

74857-2

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74857-2

NO. 74857-2-I

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

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ADVANCE ENVIRONMENTAL INC.,

Respondent,

v.

DIRECTOR, WASHINGTON STATE  
DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

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**DEPARTMENT OF LABOR AND INDUSTRIES  
BRIEF OF APPELLANT**

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ROBERT W. FERGUSON  
Attorney General

R. Marshall Morales  
Assistant Attorney General  
WSBA No. 49113  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 464-5348



**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR .....2

III. ISSUES.....2

IV. STATEMENT OF THE CASE .....3

    A. AEI Removed Asbestos-Containing Vinyl Flooring Without Providing Advance Notice, Despite Two Denials by the Department for Waiver .....3

    B. AEI Removed Asbestos-Containing Material Without Leaving the Materials Intact .....4

    C. After the Inspector Testified That AEI Could Not Have Removed the Asbestos Intact and AEI Presented No Evidence, the Board Affirmed the Department’s Citation.....6

    D. The Superior Court Reversed.....7

V. STANDARD OF REVIEW.....7

    A. The Court Interprets the Asbestos Safety Act to Further Its Goals to Protect Workers and the Public .....7

    B. The Court Reviews the Board’s Decision for Substantial Evidence.....8

VI. ARGUMENT .....9

    A. Substantial Evidence Supports Finding That AEI Did Not Remove Asbestos Intact.....11

        1. AEI Cut the Flooring, Releasing Asbestos Fibers.....11

        2. AEI Relies on Unsupported Hypotheticals, Speculation, and Conjecture.....14

B. Substantial Evidence Supports the Finding That Workers Were Exposed to a Hazard of Non-Intact Removal Without Notification to the Department .....	16
C. Substantial Evidence Shows That Exposure to Asbestos-Containing Material Presents a Substantial Probability of Serious Physical Harm or Death .....	17
D. The Board Did Not Err by Concluding That the Department Presented a Prima Facie Case or by Requiring AEI to Show That It Removed the Asbestos Intact .....	18
VII. CONCLUSION .....	21

**APPENDICES**

Appendix 1. Board D&O
Appendix 2. Superior Court Order
Appendix 3. Superior Court Judgment
Appendix 4. RCW 49.26.120
Appendix 5. WAC 296-65-020
Appendix 6. WAC 296-62-07722

## TABLE OF AUTHORITIES

### Cases

<i>Asplundh Tree Expert Co. v. Dep't of Labor &amp; Indus.</i> , 145 Wn. App. 52, 185 P.3d 646 (2008).....	20
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	9
<i>Erection Co. v. Dep't of Labor &amp; Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085 (2011).....	10
<i>Express Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 151 Wn. App. 589, 215 P.3d 951 (2009).....	10, 16, 17, 18, 19
<i>Frank Coluccio Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014).....	8, 9, 13
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	9, 12
<i>In re William Dickson Co.</i> , No. 99 W0381, 2001 WL 1755614, (Bd. Indus. Ins. App. Dec. 11, 2001).....	7, 8
<i>J.E. Dunn Nw., Inc. v. Dep't of Labor &amp; Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007).....	8
<i>Kim v. Lakeside Adult Family Home</i> , No. 91536-9, 2016 WL 2756026, (Wash. May 12, 2016).....	14
<i>Mowat Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 148 Wn. App. 920, 201 P.3d 407 (2009).....	8
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	14
<i>Potelco, Inc. v. Dep't of Labor &amp; Indus.</i> , 166 Wn. App. 647, 272 P.3d 262 (2012).....	17

<i>State v. ex rel. Lige &amp; Wm. B. Dickson Co. v. Pierce County,</i> 65 Wn.App. 614, 829 P.2d 217 (1992).....	14
<i>Tokarz v. Ford Motor Co.,</i> 8 Wn. App. 645, 508 P.2d 1370 (1973).....	14
<i>Zavala v. Twin City Foods,</i> 185 Wn. App. 838, 343 P.3d 761 (2015).....	9

**Statutes**

RCW 49.17 .....	7
RCW 49.17.010 .....	8
RCW 49.17.060 .....	16
RCW 49.17.150 .....	8, 10
RCW 49.17.150(1).....	4, 8
RCW 49.17.180(6).....	10, 17
RCW 49.26 .....	1, 7
RCW 49.26.010 .....	8, 10, 17, 21
RCW 49.26.100 .....	11
RCW 49.26.120 .....	2, 10, 11, 16
RCW 49.26.140 .....	passim

**Rules**

RAP 2.5(a) .....	10
------------------	----

**Regulations**

WAC 296-62-0772.....	11
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WAC 296-62-07722(3).....	2
WAC 296-62-07722(3)(b)(i)(B) .....	12, 19
WAC 296-62-07722(3)(b)(ii) .....	12
WAC 296-65-003.....	11
WAC 296-65-020.....	passim
WAC 296-65-020 (1).....	16
WAC 296-65-020(2).....	6
WAC 296-65-020(3).....	13

## I. INTRODUCTION

Because asbestos causes deadly lung conditions, the Legislature imposes special rules regarding its removal. A firm may not remove asbestos-containing materials if it disturbs asbestos fibers without advance notice to the Department of Labor and Industries under the Asbestos Safety Act, RCW 49.26. This protects workers and the public from asbestos exposure.

Here, substantial evidence shows that Advance Environmental Inc. (AEI) removed asbestos-containing vinyl flooring without providing 10-day advance notice to the Department. The Department inspector concluded that AEI removed the vinyl flooring in a way that would release asbestos fibers into the air. AEI therefore violated the advance-notice rule. Substantial evidence also supports that AEI exposed individuals to the hazard created by AEI and that substantial harm would result. And the Department carried its burden of proof.

This Court should reverse the trial court. It should instead affirm the factfinder Board of Industrial Insurance Appeals, which correctly affirmed the citation under WAC 296-65-020.

## II. ASSIGNMENTS OF ERROR

- A. The Department assigns error to the superior court's order granting the petition for judicial relief, entered on February 16, 2016, to the extent it reverses the Board and vacates Citation 2-1.<sup>1</sup>
- B. The Department assigns error to the superior court's judgment, entered on March 14, 2016, to the extent it reverses the Board and vacates Citation 2-1.

## III. ISSUES

- 1. A firm must provide advance notice if it plans to disturb asbestos when removing it—a non-intact removal. WAC 296-62-07722(3). The Department's inspector testified that AEI cut the asbestos-containing flooring at AEI's worksite, releasing asbestos fibers. Does substantial evidence show that AEI removed asbestos-containing material from its worksite by using tools ("mechanical means") that did not leave the flooring intact?
- 2. RCW 49.26.120 and WAC 296-65-020 require persons removing asbestos to provide notice to the Department. Generally speaking, to prove a serious violation, an individual needs to be exposed to the violative condition. Does substantial evidence support the finding that workers were exposed to a hazard of non-intact removal without notification to the Department?
- 3. Does substantial evidence show that exposure to asbestos-containing material at AEI's worksite presented a substantial probability of serious physical harm or death, as asbestos causes lung diseases and cancer?
- 4. The Department presented evidence that the flooring was not removed intact. Did the Board err by looking to AEI to provide counter-evidence that the flooring was intact?

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<sup>1</sup>The Department also cited AEI for failing to provide advance notice of removal at other worksites. The Department does not appeal the superior court's reversal of the Citation Item 1-1 relating to those worksites. Citation Item 3-1 is not part of this appeal.

