

IN THE COURT OF APPEALS OF IOWA

No. 1-550 / 10-1466
Filed November 9, 2011

AMERICAN TESTING & TRAINING, INC.
d/b/a AFFORDABLE HAZARDS REMOVAL, INC.,
Petitioner-Appellant,

vs.

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

Appeal from the Iowa District Court for Jones County, Marsha A. Bergan,
Judge.

American Testing and Training, Inc., conducting asbestos removal as Affordable Hazards Removal, Inc., appeals the district court's ruling affirming the labor commissioner's assessment of \$45,000 in civil penalties and the revocation of its asbestos permit. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

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

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.

American Testing and Training, Inc., which conducted asbestos removal as Affordable Hazards Removal, Inc., appeals the district court's ruling affirming the labor commissioner's assessment of a \$45,000 civil penalty and revocation of its asbestos permit. We affirm the revocation of Affordable Hazards' permit. We disagree with the district court's ruling upholding the commissioner's conclusion that Jeffrey Intlekofer was required to hold an asbestos supervisor's license and therefore remand with directions to remand to the commissioner for reconsideration of the civil penalty to be imposed.

I. Statutory Framework.

We begin with a general outline of the applicable statutory provisions to provide context.

Asbestos removal and encapsulation is governed by Iowa Code chapter 88B.¹ The labor commissioner² is empowered to administer the chapter, see Iowa Code § 88B.3(1); adopt rules "necessary to carry out the provisions of the chapter," *id.* § 88B.3(2); and "prescribe fees for the issuance and renewal of licenses and permits." *Id.* § 88B.3(3).

Central to asbestos removal regulation is the licensing of individuals and permitting of business entities engaged in asbestos removal. Pursuant to chapter 88B, except in very limited circumstances,³ no individual is eligible to

¹ All references are to the 2007 Iowa Code unless otherwise noted.

² Iowa Code section 88B.1(3) defines the "commissioner" as the "labor commissioner or the commissioner's designee."

³ 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).

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.⁴ See *id.* §§ 88B.3A (“A business entity engaging in the removal or encapsulation of asbestos shall hold a permit for that purpose”), .6(2) (“An individual is not eligible [to work on an asbestos project] unless the person obtains a license from the division”).

A “license” is “an authorization issued by the division permitting an individual person, including a supervisor or contractor, to work on an asbestos project” *Id.* § 88B.1(5).⁵ A “permit” is “an authorization issued by the division permitting a business entity to remove or encapsulate asbestos.” *Id.* § 88B.1(6).

The division may “revoke a permit . . . if the permittee . . . [e]mploys or permits an unlicensed or untrained person to work on an asbestos project.” *Id.* § 88B.8(4). Moreover, a “person or a business entity who willfully violates a provision of this chapter or a rule adopted pursuant to this chapter shall be

⁴ 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).

⁵ At the time of the events at issue an “asbestos project” was defined as “an activity involving the removal or encapsulation of asbestos.” *Id.* § 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.

assessed a civil penalty of not more than five thousand dollars for each violation.”
Id. § 88B.12(1).

II. Background Facts and Proceedings.

A. Intlekofer's business entities. Jeffrey Intlekofer was formerly the sole officer and stockholder of Affordable Asbestos Removal, Inc. See *Affordable Asbestos Removal, Inc. v. Iowa Dep't of Natural Res.*, No. 01-1217 (Iowa Ct. App. Feb. 28, 2003) (*Affordable Asbestos Removal I*). In *Affordable Asbestos Removal I*, we upheld a monetary penalty imposed for improper asbestos removal. *Id.* We stated, “The evidence in the record regarding the adverse health effects of exposure to asbestos and particularly the extensive history of prior violations by Affordable Asbestos and its predecessors provides substantial support for the penalties finally determined.” *Id.* at *6 (omitted footnote notes “at least twenty previous Notice of Violation letters, two administrative orders, and six referrals to the Iowa Attorney General for failure to adequately deal with RACM [regulated asbestos-containing material]”).

Affordable Asbestos Removal previously had been known as Economy Solar Corporation. See *Affordable Asbestos Removal, Inc. v. Iowa Div. of Labor Servs.*, No. 03-2115 (Iowa Ct. App. Apr. 28, 2005) (*Affordable Asbestos Removal II*). Both Jeffrey and his brother, Stephen Intlekofer, were shareholders of Economy Solar Corporation. Economy Solar Corporation evolved into ESCORP (owned by both Jeffrey and Stephen), and later into ESCORP Associates, Ltd. ESCORP Associates, Ltd. was sold to Arnold Olson in the “mid-nineties.” Jeffrey had been an employee of ESCORP Associates, Ltd. See *id.* “All of these companies were engaged in the business of removing asbestos, and they

received asbestos contractor permits from the Iowa Division of Labor Services.

