NO. 90775-7

SUPREME COURT OF THE STATE OF WASHINGTON

BNBUILDERS INC.

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Employees of BNBuilders, Inc. (BNB) hauled bags of asbestos laden flooring they demolished to a special "asbestos room." Key BNB personnel suspected the presence of asbestos when its employees demolished flooring, and yet gave no protection against exposure to asbestos. BNB does not dispute that it had its foreman instruct the employees to segregate asbestos containing flooring from non-asbestos containing flooring. Nor does it dispute that its general superintendent said that BNB needed to stop carpet removal until an abatement crew was on site, or dispute that its safety director had a similar view, and that unprotected asbestos removal work continued despite this knowledge. Not surprisingly, based on these facts, the Board of Industrial Insurance Appeals (Board) found that BNB had reason to suspect the presence of asbestos yet failed to protect its employees. As the Court of Appeals decided, substantial evidence supports this finding. *BNBuilders Inc. v. Washington State Dep't of Labor & Indus.*, No. 70142-8-I (July 7, 2014) (slip op.).

Citing no authority, BNB claims that a good faith survey shields it from all liability. A good faith survey is done before demolition to advise as to the presence of asbestos in the work place. A good faith survey, however, does not immunize an employer from protecting employees

when it chooses to ignore the known limitations of the survey or has reason to believe that asbestos is present once demolition has started. Additionally, BNB's claim that it followed the good faith survey falls short, as the facts show that BNB employees worked in areas where the good faith survey gave reason to believe that asbestos was present.

It is well established that an employer violates the Washington State Industrial & Safety Health Act (WISHA), when it has actual or constructive knowledge of a hazardous condition. No conflict with case law or issue of substantial public issue is presented by a case that involves the routine application of this established principle to the facts of this case.

II. ISSUE

Discretionary review is not merited in this case, but if review were granted, the following issue would be presented:

> Does substantial evidence support finding that BNB knew or should have known that its employees were exposed to asbestos when BNB personnel knew they were working with a very limited survey, and admitted to suspecting the presence of asbestos and the need to stop demolition, yet allowed the employees to continue working?

III. COUNTER STATEMENT OF THE CASE

The Department disputes many of the factual statements in BNB's petition. However, because many of BNB's factual assertions are without any citation to the record, they cannot be specifically refuted, and should not be accorded any weight by this Court. *See* RAP 10.3(a)(5).

A. BNB's Employees Were Exposed to Asbestos

1. BNB Had Knowledge That the 2007 Good Faith Survey Was Limited

In late December 2009, BNB began work on a demolition project at a former hospital that was to be turned into a private school. BR Voss at 5; BR Ex. 30.[1] The original building was constructed in the 1920s, with an additional wing added in 1945. BR Ex 34 (Kappers letter at 1).[2] Because flooring and thermal insulation in buildings built before 1980 are presumed to have asbestos, WISHA required BNB to obtain a survey regarding the presence of asbestos. WAC 296-62-07712(1)(b), (10)(a)(ix); RCW 49.26.013. This survey is called a good faith survey. BNB had obtained a 2007 good faith survey for the building from the owner. BR Voss at 36. However, this survey contained significant limitations: "Samples of suspect materials were limited to exposed surfaces and did not include possible insulated pipe or other ACM [asbestos containing material] located behind walls, above ceilings, or under floors." BR Ex. 35 at 5. This limitation put BNB on notice that large portions of the work areas at this jobsite had not been tested for asbestos.

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[1] The certified appeal board record is cited as BR, with the last name used for witness testimony. Janine Rees testified on both January 12, 2011, and January 14, 2011. For this reason, citations to her testimony include the date. The remaining witnesses testified on only one day; therefore, those citations do not contain a date.

[2] Attached to Exhibit 34 is a letter dated April 9, 2008, addressed to Mr. Greg Kappers, this will be referred as the "Kappers" letter.

The limitations of the good faith survey were further emphasized in a 2008 letter attached to the survey from a second survey company that reiterated the limitations of the 2007 survey and strongly recommended that a more comprehensive and complete asbestos survey be undertaken. The 2008 letter informed BNB that:

> During our sampling activities, we identified a large number of suspect asbestos-containing materials that were not sampled and analyzed during the previous asbestos inspection. Argus Pacific recommends that Prescott Homes have a more thorough asbestos inspection conducted prior to demolition in accordance with the requirements for a "good faith inspection" per WAC 296-65.

BR Ex. 35; BR Ex. 34 (Kappers letter at 6).

