

74857-2

FILED
September 15, 2016
Court of Appeals
Division I
State of Washington
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74857-2

NO. 74857-2-I

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

ADVANCE ENVIRONMENTAL, INC.,

Respondent,

v.

DIRECTOR, WASHINGTON STATE DEPARTMENT OF LABOR &
INDUSTRIES,

Appellant.

**REPLY BRIEF
DEPARTMENT OF LABOR & INDUSTRIES**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

 A. AEI Failed to Assign Error to the Board’s Findings,
 Rendering Them Verities.....3

 B. Substantial Evidence Supports Finding that AEI Did Not
 Remove Asbestos Flooring Intact.....4

 C. The Board Did Not Place the Initial Burden of Proof on
 AEI, but It Should Have Regarding Showing Intact
 Removal13

III. CONCLUSION19

TABLE OF AUTHORITIES

Cases

<i>Asplundh Tree Expert Co. v. Dep't of Labor & Indus.</i> , 145 Wn. App. 52, 185 P.3d 646 (2008).....	17
<i>Atkins v. Clein</i> , 3 Wn.2d 168, 100 P.2d 1, <i>adhered to on reh'g</i> , 3 Wn.2d 168, 104 P.2d 489 (1940).....	5
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	13
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	11
<i>Dep't of Labor & Indus. v. Rowley</i> , 185 Wn.2d 186, __ P.3d __ (2016).....	17
<i>Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014).....	6, 9
<i>Henry Indus., Inc. v. Dep't of Labor & Indus.</i> , No. 73234-0-I, 2016 WL 4515941, (Wash. Ct. App. Aug. 29, 2016).....	10
<i>In re Det. of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999).....	16
<i>J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007).....	3, 16
<i>Levea v. G. A. Gray Corp.</i> , 17 Wn. App. 214, 562 P.2d 1276 (1977).....	8
<i>Nejin v. City of Seattle</i> , 40 Wn. App. 414, 698 P.2d 615 (1985).....	11
<i>Olympia Brewing Co. v. Dep't of Labor & Indus.</i> , 34 Wn.2d 498, 208 P.2d 1181 (1949).....	14

<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	11
<i>Potelco, Inc. v. Dep’t of Labor & Indus.</i> , 194 Wn. App. 428, __ P.3d __ (2016).....	7, 8
<i>Regan v. Dep’t of Licensing</i> , 130 Wn. App. 39, 121 P.3d 731 (2005).....	3
<i>Sebastian v. Dep’t of Labor & Indus.</i> , 142 Wn.2d 280, 12 P.3d 594 (2000).....	18
<i>State ex rel. Race v. Cranney</i> , 30 Wash. 594, 71 P. 50 (1902)	5
<i>State v. Florczak</i> , 76 Wn. App. 55, 882 P.2d 199 (1994).....	5
<i>State v. Jones</i> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	5, 6
<i>Tokarz v. Ford Motor Co.</i> , 8 Wn. App. 645, 508 P.2d 1370 (1973).....	11
<i>Tuerk v. Dep’t of Licensing</i> , 123 Wn.2d 120, 864 P.2d 1382 (1994).....	14
<i>Venezelos v. Dep’t of Labor & Indus.</i> , 67 Wn.2d 71, 406 P.2d 603 (1965).....	10
<i>Wilbur v. Taylor</i> , 172 Wash. 537, 20 P.2d 1104 (1933)	5
<i>Windust v. Dep’t of Labor & Indus.</i> , 52 Wn.2d 33, 323 P.2d 241 (1958).....	14

Statutes

RCW 34.05	3
RCW 49.17.150	3, 6, 14

RCW 49.17.150(1).....	5
RCW 49.26.010	15
RCW 49.26.100(2).....	2
RCW 49.26.120	17, 18
RCW 49.26.120(2).....	2
RCW 49.26.140(1).....	3, 16
RCW 71.09.090(2).....	16