[Jeffry] Intlekofer had a contractor supervisor asbestos license.” *Id.* at *1.

In 1999 the Division notified Affordable Asbestos [and Jeffry, collectively “Affordable Asbestos,” see *id.* at 1 n.2] that it intended to deny its permit renewal applications. The parties subsequently entered into a settlement agreement that provided the permit[s] would be granted, but Affordable Asbestos was required to hire Michael Buelow as a consultant to visit each project and to file a written report with the Division concerning the same. Further, Affordable Asbestos was to have no further violations of applicable state or federal standards for asbestos removal.

Id.

But Affordable Asbestos had violations after the settlement agreement and it had not hired Buelow for every project. See *id.* In *Affordable Asbestos Removal II*, we upheld the denial of Affordable Asbestos’s and Jeffry Intlekofer’s asbestos renewal applications, concluding there was “substantial evidence in the record to show Affordable Asbestos had continuing serious violations of asbestos removal laws.” *Id.* at *3.

Stephen is the president and chief executive officer of American Testing and Training, Inc., which has provided asbestos removal training and testing since the 1980s. American Testing and Training also does business as Affordable Hazards Removal, which has, for the past several years, performed asbestos removal. Stephen stated Jeffry “used to be an employee” of Affordable Hazards Removal, but they “had a falling out” in “ ’05, ’06, somewhere in there” and “I wanted to get some distance from him because he was not widely revered by the State of Iowa.”

After leaving the employ of Affordable Hazards Removal, Jeffry started a company called White Eagle Contracting. Jeffry is the sole shareholder and employee of White Eagle Contracting.

According to Stephen, Affordable Hazards Removal (hereinafter "Affordable Hazards") contracted with White Eagle Contracting "to do asbestos bidding, to do surveys to find out what jobs were available, to bid those jobs, and then after a while he [Jeffry] started scheduling jobs." Stephen said, "it became almost necessary that he [Jeffry] schedule the jobs because" "timing is absolutely critical. . . . [I]t's extremely important to know where every project is so that you know the next one is going to start in a timely fashion." Affordable Hazards "sends him off to . . . represent the company, and he'll sign in as Jeff Intlekofer, Affordable Hazards Removal, because White Eagle does not remove asbestos, but he does represent our company in that sales position." Stephen "kept" Jeffry because "he has a very close relationship with several public or quasi public entities like the Cedar Rapids Schools."

B. The 2007 Kenwood asbestos project. Affordable Hazards became aware of the Cedar Rapids School District's Kenwood elementary school project when it received a solicitation from Shive-Hattery. Affordable Hazards gave the solicitation to Jeffry, who went to the site, attended a January 2007 pre-bid meeting (signing in as "Affordable Hazards"), and prepared a bid. Affordable was the successful bidder for three phases of asbestos removal on the Kenwood project, and Jeffry Intlekofer was listed as Affordable Hazards' "representative" on the resulting contract with the school district. Jeffry represented Affordable Hazards at a later preconstruction meeting, as well as at progress meetings.

Shive-Hattery employees Chad Siems and Michael Muhlenbruch knew Jeffry as the project manager of several asbestos projects that Shive-Hattery had worked on previously with Affordable Asbestos. Siems was aware of a “name change” from Affordable Asbestos to Affordable Hazards; Jeffry never told Siems he worked for White Eagle Contracting.

Shive-Hattery was the architect/engineer on the project and the project administrator. Upon receiving notification from Affordable Hazards that work was ready for inspection, Shive-Hattery was to conduct an inspection to determine whether the work phase had been substantially completed. When work was satisfactorily completed, Shive-Hattery could receive an application for payment from Affordable Hazards, which would be forwarded to the school district for remittance.

Pursuant to the Kenwood contract, Affordable Hazards was to abate the plaster ceilings, floor tiles, and mastic (adhesive that secures tile) on the second, first, and lower levels, working from the upper floors to the lower floors in three phases beginning on June 4, 2007. The contract set out the dates each phase was to be completed, with a final completion date of August 10, 2009. The contract further provided for liquidated damages at the rate of \$1500 for each calendar day of delay beyond a scheduled completion date.

