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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORTHWEST ABATEMENT SERVICES INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 53439-8-II UNPUBLISHED OPINION

MAXA, P.J. – The Department of Labor and Industries (DLI) issued citations against Northwest Abatement Services Inc. for violations of regulations under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, and asbestos-related regulations. The violations involved a project in which Northwest Abatement was removing a roof that contained asbestos. The Board of Industrial Insurance Appeals (Board) issued a decision and order upholding the violations, and the superior court affirmed. Northwest Abatement appeals, arguing that the Board's decision is not supported by substantial evidence.

Northwest Abatement was removing a roof on a four-story commercial building. After a DLI employee happened to observe a Northwest Abatement employee walking on the roof of the project without fall protection gear, DLI sent two inspectors to investigate the worksite. DLI

issued a number of citations against Northwest Abatement for violating fall protection, flagging, and asbestos-related regulations.

Northwest Abatement argues that substantial evidence does not support the Board's determinations that (1) Northwest Abatement employees were exposed to fall protection, flagging, and asbestos-related violations; (2) Northwest Abatement had actual or constructive knowledge of the alleged violations; and (3) Northwest Abatement did not meet its burden of proving the affirmative defense of unpreventable employee misconduct.

We conclude that substantial evidence supports the Board's determinations. Accordingly, we affirm the superior court's order affirming the Board's decision and order.

FACTS

Roof Removal Project

Northwest Abatement is an asbestos removal company that was hired to remove an asphalt roof containing asbestos on a commercial building in downtown Tacoma. The building was approximately four stories tall. The building was located on a corner with an active bus stop.

Chris Eckholm was the project manager assigned to the roof removal project. The project manager's job duties included conducting safety inspections and developing the scope of work for the project. Forrest Hamilton was Northwest Abatement's certified asbestos supervisor and was the supervisor and foreman for the roof removal project. Hamilton was responsible for reviewing the job scope with the workers, ensuring all workers had their respirator cards and were suited up, and generally making sure that everything on the job was in good shape.

Paul Peters was the safety manager for Northwest Abatement. He conducted random job site inspections and provided additional safety training for employees. He conducted random

safety inspections using a safety checklist form approximately once to twice a month. In addition, Northwest Abatement had sporadic supervisor meetings and general crew meetings whenever an issue arose.

Northwest Abatement had a three-stage disciplinary system that applied to employees who violated safety regulations: first a verbal warning, then a written warning, and then termination. Northwest Abatement retained the ability to impose a harsher penalty if warranted by the circumstances. Written warnings were supposed to be maintained in Northwest Abatement's daily logbook. However, Hamilton, Eckholm, and Peters had never written another employee up for a safety violation. Many of the employees had never heard of another employee being disciplined.

Asbestos Removal Process

Before Northwest Abatement started to remove the roof, the building owner conducted a good faith inspection to determine the extent of asbestos involved. A core sample taken from the roof revealed that five layers out of 13 layers of the roof contained a type of asbestos called chrysotile. Chrysotile is extremely small and is not visible to the human eye. The chrysotile was bound to the asphalt material. The asbestos-containing layers alternated with layers that did not contain asbestos. The bottom layer, number 13, consisted of brown fibrous material that contained no asbestos.

Northwest Abatement workers were required to wear personal protective equipment and to saturate asbestos-containing material they removed with water (the wet method) to protect against the hazards of airborne asbestos fibers. Fields Roofing, another contractor, installed a debris chute feeding into a dumpster to dispose of the removed roofing material. There was

plastic material between the end of the chute and the dumpster to prevent any debris or dust from escaping.

Northwest Abatement started removing the roofing material on the east edge of the roof. The roof was removed in large chunks. Northwest Abatement used roof saws, hatchets, roofing shovels, wheelbarrows, brooms, and bags to remove and transport the roofing materials. The workers cut through multiple layers at once. The small pieces of black asphaltic materials were bagged, but not the larger sections. The discarded roofing materials were transported in wheelbarrows or bags to the debris chute.

Once the dumpster was full of debris, a Northwest Abatement truck would take it away. This process would occur multiple times each day. The dumpster removal process involved a truck backing up to the container, lifting it onto the truck, and driving away. A worker was needed to help the truck back up because the truck drivers could not see behind them. There was an active bus stop on the same corner where the dumpster was located.

Workers wore Tyvek suits[1] and respirators during the entire course of the project as required by regulations. For safety reasons, workers would use their respirators even if they were working on the brown layer to minimize the risks of breathing in any fibers. The purpose of fitted respirators was to ensure that the worker had an appropriate fit to protect against chemicals or other hazards. Hamilton did not check the workers' fit testing documentation to ensure they had the correct fit testing.

[1] A Tyvek suit is a plastic protective coverall that can be worn directly over an employee's street clothing.

Workers were expected to take off their Tyvek suits and respirator masks inside the regulated area and place them in an asbestos bag. Although there was a HEPA vacuum[2] in a company truck to remove material from the suits, there was no HEPA vacuum in the regulated area. Workers sometimes took off their Tyvek suits outside of the regulated area and without using the HEPA vacuum first. And Hamilton did not establish a decontamination area outside the regulated area.

DLI Inspections

Northwest Abatement had removed about a quarter of the roof when DLI became involved in the project. Andrew Baga was a management analyst who worked at DLI, but was not in the Department of Occupational Safety and Health (DOSH). His office was on the fifth floor of a building near the project site. On the second day of the project, July 26, 2016, Baga happened to look out his office window and noticed workers on a roof who were not wearing fall protection harnesses. Baga visited the worksite and did not see any of the workers wearing fall protection equipment. He left the site and returned with Maili Jonkman, a DLI safety compliance officer.