#### IV. STATEMENT OF THE CASE

**A. AEI Removed Asbestos-Containing Vinyl Flooring Without Providing Advance Notice, Despite Two Denials by the Department for Waiver**

In October 2012, AEI removed vinyl flooring from two mobile homes in Auburn without filing a 10-day advance notice of asbestos removal. CP 193-94. That vinyl flooring contained asbestos, which releases carcinogenic asbestos fibers when cut or torn. CP 192, 197. Vinyl flooring is glued onto underlying flooring, such as particleboard or plywood. CP 196-97. When removing vinyl flooring, it usually needs to be cut out, as peeling it off is less practical. CP 195-98, 200. Peeling makes “a big mess of the material” and does not leave the vinyl intact. CP 197.

Before removing the vinyl flooring, AEI requested a waiver from the notice requirement. CP 193. A Department supervisor denied that request. CP 193, 202. A few days later, Randy Gee, the owner of the main contractor at the worksite, called Department inspector McClelland Davis and asked for a waiver of notice requirement. CP 191-92, 194. Davis has been an industrial hygienist for over 29 years and has been trained and certified in asbestos removal, with inspections of over 150 asbestos

worksites. CP 189-90.<sup>2</sup> Davis denied AEI's second waiver request because the Auburn project did not qualify. CP 9, 21.

After being denied a waiver, Gee told Davis that the Auburn asbestos removal would proceed without the waiver. CP 192. AEI later filed a notice of asbestos removal for the Auburn worksite on the day it removed asbestos-containing material. CP 202-03. 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.

**B. AEI Removed Asbestos-Containing Material Without Leaving the Materials Intact**

Davis inspected the Auburn worksite on October 19, 2012, and observed two mobile homes where AEI removed asbestos-containing vinyl flooring. CP 193-94. Davis entered one mobile home and spoke to Gee. CP 193-99. Davis observed that the floor in the bedroom had been completely removed, leaving just the joists below that had supported the floor. CP 195. Davis testified that cutting out the vinyl would mean cutting the flooring into pieces to get it through the doorway. CP 197, 200. This is not a method that leaves the vinyl intact because it would not be possible

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<sup>2</sup> At superior court, AEI questioned the inspector's expertise. CP 278. But at the Board it did not object to Davis's qualifications as an expert as required under RCW 49.17.150(1).

to saw or cut through the underlying flooring without disturbing the asbestos in the vinyl. CP 197, 200. Davis learned that the flooring that had been removed was sheet vinyl that contained asbestos, and Gee confirmed that there had been asbestos removal at the site. CP 194-95. AEI's asbestos survey showed 190 square feet of asbestos-containing vinyl in the mobile home that Davis inspected. CP 197.

Davis stated that the two methods for removing this type of vinyl flooring were (1) peeling up the vinyl or (2) cutting out the floor with the vinyl still attached. CP 195. There were clean edges, which suggested that the vinyl flooring had been cut out, not peeled off. CP 222, 236. Gee told Davis that the vinyl flooring was removed using a utility knife. CP 200. While Davis surmised that AEI probably used a saw to cut the floor in pieces (which would not be intact removal), he opined that a utility knife or ax would not have removed the flooring intact. CP 200-01, 221-22. Davis concluded that a saw or some other mechanical tool was used because the entire floor was removed, which would have released asbestos fibers into the air. CP 195, 197. Similarly, using a pry bar to remove the flooring would have ripped up material and released asbestos. CP 236-37.

<sup>3</sup> Relying on his expertise and observations, Davis ultimately concluded that the vinyl flooring was not removed intact. CP 198, 201.

The Department cited AEI for violating WAC 296-65-020(2), which requires 10-day advance notice before removing asbestos-containing material. CP 66-68, 76. AEI appealed to the Board. CP 88-89.

**C. After the Inspector Testified That AEI Could Not Have Removed the Asbestos Intact and AEI Presented No Evidence, the Board Affirmed the Department's Citation**

Granting the Department's motion for partial summary judgment, the Board judge decided that no dispute existed that AEI removed asbestos-containing material involving more than 10 linear feet or 48 square feet, the minimum amount to trigger WAC 296-65-020, and that AEI did not provide 10-day advance notice before removing the material. CP 127.

At the hearing, Davis testified that AEI could not have removed the flooring intact. CP 221-22, 236-37. AEI presented no testimony. CP 241. The Board affirmed, finding that AEI's "work was an asbestos project because mechanical methods for removal of the asbestos-containing material were used," so it had to provide 10-day advance notice. CP 20 (Finding of Fact 3). The Board found that a substantial

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<sup>3</sup> Davis's testimony referred to both a pry bar and a Burke Bar, which is a type of crowbar. CP 221-22, 235-36.

probability existed that the AEI employees would be exposed to an asbestos hazard and that if harm resulted, it would be serious physical harm that included the possibility of cancer, long-term disease, and suffering. CP 20 (Finding of Fact 4).

**D. The Superior Court Reversed**

AEI appealed to superior court, arguing that the Board's order was not supported by substantial evidence and that the Board improperly placed the burden of proof on AEI. CP 271. The superior court reversed, stating only that the Board's decision was "[b]ased upon an error of law, and [n]ot supported by substantial evidence." CP 317. The Department appeals.

**V. STANDARD OF REVIEW**

**A. The Court Interprets the Asbestos Safety Act to Further Its Goals to Protect Workers and the Public**

This case arises under the Asbestos Safety Act. RCW 49.26. This Act is enforced under the Washington Industrial Health & Safety Act (WISHA), RCW 49.17. RCW 49.26.140.

The Board has observed that the Department adopted the asbestos safety regulations to protect against serious injury or death. *In re William Dickson Co.*, No. 99 W0381, 2001 WL 1755614, at \*2 (Bd. Indus. Ins. App. Dec. 11, 2001). And so the regulations must be interpreted to further the prevention goals of the Asbestos Safety Act:

Because asbestos is a known carcinogen and because the safe level of exposure is unknown, varying from individual to individual, the Legislature has crafted a system in which the Department of Labor and Industries is directed to focus on the methodology of prevention.

*William Dickson Co.*, 2001 WL 1755614, at \*3.

Therefore, Asbestos Safety Act regulations, like WISHA regulations, should be construed “liberally to achieve their purpose of providing safe working conditions.” *Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014); RCW 49.26.010; RCW 49.17.010.

**B. The Court Reviews the Board’s Decision for Substantial Evidence**

In asbestos safety appeals, like 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 49.26.140; RCW 49.17.150; *J.E. Dunn Nw., Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

On appeal, the court reviews whether substantial evidence supports the Board’s factual findings. RCW 49.17.150(1); *Mowat Constr. Co. v. Dep’t of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr.*, 148 Wn. App. at 925.

The court does not reweigh the evidence. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015). Rather, it views the evidence in the light most favorable to the prevailing party at the Board (here, the Department). *Frank Coluccio*, 181 Wn. App. at 35.

Conclusions of law are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998). The court gives substantial weight to the Department's interpretation within its area of expertise—here, asbestos regulation. *See Frank Coluccio*, 181 Wn. App. at 36. Judicial deference to agency views is appropriate “when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise.” *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

## VI. ARGUMENT

Substantial evidence shows that AEI committed a serious violation of the 10-day advance notice requirement for asbestos removal. The general elements of a serious violation are (1) the cited standard applies; (2) the requirements of the standard were not met; (3) individuals were exposed to the violative condition; (4) the asbestos remover knew about or, through the exercise of reasonable diligence, could have known about the violative condition; and (5) there is a substantial probability that death

or serious physical harm could result. *See Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 597-98, 215 P.3d 951 (2009); RCW 49.17.180(6); RCW 49.26.120, .140.<sup>4</sup>

At superior court, AEI challenged Findings of Fact 3 and 4. CP 267. Finding of Fact 3 found that the Auburn worksite was an asbestos project because AEI used mechanical methods to remove the asbestos. CP 20. Finding of Fact 4 found that the hazard of asbestos exposure presented a substantial probability of serious physical harm. CP 20.