Kent Walsh was Affordable Hazard’s site supervisor at the Kenwood project. Walsh talked to Jeffry “once a day, maybe every other day” to inform him how the work was progressing. Affordable Hazards arrived on the job site in early June 2007 and prepared the initial asbestos removal “containment” area:

[W]e went in and precleaned the floor, the second floor. We HEPA vacced and wiped down all horizontal surfaces and faced the floors.

After that we set the classrooms up with poly critical on the windows. Any boards, any speakers, any vents, things like that, were all covered.

After that's done, then we hang up—We hang two sheets of poly on the walls. We layer a layer on the floor. Even though the floors were coming out, we still protected them.

June 6, 2007. Siems, an environmental specialist for Shive-Hattery, holds an asbestos supervisor license, an asbestos project designer license, and an asbestos inspector license. On June 6, 2007, Siems visited the Kenwood site. Siems observed that Affordable Hazards had “finished completing their containment.” Six Affordable Hazard employees signed in before entering the containment—Araddie Alexander, Jose Romos, David Meyer, Gerardo Martinez, Nicky Navarro, and Santana Lopez. They had begun removing ceiling plaster. Siems asked the Affordable Hazard employees for their asbestos licenses. Walsh explained to Siems that the six persons noted above—all of whom speak little English—had licenses, but had not received them yet. Walsh contacted Stephen Intlekofer and Debra Eiben, the office manager for Affordable Hazards, and informed them that Siems raised the issue of licensing.

Stephen knew asbestos removal was to begin that day and had inquired of Eiben on the morning of June 5 if the “Mexicans” had their licenses yet. Eiben informed Stephen “the Mexicans assured me that everything was handled and they would be in any day now.” Stephen knew that was not sufficient and telephoned the division to ask about the status of the employees’ license applications. He was informed there were problems and the person with whom

he spoke said she would have to talk with her supervisor. He asked that she call him back “if there’s going to be a problem.”

After receiving the call from Walsh about the “problem with the licenses,” Stephen said he instructed Walsh to reassign the employees to other work.

Over the next several days, Affordable Hazards arranged for some of the workers to have physicals from a doctor who would notarize their suitability to work, conducted respirator mask fit tests, and resubmitted the workers’ applications for Iowa asbestos worker licenses with the required fees. All of the workers but Jose Ramos had current documentation that they had completed either their initial multi-day asbestos training or single day “refresher” course in Spanish. Jose Ramos traveled to Indiana to attend refresher training conducted in Spanish on June 9, 2007.

June 7, 2007. Colleen Bowers is a civil engineer for Shive-Hattery. She holds asbestos supervisor and asbestos inspector licenses. Bowers was at the Kenwood site on June 7 and observed that Affordable Hazards was removing ceiling plaster. The daily report indicated that licenses had not been checked: the workers were “the same guys from yesterday.” There are no names listed in the area of the form entitled: “contractor’s employees signed in.”

June 8, 2007. The same six employees were again working on the site on June 8, 2007.

June 11, 2007. On June 11, 2007, Shive-Hattery civil engineer Muhlenbruch visited the Kenwood site. Muhlenbruch holds an asbestos supervisor license. In his June 11 daily project report, Muhlenbruch noted the “majority of ceiling has been removed” and “Kent Walsh is only worker signed in

on employee log-in sheet.” However, other workers were present and Walsh gave Muhlenbruch their names, which Muhlenbruch indicated in the daily report: “Kent, Santana, David, Gerardo, Nick, and Jose.” Their licenses were not checked.

June 12, 2007. Muhlenbruch was again on site on Tuesday, June 12. He observed workers were in the containment removing floor tile. Siems called Muhlenbruch and informed him that “there were workers not to be in containment due to they were not licensed.” Siems then called Walsh and informed him six unlicensed workers needed to be removed from containment. Siems also called Jeffry (because Jeffry “was the contact person for Affordable”) to inform him Shive-Hattery was requiring the unlicensed workers to leave.” The daily report notes, “Jeff Intlekofer was also called and notified that Araddie Alexander, Jose Ramos, David Meyer, Gerardo Martinez, Nicky Navarro, and Santana Lopez do not have a valid license and that they need to be removed from the containment.”

Later that day, Muhlenbruch returned to the containment and noted “all un-licensed workers were gone.” Walsh and two licensed workers were present. Walsh was informed “that containment must be available for visual inspection and clearance by noon this Friday or liquidated damages begin.”