While on the ground level outside of the building, Jonkman and Baga watched a Northwest Abatement employee, Richard Crakes, dumping debris into the unguarded debris chute without fall protection. Jonkman took a photograph showing Crakes's proximity to the chute. Jonkman and Baga also noticed that there was a large hole in the plastic sheet attached to the bottom of the chute. There was debris and dust spraying out of the hole.

[2] A HEPA vacuum is a vacuum that has a high efficiency particulate air filter which is used to clean off small particulate matters, such as asbestos fibers, from a worker's clothing.

Jonkman and Baga went up to the roof and spoke with Hamilton. But once Jonkman realized the workers were working with asbestos, she stopped her conference with Hamilton and called Lisa Van Loo, who was a DLI industrial hygienist familiar with asbestos. Van Loo's duties included conducting work site visits and inspecting them for safety and health hazards.

Jonkman and Baga went back down to the ground level to wait for Van Loo. While they were waiting outside, they saw Doug Murphy, a Northwest Abatement employee, standing in the road holding a stop/slow paddle sign. Jonkman did not see any warning signs placed in the road. A photograph Jonkman took showed Murphy standing in the bus stop area adjacent to the building without a high-visibility hard hat or a high-visibility safety garment. Murphy was helping a truck back into the work area to remove the dumpster. To reach the dumpster, the truck had to go against traffic and back across the bus stop area. Jonkman asked if Murphy had a flagger's card, but he did not provide one.

The bus stop adjacent to the building was active. The lane in which Murphy was standing was closed to regular traffic because of the construction, but it was open for buses. Jonkman did not see any buses approaching the bus stop area while Murphy was standing in the road.

Van Loo arrived, and she and Jonkman went up to the roof to continue the inspection. Van Loo took photographs during her inspection. Van Loo contacted Hamilton, and he showed her a copy of the good faith inspection and the work order. Van Loo requested and reviewed copies of the workers' respiratory fit tests and safety training documents. Crakes was wearing a half-face respirator mask despite being fitted only for a full-face respirator mask.

Van Loo observed workers using a roof saw to remove the roofing in sections and workers using a shovel to scrape along the cut line. She noticed that the cut line was not sealed

off or encapsulated in any way. She also watched workers shoveling, scraping, and sweeping dry roofing material. The workers placed the roofing material into wheelbarrows and plastic bags. The bags of material appeared to have no water in them. And the bags and the dumpster were not labeled as containing asbestos.

Van Loo took two bulk samples from loose material near the door to the stairs. A later test of the material was negative for asbestos. She did not take any samples of the material inside the plastic bags or the wheelbarrows. She did not take any other samples of the area to determine if there were airborne asbestos fibers.

Van Loo investigated the wheelbarrows that were next to the chute outside of the regulated area. They contained dry crumbly material, but she could not say definitively that it contained asbestos. There was loose debris in front of the chute.

Workers were supposed to wear fall protection gear if they went beyond the barriers set up on the roof. However, Jonkman and two Northwest Abatement workers working on the project, Murphy and Brandon Tarry, all testified to seeing workers using the chute without fall protection gear on.

Van Loo interviewed Crakes during her inspection and noticed that he had a six to eight inch long tear on the left leg of his Tyvek suit. Van Loo informed Hamilton of the tear, who asked Crakes to fix it. A tear in the work suit could contaminate the worker's street clothes underneath the work suit, which could result in transporting asbestos fibers back to the worker's home.

Citations

In October 2016, DLI issued citation and notice number 317941556 to Northwest Abatement after the inspection. The citation listed several serious violations:

- Violation 1-1was a repeat fall protection violation of WAC 296-155-24611(1)(a).
- Violation 2-1 was for directing traffic without wearing a high-visibility safety garment in accordance with WAC 296-155-305(5)(a).
- Violation 2-2 was for not ensuring the employee flagging was in possession of a valid Washington traffic control flagger card in accordance with WAC 296-155-305(6)(a).
- Violation 2-3 was for not ensuring a three sign advanced warning sequence was enforced in accordance with WAC 296-155-305(8)(a).[3]

In January 2017, DLI issued citation and notice number 317941568, which listed multiple serious asbestos-related violations:

- Violation 1-1a was for failure to use wet methods while removing roofing material in violation of WAC 296-62-07712(10)(b)(ii).
- Violation 1-1b was for dry shoveling asbestos-containing roofing material in violation of WAC 296-62-07712(4)(c).
- Violation 1-2 was for failure to wet asbestos-containing roofing material while it remained on the roof in violation of WAC 296-62-07712(10)(b)(v)(A).
- Violation 1-3 was for failure to have a dust-tight chute in violation of WAC 296-62-07712(10)(b)(v).
- Violation 1-4 was for failure to replace or repair torn protective coveralls in violation of WAC 296-62-07717(4)(b).
- Violation 1-5a was for failure to establish a decontamination area in violation of WAC 296-62-07719(3)(b)(i).
- Violation 1-5b was for failure to ensure that employees enter and exit the regulated area through the equipment room or area in violation of WAC 296-62-07719(3)(b)(v).
- Violation 1-5c was for failure to ensure the competent person supervised employees in a manner that would ensure employees used engineering controls, work practices, and personal protective equipment in a manner that is in compliance with all requirements in violation of WAC 296-62-07728(4)(f).
- Violation 1-6 was for failure to provide a HEPA vacuum for employees to decontaminate their work clothing in violation of WAC 296-62-07719(3)(b)(iii).
- Violation 1-7 was for failure to ensure bags and dumpsters containing asbestos waste were labeled with warnings in violation of WAC 296-62-07721(5)(c).
- Violation 1-8 was for failure to ensure all asbestos-containing material were cleaned up as soon as possible in violation of WAC 296-62-07723(2).
- Violation 1-9 was for failure to provide fit testing when a different respirator was chosen in violation of WAC 296-842-15005(1)(c).

