

70142-8

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NO. 701428

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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BNBUILDERS INC., a Washington Corporation;

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF  
LABOR & INDUSTRIES,

Respondent,

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 FEB - 7 AM 10: 57

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**APPELLANT'S REPLY BRIEF**

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## I. REPLY

**A. The Board specifically found that the ECI 2007 was adequate for BNB to rely on to determine which materials it could work on.**

**1. The ECI survey was adequate.**

The Department sets forth several themes to argue that BNB had knowledge of the violative acts required by RCW 49.17.180(6) because it should have known that the ECI survey was inadequate. The Department argues that because the tile was not homogeneous, it was unreasonable for BNB to rely on the 2007 ECI survey and that BNB should have known that it was not adequate. The Department further argues that because of the “checkerboard pattern” of different types of tile, that it was not reasonable to assume that if one type of tile or mastic is tested that means that other types are asbestos free.” The Department ignores Citation Item 1-8 and the Board’s Findings of Fact No. 19 for Item 1-8.

In Item 1-8, the Department alleged a violation of WAC 296-62-07721(2)(e). That rule declares:

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

As set forth in the language of Citation Item 1-8, the Department alleged that:

“Before starting work on site, the employer did not obtain an asbestos survey to determine if all materials to be worked on, removed, contain asbestos.

The contractor was advised by Argus Pacific that the Earth Consultants Screening survey for this site did not identify all asbestos containing materials on the project. BN Builders proceeded with work onsite without ensuring that all materials impacted by the project, were first tested for asbestos.”

BR Ex. 1, page 6.

The Department fails to acknowledge that the Board specifically found at Finding of Fact No. 19 of the Final Decision and Order. The Board found that:

“The Employer obtained an asbestos survey *adequate to determine if the materials to be demolished contained asbestos.* Item 1-8.”

(Emphasis added).

In explaining its decision to vacate Item 1-8, the Board held at Page 3, lines 8 - 12 of the Final Decision and Order, that:

“As we understand the testimony from the CSHO, this item was cited because, although the employer had a copy of the good faith survey report, it was incomplete. We do not agree this amounts to a violation of this particular regulation. The employer did seek a written report from an appropriate survey firm. The fact that the survey did not cover all of the materials does not constitute a violation of the statute.”

Unchallenged findings of fact are verities on appeal. *In re Marriage of Akron*, 160 Wn.App. 48 (2011). As Finding of Fact No. 19 has never been challenged, it remains a verity on appeal. This Court must

adopt as a finding that the ECI survey was adequate to determine if the materials to be demolished by BNB contained asbestos. Even if the ECI survey was incomplete, the Board specifically found that it did not amount to a violation. Thus, any theory as to why BNB should have known that the ECI survey was inadequate is contrary to Finding of Fact 19 and should not be considered. Even if Finding of Fact No. 19 is not a verity on appeal, the Department's logic is flawed.

The Department never provided any evidence that the tile under the carpet in the hallway was not homogenous. It is undisputed that at the time of the WISHA inspection, the Compliance Officer counted ten different kinds of vinyl tile at the entire job site. Because there were different kinds of vinyl tile, the Department argues that BNB should have known the significance and therefore knew that the ECI report could not be relied on.

Before BNB began to remove the carpet, it had no knowledge of what the tile looked like underneath the carpet. When BNB rolled up the carpet, it is undisputed that some of the tile stuck to the carpet when the carpet was rolled up. It is further undisputed that the portion of the carpet where the tile that was stuck it was cut out so that both the carpet and the tile was bagged separately from the carpet. Because the color side of the tile was stuck to the carpet, there was no testimony as to what color the tile was or whether it was the same or different. Moreover, there was no evidence of the color of the tile in the hallway in question. Thus, there

was no evidence to suggest that the tile in the main floor was homogenous or not. The Department's argument that there were different colored tiles in the garbage bags that contained all of the tile, including the tile removed by the owner, does not create any substantial facts that the tile in the hallway was not homogenous.

There was no testimony that indicated where the checkerboard pattern existed in the classrooms. This is relevant because it does not establish, nor did the Board make any finding, as to whether the tile underneath the carpet was homogenous or "checkered" when BNB actually removed the tile.

Even if, for the sake of argument, that the tile beneath the carpet in the hall way was checkered or not homogenous, the Department never established that this was of any significance to BNB, a lay contractor that had no expertise in performing good faith asbestos surveys.

As set forth in RCW 49.26.013, the asbestos survey may only be conducted by

"persons meeting the accreditation requirements of the federal toxics substances control act, section 206(a) (1) and (3) (15 U.S.C. 2646(a) (1) and (3))."