Because it was aware of the limitations in the 2007 survey, before work started on the project, BNB solicited bids for a more complete asbestos assessment. BR Carling at 156-57; BR Gladu at 155; BR Exs. 34, 55, 56. However, BNB ultimately decided not to obtain a more complete survey before work began in late December 2009, and used the 2007 survey instead. BR Carling at 156-57.

2. The Good Faith Survey Revealed Asbestos in Several Locations, Yet BNB Performed Work in Areas Not Covered by the 2007 Survey

The 2007 good faith survey revealed the presence of asbestos in several locations. *See* BR Ex.34. Asbestos checkered the worksite. *See* BR 34. Therefore, it cannot be assumed that if an area is untested it does

not contain asbestos. BR Rees 1/12/11 at 13, 17. BNB performed work in areas that had not been tested such as the hallway on the main floor. BR Ex. 35 (Table 1 at 3), BR Weston 71.

On the upper floor, the 2007 survey sampled vinyl tile or vinyl tile and mastic from seven locations. BR Ex. 35 (Table 1 at 3, 4). Five locations were tested for vinyl tile, Ex. 35 (Table 1 at 3, 4), and two for vinyl tile and mastic. Br Ex. 35 (Table 1 at 3, 4). Of those seven locations, five came back positive for asbestos. BR Ex. 35 at 4. Instead of prohibiting its employee from working in an area where the majority of the tested areas came back positive, BNB had its employee perform flooring demolition on three rooms on the upper floor. BR Weston at 78-79. None of these locations were tested in the 2007 survey. BR Ex. 35.

3. BNB Treated the Tiles as Asbestos Containing, and the General Superintendent and Safety Director Thought Work Should Be Stopped Because of Asbestos

One of the tasks of the employees was to rip up carpet. BR Ex. 30. As the carpet came up, many tiles that were stuck to the carpet came up as well. BR Weston at 70. Some tiles came up whole, while others broke. BR Weston at 70. When a tile containing asbestos fibers is broken, asbestos fibers are released into the air. *See* BR Ex 35 at 2.

For carpet removed without tiles stuck to it, BNB foreman Voss instructed the employees that the carpet could go into the dumpster. BR

Pennington at 10-11. For carpet removed with tiles still stuck to it, Voss instructed the employees to wrap it in plastic and tape it shut. BR Pennington at 8-10; BR Weston at 77. Significantly, Voss treated the tiles as asbestos containing material or presumed asbestos containing material for the purpose of disposal. BR Pennington at 8-10; BR Weston at 77. He instructed the employees to place all of the bags of carpet/tile/mastic in a designated room for the asbestos abatement contractors to collect later. BR Pennington at 10; BR Weston at 77. The foreman treated the materials as asbestos-containing for disposal purposes, but not for purposes of protecting BNB's employees. BR Pennington at 8-10. The materials stored in the designated asbestos room tested positive for asbestos. BR Rees 1/12/11 at 124-27; BR Ex. 27.

The foreman admitted he suspected the mastic contained asbestos. He told inspector Rees:

> Voss stated . . . that he suspected that the mastic that adhered the tile to the floor contained asbestos, and he directed the workers, the BNB workers to take tile that had been pulled up when the carpet had been stripped up, to wrap that material and seal it in plastic and place it in a storage room, and that he had contacted, he being BNBuilders, had contacted a certified asbestos abatement contractor to remove those materials and dispose of them as asbestos-containing material.

BR Rees 1/12/11 at 40. Additionally, Peter Campbell, BNB's safety director, was present on December 28, 2009, when the tile and

carpet was being bagged and put in the asbestos room. BR Campbell at 105; BR Ex. 30. The safety director testified that Voss "Should have stopped work as soon as tile started coming up." BR Campbell at 112.

BNB's general superintendent, Casey Blake, wrote "I told Voss we needed to stop carpet removal until an abatement crew is on site." BR Ex. 52 at 1. Yet, the record shows that he did nothing to stop employees from continuing to be exposed, and work continued after Blake's orders to Voss. BR Blake at 16-17; BR Voss at 13-14.

4. Employees Expressed Concerns to BNB Management, Who Were Present When Asbestos Containing and Presumed Asbestos Containing Material Were Removed

At least two BNB employees expressed concerns to at least three members of management about the safety of performing this kind of demolition of presumed asbestos containing material. BR Pennington at 8-9, 55; BR Weston at 72–73. Following the complaints to management, one of those employees contacted the Department of Labor & Industries, and the Department initiated the inspection at issue. BR Weston at 89.