[3] DLI also issued citations for three general violations: violation 3-1, for failure to tailor the accident prevention program in violation of WAC 296-155-110(3); violation 3-2, for failure to document safety meetings in violation of WAC 296-155-110(7); and violation 3-3, for failure to document safety inspections in violation of WAC 296-155-110(9)(b). Northwest Abatement generally assigns error to the findings of fact associated with these violations, but presents no arguments regarding them. Therefore, we do not address these violations.

- Violation 1-10 was for failure to ensure that sealing problems with tight-fitting respirators were prevented in violation of WAC 296-842-18005(2).

Procedural History

Northwest Abatement appealed to DLI the violations identified in the October 2016 citation. DLI issued a corrective notice of redetermination, which affirmed the violations. Northwest Abatement appealed to the Board.

Northwest Abatement appealed to DLI the violations identified in the January 2017 citation. DLI decided to not reassume jurisdiction, and the appeal was sent directly to the Board. The two appeals were consolidated for a hearing before the Board. The case was heard by an Industrial Appeals Judge (IAJ).

At the hearing, various witnesses testified to the facts described above. John Stebbins, an industrial hygiene technical specialist in the DOSH technical services group within DLI, testified as DLI's expert. Douglas Henry, an environmental consultant, testified as Northwest Abatement's expert. The IAJ issued a proposed decision and order affirming violations except violations 1-1a and 1-10, which were vacated.

The Board granted Northwest Abatement's petition for review of the proposed decision and order. The Board issued a decision and order that (1) reduced the penalty of violation 1-1 but affirmed the remainder of the violations in the corrective notice of redetermination, and (2) vacated violations 1-1a and 1-10 but affirmed the remainder of the violations in the citation and notice. The Board's order included extensive findings of fact and conclusions of law.

Northwest Abatement appealed the Board's decision and order to the superior court. The superior court affirmed the Board's decision, adopting the Board's findings of fact and conclusions of law. Northwest Abatement appeals the superior court's order affirming the Board's order and decision.

ANALYSIS

A. APPLICABLE REGULATIONS

1. WISHA

The purpose of WISHA is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every [person] working in the state of Washington." RCW 49.17.010. DLI has statutory authority to adopt workplace safety regulations. RCW 49.17.040. DLI has done so in Title 296 WAC.

RCW 49.17.060(1) states that employers are required to furnish a workplace that is "free from recognized hazards that are causing or likely to cause serious injury or death to [their] employees." Under RCW 49.17.060(2), employers must "comply with the rules, regulations, and orders promulgated under this chapter."

DLI has the authority to issue citations to employers who violate the requirements of RCW 49.17.060. RCW 49.17.120(1). In addition, DLI has authority to assess civil penalties for willful or repeated violations of RCW 49.17.060. RCW 49.17.180(1).[4] A "serious" violation exists "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." RCW 49.17.180(6).

DLI bears the burden of proving a WISHA violation. *Ostrom Mushroom Farm Co. v. Dep't of Labor & Indus.*, 13 Wn. App. 2d 262, 272, 463 P.3d 149 (2020); *see also* WAC 263-12-

[4] RCW 49.17.180 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

115(2)(b). To establish a serious violation of a WISHA safety regulation, DLI must prove "(1) the cited standard applies, (2) the requirements of the standard were not met, (3) employees were exposed to or had access to the violative condition, (4) the employer knew or through the exercise of reasonable diligence could have known of the violative condition, and (5) there is a substantial probability that death or serious physical harm could result from the violative condition." *Ostrom Mushroom,* 13 Wn. App. 2d at 272.

2. Asbestos Safety

The legislature enacted chapter 49.26 RCW, entitled "Health and Safety – Asbestos," to protect the public from "[a]irborne asbestos dust and particles . . . [that] produce irreversible lung damage and bronchogenic carcinoma." RCW 49.26.010; *see Prezant Associates, Inc. v. Dep't of Labor & Indus.*, 141 Wn. App. 1, 8, 165 P.3d 12 (2007). RCW 49.26.040 authorizes DLI to adopt standards for the safe handling of asbestos in construction. Pursuant to this statutory authority, DLI has promulgated extensive regulations for all occupational exposures to asbestos. WAC 296-62-07701(1). *See generally* WAC 296-62-077.

An "asbestos project" means the "construction, demolition, repair . . . or any public or private building . . . involving the demolition, removal . . . or disposal of material, or outdoor activity, releasing or likely to release asbestos fibers into the air." RCW 49.26.100(2). If there is a reasonable possibility that a construction project may disturb or release asbestos into the air, then the owner or owner's agent is required to conduct a good faith inspection by an accredited inspector to determine whether the proposed project will disturb or release asbestos-containing material into the air. RCW 49.26.013(1); WAC 296-62-07721(1)(c)(ii).

The type of practices that an employer is required to follow depends on what class the asbestos project falls under. WAC 296-62-07703[5]; *see also* WAC 296-62-07712(6), (9), (11), (12). Northwest Abatement was performing Class II asbestos work. An employer engaged in a Class II project is required to follow a number of safety precautions at the worksite as outlined by WAC 296-62-077 and related provisions.