At superior court AEI disputed the first, third, and fifth elements of the five-part serious violation test. Substantial evidence shows that AEI removed non-intact asbestos-containing material, exposure occurred, and that exposure to asbestos presents a substantial probability of death or serious physical harm. CP 192, 205; RCW 49.26.010.<sup>5</sup>

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<sup>4</sup> This derives from the standard under WISHA, which generally applies to the Asbestos Safety Act with exceptions noted below.

<sup>5</sup> AEI did not contest the second and fourth elements at superior court. CP 267-68. Because AEI did not argue these issues below, where it had the burden of proof, it may not now raise them. RAP 2.5(a); RCW 49.17.150. In any event, substantial evidence proves all elements. CP 21. Regarding the second element, AEI does not dispute that if the 10-day rule applied, AEI did not provide the 10-day notice. CP 127. Regarding the third element, as Davis testified, removal of the flooring exposed individuals to the hazard. CP 107, 194-95, 200. Finally, regarding the fourth element, AEI had actual or constructive knowledge because AEI knew that 10-day notice had not been given. CP 107. Also, the flooring was removed in plain view and AEI's own survey said it was 43 percent asbestos. CP 197; *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011) (knowledge is established where the violation was "readily observable").

**A. Substantial Evidence Supports Finding That AEI Did Not Remove Asbestos Intact**

**1. AEI Cut the Flooring, Releasing Asbestos Fibers**

Substantial evidence shows that the vinyl flooring was not removed intact. Davis's testimony about the flooring removal is substantial evidence that AEI needed to provide notice, but failed to do so. RCW 49.26.120 requires that "[t]he department shall require persons undertaking asbestos projects to provide written notice to the department before the commencement of the project . . . ." WAC 296-65-020 requires individuals to provide 10-day advance notice of asbestos projects to ensure safe removal:

(1) Before any person or individual begins an asbestos project as defined in WAC 296-62-07722 and 296-65-003 involving more than forty-eight square feet or ten linear feet, unless the surface area of the pipe is greater than forty-eight square feet, of asbestos-containing material, written notification must be provided to the department. Notices must include [list of project details]. . . .

(2) Notices must be received by the department no later than ten days prior to the start of the project. Notices must be sent directly to the department of labor and industries regional office having jurisdiction on the project.

*See also* RCW 49.26.120.

"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. 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). An exception to this requirement is where the asbestos-containing material is removed intact because no one would be exposed to asbestos. WAC 296-62-07722(3)(b)(ii). The purpose of the advance-notice requirement is “to allow the Department . . . to conduct an inspection,” if it chooses. CP 191. A firm thus violates WAC 296-65-020 if it fails to provide 10-day advance notice of an asbestos project that is not removed intact.

AEI’s position at the Board was that asbestos-containing flooring was removed intact. This factual question goes to the heart of agency expertise as it is a heavily regulated factual matter, and the Board properly relied on the Department’s expertise. *See Hillis*, 131 Wn.2d at 396 (court relies on agency on factual matters that are “complex, technical, and close to the heart of the agency’s expertise.”).

AEI removed a large amount of asbestos-containing flooring. CP 197. Based on Davis’s testimony, a factfinder could reasonably believe that this was removed by cutting the flooring in pieces to take them out the door. CP 197-98, 200-01, 221-22, 236-37.

Davis could not imagine a way in which AEI could remove the sheet vinyl and underlying floor without having to cut through the sheet

vinyl's asbestos matrix. CP 196. Davis understood that AEI could have cut the floor around the edges with a saw and then cut the floor into smaller sections to fit through the doorway. CP 200. But that would not leave the vinyl intact. CP 201.

Davis contrasted removal of tile when it contains asbestos. CP 196. Tile can be "popped up" and removed in its entirety. CP 196. In contrast, sheet vinyl is "glued down and it doesn't come up easy." CP 196. Vinyl "can be cut out, but that's a mechanical process that would release asbestos fibers." CP 196-97.

In addition, AEI twice asked the Department for a waiver of the 10-day notice requirement, both of which the Department rejected.<sup>6</sup> CP 191-93. After Davis denied the second waiver request, Gee told Davis that the work would commence anyway. CP 192. An asbestos-removal notice was filed on the day of the inspection by the same computer that AEI had used to file previous asbestos-removal notices with the Department. CP 203. The inference that flows from this is that AEI performed the asbestos survey and then recognized that it was required 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).

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<sup>6</sup> Waivers from the advance-notice requirement are authorized at the Department's discretion under WAC 296-65-020(3) only for "large-scale, on-going projects."

## 2. AEI Relies on Unsupported Hypotheticals, Speculation, and Conjecture

Rather than offering testimony at hearing, AEI relied entirely on hypothetical questions related to intact removal of asbestos-containing material. A factfinder may not weigh hypothetical questions as evidence unless the party offering the hypotheticals establishes the necessary facts to support them. *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 did not support its hypotheticals of flooring removal with any evidence, and those hypotheticals remain conjecture, not evidence.

At superior court, AEI argued that Davis conceded “on cross-examination that [intact removal] was possible if Advance cut along the seams [of the vinyl sheets].” CP 313 (citing CP 223). However, the Board correctly determined that AEI’s “theoretical” questions on cross-examination were speculative and that “[i]nferences from these questions are not sufficient to show that the [asbestos-containing material] was removed intact.” CP 19. *State v. ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn.App. 614, 618, 829 P.2d 217 (1992). The court does not reweigh the evidence nor make new credibility determinations. *Kim v. Lakeside Adult Family Home*, No. 91536-9, 2016 WL 2756026, at \*8 (Wash. May 12, 2016). No evidence established that AEI cut along the

seams. Davis testified that finding seams or edges of the sheets is difficult, CP 236, and a utility knife alone could not remove the vinyl. CP 200-01. Even cutting along seams would not be intact removal because peeling, sawing into the floor, or removing the floor with a pry bar would release asbestos. CP 197-99.

The factfinder reasonably accepted Davis's opinion that it would not have been physically possible to cut out the floor without using some sort of tool like a saw, which means that AEI had to cut through or rip up the vinyl. CP 196-98, 236. On cross-examination, AEI suggested that it might have used an ax or pry bar. CP 221-22, 237. Davis rejected these hypotheticals, as these methods would release asbestos fibers by ripping up more vinyl or cutting through the asbestos matrix. CP 222, 236. He observed clean edges, which suggests a tool like a saw and not an ax or crowbar was used. CP 222, 236.

Davis's testimony is substantial evidence that AEI did not remove the sheet vinyl intact. He saw the worksite and relied on his experience to conclude that the only way to remove the flooring would be to cut or rip through the sheet vinyl, which means that the asbestos-containing material was not removed intact. CP 197-98, 200-01, 221-22, 236-37. Whether by ax, pry bar, saw, or utility knife, the vinyl floor was not removed intact.

**B. Substantial Evidence Supports the Finding That Workers Were Exposed to a Hazard of Non-Intact Removal Without Notification to the Department**

The Board found that workers were exposed to the hazard of non-intact asbestos removal without notification to the Department. CP 20. This is supported by substantial evidence. Generally speaking, to provide a WISHA violation, there must be a showing that workers were exposed to the violative condition. *Express Constr.*, 151 Wn. App. at 597. This requirement of employee exposure is derived from the fact that WISHA regulates the employers. RCW 49.17.060. The Asbestos Safety Act is not similarly limited.

