No. 53439-8-II

99620-2

SUPREME COURT OF THE STATE OF WASHINGTON

NORTHWEST ABATEMENT SERVICES, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Northwest Abatement Services, Inc. ("NWAS") asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Northwest Abatement requests review of the Court of Appeals for Division II's unpublished decision filed on March 2, 2021. A copy of the decision is in the Appendix at pages A-1 through A-32.

C. ISSUES PRESENTED FOR REVIEW

A. Is the Court of Appeals' statement and application of the "zone of danger" standard, relying on other Court of Appeals decisions, in conflict with the Supreme Court's ruling in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128 (1988), which required the presence of a hazard and limits the zone of danger to normal areas of work?

B. Did substantial evidence and applicable law support the Board of Industrial Appeal's determination that Northwest Abatement committed fall protection violations when Northwest Abatement workers did not enter the six-foot wide demarcation zone from edge of the roof and were not shown to be using the debris chute on the roof?

C. Did substantial evidence support the Board's determination that Northwest Abatement committed traffic flagging violations when the employee was a) briefly spotting for the company dump truck while it was backing up, b) was not controlling traffic, c) no other traffic was present in the area, and d) the employee was not in danger?

D. Was the Court of Appeals' determination that Northwest Abatement's employee was engaged in "temporary traffic control" inconsistent with Division I's published decision in *Pilchuck Mechanical, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 519 (2012), which involved an employee who actually controlled traffic?

E. Did substantial evidence support the Board's determination that Northwest Abatement committed asbestos violations when the Department did not establish by testing or other substantial evidence that the materials being removed at that time contained asbestos, and instead relied on speculative and conjecture testimony by the Department inspectors?

D. STATEMENT OF THE CASE[1]

On July 26, 2016, Northwest Abatement was engaging in a roof tear off job, consisting of approximately 12,000 square feet, at 955 Tacoma Avenue S., in Tacoma, Washington. (Tr. 8/7/17, p. 18). The core sample taken from the jobsite established the presence of Chrysotile asbestos, described as black asphaltic fibrous materials, within five of the thirteen roof layers. (Exhibit 2, page 2). A brown, non-asbestos containing fibrous material was also present at the bottom layers. (Tr. 8/8/17, p. 31; Exhibit 2, page 2).

Because the project involved Class II asbestos material, Northwest Abatement, a certified asbestos firm, was hired to remove the roofing materials down to the concrete deck. Before starting the project, Northwest Abatement walked the site, held a safety meeting, and established fall protection and other safety requirements. (Tr. 8/8/17, p. 13, 33). *Id.*, Exhibits A-G and N-R.

Fields Roofing was hired to put in a new roof after the abatement work was completed (Tr. 8/8/17, p. 32-33). Fields Roofing had been expected to install a guardrail perimeter system around the edge of the roof on the first day of the project, as well as a debris chute with proper protections as per the site's fall protection plan. (Tr. 8/8/17, p. 9). However, because the fall protection

[1] The Certified Appeal Board Record (CABR) is referenced in the Clerk's Papers. The Transcripts are referenced and supplemented to the CABR. Transcripts will be referred to by "Tr." with the date and page number(s).

plan had not yet been completed, Northwest Abatement was forced to revised its fall protection plan. (Tr. 8/8/17, p. 9). Northwest Abatement then set up a warning line 6-feet from the building's edge to let its crews know where it was safe to work (i.e. inside that line). It also installed a cable for workers to tie onto in the event they had to leave the delineated area. (Tr. 8/7/17, p. 63; Tr. 8/8/17, p. 9-10). Northwest Abatement workers used the fall protection provided during the early part of the project when approaching the chute. (Tr. 8/7/17, p. 157, 160, 184).

Northwest Abatement started by working on the east edge with the objective of moving the edge of the roof so that Field Roofing could continue building the railing. (Tr. 8/7/17, p. 64). To remove the roofing material, Northwest Abatement employees donned personal protective equipment (including Tyvek suits and respirators), watered down the roofing material, cut the top layer of roofing material with a cutter, and removed the other layers with shovels/axes down to the concrete. (Tr. 8/7/17, p. 155-56, 170, 182).

Northwest Abatement used wheelbarrows to dispose of the roofing material into a raised chute connected to a dumpster, utilizing bags for the dusty material. (Tr. 8/7/17, p. 69, 158). Northwest Abatement had workers behind the regulated area bringing the wheelbarrows to workers outside of the regulated area, who transported debris to the chute. (Tr. 8/7/17, p. 66). Northwest Abatement also had a designated area that was roped off with an opening attached, allowing wheelbarrows to pass through. (Tr. 8/7/17, p. 183).

The asbestos containing layers of the roof (i.e., the black asphaltic material) were removed, stored and disposed of in a manner consistent with

asbestos safety regulations. (Hamilton, Tr. 8/7/17, p. 99-100). Northwest Abatement then began removal of the brown, fibrous non-asbestos layer. *Id.*

On July 26, 2016, the Department initiated an inspection of the worksite after Andrew Baja, a Department management analyst unaffiliated with its health and safety division (DOSH), claimed to see a worker on the roof without fall protection. (Tr. 8/8/17, p. 69-70). Maili Jonkman, Compliance Safety and Health Officer ("CSHO"), initiated a safety inspection and contacted industrial hygienist Lisa Van Loo to initiate a health inspection related to the asbestos issues discussed below. (Tr. 8/7/17, p. 18).

A. Alleged Fall Hazard Violations.

The Department claimed Northwest Abatement employee Richard Crakes was not wearing fall protection when dumping material into the chute, which they allege constituted a "fall hazard." (Tr. 8/9/17, p. 29-30; Exhibit 1, page 7). The Department relied primarily on the observations of Mr. Baja, the non-DOSH employee. (Tr. 8/8/17, p. 68, 81). However, while Mr. Baja testified generally that he thought the workers were walking all over the rooftop, he could not state specifically where he saw them. (Tr. 8/8/17, p. 71). The Department was also not able to determine the distance Mr. Crakes was from the edge of the roof. (Tr. 8/9/17, p. 67).

The Department also relied on photographs showing Mr. Crakes standing in the vicinity of the exposed side of the chute. CP 88-84. However, Mr. Crakes testified he did not remember ever dumping material down the chute before the guardrail was up. (Tr. 8/8/17, p. 161). Northwest Abatement's project manager Forrest Hamilton further testified he did not

observe Mr. Crakes was standing near the chute without fall protection. (Tr. 8/7/17, p. 96). In fact, Mr. Crakes testified that dumping material down the chute with a wheelbarrow would only have taken approximately three seconds, and he did not know whether he dumped material down the chute more than once without the guardrail in place. (Tr. 8/7/17, p. 161).

B. Alleged Traffic Flagging Violations.

Northwest Abatement was responsible for hauling away the removed material, which required a dump truck to backing up to the refuse container and transport it from the worksite. (Tr. 8/7/17, p. 70-71). Doug Murphy, a Northwest Abatement worker, helped "spot" for the truck by standing in a bus lane with a stop/slow paddle to help the truck back in for a period of less than two minutes. (Tr. 8/7/17, p. 127, 143). No cars or buses were present during the short time Mr. Murphy helped the truck back up. (Tr. 8/7/17, p. 71, 101).

Despite the short duration and lack of traffic control provided, the Department cited Northwest Abatement for failing to comply with the requirement for flagging under WAC 296-155-305, which would have required wearing a high-visibility safety garment and hat, possession of a traffic control flagger card, and a three-sign warning system.

C. Alleged Asbestos Violations.

Mr. Hamilton testified that when Northwest Abatement was picking up the brown cellulose layer, all of the black asphaltic material with chrysotile (the asbestos containing material) had already been removed. (Tr. 8/7/17, p. 99-100). In fact, CSHO Van Loo conducted a test, which verified no asbestos was contained in the brown fibrous material. (Tr. 8/9/17, p. 184-

86). Nevertheless, the Department issued notices of violation for Northwest Abatement's alleged failure to comply with asbestos regulations in their handling of this non-asbestos containing material.

In claiming Northwest Abatement was required to follow asbestos protocols on this portion of the work, the Department relied upon the good faith inspection/bulk sample (Exhibit 2, page 2) to establish asbestos exposure. This only showed the presence of black asphaltic fibrous material containing chrysotile (asbestos) in layers 3, 5, 7, 9, and 11, with the brown, non-asbestos containing fibrous material underneath. (Tr. 8/7/17, p. 26-29; Exhibit 2, page 2). The good faith survey clearly establishes that the brown, non-asbestos containing fibrous material contained in the photographic exhibits did not contain asbestos. (Exhibit 2, page 2; Tr. 8/7/17, p. 98).

2. PROCEDURAL HISTORY.

On October 24, 2016, the Department issued one repeat serious, three serious, and three general violations against Northwest Abatement in Citation No. 317941556 for alleged fall protection, flagging, and traffic control violations of the Washington Industrial Safety and Health Act ("WISHA"). (CABR 436-43). On January 19, 2017, the Department issued Corrective Notice of Redetermination (CNR) No. 317941556, which affirmed the violations. (CABR 431-35).