Rules

ER 702	4, 5, 8
RAP 1.2.....	14
RAP 2.5.....	14
RAP 10.3(a)(4).....	3
RAP 10.3(b)	3
RAP 10.3(h)	3

Regulations

WAC 263-12-115(2)(b)	16
WAC 296-62-07722.....	7
WAC 296-62-07722(3)(b)(i)(B)	2, 4, 17
WAC 296-65-020.....	passim

Other Authorities

5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 301.2 (5th ed. 2007)..... 17

I. INTRODUCTION

Advance Environmental, Inc., (AEI) admitted to cutting asbestos-laden flooring, which would release asbestos fibers into the air. Based on this admission alone, this Court should determine that substantial evidence supports the Board's finding that AEI did not remove the flooring without disturbing the asbestos. Because AEI disturbed asbestos fibers, asbestos regulations mandated that it provide 10 days' notice of the asbestos removal to the Department of Labor & Industries. This notice requirement helps protect workers and the public against the undisputed hazards of asbestos.

AEI's primary argument is that the Department inspector was not qualified to render an opinion about the removal of the asbestos. Not only does this argument lack factual merit, AEI never raised it at the Board and has now waived it. Its remaining substantial evidence arguments ask this Court to reweigh the facts—an endeavor prohibited under substantial evidence review.

AEI posits that the Board placed the burden of proof on AEI, but the Board's decision states that the Department had the burden of proof. Nonetheless, the Board would not have erred by placing the initial burden on AEI under the Asbestos Safety Act to prove that it removed the asbestos flooring without disturbing the fibers. Because the Department

did not raise this issue at the Board, the Court should not give affirmative relief to the Department based on this argument. However, AEI asks this Court to determine what the proper standard is and the Court should articulate the correct standard in its decision.

II. ARGUMENT

The Department's opening brief demonstrated that substantial evidence supports the Board's finding that AEI failed to provide notice that it planned to remove asbestos flooring. AEI's response consists primarily of an attempt to relitigate the facts of the case. But the Court does not do so on substantial evidence review.

The Asbestos Safety Act directs "[t]he department [to] require persons undertaking asbestos projects to provide written notice to the department before the commencement of the project" RCW 49.26.120(2). WAC 296-65-020 requires asbestos removers to provide 10-day advance notice of asbestos projects to ensure safe removal. "Asbestos project" means the demolition of any building involving removal or demolition releasing or likely to release asbestos fibers into the air. RCW 49.26.100(2). The Department has further defined an asbestos project as a project where "asbestos containing materials do not stay intact (. . . by mechanical methods such as chipping, grinding, or sanding)." WAC 296-

62-07722(3)(b)(i)(B). AEI did not comply with statutory and regulatory requirements when it failed to provide notice of the asbestos project.

A. AEI Failed to Assign Error to the Board's Findings, Rendering Them Verities

In asbestos safety appeals, like Washington Industrial Safety & Health Act (WISHA) appeals, the appellate court reviews the Board's decision directly based on the record before the agency (rather than the superior court decision). *See* RCW 49.17.150; RCW 49.26.140(1); *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). Because the court reviews the Board's decision, the party opposing the Board's decision must assign error to its findings of facts or they are verities. *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005); RAP 10.3(a)(4), (b); *cf.* RAP 10.3(h) (requiring separate assignments of error for administrative orders under RCW 34.05).

The Board found, "The work [performed by AEI] was an asbestos project because mechanical methods for removal of the asbestos containing materials were used." CP 20 (FF 3). So AEI had to provide 10 days' notice to the Department. CP 20 (FF 3). The legal conclusion that AEI violated the cited regulation flows from these findings. CP 21. This is because the citation cited AEI for violating WAC 296-65-020 because AEI did not provide 10-day advance notice of an asbestos project. CP 21.