RCW 49.26.120 requires “*persons* undertaking asbestos projects to provide written notice to the department . . . .” *See also* WAC 296-65-020(1) (applying to “any person or individual [beginning] an asbestos project”). Thus, the requirement applies to anyone, and by extension anyone can be exposed to harm.

The Legislature wanted to protect homeowners and their families from being exposed to asbestos by unscrupulous contractors. The only connection to WISHA is procedural. RCW 49.26.140. The Legislature did not want to set up a separate asbestos agency, so it had the Department administer this statute. But the Legislature was seeking to protect all Washington citizens with this legislation. This is consistent with the public

policy of protecting against asbestos exposure known to produce irreversible lung damage, which the Legislature recognizes as a hazard to “public health and safety.” RCW 49.26.010.

Here, AEI performed the asbestos removal project, CP 197, thus exposing the individuals to the hazard.

**C. Substantial Evidence Shows That Exposure to Asbestos-Containing Material Presents a Substantial Probability of Serious Physical Harm or Death**

Substantial evidence supports the finding that the removal of non-intact asbestos-containing vinyl flooring risks serious harm to the individuals exposed. CP 20 (Board’s Finding of Fact 4). A serious violation is established when “there is a substantial probability that death or serious physical harm could result.” RCW 49.17.180(6); *Express Constr. Co.*, 151 Wn. App. at 598. The substantial probability language “refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Potelco, Inc. v. Dep’t of Labor & Indus.*, 166 Wn. App. 647, 656, 272 P.3d 262 (2012) (citations omitted). This standard does not consider the probability that harm will occur, rather it looks at what would occur if harm did result. *Id.*

Asbestos causes “irreversible lung damage and bronchogenic carcinoma,” and constitutes “a hazard to the public health and safety.” RCW 49.26.010. Davis echoed the safety concern, testifying that federal

and state governments consider asbestos a serious health problem. CP 205.

Davis testified that asbestos is a known carcinogen that causes mesothelioma (cancer) and asbestosis (a debilitating lung disease). CP 191-92, 205-07. No safe level of asbestos exposure is known. CP 192.

Here, the testimony showed that using a utility knife, peeling, sawing the flooring, or using a pry bar would expose individuals to airborne asbestos. CP 195-99. Based on Davis's testimony and the Legislature's findings, the Auburn worksite removal presented a substantial probability of serious physical harm or death in the form of debilitating lung conditions. Substantial evidence supports the Board's Finding of Fact 4, and the superior court erred in ruling otherwise.

**D. The Board Did Not Err by Concluding That the Department Presented a Prima Facie Case or by Requiring AEI to Show That It Removed the Asbestos Intact**

Contrary to AEI's arguments below, the Board did not improperly shift the burden to AEI after the Department presented a prima facie case. The Department's case-in-chief presented evidence through its inspector that AEI failed to provide 10-day notice before it removed vinyl flooring containing asbestos and that AEI could not have removed the vinyl flooring intact.

Once the Department presented its evidence, the burden shifted to AEI to rebut the testimony or to prove an affirmative defense. *See Express*

*Constr.*, 151 Wn. App. at 600-01. AEI did neither—it rested its case without testimony (but relying on unsubstantiated hypothetical cross-examination questions). As the Department met its burden with sworn testimony, the Board properly looked to AEI for contradictory sworn evidence. The Board noted that “Advance did not present evidence of the manner in which the flooring was removed,” leaving only the Department’s evidence to consider. CP 18. As AEI provided no evidence, the Board properly affirmed the citation.

Although the Department proved that the flooring was not removed intact and the other elements of the notification rule and a serious violation in its case-in-chief, it did not need to.<sup>7</sup> The overall purpose and structure of the Asbestos Safety Act, and the purposes behind the notification requirements, reveal that the asbestos remover has the burden to prove the asbestos was removed intact. This is most clear from the language of the regulation defining “asbestos project” as one “where asbestos containing materials do not stay intact (including removal of vinyl asbestos floor . . .).” WAC 296-62-07722(3)(b)(i)(B). A plain reading of this definition shows that there is a presumption that vinyl flooring does not stay intact when removed. This places the burden for

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<sup>7</sup> The Department does not seek affirmative relief based on this argument not raised below, but instead briefs it to provide a complete statement of the law regarding the Asbestos Safety Act and WISHA precedent.

showing an intact removal on the firm. *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).

Otherwise, the purpose of giving the Department advance notice of the project is defeated. If a company performs a non-intact removal of asbestos without giving the Department a chance to investigate, it turns the notice requirements on their head to then let the same company that hid the project by not providing notice to say the Department cannot prove it because the Department was not there. The burden of proof as AEI formulates it encourages the asbestos remover to not give the required advance notice, and thereby frustrates the Legislature's intent.

RCW 49.26.140 directs that the administrative procedures of WISHA be used. The Legislature has not placed the burden on the Department to prove a WISHA citation; this is a judge-created law. To establish the burden of proof here 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. Placing the burden of proof on the asbestos remover furthers the remedial purposes of the Asbestos Safety Act. It goes without saying that every effort should be taken to prevent the release of fibers that present such a serious

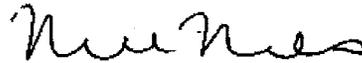
hazard to public health and safety. RCW 49.26.010.

## VII. CONCLUSION

Substantial evidence supports the Board's finding that AEI violated WAC 296-65-020, which requires 10-day advance notice before removing asbestos. Substantial evidence also supports the Board's findings about exposure and that removing asbestos presented a substantial probability of physical harm to AEI's workers. This Court should reverse the superior court's decision to the contrary and affirm the Board and the Department's citation.

RESPECTFULLY SUBMITTED this 17th day of June 2016.

ROBERT W. FERGUSON  
Attorney General



R. Marshall Morales  
Assistant Attorney General  
WSBA No. 49113  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-5348

# Appendix 1

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: ADVANCE ENVIRONMENTAL, ) DOCKET NO. 13 W0138  
2 INC. )  
3 )  
4 CITATION & NOTICE NO. 316558741 ) DECISION AND ORDER

5  
6 APPEARANCES:

7  
8 Employer, Advance Environmental, Inc., Pro Se

9  
10 Department of Labor and Industries, by  
11 The Office of the Attorney General, per  
12 Elliott S. Furst  
13

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14 The employer, Advance Environmental, Inc. (Advance), filed an appeal with the Board of  
15 Industrial Insurance Appeals on April 17, 2013, from Corrective Notice of Redetermination  
16 No. 316558741 of the Department of Labor and Industries dated March 25, 2013. In this corrective  
17 notice, the Department affirmed as modified Citation and Notice No. 316558741, dated February 7,  
18 2013, in which the Department in alleged Item No. 1-1 found one repeat serious violation of  
19 WAC 296-65-020(1); in alleged Item No. 2-1 found a serious violation of WAC 296-65-020(2); and  
20 in alleged Item No. 3-1 found a general violation of WAC 296-842-14005, for a total assessed  
21 penalty of \$9,000.00. The Department modified Item No. 1-1 of the Corrective Notice of  
22 Redetermination from a penalty of \$6,750 to \$4,500, for a total assessed penalty of \$6,750. The  
23 Department order is **AFFIRMED**.  
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29 DECISION

30 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
31 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and  
32 Order issued on June 27, 2014, in which the industrial appeals judge affirmed as modified the  
33 Department order dated March 25, 2013. In this order we address the only contested issue of this  
34 appeal; whether the Department has met its burden of proof to establish that Advance  
35 Environmental, Inc., committed the violations alleged in Citation and Notice No. 316558741.  
36  
37

