

IN THE COURT OF APPEALS OF IOWA

No. 1-547 / 10-1367
Filed November 9, 2011

**JEFFRY INTLEKOFER and
WHITE EAGLE CONTRACTING, INC.,**
Petitioners-Appellants,

vs.

**DIVISION OF LABOR SERVICES,
IOWA WORKFORCE DEVELOPMENT,**
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Jeffrey Intlekofer and White Eagle Contracting, Inc. appeal the district court's ruling on judicial review affirming the commissioner's imposition of civil penalties for performing asbestos abatement without an Iowa Code chapter 88B license or permit. **REVERSED.**

Nicholas Strittmatter of Strittmatter Law Firm, Monticello, for appellants.

Thomas J. Miller, Attorney General, and John R. Lundquist, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

In a separate filing this date, we disagreed with a district court's ruling upholding the labor commissioner's finding that Jeffry Intlekofer acted in a supervisory capacity on an asbestos abatement project in June 2007 at Kenwood Elementary School in Cedar Rapids, Iowa; vacated and remanded for reconsideration of the assessment of a \$45,000 civil penalty against the asbestos contractor, American Testing and Training doing business as Affordable Hazards Removal, Inc. for allowing unlicensed workers to remove asbestos; and affirmed the revocation of Affordable Hazards' asbestos permit. See *Am. Testing & Training, Inc. v. Div. of Labor Servs.*, No. 10-1466 (Iowa Ct. App. Nov. 9, 2011) [*Affordable Hazards*].

The *Affordable Hazards* administrative record was incorporated into this proceeding. For the reasons stated in *Affordable Hazards*, and the additional conclusions herein, we reverse the civil penalties assessed against Jeffry Intlekofer and White Eagle Contracting, Inc.

I. Background Facts and Proceedings.

We have set out much of the factual background in *Affordable Hazards*, including Jeffry Intlekofer and his brother Stephen Intlekofer's twenty-plus-year history in the area of asbestos removal, their various corporate entities, and both Jeffry Intlekofer and his corporate entities' violations of asbestos removal regulations.

In this companion case, the labor commissioner acting for the Division of Labor Services of the Iowa Department of Workforce Development (division), issued a notice of civil penalty to Jeffry Intlekofer proposing a civil penalty of

\$10,000 pursuant to Iowa Code section 88B.12(1) (2007) (“A person or business entity who willfully violates a provision of this chapter or a rule adopted pursuant to this chapter shall be assessed a civil penalty of not more than five thousand dollars for each violation.”). In the notice, the commissioner asserted that prior to 2001, Intlekofer had been issued “numerous licenses pursuant to Iowa Code Chapter 88B”; Intlekofer’s July 25, 2001 application for an inspector license was denied; Intlekofer’s October 1, 2001 application for a contractor supervisor license was denied; Intlekofer’s January 31, 2002 application for a project designer license was denied; these denials were subsequently affirmed; Intlekofer’s September 23, 2002 application for a contractor supervisor license was denied; this denial was subsequently affirmed; and that on June 13 and 15, 2007, Intlekofer performed work requiring a chapter 88B license.¹

In Intlekofer’s answer, he denied that he had performed work requiring a license, and among other things asserted “the state had failed to define the duties of a supervisor.” He further asserted, “At the times in question Jeff Intlekofer was employed by White Eagle Contracting, as its president, soliciting work and not visiting personally.”

The commissioner then issued a notice of civil penalty to White Eagle Contracting, Inc. alleging in part that “[o]n June 13, 15, and 29, 2007, Jeffery Intlekofer, president of White Eagle Contracting, Inc., entered an asbestos containment area during active asbestos abatement to supervise employees who were performing asbestos abatement work.” The commissioner further alleged,

¹ Iowa Code section 88B.6(2)(a) provides: “An individual is not eligible to be or do any of the following unless the person obtains a license from the division: (1) A contractor or supervisor, or to work on an asbestos project.”

“Through the actions of its sole recorded director, officer, and agent, White Eagle Contracting, Inc., performed asbestos abatement work without the asbestos permit required by Iowa code Chapter 88B.”² The commissioner alleged White Eagle willfully violated chapter 88B and proposed a civil penalty of \$15,000 pursuant to Iowa Code section 88B.12(1).

