



**Housing Authority Of King County, Appellant V. Wa State Department Of Labor & Industries, Respondent**

2020 | Cited 0 times | Court of Appeals of Washington | June 29, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,

Respondent,

v.

HOUSING AUTHORITY OF KING COUNTY,

Appellant. No. 80408-1-I

ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND  
SUBSTITUTING OPINION

Respondent, Department of Labor and Industries, has filed a motion for reconsideration of the opinion filed in the above matter on June 8, 2020. The court has determined that respondent motion for reconsideration should be granted, the opinion should be withdrawn and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that respondent motion for reconsideration is granted. It is further

ORDERED that the opinion filed on June 8, 2020, is withdrawn and a substitute

opinion be filed. IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,

Respondent,

v.



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HOUSING AUTHORITY OF KING COUNTY,

Appellant. No. 80408-1-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. The King County Superior Court reversed the Board of  
and Industries (Department) issuance of a citation against Housing Authority of  
King County. Housing Authority appeals, asserting that the Board correctly  
determined that Housing Authority complied w that  
requires Housing Authority to have performed a good faith inspection for  
asbestos containing material. The regulation also requires Housing Authority to  
maintain the inspection reports.

Because Housing Autho contractor misplaced one volume of its  
asbestos maintenance program and because the remaining volume did not Housing Authority failed  
to maintain the report as required by the cited regulation.

FACTS

Housing Authority, a municipal corporation, provides public housing in  
King County. To this end, Housing Authority owns Fairwood Apartments in  
Renton, Washington. And Housing Authority contracts with Allied Residential to  
run the day-to-day operations for Fairwood Apartments.

A Department regulation promulgated pursuant to Washington Industrial  
Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW requires building



report, and provide the report to the Department upon request. Pursuant to this regulation, in 1995, Clayton Environmental Consultants completed an Asbestos Operations and Maintenance Program for Fairwood Apartments. The program contained three volumes.

stated objective was to provide for asbestos-containing material (A Volume 1, section 4 provided, among other things, a short summary of a survey of Fairwood Apartments completed by Phase I Inc., an asbestos testing and removal company. Section 4 listed the known ACM present at the apartments, i.e.,

(1) ceiling texture material, (2) gypsum board and joint compound, (3) floor tile

and mastic, and (4) roofing material. Phase I had no documentation. But he explained that Phase I Inc. completes two types of inspections: (1)

sampling that does not comply with Asbestos Hazard Emergency Response Act (AHERA) standards, and (2) an asbestos survey, which includes photographs, laboratory result analyses, chain of custody information, locations of samples, and floor plans showing where the inspector took asbestos samples. An AHERA accredited inspector performs the asbestos surveys.

Appendix B in volume 1 provided a template for notifying

employees of ACM. The template stated . . . completed a

preliminary visual survey to determine the presence of [ACM,] . . . [and t]he

building was inspected in accordance with the Environmental Protection Agency

And while there is no evidence of what was contained in

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volume 3, Housing Authority contends that volum Housing Authority provided volume 3 to Allied Residential, but Allied Residential

misplaced it.

In 2001, Housing Authority obtained an asbestos survey for roofing material in conjunction with roofing construction. In 2014, it obtained another asbestos survey for flooring material throughout the apartment complex. In 2016, Allied Residential hired OV Construction, All Service Plumbing, and American Floors and Blinds (contractors) to perform work at Fairwood Apartments.

Based on the construction work completed at the apartments, the Department received a complaint. Compliance Safety and Health Officers

(CSHO) Tom Vroman and Timothy Garlock inspected Housing Authority, Allied Residential, and the contractors regarding the work being performed. CSHO Garlock collected samples from the building

And CSHO Vroman requested documentation of any information pertaining to asbestos at Fairwood Apartments that Housing Authority gave Allied Residential.

Housing Authority provided volume 1 of the program and the 2001 inspection report from the roofing construction. Housing Authority did not provide volume 2 or volume 3 to the Department.

CSHO Vroman later determined that Housing Authority violated Department regulations promulgated under WISHA. Specifically, CSHO Vroman found that and location of asbestos on-site (all items that are determined in an AHERA



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accredited Good Faith Inspection)

not list an accredited inspector or provide laboratory results, CSHO Vroman

concluded that Housing Authority

good faith inspection report.

On February 3, 2017, the Department issued one serious violation

(Violation 1) and one general violation (Violation 2) against Housing Authority.

that employees and

subcontractors assigned to do work on an asbestos project at Fairwood

And Violation 2 alleged that

Housing Authority did not perform or cause to be performed, a good faith building inspection, by an accredited inspector, to determine which building

materials contained asbestos

After the Department issued the violations, Housing Authority had another

survey performed. Housing Authority provided the resulting report to the

Department. And Mark Abernathy, Housing Authority later

testified that the report indicated nothing materially different from the 1995

program.