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),”⁶ 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

⁶ Siems testified PM meant “project manager.”

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 19, 2007. Muhlenbruch checked on Affordable Hazards on June 19. There were several workers in the containment removing ceiling texture: four or five of the workers in containment “were ones that had previously been removed.” According to the daily report, Walsh informed Muhlenbruch “that their licenses are applied for and that ‘Des Moines’ (Iowa Labor Workforce?) has the paperwork.” With an arrow pointing to “paperwork,” Muhlenbruch noted that “Chad Siems is pursuing info.”

June 20, 2007. Siems returned to the Kenwood site on June 20 and reported that plaster ceilings were being abated. Siems instructed Walsh to remove Gerardo Ortega from the containment area “since he did not have a license nor was he listed on the IDNR website as being in process.” “Santana Lopez, David Mayers [sic], Jose Rodriguez, and Nick Navarro” were also signed in and were not asked to leave.

June 21, 2007. Iowa asbestos worker licenses for Araddie Alexander, Jose Romos, David Meyer, Gerardo Martinez, Nicky Navarro, and Santana Lopez were hand-delivered to the job site in Cedar Rapids on June 21, 2007.

June 29, 2007. On June 29, 2007, Affordable Hazards’ workers were “doing final cleanings.” Muhlenbruch arrived to find “Jeff Intlekoffer [sic] was on site.” Jeffery was in the containment area wearing a respirator and “seemed to be instructing the crew about cleaning—making sure containment was clean.”

C. The notice of penalty and intent to revoke permit. On October 25, 2007, the labor commissioner, acting for the division, issued a notice of intent to revoke Affordable Hazards' asbestos permit and impose a \$45,000 civil penalty due to nine willful violations of chapter 88B at Kenwood. The notice asserted Affordable Hazards employed or permitted unlicensed workers to work at Kenwood school performing activities that require an asbestos license on June 6, June 7, June 8, June 11, June 12, June 13, June 15, June 19, and June 20,⁷ and a \$5000 penalty for each willful violation was appropriate. In addition to the current allegations, the notice listed numerous previous asbestos work practice violations dated between 1995 and 2007⁸ as "grounds for revocation" of Affordable Hazards' asbestos permit.

In a supplemental notice of hearing, the division added two factual allegations: Affordable Hazards employed or permitted Jeffrey Intlekofer to work on June 29, 2007, at Kenwood school, "perform[ing] activities that require an asbestos contractor supervisor license, but the denial or revocation of his license was upheld in [*Affordable Asbestos I*]"; and Affordable Hazards "designated Jeffrey Intlekofer as its contact" with the school district "at a time when Jeffrey Intlekofer had no license to perform asbestos work in Iowa."

⁷ The allegations of June 6, 7, and 8, noted six unlicensed employees each day: Araddie Alexander, Jose Ramos, David Meyer, Gerardo Martinez Ortega, Nicky Navarro, and Santana Lopez. On June 11, 12, and 19 the allegations noted five unlicensed employees: Jose Ramos, David Meyer, Gerardo Martinez Ortega, Nicky Navarro, and Santana Lopez. On June 13 and 15, the allegations related only to Jeff Intlekofer, and on June 20, only to Gerardo Martinez Ortega.

⁸ In May 2008, a final order regarding settlement agreement resulting in a \$2000 penalty was filed concerning an Iowa Occupational Safety and Health Bureau (IOSHAB) citation by the commissioner, which asserted three items of safety standard violations by Affordable Hazards on June 21, 2007, at the Kenwood project.

Affordable Hazards contested the proposed civil penalty and permit revocation.

D. Contested case. A hearing was held before an administrative law judge (ALJ) on August 20 and 21, 2008. The ALJ quashed two subpoenas requested by Affordable Hazards: one addressed to division employee, John Haan, a senior industrial hygienist; and one to deputy labor commissioner Steve Slater. Affordable Hazards had argued that Haan “may well have some information that may support [the] contention” that Affordable Hazards “has been singled out” by the division and is “subject to heightened scrutiny,” and Slater’s testimony “may be relevant on the issue of how—what the policy is of the Department of Labor to seek a suspension or denial or a cancellation of one’s permit.” At the hearing, the ALJ did not allow Affordable Hazards to submit an exhibit purporting to show that the division permitted another asbestos remover to continue to operate despite “many more violations in the past than has Affordable,” concluding the comparison was “irrelevant and immaterial.”