DLI has authority to enforce its regulations. RCW 49.26.040. Violations of chapter 49.26 RCW are governed by WISHA. RCW 49.26.140(1).

B. STANDARD OF REVIEW

In a WISHA appeal, we directly review the Board's decision – not the superior court's decision – based on the record before the agency. *Ostrom Mushroom*, 13 Wn. App. 2d at 271. We review the Board's findings of fact to determine whether substantial evidence supports them, and if so, whether the findings support the conclusions of law. *Potelco, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 236, 243, 433 P.3d 513 (2018). Evidence is substantial if it is sufficient in quantity to persuade a fair-minded person of the truth of the declared premise. *Id.* When determining whether substantial evidence supports the factual findings, we view the evidence in the light most favorable to the party that prevailed before the Board. *Id.* at 243-44. On appeal, we do not reweigh evidence. *Ostrom Mushroom*, 13 Wn. App. 2d at 271.

We liberally construe regulations promulgated pursuant to WISHA to protect workers from hazardous conditions at their place of employment. *Id.* at 272. DLI's interpretation of statutes and regulations are given substantial weight and shall be upheld as long as the interpretation does not contradict legislative intent. *Id.* Federal decisions that interpret the

[5] Several of the WACs cited in this opinion have been amended since the events in this case transpired. Because those amendments are minor and immaterial here, we cite to the current regulations.

federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678, may inform this court when interpreting WISHA, but not when Washington law provides controlling precedent. *Shimmick Constr. Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 2d 770, 778, 460 P.3d 192 (2020).

C. EMPLOYEE EXPOSURE TO HAZARDS

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement's employees were exposed to (1) fall protection violations, (2) flagging violations, and (3) asbestos-related violations. We disagree.

1. Legal Principles

DLI is not required to prove that a worker actually was exposed to a hazard to establish a serious violation of WISHA regulations. *Shimmick Constr.*, 12 Wn. App. 2d at 785. The requirement is that the worker be exposed to or have access to the violative conditions. *Id.* Access exposure is established by evidence that shows by reasonable predictability that workers have been, are, or will be in the zone of danger during the course of their duties. *Id.* The zone of danger is the area related to the violative condition that poses the type of hazard to workers that the regulation is intended to prevent. *Id.*

In addition, "[a] standard that proscribes certain conditions 'presumes the existence of a safety hazard.' " *Shimmick Constr.*, 12 Wn. App. 2d at 786 (quoting *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 41, 329 P.3d 91 (2014)). " '[I]f the violation concerns a specific standard, it is not necessary to *even* prove that a hazard exists, just that the specific standard was violated.' " *Shimmick Constr.*, 12 Wn. App. 2d at 786 (quoting *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006)). However, DLI represented at oral argument that these rules do not apply to the regulations at issue here.

2. Fall Protection Violations

The Board upheld DLI's issuance of a citation for a violation of fall protection regulations stated in former WAC 296-155-24611(1)(a) (2016) relating to Northwest Abatement's employee Crakes (violation 1-1). Northwest Abatement argues that substantial evidence does not support the Board's determination that Crakes was exposed to a hazard involving the fall protection violation. We disagree.

Former WAC 296-155-24611(1)(a) provides that employers must implement an appropriate fall protection system when "employees are exposed to fall hazards of 10 feet or more to the ground or lower level, while engaged in roofing work on a low pitched roof." Northwest Abatement argues that in order to establish a violation of former WAC 296-155-24611(1)(a), DLI was required to prove that Crakes was standing within six feet from the edge of the roof. Northwest Abatement relies on two federal administrative decisions in support of this argument.

However, former WAC 296-155-24611(1)(a) is not limited to the risk of falls from the edge of the roof; the regulation refers generally to exposure to "fall hazards." And the fall protection violation here was not based on Crakes's proximity to the edge of the roof. DLI based the violation on the fact that Crakes was standing in front of an *unguarded chute* on top of the roof without fall protection. A debris chute that extends from a four-story roof to the ground creates a fall hazard.

DLI presented substantial evidence that supported the finding that a fall protection violation exposed Crakes to a hazard. Jonkman provided testimony regarding her observations of the lack of fall restraint protection on either side of the chute, which posed a fall hazard to

someone standing near the chute. Jonkman observed Crakes standing on the roof in front of the unguarded chute without fall protection. A photograph confirmed that observation.

Further, Crakes acknowledged that he did not have fall protection when he was photographed near the chute, and he was unaware of any fall protection available to him. Murphy and Tarry also testified that they observed other workers approach the chute without being tied off. Finally, Hamilton agreed that based on the visual evidence, Crakes should have been wearing fall protection while standing within close proximity of the chute.

Accordingly, we conclude that substantial evidence supports the Board's determination that fall protection violation 1-1 exposed Crakes to a hazard.

3. Flagging Violations

The Board upheld DLI's issuance of citations for three violations of flagging regulations stated in WAC 296-155-305 relating to Northwest Abatement's employee Murphy's conduct (violations 2-1, 2-2, 2-3). Northwest Abatement argues that (1) the flagging regulations in WAC 296-155-305 were inapplicable because Murphy was not engaged in flagging, and (2) Murphy was not exposed to any hazard while engaging in those activities. We disagree.

a. Applicability of Flagging Regulations

An employer must comply with WAC 296-155-305 when using flaggers in a public work area. *Potelco Inc., v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 27, 361 P.3d 767 (2015). There is no question that Murphy violated the three flagging regulations if he was engaged in flagging. He was not wearing a high-visibility hard hat or a high-visibility safety garment in violation of WAC 296-155-305(5)(a). He did not have a flagger card in violation of WAC 296-155-305(6)(a). And there were no warning signs or cones in violation of WAC 296-155-305(8)(a).