On January 6, 2017, the Department issued thirteen serious violations and one repeat general violation against Northwest Abatement in Citation and Notice No. 317941568 for alleged asbestos violations of WISHA. (CABR 445-457).

Northwest Abatement timely appealed and CNR No. 317941556 and Citation No. 317941568 and were consolidated for hearings at the Board. (CABR 292-294). Hearings were held on August 7-9 of 2017 by Industrial Appeals Judge Leslie Birnbaum ("IAJ"), who issued an order affirming CNR No. 317941556 and affirming as modified Citation No. 317941568, which vacated Violations 1-1a and 1-10. The repeat general violation was withdrawn. (CABR 49-83).

Northwest Abatement filed a timely Petition for Review of the IAJ's Order. (CABR 24-46). On March 14, 2018, the Board affirmed the modified CNR No. 317941556, reduced the penalty of Violation 1-1 and affirmed the remaining violations. It also affirmed as modified Citation No. 317941568, vacating Violation 1-1a and Violation 1-10 and affirming the remaining violations. (CABR 2-20).

Northwest Abatement timely appealed to Pierce County Superior Court. After oral argument on October 26, 2018, Judge Stanley Rumbaugh issued Findings of Fact, Conclusions of Law, and Judgment affirming the Board's Decision and Order on May 22, 2019. Northwest Abatement timely appealed to Division II of the Court of Appeals. The Court issued its decision on March 2, 2021, upholding the Board's affirmation of the Department's citations in all respects.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' decision in this case raises substantial factual and legal issues that should be taken up by the Supreme Court.

Pursuant to RAP 13.4, the Supreme Court should accept review because key portions of the Court of Appeals ruling are (1) in conflict with the Supreme Court's prior decision in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128 (1988); (2) in conflict with Division I's published decision in *Pilchuck Mechanical, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 519 (2012); and because the issues involve substantial public interest.

1. Legal Standards on Review of Board Decision.

To establish a prima facie case of a "serious" violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to the violative conditions; (4) the employer knew or through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. RCW 49.17.180; *SuperValu, Inc. v. Dep't of Labor & Indus.,* 158 Wn.2d 422, 433 (2006).

In a WISHA appeal, the appellate court directly reviews the Board's decision based on the record before the agency. *J.E. Dunn Northwest., Inc. v. Dep't of Labor & Indus*, 139 Wn. App. 35, 42 (2007). The Court reviews findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support

the conclusions of law. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus*, 148 Wn. App. 920, 925 (2009). Evidence is substantial if sufficient to convince a fair-minded person of the truth of the premise. *Id.*

A. The Court of Appeals' statement and application of the "zone of danger" analysis conflicts with the Supreme Court's ruling in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128 (1988).

In framing the legal principles governing the third factor of a serious violation, exposure to the violative condition, the Court of Appeals cited to *Shimmick Construction Co. v. Dep't of Labor and Industries*, 12 Wn. App. 2d 770 (Div. I 2020), stating as follows:

> DLI is not required to prove that a worker actually was exposed to a hazard to establish a serious violation of WISHA regulations. *Shimmick Constr.*, 12 Wn. App. 2d at 785. The requirement is that the worker be exposed to or have access to the violative conditions. *Id.* Access exposure is established by evidence that shows by reasonable predictability that workers have been, are , or will be in the zone of danger during the course of their duties. *Id.* The zone of danger is the area related to the violative condition that poses the type of hazard to workers that the regulation is intended to prevent. *Id.*

Opinion, page 13.

The *Shimmick* court relied upon the standards laid out by Division I in *Mid Mountain Contractors, Inc. v. Dep't of Labor and Indus.*, 136 Wn. App. 1, 5 (2006), which in turn had relied upon the Supreme Court's decision in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128 (1988).

Mid Mountain involved a construction project where employees were working on a trench that had in one area a 4.5 foot high wall without any cave-in protection. Mid Mountain argued the Department had not established exposure to the hazard because its employees were working in a portion of the trench less than 4 feet deep and more than 5 feet away from the "zone of danger." *Mid Mountain*, at 5.

The Court of Appeals disagreed, adopting the following rules based on its discussion of the *Adkins* decision:

> To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the [worker] ***had access to the violative conditions.*** [emphasis in original, citing to *Adkins*, at 147] To establish employee access, the Department must show by "reasonable predictability that, in the course of [the workers'] duties, employees will be, are, or have been in the zone of danger." [*Adkins*, at 147]…

Mid Mountain, at 5-6.

Adkins was decided under the negligence *per se* rules existing prior to RCW 5.40.050 (effective August 1, 1986), after which a breach of a duty imposed by regulation can only be used as evidence of negligence and not as negligence per se. *Adkins*, at 143-144. Having stated that caveat, the Supreme Court proceeded to issue the following analysis:

> Thus, before WAC 296-24-15001 can apply to establish a standard of conduct under the negligence per se doctrine, a worker must be exposed to a hazard in his or her work area, regardless of whether that worker is a permanent employee

or a worker whose job is of short duration, such as Mr. Adkins. In deciding what constitutes the exposure to a hazard which will trigger application of the regulations, we will consider decisions construing the federal counterpart to WISHA, OSHA, and federal decisions involving machine guarding regulations. [*cite omitted*] Decisions by [OSHA Commission] demonstrate that to establish a violation of a machine guarding regulation there must be sufficient evidence showing that employees had access to the violative conditions. To establish employee access, the Secretary of Labor must demonstrate a reasonable predictability that, in the course of their duties, employees will be, are, or have been in the zone of danger. [*cite omitted*] Where the danger is created by an unguarded machine, the Secretary of Labor can satisfy this burden of proof by demonstrating that the unguarded machine was located where employees could gain access to it and use it in the course of their normal duties. [*cite omitted*]

The Commission's "reasonably predictable" analysis is helpful in this case to deciding whether the machine guarding standards should be applied to establish a standard of conduct under the negligence per se doctrine.

Here, the fan was down inside an air vent, well away from any normal workplace and covered by a weather cap. … We are unconvinced that it was reasonably predictable that Mr. Adkins would gain access to the fan in the course of his normal duties as a roofer. Indeed, the fan became a hazard only when he consciously and deliberately removed the cap and entered the vent, an area arguably beyond a roofer's normal work area. We conclude, therefore, that the evidence does not establish that Mr. Adkins was within the class of persons WAC 296-24-15001 was designed to protect, that is, a worker within the normal work area. Moreover, we cannot say that the danger presented by the fan was a hazard which the regulations were designed to protect against, that is, a hazard to which an employee would be reasonably predicted to gain access in the normal course of roofing duties. Therefore, we conclude that the

> trial court did not err when it determined that the machine guarding regulations did not apply as a matter of law.

Adkins, at 146-148. The Court's language, limited to the context of an unguarded machine with a dangerous fan, clearly demonstrates the requirement that a hazard exist, not merely a violative condition.

In addition, while the "reasonable predictability" and "zone of danger" standards are discussed in *Adkins* and *Mid Mountain*, those courts did not establish the definition of zone of danger appearing in *Shimmick* and the Court of Appeals decision here. Instead, *Shimmick* cited to an OSHA decision, *Evergreen Techs., Inc.*, 18 BNA OSHC 1528, 1998 WL 518250, at *7, *17 (No. 98-0348) in holding the zone of danger is:

> that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.

Shimmick, at 785. This language was also adopted by the Court of Appeals in the present case.

The language adopted by *Shimmick* and our Court of Appeals decision creates a definition based on location and proximity. However, as quoted above, the *Adkins* decision was much more limited in its ruling. Rather than establishing a zone of danger based on whether a worker could theoretically access a violative condition because it was nearby, the Court limited these rules to situations where a hazard actually exists (i.e., an unguarded machine with a dangerous fan.) The Court further made clear that the zone of danger needs to be within the worker's "normal work area" and that it is a "hazard

to which an employee would be reasonably predicted to gain access in the normal course of roofing duties." *Adkins*, at 149.

Under *Mid Mountain*, *Shimmick*, and the present case, the various Courts of Appeals have broadened the Supreme Court's ruling over time to include a much broader test that does not require any demonstration of reasonably predictable exposure or access to the identified hazard, but only the "violative condition." As stated and applied in this case, the Court of Appeals (relying on *Shimmick*) improperly expanded the *Adkins* ruling to apply regardless of whether a hazard actually exists and to remove any reference to the "normal work area" and "gaining access during the normal course" of work elements of the zone of danger analysis.

The result here is that Northwest Abatement has been found to be in violation of multiple "serious" worker safety violations despite none of its workers being subjected to these hazards in the "reasonably predictable" course of their work. The Supreme Court should grant review and issue clear case law establishing the rules that apply to workplace safety "serious violations" cases consistent with its earlier ruling in *Adkins*.