38 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
39 no prejudicial error was committed. The rulings are affirmed. The Department presented the  
40 testimony of the Department inspector, which is the only testimony in this appeal. Our industrial  
41 appeals judge relied on the cross-examination of the Department inspector and vacated Items  
42 No. 1-1 and 2-1.  
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1 In the Corrective Notice of Redetermination, the Department alleged the following violations:

Citation Item:	Type:	WAC Code:	Penalty amount:
2 1-1	Repeat Serious	WAC 296-65-020(1)	\$4,500
3 2-1	Serious	WAC 296-65-020(2)	\$2,250
4 3-1	General	WAC 296-842-14005	\$0

5  
6  
7 In a WISHA appeal, the Department has the burden of proving the alleged violations and the  
8 correctness of the assessed penalty.<sup>1</sup>

9  
10 In Item No. 1-1, the Department alleged that Advance had to provide notice of its intent to  
11 remove asbestos-containing material (ACM) in the demolition of the mobile homes.  
12  
13 WAC 296-65-020(1) indicates:

14  
15 **Notification requirements.**

16 (1) Before any person or individual begins an asbestos project as  
17 defined in WAC 296-62-07722 and 296-65-003 involving more than  
18 forty-eight square feet or ten linear feet, unless the surface area of the  
19 pipe is greater than forty-eight square feet, of asbestos containing  
20 material, written notification must be provided to the department. Notices  
21 must include:

22 (a) Name and address of the owner and contractor.

23 (b) Description of the facility including size, age, and prior use of the  
24 facility.

25 (c) Amount of asbestos-containing material to be removed or  
26 encapsulated.

27 (d) Location of the facility.

28 (e) Exact starting and completion dates of the asbestos project,  
29 including shifts during which abatement work will be accomplished.  
30 These dates must correspond to the dates specified for asbestos  
31 removal in the contract. Any change in these dates or work shifts must  
32 be communicated to the department by an amended notice filed at the  
33 office where the original notice was filed.

34 • When the starting date or time changes, the amended notice must be  
35 filed no later than 5:00 p.m. on the business day prior to the starting  
36 date in the original notice and prior to the new starting date.

37 • When the completion date or time changes, the amended notice must  
38 be filed before completion of the project, and within eight hours from  
39 when the person learns that the change will occur.

40 Notice may be filed by facsimile (fax).

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46 <sup>1</sup> WAC 263-12-115(2)(b) and *In re Richard A. Castle( Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996).

1 (f) Nature of the project and methods used to remove or encapsulate the  
2 material.

3  
4 In Item No. 2-1, the Department alleged that Advance had to provide 10 days notice of its  
5 intent to remove ACM in the demolition of the mobile homes.

6 WAC 296-65-020(2) indicates:

7  
8 (2) Notices must be received by the department no later than ten days  
9 prior to the start of the project. Notices must be sent directly to the  
10 department of labor and industries regional office having jurisdiction on  
11 the project.

12 Advance maintains that it was not required to provide 10 days notice of removal of ACM  
13 because the flooring was removed intact. The Department presented no witnesses to the removal  
14 of the ACM except Mr. Davis, who saw the jobsite after the removal had been accomplished.  
15 Advance provided no witnesses or evidence about the removal of the ACM. The only evidence  
16 available is contained in the stipulated facts; the testimony of Mr. Davis; and in the two admitted  
17 exhibits.  
18  
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20  
21 Although Advance claims it removed the ACM intact and did not need to provide a 10-day  
22 notice, it is curious that two requests for a waiver of the notice were made. Advance finally filed a  
23 notice with the Department, but according to Mr. Davis that notice was filed the day of the  
24 ACM removal, which was insufficient notice. Our industrial appeals judge determined from the  
25 Summary Judgment Hearing that, "on October 18, 2012, Advance removed flooring and window  
26 putty from the two mobile homes at the Auburn project. The project involved more than 10 linear  
27 feet of ACM and/or 48 square feet of ACM."<sup>2</sup> These facts confirm that if Advance did not remove  
28 the ACM intact, then notice was required and Items No. 1-1 and 1-2 occurred.  
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32 Advance maintains that the flooring was removed intact and therefore it had no obligation to  
33 notify the Department 10 days before the removal of ACM. However, Advance did not present  
34 evidence of the manner in which the flooring was removed. The only evidence of the removal of  
35 the flooring comes from Mr. Davis, the Department inspector. Mr. Davis testified that he did not  
36 know how Advance could have removed the flooring intact. When Mr. Davis saw the demolition he  
37 noted that the sheet vinyl and the underlayment had been removed up to the walls. He did not  
38 believe it was physically possible to remove the flooring down to the floor joists without using a saw,  
39 which would be mechanical removal rather than intact removal of ACM. When responding to  
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47 <sup>2</sup> PD&O at 2.

1 whether the ACM could have been pried up using a Burke bar, Mr. Davis said he saw clean, not  
2 ragged, edges. Such edges would denote cutting rather than prying with a bar.  
3

4 The theoretical cross-examination questions about the method Advance used to remove the  
5 ACM are speculative. Inferences from these questions are not sufficient to show that the ACM was  
6 removed intact. The Department had to present its case without the benefit of an inspection of the  
7 ACM prior to its removal due to the failure of Advance to properly notify the Department prior to the  
8 project proceeding.  
9

10 The Department has proved that Advance failed to provide proper notice of an asbestos  
11 project. The eyewitness testimony of Mr. Davis is circumstantial evidence that shows that flooring  
12 containing ACM had been cut (mechanically removed) from the project location. The project  
13 involved over 10 linear feet of ACM and/or 48 square feet of ACM. Because this was not an intact  
14 removal, Advance was subject to notice requirements. These notice requirements were not met.  
15 No evidence was presented to rebut the testimony on the penalty calculations. Exhibit Nos. 1 and 2  
16 establish that Item No. 1-1 was a repeat serious violation. The evidence shows Item No. 2-1 was a  
17 serious violation involving an asbestos abatement project. The industrial appeals judge was correct  
18 in the Proposed Decision and Order that the record establishes Item No. 3-1 because Advance was  
19 temporarily in possession of an employee's medical questionnaire.  
20

21 The Department has met its burden of proof to establish that Advance Environmental, Inc.,  
22 committed the violations alleged in Citation and Notice No. 316558741, and the evidence shows  
23 that the Department's penalty calculations are correct. Corrective Notice of Redetermination  
24 No. 316558741 of the Department of Labor and Industries dated March 25, 2013, is correct and is  
25 affirmed.  
26

#### 27 FINDINGS OF FACT

- 28 1. On June 27, 2013, an industrial appeals judge certified that the parties  
29 agreed to include the Jurisdictional History in the Board record solely for  
30 jurisdictional purposes.  
31
- 32 2. On October 19, 2012, an Inspector and Supervisor of Hygiene  
33 Compliance for the Department of Labor and Industries went to the  
34 jobsite at 3611 "I" Street Northeast, in Auburn Washington. On  
35 February 7, 2013, the Department of Labor and Industries issued  
36 Citation and Notice No. 316558741. Advance Environmental, Inc.,  
37 appealed the Citation and Notice to the Department and a  
38 re-assumption hearing was held on March 19, 2013. The Department  
39 modified the citation at a re-assumption hearing, issuing Corrective  
40 Notice of Redetermination No. 316558741 on March 25, 2013.  
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1 Corrective Notice of Redetermination, 316558741, alleged in Item  
2 No 1-1, a Repeat Serious violation of WAC 296-65-020(1) with a penalty  
3 of \$4,500, in Item No. 2-1, a Serious violation of WAC 296-65-020(2)  
4 with a penalty of \$2,250, and in Item No. 3-1, a General violation of  
5 WAC 296-842-14005 with no penalty. Advance Environmental, Inc.  
6 received Corrective Notice of Redetermination No. 316558741 on  
7 March 27, 2013, and filed the appeal on April 17, 2013.