The ALJ issued a proposed decision concluding the division had established Affordable Hazards did commit nine willful violations of chapter 88B.8

by employing six unlicensed asbestos workers to encapsulate and remove asbestos at the Kenwood project during a period from June 6, 2007 to June 20, 2007, and by allowing an unlicensed asbestos company representative, Jeffry Intlekofer, to perform supervisory duties in the containment area of the worksite that required asbestos licensing as asserted by the division.

The ALJ wrote:

Appellant/President Stephen Intlekofer knew on June 6 . . . he had six unlicensed asbestos workers on the Kenwood asbestos removal project [W]hen Shive-Hattery employees requested the workers to produce asbestos licenses on June 12, they did not

do so, and after confirming with Respondent [division] it had issued no such licenses, they requested Supervisor Walsh to remove the workers, and Siems informed [Affordable Hazards] contract representative Jeffry Intlekofer.

President Intlekofer knew on June 11 and June 12 that his workers were not licensed as he was completing fitness tests and signing checks for the payment and submission of asbestos licensing applications to the [division].

[Affordable Hazards] named Jeffry Intlekofer as contract representative and he became the “contact” person for Shive–Hattery employees who were monitoring progress. Affordable knew that Jeffry Intlekofer was not asbestos licensed, and yet it allowed him to go to the worksite, enter the containment area, bring cleaning equipment, and give instructions to supervise Walsh about the work progress to the point of stating he was fired for a failure of job performance. [Affordable Hazard’s] excuse that he was just checking on the work schedule progress is not supported by the evidence.

President Stephen Intlekofer contended at the hearing that his company made a good faith effort to have his workers licensed, and that the [division] was “out to get him” by thwarting his effort. Intlekofer’s contentions are not supported by the evidence and his companies have displayed a repeated pattern of disregard of the [division’s] regulatory provisions and that of the Iowa Department of Natural Resources.

What arguably may have been inadvertence and/or negligence, became willful, when President Intlekofer knew his workers were not asbestos licensed, and yet, he chose not to pull them off the Kenwood project. A reasonable inference may be made that [Affordable Hazards] faced a stiff liquidated damage penalty (\$1500 per day) for failure to timely complete the Kenwood project work, and it chose to risk the asbestos permit to work rather than replace the unlicensed workers.

The ALJ observed the commissioner considered each day an unlicensed worker worked at the project was a violation and, consequently, the civil penalty could have been \$180,000. Citing the intentional disregard of licensing regulation for financial gain, the avoidance of the contract liquidated damages, and Affordable Hazards’ corporate officers “history of paying civil penalties,” and the failure of those penalties “to deter the Appellant when it comes to observing

state regulations,” the ALJ affirmed the notice of civil penalty in the amount of \$45,000 with intent to revoke Affordable Hazards’ permit.

E. Appeal to commissioner. On appeal to the labor commissioner, Affordable Hazards asserted numerous claims of error, including statutory misinterpretation, ignoring or disregarding evidence, error in quashing two subpoenas of two division employees, and refusing to consider that the division imposed less severe sanctions on another asbestos removal company.

The Iowa Workforce Development Division of Labor Commissioner David Neil affirmed, adopting the ALJ’s findings of fact and decision, with some additional reasoning and conclusions of law. The commissioner summarized six areas of the appeal claims and found them “fatally flawed as follows”:

(1) merely receiving training in another state does not comport with Iowa Code Section 88B.8(4), authorizing revocation of an asbestos permit for letting an “unlicensed or untrained person to work on an asbestos project;”

(2) Affordable had seven unlicensed workers either supervising (Jeffry Intlekofer) or performing asbestos removal (six workers) at the Kenwood site during a period of June 6 through June 29, 2007, even though Affordable President Stephen Intlekofer[] knew the workers were unlicensed and that some of the license application paperwork was submitted after work had begun—a blatant violation of Iowa Code section 88B.6;

(3) the fact that one worker had a license from another state is insufficient for complying with Iowa’s licensing requirement for all workers found at section 88B.6;

(4) Jeffry Intlekofer’s actions went beyond “sales” when he entered the containment area bringing equipment and giving instructions to workers;

(5) the lengthy history of violations by Appellant[] demonstrates an intentional pattern of disregarding the law, and there is no mandatory “cut off” in the applicable law, Iowa Code Section 88B.8, for consideration of previous violations in assessing the willfulness of Appellant’s conduct; and

(6) the fact that the material contained small amounts of asbestos and/or that high levels of contaminant were not found at

the work site does not excuse failure to meet the licensing requirements of the law.