B. Substantial evidence did not support the conclusion that Northwest Abatement committed fall protection violations.

The Board's determination that the Department established employee exposure to the fall protection violation is not supported by substantial evidence in the record. WAC 296-155-24611(1)(a) requires an employer to provide an adequate fall protection system when employees are

exposed to fall hazards of 10 feet or more to the ground or lower level while engaged in roofing work on a low-pitched roof.

In the present case, the Department identified Mr. Crakes as the only Northwest Abatement employee exposed to a fall hazard, but was not able to calculate the distance Mr. Crakes was from the edge of the roof. (Tr. 8/9/17, p. 58-59, 67; Exhibit 1). The Department could not establish that Mr. Crakes was closer than 6 feet from the edge of the roof where the delineators were set up and, therefore, the Department did not establish Mr. Crakes was exposed to a fall hazard. *See Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012) (failure to establish workers were in the zone of danger when they were no closer than 6 feet from unguarded edge when not reasonably predictable such workers would wander around the deck or come any closer to the edge of the deck); *see also Secretary of Labor v. Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (failure to show workers likely to come within 6 feet of edge).

The Department and the Court of Appeals attempted to circumvent the six-foot issue by instead arguing that the debris chute itself was also a "fall hazard." The Court stated:

> However, former WAC 296-155-24611(1) is not limited to the risk of falls from the edge of the roof; the regulation refers generally to exposure to "fall hazards." And the fall protection violation here was not based on Crakes' proximity to the edge of the roof. DLI based the violation on the fact that Crakes was standing in front of an unguarded chute on top of the roof without fall protection. A debris chute that extends from a four-story roof to the ground creates a fall hazard.

Opinion, at p. 14.

Assuming that the debris chute created a fall hazard, there was still no substantial evidence that Mr. Crakes was in the zone of danger. The Board and Court of Appeals relied on the testimony of Ms. Jonkman and photographs allegedly showing Mr. Crakes standing "in front of" the exposed chute. CP 1090-91; 880-84; 842-43. However, there was no ability to determine how far away he was from the chute's opening. Even so, Mr. Crakes could not remember dumping materials without the guardrail in place and testified that dumping material down the chute would have taken only approximately three seconds. (TR 8/8/17, p. 161.) The Department failed to provide substantial evidence that the chute was a "fall hazard" or that Mr. Crakes was in the zone of danger without fall protection.

C. Substantial evidence did not support Board's determination that Northwest Abatement committed traffic flagging violations.

Under WAC 296-155-305, a flagger is defined as "a person who provides temporary traffic control." However, Mr. Murphy was not providing temporary traffic control, as he was spotting or helping a truck back into the work zone to remove a dumpster holding roofing material. Mr. Murphy stood in a non-traffic lane with a stop/slow paddle to help the truck back in for a period of less than two minutes. He never stood in an active traffic lane, never flagged or directed any traffic, and no traffic was present during the inspection. Mr. Murphy's intent was only to ensure the dump truck did not come out until it was clear from traffic.

While issuing a "serious violation" under these circumstances is not justified under the circumstances, the future implications of this ruling are significant. Under the Court of Appeals ruling, if Mr. Murphy's actions are considered to be "flagging," then any time the driver of a commercial truck asks for assistance while backing up, it will be necessary to hire a certified flagger, with all of the traffic control cones, flags and barricades that go along with it. WAC 296-155-305(1). The result will be that truck drivers will be less likely to ask for momentary assistance when backing up.

In addition, even if Mr. Murphy's actions are construed as flagging, there was no substantial evidence he was ever exposed to any hazard. The area where Mr. Murphy was standing was closed due to the construction activities. (Tr. 8/9/17, p. 52; Exhibit S). The sidewalk was closed with a barricade, the parking lane was closed with a sign, and the bus zone was not open for direct travel by cars. *Id.* CSHO Jonkman confirmed she did not observe any buses approaching the bus zone, nor did she see Mr. Murphy stop or direct any kind of traffic, or see that he was exposed to any hazards. (Tr. 8/9/17, p. 54). If Mr. Murphy's actions are construed as flagging, he was not in the zone of danger, nor was it reasonably predictable he would be in the zone of danger given the lane closures.

D. The determination that Mr. Crakes was engaged in "temporary traffic control" was inconsistent with *Pilchuck Mechanical*.

In affirming the Board's ruling on this issue, the Court of Appeals cited to *Pilchuck Mechanical, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 519 (Div. 1 2012) for the following statements:

> WAC 296-155-305 defines a flagger as a "a person who provides temporary traffic control. WAC 296-155-305 does reference the Manual on Uniform Traffic Control Devices (MUTCD) as adopted by the Washington Department of Transportation. The MUTCD describes flagging procedures as stopping, directing, slowing, and alerting traffic.

Opinion, at page 17. Despite the lack of any evidence that Mr. Murphy actually stopped, directed, slowed or alerted traffic, the Court of Appeals concluded that Mr. Murphy was "acting as a flagger" because of his testimony that he was there "to hold up a stop sign so nobody would run into" the Northwest Abatement truck while it was backing into the load zone. The Court also ruled that holding the sign created an inference and that WISHA regulations are to be treated liberally. *Opinion* at 17, *citing Shimmick Constr.* 12 Wn. App.2d at 778.

This is a substantial extension of Division I's holding in the *Pilchuck* case. There, while the employer argued that its employee did not provide traffic control, the court pointed to evidence in the record that the employee had actively engaged with and directed motorists. By concluding that Northwest Abatement's spotter was engaging in temporary traffic control without actually having controlled traffic, the Court of Appeals' opinion is in conflict with *Pilchuck*, the reported decision of another division.

E. Substantial evidence does not support the determination that Northwest Abatement committed asbestos violations.

In analyzing the asbestos violations contained in Citation and Notice No. 317941568, it is imperative to understand that the Department has submitted no objective evidence establishing that Northwest Abatement's

employees were exposed to, or working with, asbestos during its inspection and the taking of the photographic exhibits presented during the hearing.

Rather, Northwest Abatement's employee's testified the asbestos containing layers of the roof had been removed, stored and disposed of in a manner consistent with all of the asbestos safety regulations. (Hamilton, Tr. 8/7/17, p. 99-100). The activities observed by the Department were made after the asbestos containing materials had been removed and involved the non-asbestos-containing material. Consequently, there were no violations because at the time of the inspection, no asbestos material was present.

The Board further found in Finding of Fact No. 34:

> Violation 1-1b: A substantial probability existed that Northwest Abatement workers were exposed to the hazard described in Violation 1-1b, consisting of dry sweeping, shoveling, or other dry clean-up of dust and debris containing asbestos-containing materials prohibited under WAC 296-62-07712(4)(c). The safety officer observed workers shoveling dry roofing material and placing it into bags that did not appear to contain water. Substantial probability existed that the workers could be injured as a result of the exposure…

However, this is refuted by the record and the Department's own testing. For instance, CSHO Van Loo performed sampling on two loose samples of material at the inspection site because she thought they contained asbestos. (Tr. 8/9/17, p. 115). Yet, neither of her samples contained asbestos. (Tr. 8/9/17, p. 116, 121). CSHO Van Loo also failed to take any wipe or area samples at the inspection site to determine whether asbestos

was present, nor did she perform any personal air monitoring to determine whether any airborne asbestos fibers were present. (Tr. 8/9/17, p. 127).

Objective testing is necessary to determine the presence of asbestos because, as CSHO Van Loo testified, asbestos fibers are so small that an electron microscope is needed to see them. (Tr. 8/9/17, p. 128). Instead, CSHO Van Loo largely relied upon the good faith inspection, or bulk sample to establish asbestos exposure, which showed the presence of black asphaltic fibrous material containing Chrysotile (asbestos) in layers 3, 5, 7, 9, and 11 only, with brown, non-asbestos containing fibrous material underneath. (Tr. 8/7/17, p. 26-29; Exhibit 2, page 2). However, the good faith inspection establishes that the bottom layer, number 13, was the only brown layer and it did not contain asbestos. (Ex. 2; Tr. 8/7/17, p. 98).

The Court of Appeals recognized Northwest Abatement's argument that proof of asbestos removal was required, but nevertheless concluded that "substantial evidence" supported a finding that the materials being removed did contain asbestos, based on other speculative statements:

> But there was evidence that would support a finding that this material did contain asbestos. Stebbins, DLI's expert testified that there is a potential that asbestos could be contained in the bottom layer because removal of the other layers might cause asbestos dust and debris to be left behind in that material. Crakes also stated that he believed that material from the black asphaltic layers *could have* intermixed with the brown fibrous layer.
>
> In addition, Van Loo observed workers using a roof saw to remove sections of the roof, which created a cut line between the sections that were being removed and the sections that remained. The cut line was not sealed off or encapsulated in any way. She

> then saw workers scraping with shovels along the exposed edge of the asphalt roof. She stated that this scraping would loosen any asbestos fibers that were in the asbestos-containing layers adjacent to the removed section.