- 8  
9
- 10 3. On October 18, 2012, Advance Environmental, Inc., removed flooring  
11 and window putty from the two mobile homes at 3611 "I" Street NE,  
12 Auburn, WA 98002. The work involved the removal of over 10 linear  
13 feet and/or 48 square feet of asbestos containing material. The work  
14 was an asbestos project because mechanical methods for removal of  
15 the asbestos containing materials were used. Because the work was an  
16 asbestos project, Advance Environmental, Inc., had to provide 10 days  
17 written notice to the Department before beginning its work removing the  
18 asbestos containing material.
  - 19 4. A substantial probability existed that the Advance employees exposed to  
20 the hazard described in Items No. 1-1 and 2-1 would be injured, and that  
21 if harm resulted, it would be serious physical harm, including the  
22 possibility of cancer, long-term disease, and suffering.
  - 23 5. The severity of the hazard in Item No. 1-1 of Corrective Notice of  
24 Redetermination No. 316558741 was 6 on a scale of 1 to 6.
  - 25 6. The probability of an injury occurring due to the hazard in Item No. 1-1  
26 was 3 on a scale of 1 to 6.
  - 27 7. The employer's good faith rating was average, resulting in no  
28 adjustment to the penalty for Item No. 1-1.
  - 29 8. The Department correctly determined that the employer's history was  
30 poor, and this was a repeat violation, as Advance Environmental Inc.,  
31 had been cited for similar serious violations within the past three years.
  - 32 9. The employer, Advance Environmental, Inc., had between one and  
33 25 employees as of the time of the inspection on October 19, 2012,  
34 making it a small employer for purposes of calculating the penalty. The  
35 Department correctly reduced the base penalty by \$2,700 for this factor.
  - 36 10. The Department accurately calculated the total penalty assessed  
37 against Advance Environmental, Inc., for Item No. 1-1 as \$6,750, and  
38 correctly modified the total assessed penalty to \$4,500.
  - 39 11. The severity of the hazard in Item No. 2-1 of Corrective Notice of  
40 Redetermination No. 316558741 was 6 on a scale of 1 to 6.
  - 41 12. The probability of an injury occurring due to the hazard in Item No. 2-1  
42 was 3 on a scale of 1 to 6.
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13. Regarding Item No. 2-1, the Department correctly assessed the penalty at \$2,250. The factors for good faith, size, and history were the same as for Item No. 1-1 above.
  14. Dan Venable, owner of Advance Environmental, Inc., was temporarily in possession of, and reviewed, an employee's medical records.
  15. Regarding Item No. 3-1, a general violation, the Department correctly assessed the penalty at \$0.
  16. The Department established that the employer, Advance Environmental Inc., violated WAC 296-65-020(1), WAC 296-65-020(2), and WAC 296-842-14005.

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**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. On or about October 18, 2012, Advance Environmental, Inc., committed a repeat serious violation of WAC 296-65-020(1) as alleged in Item No. 1-1 of Corrective Notice of Redetermination No. 316558741. This violation was appropriately assigned a penalty of \$4,500 for a repeat serious violation.
3. On or about October 18, 2012, Advance Environmental, Inc., committed a serious violation of WAC 296-65-020(2) as alleged in Item No. 2-1 of Corrective Notice of Redetermination No. 316558741. This violation was appropriately assigned a penalty of \$2,250 for a serious violation.
4. Advance Environmental, Inc. committed a general violation of WAC 296-842-14005. The penalty of \$0 assessed for Item No. 3-1 was appropriate.
5. The Corrective Notice of Redetermination, No. 316558741, dated March 25, 2013, is affirmed. Items No. 1-1, 2-1, and 3-1, and the associated penalties, are correct and are affirmed.

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Dated: October 3, 2014:

BOARD OF INDUSTRIAL INSURANCE APPEALS

  
\_\_\_\_\_  
DAVID E. THREEDY Chairperson

  
\_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

# Appendix 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

ADVANCE ENVIRONMENTAL INC.,

Plaintiff/Petitioner,

NO. 15-2-15857-1 KNT

vs.

**JUDGMENT**

DIRECTOR, WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Citation and Notice No. 316558741  
BOIIA Docket No. 13-W0138

Defendant/Respondent.

**JUDGMENT SUMMARY**

- |                                  |  |
|----------------------------------|--|
| 1. Judgment Creditor:            | Advance Environmental, Inc.                            |
| 2. Judgment Debtor:              | Washington State Department of<br>Labor and Industries |
| 3. Principal Amount of Judgment: | \$0  |
| 4. Interest to Date of Judgment: | \$0  |

JUDGMENT

Page 1 of 3

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**DAVIES PEARSON, P.C.**

ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (253) 620-1500  
TOLL-FREE (800) 439-1112  
FAX (253) 572-3052



annum from the date of entry of this Judgment.

DATED this 14 Day of March, 2016.

*L. Bradburn-Jo*  
Honorable LAURA GENE MIDDAUGH

*Presented by:*  
DAVIES PEARSON, P.C.

/s/ Trevor D. Osborne  
Trevor D. Osborne, WSBA #42249  
Attorney for Petitioner

*Approved for Entry by:*  
OFFICE OF THE WASHINGTON  
STATE ATTORNEY GENERAL

/s/ Marshal Morales  
Marshal Morales, WSBA No. 49113  
Counsel for Defendant/Respondent

JUDGMENT  
Page 3 of 3

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**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (253) 620-1500  
TOLL-FREE (800) 439-1112  
FAX (253) 572-3052

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# Appendix 3

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ADVANCE ENVIRONMENTAL INC.,  
  
Plaintiff/Petitioner,  
  
vs.  
  
DIRECTOR, WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,  
  
Defendant/Respondent.

NO. 15-2-15857-1 KNT

**ORDER GRANTING  
PETITION FOR JUDICIAL  
RELIEF**

Citation and Notice No. 316558741  
BOIIA Docket No. 13-W0138

THIS MATTER came regularly before the court for hearing on Advance Environmental Inc.'s Petition for Judicial Review. The Court having considered Advance Environmental Inc.'s Petition, the Department of Labor and Industries' responsive materials, Advance Environmental Inc.'s reply materials, the record before the Board of Industrial Appeals, and the oral argument of counsel, the Court is fully advised in the premises herein.

**ORDER GRANTING PETITION FOR JUDICIAL  
RELIEF**

1 NOW, THEREFORE, the court hereby CONCLUDES that the Board of Industrial  
2 Appeal's October 3, 2014 Decision and Order regarding Corrective Notice of  
3 Redetermination No. 316558741

4 a. Item 1-1 (concerning the Tacoma, Lakewood, and Puyallup projects), is:

5 Not supported by substantial evidence

6 b. Item 2-1 (concerning the Auburn project) is:

7 Based upon an error of law, and

8 Not supported by substantial evidence

9  
10 This Court HEREBY REVERSES AND REMANDS the Board of Industrial Insurance  
11 Appeals Decision and Order and instructs the Board to vacate Citation Items 1-1 and 2-1  
12 of the Corrective Notice of Redetermination No. 316558741 and all administrative action  
13 associated therewith, including but not limited to the penalties imposed for each Item.  
14

15 This Court retains jurisdiction for the purpose of hearing Advance Environmental  
16 Inc.'s motion for attorney fees and costs, which shall be filed within 10 days of the entry  
17 of this order and decided without oral argument.