Intlekofer and White Eagle contested the proposed civil penalties, and the matters were consolidated and heard by the same administrative law judge (ALJ) who heard the *Affordable Hazards* contested case. The administrative record from *Affordable Hazards* was incorporated by consent of the parties and additional evidence was presented.

The ALJ issued a proposed decision finding in part:

Appellant Intlekofer knew and understood the asbestos licensing requirements based on his work experience while he had the necessary licensing to do it. The boundaries of doing asbestos work that required licensing should have become clearer to him, as a result of hi[s] contesting and being denied that licensing d[ue] to a violation history. [Intlekofer] acknowledged his licensing deficiency when he entered into an agreement with Affordable [Hazards Removal, Inc.] to be a salesman for the asbestos removal business.

[Intlekofer] “crossed the line” when he transitioned from being a salesman to the company representative when Affordable’s bid for the asbestos removal/Kenwood project was accepted, and the contract was executed. The contract states that [Intlekofer] is the Affordable representative, and Shive-Hattery employees used his cell phone number to contact him regarding work progress and inspection issues. At the very least, [Intlekofer] was an “asbestos worker” that required licensing . . . as he responded to a Shive-Hattery report of an inspection problem by reporting to the Kenwood project with an HVAC, entered the containment area with instruction to the crew/Supervisor Walsh on the “means and methods” for asbestos removal, to the point of saying to Walsh that

² Section 88B.3A(2) provides: “A business entity engaging in the removal or encapsulation of asbestos shall hold a permit for that purpose unless the business entity is removing or encapsulating asbestos at its own facilities.”

he was fired, which activity occurred on June 13 and/or June 15, 2007. . . .

. . . .

It is apparent that [Intlekofer] and Affordable attempted to “skirt” Respondent’s licensing requirements by cloaking [Intlekofer’s] work in a job title, salesman. As a salesman, [Intlekofer] could have monitored work progress through other Affordable representatives or by telephone communications that did not necessitate on-site visits. [Intlekofer] went to the Kenwood project in response to an inspection failure, so he could personally observe any deficiency by entering the containment area, and correct the problem at his supervision.

With respect to White Eagle, the ALJ concluded the business entity “did not have a permit when its company president entered the asbestos containment area of the Kenwood project to perform asbestos work on June 13, June 15, and June 29, 2007.”

The ALJ noted Intlekofer’s extensive personal and corporate violation history and stated it was “apparent that the Appellant intentionally chose to disregard the licensing regulations for financial gain,” and the history of penalties imposed “have failed to deter Appellant when it comes to observing state regulations.” The ALJ affirmed the proposed civil penalties assessed to Intlekofer and White Eagle.

On appeal to the labor commissioner, Intlekofer and White Eagle contended the ALJ improperly ruled that mere presence in a containment area required a license, and ignored evidence supporting their contention that Intlekofer did not require a license to be on site. The commissioner adopted the ALJ’s ruling with additional reasoning, including the following:

At some point after being denied several requests for an asbestos license, Appellant Jeffrey Intlekofer formed a new company, Appellant White Eagle Contracting, Inc., whose primary source of income is revenue from Affordable Hazards [Removal]

Inc, a company owned by Appellant Jeffrey Intlekofer's brother, Stephen. As noted by [ALJ] Stephenson, the Intlekofer brothers on behalf of their respective companies, Affordable Asbestos [sic³] and White Eagle Contracting, reached an agreement in late 2006 to conduct business together. [ALJ] Stephenson cited numerous ways Appellant Jeffrey Intlekofer was involved with the project: (a) he participated in the pre-bidding process on behalf of Affordable [Hazards]; (b) he was designated as Affordable's contact on the school contract; (c) he instructed workers in the asbestos containment area; (d) he was reimbursed for abatement crew expenses and materials; and (e) by his own testimony, he entered the Kenwood containment area "to make sure the work crew was doing what they're supposed to be doing in the time frames and meeting the work schedule." Appellants fail in their appeal to refute [the] detailed findings that Jeffrey Intlekofer and his company, White Eagle, were engaged in asbestos abatement activities at the Kenwood site without the required license and permit, merely quibble that there was insufficient evidence of the exact words Mr. Intlekofer uttered when he was in the containment area.