Opinion, at p. 20 (underline supplied.) These statements about potential and possible releases of airborne asbestos particles do not meet the test for substantial evidence.[3]

F. CONCLUSION

For the above reasons, Northwest Abatement respectfully requests that the Supreme Court accept review of the Court of Appeals Decision and that it overturn said ruling and reverse the Board's Decision and Order.

RESPECTFULLY submitted this 12th day of April, 2021.

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[3] This is especially true given the large amount of evidence and testimony submitted by Northwest Abatement showing that no asbestos likely was disturbed during these activities, including the testimony of Project Manager Hamilton (Tr. 8/7/17, p. 99-100) and opinions of expert witness Doug Henry (Tr. 8/7/17, p. 183-88).

CERTIFICATE OF SERVICE

I certify that on April 12, 2021, I caused the original and copy of the **Employer's/Appellant's Amended Petition for Review** to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

(X) Court of Appeals Division II e-Filing Service; U.S. Mail, Postage Prepaid:

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DATED this 12th day of April, 2021, in Pateros, Washington.

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ATTACHMENT A

Filed
Washington State
Court of Appeals
Division Two

March 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORTHWEST ABATEMENT SERVICES INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 53439-8-II UNPUBLISHED OPINION

MAXA, P.J. – The Department of Labor and Industries (DLI) issued citations against Northwest Abatement Services Inc. for violations of regulations under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, and asbestos-related regulations. The violations involved a project in which Northwest Abatement was removing a roof that contained asbestos. The Board of Industrial Insurance Appeals (Board) issued a decision and order upholding the violations, and the superior court affirmed. Northwest Abatement appeals, arguing that the Board's decision is not supported by substantial evidence.

Northwest Abatement was removing a roof on a four-story commercial building. After a DLI employee happened to observe a Northwest Abatement employee walking on the roof of the project without fall protection gear, DLI sent two inspectors to investigate the worksite. DLI

issued a number of citations against Northwest Abatement for violating fall protection, flagging, and asbestos-related regulations.

Northwest Abatement argues that substantial evidence does not support the Board's determinations that (1) Northwest Abatement employees were exposed to fall protection, flagging, and asbestos-related violations; (2) Northwest Abatement had actual or constructive knowledge of the alleged violations; and (3) Northwest Abatement did not meet its burden of proving the affirmative defense of unpreventable employee misconduct.

We conclude that substantial evidence supports the Board's determinations. Accordingly, we affirm the superior court's order affirming the Board's decision and order.

FACTS

Roof Removal Project

Northwest Abatement is an asbestos removal company that was hired to remove an asphalt roof containing asbestos on a commercial building in downtown Tacoma. The building was approximately four stories tall. The building was located on a corner with an active bus stop.

Chris Eckholm was the project manager assigned to the roof removal project. The project manager's job duties included conducting safety inspections and developing the scope of work for the project. Forrest Hamilton was Northwest Abatement's certified asbestos supervisor and was the supervisor and foreman for the roof removal project. Hamilton was responsible for reviewing the job scope with the workers, ensuring all workers had their respirator cards and were suited up, and generally making sure that everything on the job was in good shape.

Paul Peters was the safety manager for Northwest Abatement. He conducted random job site inspections and provided additional safety training for employees. He conducted random

safety inspections using a safety checklist form approximately once to twice a month. In addition, Northwest Abatement had sporadic supervisor meetings and general crew meetings whenever an issue arose.

Northwest Abatement had a three-stage disciplinary system that applied to employees who violated safety regulations: first a verbal warning, then a written warning, and then termination. Northwest Abatement retained the ability to impose a harsher penalty if warranted by the circumstances. Written warnings were supposed to be maintained in Northwest Abatement's daily logbook. However, Hamilton, Eckholm, and Peters had never written another employee up for a safety violation. Many of the employees had never heard of another employee being disciplined.

Asbestos Removal Process

Before Northwest Abatement started to remove the roof, the building owner conducted a good faith inspection to determine the extent of asbestos involved. A core sample taken from the roof revealed that five layers out of 13 layers of the roof contained a type of asbestos called chrysotile. Chrysotile is extremely small and is not visible to the human eye. The chrysotile was bound to the asphalt material. The asbestos-containing layers alternated with layers that did not contain asbestos. The bottom layer, number 13, consisted of brown fibrous material that contained no asbestos.

Northwest Abatement workers were required to wear personal protective equipment and to saturate asbestos-containing material they removed with water (the wet method) to protect against the hazards of airborne asbestos fibers. Fields Roofing, another contractor, installed a debris chute feeding into a dumpster to dispose of the removed roofing material. There was

plastic material between the end of the chute and the dumpster to prevent any debris or dust from escaping.

Northwest Abatement started removing the roofing material on the east edge of the roof. The roof was removed in large chunks. Northwest Abatement used roof saws, hatchets, roofing shovels, wheelbarrows, brooms, and bags to remove and transport the roofing materials. The workers cut through multiple layers at once. The small pieces of black asphaltic materials were bagged, but not the larger sections. The discarded roofing materials were transported in wheelbarrows or bags to the debris chute.

Once the dumpster was full of debris, a Northwest Abatement truck would take it away. This process would occur multiple times each day. The dumpster removal process involved a truck backing up to the container, lifting it onto the truck, and driving away. A worker was needed to help the truck back up because the truck drivers could not see behind them. There was an active bus stop on the same corner where the dumpster was located.

Workers wore Tyvek suits[1] and respirators during the entire course of the project as required by regulations. For safety reasons, workers would use their respirators even if they were working on the brown layer to minimize the risks of breathing in any fibers. The purpose of fitted respirators was to ensure that the worker had an appropriate fit to protect against chemicals or other hazards. Hamilton did not check the workers' fit testing documentation to ensure they had the correct fit testing.

[1] A Tyvek suit is a plastic protective coverall that can be worn directly over an employee's street clothing.

Workers were expected to take off their Tyvek suits and respirator masks inside the regulated area and place them in an asbestos bag. Although there was a HEPA vacuum[2] in a company truck to remove material from the suits, there was no HEPA vacuum in the regulated area. Workers sometimes took off their Tyvek suits outside of the regulated area and without using the HEPA vacuum first. And Hamilton did not establish a decontamination area outside the regulated area.

DLI Inspections

Northwest Abatement had removed about a quarter of the roof when DLI became involved in the project. Andrew Baga was a management analyst who worked at DLI, but was not in the Department of Occupational Safety and Health (DOSH). His office was on the fifth floor of a building near the project site. On the second day of the project, July 26, 2016, Baga happened to look out his office window and noticed workers on a roof who were not wearing fall protection harnesses. Baga visited the worksite and did not see any of the workers wearing fall protection equipment. He left the site and returned with Maili Jonkman, a DLI safety compliance officer.

While on the ground level outside of the building, Jonkman and Baga watched a Northwest Abatement employee, Richard Crakes, dumping debris into the unguarded debris chute without fall protection. Jonkman took a photograph showing Crakes's proximity to the chute. Jonkman and Baga also noticed that there was a large hole in the plastic sheet attached to the bottom of the chute. There was debris and dust spraying out of the hole.

[2] A HEPA vacuum is a vacuum that has a high efficiency particulate air filter which is used to clean off small particulate matters, such as asbestos fibers, from a worker's clothing.

Jonkman and Baga went up to the roof and spoke with Hamilton. But once Jonkman realized the workers were working with asbestos, she stopped her conference with Hamilton and called Lisa Van Loo, who was a DLI industrial hygienist familiar with asbestos. Van Loo's duties included conducting work site visits and inspecting them for safety and health hazards.

Jonkman and Baga went back down to the ground level to wait for Van Loo. While they were waiting outside, they saw Doug Murphy, a Northwest Abatement employee, standing in the road holding a stop/slow paddle sign. Jonkman did not see any warning signs placed in the road. A photograph Jonkman took showed Murphy standing in the bus stop area adjacent to the building without a high-visibility hard hat or a high-visibility safety garment. Murphy was helping a truck back into the work area to remove the dumpster. To reach the dumpster, the truck had to go against traffic and back across the bus stop area. Jonkman asked if Murphy had a flagger's card, but he did not provide one.

The bus stop adjacent to the building was active. The lane in which Murphy was standing was closed to regular traffic because of the construction, but it was open for buses. Jonkman did not see any buses approaching the bus stop area while Murphy was standing in the road.

Van Loo arrived, and she and Jonkman went up to the roof to continue the inspection. Van Loo took photographs during her inspection. Van Loo contacted Hamilton, and he showed her a copy of the good faith inspection and the work order. Van Loo requested and reviewed copies of the workers' respiratory fit tests and safety training documents. Crakes was wearing a half-face respirator mask despite being fitted only for a full-face respirator mask.

Van Loo observed workers using a roof saw to remove the roofing in sections and workers using a shovel to scrape along the cut line. She noticed that the cut line was not sealed

off or encapsulated in any way. She also watched workers shoveling, scraping, and sweeping dry roofing material. The workers placed the roofing material into wheelbarrows and plastic bags. The bags of material appeared to have no water in them. And the bags and the dumpster were not labeled as containing asbestos.