But Northwest Abatement argues that WAC 296-155-305 does not even apply because Murphy was not engaged in flagging. We disagree.

The question here involves the definition of a flagger in WAC 296-155-305. We interpret agency regulations as though they were statutes. *Shimmick Constr.*, 12 Wn. App. 2d at 778. The objective is to ascertain and give effect to the intent of the regulation. *Bayley Constr. v. Dep't of Labor & Indus.*, 10 Wn. App. 2d 768, 789, 450 P.3d 647 (2019), *review denied*, 195 Wn.2d 1004 (2020). We consider the plain language of the regulation to determine its meaning. *Id.* If the plain meaning of the statute is unambiguous, we apply that meaning. *Id.*

Significantly, we construe WISHA statutes and regulations liberally to achieve their purpose of providing safe workplace conditions. *Shimmick Constr.*, 12 Wn. App. 2d at 778. In addition, we afford substantial weight to DLI's interpretation of a regulation given its expertise in the subject matter, and its interpretation is consistent with legislative intent. *Ostrom Mushroom*, 13 Wn. App. 2d. at 272.

WAC 296-155-305 defines a flagger as "a person who provides temporary traffic control." But the flagging regulation does not define "temporary traffic control." *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 519, 286 P.3d 383 (2012). WAC 296-155-305 does reference the Manual on Uniform Traffic Control Devices (MUTCD) as adopted by the Washington Department of Transportation. *See Pilchuck Contractors*, 170 Wn. App. at 519. The MUTCD describes flagging procedures as stopping, directing, slowing, and alerting traffic. *Id.*

Northwest Abatement argues that WAC 296-155-305 is inapplicable because Murphy was "spotting" rather than flagging. Northwest Abatement claims that he was not providing temporary traffic control. Instead, he was assisting the driver of a truck with backing into the

work area to remove a dumpster. He stood in the bus stop area that was closed to regular traffic, and he did not stop or direct any traffic. According to Northwest Abatement, Murphy's only purpose was to prevent the truck from hitting anything because the driver could not see behind the truck. It was not necessary for him to stop traffic.

However, Murphy's own testimony suggests that he was engaged in traffic control:

> Q. Do you know -- what were you doing in that photograph?
> A. It looks like I am holding up a stop sign and a slow sign.
> Q. Do you recall why you were doing that?
> A. That was right where the bus came in and *our container truck had to go against traffic* and back into our disposal site and *he had to pull up into that bus zone* right where I am at and then back in.
> Q. Do you -- do you recall giving him directions or were you simply there to stop traffic?
> A. I was simply there to *hold up a stop sign so nobody would run into him* when he was pulling into the job site.

Clerk's Papers (CP) at 621 (emphasis added).

In addition, the fact that Murphy was holding a stop/slow sign creates an inference that he was controlling traffic. He would not need such a sign if he was merely trying to prevent the truck from backing into something. Hamilton testified, "I think we were given that sign to keep people from driving in, because there was people that would come and drop people off on the corner there while we were trying to do what we were doing." CP at 597.

Finally, we liberally interpret WISHA regulations to promote worker safety. *Shimmick Constr.*, 12 Wn. App. 2d at 778. Applying this liberal construction, Murphy's activities fall within the meaning of "temporary traffic control."

We conclude that Murphy was acting as a flagger and therefore the WAC 296-155-305 regulations were applicable to his activities.

b. Exposure to Hazard

Northwest Abatement argues that even if Murphy's actions constituted flagging, substantial evidence does not support the Board's determination that the violations of WAC 296-155-305 exposed Murphy to any hazard. We disagree.

Northwest Abatement claims that Murphy was never exposed to any hazard because he was standing in an area that was closed to regular traffic because of the construction, there were no buses present when Murphy was standing in the area, and Jonkman admitted that Murphy was not subjected to any oncoming traffic. As a result, Murphy was never in a zone of danger.

However, the evidence showed that Murphy was standing in a lane of travel of an urban street, near a busy intersection. The lane was closed to regular traffic, but it still was available for buses. Murphy was in the bus stop area. In addition, Hamilton testified that he believed that people were being dropped off on the same corner where the truck was backing up to remove the dumpster. This evidence supports a finding that Murphy was exposed to the hazard of being hit by a vehicle when engaging in flagging activities. Further, that hazard clearly is the type of hazard that the regulations in WAC 296-155-305 were designed to prevent. *See Shimmick Constr.*, 12 Wn. App. 2d at 785.

The fact that no buses were in the area at the time Jonkman observed Murphy is immaterial. As noted above, a worker need not *actually* be exposed to a hazard; the worker must only be within the zone of danger. *Id.* Murphy was within the zone of danger when he was standing in the lane of travel in an active bus stop area.

We conclude that substantial evidence supports the Board's determination that flagging violations 2-1, 2-2, and 2-3 exposed Murphy to a hazard.

4. Asbestos Violations

The Board upheld DLI's issuance of citations for multiple violations of asbestos-related regulations (violations 1-1b, 1-2, 1-3, 1-4, 1-5a, 1-5b, 1-5c, 1-6, 1-7, 1-8, 1-9). Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement's employees were exposed to asbestos hazards. We disagree.

a. Presence of Asbestos

Northwest Abatement's primary argument regarding all the asbestos-related violations is that the violations did not expose its employees to an asbestos hazard because at the time of the inspections, the material that the employees were handling did not contain asbestos. According to Northwest Abatement, the only material its employees were working with at the time of the inspections was the brown bottom layer, layer 13, which did not contain asbestos. Northwest Abatement emphasizes that the only material Van Loo sampled tested negative for asbestos. Therefore, there was no evidence that the material the inspectors observed contained asbestos.