Because it is a verity that the asbestos was not removed intact, this means the project was an “asbestos project” subject to WAC 296-65-020’s notification requirement, and the Board’s conclusion that AEI violated the regulation is correct. *See also* WAC 296-62-07722(3)(b)(i)(B) (defining asbestos project).

The Court need not reach AEI’s substantial evidence arguments because the uncontested findings lead only to the conclusion that AEI did not remove the flooring intact as the regulation requires.

B. Substantial Evidence Supports Finding that AEI Did Not Remove Asbestos Flooring Intact

If the Court decides to reach the substantial evidence argument, it should reject AEI’s attempts to argue about the weight of the facts.

1. AEI waived any argument about the inspector’s qualification; but in any event he was qualified to testify that AEI did not remove the asbestos flooring intact

AEI concedes it did not object to the inspector’s testimony under ER 702 to argue that he was not qualified to testify about flooring removal. AEI Br. 18. Yet AEI now argues that the Board’s findings regarding non-intact removal are not supported by substantial evidence because the Department inspector was “not qualified to testify” regarding floor removal. AEI Br. 18. Since AEI did not raise this argument at the Board, and object to the testimony at the time, it cannot raise it now. RCW

49.17.150(1). AEI tries to avoid its failure to raise this issue at the hearing by mischaracterizing its own argument. It denies that it is challenging the evidence's admissibility and instead claims its qualification argument goes to determining if there is sufficient evidence to support the findings. AEI Br. 18. This argument fails under the substantial evidence standard of review for two reasons.

First, AEI does not deny that it did not object to the inspector's testimony on qualification grounds under ER 702. AEI Br. 18. When evidence is admitted and heard without an objection, the fact-finder may use the evidence for any purpose. *Atkins v. Clein*, 3 Wn.2d 168, 173, 100 P.2d 1, *adhered to on reh'g*, 3 Wn.2d 168, 104 P.2d 489 (1940) (when party did not object to hearsay, jury may consider it); *Wilbur v. Taylor*, 172 Wash. 537, 539, 20 P.2d 1104 (1933) (when party did not object to testimony, proper to submit this evidence to the jury); *State ex rel. Race v. Cranney*, 30 Wash. 594, 604, 71 P. 50 (1902) (when party did not object to hearsay testimony, the appellate court may consider it on appeal).

Courts routinely reject the type of argument raised by AEI and hold that a party that does not object to testimony based on witness qualifications waives the objection and the fact-finder may consider the evidence. *E.g.*, *State v. Florczak*, 76 Wn. App. 55, 72, 882 P.2d 199 (1994). In *State v. Jones*, the court concluded that the admission of a

caseworker's testimony was improper because it included "generalized assertions about common behaviors of sexually abused children" and thus exceeded the limits of the caseworker's personal experience. *State v. Jones*, 71 Wn. App. 798, 820–21, 863 P.2d 85 (1993). But the defendant failed to preserve the issue for review by never specifically objecting to an inadequate foundation for the caseworker's testimony. *Id.* at 821. In *Jones*, like here, the fact-finder properly considered the testimony.

Second, when the appellate court reviews findings for substantial evidence, the court accepts the evidence as true when it views that evidence in the light most favorable to the prevailing party. *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). This is based on the record before the fact-finder. RCW 49.17.150 ("The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, if supported by substantial evidence on the *record considered as a whole*, shall be conclusive." (emphasis added)). AEI tries to side-step the substantial evidence standard, arguing that it is not about admissibility but "the weight that should be given to Mr. Davis's testimony" AEI Br. 18. With this phrase, AEI illustrates why its argument must be rejected. The Board, as fact-finder, weighed the inspector's qualifications and found his testimony credible. On substantial

evidence review, the appellate court does not reweigh the evidence. *E.g.*, *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, ¶ 14, ___ P.3d ___ (2016).