B. The Board Found That BNB Had Reason To Suspect That Asbestos Was Present and Therefore It Violated Several WISHA Regulations

The Department issued a citation alleging violations of asbestos removal procedures. BR Ex 1. BNB appealed the citation to the Board.

An industrial appeals judge issued a proposed decision and order, which affirmed the citations. BR 44-54. BNB petitioned the three-member Board for review. BR 12-28. The Board granted review and issued a decision that affirmed all of the violations except one.[3] The Board found that BNB had reason to suspect its employees were working with asbestos. BR 5-8 (FF 5, 7, 9, 11, 13, 15, 18, 21).

C. The Superior Court and Court of Appeals Ruled That Substantial Evidence Supported the Board's Finding of Knowledge

BNB appealed the Board's order to King County Superior Court. The superior court affirmed. The Court of Appeals affirmed the Board's decision in its entirety. After noting BNB's awareness of the limitations of the good faith survey, the Court of Appeals noted that "BNB was not entitled to rely only on this survey for the duration of its work, ignoring readily observable conditions discovered at the jobsite demonstrating worker exposure to asbestos." *BNBuilders, Inc.*, slip op. at 11.

BNB moved for reconsideration, which was denied. BNB now petitions for review.

IV. ARGUMENT

It is well recognized that asbestos is very hazardous:

[3] The Board's decision is attached as appendix A.

> Air-borne asbestos dust and particles . . . 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.

RCW 49.26.010. Because of this hazard, WISHA imposes multiple requirements on employers when their employees are working with materials that may contain asbestos. *See* WAC 296-62-077 to -0755. This case involves the factual question as to whether BNB knew or had reason to know that its employees were exposed to asbestos. The fact-finder found it did know and this is supported by the admissions from key BNB personnel: the foreman, the safety director, and the superintendent. No issue of substantial public interest is raised by the routine application of the legal standard regarding knowledge to the facts of this case. No conflict with this Court's case law regarding strict liability is shown as such liability was not imposed. This Court should deny review.

A. No Issue of Substantial Public Interest Is Presented by a Case Involving the Admission by the Employer That It Suspected Asbestos Was Present Where the Employees Worked

1. The Admissions and Conduct of BNB Personnel Provide Substantial Evidence That BNB Had Reason To Believe There Was Asbestos Where the Employees Worked

As is well established by the case law, WISHA imposes penalties upon employers who have constructive or actual knowledge of hazardous conditions. RCW 49.17.180(6); *see BD Roofing, Inc. v. Dep't of Labor and Indus.*, 139 Wn. App. 98, 109, 161 P.3d 387 (2007); *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003). RCW 49.17.180(6) provides the definition of "knowledge" under the WISHA. It provides that a "serious" violation exists if it is known or could be known with the exercise of reasonable diligence:

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*

RCW 49.17.180(6)(emphasis added).

Reasonable diligence includes 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 their occurrence. *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P. 3d 1085 (2011).

Here, substantial evidence supports the Board's finding of knowledge as shown by the admissions of the foreman, the safety director,

and the general superintendent, all of which demonstrate that BNB had reason to believe asbestos was present where the employees were removing carpet. The conduct by BNB's management demonstrates actual knowledge that employees were exposed to asbestos. Two employees testified that foreman Voss instructed them to bag and segregate broken tiles because they contained asbestos. BR Pennington at 8-10; BR Weston at 77. The foreman admitted he suspected asbestos. BR Rees 1/12/11 at 40. The safety director said that work should have stopped on the carpet removal. BR Campbell at 112. The superintendent said that he directed that work should be stopped until an abatement contractor was on site. BR Ex. 52 at 1, Blake at 15-17. Yet work continued.

Now BNB wishes to hide behind the good faith survey performed on the site. Pet. 4. A good faith survey is required before any demolition or construction begins that may disturb and expose workers to asbestos. RCW 49.26.013(1); WAC 296-62-07721(2)(b). Raising an argument it did not brief below, BNB claims it did not need to follow up on its foreman's and general superintendent's beliefs that the material contained asbestos because they were not "AHERA accredited Building

Supervisors." Pet. 5-6.[4] Similarly, it must believe that it need not be accountable for the safety director's knowledge as well. Nothing in the good faith survey regulation allows an employer to ignore the presence of asbestos when it becomes known after construction or demolition begins.