DLI emphasizes that there is no question that there was asbestos at the work site. The good faith inspection showed that there was asbestos in several layers of the roof. And Northwest Abatement had removed only a quarter of the roof at the time of the inspections. So the remainder of the roof still contained asbestos. Therefore, the employees had at least access exposure to asbestos.

b. Violation 1-1b

DLI issued violation 1-1b under WAC 296-62-07712(4)(c), which prohibits "dry sweeping, shoveling, or other dry cleanup of dust and debris containing [asbestos-containing material]." This violation was based on Van Loo's observations of Northwest Abatement's workers scraping and shoveling dry roofing materials. The Board upheld this violation.

Northwest Abatement argues that substantial evidence does not support the Board's determination that its employees performed dry shoveling and sweeping of asbestos material because the material it was shoveling and sweeping did not contain asbestos. Instead, the material was the brown material in the bottom layer of the roof that did not contain asbestos, not the black asphaltic materials that did contain asbestos. Northwest Abatement relies on the testimony of its expert, Henry, and Hamilton that the brown material that was collected and put in wheelbarrows did not contain asbestos. Northwest Abatement also emphasizes that Van Loo did not know whether the materials in the wheelbarrows contained asbestos and the samples she took tested negative for asbestos.

But there was evidence that would support a finding that this material did contain asbestos. Stebbins, DLI's expert, testified that there is a potential that asbestos could be contained in the bottom layer because removal of the other layers might cause asbestos dust and debris to be left behind in that material. Crakes also stated that he believed that material from the black asphaltic layers could have intermixed with the brown fibrous layer.

In addition, Van Loo observed workers using a roof saw to remove sections of the roof, which created a cut line between the sections that were being removed and the sections that remained. The cut line was not sealed off or encapsulated in any way. She then saw workers scraping with shovels along the exposed edge of the asphalt roof. She stated that this scraping would loosen any asbestos fibers that were in the asbestos-containing layers adjacent to the removed sections.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-1b.

c. Violation 1-2

DLI issued violation 1-2 under WAC 296-62-07712(10)(b)(v)(A), which states that while asbestos-containing material remains on the roof, the material "must either be kept wet, placed in an impermeable waste bag, or wrapped in plastic sheeting." This violation was based on Van Loo's observation that Northwest Abatement's workers were not saturating the removed roofing materials and that dry materials were sitting in a wheelbarrow. The Board upheld this violation.

Northwest Abatement's arguments regarding this violation are the same as for violation 1-1b. And the analysis is the same. The testimony of Stebbins and Van Loo supports a finding that the dry material in bags and wheelbarrows contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-2.

d. Violation 1-3

DLI issued violation 1-3 under WAC 296-62-07712(10)(b)(v), which requires asbestos-containing material to be "lowered to the ground via covered, dust-tight chute, crane or hoist." This violation was based on Jonkman's and Baga's observation of a large hole in the plastic sheet that was attached to the chute and dumpster and dust and debris coming out of the hole. The Board upheld this violation.

Northwest Abatement does not dispute that there was a hole in the plastic at the bottom of the chute. Instead, Northwest Abatement claims that there is no objective evidence that shows whether the material inside the dumpster at the time of the inspection actually contained asbestos. Northwest Abatement also relies on Hamilton's testimony that the debris being lowered down the chute already was bagged and therefore no material from within the bags would be released.

But Baga and Jonkman testified that they saw dust and debris coming out of the hole in the plastic. And as discussed above, there was evidence that the material the employees were working with contained asbestos. Therefore, the Board could infer that the dust and debris coming out of the hole contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-3.

e. Violation 1-4

DLI issued violation 1-4 under WAC 296-62-07717(4)(b), which states that "[w]hen rips or tears are detected while an employee is working, rips and tears must be immediately mended, or the worksuit must be immediately replaced." This violation was based on Van Loo's observation of a tear in Crakes's Tyvek suit. The Board upheld this violation.

Northwest Abatement argues that DLI failed to establish when Crakes's suit was ripped, and points out that the suit was repaired immediately once the rip was brought to Hamilton's attention.

DLI argues that it was likely that the rip was present before Van Loo arrived, and notes that Hamilton was working alongside Crakes. In addition, Crakes testified that their thin suits ripped all the time. Therefore, the Board could infer that the rip had been present for some period of time and that the tear was not immediately repaired. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-4.

f. Violations 1-5a and 1-5b

DLI issued violation 1-5a under WAC 296-62-07719(3)(b)(i), which requires employers to provide a decontamination area adjacent to the regulated area when there is asbestos exposure. DLI issued violation 1-5b under WAC 296-62-07719(3)(b)(v), which requires employers to ensure that their employees enter and exit the regulated area through the decontamination area.

These violations were based on Van Loo's visual inspection, which revealed that no decontamination area had been set up. The Board upheld these violations.

First, Northwest Abatement argues that Van Loo relied solely on a photograph showing no decontamination area, but she did not know when the photograph was taken. However, there was extensive evidence that no decontamination area was set up. Murphy testified that there was no decontamination zone set up outside the regulated area and that he removed his Tyvek suit right outside the regulated area. Hamilton likewise conceded that he did not establish a decontamination area. And even though Van Loo had no personal knowledge regarding who took the photographs of the regulated area or when they were taken, she also interviewed employees about the contamination zone and relied on her personal visual inspection of the work area.