Housing Authority appealed the violation to an Industrial Appeals Judge

(IAJ). And thereafter, Housing Authority moved for partial summary judgment,

seeking dismissal of Violation 1. In response, the Department moved to vacate

Violation 1. And the IAJ issued an order granting the D to



vacate, thereby denying Housing Authority judgment.

On April 9, 2018, the IAJ held a hearing on Violation 2. Thereafter, the IAJ

issued a proposed decision and order vacating the general violation.

Specifically, the IAJ determined that the program complied with the

regulations because the program identified building materials containing

asbestos and provided specific instructions on how to maintain or repair those

building materials.

The Department petitioned for review by the Board, but the Board denied

the petition for review without comment, resulting in . Thus, the Board adopted the following findings of

fact and conclusions of law: 4. In 1995, the Housing Authority of King County, through Clayton Environmental Consultants, an accredited inspector, performed a good faith building inspection of the Fairwood Apartments to identify and determine asbestos containing materials at the apartment complex. Clayton Environmental Consultants produced a three-volume report of its inspection. The Housing Authority of King County provided a complete copy of all volumes of the inspection report to Allied Residential, whom the Housing Authority of King County hired to conduct the day to day management and maintenance of the Fairwood Apartments.

5. The Housing Authority of King County complied with the requirements of [Washington Administrative Code] (WAC) 296- 62-07721(2)(b)(ii) in that before it authorized or allowed any construction, renovation, remodeling, maintenance, repair, or demolition project, it, as the facility owner, caused to be performed a good faith inspection to determine whether materials to be worked on or removed contained asbestos, and the inspection was documented by a written report maintained on file and made available upon request to the director of the Department.

The B Housing Authority . . . did not commit a

general violation of WAC 296-62-07721(2)(b)(ii) as specified in Violation 2, Item 1

of Corrective Notice.

The Department appea Court. The superior court determined that Housing Authority violated WAC

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296-

62-07721(2)(b)(ii) because it [ ]the 1995 good faith

inspection report in its

Specifically, the court found tha . . . requires the

entire report to be the superior court reversed the

B ed Violation 2.

Housing Authority appeals. ANALYSIS

Housing Authority contends that the superior court erred when it reversed

the Board decision and determined that Housing Authority violated WAC 296-

62-07721(2)(b)(ii). We disagree.

Under WISHA, the Department bears the initial burden to prove a

violation Mowat Const t of Labor & Indus., 148 Wn. App. 920, 924,

201 P.3d 407 (2009); WAC 263-12-115(2)(b). Here, the Department cited

Housing Authority for a violation of WAC 296-62-07721(2)(b)(ii), which states:

Before authorizing or allowing any construction . . . , a[ building] owner . . . must perform, or cause to be performed, a good faith inspection to determine whether materials to be worked on or removed contain asbestos. The inspection must be documented by a written report maintained on file and made available upon request to the director . . . . . [and] must be conducted by an accredited inspector.

In short, the regulation requires building owners to complete a good faith

inspection using an accredited inspector and to maintain the report produced

therefrom.

W on the record before



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the agency. *Mowat Constr. Co.*, 148 Wn. App. at 925. To this end, we review

to view the evidence and

reasonable inferences in the light most favorable to [Housing Authority,] the

prevailing party. *Pro-Active Home Builders*, 7

Wn. App. 2d 10, 16, 432 P.3d 404 (2018) (quoting *Frank Coluccio Constr. Co. v.*

*State of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014)). We review

conclusions of law de novo to determine whether the Board correctly applied the law and fact support its conclusions

of law. *Pro-Active Home Builders*, 7 Wn. App. 2d at 16.

As an initial matter, Housing Authority asserts that the Department failed

to find fact 5 and that it therefore cannot

challenge it on appeal. The Department argued at the superior court that it was

unable to reverse any of the factual findings because it was

not

conclusion that Housing Authority maintained the report. While the Board

labeled the conclusion a finding of fact, the determination in finding of fact 5 that

regulations involved a conclusion of law. And even if a conclusion of law is

labeled as a finding of fact, . . . it will be treated as a conclusion of law *D*

*Labor & Indus. v. Lyons Enters., Inc.*, 186 Wn. App. 518, 529-30, 347 P.3d 464

(2015), , 185 Wn.2d 721, 374 P.3d 1097 (2016). Thus, because the

Department discussed this conclusion of law at the superior court, we disagree





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with Housing Authority and conclude that the Department properly raised the issue below.