Despite the multitude of published state and federal worker safety opinions arising from inspections involving foremen, safety directors, and superintendents, no authority is cited by BNB to support its argument that their personnel's assessment of the hazards can be ignored because such personnel are not accredited asbestos experts. In fact, case law provides that the knowledge of management personnel such as foremen, safety directors, and superintendents are imputed to the employer. *See Danis-Shook Joint Venture XXV v. Sec. of Labor,* 319 F.3d 805 (6th Cir. 2003).

Here the foreman, safety director, and general superintendent had years of experience in construction, had read the 2007 survey and the 2008 letter, and made statements admitting the presence of asbestos. *See* BR Rees 1/12/11 at 40; Campbell at 112; Blake at 16-17; Voss at 13-14. On

[4] Although BNB referred to a similar argument in oral argument because an amicus raised it, BNB did not raise this issue in its briefing. This Court need not consider an argument not properly raised in the Court of Appeals. *Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975) (Court does not consider arguments not raised in the Court of Appeals); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court only considers arguments raised in the appellant's brief); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (court does not consider arguments raised only by amici); *State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992) (argument raised for first time at oral argument is not properly before the court and need not be considered).

substantial evidence review, the inference from these facts is that, based on this information, they believed the employees were encountering asbestos. *See Frank Colluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014) (court views evidence in the light most favorable to the prevailing party at the Board). The fact-finder's finding of knowledge is not to be second guessed, and certainly presents no issue for review.

In attempting to avoid the finding of "knowledge" by the Board, BNB argues that it should be allowed to rely exclusively upon the good faith survey; and, because they lack expertise in identifying asbestos, neither BNB's management nor its employees should be allowed to "second guess" a good faith survey. Pet. 5-6. The flaw in this argument is that, as noted below, the good faith survey and the attachments to the survey plainly stated the limitations to the survey. BNB chose to "second-guess" those limitations and conduct work both where asbestos had not been sampled and where it had been found.

Applying BNB's request to ignore its foreman's, safety director's, and superintendent's concerns demonstrates the flaws in its argument. They were aware of the limitations of the good faith survey. BR Carling at 156-57; BR Gladu at 155. The good faith survey stated on its face that it had substantial limitations. BR Ex. 35 (Section 3.0 "Limitations").

There were documents attached to the survey that recommended that a new survey be obtained because there were large areas containing potential asbestos containing materials that were not tested in the 2007 survey. BR Ex. 35; BR Ex. 34 (Kappers letter at 6). BNB's petition never mentions any of the limitations placed on the 2007 good faith survey. It appears to argue that contractors should be allowed to rely on parts of a good faith survey and ignore other parts of the survey.

It is not surprising that asbestos was found in a building built in the 1940s. The potential of asbestos exposure to employees in this building would be known to many members of the general public without specialized training in light of the amount of attention our society has given the problems associated with asbestos in old buildings. BNB personnel do not have to be extensively trained in asbestos removal to know that employees may be at risk when removing floor tiles in a more than 70 year-old building.

Similarly, BNB believes it did not need to follow up on the safety complaints of its employees. Pet. 1, 5-6. This Court should reject BNB's attempts to discredit the complaints of its employees. BNB's arguments are contrary to one of the basic premises underlying the WISHA that encourage employees to bring safety concerns to the attention of their employers because the government cannot be present in every workplace

at all times. *See* RCW 49.17.110. No court has allowed employers to disregard employee concerns about their own safety.

2. BNB Directed Its Employees To Work in Areas That the Good Faith Survey Indicated Were Surrounded by Asbestos. This Information From the Good Faith Survey Provides Substantial Evidence of Knowledge

BNB claims that it followed the good faith survey are belied by the facts. It claims BNB "removed the carpet because the ECI Survey indicated there was no asbestos material beneath it." Pet. 7. But it allowed its employees to work in an area where five out seven places tested in the good faith survey came back positive for asbestos. BR Ex. 35 at 4. This fact alone shows knowledge and supports the Board's finding.[5]

Additionally, BNB allowed its employees to work in areas that were not tested, even though asbestos checkered the worksite. *See* BR 34; BR Ex. 35 (Table 1 at 3), BR Weston 71. The Department's inspector testified it cannot be assumed that if an area is untested it does not contain asbestos. BR Rees 1/12/11 at 13, 17.

3. Review Is Not Warranted in This Substantial Evidence Case

[5] BNB also had actual knowledge it was using a good faith survey with major limitations, and had rejected recommendations it obtain a more expensive comprehensive survey. BNB adopted a "see no evil" approach that guaranteed it would not know *exactly* where asbestos was located at its worksite, even though it knew about the asbestos' presence. Such conduct cannot be rewarded.