Moreover, asbestos sampling protocol is regulated by 40 CFR 763.

One can presume that the legislature required only "accredited" persons to conduct the asbestos good faith surveys because of the health hazards and dangers associated with asbestos. Thus, what material samples are taken, the number of samples and the locations of the samples

for the survey are left in the capable hands of accredited persons. BNB had neither the expertise nor the personnel qualified to conduct an asbestos good faith survey. As held by the Board, the ECI survey was adequate because it professed to have followed all statutory guidelines of protocols, accredited inspectors, and proper analysis techniques. When RCW 49.26.013 mandates that the survey be conducted by an accredited person, it is inappropriate for the Department to assess knowledge to a contractor merely relying on the expertise of an outside inspector.

**B. The ECI survey covered the scope of work performed by BNB.**

Exhibit 35 is the ECI good faith survey. Contrary to the allegations made by the Department in its brief, the ECI survey did cover the areas where BNB performed work, including the hallway.

“At the time of our site visits on February 15 and 16, 2007, an AHERA Certified Building Inspector observed building materials with *the main building and outbuildings for suspected ACMs*. ECI collected random bulk samples of suspect ACM. (Certification documentation is attached to this report as Appendix A.). Our approach followed ECI’s understanding of what constitutes the responsibilities of a ‘prudent person’ and ‘state of the art’ practice for these types of activities. This was achieved by the implementation of bulk sampling methods.”

Section 2.0 of Exhibit 35.

The ECI survey specifically states that it covered the main building. Mr. Mark Hamper, a certified asbestos supervisor, testified in cross examination that the maps in Exhibit 35 clearly show the building outline of classrooms and hallways covered by the ECI survey. Hamper,

page 172, line 15 – page 173, line 11. More importantly, asbestos samples in Exhibit 35 show that samples were taken and analyzed by ECI in the areas where BNB performed work.

The Department’s argument that the ECI survey was outside the scope of BNB work areas is not supported by the evidence and is contrary to the testimony of its own witness, Mark Hamper, a certified asbestos supervisor for PAS, an asbestos abatement contractor who was called to testify for the Department.

Contrary to the Department’s argument that the Compliance Officer had to shut the work down, Mr. Hamper and PAS were already at the job site when Ms. Rees first began her inspection.

**C. Because the ECI survey covered the areas where BNB worked, the survey did not need to test every single tile that BNB worked on.**

The Department argues that BNB performed work in the classrooms of the main building where the ECI indicates that it did not take any samples. While this is true, the Department fails to explain the relevancy or any significance of this point. The IAJ in her proposed decision at page 2, line 45 – page 3, line 1, correctly found:

“A good faith survey refers to a specific examination of construction materials. An accredited inspector enters the building, takes actual or potential asbestos containing materials from the work site and has such material analyzed prior to commencing construction work at the relevant site. A good-faith survey need not sample every material in a given building and can be limited in scope.”

As set forth above, the ECI survey covered the main building and outbuildings for suspected ACM. See Exhibit 35, section 2.0. The AHERA accredited building inspector, allowed by RCW 49.26.013 to conduct asbestos surveys, obviously did not sample every material at the site. However, as correctly declared by the IAJ, every material need not be sampled.

The ECI Survey clearly covered the tiles underneath the carpet in the hallways. Mr. Campbell reiterated that he fully relied on the survey and had no reason to question ECI (Tr. 2/15/11, p. 148, lines 18-25):

- Q. And was there anything that would have prompted you to come to this conclusion that the good faith survey that you're relying on was inadequate?
- A. No. And I mean, based on the other samples I took out there, if I would have thought the floor tile was suspect I would have sampled it. There was no reason for me not to sample it if there was any indication I needed to. I did other areas so why wouldn't I do this.

The main floor hallway is shown in the ECI survey. As shown in Exhibit 35, the mainfloor hallway shows it running between the two wings on the same floor. The fact that it shows that ECI only took one sample on the floor and that the 1945 wing was not tested shows that the hallway was indeed tested by ECI. As much as the Department argues that this is relevant, it has not demonstrated that it was of any significance to BNB who relied on the ECI survey, or to this Court. As the statutorily authorized inspector prepared the report, and the ECI report did not report that any tile underneath the carpet contained asbestos, and the Board found

that the ECI survey was adequate for BNB to rely on, the Department offers no evidence to support its proposition, or the board's finding, that BNB either knew, or should have known, that the ECI survey was inadequate.