In any event, the inspector was qualified to testify about asbestos in flooring and its removal, as relevant to WAC 296-62-07722. An industrial hygienist with 29 years of experience, he has conducted 150–200 asbestos-related inspections. CP 189. He has completed the asbestos certification program that workers take in order to perform asbestos-related work. CP 190. AEI misstates the record in arguing that Davis does not have experience in floor removal methods, like using an ax or a Burke bar, and so he was not qualified. AEI Br. 19. Davis has performed at least 35 inspections involving flooring. CP 198–99.¹

Underlying AEI's argument is a deeply flawed assumption. AEI implies that an inspector who does not actually perform construction cannot inspect asbestos removal projects and render an opinion about them. Acceptance of such a narrow view of expertise for purpose of offering opinion testimony would eviscerate enforcement of WISHA and the Asbestos Safety Act. Oftentimes an expert does not actually perform the work, but based on his or her training and experience may render an

¹ That he may not have encountered the creative theory floated by an employer goes to the weight of his testimony, not whether it is considered on substantial evidence review.

opinion. ER 702. The lack of direct work in construction goes to the weight of the testimony before the fact-finder, but the appellate review does not engage in such analysis. *Levea v. G. A. Gray Corp.*, 17 Wn. App. 214, 222, 562 P.2d 1276 (1977) (“The claimed deficiencies in the experts’ qualifications and opinions properly went to the weight of such testimony . . .”); *Potelco, Inc.*, 194 Wn. App. 428, ¶ 14 (court does not reweigh evidence).

2. AEI admitted it cut the flooring, releasing fibers

AEI admitted to the inspector that AEI cut the flooring: “[T]hey had said they had . . . cut it out with, I gather, a utility knife.” CP 200; *see also* CP 197. The inspector questioned the use of a knife, but explained that using a utility knife to cut the floor would not have removed the flooring intact. CP 195–201, 221–22. It would release asbestos fibers into the air. CP 197–98. This Court can accept AEI’s admission as substantial evidence that AEI cut the flooring and did not remove it intact.

AEI also admitted that it would not remove the flooring intact when it filed a late notice. AEI filed a notice of asbestos removal for the Auburn worksite on the day it removed the asbestos flooring. CP 203. Despite AEI denying that it ever filed a notice, the Department traced the filing through metadata analysis to a computer that had filed AEI’s prior

asbestos-removal notices. CP 203. The Board accepted that AEI filed a late notice. CP 18.

The fact of late filing provides additional substantial evidence that AEI did not remove the asbestos flooring intact—else there would be no reason to file a notice. On substantial evidence review, the inference that flows from this fact is that AEI performed the asbestos survey and then recognized that the regulation required it to notify the Department of the non-intact removal. *See Frank Coluccio*, 181 Wn. App. at 35 (inferences construed in favor of the prevailing party at the Board).

3. The inspector’s testimony provides substantial evidence that AEI did not remove the asbestos flooring intact

The inspector also pointed to the clean edges of the flooring to support his opinion that AEI had cut the flooring with a saw or other mechanical means, and therefore released asbestos fibers. CP 195, 197–98, 236. This testimony provides substantial evidence that AEI did not remove the asbestos flooring intact.

AEI admits that the inspector testified that AEI cut the flooring with a saw. AEI Br. 20. It argues that the inspector then contradicted himself in later testimony. AEI Br. 22. But even assuming there were inconsistencies in the inspector’s testimony (there were not), this argument does not demonstrate a lack of substantial evidence. Absent a complete

retraction of his or her testimony, a witness may have inconsistencies in his or her testimony, which goes to the weight of the evidence, not the sufficiency. *Venezelos v. Dep't of Labor & Indus.*, 67 Wn.2d 71, 73, 406 P.2d 603 (1965); *Henry Indus., Inc. v. Dep't of Labor & Indus.*, No. 73234-0-I, 2016 WL 4515941, *9 (Wash. Ct. App. Aug. 29, 2016) (fact-finder resolves conflicts in a witness's testimony).

