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Court of Appeals
Division II
State of Washington

NO. 51047-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PRO-ACTIVE HOME BUILDERS, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF APPELLANT PRO-ACTIVE HOME BUILDERS, INC.

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I. INTRODUCTION

This matter arises from a Safety Citation & Notice (C&N) issued by the Defendant, the Department of Labor & Industries (Department) against the Plaintiff, Pro-Active Home Builders, Inc (Pro-Active). The C&N alleged seven "serious" violations of the Washington Industrial Safety and Health Act, Ch. 49.17 RCW (WISHA). (CABR 67-76).

Administrative Hearings were held before Industrial Appeals Judge Tom M. Kalenius (IAJ) on December 8, 2014 and December 16, 2014. The IAJ issued a Proposed Decision & Order on March 13, 2015 that affirmed the C&N. (CABR 45-58). Following a timely Petition for Review by Pro-Active, the Board of industrial Insurance Appeals (Board) issued an Order Denying Petition for Review, and the Proposed Decision and Order became the Decision and Order of the Board. (CABR 1).

Pro-Active timely appealed the Board's Decision and Order and appeared before Superior Court for an administrative law review on April 15, 2016. The Honorable Mary Sue Wilson remanded this matter to the Board for further a Findings of Fact regarding Employer knowledge of the serious violations. (CABR 159-161). Thereafter, the Board issued a Decision and Order that determined Pro-Active had constructive knowledge of the violations and, accordingly, affirmed the CNR. (CABR 164-171).

Pro-Active appealed the Board's Decision and Order to Superior Court. After an administrative law review on July 21, 2017, The Honorable Chris Lanese affirmed the Board's Decision and Order affirming the C&N. As such, Pro-Active timely appealed to this Court.

II. ASSIGNMENTS OF ERROR

Pro-Active respectfully asserts that the Board and the Superior Court erred as follows:

1. Pro-Active excepts to and petitions for review Findings of Fact Numbers 2 through 20 as to the issue of prima facie burden of the Department and the affirmative defense of unpreventable employee misconduct;
2. Pro-Active excepts to and petitions for review Conclusions of Law Numbers 2 through 4 as to the issue of prima facie burden of the Department and the affirmative defense of unpreventable employee misconduct; and
3. Pro-Active excepts to and petitions for review all evidentiary rulings adverse to Pro-Active.

III. ISSUES

A. Did the Department establish Employer knowledge as required by RCW 49.17.180(6) when there are no facts that demonstrate Pro-Active knew or could have known of the violative conduct despite its reasonable diligence?

B. Alternatively, if the Department established all prima facie elements required by RCW 49.17.180(6), should the C&N be vacated when Pro-Active met its burden of proving the vioaltive conduct resulted from unpreventable employee misconduct?

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IV. STATEMENT OF FACTS

A. Pro-Active's Tumwater Jobsite:

Pro-Active is a siding contractor. (Tr. 12/16/14, p. 26-27). On January 13, 2014, Pro-Active assigned employees to install siding on two houses in Tumwater, Washington. (Tr. 12/8/14, p. 151). Onofre Valadez Gomez (Mr. Valadez) was working on Lot 5, and Nelson Picazo Sanchez (Mr. Picazo), Martin Gonzales Verdozco (Mr. Gonzales), and Apolinar Aguilar (Mr. Aguilar) were working on Lot 4. (Tr. 12/8/14, p. 136, 151).

Pro-Active's superintendent, John Hodges (Mr. Hodges), was assigned to supervise employees and oversee safety at the Tumwater jobsite. (Tr. 12/8/14, p. 149-150). Pro-Active inspected jobsites unannounced and announced, convened safety meetings, and trained/instructed employees in the proper use of scaffolds, and fall protections. (Tr. 12/8/14, p. 162-164). Pro-Active also trained its employees and distributed a handbook that covered scaffold safety; as well as, the scaffold manufacturer's safety instructions to its employees. (Tr. 12/8/14, p.164-65; Tr. 12/16/14, p. 6-7; Exhibits No. 11, 14). Scaffolding, fall protection, and ladder safety were also specifically addressed in safety meetings. (Tr. 12/8/14, p. 163-164; Exhibit No. 14).

On the morning of January 13, 2014, Mr. Hodges observed Mr. Valadez on a rooftop without being tied off, so he warned Mr. Valadez to attach the safety line to his harness. (Tr. 12/8/14, p. 153). Mr. Hodges considered this communication a verbal warning of a fall protection infraction. (Tr.

12/8/14, p. 153). Mr. Hodges had communicated the dangers of not using fall protection equipment to Mr. Valadez in the past. (Tr. 12/8/14, p. 153-54).

After Mr. Hodges left the jobsite on January 13, 2014, Mr. Valadez constructed a scaffold, as depicted in Exhibit Nos. 1 and 3. (Tr. 12/8/14, p. 155). Mr. Hodges opined that Mr. Valadez is a competent person in erecting scaffolds, as he has the knowledge of how to do it correctly. (Tr. 12/8/14, p. 155). Mr. Gonzalez and Mr. Picazo testified that they did not observe Mr. Valadez build the scaffold or work from his scaffold at their jobsite. (Tr. 12/8/14, p. 141; Tr. 12/16/14, p. 23). Mr. Gonzalez could not see the scaffold from where he was working. (Tr. 12/8/14, p. 141-42). On January 13, 2014, Mr. Gonzalez, Mr. Picazo, and Mr. Aguilar installed a pump jack scaffold at their job site, as depicted in Exhibit Nos. 5 and 6. (Tr. 12/8/14, p. 137, 145). Mr. Gonzalez was trained and considered a competent person in the erection of scaffolds. (Tr. 12/8/14, p. 137).