Perhaps to an asbestos qualified industrial hygienist or to an AHERA accredited asbestos building inspector, the ECI survey, would after close scrutiny, be deemed as inadequate. However, to BNB, a general contractor, with no expertise in conducting asbestos good faith surveys, there was no knowledge, actual or constructive, that would indicate to BNB that the ECI survey was inadequate to remove the carpet in the main hallway.

**D. The evidence does not support the Department's contention that BNB was aware of the Kapper's letter that indicated that the ECI survey was inadequate for its purposes.**

The Department argues that the limitations of the ECI survey were further reiterated in a 2008 letter (Kappers letter at 6, BR Exhibit 34). While the facts indicate that Argus Pacific was trying to solicit work from BNB, there was no evidence that this was actually communicated to BNB, and even if it were, it did not provide any details as to how the ECI survey was flawed for the final building plan.

Ms. Nicole Gladu (hereinafter "Mr. Gladu") is a regulated building materials department manager for Argus Pacific since February of 2008. (Tr. 1/12/11, p. 149-150). By the time Ms. Gladu e-mailed Steve Carling on December 14, 2009, the decision not to hire an asbestos consultant had been made, and it was no longer necessary to review or consider the

proposal to be a consultant submitted by Argus Pacific on December 14, 2009. Because an asbestos consultant was not needed, Mr. Carling testified that he did not open Ms. Gladu's e-mail attachment. Consequently, he was not aware of the last paragraph in which it was suggested that the ECI report was inadequate. The record reflects the July 2008 asbestos plan prepared by Argus Pacific was never shared with the Employer. (Tr. 1/12/11, p. 161-162). In relevant testimony Ms. Gladu acknowledged that an email sent to Mr. Carling was not sent via return-receipt requested nor did Ms. Gladu have any independent knowledge of whether Mr. Carling actually read the correspondence sent. (Tr. 1/12/11, p. 156). Additionally, Ms. Gladu admitted that the attachment, even if it had been opened and reviewed, did not contain any specific information detailing how the ECI report was inadequate, the areas or types of material that were inadequate, or even if the inadequacies were related to the scope of work to be performed. (Tr. 1/12/11, p. 162-163). As a business, Argus Pacific was not willing to give a detailed report unless somebody paid them \$4,800.00 for their work product. (Tr. 1/14/11, p. 74, lines 15-19).

Argus Pacific had previously sent a letter to Mr. Kappers, Prescott Homes, indicating that the ECI report was "inadequate." This was attached to the ECI report and reviewed by BNB when they received the ECI report. BNB agreed that the ECI report was, in fact, inadequate for a total demolition of the building because it did not address areas such as the attic. This inadequacy, however, was not relevant to the scope of the work in December 2009 because at that point it was decided that no work would be performed in the attic.

**E. Concerns from non-accredited employees that there might be asbestos were not sufficient to put BNB on notice that the ECI Survey was wrong.**

At page 11 of its Response, the Department argues that at least two employees expressed concerns regarding demolition of PACM. Stewart Weston testified that he told Bob Voss about his concerns about the tile underneath the carpet in the main hallway. Weston, pages 71 – 73. Mr. Weston, however, is not an AHERA accredited building inspector who was allowed by statute to conduct asbestos surveys. He voiced his concerns to Mr. Voss. Mr. Voss, however, relied on the ECI survey which did not indicate the presence of vinyl asbestos tiles or mastic beneath the carpeting where the BNB employees were removing carpet.

The Department argues that the opinion of an unaccredited building inspector should put BNB on notice that the ECI survey was inadequate. None of the BNB employees who expressed concerns were qualified, nor did they provide any specific facts to explain why the ECI survey was flawed. Yet, the Department argues that their concerns should somehow put the Employer on notice.

While concerns for safety and health should be raised, as a matter of law, BNB respectfully asserts that it should be entitled to rely on the ECI survey performed by an accredited building inspector. Where the Board found in Findings of Fact 19 that BNB indeed had obtained an asbestos survey adequate to determine if the materials to be demolished contained asbestos, the Board erred by finding that the concerns from the

employees were adequate to put BNB on notice that the ECI survey was wrong. In that case, BNB would have been required to perform another good faith survey at an additional cost.

Such an additional cost would have been reasonable if the employee concerns were based on legitimate, non-conclusory opinions, or if they were made by an accredited building inspector who could point out relevant factors. However, in the absence of such concerns, BNB was entitled to rely on the good faith survey that the Board found was adequate.

The legislature intended construction practices to be guided by competent information. This would not contemplate non-accredited persons to give conclusory opinions that material need not be tested. Such a practice is unwise and unsafe as certainly does not help assure that every man, woman and child working in the state be afforded safe and healthful working conditions as mandated by WISHA, Ch. 49.17 RCW. By the same token, to allow construction work be performed in both an efficient and safe manner, contractors must be able to rely on good faith surveys that are prepared by qualified individuals without having to re-test when an unqualified person has a different opinion.