Van Loo took two bulk samples from loose material near the door to the stairs. A later test of the material was negative for asbestos. She did not take any samples of the material inside the plastic bags or the wheelbarrows. She did not take any other samples of the area to determine if there were airborne asbestos fibers.

Van Loo investigated the wheelbarrows that were next to the chute outside of the regulated area. They contained dry crumbly material, but she could not say definitively that it contained asbestos. There was loose debris in front of the chute.

Workers were supposed to wear fall protection gear if they went beyond the barriers set up on the roof. However, Jonkman and two Northwest Abatement workers working on the project, Murphy and Brandon Tarry, all testified to seeing workers using the chute without fall protection gear on.

Van Loo interviewed Crakes during her inspection and noticed that he had a six to eight inch long tear on the left leg of his Tyvek suit. Van Loo informed Hamilton of the tear, who asked Crakes to fix it. A tear in the work suit could contaminate the worker's street clothes underneath the work suit, which could result in transporting asbestos fibers back to the worker's home.

Citations

In October 2016, DLI issued citation and notice number 317941556 to Northwest Abatement after the inspection. The citation listed several serious violations:

- Violation 1-1was a repeat fall protection violation of WAC 296-155-24611(1)(a).
- Violation 2-1 was for directing traffic without wearing a high-visibility safety garment in accordance with WAC 296-155-305(5)(a).
- Violation 2-2 was for not ensuring the employee flagging was in possession of a valid Washington traffic control flagger card in accordance with WAC 296-155-305(6)(a).
- Violation 2-3 was for not ensuring a three sign advanced warning sequence was enforced in accordance with WAC 296-155-305(8)(a).[3]

In January 2017, DLI issued citation and notice number 317941568, which listed multiple serious asbestos-related violations:

- Violation 1-1a was for failure to use wet methods while removing roofing material in violation of WAC 296-62-07712(10)(b)(ii).
- Violation 1-1b was for dry shoveling asbestos-containing roofing material in violation of WAC 296-62-07712(4)(c).
- Violation 1-2 was for failure to wet asbestos-containing roofing material while it remained on the roof in violation of WAC 296-62-07712(10)(b)(v)(A).
- Violation 1-3 was for failure to have a dust-tight chute in violation of WAC 296-62-07712(10)(b)(v).
- Violation 1-4 was for failure to replace or repair torn protective coveralls in violation of WAC 296-62-07717(4)(b).
- Violation 1-5a was for failure to establish a decontamination area in violation of WAC 296-62-07719(3)(b)(i).
- Violation 1-5b was for failure to ensure that employees enter and exit the regulated area through the equipment room or area in violation of WAC 296-62-07719(3)(b)(v).
- Violation 1-5c was for failure to ensure the competent person supervised employees in a manner that would ensure employees used engineering controls, work practices, and personal protective equipment in a manner that is in compliance with all requirements in violation of WAC 296-62-07728(4)(f).
- Violation 1-6 was for failure to provide a HEPA vacuum for employees to decontaminate their work clothing in violation of WAC 296-62-07719(3)(b)(iii).
- Violation 1-7 was for failure to ensure bags and dumpsters containing asbestos waste were labeled with warnings in violation of WAC 296-62-07721(5)(c).
- Violation 1-8 was for failure to ensure all asbestos-containing material were cleaned up as soon as possible in violation of WAC 296-62-07723(2).
- Violation 1-9 was for failure to provide fit testing when a different respirator was chosen in violation of WAC 296-842-15005(1)(c).

[3] DLI also issued citations for three general violations: violation 3-1, for failure to tailor the accident prevention program in violation of WAC 296-155-110(3); violation 3-2, for failure to document safety meetings in violation of WAC 296-155-110(7); and violation 3-3, for failure to document safety inspections in violation of WAC 296-155-110(9)(b). Northwest Abatement generally assigns error to the findings of fact associated with these violations, but presents no arguments regarding them. Therefore, we do not address these violations.

- Violation 1-10 was for failure to ensure that sealing problems with tight-fitting respirators were prevented in violation of WAC 296-842-18005(2).

Procedural History

Northwest Abatement appealed to DLI the violations identified in the October 2016 citation. DLI issued a corrective notice of redetermination, which affirmed the violations. Northwest Abatement appealed to the Board.

Northwest Abatement appealed to DLI the violations identified in the January 2017 citation. DLI decided to not reassume jurisdiction, and the appeal was sent directly to the Board. The two appeals were consolidated for a hearing before the Board. The case was heard by an Industrial Appeals Judge (IAJ).

At the hearing, various witnesses testified to the facts described above. John Stebbins, an industrial hygiene technical specialist in the DOSH technical services group within DLI, testified as DLI's expert. Douglas Henry, an environmental consultant, testified as Northwest Abatement's expert. The IAJ issued a proposed decision and order affirming violations except violations 1-1a and 1-10, which were vacated.

The Board granted Northwest Abatement's petition for review of the proposed decision and order. The Board issued a decision and order that (1) reduced the penalty of violation 1-1 but affirmed the remainder of the violations in the corrective notice of redetermination, and (2) vacated violations 1-1a and 1-10 but affirmed the remainder of the violations in the citation and notice. The Board's order included extensive findings of fact and conclusions of law.

Northwest Abatement appealed the Board's decision and order to the superior court. The superior court affirmed the Board's decision, adopting the Board's findings of fact and conclusions of law. Northwest Abatement appeals the superior court's order affirming the Board's order and decision.

ANALYSIS

A. APPLICABLE REGULATIONS

1. WISHA

The purpose of WISHA is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every [person] working in the state of Washington." RCW 49.17.010. DLI has statutory authority to adopt workplace safety regulations. RCW 49.17.040. DLI has done so in Title 296 WAC.

RCW 49.17.060(1) states that employers are required to furnish a workplace that is "free from recognized hazards that are causing or likely to cause serious injury or death to [their] employees." Under RCW 49.17.060(2), employers must "comply with the rules, regulations, and orders promulgated under this chapter."

DLI has the authority to issue citations to employers who violate the requirements of RCW 49.17.060. RCW 49.17.120(1). In addition, DLI has authority to assess civil penalties for willful or repeated violations of RCW 49.17.060. RCW 49.17.180(1).[4] A "serious" violation exists "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).

DLI bears the burden of proving a WISHA violation. *Ostrom Mushroom Farm Co. v. Dep't of Labor & Indus.*, 13 Wn. App. 2d 262, 272, 463 P.3d 149 (2020); *see also* WAC 263-12-

[4] RCW 49.17.180 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

115(2)(b). To establish a serious violation of a WISHA safety regulation, DLI must prove "(1) the cited standard applies, (2) the requirements of the standard were not met, (3) employees were exposed to or had access to the violative condition, (4) the employer knew or through the exercise of reasonable diligence could have known of the violative condition, and (5) there is a substantial probability that death or serious physical harm could result from the violative condition." *Ostrom Mushroom,* 13 Wn. App. 2d at 272.

2. Asbestos Safety

The legislature enacted chapter 49.26 RCW, entitled "Health and Safety – Asbestos," to protect the public from "[a]irborne asbestos dust and particles . . . [that] produce irreversible lung damage and bronchogenic carcinoma." RCW 49.26.010; *see Prezant Associates, Inc. v. Dep't of Labor & Indus.*, 141 Wn. App. 1, 8, 165 P.3d 12 (2007). RCW 49.26.040 authorizes DLI to adopt standards for the safe handling of asbestos in construction. Pursuant to this statutory authority, DLI has promulgated extensive regulations for all occupational exposures to asbestos. WAC 296-62-07701(1). *See generally* WAC 296-62-077.

An "asbestos project" means the "construction, demolition, repair . . . or any public or private building . . . involving the demolition, removal . . . or disposal of material, or outdoor activity, releasing or likely to release asbestos fibers into the air." RCW 49.26.100(2). If there is a reasonable possibility that a construction project may disturb or release asbestos into the air, then the owner or owner's agent is required to conduct a good faith inspection by an accredited inspector to determine whether the proposed project will disturb or release asbestos-containing material into the air. RCW 49.26.013(1); WAC 296-62-07721(1)(c)(ii).

The type of practices that an employer is required to follow depends on what class the asbestos project falls under. WAC 296-62-07703[5]; *see also* WAC 296-62-07712(6), (9), (11), (12). Northwest Abatement was performing Class II asbestos work. An employer engaged in a Class II project is required to follow a number of safety precautions at the worksite as outlined by WAC 296-62-077 and related provisions.

DLI has authority to enforce its regulations. RCW 49.26.040. Violations of chapter 49.26 RCW are governed by WISHA. RCW 49.26.140(1).

