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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

APCOMPOWER INC.,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The Department of Labor and Industries (Department) cited AComPower (APC) for twelve serious violations of WISHA regulations relating to asbestos.

The Board of Industrial Insurance Appeals (Board) affirmed the violations in their entirety. On appeal, the trial court vacated the violations.

The trial court concluded there was insufficient evidence to support the Board's determination that APC employees were performing an asbestos abatement project, employees removed asbestos containing material, or that APC had the requisite knowledge of the violations. The trial court also appears to have concluded that, as a matter of law, APC was not required to comply with the asbestos regulations in any event because it is not in the business of performing asbestos abatement.

Here, it is the Board's decision that is reviewed and substantial evidence supports all of the Board's findings of fact. Under the plain language of the regulations, APC's work was subject to the regulations that apply to asbestos abatement projects and class I asbestos work, despite the fact that APC is not an asbestos abatement contractor.

II. STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's findings that APC performed an asbestos abatement project without being a certified asbestos abatement contractor within the meaning of WAC 296-65-030 when the evidence shows that APC employees removed at least one 50-60 gallon garbage bag full of block type insulation containing asbestos?
2. Does substantial evidence support the Board's findings that APC violated WAC 296-62-07712, WAC 296-62-07711, WAC 296-62-07719, WAC 296-62-07722, WAC 296-62-07715, WAC 296-62-07728, and WAC 296-62-07709, when the evidence shows that APC employees performed class I asbestos work without being certified and failed to take any of the proper precautions required by the regulations?
3. Does substantial evidence establish that APC had knowledge of the hazardous condition when the evidence shows that APC knew asbestos was present at the plant where workers would be working and failed to reasonably determine whether asbestos was in the specific work area of employees within the plant?

III. ASSIGNMENTS OF ERROR

1. The Department assigns error to the trial court's finding of fact 7 through 22.¹ The Department assigns error to the superior court's failure to adopt the Board's findings.
2. The Department assigns error to the trial court's conclusions of law 2 through 13. Because the Board's findings of fact were

¹ Although the Department assigns error to the superior court's findings, it is the findings of the Board that are reviewed. RCW 49.17.150; *Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 106 P.3d 776 (2005). The findings of fact of the superior court are irrelevant. See *Campbell v. Dep't of Soc. & Health Serv.*, 150 Wn.2d 881, 898-99, 83 P.3d 999 (2004) (in review of administrative decisions, findings of superior court are not reviewed). In the analogous context of the appeals under the Administrative Procedures Act, the court has held that appealing parties are not required to assign error to each of the superior court's findings. *Waste Management of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

supported by substantial evidence, the superior court's conclusions of law erroneously vacate the Department's citation in its entirety.

IV. STATEMENT OF THE CASE

On May 28, 2009, Larry Gore, a Compliance Safety and Health Officer with the Department, began a WISHA inspection of an APC work site at the TransAlta steam plant in Centralia, Washington. BR Gore 98.² APC was at TransAlta as a contractor to work on pre-heaters at the plant during a planned outage. BR Ortis 8. The Department began the inspection because it had received a referral that employees had been exposed to asbestos. BR Gore 98.

After an opening conference with representatives from APC, the principal witnesses, Randall Johnson, Vincent Fierro and Tim Ketzenberg, laborers for APC, were interviewed. BR Gore 98-99. Through these interviews, Mr. Gore learned that employees of APC had removed block-type insulation material. BR Gore 99-100. Mr. Gore determined that APC had removed at least three square feet (or three linear feet) of asbestos containing material, which was a violation of WAC 296-65-030 because APC was not a certified asbestos contractor. BR Gore 100. He further determined that APC had performed class I work within the

² The certified appeal board record is cited as "BR". Citations to the hearing and deposition transcripts will be listed with BR followed by the name of the witness and the page number of the transcript.

meaning of WAC 296-62-07703 and that it had not taken the precautions necessary when doing such work as set forth in WAC 296-62. BR Gore at 104-122. Class I work “means activities involving the removal of thermal system insulation or surfacing” asbestos containing material or presumed asbestos containing material. WAC 296-62-07703.

The Centralia TransAlta steam plant was built in 1972 and is used to produce electricity. BR Ortis 5-6. Because the plant was built in 1972, the majority of its systems were insulated with products containing asbestos. BR Ortis 6.³ Due to the extensive presence of asbestos at the plant, TransAlta’s on-site maintenance contractor, North American Energy Services, retained Performance Contracting, an asbestos contractor, to provide consulting services regarding asbestos on an ongoing basis to TransAlta and other contractors performing work at the plant. BR Ortis 31-32. Performance Contracting uses a subsidiary, Performance Abatement Services, to abate asbestos at the plant when needed. BR Ortis 32. Rather than abate whole sections, Performance Abatement Services typically only removes asbestos from the spot where work is needed, leaving behind asbestos where it believes work was not being performed. BR Puderbaugh 43. As Performance Contracting provides

³ WAC 296-62-07703 states that thermal insulation found in buildings built before 1980 is presumed to contain asbestos.

services on a year-round basis, it has a permanent office within the plant. BR Ortis 5. Because the plant is open twenty four hours a day, seven days a week, the plant is closed for approximately six weeks each year so that subcontractors may come in and perform maintenance work. BR Ortis 5-6. Keith Ortis, a certified asbestos supervisor, works for Performance Contracting as the on-site foreman at the plant. BR Ortis 6-7. He has worked at the plant for twenty-five years. BR Ortis 32.