Intlekofer and White Eagle thereafter sought judicial review by the district court. The district court concluded there was substantial evidence to support the finding that Jeffrey Intlekofer and White Eagle willfully violated chapter 88B due to Intlekofer's work on the Kenwood project, which included information in the record showing that Intlekofer "was aware of the scope of the work that he could perform without a license," yet engaged in activities described in the testimony of Chad Siems, Colleen Bowers, and Michael Muhlenbruch. The court concluded the penalties assessed were "not so harsh and unconscionably disproportionate to the offense that the Court could find the agency abused its discretion," and affirmed the agency's action. See *State ex rel. Miller v. DeCoster*, 596 N.W.2d 898, 904 (Iowa 1999).

³ Affordable Asbestos Removal, Inc. was an asbestos removal corporation owned by Jeffrey Intlekofer, whose permit revocation we affirmed in *Affordable Asbestos Removal, Inc. v. Iowa Division of Labor Services*, No. 03-2115 (Iowa Ct. App. Apr. 28, 2005) (*Affordable Asbestos II*). Affordable Hazards is the asbestos removal entity at issue.

II. Standard of Review.

Factual determinations of an agency are binding upon us if supported by substantial evidence. Iowa Code § 17A.19(10)(f) (2009). “The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made’ by the agency.” *Ludtke v. Iowa Dep’t of Transp.*, 646 N.W.2d 62, 65 (Iowa 2002) (citation omitted).

The application of the law to the facts is vested in the commissioner. See *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). We reverse only if the commissioner’s application was “irrational, illogical, or wholly unjustifiable.” *Id.*; Iowa Code § 17A.19(10)(l). “This standard requires us to allocate some deference to the commissioner’s determinations, but less than we give to the agency’s findings of fact. *Larson Mfg.*, 763 N.W.2d at 850–51 (citing Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 70 (1998) (“[W]hen an agency is delegated discretion in applying a provision of law to specified facts the scope of review appropriately applied by courts must be deferential because the legislature decided that the agency expert[ise] justifies vesting primary jurisdiction over that matter in the discretion of the agency rather than in the courts.”)).

III. Discussion.

For the reasons that follow, we agree with Intlekofer and White Eagle that the evidence presented does not support the finding that Intlekofer required a license to perform the actions he took at the asbestos project.

On appeal, Intlekofer and White Eagle complain in various ways that the commissioner erred in finding Jeffry Intlekofer needed an asbestos license to be on site. They argue entering a containment area is not alone sufficient to require a license; Intlekofer's statements to the work crew on June 15, 2007, "did not constitute advice or instruction"; simply delivering a vacuum to the worksite did not require a license; pre-bid activity did not bring Intlekofer within licensing requirements; and allowing employees of Affordable Hazards to use his credit card was irrelevant.

As we said in *Affordable Hazards*, the licensing of individuals and permitting of business entities are key aspects of asbestos removal regulation. Pursuant to chapter 88B, except in very limited circumstances,⁴ no individual is eligible "to work on an asbestos project," and no business may remove asbestos, unless authorized to do so by the division of labor services of the department of workforce development.⁵ The problem presented here with regard to Jeffry Intlekofer, unlike the situation of the six employees discussed in *Affordable Hazards*, is what it means to supervise workers on an asbestos project and whether that language applies to the actions taken by Jeffry Intlekofer.

A. *Statutory provisions.* A "license" is "an authorization issued by the division permitting an individual person, including a supervisor or contractor, to

⁴ See Iowa Code §§ 88B.3A(2) (exempting from permit requirement a business entity "removing or encapsulating asbestos at its own facilities"), .6(3) (exempting from license requirement "an employee employed by an employer exempted from the permit requirement" and properly trained).