B. STANDARD OF REVIEW

In a WISHA appeal, we directly review the Board's decision – not the superior court's decision – based on the record before the agency. *Ostrom Mushroom*, 13 Wn. App. 2d at 271. We review the Board's findings of fact to determine whether substantial evidence supports them, and if so, whether the findings support the conclusions of law. *Potelco, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 236, 243, 433 P.3d 513 (2018). Evidence is substantial if it is sufficient in quantity to persuade a fair-minded person of the truth of the declared premise. *Id.* When determining whether substantial evidence supports the factual findings, we view the evidence in the light most favorable to the party that prevailed before the Board. *Id.* at 243-44. On appeal, we do not reweigh evidence. *Ostrom Mushroom*, 13 Wn. App. 2d at 271.

We liberally construe regulations promulgated pursuant to WISHA to protect workers from hazardous conditions at their place of employment. *Id.* at 272. DLI's interpretation of statutes and regulations are given substantial weight and shall be upheld as long as the interpretation does not contradict legislative intent. *Id.* Federal decisions that interpret the

[5] Several of the WACs cited in this opinion have been amended since the events in this case transpired. Because those amendments are minor and immaterial here, we cite to the current regulations.

federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678, may inform this court when interpreting WISHA, but not when Washington law provides controlling precedent. *Shimmick Constr. Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 2d 770, 778, 460 P.3d 192 (2020).

C. EMPLOYEE EXPOSURE TO HAZARDS

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement's employees were exposed to (1) fall protection violations, (2) flagging violations, and (3) asbestos-related violations. We disagree.

1. Legal Principles

DLI is not required to prove that a worker actually was exposed to a hazard to establish a serious violation of WISHA regulations. *Shimmick Constr.*, 12 Wn. App. 2d at 785. The requirement is that the worker be exposed to or have access to the violative conditions. *Id.* Access exposure is established by evidence that shows by reasonable predictability that workers have been, are, or will be in the zone of danger during the course of their duties. *Id.* The zone of danger is the area related to the violative condition that poses the type of hazard to workers that the regulation is intended to prevent. *Id.*

In addition, "[a] standard that proscribes certain conditions 'presumes the existence of a safety hazard.' " *Shimmick Constr.*, 12 Wn. App. 2d at 786 (quoting *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 41, 329 P.3d 91 (2014)). " '[I]f the violation concerns a specific standard, it is not necessary to *even* prove that a hazard exists, just that the specific standard was violated.' " *Shimmick Constr.*, 12 Wn. App. 2d at 786 (quoting *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006)). However, DLI represented at oral argument that these rules do not apply to the regulations at issue here.

2. Fall Protection Violations

The Board upheld DLI's issuance of a citation for a violation of fall protection regulations stated in former WAC 296-155-24611(1)(a) (2016) relating to Northwest Abatement's employee Crakes (violation 1-1). Northwest Abatement argues that substantial evidence does not support the Board's determination that Crakes was exposed to a hazard involving the fall protection violation. We disagree.

Former WAC 296-155-24611(1)(a) provides that employers must implement an appropriate fall protection system when "employees are exposed to fall hazards of 10 feet or more to the ground or lower level, while engaged in roofing work on a low pitched roof." Northwest Abatement argues that in order to establish a violation of former WAC 296-155-24611(1)(a), DLI was required to prove that Crakes was standing within six feet from the edge of the roof. Northwest Abatement relies on two federal administrative decisions in support of this argument.

However, former WAC 296-155-24611(1)(a) is not limited to the risk of falls from the edge of the roof; the regulation refers generally to exposure to "fall hazards." And the fall protection violation here was not based on Crakes's proximity to the edge of the roof. DLI based the violation on the fact that Crakes was standing in front of an *unguarded chute* on top of the roof without fall protection. A debris chute that extends from a four-story roof to the ground creates a fall hazard.

DLI presented substantial evidence that supported the finding that a fall protection violation exposed Crakes to a hazard. Jonkman provided testimony regarding her observations of the lack of fall restraint protection on either side of the chute, which posed a fall hazard to

someone standing near the chute. Jonkman observed Crakes standing on the roof in front of the unguarded chute without fall protection. A photograph confirmed that observation.

Further, Crakes acknowledged that he did not have fall protection when he was photographed near the chute, and he was unaware of any fall protection available to him. Murphy and Tarry also testified that they observed other workers approach the chute without being tied off. Finally, Hamilton agreed that based on the visual evidence, Crakes should have been wearing fall protection while standing within close proximity of the chute.

Accordingly, we conclude that substantial evidence supports the Board's determination that fall protection violation 1-1 exposed Crakes to a hazard.

3. Flagging Violations

The Board upheld DLI's issuance of citations for three violations of flagging regulations stated in WAC 296-155-305 relating to Northwest Abatement's employee Murphy's conduct (violations 2-1, 2-2, 2-3). Northwest Abatement argues that (1) the flagging regulations in WAC 296-155-305 were inapplicable because Murphy was not engaged in flagging, and (2) Murphy was not exposed to any hazard while engaging in those activities. We disagree.

a. Applicability of Flagging Regulations

An employer must comply with WAC 296-155-305 when using flaggers in a public work area. *Potelco Inc., v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 27, 361 P.3d 767 (2015). There is no question that Murphy violated the three flagging regulations if he was engaged in flagging. He was not wearing a high-visibility hard hat or a high-visibility safety garment in violation of WAC 296-155-305(5)(a). He did not have a flagger card in violation of WAC 296-155-305(6)(a). And there were no warning signs or cones in violation of WAC 296-155-305(8)(a).

But Northwest Abatement argues that WAC 296-155-305 does not even apply because Murphy was not engaged in flagging. We disagree.

The question here involves the definition of a flagger in WAC 296-155-305. We interpret agency regulations as though they were statutes. *Shimmick Constr.*, 12 Wn. App. 2d at 778. The objective is to ascertain and give effect to the intent of the regulation. *Bayley Constr. v. Dep't of Labor & Indus.*, 10 Wn. App. 2d 768, 789, 450 P.3d 647 (2019), *review denied*, 195 Wn.2d 1004 (2020). We consider the plain language of the regulation to determine its meaning. *Id.* If the plain meaning of the statute is unambiguous, we apply that meaning. *Id.*

Significantly, we construe WISHA statutes and regulations liberally to achieve their purpose of providing safe workplace conditions. *Shimmick Constr.*, 12 Wn. App. 2d at 778. In addition, we afford substantial weight to DLI's interpretation of a regulation given its expertise in the subject matter, and its interpretation is consistent with legislative intent. *Ostrom Mushroom*, 13 Wn. App. 2d. at 272.

WAC 296-155-305 defines a flagger as "a person who provides temporary traffic control." But the flagging regulation does not define "temporary traffic control." *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 519, 286 P.3d 383 (2012). WAC 296-155-305 does reference the Manual on Uniform Traffic Control Devices (MUTCD) as adopted by the Washington Department of Transportation. *See Pilchuck Contractors*, 170 Wn. App. at 519. The MUTCD describes flagging procedures as stopping, directing, slowing, and alerting traffic. *Id.*

Northwest Abatement argues that WAC 296-155-305 is inapplicable because Murphy was "spotting" rather than flagging. Northwest Abatement claims that he was not providing temporary traffic control. Instead, he was assisting the driver of a truck with backing into the

work area to remove a dumpster. He stood in the bus stop area that was closed to regular traffic, and he did not stop or direct any traffic. According to Northwest Abatement, Murphy's only purpose was to prevent the truck from hitting anything because the driver could not see behind the truck. It was not necessary for him to stop traffic.

However, Murphy's own testimony suggests that he was engaged in traffic control:

> Q. Do you know -- what were you doing in that photograph?
> A. It looks like I am holding up a stop sign and a slow sign.
> Q. Do you recall why you were doing that?
> A. That was right where the bus came in and *our container truck had to go against traffic* and back into our disposal site and *he had to pull up into that bus zone* right where I am at and then back in.
> Q. Do you -- do you recall giving him directions or were you simply there to stop traffic?
> A. I was simply there to *hold up a stop sign so nobody would run into him* when he was pulling into the job site.

Clerk's Papers (CP) at 621 (emphasis added).

In addition, the fact that Murphy was holding a stop/slow sign creates an inference that he was controlling traffic. He would not need such a sign if he was merely trying to prevent the truck from backing into something. Hamilton testified, "I think we were given that sign to keep people from driving in, because there was people that would come and drop people off on the corner there while we were trying to do what we were doing." CP at 597.

Finally, we liberally interpret WISHA regulations to promote worker safety. *Shimmick Constr.*, 12 Wn. App. 2d at 778. Applying this liberal construction, Murphy's activities fall within the meaning of "temporary traffic control."

We conclude that Murphy was acting as a flagger and therefore the WAC 296-155-305 regulations were applicable to his activities.

b. Exposure to Hazard

Northwest Abatement argues that even if Murphy's actions constituted flagging, substantial evidence does not support the Board's determination that the violations of WAC 296-155-305 exposed Murphy to any hazard. We disagree.

Northwest Abatement claims that Murphy was never exposed to any hazard because he was standing in an area that was closed to regular traffic because of the construction, there were no buses present when Murphy was standing in the area, and Jonkman admitted that Murphy was not subjected to any oncoming traffic. As a result, Murphy was never in a zone of danger.