The Board's inquiry was simple: did BNB know or have reason to believe after exercising due diligence that asbestos was present where the employees were working. Although BNB portrays this case as one that involves the daily operations of contractors such as to justify review under RAP 13.4(b)(4), it neglects to mention the Court of Appeals decision is unpublished and has no effect beyond this case. But in the instant application only at issue here, the Board correctly evaluated the evidence to see if BNB had knowledge of the asbestos after the good faith survey was completed, and the Court of Appeals correctly reviewed that decision for substantial evidence. There is not a case that has precisely addressed the issue in this case, but it was decided based on well-accepted principles of substantial evidence review and employer knowledge. No issue of substantial public interest is presented by the substantial evidence review of the Board's finding that BNB did have reason to suspect asbestos.

B. BNB Shows No Conflict With this Court's Cases Regarding Strict Liability as Strict Liability Was Not Imposed by Following the Applicable Regulations and Statutes

Strict liability was not imposed in this case. At the Board, the Department had to prove that BNB had knew or had reason to believe that asbestos was present. RCW 49.17.180(6). BNB cites to *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984), for the proposition that certain standards must be

shown before imposing strict liability. Pet. at 7-8, 12. It claims these standards were not met, and thus the Court of Appeals decision conflicts with this Court's decision in *New Meadows*. *Id.* No conflict is demonstrated by a case that simply does not apply.

BNB argues that it is being held strictly liable because it relied on the good faith survey, and the good faith survey "results were in error." Pet. at 12. The Department has never argued, and the Court of Appeals never stated, that the good faith survey was "in error." To the contrary, the survey clearly stated its limitations. Requiring that BNB also rely on the survey's stated limitations is not an imposition of strict liability.

Nor is strict liability imposed by a holding that a good faith survey does not shield an employer from liability when the employer had reason to believe asbestos was where the employees worked. BNB cites an array of administrative and court decisions addressing citations issued under the federal Occupational Safety and Health Act in support of its argument that strict liability is not required by it. Pet. 9-14. The Department agrees that strict liability is not the standard, but here substantial evidence supports the finding of knowledge and that strict liability was not applied.

V. CONCLUSION

BNB cannot demonstrate any conflict with the decisions of this Court, nor has it shown any other basis warranting review. Here BNB

personnel thought that there was asbestos present where the employees worked and this knowledge, which arose after the good faith survey occurred, necessitated BNB to take steps to protect its employees. BNB sent its employee into an area that the asbestos survey showed was surrounded by asbestos, and this fact alone shows knowledge. In the face of such evidence, the Court of Appeals properly determined that substantial evidence supports the Board's factual findings. The Department asks this Court to deny review.

RESPECTFULLY SUBMITTED this 21st day of November, 2014.

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SUPREME COURT OF THE STATE OF WASHINGTON

BNBUILDERS INC. Petitioner, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Petition for Review, Attachment, and this Certificate of Service in the below described manner:

//

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Via Email filing to:

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DATED this 25th day of November, 2014.

SHARA WUSSTIG
Legal Assistant

ATTACHMENT

BEFORE T. . BOARD OF INDUSTRIAL INSUR .NCE APPEALS
STATE OF WASHINGTON

IN RE: BNBUILDERS INC	DOCKET NO. 10 W0012
CITATION & NOTICE NO. 313918351	DECISION AND ORDER

APPEARANCES:

Employer, BNBuilders, Inc., by
AMS Law, P.C., per
Aaron K. Owada

Department of Labor and Industries, by
The Office of the Attorney General, per
Ingrid Golosman, Assistant