⁵ Section 88B.1(4) defines the "division" as the "division of labor services of the department of workforce development created under section 84A.1." The department of workforce development was "created to administer the laws . . . related to . . . job placement and training, employment safety, labor standards, and workers' compensation." Iowa Code § 84A.1(1).

work on an asbestos project” Iowa Code § 88B.1(5).⁶ A “permit” is “an authorization issued by the division permitting a business entity to remove or encapsulate asbestos.” *Id.* § 88B.1(6). A “contractor/supervisor” is defined by Iowa Administrative Code rule 875-155.1 as “a person who supervises workers on asbestos projects.” The term “supervise” is not further defined in the statute.

Since the license requirement as to Intlekofer covers the broad phrase, “supervises workers on asbestos projects,” our job is to determine whether the commissioner’s specific findings as to Intlekofer’s activities on the Kenwood school project actually are supported by the evidence. In so doing, we examine each of the listed activities to determine whether they constitute “supervis[ing] workers on asbestos projects.” In the instance case, the commissioner adopted ALJ Stephenson’s written findings, saying:

[ALJ] Stephenson cited numerous ways Appellant Jeffrey Intlekofer was involved with the project: (a) he participated in the pre-bidding process on behalf of Affordable [Hazards]; (b) he was designated as Affordable’s contact on the school contract; (c) he instructed workers in the asbestos containment area; (d) he was reimbursed for abatement crew expenses and materials; and (e) by his own testimony, he entered the Kenwood containment area “to make sure the work crew was doing what they’re supposed to be doing in the time frames and meeting the work schedule.”

⁶ At the time of the events at issue, an “asbestos project” was defined as “an activity involving the removal or encapsulation of asbestos.” Iowa Code § 88B.1(1).

This definition was revised, effective July 1, 2007, and now reads:

“Asbestos project” means an activity involving the removal or encapsulation of asbestos and affecting a building or structure. “Asbestos project” includes the preparation of the project site and all activities through the transportation of the asbestos-containing materials off premises. “Asbestos project” includes the removal or encapsulation of building materials containing asbestos from the site of the building or structure renovation, demolition, or collapse.

2007 Iowa Acts ch. 125, §1.

We first note that the licensing requirement does not apply to an individual who is simply “involved” in an asbestos project. Our statutes require a license to work on or supervise workers on an asbestos project.

As stated above, a “contractor/supervisor” is defined by administrative rule 875-155.1 as “a person who supervises workers on asbestos projects.” The term “supervise” is not further defined in the statute or corresponding regulations. Therefore, “[w]e may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage” to determine its meaning. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996); *accord Hameed v. Brown*, 530 N.W.2d 703, 707 (Iowa 1995) (noting dictionary definition for “supervise”). “Supervise” means to “oversee with the powers of direction and decision the implementation of one’s own or another’s intentions” or “to coordinate, direct, and inspect continuously and at first hand the accomplishment of.” Webster’s Third New International Dictionary 2296 (P. Gove ed. 1993).

B. Commissioner’s findings.

1. *Intlekofer participated in the pre-bidding process—“a.”* The division points to no statute or regulation that prohibits an unlicensed person from attending meetings or reviewing the proposed job site in order to obtain information necessary to determine the scope of a project for which a bid has been solicited. Although the record suggests that Jeff Intlekofer may have been invited to prepare a bid for the project because of his previous asbestos removal experience in the Cedar Rapids school district, his failure to qualify for a current license does not alter his ability to create a bid for approval or disapproval by Affordable Hazards Removal.

2. *Intlekofer was designated as Affordable's contact on the school contract—"b."* As a contact person, Intlekofer attended progress meetings where the project was discussed. Like the pre-bid meeting, this function was as an intermediary between the crew and the school district, and did not entail the removal of asbestos or any hands-on function that might require a license. Because the staff of Shive-Hattery and the school district had worked before with Intlekofer, when he had a license and was a project manager, there is some confusion about his role on this job. However, no evidence supports the commissioner's findings that being a "contact person" requires a license.

3. *Intlekofer was reimbursed for abatement crew expenses and materials—"d."* The record supports the commissioner's finding that Intlekofer was the employee of Affordable who went to the store to purchase items necessary for the work, that he used his personal finances to purchase the items, and was reimbursed by Affordable. However, nothing supports a finding that this activity requires a license.