The inspector did not retract his testimony. AEI misrepresents the record when it asserts that the inspector “conceded on cross examination that an intact removal was possible.” AEI Br. 3. Notably, AEI cites all of the inspector's testimony for this proposition. AEI Br. 3 (citing CP 187–242). The reason AEI does not cite to a specific page in the testimony is because there is no such testimony. Toward the end of his testimony, the inspector reiterated that the edges of the flooring were clean, meaning the flooring was cut out. CP 236. “I believe that it [] was removed cleanly to the walls and that all the floor joists were left. I would think that you would have to cut through the wood of the floor to remove that.” CP 222. AEI has not denied that cutting through the flooring releases asbestos fibers into the air. *See* CP 198–99.

AEI's arguments center around the inspector's testimony that cutting on the seam or using a Burke bar was “possible.” AEI Br. 22. Not only is AEI ignoring the standard of review in how it characterizes the

testimony, evidence of a possibility of something does not prove a fact. *Nejin v. City of Seattle*, 40 Wn. App. 414, 421, 698 P.2d 615 (1985) (“In matters of proof the existence of facts may not be inferred from mere possibilities.”). But more significantly, the fact-finder discounted the answers to the questions about cutting on seams, Burke bars, and axes because the questions were hypotheticals unsupported by testimony that AEI actually used these methods to remove the asbestos. CP 19, 223, 237; *see Petersen v. State*, 100 Wn.2d 421, 442, 671 P.2d 230 (1983); *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973).

AEI does not deny that a party must support hypothetical questions with proof in the record, but without citation to any authority, AEI argues that this principle is limited to an opponent’s testimony. AEI Br. 23. A court may generally assume that when a party has cited no authority, none exists. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Finally, AEI is wrong that the inspector believed that AEI could have used a Burke bar, ax, or cut along seams without disturbing the asbestos fibers at the mobile home job site. AEI Br. 22. As the inspector testified, a Burke bar would not cause the clean edges that were present. CP 236. Cutting along seams is difficult and would not alone remove the

flooring without using a mechanical means to assist it. CP 197–99, 236.²

Use of a mechanical means to use a tool like an ax would not remove the flooring intact. *See generally* CP 199.

Each of AEI’s arguments—the qualifications argument and the alleged inconsistency argument—are really attempts to reweigh and retry the case on appeal. But they do not demonstrate a lack of substantial evidence. Viewing the evidence in the light most favorable to the Department, the inspector’s testimony constitutes substantial evidence that AEI did not remove the flooring intact. He saw the worksite and relied on his experience to conclude AEI removed the flooring by cutting through the sheet vinyl, which means that AEI did not remove the asbestos-containing material intact. CP 197–201, 221–22, 236–37.³

² AEI quotes the inspector’s testimony at 223 at page 5 of its brief that asks the inspector to assume that AEI cut the asbestos flooring along the seam, and then removed it. AEI, however, fails to cite the inspector’s testimony that this would be difficult and would not alone remove the flooring without using a mechanical means to assist it. CP 197–201, 236. In any event, the fact-finder could disregard this hypothetical because AEI did not produce any evidence to support it.

³ AEI argues that the Department failed to show that AEI’s employees were exposed to any health and safety risk associated with the project. AEI Br. 17. To make this argument, it solely relies on its argument that it removed the asbestos flooring intact. AEI Br. 17. As it was not intact, AEI effectively concedes that it exposed its workers and the public to the safety risks. AEI makes passing reference that the Department must prove “employee” exposure to show a violation. AEI Br. 11. But as argued in the brief of appellant, the Asbestos Safety Act allows exposure to be of workers, contractors, homeowners, and the general public. DLI Appellant’s Br. 16.