The employer, BNBuilders, Inc., filed an appeal on April 20, 2010, from a Citation and Notice No. 313918351, dated April 7, 2010, in which the Department alleged serious violations of WAC 296-62-07712(9)(b)(i) (Item 1-1); WAC 296-62-07709(3)(a)(ii) (Item 1-2); WAC 296-62-07709(3)(h) (Item 1-3); WAC 296-62-07717(1) (Item 1-4); WAC 296-62-07712(2)(c) (Item 1-5); WAC 296-62-07715(4)(a)(ii) (Item 1-6); WAC 296-62-07722(3)(b)(i)(A)(Item 1-7a); WAC 296-65-030(1) (Item 1-7b Subsumed in 1-7a); WAC 296-62-07721(2)(e) (Item 1-8); and WAC 296-62-07712(2)(d) (Item 1-9). Each of these serious alleged violations were assessed a penalty of $2,100 except for Item 1-8, which was assessed penalty of $2,500, for a total penalty assessed of $19,300. In addition, the Citation and Notice alleged three general violations of WAC 296-62-07709(3)(g) (Item 2-1); WAC 296-65-020(1)(e) (Item 2-2); and WAC 296-842-12005(1) (Item 2-3). No penalties were assessed for these alleged violations. The Department Citation and Notice No. 313918351 is **MODIFIED.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on June 27, 2011, in which the industrial appeals judge affirmed the Department order dated April 7, 2010.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because we do not agree that the Department has proved the employer violated WAC 296-22-07721(2)(e) as cited in Item 1-8. That item should be vacated. In addition, we disagree with the reason for affirming the citation for violation of 296-22-07717(1) as cited in Item 1-4. Finally, we have

amended the findings and conclusions to include information about the bases for the penalties assessed. We summarize the evidence only to the extent necessary to explain our decision.

This citation arose from the inspection of a soft demolition project performed by BNBuilders at 8511 15th Avenue NE in Seattle, Washington. The building formerly housed a hospital and then a Boys and Girls Club. It was being renovated to be used for a private school. BNBuilders was hired to perform soft demolition work in preparation for remodeling the building. The work included removing fixtures, carpet, and sheetrock/stucco walls. BNBuilders removed all of the carpet from the hallways of the buildings, but contends that an employee of the building owner removed carpeting from the rooms. As it turns out, it does not matter if BNBuilders removed carpet in the rooms because the work they performed in the hallways is a sufficient basis for affirming the violations related to working on asbestos-containing material without taking the appropriate protective measures.

Prior to commencing the project, the firm obtained a copy of a good faith survey for potential asbestos-containing material. The survey was completed by Earth Consulting, Inc., on March 13, 2007. The company sampled material on all three floors of the building, including pipe lagging, vinyl floor tile, vinyl floor mastic, carpet mastic, and tank insulation. The survey detected asbestos in a number of materials including vinyl floor tile and carpet mastic in several areas. The record is not clear as to whether Earth Consulting Inc., sampled flooring material underneath installed carpeting. The employer believed such sampling had been completed down to the subfloor.

During the removal of carpeting in certain areas, the firm found that some of the floor tiles underneath the carpet were being lifted with the carpet. The labor supervisor, Robert Voss, became concerned that some of the tile and mastic could contain asbestos. He instructed employees to cut the carpet around the tile and discard it in the dumpster. Any tiles that came loose were to be double-bagged and placed in a room reserved for hazardous waste removal. Mr. Voss did not instruct or require the employees to take any specific measures to avoid exposure to asbestos. Later sampling by the Compliance Safety and Health Officer (CSHO) revealed that the tiles and mastic under the carpet was asbestos-containing material.

We agree with our industrial appeals judge that the employer committed the violations identified in Items 1-1 through 1-7, Item 1-9 and Items 2-1 through 2-3. With regard to Item 1-8, the CSHO cited the employer for a violation of WAC 296-62-07721(2)(e). The rule states:

> (e) No contractor may commence any construction, renovation, remodeling, maintenance, repair, or demolition project without receiving a copy of the written response or statement required by WAC 296-62-07721(2)(b). Any contractor who begins any project without the copy of the written report or statement will be subject to a mandatory fine of not less than two hundred fifty dollars per day. Each day the violation continues will be considered a separate violation.

As we understand the testimony from the CSHO, this item was cited because, although the employer had a copy of the good faith survey report, it was incomplete. We do not agree this amounts to a violation of this particular regulation. The employer did seek a written report from an appropriate survey firm. The fact that the survey did not cover all of the materials does not constitute a violation of the statute. The employer's actions in working with asbestos-containing materials once the employer had reason to believe such materials were present are more properly addressed by the other items cited. Item 1-8 should be vacated.

With regard to Item 1-4, WAC 296-62-07717(1) states:

> (1) Provision and use. If an employee is exposed to asbestos above the permissible exposure limits, or where the possibility of eye irritation exists, or for which a required negative exposure assessment is not produced and for any employee performing Class I operations, the employer shall provide at no cost to the employee and require that the employee uses appropriate protective work clothing and equipment such as, but not limited to:
>
> (a) Coveralls or similar full-body work clothing;
>
> (b) Gloves, head coverings, and foot coverings; and
>
> (c) Face shields, vented goggles, or other appropriate protective equipment which complies with WAC 296-800-160.