APC was hired to perform maintenance and modification work to pre-heaters in the plant during a planned outage in May 2009. BR Ortis 8. The pre-heaters are hot air systems that pressurize coal, which, in turn, runs the boilers at the plant. BR Ortis 8. APC employees' duties included, among other things, work around the pre-heaters labeled 11 and 12, which were lined with tin and insulation material. BR Ortis 8-9. In order to work on the pre-heaters, APC's employees had to remove both the tin and the insulation material that lined them. BR Ortis 8-9; BR Larson 16.

Before commencing work, Mr. Ortis and Ralph Mitchell, a foreman for APC, walked around the area where work would be performed and discussed, without much detail, which areas surrounding pre-heaters 11 and 12 contained asbestos and which, at least, according to

Mr. Ortis, did not.⁴ BR Ortis 9-12. Mr. Ortis told Mr. Mitchell that, based on his recollection, there was some asbestos containing material in two areas; the area south of pre-heater 11 and the area north of pre-heater 12. BR Ortis 12, 37. Mr. Ortis further indicated that the asbestos in the area between pre-heaters 11 and 12, which was the area where APC's employees would be working, had been removed. BR Ortis 12, 37. He provided Mr. Mitchell with a hand drawn map that indicated where, according to Mr. Ortis, asbestos was located in that general area. BR Ortis 35; *see also* BR Ex. 1. However, the map was confusing and had east and west reversed. BR Mitchell 56-57; BR Ortis 36; BR Ex. 1. Further, at no time prior to, or during, the work did APC request or obtain copies of the good faith survey showing precisely where asbestos or presumed asbestos containing material was located because no records were kept by Performance Abatement Services. BR Ortis 33.

Additionally, areas in the plant that contain asbestos are marked with a red tag, while areas that do not contain asbestos are marked with a green tag. BR Ortis 10. APC's safety plan indicated that if an area had no tag, then they were to treat the area as if it contained asbestos.

⁴ As the Department will explain below, the record reveals that the area that Mr. Ortis told Mr. Mitchell did not contain asbestos did, in fact, contain asbestos.

BR Puderbaugh 34. The area where APC's employees were working did not have either a red or green tag. BR Puderbaugh 42.

APC's written statements told its employees that they were not expected to disturb asbestos containing insulation and that "all such insulation will be removed from work surfaces before" they began work. BR Ex. 10 at 2; *see also* BR Ex. 11; BR Ex. 12 at 2; BR Ex. 13 at 2. APC management further verbally assured employees that they were not working in areas containing asbestos. BR Ketzenberg 51. Tim Ketzenberg, an APC laborer, asked three different supervisors whether there was any asbestos insulation present at the location where he was working, and each supervisor told him there would not be any asbestos where he was working. BR Ketzenberg 51-52. Based on what his supervisors told him, he did not treat the areas where he worked as potentially containing asbestos. BR Ketzenberg 51.

Mr. Ketzenberg was working near what he referred to as "the north pre-heater",⁵ when he encountered and removed block material and placed it in a plastic bag. BR Ketzenberg 49-50. Subsequently, Mr. Fierro and Mr. Johnson, who were working in the area between pre-heaters 11 and 12, which Mr. Ortis had identified as not containing asbestos material, also

⁵ Mr. Ketzenberg testified he could not remember if the north pre-heater was eleven or twelve. BR Ketzenberg 49.

encountered and removed block material from the north boiler unit. BR Fierro 62-65, 75; BR Johnson 85, 92. They filled 50-60-gallon clear garbage bags with the block material and other insulation and took them to the dumpster on site. BR Fierro 66; BR Johnson 85-86. They did not know at the time that the block insulation they encountered contained asbestos. BR Ketzenberg 48-52; BR Fierro 63-67; *and* BR Johnson 84-87.

After removing the block material, Mr. Fierro asked Mr. Mitchell, who happened to be passing by, what it was and whether they needed to worry about it. BR Fierro 67. Mr. Mitchell told him to stop working and hold on while he reached Mr. Ortis. BR Fierro 67. Mr. Ortis was called,⁶ as well as Kersandra Puderbaugh, APC's on-site safety director, and Larry Schreiner, the APC labor foreman. BR Ortis 15-16. Ms. Puderbaugh placed caution barriers around the area, and Mr. Ortis decided to return the next day with an abatement team to remove the asbestos material from the area. BR Ortis 17, 39. It was not until this incident with Mr. Fierro and Mr. Johnson that Mr. Ketzenberg realized the block type material he had removed might be asbestos because it was similar to the material that Mr. Fierro and Mr. Johnson had removed. BR Ketzenberg 52, 60.

⁶ There is conflicting testimony as to who called Mr. Ortis to inform him that asbestos may have been encountered. Mr. Ortis testified that Vincent Fierro called him (BR Ortis 67-68), while Vincent Fierro testified that it was Ralph Mitchell who contacted Mr. Ortis. (BR Fierro 14).

Ms. Puderbaugh directed Mr. Fierro and Mr. Johnson to accompany her to the first floor restroom so that their Tyvek suits, work boots, and personal clothing could be removed and bagged. BR Fierro 79. Neither APC nor Performance Abatement Services personnel, nor any other person, vacuumed the workers before taking them from the area where they were working. BR Fierro 71.