**F. As found by the Board, once TSI (thermal system insulation) was encountered in the walls, BNB stopped work.**

As part of the “soft” demolition that BNB employees performed, the interior walls of both the “old” section and the “new” section were removed. It was undisputed that thermal system insulation was only found in the “new” section of the building at MMSC. Ms. Rees further agreed

that there was no thermal system insulation in the older section. This is significant because the manner of performing the soft demolition was different. The BNB employees testified that in the new section where there was potentially TSI (Thermal System Insulation), peep holes were cut to see if there were any pipes. Once the peep hole was cut, the worker carefully removed pieces of the drywall by hand in a “surgical” manner. Not only was there a potential to find TSI, the workers were also concerned about coming into contact with the non-insulated electrical wiring that had the potential of being energized.

The same concerns that existed in the newer section of the building, however, did not exist in the older section of the MMSC. Consequently, BNB employees used hammers, pry-bars and other tools to remove the plaster board walls in a more aggressive manner.

When suspect material was found, consistent with their asbestos training, BNB employees stopped work in those areas so PAS, the certified asbestos abatement contractor, could perform clean up work of the suspect ACM. Contrary to the Department’s claim that BNB workers were exposed to asbestos in the wall demolition, the Board did not make this finding. In fact, the Board reached an opposite finding. At page 3, lines 25 – 26 of the Decision and Order, the Board found:

“The record is clear that the employer stopped work when thermal insulation was encountered.”

**G. Substantial evidence does not exist in the record adequate facts to support Item 1-9 as cleaning of asbestos debris only applies to asbestos abatement projects.**

The Department alleges in Item 1-9 that BNB did not promptly clean up presumed asbestos containing material that was damaged in the wall demolition process. However, the Department never provided any testimony regarding the individual who removed the interior wall in Exhibits 10 through 23. More importantly, where the Department asserts that the TSI was damaged, there was no testimony as to who specifically damaged the TSI, or when it was in fact damaged.

In short, the Department provided no evidence that BNB was responsible for TSI debris that allegedly should have been cleaned up by BNB.

In Item 1-9, the Department alleged that:

1-9 WAC 296-62-07712(2)(d) "Serious" \$2,100.00

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

The above cited regulation declares:

**(2) Engineering controls and work practices for all operations covered by this section.** The employer must use the following engineering controls and work practices in all operations covered by this section, regardless of the levels of exposure:

(a) Vacuum cleaners equipped with HEPA filters to collect all debris and dust containing ACM and PACM, except as provided in subsection (10)(b) of this section in the case of roofing material.

(b) Wet methods, or wetting agents, to control employee exposures during asbestos handling, mixing, removal, cutting, application, and cleanup, except where employers demonstrate that the use of wet methods is infeasible due to, for example, the creation of electrical hazards,

equipment malfunction, and, in roofing, except as provided in subsection (10)(b) of this section.

(c) Asbestos must be handled, mixed, applied, removed, cut, scored, or otherwise worked in a wet saturated state to prevent the emission of airborne fibers unless the usefulness of the product would be diminished thereby.

(d) Prompt cleanup and disposal of wastes and debris contaminated with asbestos in leak-tight containers except in roofing operations, where the procedures specified in this section apply.

The application of this section is clear: regardless of the exposure level of asbestos, when an employer undertakes an asbestos operation, the engineering controls set forth in sections (a) through (d) must be followed. As previously noted, BNB never sought to undertake an asbestos operation covered by WAC 296-62-07701(2). PAS was hired to specifically engage in asbestos abatement work. Consequently, the cited regulation simply does not apply to the soft demolition activities. Demolition activities are specifically covered in Chapter S of WAC 296-155. *See* WAC 296-155-775 through 830.

Moreover, BNB was not a certified asbestos contractor, and it did not hire Certified Asbestos Workers or Certified Asbestos Supervisors. It is inconsistent for the Department to cite BNB for not being certified in asbestos abatement, but yet cite BNB for allegedly not complying with activities that would require asbestos certification. Under the Department's own regulations, BNB could not engage in the clean up operations for asbestos because they were never certified to do so.

Even if the cited regulation applied to BNB, which it does not, the Department offered no proof or evidence that BNB was responsible for the

alleged damage. There was no evidence that BNB created the debris, or that it was even aware that it existed.

As found by the Board, the evidence was clear, once thermal system insulation was encountered, BNB promptly shut down the work.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of February, 2014.

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