However, the evidence showed that Murphy was standing in a lane of travel of an urban street, near a busy intersection. The lane was closed to regular traffic, but it still was available for buses. Murphy was in the bus stop area. In addition, Hamilton testified that he believed that people were being dropped off on the same corner where the truck was backing up to remove the dumpster. This evidence supports a finding that Murphy was exposed to the hazard of being hit by a vehicle when engaging in flagging activities. Further, that hazard clearly is the type of hazard that the regulations in WAC 296-155-305 were designed to prevent. *See Shimmick Constr.*, 12 Wn. App. 2d at 785.

The fact that no buses were in the area at the time Jonkman observed Murphy is immaterial. As noted above, a worker need not *actually* be exposed to a hazard; the worker must only be within the zone of danger. *Id.* Murphy was within the zone of danger when he was standing in the lane of travel in an active bus stop area.

We conclude that substantial evidence supports the Board's determination that flagging violations 2-1, 2-2, and 2-3 exposed Murphy to a hazard.

4. Asbestos Violations

The Board upheld DLI's issuance of citations for multiple violations of asbestos-related regulations (violations 1-1b, 1-2, 1-3, 1-4, 1-5a, 1-5b, 1-5c, 1-6, 1-7, 1-8, 1-9). Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement's employees were exposed to asbestos hazards. We disagree.

a. Presence of Asbestos

Northwest Abatement's primary argument regarding all the asbestos-related violations is that the violations did not expose its employees to an asbestos hazard because at the time of the inspections, the material that the employees were handling did not contain asbestos. According to Northwest Abatement, the only material its employees were working with at the time of the inspections was the brown bottom layer, layer 13, which did not contain asbestos. Northwest Abatement emphasizes that the only material Van Loo sampled tested negative for asbestos. Therefore, there was no evidence that the material the inspectors observed contained asbestos.

DLI emphasizes that there is no question that there was asbestos at the work site. The good faith inspection showed that there was asbestos in several layers of the roof. And Northwest Abatement had removed only a quarter of the roof at the time of the inspections. So the remainder of the roof still contained asbestos. Therefore, the employees had at least access exposure to asbestos.

b. Violation 1-1b

DLI issued violation 1-1b under WAC 296-62-07712(4)(c), which prohibits "dry sweeping, shoveling, or other dry cleanup of dust and debris containing [asbestos-containing material]." This violation was based on Van Loo's observations of Northwest Abatement's workers scraping and shoveling dry roofing materials. The Board upheld this violation.

Northwest Abatement argues that substantial evidence does not support the Board's determination that its employees performed dry shoveling and sweeping of asbestos material because the material it was shoveling and sweeping did not contain asbestos. Instead, the material was the brown material in the bottom layer of the roof that did not contain asbestos, not the black asphaltic materials that did contain asbestos. Northwest Abatement relies on the testimony of its expert, Henry, and Hamilton that the brown material that was collected and put in wheelbarrows did not contain asbestos. Northwest Abatement also emphasizes that Van Loo did not know whether the materials in the wheelbarrows contained asbestos and the samples she took tested negative for asbestos.

But there was evidence that would support a finding that this material did contain asbestos. Stebbins, DLI's expert, testified that there is a potential that asbestos could be contained in the bottom layer because removal of the other layers might cause asbestos dust and debris to be left behind in that material. Crakes also stated that he believed that material from the black asphaltic layers could have intermixed with the brown fibrous layer.

In addition, Van Loo observed workers using a roof saw to remove sections of the roof, which created a cut line between the sections that were being removed and the sections that remained. The cut line was not sealed off or encapsulated in any way. She then saw workers scraping with shovels along the exposed edge of the asphalt roof. She stated that this scraping would loosen any asbestos fibers that were in the asbestos-containing layers adjacent to the removed sections.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-1b.

c. Violation 1-2

DLI issued violation 1-2 under WAC 296-62-07712(10)(b)(v)(A), which states that while asbestos-containing material remains on the roof, the material "must either be kept wet, placed in an impermeable waste bag, or wrapped in plastic sheeting." This violation was based on Van Loo's observation that Northwest Abatement's workers were not saturating the removed roofing materials and that dry materials were sitting in a wheelbarrow. The Board upheld this violation.

Northwest Abatement's arguments regarding this violation are the same as for violation 1-1b. And the analysis is the same. The testimony of Stebbins and Van Loo supports a finding that the dry material in bags and wheelbarrows contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-2.

d. Violation 1-3

DLI issued violation 1-3 under WAC 296-62-07712(10)(b)(v), which requires asbestos-containing material to be "lowered to the ground via covered, dust-tight chute, crane or hoist." This violation was based on Jonkman's and Baga's observation of a large hole in the plastic sheet that was attached to the chute and dumpster and dust and debris coming out of the hole. The Board upheld this violation.

Northwest Abatement does not dispute that there was a hole in the plastic at the bottom of the chute. Instead, Northwest Abatement claims that there is no objective evidence that shows whether the material inside the dumpster at the time of the inspection actually contained asbestos. Northwest Abatement also relies on Hamilton's testimony that the debris being lowered down the chute already was bagged and therefore no material from within the bags would be released.

But Baga and Jonkman testified that they saw dust and debris coming out of the hole in the plastic. And as discussed above, there was evidence that the material the employees were working with contained asbestos. Therefore, the Board could infer that the dust and debris coming out of the hole contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-3.

e. Violation 1-4

DLI issued violation 1-4 under WAC 296-62-07717(4)(b), which states that "[w]hen rips or tears are detected while an employee is working, rips and tears must be immediately mended, or the worksuit must be immediately replaced." This violation was based on Van Loo's observation of a tear in Crakes's Tyvek suit. The Board upheld this violation.

Northwest Abatement argues that DLI failed to establish when Crakes's suit was ripped, and points out that the suit was repaired immediately once the rip was brought to Hamilton's attention.

DLI argues that it was likely that the rip was present before Van Loo arrived, and notes that Hamilton was working alongside Crakes. In addition, Crakes testified that their thin suits ripped all the time. Therefore, the Board could infer that the rip had been present for some period of time and that the tear was not immediately repaired. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-4.

f. Violations 1-5a and 1-5b

DLI issued violation 1-5a under WAC 296-62-07719(3)(b)(i), which requires employers to provide a decontamination area adjacent to the regulated area when there is asbestos exposure. DLI issued violation 1-5b under WAC 296-62-07719(3)(b)(v), which requires employers to ensure that their employees enter and exit the regulated area through the decontamination area.

These violations were based on Van Loo's visual inspection, which revealed that no decontamination area had been set up. The Board upheld these violations.

First, Northwest Abatement argues that Van Loo relied solely on a photograph showing no decontamination area, but she did not know when the photograph was taken. However, there was extensive evidence that no decontamination area was set up. Murphy testified that there was no decontamination zone set up outside the regulated area and that he removed his Tyvek suit right outside the regulated area. Hamilton likewise conceded that he did not establish a decontamination area. And even though Van Loo had no personal knowledge regarding who took the photographs of the regulated area or when they were taken, she also interviewed employees about the contamination zone and relied on her personal visual inspection of the work area.

Second, Northwest Abatement again argues that a decontamination area was not required because there was no evidence of exposure to asbestos at the time of the inspections. But as discussed above, there was evidence that the material the employees were working with contained asbestos.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violations 1-5a and 1-5b.

g. Violation 1-5c

DLI issued violation 1-5c under WAC 296-62-07728(4)(f), which requires employers to ensure that a competent person supervises workers to enforce compliance with work practices and personal protective equipment. The Board upheld this violation.

Northwest Abatement provided no argument on its claim that substantial evidence did not support the Board's determination that it committed violation 1-5c. Therefore, we need not

address this issue. *See West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (declining to address the appellant's vague and broad argument that was not supported by factual or legal authority).

h. Violation 1-6

DLI issued violation 1-6 under WAC 296-62-07719(3)(b)(iii), which states that "[w]ork clothing must be cleaned with a HEPA vacuum before it is removed." This violation was based on Van Loo's observation that there was no HEPA vacuum on the roof at the time of her inspection. The Board upheld this violation.

Northwest Abatement argues that a HEPA vacuum was not required because all the asbestos-containing material had been removed at the time of DLI's inspections. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-6.

i. Violation 1-7

DLI issued violation 1-7 under WAC 296-62-07721(5)(c), which requires employers to ensure that bags containing asbestos scrap or waste are labeled with warnings about asbestos. This violation was based on Van Loo's observation that plastic bags containing roofing material did not have warning signs that they contained asbestos. The Board upheld this violation.

Northwest Abatement argues that it did not need to label the bags because there is no evidence that the bags contained asbestos-containing material. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-7.

j. Violation 1-8

DLI issued violation 1-8 under WAC 296-62-07723(2), which requires that all spills of asbestos-containing material must be cleaned up as soon as possible. This violation was based on Van Loo's observation of dry materials located near the debris chute and materials in the wheelbarrow that had not been disposed of. The Board upheld this violation.