The commissioner rejected Affordable Hazards' request that he dismiss all charges, or eliminate or reduce the monetary penalty. The commissioner also denied Affordable Hazards' applications to amend decision and for rehearing.

F. Judicial review. Affordable Hazards then sought judicial review in the district court asserting the same twenty-five grounds for relief as had been presented to the commissioner. The district court considered written and oral arguments, specifically enumerated and summarized Affordable Hazards' claims of error, and affirmed. The district court concluded:

[T]here is substantial evidence in the record to support the agency's finding that Affordable violated Iowa Code section 88B.8 by employing six unlicensed persons to encapsulate and remove asbestos at the Kenwood School abatement project between June 6, 2007, and June 20, 2007. Further, this Court concludes there is substantial evidence in the record to support the agency's finding that Affordable violated Iowa Code section 88B.8 by permitting Jeffrey Intlekofer, an unlicensed company representative, to direct and supervise asbestos-related work on the abatement project site and within the containment area without possessing any current Iowa asbestos licenses. The substantial evidence is found in the testimony of Mr. Siems, Ms. Bowers and Mr. Muhlenbruch, as well as in the project reports compiled by Shive-Hattery. The Court construes Iowa Code sections 88B.6 as requiring that an individual actually obtain a license prior to working on an asbestos project within the containment area. In this case, there is substantial evidence to support the finding that the six employees of Affordable and Jeffrey Intlekofer did not have current Iowa asbestos licenses when the asbestos-related work (including Jeffrey Intlekofer's supervision) was performed within the containment area. The agency's decision should be upheld on these issues.

. . . The ALJ did not err in quashing the subpoenas for Mr. Slater and Mr. Haan. When inquiry into an agency decision to assess penalties and revoke the license of an entity by an agency is permitted, "it is 'limited to information concerning the *procedural steps* that may be required *by law* and does not extend to inquiries into the mental processes of an administration which, as being part of the judgment process, are not discoverable.'" [*State v.*]

DeCoster, 608 N.W.2d [785, 790 (Iowa 2000)]; *Cf. U.S. v. Morgan*, 313 U.S. 409, 422 (1941).

This Court concludes that the testimony sought by Affordable from Mr. Slater and Mr. Haan appears to be based on inquiries into the mental processes each individual made regarding the decision to penalize Affordable. Consequently, Affordable was not permitted Further, any testimony would have been irrelevant and immaterial.

The court upheld the civil penalty and revocation of Affordable Hazard's permit as "not so harsh and unconscionably disproportionate to the offense that the Court could find the agency abused its discretion." Affordable Hazards appeals the district court's ruling.

III. Standard of Review.

When reviewing the decision of the district court on judicial review, "we must apply the standards set forth in [the Iowa Administrative Procedure Act] and determine whether our application of those standards produces the same results as reached by the district court." The Iowa Administrative Procedure Act allows the district court to reverse or modify an agency's decision only if it is incorrect under a ground specified in the Act, and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10).

City of Des Moines v. Emp't Appeal Bd., 722 N.W.2d 183, 189 (Iowa 2006) (citations omitted); see *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010).

IV. Merits.

A. Affordable Hazards employed or permitted unlicensed persons to work on an asbestos project. Affordable Hazards first contends the penalty was unwarranted and an abuse of discretion because five of six of its workers⁹ were

⁹ Affordable states Santana Lopez, David Meyer, Nicki Navarro, Gerardo Ortega, and Herardi Alexander had all completed their asbestos removal training requirements prior to the dates of the asserted violations. Affordable admits that Jose Ramos did not

effectively licensed upon completing their asbestos training in Indiana (where training was conducted in Spanish) and the sixth had a current license in another state. Affordable relies upon section 88B.6(1)(c), which provides that “a license is valid for one year from the completion date of the required training.” Affordable argues the purposes of the asbestos removal chapter are sufficiently met upon completion of training and that the license issuance is a technicality that offers no more protection to the worker or the public. Affordable’s argument ignores the fact that there must *be* a license before a license can be “valid for one year from the completion date of the required training” under section 88B.6(1)(c).