Second, Northwest Abatement again argues that a decontamination area was not required because there was no evidence of exposure to asbestos at the time of the inspections. But as discussed above, there was evidence that the material the employees were working with contained asbestos.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violations 1-5a and 1-5b.

g. Violation 1-5c

DLI issued violation 1-5c under WAC 296-62-07728(4)(f), which requires employers to ensure that a competent person supervises workers to enforce compliance with work practices and personal protective equipment. The Board upheld this violation.

Northwest Abatement provided no argument on its claim that substantial evidence did not support the Board's determination that it committed violation 1-5c. Therefore, we need not

address this issue. *See West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (declining to address the appellant's vague and broad argument that was not supported by factual or legal authority).

h. Violation 1-6

DLI issued violation 1-6 under WAC 296-62-07719(3)(b)(iii), which states that "[w]ork clothing must be cleaned with a HEPA vacuum before it is removed." This violation was based on Van Loo's observation that there was no HEPA vacuum on the roof at the time of her inspection. The Board upheld this violation.

Northwest Abatement argues that a HEPA vacuum was not required because all the asbestos-containing material had been removed at the time of DLI's inspections. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-6.

i. Violation 1-7

DLI issued violation 1-7 under WAC 296-62-07721(5)(c), which requires employers to ensure that bags containing asbestos scrap or waste are labeled with warnings about asbestos. This violation was based on Van Loo's observation that plastic bags containing roofing material did not have warning signs that they contained asbestos. The Board upheld this violation.

Northwest Abatement argues that it did not need to label the bags because there is no evidence that the bags contained asbestos-containing material. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-7.

j. Violation 1-8

DLI issued violation 1-8 under WAC 296-62-07723(2), which requires that all spills of asbestos-containing material must be cleaned up as soon as possible. This violation was based on Van Loo's observation of dry materials located near the debris chute and materials in the wheelbarrow that had not been disposed of. The Board upheld this violation.

Northwest Abatement argues that WAC 296-62-07723(2) is inapplicable because there is no evidence that the material that was not cleaned up was asbestos-containing material. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-8.

k. Violation 1-9

DLI issued violation 1-9 under WAC 296-842-15005(1)(c), which requires the employer to provide fit testing for the type of mask the employee is wearing. This violation was based on Van Loo's determination that Crakes was fit tested for a full face respirator but was wearing a half face respirator for which he had not been fitted. The Board upheld this violation.

Northwest Abatement argues that Crakes was not required to wear a respirator at the time of the inspection because all the asbestos-containing material had been removed. However, as discussed above, the testimony of Stebbins and Van Loo supports a finding that the material Northwest Abatement was working with contained asbestos. We conclude that substantial evidence supports the Board's determination that Northwest Abatement committed violation 1-9.

D. EMPLOYER KNOWLEDGE OF VIOLATIVE CONDITIONS

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement had constructive knowledge of the alleged fall protection and flagging violations.[6] We disagree.

1. Legal Principles

To prove a serious violation under WISHA, DLI must show that the employer knew or by exercising reasonable diligence could have known of the violative condition. RCW 49.17.180(6); *Ostrom Mushroom*, 13 Wn. App. 2d at 272. Whether an employer has exercised reasonable diligence involves consideration of factors such as the employer's obligations to inspect the work site, to anticipate potential hazards that its employees may encounter, and to take measures to prevent a violative condition from occurring. *Bayley Constr.*, 10 Wn. App. 2d at 783.

In addition, an "employer has constructive knowledge of the hazardous condition if it is readily observable or in a conspicuous work site location." *Id.* As a result, DLI can show constructive knowledge if the violation was in plain view. *Potelco*, 7 Wn. App. 2d at 244. A violation is in plain view when any bystander, and especially the project foreman, easily can observe the violation. *Id.* at 245.

2. Fall Protection Violation

Northwest Abatement argues that there is no evidence that it had knowledge of the fall protection violation that Crakes committed. We disagree.

There is no evidence that Northwest Abatement had actual knowledge that Crakes was violating fall protection regulations. Hamilton testified that he did not see or know that Crakes

[6] Northwest Abatement does not argue that it had no knowledge of the alleged asbestos-related violations.

was standing near the debris chute without fall protection. The issue here is reasonable diligence and constructive knowledge.

DLI presented evidence that Crakes's fall protection violation was in plain view. From ground level, Jonkman and Baga watched Crakes dumping debris into the unguarded debris chute without fall protection. In addition, Hamilton was on the roof at the time working alongside Crakes and the other employees and easily could have observed the violation. This evidence supports a finding of constructive knowledge. *Potelco*, 7 Wn. App. 2d at 244; *Bayley Constr.*, 10 Wn. App. 2d at 783.

Northwest Abatement contends that it could not have discovered the violation through reasonable diligence because the violative conduct lasted only a short period of time. Northwest Abatement claims that constructive knowledge can be found only if a violative condition lasts long enough for the employer to identify and correct it. Otherwise, the employer would be required to monitor its employees on a continual basis.

However, the duration of a violation is not a required element to show constructive knowledge. *Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 19, 465 P.3d 375 (2018). "Focusing on duration may have the adverse effect of encouraging inspectors to leave workers in dangerous situations to prove a violation." *Id.* at 19-20.

Further, Northwest Abatement emphasizes that Crakes testified that dumping the wheelbarrow down the chute would have taken only a few seconds. However, Jonkman testified that the violation lasted for as long as four minutes. The evidence must be viewed in the light most favorable to DLI. *See Potelco*, 7 Wn. App. 2d at 243-44. A violation lasting four minutes in plain sight is readily observable.