The next day, Mr. Ortis, along with an abatement team, went back to the area where Mr. Fierro and Mr. Johnson had encountered the block material. BR Ortis 17-18. Mr. Ortis subsequently received a call from Bill Largent, another APC laborer, indicating that APC employees may have gotten into asbestos again, as they had encountered more block material. BR Ortis 18. The APC workers at this time were located at the north end of the number 11 pre-heater. BR Ortis 18.

Mr. Ortis and his abatement team removed the asbestos located to the south of boiler 12 and south of boiler 11, as well as asbestos located between the two boilers. BR Ortis 19. At the time that Mr. Ortis and his abatement team arrived to perform the clean-up work, they noticed that further work on the boilers had been conducted during the night shift and that more material was missing. BR Ortis 20.

Mr. Ortis looked in the dumpsters and found clear plastic bags of insulation and asbestos. BR Ortis 20, 29. Both dumpsters contained the

block material removed by APC employees. BR Ortis 20-21, 29. Mr. Ortis had Pacific Rim Environmental sample the material for asbestos. BR Ortis 21. The sample tested positive. BR Galloway 18-19; *See* BR Ex. 15.

Following hearings, an industrial appeals judge issued a proposed decision and order on August 24, 2010, which affirmed the Department's citation in its entirety. BR 20.

APC filed a petition for review on September 20, 2010. BR 3. The Board issued an order denying the petition on October 7, 2010, and thus, the proposed decision became the final order of the Board. BR 2.

APC filed a notice of appeal to the Lewis County Superior Court. CP 65-66. The superior court issued a judgment on January 27, 2012, vacating the Department's citation in its entirety. CP 274-282. The Department appealed the superior court's decision. CP 283-293.

V. SUMMARY OF ARGUMENT

The Department is responsible for enforcing the WISHA. In this role, it imposes certain duties on employers by enacting rules to protect workers from unsafe working conditions, and it inspects work sites to ensure that employers and their employees use safe work practices.

Here, substantial evidence supports the Board's findings that APC employees were exposed to asbestos, which is a serious safety hazard that

presents a substantial probability of serious bodily injury. The record further supports the conclusion that APC violated each of the asbestos regulations that the Department cited it for violating.

The record also establishes that APC had both constructive knowledge and actual knowledge that its employees were exposed to serious and hazardous working conditions. Had APC exercised due diligence, it would have known of the presence of asbestos or presumed asbestos containing material, as APC management knew there was asbestos within the general area that its employees were working. APC failed to obtain the written documentation, a good faith survey under WAC 296-62-07721(2)(e), that would have shown whether asbestos was present or not. The purpose of a good faith survey is to avoid precisely the situation that occurred here, reliance on the imperfect memory of one person. Moreover, APC had its employees working in an area that was not tagged, yet its own safety plan recognized that areas with no tags were presumed to contain asbestos. If APC had exercised reasonable diligence, the lack of documentation, the confusing nature of the map, and the lack of green tags would have triggered further inquiry. APC then had actual knowledge of the asbestos after two employees discovered asbestos containing materials, yet APC continued to let employees work in the area

despite knowing that its assumptions about the lack of asbestos were incorrect.

Substantial evidence also establishes that APC performed an asbestos abatement project as that term is defined by WAC 296-62-07703 because APC's employees removed more than three linear feet or three square feet or more of asbestos containing material. Finally, substantial evidence establishes that APC performed class I asbestos work because APC employees removed thermal insulation or surfacing asbestos containing material.

APC's primary argument below appears to be that it was not required to follow any of the workplace regulations that relate to asbestos exposure because it is not an asbestos abatement contractor. CP 104 However, under the plain language of WAC 296-65-003, any employer whose employees remove three or more square feet or three or more linear feet of material containing asbestos has performed an asbestos abatement project, and is therefore subject to the rules governing asbestos abatement, such as WAC 296-65-030. Under the plain language of the applicable regulations, the fact that an employer is not an asbestos abatement contractor does not absolve it of responsibility to comply with the rules governing asbestos exposure.

APC also argued below that the Department did not establish a chain of custody to prove that the thermal insulation removed by APC's employees contained asbestos. CP 101-102. However, substantial evidence supports that APC's employees were exposed to asbestos because a reasonable inference exists that can be drawn from circumstantial facts. *Harrison v. Whitt*, 40 Wn. App. 175, 177, 698 P.2d 87 (1985).

As substantial evidence supports all of the Board's findings, and as substantial evidence supports the Board's conclusion that APC was properly cited for violating the asbestos regulations, this Court should reverse the trial court's decision, and like the Board, uphold the Department's citation.

VI. STANDARD OF REVIEW

In a WISHA appeal, this Court directly reviews the Board's decision based on the record before the agency. *J.E. Dunn Northwest, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925,

201 P.3d 407 (2009) (citing RCW 49.17.150(1)).⁷ Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr. Co.*, 148 Wn. App. at 925. The Board's conclusions of law are reviewed to see if they follow from its findings of fact. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

WISHA statutory provisions and regulations must be interpreted in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Elder Demolition, Inc. v. Dep't of Labor and Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citing RCW 49.17.010). This Court gives great deference to the Department's interpretation of WISHA. *See Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478 n.7, 36 P.3d 558 (2001).

A party may establish any fact by circumstantial evidence. *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). Indeed, circumstantial evidence is "as good" as direct evidence. *Rogers Potato Services, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Findings do not rest on mere speculation or conjecture when they are based on reasonable inferences drawn from circumstantial facts.