18 ENTERED this \_\_\_\_\_ day of February, 2016.

19  
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21 JUDGE LAURA GENE MIDDAUGH

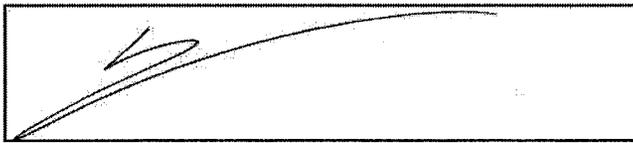
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24 **ORDER GRANTING PETITION FOR JUDICIAL**  
25 **RELIEF**

26 Page 2 of 2

King County Superior Court  
Judicial Electronic Signature Page

Case Number: 15-2-15857-1  
Case Title: ADVANCE ENVIRONMENTAL INC VS WASHINGTON  
STATE OF LABOR & INDUSTRIES  
Document Title: ORDER ON PETITION

Signed by: Laura Middaugh  
Date: 2/10/2016 2:35:16 PM



Judge/Commissioner: Laura Middaugh

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: B76F50E59A8D1D32927FDF5CC70F03F3ADB4DCA5  
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# Appendix 4

**RCW 49.26.120**

**Asbestos projects—Qualified asbestos workers and supervisor—Prenotification to department—Fire personnel.**

(1) No person may assign any employee, contract with, or permit any individual or person to remove or encapsulate asbestos in any facility unless performed by a certified asbestos worker and under the direct, on-site supervision of a certified asbestos supervisor. In cases in which an employer conducts an asbestos abatement project in its own facility and by its own employees, supervision can be performed in the regular course of a certified asbestos supervisor's duties. Asbestos workers must have access to certified asbestos supervisors throughout the duration of the project.

(2) The department shall require persons undertaking asbestos projects to provide written notice to the department before the commencement of the project except as provided in RCW 49.26.125. The notice shall include a written description containing such information as the department requires by rule. The department may by rule allow a person to report multiple projects at one site in one report. The department shall by rule establish the procedure and criteria by which a person will be considered to have attempted to meet the prenotification requirement.

(3) The department shall consult with the Washington state association of fire chiefs and may establish any additional policies and procedures for municipal fire department and fire district personnel who clean up sites after fires which have rendered it likely that asbestos has been or will be disturbed or released into the air.

[2010 1st sp.s. c 7 § 52; 1995 c 218 § 6; 1989 c 154 § 7. Prior: 1988 c 271 § 12; 1985 c 387 § 4.]

**NOTES:**

**Effective date—2010 1st sp.s. c 26; 2010 1st sp.s. c 7:** See note following RCW 43.03.027.

**Purpose—Severability—1989 c 154:** See notes following RCW 49.26.013.

# Appendix 5

## **WAC 296-62-07722**

### **Employee information and training.**

(1) Certification.

(a) Only certified asbestos workers may work on an asbestos project as required in WAC 296-65-010 and 296-65-030.

(b) Only certified asbestos supervisors may supervise asbestos abatement projects as required in WAC 296-65-012 and 296-65-030.

(c) In cases where certification requirements of chapter 296-65 WAC do not apply, all employees must be trained according to the provisions of this section regardless of their exposure levels.

(d) Certification is not required for asbestos work on materials containing less than one percent asbestos.

(2) Training must be provided prior to or at the time of initial assignment, unless the employee has received equivalent training within the previous twelve months, and at least annually thereafter.

(3) Asbestos projects.

(a) Class I work must be considered an asbestos project. Only certified asbestos workers may do this work.

(b) Only certified workers may conduct Class II asbestos work that is considered an asbestos project.

(i) The following Class II asbestos work must be considered asbestos projects:

(A) All Class II asbestos work where critical barriers, equivalent isolation methods, or negative pressure enclosures are required; or

(B) All Class II asbestos work 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).

(ii) The following Class II asbestos work is not considered an asbestos project and is excluded from asbestos worker certification:

(A) All Class II asbestos work involving intact asbestos containing materials (for example, intact roofing materials, bituminous or asphalt pipeline coatings, and intact flooring/decking materials);

(B) All Class II asbestos work of less than one square foot of asbestos containing materials; or

(C) All Class II asbestos work involving asbestos-cement water pipe when the work is done in accordance with training approved by the department through the asbestos certification program (see WAC 296-65-015(4)).

(iii) Asbestos work involving the removal of one square foot or more of intact roofing materials by mechanical sawing or heavy equipment must meet the following requirements:

(A) Only certified asbestos workers may conduct mechanical sawing of intact roofing material;

(B) Noncertified asbestos workers may handle roofing dust, material and debris;

(C) Operators of heavy equipment (such as track hoes with clam shells and excavators) do not need to be certified asbestos workers in the removal or demolition of intact roofing materials.

(c) Only certified asbestos workers may conduct all Class III and Class IV asbestos work that is considered an asbestos project.

(i) The following asbestos work is considered an asbestos project:

(A) All Class III asbestos work where one square foot or more of asbestos containing materials that do not stay intact;

(B) All Class IV asbestos work where one square foot or more of asbestos containing materials that do not stay intact; or

(C) All Class III and Class IV asbestos work with pipe insulation.

(ii) Except for a project involving pipe insulation work, any project involving only Class III or Class IV asbestos work with less than one square foot of asbestos containing materials is not considered an asbestos project.

(4) Training requirements for asbestos work that is not considered an asbestos project or is excluded from asbestos worker certification.

(a) Class II asbestos work.

(i) Employers must provide eight-hours of training to employees who perform asbestos work on one generic category of asbestos containing materials (ACM). When performing asbestos work in more than one category of asbestos containing materials, additional training must be used to supplement the first eight hour training course.

(ii) The training course must include:

- Hands-on training that applies to the category of asbestos containing materials,
- Specific work practices and engineering controls related to the category of asbestos containing materials present as specified in WAC 296-62-07712 , and
- All the minimum elements of subsection (5) of this section.

(b) Class III asbestos work (maintenance and custodial work in buildings containing asbestos containing materials).

(i) Employers must provide training with curriculum and training methods equivalent to the sixteen-hour operations and maintenance course developed by the EPA. (See 40 C.F.R. 763.92 (a)(2).) For those employees whose only affected work is Class II work as described in subsection (4)(a)(i) of this section, employers must meet this 16-hour training requirement or provide training that meets the eight hours Class II requirements in subsection (4)(a) of this section.

(ii) Sixteen hours of training must include:

- Hands-on training in the use of respiratory protection and work practices, and
- All the minimum elements of subsection (5) of this section.

(c) Class IV asbestos work (maintenance and custodial work in buildings containing asbestos-containing materials).

(i) Employers must provide at least two hours of training with curriculum and training methods equivalent to the awareness training course developed by the EPA.

(ii) Training must include:

- Available information concerning the location of PACM, ACM, asbestos-containing flooring or flooring materials where the absence of asbestos has not been certified,
- Instruction on how to recognize damaged, deteriorated, and delimitation of asbestos containing building materials, and
- All of the minimum elements of subsection (5) of this section.