Iowa Code section 88B.6(2)(a) clearly provides, “An individual is not eligible [to be a ‘supervisor’ or ‘work on an asbestos project’¹⁰] *unless the person obtains a license from the division.*” (Emphasis added.) There is only one exception to the license requirement, which is not applicable here. See Iowa Code § 88B.6(3) (“A license is not required of an employee employed by an employer exempted from the permit requirement of section 88B.3A, subsection 2 [removing or encapsulating asbestos at its own facilities], if the employee is trained on appropriate removal or encapsulation procedures . . .”).

Moreover, training alone is not sufficient for the issuance of a license. See *id.* § 88B.6(2). To be eligible to obtain a license under section 88B.6(2), the applicant “must have successfully completed training,” *id.* § 88B.6(2)(b); “met other requirements as specified by the division by rule,” *id.* § 88B.6(2)(b); Iowa

complete his required asbestos training until three days after the asbestos removal project began.

¹⁰ See Iowa Code § 88B.6(2)(a)(1).

Admin. Code r. 875-155.6; and “been examined by a physician within the preceding year and declared . . . physically capable of working while wearing a respirator.” Iowa Code § 88B.6(2)(c).

We note, too, section 88B.6 states the asbestos removal worker or supervisor must have obtained a “license from the division”; a license from another state is not sufficient. See *also* Iowa Admin. Code r. 875-155.6(1) (requiring use of Iowa forms and stating “[f]orms from other states may not be substituted for the Iowa form or any part thereof”). Thus, even if worker Ramos was licensed in Michigan and Ohio—as asserted by Affordable Hazards—that licensing is not sufficient under the code. Without a license obtained from the division, a person is not eligible to work on an asbestos project in Iowa. Iowa Code § 88B.6(2).

Affordable Hazards complains in various ways that the commissioner erred in finding Jeffry Intlekofer needed an asbestos license to be on site. It argues there is no finding of what type of license was required. However, we note the commissioner found Jeffry was acting in a supervisory capacity and thus the clear implication is that the commissioner ruled Jeffry needed a supervisor’s license.

The commissioner’s findings are binding upon us if supported by substantial evidence. See *City of Des Moines*, 722 N.W.2d at 195. “Substantial evidence” means

the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1).

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. 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” means to “oversee with the powers of direction and decision the implementation of one’s own or another’s intentions”). “Supervise” means “to coordinate, direct, and inspect continuously and at first hand the accomplishment of.” Webster’s Third New International Dictionary 2296 (P. Gove ed. 1993).

The commissioner determined Jeffry was acting in a supervisory capacity. We conclude the finding is not supported by the testimony of Walsh, Muhlenbruch, Bowers, and Siems. Even though Jeffry was Affordable Hazards’ representative and contact person, Walsh stated he spoke with Jeffry almost daily to discuss progress of the project, and when there was a failure of inspection, Jeffry was contacted and quickly arrived on site with necessary equipment to remedy the reported problem; we disagree that these actions on the part of Jeffry constitute supervision of asbestos workers. As we have detailed in the companion case of *Intlekofer v. Division of Labor Services*, No. 10-1367 (Iowa Ct. App. Nov. 9, 2011), filed with this opinion, we reversed the district court’s ruling affirming the commissioner’s finding that Jeffry Intlekofer

required a license to perform the actions he took at the Kenwood asbestos project on June 13, 15, and 29.

In adopting the findings of the ALJ, the commissioner found “there was at least one unlicensed person in the containment area on each of ten days” between June 6 and June 29, 2007, and Affordable’s president, Stephen Intlekofer “knew on June 6” when he called the division “that he had six unlicensed workers on the Kenwood asbestos removal project.” The commissioner also found it was “apparent” that Affordable “intentionally chose to disregard the licensing regulations for financial gain.” Further, Affordable had a “history of paying civil penalties,” which penalties had “failed to deter” Affordable. The commissioner concluded the \$45,000 civil penalties were “appropriate and reasonable when weighed against the willful disregard of Respondent’s regulatory scheme, as motivated by a desire for pecuniary gain.” With the exception of the commissioner’s findings with regard to Jeffry Intlekofer, we find no reason to interfere with the commissioner’s application of law to the facts. *See Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004) (“An agency’s application of the law to the facts can only be reversed if we determine such an application was ‘irrational, illogical, or wholly unjustifiable.’ Iowa Code § 17A.19(10)(m). Applying this ‘irrational, illogical, or wholly unjustifiable’ standard, we are likewise giving ‘appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.’ Iowa Code § 17A.19(11)(c).”)