⁷ The superior court below appears to have applied the incorrect standard of review and to have conducted a de novo review of the evidence rather than determining whether the Board's findings were supported by substantial evidence. *See VRP*.

See Harrison, 40 Wn. App. at 177. An inference is a logical conclusion or deduction from an established fact. *Torakz v. Ford Motor Co.*, 8 Wn. App. 645, 654, 508 P.2d 1370 (1973). On appeal, the reviewing court may affirm findings based entirely on circumstantial evidence. *See State Dep't of Fisheries v. Gillette*, 27 Wn. App. 815, 821-22, 621 P.2d 764 (1980).

The Court of Appeals does not weigh evidence or make credibility determinations on appeal. *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Likewise, the reviewing court will not substitute its judgment for that of the fact finder even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrigations. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

VII. ARGUMENT

A. APC Violated WAC 296-65-030 Because APC Did Not Obtain An Asbestos Contractor Certificate And Its Employees Removed At Least Three Square Feet Or Three Linear Feet Of Material Containing Asbestos

1. The Work By APC Employees Meets The Definition Of An Asbestos Abatement Project As Defined in 296-65-003

APC was properly cited under WAC 296-65-030 because it was performing an asbestos abatement project as defined by the plain language of WAC 296-65-003. The rules of statutory construction apply to administrative rules just as they do to statutes. *Dep't of Licensing v.*

Cannon, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Under rules of statutory construction, the court interprets a WAC provision to ascertain and give effect to its underlying policy and intent. *Id.*

An asbestos abatement project is defined as “an asbestos project involving three square feet or three linear feet, or more, of asbestos containing material.” WAC 296-65-003. Here, as detailed below in Part VII.A.2, APC employees removed at least three square feet or three linear feet of asbestos containing insulation. Therefore, they were performing an asbestos abatement project.

APC argued below, and the trial court apparently agreed, that because APC is not an asbestos abatement contractor, and because they did not intend to perform an asbestos abatement project, they are not subject to WAC 296-65-030 and thus cannot be found to have violated that code. CP 104. WAC 296-65-030(1) states that “before submitting a bid *or working on* an asbestos abatement project, any person or individual must obtain an asbestos contractor certificate” (emphasis added). Nothing in this language requires that an employer be an abatement contractor, rather, it requires that anyone “working on an asbestos abatement project” obtain a contractor certificate. *Id.* Thus, an employer need not be an asbestos abatement contractor in order for WAC 296-65-030 and the related asbestos regulations to apply to it. APC did perform

an asbestos abatement project without obtaining a contractor's certificate, and therefore violated WAC 296-65-030(1).

Nor is an employer's intent relevant when determining whether it performed work that constitutes an asbestos abatement project as defined by WAC 296-65-003. It is what its employees have actually done, not what the employer expected when it accepted a given project, that controls this issue. Under the plain language of WAC 296-65-003, an employer has performed an asbestos abatement project whenever its employees have removed more than three square feet or three linear feet of asbestos containing material. Since APC's employees removed more than three square feet or three linear feet of material containing asbestos at the TransAlta plant, APC performed an asbestos abatement project as defined by WAC 296-65-003.

Furthermore, accepting APC's argument that an employer is not subject to the asbestos regulations unless it is an asbestos abatement contractor would lead to absurd results that would be contrary to the purpose of WISHA. If employers do not need to follow any of the asbestos regulations unless they are asbestos abatement contractors, then employers who are not asbestos abatement contractors would have no incentive, under the law, to ensure that their employees are not exposed to asbestos. As the record in this case amply demonstrates, employers who

are not asbestos abatement contractors sometimes send their employees into areas that contain large amounts of asbestos. The asbestos regulations exist to protect all employees, not just the employees of asbestos abatement contractors, from dangerous exposure to asbestos. This purpose would be undermined if asbestos abatement contractors were the only employers who are subject to citations under these regulations if they expose their employees to asbestos.

Indeed, if this Court concludes that the asbestos regulations do not apply to employers unless they are asbestos abatement contractors, it is even conceivable that some contractors would intentionally not become certified so that they could remove asbestos from jobsites without any possibility of receiving a WISHA citation, while, if they were so certified, they would have to strictly comply with all of the asbestos regulations or face citations. The Department raises this possibility not because there is any reason to believe that APC deliberately did not become an asbestos abatement contractor so that it could expose its employees to asbestos with impunity, but to highlight the absurd results that might be reached if the rule of law that APC apparently advocates was accepted by this Court. *Cf. State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) (a statute is to be interpreted in a manner consistent with its

underlying purpose and unlikely, absurd, or strained results are to be avoided).

Furthermore, the inappropriateness of narrowly construing the asbestos regulations as only applying to asbestos abatement contractors is underscored by the fact that the legislature has expressly acknowledged the special nature of the dangers created by asbestos. In RCW 49.25.010, the legislature expressly recognized that asbestos is an inherently dangerous material, stating:

Air-borne asbestos dust and particles, such as those from sprayed asbestos slurry, asbestos-coated ventilating ducts, and certain other applications of asbestos are known to produce irreversible lung damage and bronchogenic carcinoma. One American of every four dying in urban areas of the United States has asbestos particles or dust in his lungs. The nature of this problem is such as to constitute a hazard to the public health and safety, and should be brought under appropriate regulation.