Northwest Abatement argues that WAC 296-62-07723(2) is inapplicable because there is no evidence that the material that was not cleaned up was asbestos-containing material. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-8.

k. Violation 1-9

DLI issued violation 1-9 under WAC 296-842-15005(1)(c), which requires the employer to provide fit testing for the type of mask the employee is wearing. This violation was based on Van Loo's determination that Crakes was fit tested for a full face respirator but was wearing a half face respirator for which he had not been fitted. The Board upheld this violation.

Northwest Abatement argues that Crakes was not required to wear a respirator at the time of the inspection because all the asbestos-containing material had been removed. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-9.

D. EMPLOYER KNOWLEDGE OF VIOLATIVE CONDITIONS

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement had constructive knowledge of the alleged fall protection and flagging violations.[6] We disagree.

1. Legal Principles

To prove a serious violation under WISHA, DLI must show that the employer knew or by exercising reasonable diligence could have known of the violative condition. RCW 49.17.180(6); *Ostrom Mushroom*, 13 Wn. App. 2d at 272. Whether an employer has exercised reasonable diligence involves consideration of factors such as the employer's obligations to inspect the work site, to anticipate potential hazards that its employees may encounter, and to take measures to prevent a violative condition from occurring. *Bayley Constr.*, 10 Wn. App. 2d at 783.

In addition, an "employer has constructive knowledge of the hazardous condition if it is readily observable or in a conspicuous work site location." *Id.* As a result, DLI can show constructive knowledge if the violation was in plain view. *Potelco*, 7 Wn. App. 2d at 244. A violation is in plain view when any bystander, and especially the project foreman, easily can observe the violation. *Id.* at 245.

2. Fall Protection Violation

Northwest Abatement argues that there is no evidence that it had knowledge of the fall protection violation that Crakes committed. We disagree.

There is no evidence that Northwest Abatement had actual knowledge that Crakes was violating fall protection regulations. Hamilton testified that he did not see or know that Crakes

[6] Northwest Abatement does not argue that it had no knowledge of the alleged asbestos-related violations.

was standing near the debris chute without fall protection. The issue here is reasonable diligence and constructive knowledge.

DLI presented evidence that Crakes's fall protection violation was in plain view. From ground level, Jonkman and Baga watched Crakes dumping debris into the unguarded debris chute without fall protection. In addition, Hamilton was on the roof at the time working alongside Crakes and the other employees and easily could have observed the violation. This evidence supports a finding of constructive knowledge. *Potelco*, 7 Wn. App. 2d at 244; *Bayley Constr.*, 10 Wn. App. 2d at 783.

Northwest Abatement contends that it could not have discovered the violation through reasonable diligence because the violative conduct lasted only a short period of time. Northwest Abatement claims that constructive knowledge can be found only if a violative condition lasts long enough for the employer to identify and correct it. Otherwise, the employer would be required to monitor its employees on a continual basis.

However, the duration of a violation is not a required element to show constructive knowledge. *Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 19, 465 P.3d 375 (2018). "Focusing on duration may have the adverse effect of encouraging inspectors to leave workers in dangerous situations to prove a violation." *Id.* at 19-20.

Further, Northwest Abatement emphasizes that Crakes testified that dumping the wheelbarrow down the chute would have taken only a few seconds. However, Jonkman testified that the violation lasted for as long as four minutes. The evidence must be viewed in the light most favorable to DLI. *See Potelco*, 7 Wn. App. 2d at 243-44. A violation lasting four minutes in plain sight is readily observable.

Finally, Baga noticed from his office window that Northwest Abatement workers were not wearing fall protection harnesses. The Board expressly relied on this fact in upholding the fall protection violation. Although Crakes's violation occurred a little later, the existence of observable fall protection violations suggest that Hamilton was not exercising reasonable diligence to observe Crakes's conduct.

We conclude that substantial evidence supported the Board's finding that Northwest Abatement had constructive knowledge of the fall protection violation.

3. Flagging Violations

Northwest Abatement argues that there is no evidence that it had knowledge of Murphy's flagging violations. We disagree.

There is no evidence that Northwest Abatement had actual knowledge that Murphy was violating flagging regulations. Hamilton testified that he did not see Murphy engaging in flagging activities and did not direct Murphy to act as a flagger. Again, the issue here is reasonable diligence and constructive knowledge.

DLI presented evidence that Murphy's flagging violations were in plain view. Jonkman and Baga watched Murphy while standing next to the building. And Murphy was standing in a public street and his conduct was readily observable. This evidence supports a finding of constructive knowledge.

In addition, Hamilton knew that employees were expected to help the truck back in to pick up the dumpster several times a day as part of the disposal process. And he stated that the area where the trucks backed up also was being utilized by the public to drop people off. Therefore, Hamilton could have discovered the flagging violations by exercising reasonable diligence.

Northwest Abatement again argues that the violation occurred for only a short period of time, only two to four minutes. But as stated above, duration of a violation is not required to show constructive knowledge. *Pro-Active Home Builders*, 7 Wn. App. 2d at 19. And a violation lasting four minutes in plain sight is readily observable.

We conclude that substantial evidence supported the Board's finding that Northwest Abatement had constructive knowledge of the flagging violations.

E. UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement failed to meet the burden of proving the affirmative defense of unpreventable employee misconduct. We disagree.

1. Legal Principles

After DLI establishes a prima facie case that the violations occurred, the burden shifts to the employer to establish the affirmative defense of "unpreventable employee misconduct." *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 46, 156 P.3d 250 (2007). Under RCW 49.17.120(5), an employer can avoid liability upon showing the following:

> (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
> (ii) Adequate communication of these rules to employees;
> (iii) Steps to discover and correct violations of its safety rules; and
> (iv) Effective enforcement of its safety program as written in practice and not just in theory.

"The defense addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement." *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008).

A safety program is effective in practice when the evidence supports the employer's claim that the employees' misconduct was an isolated occurrence and not foreseeable. *BD*

Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 111, 161 P.3d 387 (2007). Prior violations for similar misconduct may serve as evidence that the employer had notice of the problem, which undermines the employer's claim that the misconduct was unforeseeable. *Id.* However, evidence of prior violations is not a total bar to the unpreventable employee misconduct defense. *Id.*

We review whether Northwest Abatement has met its burden of establishing the unpreventable employee misconduct defense under a substantial evidence standard. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003).

2. Effectiveness of Safety Program

In summarizing its rulings, the Board stated, "Although Northwest Abatement had a safety program in place, communicated safety rules to employees, and took some steps to discover and correct violations, it failed to enforce its safety program and has not proved the defense of unpreventable employee misconduct." CP at 44. The Board also made findings that Northwest Abatement's employees did not engage in unpreventable employee misconduct with regard to the various violations.

Northwest Abatement argues that it met its burden of proving the affirmative defense because it (1) had a thorough safety program, (2) designed and implemented a reliable training program, (3) conducted regular safety meetings, and (4) had a disciplinary system in place to prevent its workers from using unsafe work practices. However, Northwest Abatement did not directly address the Board's finding that it did not *enforce* its safety program.

In *BD Roofing*, this court concluded that an employer must do more than show the existence of a safety program to meet the requirements of RCW 49.17.120(5). 139 Wn. App. at 113 ("Merely showing a good paper program does not demonstrate effectiveness in practice.").

In that case, an employer offered testimony that its safety inspectors had the authority to fire employees based on safety concerns and that there was a general company policy that an employee could face dismissal for failing to follow its safety protocols. *Id.* at 112. But the court determined that without evidence that showed its inspectors actually had disciplined employees for violating safety rules, the enforcement of its safety program was merely theoretical. *See id.* at 113. In addition, the employer had been cited for the fall protection violations seven times in the previous three years, which showed that the fall protection violations were a recurring and foreseeable problem for the employer. *Id.* at 114.

The evidence shows that Northwest Abatement failed to meet its burden to show its safety program was effective in practice as required for the fourth element of RCW 49.17.120(5). Northwest Abatement relies on testimony that explained how its disciplinary system operated. Peters testified that under Northwest Abatement's three-stage discipline policy, employees could receive a verbal warning, written warning, and finally, termination. But he also testified that he had never issued anything more than a verbal warning for a safety violation despite having been in his position for several years. The record also shows that he only conducted safety inspections once or twice a month.

In addition, several Northwest Abatement employees testified that they had never heard of any other employees being disciplined. Hamilton also appeared unclear about the general disciplinary process and was unable to explain what happened when Peters performed a safety check. Indeed, there does not appear to be any evidence in the record that shows that Northwest Abatement has enforced its safety program in practice.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement did not meet the burden of proving the affirmative defense of unpreventable employee misconduct.

CONCLUSION

We affirm the trial court's order affirming the Board's decision and order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

GLASGOW, J.

CRUSER, J.

ZORETIC LAW, PLLC

April 12, 2021 - 1:44 PM

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