Our industrial appeals judge concluded BNBuilders was engaged in Class I asbestos work. Class I involves the removal of thermal insulation. The record is clear that the employer stopped work when thermal insulation was encountered. Nevertheless, the employer was engaged in Class II asbestos work. For Class II asbestos work, the employer was required to have employees wear protective clothing for work that was not the subject of a negative exposure assessment. BNBuilders admitted that no negative exposure assessment had been conducted. The employees were not advised or required to wear any protective clothing. Therefore, the violation stands.

In assessing penalties for the violations, the CSHO considered the possible consequences of exposure to be severe at a level 6. Asbestos exposure can lead to fatal lung diseases. She determined the probability to be at a 2 based on the number of employees exposed and the amount of time they worked with the material. The base penalty for each violation was determined using those values, with the exception of Item 1-8. The base penalty can be increased or reduced based on certain factors. In this case, the CSHO increased the penalty for each violation based on poor faith. She did so because she felt the employer had demonstrated poor faith by not immediately stopping work and instituting protective measures as soon as the employer suspected asbestos-containing material had been encountered. She also felt the employer had not been entirely honest in the information it provided her during the inspection. Because we have vacated Item 1-8, we will not analyze the penalty calculation for Item 1-8.

FINDINGS OF FACT

1. On January 13, 2010, the Department of Labor and Industries, Division of Safety and Health, conducted an inspection of BNBuilders work site located at 8511 15th Avenue N.E. Seattle, Washington 98115. On April 7, 2010, the Department issued Citation and Notice No. 313918351 in which it alleged violations and assessed penalties as follows: Item No. 1-1 WAC 296-62-07712(9)(b)(i) (Serious) Assessed Penalty: $2,100; and Item No. 1-2 WAC 296-62-07709(3)(a)(ii) (Serious) Assessed Penalty: $2,100; and Item No. 1-3 WAC 296-62-07709(3)(h) (Serious) Assessed Penalty: $2,100; and Item No. 1-4 WAC 296-62-07717(1) (Serious) Assessed Penalty: $2,100; and Item No. 1-5 WAC 296-62-07712(2)(c) (Serious) Assessed Penalty: $2,100; and Item No. 1-6 WAC 296-62-07715(4)(a)(ii) (Serious) Assessed Penalty: $2,100; and Item No. 1-7a WAC 296-62-07722(3)(b)(i)(A) (Serious) Assessed Penalty: $2,100; and Item No. 1-7b WAC 296-65-030(1) (Serious) Assessed Penalty: Included in Violation Item No. 1-7a; and Item No. 1-8 WAC 296-62-07721(2)(e) (Serious) Assessed Penalty: $2,500; and Item No. 1-9 WAC 296-62-07712(2)(d) (Serious) Assessed Penalty: $2,100; and Item No. 2-1 WAC 296-62-07709(3)(g) (General) Assessed Penalty: $0; and Item No. 2-2 WAC 296-65-020(1)(e) (General) Assessed Penalty: $0; and Item No. 2-3 WAC 296-842-12005(1) (General) Assessed Penalty: $0. Total Penalty Assessed: $19,300.

   On April 8, 2010, the employer, filed a Notice of Appeal of the Department's April 7, 2010 Citation and Notice with the Department's Safety Division. On April 20, 2010, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On April 20, 2010, the file was transmitted to the Board. On April 21, 2010, the

Board issued a Notice of Filing of Appeal under Docket No.10 W0012, and directed that further proceedings be held.

2. On January 13, 2010, BNBuilders performed soft demolition work at a jobsite located at the old Waldo General Hospital, 15th Avenue N.E., Seattle, Washington 98115. The owner of the building was converting the former hospital to a school. The soft demolition consisted of removal of carpet, baseboards, walls, and casework. During the course of demolition, workers pulled up carpet with tile still attached and damaged insulation on pipes within the walls to be demolished.

3. BNBuilders, Inc., relied on a good faith survey conducted by Earth Consultants, Inc., in 2007. The Earth Consultants report stated, "Samples of suspect materials were limited to exposed surfaces and did not include possible insulated pipe or other ACM located behind walls, above ceilings, or under floors."

4. The employer failed to ensure that removal of presumed asbestos containing (PACM) vinyl flooring and mastic was conducted using critical barriers to isolate the removal area, and failed to have a negative exposure assessment (NEA) for the work. Item 1-1.