The legislature accordingly adopted a comprehensive set of statutory provisions regarding exposure to asbestos. RCW 49.26. Under these statutory provisions, all “construction, renovation, remodeling, maintenance, repair or demolition” projects with a “reasonable possibility of disturbing or releasing asbestos into the air” must be inspected, and all of the precautions mandated by the asbestos regulations must be put into place before any work begins on a project. RCW 49.26.013. Asbestos regulations are implemented and enforced, “including penalties,

violations, citations, and other administrative procedures” under WISHA. RCW 49.26.140.

Under this legislative mandate, the Department promulgated health and safety standards for all occupational exposures to asbestos in all industries covered by RCW 49.17. WAC 296-62-077 *et seq.* The fundamental purpose of these regulations is to protect workers from asbestos exposure, which is critical since exposure to asbestos is known to result in serious injury or death. *In re Walkenhauer & Associates, Inc.*, BIIA Dec., 91 W088, 1993 WL 453604, *3 (Wash. Bd. Indus. Ins. Appeals Sept. 7, 1993). Thus, the legislature has recognized the danger of asbestos and the asbestos regulations should be construed to ensure worker safety. *See Inland Foundry Co., v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001). In this case, the plain language of WAC 296-65-003, which establishes an asbestos abatement project as an asbestos project involving three square feet or three linear feet, or more, of asbestos containing material, and WAC 296-65-030, which is triggered by the presence of an asbestos abatement project, should be given effect to further the legislative intent to protect workers.

2. There Is Substantial Evidence That APC's Employees Removed At Least Three Square Feet Or Three Linear Feet Of Material That Contained Asbestos

There is substantial evidence supporting the Board's finding of fact (FF) no. 2 that APC's employees removed at least three square feet of asbestos containing material. APC's employee estimated that the blocks of insulation removed were twelve by twelve inches. BR Fierro 66. APC employees testified that they filled 50-60 gallon garbage bags with the insulation and that they did not discover that it might be asbestos until after they were done removing it from the boiler. BR Fierro 67. Based on this testimony, a fair-minded trier of fact could readily determine, as the Board did, that APC's employees removed well over three square feet of asbestos-containing material.

Further, substantial evidence supports the Board's FF no. 2 that the material that was removed by APC's employees contained asbestos. Mr. Fierro, Mr. Johnson, and Mr. Ketzenberg each testified that they removed block-type insulation on May 25, 2009, and placed it into clear plastic bags. BR Fierro 66; BR Johnson 85; BR Ketzenberg 50. The next day, Mr. Ortis noticed that further block material was missing from the area where APC's employees were working after Mr. Johnson and Mr. Fierro had encountered the material. BR Ortis 20. He and Scott Gaffety removed from the dumpsters bags of block insulation mixed with rock wool in clear plastic bags. BR Ortis 24. A sample was taken of the material found in the bags located in the dumpster by Mr. Ortis, and given

to Scott Gaffety, who passed it to Karen Lewis, of Pacific Rim Environmental. BR Ortis 20-21. This sample tested positive for asbestos. BR Galloway 18-19. Furthermore, Karen Lewis, of Pacific Rim Environmental, took a dozen samples from different locations around pre-heaters numbers 11 and 12. *See Exs. 14, 15.* Asbestos residue was present in several different places around the 11 and 12 pre-heaters. BR Galloway 33.

APC argued below that the Department did not establish that the material removed by its employees was in fact asbestos-containing material because no “chain of custody” was in place to ensure that the material tested was the same material removed by its employees. CP 101-02. This argument fails for at least two reasons.

First, it was not necessary for the Department to establish a “chain of custody” in order for there to be substantial evidence that APC’s employees were exposed to asbestos-containing material. As noted above, substantial evidence exists if the evidence is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr. Co.*, 148 Wn. App. at 925. Reasonable inferences can be made based on circumstantial evidence. *See Harrison*, 40 Wn. App. at 177. Here, while no one witnessed an APC’s employee placing the bags of insulation in the dumpster, APC employees testified that they had placed the block

materials in plastic bags that were the same type of bags as those found in the dumpster. There is no evidence that any other subcontractor was removing insulation in the plant, and, thus, it may be reasonably inferred that the bags of insulation found in the dumpsters by Mr. Ortis and Mr. Gaffety were the same material removed by APC's employees. Circumstantial evidence of this kind is sufficient to provide substantial evidence that asbestos was present.

Finally, even assuming the tested material from the dumpster was not material that Mr. Fierro and Mr. Johnson removed from between pre-heaters 11 and 12, or from where further work was done on the night shift on May 25, Karen Lewis found asbestos residue in the area around pre-heaters 11 and 12. This evidence alone establishes that there is substantial evidence that APC's employees were exposed to material that contained asbestos. BR Galloway 33.

3. APC Violated WAC 296-65-030 Because They Performed An Asbestos Abatement Project And Are Not A Certified Asbestos Contractor

WAC 296-65-030(1) states that before working on an asbestos abatement project an employer must have an asbestos contractor certificate. As noted above, APC was performing an asbestos abatement project because its employees removed at least three square feet or three

linear feet of material that contained asbestos. WAC 296-65-003. As APC is not a certified asbestos contractor, it violated WAC 296-65-030.