B. The commissioner did not abuse its discretion in its evidentiary rulings.

Affordable Hazards also contends it was improperly denied the right to call certain witnesses and to introduce evidence about the division's failure to sanction another asbestos remover. However, no authority is cited in support of its contentions and the issues are thus waived. See Iowa R. App. P. 6.903(g)(3).

Even if we would conclude the claims were not waived, the ALJ did not err in quashing the subpoenas of the division employees as agency decision makers are not to be examined about their decision-making processes. See *State ex rel. Miller v. DeCoster*, 608 N.W.2d 785, 790 (Iowa 2000), and cases cited therein.

The ALJ refused the offer of an exhibit purporting to show that another asbestos contractor was not sanctioned, even though it had more violations than Affordable Hazards. The ALJ ruled the exhibit was irrelevant and immaterial. Under section 88B.8, the division “*may deny, suspend, or revoke a permit or license*” (Emphasis added.) Because the imposition of sanctions by the division is discretionary, see *Stephenson v. Furnas Electric Co.*, 522 N.W.2d 828, 830 (Iowa 1994), and the decision makers are not subject to examination about that decision-making process, see *DeCoster*, 608 N.W.2d at 790, whether the division has or has not imposed sanctions on another asbestos contractor would offer little relevant information to the case at hand.¹¹ We find no abuse of

¹¹ The division cites to *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655, 84 L. Ed. 2d 714, 723 (1985), in support of the proposition that an agency's decision not to prosecute or enforce is generally committed to an agency's absolute discretion.

The Court in *Chaney* gave these reasons for denying review of agency decisions not to enforce: (1) These decisions involve “a complicated balancing” of factors such as allocation of agency resources and a

discretion. See Iowa Code § 17A.14 (providing that in contested cases “irrelevant, immaterial, or unduly repetitious evidence should be excluded”).

Finally, Affordable Hazards argues that the penalty imposed was an abuse of discretion because its violation history was exaggerated, the level of asbestos was “extremely low,” and its workers were trained. We are not persuaded.

There is no real dispute that at least one unlicensed employee was working on the asbestos project on seven¹² different days between June 6 and June 20 and some days there were as many as six unlicensed workers. The ALJ noted Affordable Hazards acknowledged the maximum civil penalty that could be imposed was \$180,000. Affordable Hazards was aware that the workers did not have Iowa licenses at the time and the commissioner reasonably concluded the licensing violations were willful. In light of the noted factors (regulatory violation history, disregard of licensing regulations for financial gain, and failure of prior penalties to defer), we find no abuse of discretion in the revocation of Affordable Hazards’ permit, but in light of our disagreement that Jeffry Intlekofer’s presence on site required a license, we find the \$45,000 fine must be reexamined. We therefore remand to the district court for remand to the commissioner for a

realization that “[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing,” (2) courts generally defer to an agency’s construction of the statute it enforces, and (3) an agency’s refusal to enforce is akin to a prosecutor’s discretion not to indict. *Id.* at 831–32, 105 S. Ct. at 1655–56, 84 L. Ed. 2d at 723–24. *Lewis Cent. Educ. Ass’n v. Iowa Bd. of Educ. Exam’rs*, 625 N.W.2d 687, 690 (Iowa 2001). While our supreme court acknowledged the *Heckler* rationale, it found the principle inapplicable with regard to the board’s probable cause determination process. See *id.* at 692.

¹² The original notice alleged unlicensed workers were present on nine days and the supplemental notice alleged an additional tenth day. However, on three of the days the only worker alleged to be unlicensed was Jeffry Intlekofer. In light of our ruling that Jeffry did not need to be licensed, we conclude the commissioner’s finding of the presence of unlicensed workers was supported on each of only seven days.

reconsideration of the civil penalty to be imposed consistent with this opinion and that of *Intlekofer v. Division of Labor Services*.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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 revocation of Affordable Hazards' license and the violations affirmed by the majority. However, I respectfully dissent in regard to the determination that Jeffry 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 Jeffry Intlekofer was involved in the asbestos project at the Kenwood Elementary School in June 2007. The issue is whether his "involvement" rose to 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, Jeffry 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 Jeffry 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; and was contacted by Shive-Hattary employees to provide updates on work in progress and inspection issues. And although it is disputed, there was evidence Jeffrey 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 Jeffrey Intlekofer was a supervisor or worker because the agency levied both allegations, and in either circumstance, a license was required. The agency clearly did not accept the 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 American Testing & Training, Inc., d/b/a Affordable Hazards Removal Inc., was not an abuse of discretion. For these reasons, I would affirm.