Activities "a", "b", and "d" are undisputed factually, and each reflects Intlekofer's experience in the scheduling and scope of a contract to remove asbestos, and his familiarity with the Cedar Rapids schools and Shive-Hattery. None could reasonably be considered a violation of the supervisory licensing requirements of chapter 88B.

4. *Intlekofer "instructed workers in the asbestos containment area"—"c."* The activity labeled "c" in the commissioner's list—whether Intlekofer "instructed" workers—presents the fighting factual issue, which was strenuously

disputed. We therefore examine the record carefully to see if the commissioner's conclusion is supported by substantial evidence.

The division argues the testimony of Shive-Hattery employees Siems, Bowers, and Muhlenbruch, as well as the project reports compiled by Shive-Hattery, provide substantial evidence to support the commissioner's finding. We review that testimony and those reports, along with the testimony of Affordable Hazards' supervisor on site, Kent Walsh. Intlekofer was at the job site three times in June—on the 13th, the 15th, and the 29th during the eight-week project. The issue is whether the record supports the finding that he instructed workers while he was there.

We examined the record in detail in *Affordable Hazards* and repeat those paragraphs here.

June 13, 2007. Muhlenbruch checked on Affordable Hazards the following day. Wearing his Tyvek suit and respirator, Muhlenbruch entered the containment area. Jeffry Intlekofer was in the containment wearing a respirator, which did not surprise Muhlenbruch “[b]ecause previous projects for this company, he was in containment, and served as the project manager.” Muhlenbruch noted in the daily report that new workers were present on site and licenses were checked. He also wrote:

Workers have started to remove the mastic and are completing the stairwell. Setup continues on 1st Floor. There's one light where the source of power can't be found and remains on in future containment. The un-licensed workers are not in containment. About 25 ft² of tile on stairwell left. Jeff Intlekofer was on site walking through jobsite. Photos of containment were taken. Kent says he thinks he's on target to be completed by noon on Friday for visual inspection/clearances.

June 15, 2007. On Friday June 15, Siems and Bowers were on site to “perform the final visual and then the air clearance testing” for that phase of the contract. Siems explained:

We failed Kent on the visual, because there is [sic] all kinds of mixed cellulose on the floor. There were pieces of plaster. So it wasn't visibly clean, so we had to fail them on that inspection.

Anytime I fail an inspection, I contact the person in charge, so I gave Jeff Intlekofer a phone call and let him know that we were failing the containment, and that if they could clean it up quick enough, we could still do the air quality testing and get it off to the lab in time.

They did not have a HEPA vacuum on site to do the —perform the cleaning necessary, and Jeff showed up about half an hour later and brought that HEPA vacuum with him.

He was upset that we were failing it, and he wanted to take a look. He went into the containment with no respirator, no suit, and wanted to see why they failed. So I took a flashlight and I laid it on the floor, and I showed him the reasoning for failing him.

At that time he and Kent got into an argument, and he said he fired—he yelled at Kent that he was fired, and Kent said that, “You can't fire me. I quit.”

Siems and Bowers both completed daily reports for June 15. Siems' report indicates he contacted “Jeff Intlekofer (PM),”⁷ who was informed of the inspection failure. Bowers' report includes the following note: “While we were containment inspecting, Jeff Intelkofe [sic] walked in to the containment. He was not wearing any protective measures and he is not licensed. He should not have walked into regulated space.”

Clearance was given after further clean up and the project proceeded to the next phase.

June 29, 2007. On June 29, 2007, Affordable Hazards' workers were “doing final cleanings.” Muhlenbruch arrived to find “Jeff Intlekoffer [sic] was on

⁷ Siems testified PM meant “project manager.”

site.” Intlekofer was in the containment area wearing a respirator. Muhlenbruch could not remember what Intlekofer said, but he “seemed to be instructing the crew about cleaning—making sure containment was clean.”

In addition to these observations from *Affordable Hazards*, we note Muhlenbruch’s testimony and report for June 13 make it clear that Kent Walsh was the supervisor, and that Intlekofer’s activity that day was merely walking through the site.