B. APC Was Properly Cited For Failing To Follow The Regulations Associated With Completing an Asbestos Project And Performing Class I Work

The remainder of the ten violations cited fall under WAC 296-62, Part I of the asbestos regulations. This chapter applies to all occupational exposures to asbestos in all industries covered by RCW 49.17 and not just abatement work. WAC 296-62-07701. Here, APC does not claim that it did any of the things that the asbestos regulations require. Rather, as it did with regard to the citation based on WAC 296-65-030, it argued, and the trial court apparently agreed, that it did not have to comply with those rules because it is not an asbestos contractor. CP 104. However, just as an employer is subject to WAC 296-65-030 if its employees remove three or more square feet or three linear feet of material that contains asbestos regardless of whether the employer is an asbestos abatement contractor, an employee whose employees perform class I asbestos work as defined by WAC 296-62-07703 is subject to the asbestos regulations regardless of whether the employer is regularly engaged in the business of removing such materials. Furthermore, substantial evidence supports the Board's finding that APC's employees disturbed insulation materials that contained asbestos. Therefore, APC's employees did class I work as

defined by WAC 296-62-07703, and, as a result, the Department properly cited APC for failing to comply with the various rules that apply to such work.

1. There Is Substantial Evidence That APC's Workers Completed "Class I Work" As Defined By WAC 296-62-07703

Class I asbestos work is defined by WAC 296-62-07703, as "activities involving the removal of thermal system insulation or surfacing ACM/PACM."⁸ An asbestos project:

includes the construction, demolition, repair, remodeling, maintenance or renovation of any public or private building or structure, mechanical piping equipment or system involving the demolition, *removal*, encapsulation, salvage, or disposal of material or outdoor activity releasing or likely to release asbestos fibers into the air.

WAC 296-62-07703 (emphasis added). Class I work is considered to be an asbestos project. WAC 296-62-07722(3)(a). Employees performing class I asbestos work triggers application of several regulations that APC was cited for violating. *See* discussion *infra* Part VII.B.2.

Here, APC employees were conducting maintenance on pre-heaters 11 and 12 that required removal of insulation. BR Larson 16. In this case, APC employees removed thermal system insulation that was

⁸ ACM means asbestos containing material and PACM means presumed asbestos containing material. WAC 296-62-07703.

used to insulate air pre-heaters containing 900 degree air. BR Ortis 8. Additionally, the asbestos material removed by APC employees was dry, and likely to release asbestos fibers into the air. BR Fierro 67. Thus, APC was performing class I asbestos work, and by extension, it performed an “asbestos project” as defined by WAC 296-62-07703.

The Board found that APC removed thermal system asbestos and that the removal of this material constituted class I asbestos work. Board’s FF 2. There is substantial evidence that the insulation removed by APC employees contained asbestos, or, at the very least, that the insulation contained material that is presumed to contain asbestos. Therefore, the removal of that insulation meets the definition of class I work and meets the definition of an “asbestos project” under WAC 296-62-07703. None of APC’s employees were certified asbestos workers and none of them were aware that asbestos was present in the area where they were working. BR Fierro 72; BR Johnson 92; BR Ketzenberg 46.

As noted above, APC argued below that the Department did not establish that the material removed by its employees was in fact asbestos-containing material because no chain of custody was in place to ensure that the material tested was the same material removed by its employees.

First, in order to prove that APC’s employees performed class I work, the Department did not need to prove that the material removed

from the pre-heaters actually contained asbestos. Rather, the Department need only show that at the very least APC removed presumed asbestos material. Presumed asbestos-containing material “means thermal system insulation and surfacing material found in buildings, vessels, and vessel sections constructed no later than 1980.” WAC 296-62-07703. Here, the TransAlta plant was constructed in 1972, and it was established that APC employees were removing thermal system insulation and surfacing material. BR Ortis 6. Thus, the block material removed by APC employees was presumed asbestos containing material and sufficient to show that APC was performing class I asbestos work. Second, as explained above, the circumstantial evidence establishes that no one else but APC’s employees removed insulation and placed it in clear plastic garbage bags that were placed in the dumpster.

2. The Department Properly Cited APC For Failing To Follow Asbestos Regulations That Apply To Employers Whose Workers Can Be Exposed To Asbestos Or Whose Workers Complete Class I Asbestos Work

Because APC’s employees performed class I work, the regulations governing such work applies to its employees’ removal of the insulation. APC failed to comply with a variety of regulations under the asbestos regulations when its employees completed class I asbestos work. It failed to designate a competent person while their employees were disturbing

asbestos as required by WAC 296-62-07728(1). BR Gore 115; Board's FF 29. Employees removing asbestos containing materials were not certified asbestos workers as required by WAC 296-62-07722(3)(a). BR Gore 108; Board's FF 17. It did not do an initial exposure assessment as required by WAC 296-62-07709(3)(a)(ii). BR Gore 118; Board's FF 32. It also did not do daily monitoring of employee exposure WAC 296-62-07709(3)(c)(i). BR Gore 121; Board's FF 35. It removed the asbestos-containing block insulation while it was dry contrary to WAC 296-62-07712(2)(c), BR Gore 109; Board's FF 20, creating the possibility that asbestos fibers would be released when its employees disturbed the block material. BR Johnson 90. Indeed, the block material broke when APC employees removed it, and they broke it further while stuffing it into plastic bags, undoubtedly releasing asbestos fibers in the process. BR Fierro 65.