5. The severity of injury potentially caused by the serious violation cited in Item 1-1 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

6. The employer did not conduct initial asbestos air monitoring during the removal of PACM (flooring and mastic) as required when no NEA is performed. Item 1-2.

7. The severity of injury potentially caused by the serious violation cited in Item 1-2 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

8. The employer failed to ensure asbestos air clearance monitoring was performed after removal of PAC vinyl flooring and mastic. Item 1-3.

9. The severity of injury potentially caused by the serious violation cited in Item 1-3 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

10. The employer failed to ensure it workers used full body protective clothing in removing asbestos in the absence of a NEA. Item 1-4.

11. The severity of injury potentially caused by the serious violation cited in Item 1-4 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

12. The employer failed to ensure that PAC floor tile and mastic was removed in a wet saturated state. Item 1-5.

13. The severity of injury potentially caused by the serious violation cited in Item 1-5 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

14. BNBuilders workers conducted dry removal of PAC floor tile and mastic without using supplied air respirators. Item 1-6.

15. The severity of injury potentially caused by the serious violation cited in Item 1-6 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent

information during the inspection. The total penalty for this item is $2,100.

16. The employer did not use certified asbestos workers to conduct the demolition, which was a Class II asbestos project. Item 1-7a (grouped with Item 1-7b).

17. The employer did not obtain certification as an asbestos contractor before conducting a Class II abatement project. Item 1-7b.

18. The severity of injury potentially caused by the serious violations cited in Items 1-7a and 1-7b was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

19. The employer obtained an asbestos survey adequate to determine if the materials to be demolished contained asbestos. Item 1-8.

20. The employer did not promptly clean up and dispose of presumed asbestos thermal insulation that was damaged by employees during interior wall demolition. Item 1-9.

21. The severity of injury potentially caused by the serious violation cited in Item 1-9 was 6 due to the potential exposure to asbestos to cause fatal diseases. The probability was 2 based on the number of employees exposed and the length of time they were exposed. The base penalty is increased based on the employer's poor faith. The employer did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material. The employer also failed to fully and completely disclose pertinent information during the inspection. The total penalty for this item is $2,100.

22. The employer did not conduct air monitoring before removing presumed asbestos containing floor tile and mastic. This general violation was appropriately cited. No penalty was assessed. Item 2-1.

23. The employer failed to file a notice of intent to remove asbestos before beginning a Class II asbestos abatement project. This general violation was appropriately cited. No penalty was assessed. Item 2-2.

24. The employer's written respiratory protection program was generic in nature, not tailored to the jobsite and the hazard present. This general violation was appropriately cited. No penalty was assessed. Item 2-3.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to and subject matter of this appeal.

2. BNBuilders committed serious violations of the following WACs: 296-62-07712 (9) (b) (i); 296-62-07709 (3) (a) (ii); 296-62-07709(3) (h); 296-62-07717 (1); 296-62-07712 (2) (c); 296-62-07715 (4) (a) (ii); 296-62-07722 (3)(b)(i)(A); 296-65-030 (1); and 296-62-07712 (2) (d). The penalties for these violations are assessed at $16,800.

3. BNBuilders did not commit a serious violation of WAC 296-62-07712(2)(e).

4. The employer committed general violations of WAC 296-62-07709(3)(g), WAC 296-65-020(1)(e), and WAC 296-842-12005(1). No penalties were assessed for these violations.

5. The Citation and Notice No. 313918351 is modified. The violations cited in items 1-1 through 1-7, 1-9, and 2-1 through 2-3 are affirmed, and a total penalty of $16,800 is assessed for these violations. The violation cited in Item 1-8 is vacated.

DATED: October 4, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY — Chairperson

FRANK E. FENNERTY, JR. — Member

LARRY DITTMAN — Member

OFFICE RECEPTIONIST, CLERK

To: Wusstig, Sharlene (ATG)
Cc: Furst, Elliott (ATG); Aaron Owada (aowada@amslaw.net)
Subject: RE: 90775-7; BNBuilders, Inc. v. DLI

Received 11-25-2014

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Subject: 90775-7; BNBuilders, Inc. v. DLI

RE: ***BNBuilders, Inc. v. DLI***
Case Number: 90775-7

Dear Mr. Carpenter,

Attached for filing is the Department's Answer to Petition For Review, Attachment, and Certificate of Service in the above referenced matter.

Thank you,

Shara Wusstig
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Elliott Furst, Senior Counsel
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