

Asbestos/Duty to Maintain: Court of Appeals of Washington Addresses Housing Authority Violation



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06/16/2020

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The Court of Appeals of Washington, Division 1 (“Court of Appeals”) in a June 8th opinion affirmed a King County Superior Court’s (“Superior Court”) decision addressing issues involving application of the state’s asbestos regulations to the Housing Authority of King County (“Housing Authority”). See *Department of Labor and Industries v. Housing Authority*, 2020 WL 3047306 (Wash. Ct. App. 2020).

The Department of Labor and Industries (“Department”) had determined the Housing Authority violated the Washington County Industry Safety and Health Act of 1973 (“WISHA”) by failing to maintain an asbestos survey report.

WISHA requires building owners to perform or cause to be performed an asbestos survey, maintain the survey report, and provide the report to the Department upon request. Building owners are also required to perform or have performed a good faith inspection pursuant to the Asbestos Hazard Emergency Response Act (“AHERA”) standards prior to any construction, renovation, remodeling, maintenance, repair, or demolition project.

The Housing Authority provides public housing in King County. Its housing stock includes the Fairwood Apartments in Renton, Washington. Allied Residential is contracted to run Fairwood Apartments’ day-to-day operations.

In 1995, Housing Authority hired Clayton Environmental Consultants to complete an Asbestos Operations and Maintenance Program for Fairwood Apartments. The resulting written report (“Report”) was three Volumes.

Volume 1 provided a list of asbestos-containing material (“ACM”) in Fairwood Apartments. In Section 4 of Volume 1, there was a short summary of an asbestos test completed by Phase I Inc. This included a list of known ACM present in the apartments. Volume 1, Appendix B also stated that the Fairwood Apartments had been inspected in accordance with the United States Environmental Protection Agency guidelines for ACM. Volume 2 included copies of applicable regulations and that Volume 3 contained backup studies.

In 2016, Allied Residential began a construction project at Fairwood Apartments. The Department received a complaint related to that construction project and sent Compliance Safety and Health Officers (“CSHOs”) to investigate that complaint. The CSHOs collected samples from the buildings indicating asbestos was present. Documentation of any information pertaining to asbestos at Fairwood Apartments was requested.

Allied Residential misplaced Volume 3 of the Report and could not produce it for the Department.

The CSHOs concluded that Housing Authority had violated WISHA by failing to perform or have performed a good faith inspection and maintain the Report. It accordingly issued two violations.

Violation 1 alleged that Housing Authority had not ensured that the employees and subcontractors assigned to work on an asbestos project at Fairwood Apartments were certified asbestos workers.

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.”

The Housing Authority appealed to an Industrial Appeals Judge (“IAJ”). The Department moved to vacate Violation 1. The IAJ granted that order.

The IAJ also vacated Violation 2. He determined that Volume 1 of the Report was sufficient to prove that Housing Authority had complied with the good faith inspection requirement.

The Department appealed these findings to the Board of Industrial Insurance Appeal (“Board”). The Board affirmed the IAJ’s findings. The Department appealed the Board’s decision to the Superior Court. The Superior Court found that Housing Authority had failed to maintain the 1995 report and affirmed Violation 2.

The Housing Authority appealed the Superior Court’s decision to the Court of Appeals.

The Court of Appeals considers the WISHA definition of the term “maintain.” The meaning ascribed to this term would determine the if Housing Authority was in violation of WISHA (i.e., whether it failed to maintain the Report and provide it to the Department upon request).

The Court of Appeals first noted regulations are interpreted as though they are statutes. Further, when statutory language is unambiguous it must be given its plain meaning. When a term is not defined within a regulation it is given its ordinary dictionary definition.

The regulation was determined to be unambiguous. Webster’s Third New International Dictionary was noted to define the term “maintain” as “to keep in a state of repair, efficiency, or validity[, and] preserve from failure or decline.”

The Court of Appeals reasoned that Volume 1 of the Report did not, alone, provide sufficient evidence to determine whether the 1995 survey had met the regulation’s requirements that an AHERA-accredited good faith inspection occur prior to any construction. Without the full Report, the Department could not make an informed determination. The Housing Authority was determined to have allowed the Report to become deficient.

The Housing Authority argued that the language of Violation 2 cited it for failing to perform or have performed a good faith inspection—not a failure to maintain the Report. However, the Court of Appeals noted that Violation 2 cited WAC 296.62.07721(2)(b)(ii). This provision required maintenance of the Report. It further concluded that maintenance of the Report had been litigated throughout the procedural history of the case. There was no legal precedent suggesting that the language of a violation must specifically state all issues materially related to the violation.

The Circuit Court found that the Housing Authority was deemed to have violated WISHA regulations by failing to maintain the Report pertaining to the asbestos survey. The Superior Court’s reversal of the Board’s order was affirmed.

A copy of the Opinion can be downloaded [here](#).