B they were statutes, Top

Cat Enters., LLC, v. City of Arlington, 11 Wn. App. 2d 754, 760, 455 P.3d 225

(2020), and because regulation, whether Housing Authority maintained its report in compliance with

WAC 296-62-07721(2)(b)(ii) presents an issue of statutory interpretation that we

review de novo. See t of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). If a regulation is unambiguous, intent can be determined from

the language alone, and we will not look beyond the plain meaning of the words

Top Cat Enters., LLC, 11 Wn. App. 2d at 761 (quoting Mader

v. Health Care Auth., 149 Wn.2d 458, 473, 70 P.3d 931 (2003)). To that end, if a

word is not defined in a regu ordinary definition as defined in

the dictionary. , 143 Wn. App. 576,

582, 178 P.3d 1070 (2008).

Here, the regulation is unambiguous because the intent of the regulation is

clear: a building owner must perform or have performed an asbestos survey by

an accredited inspector, maintain the survey report, and provide it to the

Department. And m not defined in the regulation. But its ordinary

meaning is in a state of repair, efficiency, or validity[, and] preserve from

WEBSTER S THIRD NEW INTERNATIONAL DICTIONARY 2627

(2002). Here, Housing Authority concedes that volume 3 is missing. And volume



completion of the

survey. But, as discussed below, volume 1 alone did not provide sufficient

evidence to make a determination as to whether the survey met

requirements. Without H

informed determination as to whether the survey complied with and fulfilled the

purpose of the regulation. And WISHA regulations are to be interpreted liberally

in order to achieve their purpose of providing safe working conditions for every

worker in Washington. Frank Coluccio Constr. Co., 181 Wn. App. at 36. Without volume 3, the Department cannot . Therefore according to the plain language of the regulation lacking volume 3, Housing

Authority violated WAC 296-62-07721(2)(b)(ii).

Housing Authority disagrees and asserts that volume 1 satisfied the

requirement to maintain the report. Volume 1 contains significant information on

the management of and best practices for dealing with ACM. However, the only

information relating to a good faith inspection is found in section 4, which simply

lists the four building materials known to contain asbestos. Section 4 does not

provide information on whether the listed ACMs exist throughout the whole

property, and it does not explain the sampling process, provide the laboratory

results, show the location of the samples taken, provid

accreditation, or give any insight into the type of ACM located throughout the

apartment complex.

In contrast, Housing Authority contends that the summary list contained in

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section 4 of volume 1 applies to all units of the apartment complex. But it cites testimony that does not provide evidence to that effect. Specifically, Abernathy stated that section 4 applied to each apartment. But Abernathy also whether v And nowhere in the record particularly in section 4 does it indicate that the summary list pertained to all units. Thus, contrary to Housing olume 1 does not provide notice of the actual location of ACM and does not assert that ACM is in every apartment. And to read the regulation as requiring only a summary list of building materials containing e to provide safe working conditions.

In further support of its position, Housing Authority also points to the f the volumes of the report was lost since the report was issued does not negate the fact the inspection was performed and the report prepared which detailed which building The Board conclusion was incorrect.

Specifically, the fact that an inspector prepared a report does not satisfy the legal requirement that Housing Authority maintained the report and provided it to the Department. Thus,

Finally, Housing Authority asserts record unequivocally

First, as discussed above, due to the lack of a complete report, the Department was unable to determine whether the survey complied with the accreditation requirement under the statute. 1 Furthermore, while Violation 2 references only



the Department

cited WAC 296.62.07721(2)(b)(ii) as the violated and applicable regulation. And

the inspection information summary noted the importance of the information

1 did not comply with the WAC 296-62-07721. Specifically, section 4 explicitly states

Kieselbach testified that a Phase I Inc. survey would not comply with AHERA

reporting standards by an accredited inspector. Furthermore, the record provides Inc.] did an asbestos ved an accredited inspector. missing from the report, stating:

[G]iven the lack of specific knowledge of the presence, quantity and location of asbestos on-site (all items that are determined in an AHERA accredited Good Faith Inspection), it is likely that many projects on site would be considered to disturb ACM or PACM. If the annual budgeting process does not accurately account cost of doing maintenance and repair work on ACM, then both parties are not appropriately setting up procedures to handle ACM properly.

Additionally, the issue of whether Housing Authority maintained the report was

litigated at the IAJ hearing and throughout the appeals process. Housing

Authority also points to no legal authority and we have found none that

requires the citation to specifically state all issues material to the violation. See

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)

here no authorities are cited in support of a proposition, the court is not

required to search out authorities, but may assume that counsel, after diligent

Thus, H

WISHA asbestos regulations are vital to the health and safety of workers

throughout the state. And because Housing Authority failed to maintain the

if not imperative information pertaining to the asbestos

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survey, the Board erred when it concluded that Housing Authority did not violate

WAC 296-62-07721(2)(b)(ii). Therefore, we affirm .

WE CONCUR:

