90775-7

NO. 701428

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BNBUILDERS INC., a Washington Corporation;

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR & INDUSTRIES,

Respondent,

APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellant, BN Builders, Inc. (hereinafter "BN") requests this Court to accept review of the decision or parts of the decision terminating review designated in Part B of this motion.

II. DECISION

BN asks this Court to review the opinion of the Court of Appeals, Division One, terminating review that was filed on July 7, 2014. BN's motion for reconsideration was denied on July 4, 2014.

The effect of this decision is that contractors in Washington will not be entitled to rely on asbestos results of AHERA accredited building inspectors if uncertified and unqualified employees challenge a Good Faith Survey (hereinafter "GFS") mandated by RCW 49.26.013.

A copy of the Court of Appeals decision and the post-opinion order are located in Appendix A at pages 1through 16.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in applying a strict liability standard for a WISHA violation where none of the workers, including the project manager, were qualified to undermine the GFS results of an accredited building inspector that floor tiles underneath a carpet tested negative for asbestos, was BN entitled as a matter of law to rely on the GFS results, and therefore could not have had knowledge that the removal of carpet would constitute an asbestos project when it was later determined that the GFS results were wrong?

IV. STATEMENT OF THE CASE

BN seeks review of the Court of Appeal's Opinion which affirmed a Washington Industrial Safety and Health (hereinafter "WISHA") Decision and Order of the Board of Industrial Insurance Appeals (hereinafter "Board") involving citations by the Department of Labor and Industries (hereinafter "Department") for asbestos workplace violations.

As required by RCW 49.26.013, before beginning any work BN obtained a GFS from Earth Consulting Inc. (hereinafter "ECI"), an accredited, independent testing company. The purpose of a GFS is to identify and test all suspect asbestos-containing materials (hereinafter "PACMs") and issue a written report confirming the presence, location and condition of any asbestos containing materials (hereinafter "ACMs"). The property owner ordered and provided the GFS to BN. In accord with industry practices and good construction principles, BN carefully reviewed and relied upon the experts and the GFS. BN planned to remove carpet only in the areas where the GFS indicated no asbestos was present. Relying on the GFS, BN did not plan an asbestos project for carpet removal because no asbestos would be disturbed. For the "soft wall demolition," the GFS did not test "behind walls," so BN followed appropriate safety protocols to avoid contact with, or disturbance of, asbestos within the walls.

The Board concluded that BN did obtain a GFS as required by law, and vacated Item 1-8.

During carpet removal some tiles underneath the carpet stuck to the carpet and were removed along with the carpet. The Department inspected later and tested the tile beneath the carpet. Their tests concluded that the ECI GFS results upon which BN relied were inaccurate as the tile contained asbestos. The Department then cited BN with asbestos violations[1] because BN had not followed required work practice regulations for a Class II Asbestos project, and other citations. The Superior Court affirmed the Board's Decision and Order.

Although BN had obtained a GFS in accordance with law, the Board, and the Court of Appeals, affirmed all asbestos violations despite BN's reasonable reliance on the GFS, by concluding that BN could not rely on the GFS results.

BN did not know, and could not reasonably have known, that asbestos was present in the tile beneath the carpet because it reasonably relied on the GFS. Moreover, it is standard operating procedures in the construction industry to rely on the GFS, and per statute, BN must rely on the GFS. Asbestos safety violation Items 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, and 1-7a must be vacated.

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[1] The Department alleged ten serious violations and three general violations. Of the thirteen violations, twelve of them involved asbestos work practices that must be followed in an asbestos abatement project. For example, in violation Item 1-1, the Department cited BN for not establishing critical barriers when the carpet in the hallway was removed. In Item 1-2, BN was cited for not conducting initial air monitoring during the carpet removal.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. This Court should accept review pursuant to RAP 13.4(b)(4) and 13.4(b)(1) because there is a substantial public interest for all contractors engaged in remodeling projects where asbestos may be encountered; and, the Court of Appeal's decision is contrary to a decision of the Washington Supreme Court.

1. Where microscopic asbestos fibers cannot be seen with the naked eye, contractors must be able to rely on GFS results performed by qualified AHERA building inspectors following EPA sampling protocol.

It is undisputed that asbestos is hazardous. That is precisely why the Legislature adopted the Asbestos Act. Ch. 49.26 RCW. It specifically requires a good faith survey to be performed by qualified persons before a building renovation can take place. Pursuant to RCW 49.17.180(6), knowledge of the violation a prima facie element of a serious violation. BN asserts that it did not have actual knowledge that the tile contained asbestos, or that it failed to exercise due diligence. As a matter of law, due diligence is established by relying on a GFS performed by a qualified AHERA building inspector. [2]

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[2] RCW 49.17.140-150(1) sets forth the nature for judicial review of WISHA decisions issued by the Board of Industrial Insurance Appeals. In a WISHA appeal, the BIIA findings of fact are verities if supported by substantial evidence. RCW 49.17.150; RCW 34.05.570(3)(e); *Inland Foundry Co., Inc. v. Dep't of Labor and Indus.*, 106 Wn.App. 333, 340, 24 P.3d 424 (2001).

Legal decisions by the board are reviewed directly, based upon the record before the board. *Legacy Roofing,Inc. v. Dep't of Labor & Indus.*, 129 Wn.App 356, 363, 119 P.3d 366 (2005). The Board's interpretations of statutes and regulations are reviewed de novo, *Prezant Assocs., Inc. v. Dep't of Labor & Indus.*, 141 Wn.App. 1, 7, 165 P.3d 12 (2007), giving substantial weight to an agency's interpretation of a regulation within its area of expertise, *Wash. Cedar & Supply Co. v. Dep't*

The only evidence that contradicted the ECI survey came from individuals who did not meet the requirements imposed under RCW 49.26.013. As set forth in RCW 49.26.013, the asbestos survey may only be conducted by "persons meeting the accreditation requirements of the federal toxics substances control act, section 206(a) (1) and (3) (15 U.S.C. 2646(a) (1) and (3))." Asbestos sampling protocol is regulated by the EPA requirements set forth under 40 CFR 763.

WAC 296-62-07703 defines ACM as any material containing more than 1% asbestos. PACM means that the material is presumed to contain asbestos unless tested and shown not to contain asbestos. "The designation of a material as 'PACM' *may be rebutted pursuant* to WAC 296-62-07721." WAC 296-62-07703 (*emphasis added*).

In this case, none of the workers who had concerns that the ECI survey was inadequate met the requirements set forth under RCW 49.26.013, nor did they perform any kind of test that satisfied the EPA sampling protocol.

The individuals who contradicted the ECI survey included: Stewart Weston, Jeff Pennington, Casey Blake, and Robert Voss. However, none of these individuals had any qualifications to rebut the ECI survey results. That is, none of these persons were AHERA accredited

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of Labor & Indus.,119 Wn.App. 906, 913, 83 P.3d 1012 (2004). WISHA statutes and regulations are to be interpreted liberally in order to achieve their purpose of providing safe working conditions for every worker in Washington. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn.App. 333, 336, 24 P.3d 424 (2001).

Building Supervisors. As such they are prohibited by law to conduct good faith surveys. They did not follow any of the EPA sampling protocol, and therefore, their conclusions were not based on any scientific testing mandated by 40 CFR 763. There was no evidence in the record to support their belief as they did not articulate a reasonable basis to question the GFS results. When the tile beneath the carpet was questioned, Bob Voss went to the ECI GFS to confirm that the tile beneath the carpet tested negative for asbestos (i.e. "non detect"). The Court of Appeals failed to acknowledge that Voss relied on the GFS as the jobsite "Bible" due to the extensive and continual reference back to the document. (Tr. 2/15/11, p. 35, lines 4-20).

By adopting the Asbestos Act, and imposing the requirement of a good faith asbestos survey performed by an AHERA qualified building inspector, the Legislature created a "bright line" approach to identifying materials containing microscopic asbestos fibers. The legislative purpose was to take away any kind of guess work to determine if a material contained asbestos. Rather than allowing untrained and unqualified workers to conclude whether or not material contained asbestos, the law requires that the material be selected by a qualified building inspector and analyzed under the EPA sampling protocol. This eliminates the guess work or uncertainty.

Until the Department pointed out that the ECI survey was inadequate, a fact unknown to any of the persons on site, BN was

required to follow the ECI survey. Surely if the ECI report reported a positive result for asbestos, an employer would not be allowed to ignore the ECI survey results by concluding that the GFS results were incorrect. Yet, that is precisely the position the Department is taking. Evidence that the ECI survey was inadequate from persons not qualified to rebut the ECI survey, was not sufficient to put BN on notice that the ECI results regarding the sample beneath the carpet were in error.

The fact remains that BN removed the carpet because the ECI Survey indicated there was no asbestos material beneath it. That is the bright line approach adopted by the legislature and the Department in its WISHA regulations.

General contractors in Washington must be allowed to follow the law as required under the Asbestos Act, and not be penalized for relying on an asbestos survey that demonstrated on its face that it met the legal standards. To hold otherwise would create the uncertainty that the Legislature sought to eliminate by requiring general contractors to obtain a good faith survey before working.

2. The decision below imposes strict liability on employers contrary to both federal and state law contrary to this Court's New Meadows decision.[3]

In *New Meadows,* this Court adopted the strict liability criteria set forth in the Restatement (Second) of Torts §§ 519, 520 (1977). In that case, the plaintiff, while attempting to light an oil stove on December 31,

[3] 102 Wn.2d 495, 687 P.2d 212 (1984).

1978, unwittingly ignited natural gas which was leaking from a damaged gas line several blocks away. The natural gas, unable to permeate the frozen ground, traveled laterally entering the drain field which serviced the plaintiff's residence. The leak allegedly was caused 7 years earlier when an underground contractor damaged a 2-inch natural gas pipe line owned by Washington Water Power Company (hereinafter "WWP") while laying underground telephone cable for Pacific Northwest Bell (hereinafter "PNB"). The subsequent explosion seriously injured Brown and destroyed the residence he rented from New Meadows Holding Company (hereinafter "New Meadows").

The *New Meadows* Court was asked to apply a strict liability standard. The Court declined to apply a strict liability standard because it concluded that natural gas pipelines did not constitute a "high degree of risk" which could not be eliminated by the use of reasonable care. The Court concluded that, "Some degree of risk of natural gas pipeline leaks will always be present." Even though asbestos presents a risk to the safety and health of employees, because the risk can be eliminated by a GFS, asbestos does not rise to the level of a "high degree of risk". Yet, the Court of Appeals decision applies a strict liability standard to asbestos.

The effect of the decision below allows the Department to cite employers under a strict liability standard. By concluding that BN could not rely on the GFS result that indicated that the tile underneath the carpet in the hallway where they removed the carpet did not contain asbestos, BN

was then required to follow all of the safety and health regulations that applied to asbestos abatement contractors and was then punished because it did not do so. The asbestos removal violations cited by the Department only applied to the carpet removal. Yet, the Court emphasized that when suspect insulation material was found behind the walls, the work activities were stopped. This was consistent with the GFS as it clearly indicated that no testing was done behind the walls. Thus, there were no asbestos results for material behind the walls. Consistent with their asbestos awareness training, the workers stopped work to have the material tested (for the first time) to determine whether it contained asbestos or not. The fact that they stopped activities for wall insulation material does not support any inference that they should have stopped the carpet removal because tiles were coming up. The Department and the court below impose a strict liability standard on BN. This is contrary to both RCW 49.17.010 and federal case law.

When Washington statutes or regulations have the same purpose as their federal counterparts, the court will also look to federal decisions to determine the appropriate construction. *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980). *Clarke v. Shoreline Sch. Dist. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986). *Adkins v. Aluminum Co. of America*, 750 P.2d 1257, 1268, 110 Wn.2d 128 (1988). In WISHA appeals, the court will consider decisions construing the federal counterpart to WISHA, Occupational Health and Safety Act of 1970, 29

U.S.C. §§ 651-678 (hereinafter "OSHA"), including decisions by the Occupational Safety and Health Review Commission. *Id.*

The purpose of WISHA is to create a program to "assure, insofar as ***may reasonably be possible***, safe and healthful working conditions for every man and woman working in the state of Washington...." and such "program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590)." RCW 49.17.010. (emphasis added). Regulations promulgated pursuant to WISHA must be construed in light of the statute's stated purpose. *Adkins v. Aluminum Co. of America,* 110 Wn.2d at 146.

Similarly, OSHA was never designed, nor could it have been, to eliminate all occupational accidents, nor was the Act designed to require employers to provide absolutely risk-free workplaces. *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587 (2nd Cir. 1998). An employer's duty under OSHA is, "qualified by the simple requirement that it be achievable and not be a mere vehicle for strict liability." *Loomis Cabinet Co. v. Occupational Safety & Health Review* Com'n, 20 F.3d 938, (9th Cir,1994), citing *National Realty & Const. Co., Inc. v. Occupational Safety and Health Review Commission*, 489 F.2d 1257 (D.C. Cir. 1973).

OSHA was designed to require, "a good faith effort to balance the need of workers to have a sale (sic) and healthy work environment against the requirement of industry to function without undue interference." *Titanium Metals Corp. of America v. Usery*, 579 F.2d 536 (9th Cir. 1978)

(citing *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1088 (7th Cir. 1975) (quoting Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (Comm. Print 1971) at 435 (Remarks of Senator Williams).

Federal courts have held that imposing negligence *per se* standard would inappropriately shift the burden of proof and precluding a finding of comparative negligence for an OSHA violation would "enlarge or diminish or affect in any other manner" the liability of an employer. *See Ries v. National R.R. Passenger Corp,* 960 F.2d 1156 (3rd Cir. 1992),(holding that a violation of an OSHA regulation neither results in negligence *per se* nor bars a finding of comparative negligence); *Albrecht v. Baltimore & Ohio R.R. Co,* 808 F.3d 329 (4th Cir. 1987) (same); *see also Minichello v. U.S. Indus.,* 756 F.2d 26, 29 (6th Cir. 1985) (prohibiting use of OSHA regulations to establish product liability because knowledge of the regulation may lead the trier of fact to find liability).

The Oregon Supreme Court has explicitly stated that OSHA "is a fault-based system." *Don Whitaker Logging, Inc.,* 329 Or. at 263, 985 P.2d 1272 (1999). Also, addressing the reasonable diligence inquiry, the federal courts have repeatedly clarified that "Congress quite clearly did not intend ... to impose strict liability[,]" reaffirming that, "[i]n keeping with this purpose of eschewing a strict liability standard, ... the Act imposes liability on the employer *only* if the employer knew, or 'with the exercise

of reasonable diligence, [should have known] of the presence of the violation.' " *W.G. Yates & Sons v. Occupational Safety & Health,* 459 F.3d 604, 606–07 (5th Cir.2006) (citations and some internal quotation marks omitted; emphasis, brackets, and omissions in original); *accord Titanium Metals,* 579 F.2d at 543–44.

> "Not requiring the Secretary to establish that an employer knew or should have known of the existence of an employee violation would in effect make the employer strictly and absolutely liable for all violations and would render meaningless the statutory requirement for employee compliance." *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139, 1145 (9th Cir. 1975).

WISHA has the same stated purpose, and so, similarly, strict liability should not be imposed. If this Court affirms the asbestos violations against BN by affirming the conclusion that BN could not rely on the GFS, a strict liability standard is imposed on BN because BN in fact relied on the GFS results. In essence, where the GFS results were in error, the decision below holds BN to a strict-liability standard by requiring BN to follow all of the asbestos regulations when it did not know that the GFS results were incorrect. This is contrary to this Court's holding in *New Meadows Holding Company v. Washington Water Power Company,* 102 Wn.2d 495, 687 P.2d 212 (1984) and the stated purpose of WISHA.

As noted by this Court in *Siegler v. Kuhlman,* 81 Wn.2d 448, 502 P.2d 1181 (1973), one of the underlying concepts of strict liability rests on, "the ultimate idea of rectifying a wrong and putting the burden where

it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible". *Id.* at 455. In this case, BN and the employees potentially exposed to asbestos fibers are the two innocent parties: BN for relying on the incorrect GFS, and the employees who pulled up the carpet.

When certain activities are sufficiently unusual and dangerous, even when the utmost care is taken to prevent harm, strict liability can be justified. The Restatement balances the beneficial character of the activity, the nature of the risk, and the degree to which it is an usual activity. Since many environmental cases involve injuries that occur over time, or from activities common in the past, the doctrine is somewhat limited in the environmental context.

In *New Meadows,* this Court adopted the strict liability criteria set forth in the Restatement (Second) of Torts Sections 519, 520 (1977). *Pacific Northwest Bell Tel. Co. v. Port of Seattle,* 80 Wn.2d 59, 64, 491 P.2d 1037 (1971) (holding underground water mains do not constitute an abnormal condition warranting strict liability). Specifically, Section 519 provides for the imposition of strict liability upon those who are carrying on an "abnormally dangerous activity". Whether an activity is abnormally dangerous is a question of law *Langan v. Valicopters, Inc.,* 88 Wn.2d 855, 861, 567 P.2d 218 (1977).

Section 520 of the Restatement (Second) of Torts lists the factors to be considered when determining what constitutes an abnormally

dangerous activity:

a) Existence of a high degree of risk of some harm to the person, land or chattels of others;

b) Likelihood that the harm that results from it will be great;

c) Inability to eliminate the risk by the exercise of reasonable care;

d) Extent to which the activity is not a matter of common usage;

e) Inappropriateness of the activity to the place where it is carried on; and

f) Extent to which its value to the community is outweighed by its dangerous attributes.

Rolling up old carpet for a construction renovation project does not meet the factors of strict liability pursuant to Section 520 of the Restatement (Second) of Torts. Following the statutory requirement of obtaining a GFS should constitute reasonable care to reduce the hazards of asbestos; removing the carpet in an old building is an appropriate place to engage in the renovation activity; and the need to renovate old buildings outweighs the potential hazards engaged in by BN. As such, this Court should accept review and correct the strict liability placed on BN for not following the asbestos safety regulations.

3. Case of first impression.

There are no reported decision from this Court addressing the relationship between the Washington Industrial Safety and Health Act, Ch. 49.17 RCW and the Asbestos Act, Ch. 49.26 RCW. Moreover, there are no reported cases addressing the appropriate standard to impose on

employers under WISHA. As such, this is a case of first impression for the Court. This Court has accepted for review over 1,300 cases of first impression.[4]

Contractors need a prompt and ultimate resolution by the Court to safely and efficiently renovate old buildings. Across the state contractors on a daily basis obtain and rely on a GFS to warn them where asbestos is present, as well as areas where no asbestos has been detected to allow them where they may safely work. By citing BN for not following the WISHA asbestos safety regulations after it relied on a GFS result in essence holds BN to a strict liability standard. Moreover, where the results of a GFS were questioned by employees who did not have the statutorily mandated qualifications to perform or test GFS samples, the decision below erodes the confidence or security in relying on a GFS. This is not consistent with the Asbestos Act or WISHA. Accordingly, the issue presented for review is of substantial public interest pursuant to RAP 13.4(b)(4). *State v. Watson,* 155 Wn.2d 574, 122 P.3d 903 (2005).

VI. CONCLUSION

Review of the Court of Appeals opinion is merited here under RAP 13.4(b) because contractors must be able to rely on a GFS that was performed by a qualified AHERA building inspector. Where no one on site was qualified to contradict the GFS results, and there was no reasonable evidence to question the GFS results, as a matter of law,

[4] A Westlaw search for the term, "first impression" found 1,303 cases.

contractors must be allowed to rely on the results. To hold that an employer cannot rely on a GFS incorrectly imposes a strict liability standard that was never contemplated by either federal OSHA laws or RCW 49.17.010. As a case of first impression, guidance from this Court will be of great assistance to employers in the State of Washington.

This Court should accept review and order the vacation of violation Items 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, and 1-7a against BN.

RESPECTFULLY SUBMITTED this 3rd day of September, 2014.

AMS LAW, P.C.

By: _____

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Attorneys for Appellant, BNB

CERTIFICATE OF SERVICE

I, Brittany Plotnikoff, hereby certify under penalty of perjury under the laws of the State of Washington that on September 3, 2014, I filed with the Court of Appeals Division I, via hand delivery, the original of the following document and one copy of:

1. **APPELLANT'S PETITION FOR REVIEW**

and that I further served a copy via facsimile and U.S. Mail upon:

Elliott Furst
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

SIGNED this 3rd day of September, 2014 in Seattle, Washington.

Brittany Plotnikoff, Paralegal

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

BN BUILDERS, INC., a Washington corporation, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES AND BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondent	No. 70142-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 7, 2014

LEACH, J. — BN Builders Inc. (BNB) appeals a superior court judgment affirming the decision of the Board of Industrial Insurance Appeals (Board) involving Department of Labor & Industries (Department) citations for asbestos workplace violations. BNB contends that substantial evidence does not support the Board's findings and that the Board applied an inappropriate strict liability standard. BNB also disputes the assessed penalties, which the Department increased because of a "poor" rating for good faith. Because substantial evidence in the record supports the Board's findings and those findings support the Board's conclusions of law, we affirm.

FACTS

In late December 2009, BNB began work as the general contractor to convert a former hospital into a private school. The original building dates from the 1920s, with an additional wing added in 1945. Federal and state law required BNB to obtain a good faith survey to assess the presence of asbestos before beginning demolition work.[1]

The property owner gave BNB a survey that Earth Consulting Inc. (ECI) conducted in 2007. This survey analyzed 87 samples and found asbestos-containing material (ACM) in vinyl floor tiles, tile and carpet mastic, cement asbestos board, pipe lagging, tank and water heater insulation, and asphaltic roofing materials. The ECI survey report noted that it did not address ACM that might be located "behind walls and/or columns, beneath flooring, above non-removable ceilings, underground, or in any other inaccessible areas," and stated, "Should suspected ACM be uncovered during demolition activities, it should be sampled, tested, and characterized at that time." The property owner also gave BNB a 2008 inspection report from Argus Pacific Inc. This inspection analyzed samples for other possible contaminants, including lead, mercury, metals, radiation, and mold. The Argus Pacific inspection also identified but did not analyze "a large number of suspect asbestos-containing materials that were not sampled and analyzed during the previous asbestos inspection." Argus Pacific

[1] 40 CFR § 763.86; WAC 296-62-07721(1)(c)(ii).

recommended that the property owner commission a "more thorough asbestos inspection" before demolition.

Before beginning its work, BNB solicited bids for a new asbestos survey. After two consultants recommended that "a quality abatement contractor would be money better spent," BNB decided to rely on the 2007 ECI asbestos assessment and not commission another survey. BNB was not a certified asbestos contractor, and BNB's contract with the property owner expressly excluded abatement or removal of hazardous materials. When BNB started work on December 28, 2009, it had not yet hired an abatement contractor.

BNB performed a "soft demolition": removal of nonstructural portions of the building. Demolition areas included some not shown as tested in the ECI survey. As BNB workers removed carpet, they sometimes also removed old vinyl tiles that stuck to the carpet. Some of these tiles broke during removal. BNB foreman Robert Voss instructed workers to throw carpet free of tiles directly into the dumpster. For carpet containing tile or mastic, Voss directed workers to wrap the materials in plastic bags, secure the bags with duct tape, and place them in a designated room for asbestos abatement contractors to pick up later. Workers did not wear protective clothing or use respirators for most or all of the work. In the course of the work, workers sometimes also disturbed thermal system insulation. On January 11, 2010, worker Jeff Pennington completed a "near miss" incident report describing insulation that fell on him from a wall he was demolishing. He wrote, "I had seen it befor[e] but didn't know if it contained asbestos or not. I

asked Bob Voss he said it has been tested but the results weren't in yet. WORK IN THAT AREA WAS HALTED!" At least two BNB workers expressed their concerns about asbestos exposure to managers. These managers were on site during several days of demolition.

On January 12, 2010, worker Stewart Weston contacted the Department, which conducted an inspection the next day. Based on her observations and belief that previous surveys had "serious flaws," inspector Janine Rees directed BNB to obtain another asbestos survey. Subsequent testing by NVL Laboratories Inc. revealed asbestos in a number of materials, including pipe insulation and vinyl floor tiles of varying sizes and colors.

The Department issued a citation to BNB for ten serious and three general violations, with a total penalty of $19,300.[2] Twelve of the violations involved

[2] Specifically, the citation alleged that BNB did not use critical barriers to isolate the class II removal of presumed asbestos containing vinyl flooring and mastic or have a negative exposure assessment for the work, in violation of WAC 296-62-07712(9)(b)(I); did not conduct asbestos air monitoring during removal or air clearance monitoring after removal of vinyl flooring and mastic, in violation of WAC 296-62-07709(3)(a)(II) and -07709(3)(h); did not ensure the use of full body protective clothing during asbestos removal, which is required in the absence of a negative exposure assessment, in violation of WAC 296-62-07717(1); removed asbestos in a dry state without the use of supplied air respirators rather than in a wet, saturated state, in violation of WAC 296-62-07712(2)(c) and -07715(4)(a)(II); did not use certified asbestos workers or obtain certification as a certified asbestos contractor before conducting a class II asbestos abatement project, in violation of WAC 296-62-07722(3)(b)(I)(A) and 296-65-030(1); did not obtain an asbestos survey identifying all asbestos containing materials on the site before starting work, in violation of WAC 296-62-07721(2)(e); did not promptly encapsulate or clean up presumed asbestos thermal system insulation damaged by employees during interior wall demolition, in violation of WAC 296-62-07712(2)(d), -07723(8), or -07723(2); did not conduct preabatement asbestos air monitoring before removing presumed asbestos containing vinyl floor tile and mastic, in violation of

asbestos removal procedures, and one cited an inadequate respirator program. The Department gave BNB a "poor" rating for good faith, which increased the penalties for ten of the violations. BNB appealed the citations, and an industrial appeals judge affirmed. BNB then petitioned the Board of Industrial Appeals, which affirmed nine of the serious violations and all three general violations, imposing a judgment against BNB of $16,800.[3] BNB appealed to King County Superior Court, which affirmed the Board's decision.

BNB appeals.

STANDARD OF REVIEW

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs judicial review of a decision issued by the Board.[4] This court directly reviews the Board's decision based on the record before the agency.[5] 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.[6] Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter

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WAC 296-62-07709(3)(g); did not file with the Department a notice of intent to remove asbestos abatement project before conducting a class II asbestos abatement project, in violation of WAC 296-65-020(1)(e); and did not maintain an adequate respirator protection program, in violation of WAC 296-842-12005(1).

[3] The Board reversed violation 1-8, in which the Department found that "Before starting work on site, the employer did not obtain an asbestos survey to determine if all materials to be worked on, or removed, contain asbestos."

[4] RCW 49.17.140.150(1).

[5] Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

[6] RCW 49.17.150(1); Mowat, 148 Wn. App. at 925.

asserted.[7] If this court determines that substantial evidence supports the Board's findings, it then decides if those findings support the Board's conclusions of law.[8]

This court reviews the Board's interpretation of a statute or regulation de novo, under an error of law standard.[9] This court gives "substantial weight" to the agency's interpretation of regulations within its area of expertise and will uphold that interpretation if "'it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent.'"[10] This court reviews WISHA penalty amounts for abuse of discretion.[11] A court abuses its discretion where its decision is arbitrary or rests on untenable grounds or reasons.[12]

ANALYSIS

WISHA and Asbestos

The legislature enacted WISHA "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington."[13] In RCW 49.26.010, the legislature recognized the dangers of exposure to asbestos, which is "known to produce irreversible lung damage and bronchogenic carcinoma. . . . The nature of this problem is such as to

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[7] Mowat, 148 Wn. App. at 925.

[8] J.E. Dunn Nw, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

[9] Roller v. Dep't of Labor & Indus., 128 Wn. App. 922, 926, 117 P.3d 385 (2005).

[10] Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wn. App. 402, 409, 97 P.3d 17 (2004) (quoting Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Serv., 82 Wn. App. 495, 518, 919 P.2d 602 (1996)).

[11] Danzer v. Dep't of Labor & Indus., 104 Wn. App. 307, 326, 16 P.3d 35 (2000).

[12] Danzer, 104 Wn. App. at 326.

[13] RCW 49.17.010.

constitute a hazard to the public health and safety, and should be brought under appropriate regulation." The legislature established a comprehensive statutory regime to regulate asbestos, and the Department promulgates and enforces rules for all occupational exposure to asbestos in workplaces that WISHA covers.[14]

The regulations define "ACM" as any material containing more than one percent asbestos.[15] When friable thermal system insulation crumbles or flooring materials break during demolition, asbestos fibers may be released into the air. In buildings constructed before 1980, vinyl and asphalt flooring materials are presumed to contain asbestos.[16] Friable thermal system insulation is also presumed to contain asbestos.[17] To ensure proper identification and abatement of ACM, an owner or agent must perform a good faith inspection for ACM before any construction, renovation, remodeling, or demolition that may disturb and expose workers to asbestos.[18] An employer may rebut the presumption of asbestos by producing a report by an industrial hygienist who has used "recognized analytical techniques" showing that the material is asbestos-free.[19] Removal of broken asbestos-containing vinyl floor tile is a class II asbestos project, requiring the use of certified asbestos workers.[20]

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[14] RCW 49.26; WAC 296-62-077 to -0755; WAC 296-65-001 to -050.

[15] WAC 296-62-07703.

[16] WAC 296-62-07712(10)(a)(ix); WAC 296-62-07721(1)(b).

[17] WAC 296-62-07712(12)(b).

[18] RCW 49.26.013(1); WAC 296-62-07721(2)(b)(ii); Prezant Assocs., Inc. v. Dep't of Labor & Indus., 141 Wn. App. 1, 8, 165 P.3d 12 (2007).

[19] WAC 296-62-07712(10)(a)(ix).

[20] WAC 296-62-07703, -07722(3)(b)(i)(B). Class II asbestos work involving intact materials or less than one square foot of ACM is not considered an asbestos

RCW 49.17.180 divides civil violations of WISHA into three categories: willful or repeat, serious, and not serious. The Department cited BNB for 10 serious violations, which exist where

> 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.[21]

To prove a violation of a specific health and safety standard, the Department must prove (1) the cited standard applies, (2) the employer did not meet the requirements of the standard, (3) employees were exposed 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 injury could result from the violative condition.[22] "[C]onstructive knowledge is sufficient to prove knowledge of the violative condition."[23] The Department may establish constructive knowledge of a WISHA violation in a number of ways, including with evidence showing that the violation was readily observable or in a conspicuous location in the area where the employees were working.[24] "'Reasonable diligence involves several factors,

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project and does not require asbestos worker certification. WAC 296-62-07722(3)(b)(ii)(A)–(B).

[21] RCW 49.17.180(6).

[22] Wash. Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2003) (quoting D.A. Collins Constr. Co. v. Sec'y of Labor, 117 F.3d 691, 694 (2d Cir. 1997)).

[23] BD Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 109, 161 P.3d 387 (2007).

[24] BD Roofing, 139 Wn. App. at 109-10.

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.'"[25]

BNB's Knowledge of the Violative Condition

BNB challenges the Department's proof of the fourth element, arguing that BNB exercised reasonable diligence by obtaining and relying on ECI's survey and could not have known of the presence of asbestos at the site. BNB contends that the Board's decision to reverse violation 1-8, "the employer did not obtain an asbestos survey to determine if all materials to be worked on, or removed, contain asbestos," supports its argument that it exercised reasonable diligence. As BNB frames the issue, the Board improperly penalized it for reasonably relying on a good faith survey and "inappropriately applied a strict liability standard" to reach a decision that "defies common sense and construction industry practice."[26]

BNB mischaracterizes the issue. The Board did not sanction BNB for its initial reliance upon its good faith survey. Instead, the Board sanctioned BNB because, as a result of its work, it later "knew or, through the exercise of reasonable diligence, could have known" of the hazardous conditions that the survey did not reveal. In its findings of fact, the Board found that "[t]he employer did not take measures to protect employees as soon as it had reason to suspect

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[25] Erection Co. v. Dep't of Labor & Indus., 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (internal quotation marks omitted) (quoting Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm'n, 232 Fed. Appx. 510, 512 (6th Cir. 2007)).

[26] In an amicus brief, the Associated General Contractors of Washington makes a similar argument.

employees were working with asbestos-containing material." Substantial evidence supports these findings. Voss appeared to treat the vinyl tiles pulled up with carpet as ACM when he ordered that they be double-bagged, sealed, and segregated from other waste. Rees testified that when she interviewed Voss, "He told me that he suspected there might be asbestos in the mastic; and that it was only two percent, and he wasn't concerned about it because it was nonfriable." BNB worker Stewart Weston also testified that Voss told him some of the tile mastic contained asbestos. He testified that he and several other employees brought their concerns about asbestos to Voss "right away."

On December 31, 2009, Casey Blake, BNB general superintendent for the jobsite, told Voss that "we needed to stop carpet removal until an abatement crew is on site." BNB safety director Bruce Campbell testified in a deposition, "As soon as the tile started coming up with the carpet they should have stopped work." Blake's notes about January 11 also describe a conversation with Weston about Weston's concerns and reference "a lot of concerned people . . . [we] decided to have a quick meeting with the guys and tell them by no way do we want people exposed to hazards." On that day, Blake also asked Voss "to have the abatement crew look at the [presumed] ACM we found as well and I learned we did not have one signed up yet." A BNB "Weekly Safety Review" dated January 9, 2010, noted that at the site, "[a]sbestos floor tiles that come up when carpet is removed need to be replaced or set aside in a sealed bag for the abatement contractor. Took

additional samples to lab for possible asbestos. Samples were not listed on the Good Faith Survey."

BNB challenges the Board's finding that BNB "did not take measures to protect employees as soon as it had reason to suspect employees were working with asbestos-containing material," asserting, "The correct legal standard is 'knowledge,' not 'suspicion.'" But the fact that the Board's finding did not use the precise statutory language does not prevent us from affirming the Board's decision. Substantial evidence supports the Board's finding that BNB had constructive knowledge of the violative condition under RCW 49.17.180(6).

The Board found that BNB "obtained an asbestos survey adequate to determine if the materials to be demolished contained asbestos." BNB infers from this that "the Board concluded that an adequate [survey] had been obtained," and "the Board found BNB had been reasonably diligent and reasonably believed it was following the [survey] and the promulgated standard." However, 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 workers' exposure to asbestos. Despite evidence that contradicted the ECI survey, BNB did not "'anticipate hazards to which employees may be exposed,'" or "'take measures to prevent the occurrence.'"[27] Substantial evidence shows that BNB could have protected its workers from asbestos exposure through the exercise of reasonable diligence.

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[27] Erection Co., 160 Wn. App. at 206-07 (quoting Kokosing, 232 Fed. Appx. At 512).

Failure to Dispose of Wastes

BNB also challenges violation 1-9, which sanctioned BNB for its failure to ensure "[p]rompt cleanup and disposal of wastes and debris contaminated with asbestos in leak-tight containers." BNB argues that (1) there was no evidence that BNB created or was aware of the debris and (2) because BNB is not a certified asbestos contractor, such cleanup was beyond the scope of its work. BNB contends, "It is inconsistent for the Department to cite BNB for failing to engage in the clean up operations for asbestos, when BNB was never certified to engage in such activities." However, BNB's lack of certification and the limitations of its contract do not excuse workers' exposure to "chunks of fluffy, dry friable asbestos pipe insulation," which Rees found "dropped on the floor" during her inspection. Moreover, BNB did not dispute that for nearly two weeks, workers demolished carpet and broken floor tiles without air monitoring, protective clothing, respirators, critical barriers, or wet saturation removal. At the end of that time, BNB had still not engaged an abatement contractor. The record contains substantial evidence showing that BNB failed to clean up debris contaminated with asbestos.

Written Respirator Program

BNB argues next that substantial evidence does not support the Department's citation for violation 2-3, in which the Department found that BNB's written respirator program was deficient. The Department cited BNB for "not list[ing] specific respirators to be used for each type of hazard, such as lead, silica,

asbestos or dusts. The program is generic in nature and must be tailored to the employer's workplace and hazards found on the work site."

WAC 296-842-12005(1) requires that employers "[d]evelop a complete worksite-specific written respiratory protection program" that includes a list of required elements related to respirator selection and use, medical evaluation, fit-test procedures, and training. BNB did not present a worksite-specific respirator program. "Pre-activity hazard analysis" forms in the record identify hazards such as lead and note the need for personal protective equipment. But neither the respirator program nor the hazard analysis forms specify "the appropriate respirator for each respiratory hazard in your workplace,"[28] as required by the applicable regulation. Substantial evidence supports the Board's finding that BNB's written respirator program was deficient.

Penalties

Finally, BNB argues the Board erred by affirming penalties that the Department increased because of a "poor" rating for good faith. The Department may adjust a base penalty using several factors, including "good faith effort."[29] A "poor" rating for good faith results in a 20 percent increase in the base penalty.[30] To determine good faith, the Board considers if the employer "(1) took prompt action to understand and comply with the regulation, (2) cooperated with the investigation, (3) worked with the Department to resolve the problem, and (4)

[28] WAC 296-842-12005 (Table 3).
[29] WAC 296-900-14015 (Table 5).
[30] WAC 296-900-14015 (Table 5).

appeared committed to assuring a safe and healthful workplace."[31] Conscious disregard of risks, delay in correcting the violation, deceptive behavior, and willful resistance to compliance indicate a lack of good faith.[32]

Rees testified that "a variety of factors" contributed to her good faith rating, including "incorrect or evasive information" from management:

> Mr. Voss told me the workers were wearing respirators during the removal of the floor tile. Later on when I interviewed him in BNBuilders office, he admitted that the respirators weren't provided until the very end. Mr. Voss stated that Pete Campbell took the—some of the supplemental asbestos samples during the course of the work, and that he was an accredited inspector. Later on Mr. Voss admitted that he was the one who took the samples, not Mr. Campbell, and Mr. Campbell was not accredited at the time. Mr. Voss completely misrepresented the amount of tile that was removed by workers from BNBuilders, which he corrected much later. So information was not candid and forthright at the outset of the inspection. When I contained [sic] information that contradicted what I had been told by management from multiple sources, I confronted them, and then they did admit the truth. But BNBuilders, you know, was not particularly cooperative in this inspection in providing truthful information.[33]

The substantial evidence standard "necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."[34] Testimony in the record supports the Board's finding that BNB "failed to fully and completely disclose pertinent information during the inspection." Because the Department based its penalty calculation on the factors in RCW 49.17.180(7) and substantial evidence supports

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[31] Danzer, 104 Wn. App. at 324.
[32] Danzer, 104 Wn. App. at 324.
[33] Voss denied at hearing that he told Rees he had taken any samples.
[34] State v. ex rel. Lige & Wm. B. Dickson Co. v. Pierce County, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

the calculations, the penalties are not arbitrary or based on untenable grounds.[35] The Department did not abuse its discretion.

CONCLUSION

Because substantial evidence in the record supports the Board's findings that BNB knew or could have known through reasonable diligence that its employees were exposed to asbestos, that BNB failed to properly clean up asbestos debris or maintain a written respirator program, and that the Department did not abuse its discretion by assessing a "poor" good faith rating, we affirm.

Leach, J.

WE CONCUR:

Cox, J.

Appelwick, J.

[35] Danzer at 104 Wn. App. at 327.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

BN BUILDERS, INC., a Washington corporation, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES AND BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondent	)	No. 70142-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, BN Builders, Inc., and amicus curiae, Association of General Contractors, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 4th day of August, 2014.

FOR THE COURT:

Judge