(5) The training program must be conducted in a manner which the employee is able to understand. The employer must ensure that each employee is informed of the following:

- (a) The health effects associated with asbestos exposure;
- (b) The relationship between smoking and exposure to asbestos producing lung cancer;
- (c) Methods of recognizing asbestos and quantity, location, manner of use, release (including the requirements of WAC 296-62-07721 (1)(c) and (2)(b) to presume certain building materials contain asbestos), and storage of asbestos and the specific nature of operations which could result in exposure to asbestos;
- (d) The engineering controls and work practices associated with the employee's job assignment;
- (e) The specific procedures implemented to protect employees from exposure to asbestos, such as appropriate work practices, housekeeping procedures, hygiene facilities, decontamination procedures, emergency and clean-up procedures (including where Class III and IV work is performed, the contents "Managing Asbestos In Place" (EPA 20T-2003, July 1990) or its equivalent in content), personal protective equipment to be used, waste disposal procedures, and any necessary instructions in the use of these controls and procedures;
- (f) The purpose, proper use, and limitations of protective clothing;
- (g) The purpose and a description of the medical surveillance program required by WAC 296-62-07725;
- (h) The content of this standard, including appendices;
- (i) The names, addresses and phone numbers of public health organizations which provide information, materials, and/or conduct programs concerning smoking cessation. The employer may distribute the list of such organizations contained in Appendix I, to comply with this requirement;
- (j) The requirements for posting signs and affixing labels and the meaning of the required legends for such signs and labels; and
- (k) The purpose, proper use, limitations, and other training requirements for respiratory protection as required by chapter 296-842 WAC (see WAC 296-842-11005, 296-842-16005, and 296-842-19005).

(6) The employer must also provide, at no cost to employees who perform housekeeping operations in a facility which contains ACM or PACM, an asbestos awareness training course to all employees who are or will work in areas where ACM and/or PACM is present who work in buildings containing asbestos-containing materials, which must, at a minimum, contain the following elements:

- Health effects of asbestos,
- Locations of ACM and PACM in the building/facility,
- Recognition of ACM and PACM damage and deterioration,
- Requirements in this standard relating to housekeeping, and
- Proper response to fiber release episodes.

Each such employee must be so trained at least once a year.

(7) Access to information and training materials.

(a) The employer must make a copy of this standard and its appendices readily available without cost to all affected employees.

(b) The employer must provide, upon request, all materials relating to the employee information and training program to the director.

(c) The employer must inform all employees concerning the availability of self-help smoking cessation program material. Upon employee request, the employer must distribute

such material, consisting of NIH Publication No. 89-1647, or equivalent self-help material, which is approved or published by a public health organization listed in Appendix I, WAC 296-62-07751.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060. WSR 05-03-093, § 296-62-07722, filed 1/18/05, effective 3/1/05. Statutory Authority: RCW 49.17.010, [49.17].040, [49.17].050, and 49.26.130. WSR 00-06-075, § 296-62-07722, filed 3/1/00, effective 4/10/00. Statutory Authority: RCW 49.17.040, 49.17.050, 49.26.040 and 49.26.130. WSR 99-17-026, § 296-62-07722, filed 8/10/99, effective 11/10/99. Statutory Authority: RCW 49.17.010, [49.17].040 and [49.17].050. WSR 99-10-071, § 296-62-07722, filed 5/4/99, effective 9/1/99. Statutory Authority: RCW 49.17.040, [49.17.]050 and [49.17.]060. WSR 97-01-079, § 296-62-07722, filed 12/17/96, effective 3/1/97.]

# Appendix 6

## **WAC 296-65-020**

### **Notification requirements.**

(1) Before any person or individual begins an asbestos project as defined in WAC 296-62-07722 and 296-65-003 involving more than forty-eight square feet or ten linear feet, unless the surface area of the pipe is greater than forty-eight square feet, of asbestos containing material, written notification must be provided to the department. Notices must include:

- (a) Name and address of the owner and contractor.
- (b) Description of the facility including size, age, and prior use of the facility.
- (c) Amount of asbestos-containing material to be removed or encapsulated.
- (d) Location of the facility.

(e) Exact starting and completion dates of the asbestos project, including shifts during which abatement work will be accomplished. These dates must correspond to the dates specified for asbestos removal in the contract. Any change in these dates or work shifts must be communicated to the department by an amended notice filed at the office where the original notice was filed.

- When the starting date or time changes, the amended notice must be filed no later than 5:00 p.m. on the business day prior to the starting date in the original notice and prior to the new starting date.

- When the completion date or time changes, the amended notice must be filed before completion of the project, and within eight hours from when the person learns that the change will occur.

Notice may be filed by facsimile (fax).

(f) Nature of the project and methods used to remove or encapsulate the material.

(2) Notices must be received by the department no later than ten days prior to the start of the project. Notices must be sent directly to the department of labor and industries regional office having jurisdiction on the project.

(3) The director may waive the prenotification requirement upon written request of an owner for large-scale, on-going projects. In granting such a waiver, the director will require the owner to provide prenotification if significant changes in personnel, methodologies, equipment, work site, or work procedures occur or are likely to occur. The director will further require annual resubmittal of such notification.

(4) The director, upon review of an owner's reports, work practices, or other data available as a result of inspections, audits, or other authorized activities, may reduce the size threshold for prenotification required by this section. Such a change will be based on the director's determination that significant problems in personnel, methodologies, equipment, work site, or work procedures are creating the potential for violations of this chapter.

(5) Emergency projects which disturb or release asbestos into the air must be reported to the department within three working days after commencement of the project in the manner otherwise required under this chapter. The employees, the employees' collective bargaining representative or employee representative, if any, and other persons at the project area must be notified of the emergency as soon as possible by the person undertaking the emergency project. A notice describing the nature of the emergency project must be clearly posted adjacent to the work area.

(6) Incremental phasing in the conduct or design of asbestos projects or otherwise conducting or designing asbestos projects of a size less than the threshold exemption

specified in subsection (1) of this section, with the intent of avoiding the notification requirements, is a violation of this chapter.

[Statutory Authority: RCW **49.17.040**, **49.17.050**, **49.26.040** and **49.26.130**. WSR 99-17-026, § 296-65-020, filed 8/10/99, effective 11/10/99. Statutory Authority: RCW **49.17.040**, [49.17.]050 and [49.17.]060. WSR 96-05-056, § 296-65-020, filed 2/16/96, effective 4/1/96. Statutory Authority: Chapter **49.17** RCW. WSR 89-21-018 (Order 89-10), § 296-65-020, filed 10/10/89, effective 11/24/89; WSR 87-24-051 (Order 87-24), § 296-65-020, filed 11/30/87. Statutory Authority: RCW **49.17.050(2)** and **49.17.040**. WSR 87-10-008 (Order 87-06), § 296-65-020, filed 4/27/87. Statutory Authority: SSB 4209, 1985 c 387. WSR 85-21-080 (Order 85-30), § 296-65-020, filed 10/22/85.]

NO. 74857-2-I

**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Appellant,

v.

ADVANCE ENVIRONMENTAL,  
INC.,

Respondent.

CERTIFICATE OF  
SERVICE

DATED June 17, 2016, at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served Department of Labor and Industries Brief of Appellant and Certificate of Service to counsel for all parties on the record in the below described manner:

**Via Electronic Filing**

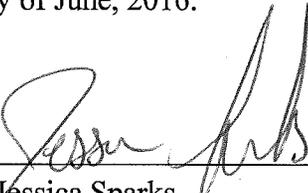
Richard D. Johnson, Court Administrator/Clerk  
Court Of Appeals, Division I  
600 University Street  
Seattle, WA 98101

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Via First Class United States Mail, Postage Prepaid to:

Trevor Osborne  
Davies Pearson, PC  
PO Box 1657  
Tacoma, WA 98401

DATED this 17<sup>th</sup> day of June, 2016.

  
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Jessica Sparks  
Legal Assistant