APC also did not set up an enclosure to contain the asbestos fibers being released contrary to WAC 296-62-07712(7)(a). BR Gore 104; Board's FF 8. When APC's employees removed the block material they were not wearing the proper respiratory protection to keep from inhaling the fibers as required by WAC 296-62-07715(4)(a)(ii). BR Gore 113; Board's FF 26; BR Ortis 26; BR Fierro 82. Furthermore, APC did not ensure that a regulated area was set up to keep people out of the area as

required by WAC 296-62-07711(1). BR Gore 106; Board's FF 11, nor did APC set up a decontamination area to keep the employees working in the area from spreading asbestos fibers further when they left the area, as required by WAC 296-62-07719(3)(b)(i). BR Gore 107; Board's FF 14. As a result was some of APC's workers left the area after handling the block insulation without disposing of their work clothes or being vacuumed with a HEPA vacuum as required by WAC 296-62-07719(3)(b)(iii). BR Gore 111; Board's FF 23.

As noted above, APC did not contend that it did any of the various things required by the above regulations. Rather, it disputes whether those regulations apply to it because they did not intend to remove asbestos. However, for the reasons explained above, those regulations do apply to APC, and, as it is undisputed that APC failed to conduct its employees' work in accordance with those regulations, substantial evidence supports the Board's findings that APC violated those asbestos regulations.

C. The Board Correctly Found That The Department Established All Of The Elements Of Its Prima Facie Case, Including Knowledge

In order to prove a serious violation of a WISHA regulation, the record must show that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the

exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *Washington Cedar Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003); RCW 49.17.180.

As discussed above, the cited standards apply to APC because its employees performed work that constitutes an asbestos abatement project and class I asbestos work as those terms are defined by the applicable regulations, and it is undisputed that the standards were not met. Furthermore, for the reasons explained above, there is substantial evidence that APC's employees were exposed to the "violative condition", i.e. asbestos. Finally, it cannot be seriously disputed that exposure to asbestos in violation of the asbestos regulations is exposure to a condition that *could* result in serious physical harm. Thus, the only remaining issue is whether APC had either actual or constructive knowledge of the existence of the violative condition.

A serious violation of a WISHA regulation exists if the employer knew, or with the exercise of reasonable diligence could have known of the violative condition. RCW 49.17.180(6); *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07; 248 P.3d 1085, *review*

denied, 171 Wn.2d 1033 (2011); *Washington Cedar*, 119 Wn. App. at 914 (2003). Employer knowledge may be actual or constructive.

Constructive knowledge can be based on evidence that the employer failed to establish an adequate program to promote compliance with safety requirements. *New York State Electric & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105-06 (2nd Cir. 1996). Constructive knowledge has been found where the employer failed to discover readily apparent hazards, where there were inadequate safety instructions, and where safety rules were not enforced. *See Erection Co.*, 160 Wn. App. at 206-07; Mark A. Rothstein, *Occupational Safety & Health Law*, § 5:15 (2010 ed.).

In this case, the APC supervisors knew there was asbestos-containing material all over the TransAlta plant. This is not only apparent from APC's contract with TransAlta that they not perform asbestos work (necessarily implying that asbestos was present at the job site, even if the contract did not direct APC to remove it), but also by the permanent presence of an on-site asbestos consulting and abatement company. APC also knew that when abatement was done at the plant, it was done only to the extent deemed absolutely necessary to make it possible for work to be performed at the plant. BR Puderbaugh 43. This, therefore, creates the possibility that some asbestos material may remain in the area, even after there has been an attempt to do a limited abatement. BR Puderbaugh 43.

APC was also aware that there was asbestos in the general area that the work was being performed. Mr. Mitchell, the general foreman for APC, performed a walk around with Mr. Ortis to discuss the location of the asbestos. BR Ortis 9; BR Mitchell 56. Mr. Ortis drew a map showing where the asbestos was located in the area APC employees would be working, but APC failed to communicate that information to the employees. BR Mitchell 57; BR Schreiner 70.

Constructive knowledge is found when in the exercise of reasonable diligence, the employer could have known about the hazard. RCW 49.17.180. APC failed to exercise reasonable diligence. “Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co.*, 160 Wn. App. at 207 (quoting *Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm’n*, 232 Fed. App’x. 510, 512 (6th Cir. 2007)); *Brennan v. Butler, Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975) (hazardous conduct may be precluded with “feasible precautions concerning the hiring, *training*, and sanctioning of employees”) (emphasis added; internal quotations omitted). Reasonable diligence “‘implies, as between the employer and employee, such *watchfulness*, *caution*, and *foresight* as, under all the circumstances

of the particular service, a corporation controlled by careful, prudent officers ought to exercise.”” *Sec’y of Labor v. Ames Crane & Rental Service, Inc.*, 3 BNA OSHC 1279, 1282, 3 O.S.H. Cas. (BNA) 1279, 1975 WL 4924 (June 09, 1975) (quoting *Wabash Ry. Co. v. McDaniels*, 107 U.S. 454, 460, 2 S.Ct. 932 (1883)).

Here, APC’s managers relied on verbal confirmation from Mr. Ortis with regard to the ostensible location of asbestos at the plant, and APC failed to insist on written confirmation that Mr. Ortis had actually removed all asbestos from the area where its workers would be performing their work-related activities as required by WAC 296-62-07721(2)(e). APC accepted, as sufficient, a hand drawn map that Mr. Ortis constructed from his memory. Mr. Mitchell testified that he relied on the map and Mr. Ortis’ statement to tell him where asbestos was, yet he also testified that the map was confusing because east and west were reversed. BR Mitchell 57; *see also* BR Ex. 1.