With regard to June 15, Siems testified that it was Walsh who supervised the workers, and operated the vacuum delivered to the site by Intlekofer. Intlekofer did not supervise Walsh in cleaning the containment space, although he was angry that the inspection was not going to clear that day and told Walsh he should be fired. Siems testified that Intlekofer was rarely at the job site and that his “primary role was at the prebid, the preconstruction, the first couple progress meetings.”

Bowers was asked the following questions about the argument between Walsh and Intlekofer on the 15th:

Q. Did the fact that Jeff was yelling at the supervisor, does that mean that he was supervising Kent? A. He told him he was fired, so I would say yes, that qualifies that he was supervising Kent.

Q. What did he say to Kent? A. They were yelling back and forth, and he was very upset that the containment wasn’t visually clear, and he was yelling at him. They were yelling back and forth.

Q. If he was supervising Kent, he didn’t do a very good job of it, did he? A. Apparently not.

Walsh, the supervisor at the school site, testified that he spoke to Intlekofer every day or every other day to talk about scheduling and sales. About the incident on June 15, Walsh stated Intlekofer “told me I should get out of there

or where I was to go” but Walsh replied, “Well, I don’t accept it,” and “went on [his] business to get that floor ready.” Walsh knew Intlekofer did not have the authority to fire him.

On June 29th, at the end of the project, witness Muhlenbruch testified Intlekofer was instructing employees on the “means and methods” of cleaning up, but that he could not remember what Intlekofer said. In his daily project report for June 29, Muhlenbruch wrote that Intlekofer was on site “checking things out.”

No witness testified that Intlekofer instructed anybody to do anything on the 13th. On June 15th, Intlekofer had a disagreement with the supervisor Walsh when he brought a HEPA vacuum to the site because he had been informed that the floor was not sufficiently clean to pass a visual inspection. On June 29th, Intlekofer was on site and Muhlenbruch characterized Intlekofer as instructing on “means and methods” but could not testify to any particular instruction or words

5. Intlekofer’s testimony. Finally, the commissioner points to Intlekofer’s testimony in finding “e,” interpreting it as supervising workers. Intlekofer stated he entered the Kenwood containment area “to make sure the work crew was doing what they’re supposed to be doing in the time frames and meeting the work schedule.”

Although the commissioner and the district court find this statement of Intlekofer’s to be a confession to supervision, in context the words Intlekofer used describe a monitoring and scheduling function and not supervision. The daily reports and the testimonies of Muhlenbruch, Siems, Bowers, and Walsh make it clear that Walsh was the supervisor and Intlekofer was the company representative on site. Checking on progress is not supervision. While the

commissioner correctly concluded that Intlekofer's work went beyond that of a salesperson, it did not morph into supervision of the work as a result of the incidents listed in the agency decision.

The division now concedes there is no requirement in chapter 88B that one have a license to go into a containment tent or to enter a job site, and the expert witnesses so testified. However, all of the witnesses were questioned by the division about whether individuals who enter a containment "typically have a license" and whether they "know of any reason why they did not need a license" to enter the containment, which is indicative of the assumption that merely entering the containment qualifies as license-only work.

The division now argues that Intlekofer was a "de facto supervisor" contending that the "overt act" of entering the containment, accompanied by monitoring progress on the job, encouraging prompt completion of the job so as to avoid liquidated damages and giving instructions on "means and methods of removal and cleanup" were the salient facts. We disagree. Except to the extent that the record supports the finding that Intlekofer gave instructions to workers on means and methods of asbestos removal, his actions did not require a license. And the record does not support such a finding.

The commissioner states that Intlekofer and his company, White Eagle, "quibble" over the exact words used by Intlekofer when he was in the containment area, concluding Intlekofer was supervising workers on that date. We disagree. The penalties imposed and the consequences to White Eagle and Intlekofer make it reasonable to insist on more than mere characterizations. See Iowa Code § 88B.12 (authorizing a \$5000 civil penalty for each willful violation

and criminal penalties for further willful violations). The commissioner must find a willful violation of the statute. See *id.*; cf. *Insituform Techs., Inc. v. Emp't Appeal Bd.*, 728 N.W.2d 781, 800 (Iowa 2007) (“The difference between a serious and willful violation of a workplace safety standard is analogous to the difference between negligence and recklessness in tort law.”); *IBP, Inc. v. Iowa Emp't Appeal Bd.*, 604 N.W.2d 307, 321 (Iowa 1999) (“A willful violation of a workplace safety standard exists when the violation is committed with intentional disregard of, or plain indifference to, the requirements of the regulation. Thus, something more than just negligence on the part of the employer is required to support a finding of a willful violation” (citation omitted)).

In *Affordable Hazards*, we reversed the commissioner’s finding that Intlekofer did act in a supervisory capacity on the Kenwood project, and we reaffirm that finding here. The commissioner’s ruling was thus irrational, illogical, or wholly unjustifiable on this aspect of its ruling. See Iowa Code § 17A 19(10)(f); *Larson Mfg.*, 763 N.W.2d at 850.

IV. Issues Not Preserved.

We do not address appellants’ claims that the ALJ erred in quashing the subpoena addressed to division employee Steven Slater, and in denying their motion for directed verdict. Neither claim was raised before the commissioner or the district court by these parties;⁸ we do not address claims made for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

⁸ While the issue was raised by *Affordable Hazards* in its case, the issue was not raised by *White Eagle* or *Jeffrey Intlekofer*.

Additionally, appellants fail to cite any authority in support of their claim, which we deem as a waiver of the issue. See Iowa R. App. P. 6.903(2)(g).

V. Conclusion.

We conclude the commissioner erroneously concluded Intlekofer needed a license to be on site. We therefore reverse the district court judgment affirming the commissioner's decision.

REVERSED.

Vogel, P.J., concurs; Danilson, J., concurs in part and dissents in part.

DANILSON, J. (concurring in part and dissenting in part)

I concur in respect to the claims the majority concluded were not properly preserved for our review. However, I part ways from the majority and respectively dissent in regard to the determination that Intlekofer was not required to be licensed. For that reason, I would affirm and conclude the commissioner's ruling was not irrational, illogical, or wholly unjustifiable.

There is no dispute Intlekofer was involved in the asbestos project at the Kenwood Elementary School in June 2007. The issue is whether his "involvement" rose to the level of requiring an asbestos license. The law provides that no person shall serve as a supervisor, or otherwise work on an asbestos project unless properly licensed. Iowa Code § 88B.6(2)(a). "Asbestos project" is defined "as an activity involving the removal or encapsulation of asbestos and affecting a building or structure." *Id.* § 88B.1(1). Such project also "includes the preparation of the project site and all activities through the transportation of the asbestos-containing materials off the premises," as well as "the removal or encapsulation of building materials containing asbestos from the site of a building or structure renovation, demolition, or collapse." *Id.* Considering this broad definition of "asbestos project," clearly the legislature intended any supervisor or worker involved in any of the activities of the project, including transportation of materials off-site, to be licensed.

Here, Intlekofer was identified in the contract between Affordable Hazards and the school district as Affordable Hazards' representative or "contact person" for the asbestos project. The evidence reflects Intlekofer was in communication almost daily with the job supervisor, Kent Walsh; was at the containment area on

three occasions during the project (including one occasion when Intlekofer delivered a HEPA vacuum to the site for the purposes of clean-up, in addition to berating the job supervisor); served as a conduit of information to the president of Affordable Hazards, Stephen Intlekofer; was contacted by Shire-Hattary employees to provide updates on work in progress and inspection issues; and advanced abatement crew members' job expenses through the use of his credit card. And although it is disputed, there was evidence Intlekofer instructed abatement crew members at the containment area.

I conclude this evidence amply constitutes substantial evidence to support the commissioner's findings, and accordingly, such findings are binding upon us. *See City of Des Moines v. Emp't Appeal Bd.*, 722 N.W.2d 183, 195 (Iowa 2006). It is not necessary to discern whether Intlekofer was a supervisor or worker on an asbestos project, because in either case, a license was required. Moreover, the agency alternatively levied both allegations against him. The agency clearly did not accept Intlekofer's contention that he merely served as a salesman and contract bidder for Affordable Hazards as credible, and there is substantial evidence for such determination. I also conclude the agency's imposition of penalties upon Intlekofer and his company, White Eagle, was not an abuse of discretion. For these reasons, I would affirm.