Finally, Baga noticed from his office window that Northwest Abatement workers were not wearing fall protection harnesses. The Board expressly relied on this fact in upholding the fall protection violation. Although Crakes's violation occurred a little later, the existence of observable fall protection violations suggest that Hamilton was not exercising reasonable diligence to observe Crakes's conduct.

We conclude that substantial evidence supported the Board's finding that Northwest Abatement had constructive knowledge of the fall protection violation.

3. Flagging Violations

Northwest Abatement argues that there is no evidence that it had knowledge of Murphy's flagging violations. We disagree.

There is no evidence that Northwest Abatement had actual knowledge that Murphy was violating flagging regulations. Hamilton testified that he did not see Murphy engaging in flagging activities and did not direct Murphy to act as a flagger. Again, the issue here is reasonable diligence and constructive knowledge.

DLI presented evidence that Murphy's flagging violations were in plain view. Jonkman and Baga watched Murphy while standing next to the building. And Murphy was standing in a public street and his conduct was readily observable. This evidence supports a finding of constructive knowledge.

In addition, Hamilton knew that employees were expected to help the truck back in to pick up the dumpster several times a day as part of the disposal process. And he stated that the area where the trucks backed up also was being utilized by the public to drop people off. Therefore, Hamilton could have discovered the flagging violations by exercising reasonable diligence.

Northwest Abatement again argues that the violation occurred for only a short period of time, only two to four minutes. But as stated above, duration of a violation is not required to show constructive knowledge. *Pro-Active Home Builders*, 7 Wn. App. 2d at 19. And a violation lasting four minutes in plain sight is readily observable.

We conclude that substantial evidence supported the Board's finding that Northwest Abatement had constructive knowledge of the flagging violations.

E. UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement failed to meet the burden of proving the affirmative defense of unpreventable employee misconduct. We disagree.

1. Legal Principles

After DLI establishes a prima facie case that the violations occurred, the burden shifts to the employer to establish the affirmative defense of "unpreventable employee misconduct." *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 46, 156 P.3d 250 (2007). Under RCW 49.17.120(5), an employer can avoid liability upon showing the following:

> (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
> (ii) Adequate communication of these rules to employees;
> (iii) Steps to discover and correct violations of its safety rules; and
> (iv) Effective enforcement of its safety program as written in practice and not just in theory.

"The defense addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement." *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008).

A safety program is effective in practice when the evidence supports the employer's claim that the employees' misconduct was an isolated occurrence and not foreseeable. *BD*

Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 111, 161 P.3d 387 (2007). Prior violations for similar misconduct may serve as evidence that the employer had notice of the problem, which undermines the employer's claim that the misconduct was unforeseeable. *Id.* However, evidence of prior violations is not a total bar to the unpreventable employee misconduct defense. *Id.*

We review whether Northwest Abatement has met its burden of establishing the unpreventable employee misconduct defense under a substantial evidence standard. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003).

2. Effectiveness of Safety Program

In summarizing its rulings, the Board stated, "Although Northwest Abatement had a safety program in place, communicated safety rules to employees, and took some steps to discover and correct violations, it failed to enforce its safety program and has not proved the defense of unpreventable employee misconduct." CP at 44. The Board also made findings that Northwest Abatement's employees did not engage in unpreventable employee misconduct with regard to the various violations.

Northwest Abatement argues that it met its burden of proving the affirmative defense because it (1) had a thorough safety program, (2) designed and implemented a reliable training program, (3) conducted regular safety meetings, and (4) had a disciplinary system in place to prevent its workers from using unsafe work practices. However, Northwest Abatement did not directly address the Board's finding that it did not *enforce* its safety program.

In *BD Roofing*, this court concluded that an employer must do more than show the existence of a safety program to meet the requirements of RCW 49.17.120(5). 139 Wn. App. at 113 ("Merely showing a good paper program does not demonstrate effectiveness in practice.").

In that case, an employer offered testimony that its safety inspectors had the authority to fire employees based on safety concerns and that there was a general company policy that an employee could face dismissal for failing to follow its safety protocols. *Id.* at 112. But the court determined that without evidence that showed its inspectors actually had disciplined employees for violating safety rules, the enforcement of its safety program was merely theoretical. *See id.* at 113. In addition, the employer had been cited for the fall protection violations seven times in the previous three years, which showed that the fall protection violations were a recurring and foreseeable problem for the employer. *Id.* at 114.

The evidence shows that Northwest Abatement failed to meet its burden to show its safety program was effective in practice as required for the fourth element of RCW 49.17.120(5). Northwest Abatement relies on testimony that explained how its disciplinary system operated. Peters testified that under Northwest Abatement's three-stage discipline policy, employees could receive a verbal warning, written warning, and finally, termination. But he also testified that he had never issued anything more than a verbal warning for a safety violation despite having been in his position for several years. The record also shows that he only conducted safety inspections once or twice a month.

In addition, several Northwest Abatement employees testified that they had never heard of any other employees being disciplined. Hamilton also appeared unclear about the general disciplinary process and was unable to explain what happened when Peters performed a safety check. Indeed, there does not appear to be any evidence in the record that shows that Northwest Abatement has enforced its safety program in practice.

We conclude that substantial evidence supports the Board's determination that Northwest Abatement did not meet the burden of proving the affirmative defense of unpreventable employee misconduct.

CONCLUSION

We affirm the trial court's order affirming the Board's decision and order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

GLASGOW, J.

CRUSER, J.