C. The Board Did Not Place the Initial Burden of Proof on AEI, but It Should Have Regarding Showing Intact Removal

1. The Board stated that the Department had the burden of proof

Contrary to AEI’s arguments, the Board did not place the initial burden of proof on AEI. AEI points to discussion by the Board about AEI’s failure to put on evidence and its improper use of hypotheticals. AEI Br. 8–9. But AEI ignores the Board’s specific statements: “In this order we address the only contested issue of this appeal[:] whether the Department has met its burden of proof to establish that [AEI] committed the violations alleged in [the citation].” CP 16. It further stated, “In a WISHA appeal, the Department has the burden of proving the alleged violations and the correctness of the assessed penalty.” CP 17. This plainly shows upon whom the Board placed the burden, and AEI cites no authority or reasoned argument that this Court should disbelieve the Board when it says what it has done. The court does not consider contentions unsupported by argument and citation to authority. *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 248–49, 350 P.3d 647 (2015).

The Board first determined that the Department proved its case, “The Department has proved that [AEI] failed to provide proper notice of an asbestos project. The eyewitness testimony of Mr. Davis is circumstantial evidence that shows that flooring containing [asbestos] had

been cut (mechanically removed) from the project location.” CP 19. Once the Department established its case, the Board shifted the burden to AEI to rebut it or present an affirmative defense. It did neither.⁴

2. The Asbestos Safety Act places the burden on the asbestos remover to show compliance with the Act regarding removing the flooring intact

At the Board, the Department argued for a relaxed burden of proof, but it did not specifically argue that AEI had the burden of proof to show an intact removal. CP 40–41. So the Department has waived any argument that this Court should give it affirmative relief based on this theory—in other words the Department cannot argue that the Court should reverse the superior court decision on the ground that placing the burden of proof on the Department was incorrect. RAP 2.5; RCW 49.17.150. However, nothing precludes the Department from responding to AEI’s arguments that the burden of proof is on the Department on all elements and providing the correct legal analysis.⁵ The court can review all arguments necessary to “serve the ends of justice” including those issues not raised previously. RAP 1.2; *Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124,

⁴ If AEI is correct that the Board did not apply the correct burden of proof, the remedy is to remand to the Board to do so. *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 508, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

⁵ The Department is only arguing the asbestos remover has the burden to show the element of intact removal. The Department has the burden to show the other elements under WAC 296-65-020.

864 P.2d 1382 (1994). This Court should exercise its discretion to consider the correct legal standards when announcing the rule that applies. This is especially important because there are no cases addressing the standards under the Asbestos Safety Act.

The Legislature enacted the Asbestos Safety Act to protect the public against “irreversible lung damage and bronchogenic carcinoma” caused by asbestos. RCW 49.26.010. One in every four Americans dying in the urban areas of the United States has asbestos particles in his or her lungs. *Id.* This is a “hazard to the public health and safety” and requires careful regulation. *Id.* Given the importance of asbestos regulation, the Court should consider the burden of proof issue, and reject AEI’s arguments that the Department carries the burden to show that AEI removed the asbestos non-intact.

The asbestos remover should prove that the asbestos was removed intact because first, this is consistent with the statutory scheme, and second, it is consistent with the important public policies underlying the Asbestos Safety Act. Under both the structure of the Act and the purpose behind it, it is a basic principle of fairness that the entity that controls the information—namely whether it removed the asbestos intact—should have to demonstrate the status of the asbestos.

AEI argues that “Washington courts have shifted the burden of proof to employers only for affirmative defenses.” AEI Br. 10 (citing *J.E. Dunn Nw.*, 139 Wn. App. at 46–47). But *J.E. Dunn* is a WISHA case, where the courts have placed the burden on the Department. AEI cites no case for the proposition that employers for all types of cases only have the burden of proof for affirmative defenses. No such presumption exists.