While it might have been reasonable for APC to rely in part on Mr. Ortis’ oral statements, APC had its own obligation to its employees to fully understand where asbestos, or presumed asbestos, containing material might be before work was performed. Reasonable diligence requires more from an employer than simply relying on someone’s memory as to the location of asbestos. This would include obtaining a

written report as to where abatement testing had been performed in order to verify that Mr. Ortis' memory was accurate. WAC 296-62-07721(2)(e) requires that contractors receive a written copy of any good faith surveys or reports detailing the location and extent of asbestos at the worksite prior to commencing work. Had APC obtained a written report, it would have known that asbestos was present in the area where its employees would be working.

Additionally, Mr. Ortis testified that the plant areas that did not have asbestos present were marked with a green tag to indicate that asbestos was not present. BR Ortis 10. APC's own safety plan indicated that if an area was *not* marked with a red or green tag, employees are to treat the area as if it contains asbestos. BR Puderbaugh 34. APC's employees had been told that if an area was not tagged, it was to be treated as containing asbestos. BR Johnson 90-91. The area in which APC's employees were working was not tagged with a red or green label, yet APC chose to ignore that fact and, instead, it relied on the statements of Mr. Ortis and failed to ensure that its employees treated the unknown insulation material as potentially asbestos-containing material. BR Puderbaugh 42; BR Fierro 73. Rather, APC assured its employees that all asbestos-containing material was removed prior to commencement of their work and essentially told its employees to ignore the fact that the

area in which they were working was not marked with a green or red tag.
See BR Ketzenberg 51; BR Johnson 91.

Indeed, Mr. Ketzenberg testified that he asked no fewer than three times whether there was asbestos in the area, and he was told no. BR Ketzenberg 51. He stated that he did not worry about the insulation, because he was told there was no asbestos present in the area. BR Ketzenberg 60. Instead of warning its workers of the hazard, APC rendered ineffective the training employees had received that taught them to view unknown insulation with suspicion and stop working. APC's employees continued to work, even after the block material was encountered, because they had no idea that asbestos might be present until Mr. Fierro just happened to ask about the block material as Mr. Mitchell was passing by. BR Fierro 67. APC should have instructed their workers to treat any mysterious materials as potentially asbestos containing and have workers immediately stop work if any was encountered.

APC further argued below that because their contract with TransAlta required that all asbestos be removed prior to commencement of its work, it could not have had knowledge of the violative condition. CP 94-95. However, regardless of what the contract between APC and TransAlta showed, the record demonstrates that APC had notice that the worksite contained asbestos and that it failed to take reasonable steps to

ensure that the area into which it was sending its employees to perform work was, indeed, asbestos-free. Furthermore, the record shows that APC continued to fail to take reasonable precautions to stop its workers from continuing to work at the TransAlta plant even after it learned that two of its employees had likely been exposed to asbestos at that jobsite. Thus, the fact that the contract between APC and TransAlta makes it clear that APC was not expected to perform asbestos abatement work at the jobsite does not establish that APC lacked actual or constructive knowledge of the existence of violative working conditions.

APC also argued below that it was TransAlta's responsibility to conduct a good faith survey and the fact that the Department did not cite TransAlta or Performance Abatement for failure to conduct a good faith survey means that its reliance on their statements was appropriate. CP 95. APC then points to the lack of documentation that Performance Abatement had for where asbestos was located. CP 97. However, APC had its own responsibility to fully understand where asbestos was present at the worksite and to take reasonable steps to protect its own employees from exposure to asbestos. The fact that other contractors may have made mistakes does not absolve APC of its responsibility to ensure its employees do not remove asbestos. The fact that Mr. Ortis relied on his memory for the location of asbestos and lacked documentation only

provides further support to the conclusion that APC failed in its own, independent, duty to use reasonable diligence to ensure its workers did not encounter asbestos.

APC apparently assumed that there was no possibility that Mr. Ortis or Performance Abatement Services had failed to remove all of the asbestos in the section of the plant where its workers would be working. This assumption was unreasonable, given the vast amount of asbestos present at the TransAlta plant and the inherent unreliability of an individual's imperfect memory. APC knew that asbestos was located in the plant, it knew it had received a confusing map, it knew that Mr. Ortis lacked documentation as to the location of asbestos, it knew it had not reviewed a written copy of the good faith survey, and it knew that the area in which they were working had not been tagged as either asbestos-free or containing asbestos. Thus, had APC exercised reasonable diligence, it could have known that asbestos was present in the area its employees were working, therefore, it had constructive knowledge of the existence of the violative working condition.

Additionally, even after the block material was discovered by Mr. Fierro and Mr. Johnson, the next day, Mr. Ortis received a call from Bill Largent that APC's workers may have again encountered asbestos. BR Ortis 18. The abatement team had also discovered that further work

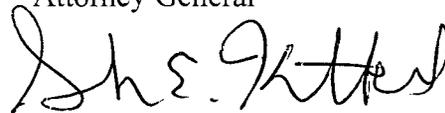
had been conducted by the night shift and bags of insulation removed to the dumpster. BR Ortis 20; BR Puderbaugh 27. Therefore, even after APC had actual knowledge that two of its employees had been exposed to material that was likely to contain asbestos and that Mr. Ortis' information was incorrect, it failed to ensure that its employees stopped working in that area and it failed to protect its employees from further exposure to the asbestos. *See* BR Puderbaugh 26-27.

VIII. CONCLUSION

The Department respectfully requests that this Court affirm the October 7, 2010 decision of the Board and thereby affirm the Department's citation and notice dated October 5, 2009.

RESPECTFULLY SUBMITTED this 3 day of August, 2012.

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