RCW 49.26.140(1) directs use of the administrative procedures of WISHA. The Legislature has not placed the burden on the Department to prove a WISHA citation; instead the Board of Industrial Insurance Appeals has done so by regulation. WAC 263-12-115(2)(b); *J.E. Dunn*, 139 Wn. App. at 44. But the Board has not elected to adopt such a rule for Asbestos Safety Act cases. In any event, the placement of the burden of proof goes beyond a procedural requirement—it goes to the heart of the substantive obligations under the Asbestos Safety Act. Burden of proof in this case thus implicates substantive issues regarding AEI’s obligations to comply with the Act. *See In re Det. of Turay*, 139 Wn.2d 379, 422–23, 986 P.2d 790 (1999) (placing the subheading “Burden of Proof at the Show Cause Hearing under RCW 71.09.090(2)” under the larger heading “Substantive Issues Raised by the State.”).

To decide the burden of proof issue, the Court needs to consider the structure of the Asbestos Safety Act where the Legislature charges the

asbestos remover with the obligations to proceed in a safe manner. The regulation defines “asbestos project” as one “where asbestos containing materials do not stay intact (including removal of vinyl asbestos floor (VAT) or roofing materials by mechanical methods such as chipping, grinding, or sanding).” WAC 296-62-07722(3)(b)(i)(B). AEI argues that this regulation proves that it does not have the burden of proof, but the definition’s plain meaning shows that regulation presumes that vinyl flooring does not stay intact when removed. This places the burden for showing an intact removal on the asbestos remover. *See Asplundh Tree Expert Co. v. Dep’t of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008) (placing the burden to prove a regulatory exception for WISHA violations on the firm asserting the exception). Similarly, RCW 49.26.120 and WAC 296-65-020 require persons removing asbestos to provide notice to the Department.

The courts decide who has the burden of proof as a matter of statutory construction, but also as a matter of policy. *Dep’t of Labor & Indus. v. Rowley*, 185 Wn.2d 186, ¶46, ___ P.3d ___ (2016) (“Common sense and policy concerns may dictate the allocation of the burden of persuasion in a civil case.”); 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 301.2, at 193 (5th ed. 2007) (where preponderance standard applies, “[t]rial convenience, access to facts, and

substantive policy are all factors for consideration, but for the most part the burden of persuasion must be determined on a case-by-case basis.”). In other words, the court decides who should have the burden in order to further the goals of the Legislature.

Placing the burden on the asbestos remover to show that it removed the asbestos intact furthers the purpose of giving the Department advance notice of the project. If a company performs a non-intact removal of asbestos without giving the Department a chance to investigate, it turns the notice requirements upside down to then let that same company say the Department cannot prove an asbestos violation because the Department was not there. It is a matter of fairness that the burden to prove the status of the asbestos flooring removal should be placed on the party that controls how it is removed. Allowing the asbestos remover to escape the burden of proof encourages the asbestos remover to not give the required advance notice, frustrating the Legislature’s intent.

The court interprets remedial statutes to further their purposes. *Sebastian v. Dep’t of Labor & Indus.*, 142 Wn.2d 280, 284, 12 P.3d 594 (2000). Here, RCW 49.26.120’s purpose is to have notice of asbestos projects so that the Department ensures that asbestos removers do not expose workers and the public to the hazards of asbestos—giving the

asbestos remover the responsibility to show that it removed the asbestos intact furthers this goal.

III. CONCLUSION

Substantial evidence supports the Board's finding that AEI violated WAC 296-65-020, which requires 10-day advance notice before removing asbestos. The Board placed the burden of proof on the Department, but this Court should hold that the burden belongs to the asbestos remover to show that it removed the asbestos intact. This Court should reverse the superior court's decision and affirm the Board and the Department's citation.

RESPECTFULLY SUBMITTED this 15th day of September, 2016.

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**COURT OF APPEALS, DIVISION I
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ADVANCE ENVIRONMENTAL INC.,

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v.

DIRECTOR, WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Reply Brief and this Certificate of Service in the below described manner:

Via E-File to:

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DATED this 15th day of September, 2016.

A handwritten signature in black ink, reading "Shana Pacarro-Muller". The signature is written in a cursive style with a horizontal line underneath it.

SHANA PACARRO-MULLER
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