B. The Department's Inspection and C&N:

Later that day, on January 13, 2014, Raul De Leon, a Department Compliance Safety and Health Officer (CSHO De Leon) conducted an inspection against Pro-Active at the Tumwater jobsite. (Tr. 12/8/14, p. 4, 6-7). The inspection was initially in response to a referral for housekeeping issues. (Tr. 12/8/14, p. 7). Because CSHO De Leon was not on site prior to 1:31 p.m., he did not see Mr. Hodges onsite, nor did he see how Mr. Valadez got onto the roof. (Tr. 12/8/14, p. 56). CSHO De Leon took the photos at the Tumwater jobsite that were admitted as exhibits. (Tr. 12/8/14, p. 7, 9).

Upon arrival, CSHO De Leon observed that one of Pro-Active's

workers, Mr. Valadez, was wearing a fall protection harness on the roof of a house; however, his safety line was not attached to the fall protection harness. (Tr. 12/8/14, p. 8). CSHO De Leon also observed Mr. Valadez work on a scaffold platform without fall protection. (Tr. 12/8/14, p. 10, 28-29). Altogether, CSHO De Leon documented that Mr. Valdez was exposed to a fall hazard for only two minutes. (Tr. 12/8/14, p. 20).

CSHO De Leon also asserted that the design of Mr. Valadez's scaffold system, pictured in Exhibit 1, was unsafe; namely because it used a ladder as a scaffold support and it used either a 2-by-6 or a 2-by-8 as a scaffold bracket that was not constructed or designed by a competent person. (Tr. 12/8/14, p. 22-23, 26). CSHO De Leon further asserted that Mr. Valadez's scaffold system had been erected by a non-qualified person, Mr. Valdez, and without supervision by a qualified person. (Tr. 12/8/14, p. 20-21). Finally, CSHO De Leon asserted that the scaffold lacked safe access, as a ladder was being used in an unopened and unlocked position. (Tr. 12/8/14, p. 27, 29).

In addition, CSHO De Leon asserted that there was a second pump jack scaffold system, pictured in Exhibit Numbers 5 and 6, that was not adequately secured to the structure. (Tr. 12/8/14, p. 30). CSHO De Leon asserted that the box built around the bottom part of the poles was not secured to the ground, so impact could displace the poles. (Tr. 12/8/14, p. 31).

As a result of CSHO De Leon's inspection, Pro-Active was cited for the following violations:

1-1 Pursuant to WAC 296-155-24609(7)(a), alleging the Employer did not ensure employees exposed to fall hazards over 4 feet on steep pitched roof used fall protection.

1-2 Pursuant to WAC 296-874-20004, alleging the Employer did not ensure that scaffolds erected, moved, altered, or dismantled only when the work is supervised and directed by a competent person and done by experienced and trained EE's selected by competent person.

1-3 Pursuant to WAC 296-874-20002, alleging the Employer did not ensure scaffolds were properly designed and constructed and designed by a qualified person.

1-4 Pursuant to WAC 296-874-20020, alleging the Employer failed to ensure that employees working from a scaffold platform were provided with appropriate safe access.

1-5 Pursuant to WAC 296-874-20052, alleging the Employer did not ensure that employees working from a scaffold platform at heights over 10 feet used appropriate personal fall arrest systems.

1-6 Pursuant to WAC 296-876-40005, alleging the Employer did not ensure that the ladder used by employees onsite were used in accordance with manufacturer's instructions and in a way that they were designed for and intended to be used.

1-7 Pursuant to WAC 296-874-40032, alleging the Employer did not ensure pump jack scaffolds used on site met the requirements of this standard.

After hearings were held, the Board determined that the Department met its burden of establishing the serious violations issued in the C&N, and the Employer failed to meet its burden of establishing the affirmative defense of unpreventable employee misconduct. (CABR 57). As a result, the Board affirmed the C&N. (CABR 57). After Pro-Active appealed the Board's Decision and Order, The Honorable Mary Sue Wilson remanded this matter back to the Board for a further Finding of Fact regarding Employer knowledge as to serious violations issued in the C&N. (CABR 159-161).

Thereafter, the Board issued a Decision and Order on remand from the Superior Court, which determined that Pro-Active had constructive knowledge of all the serious violations issued in the C&N because it could have discovered or prevented the violative conduct by exercising reasonable diligence. (CABR 169). Specifically, the Board determined that Items 1-1, 1-4, 1-5, 1-6, and 1-7 were in plain view. (CABR 169). The Board further determined that Mr. Hodges knew or should have known that Mr. Valdez was going to work on the exterior of the second floor of the home being built, but Pro-Active failed to determine there was a scaffold on-site; therefore, Pro-Active had constructive knowledge of Items 1-2 and 1-3. (CABR 169). Finally, the Board determined that Pro-Active failed to meet its burden of establishing the affirmative defense of unpreventable employee misconduct. (CABR 171). Therefore, the Board affirmed the C&N. (CABR 164-171).

Pro-Active appealed to Superior Court. The Honorable Chris Lanese determined substantial evidence supported the Board's Decision and Order and, therefore, he affirmed the Board's Decision and Order. Pro-Active appeals to this Court to reverse the Board's Decision and Order, as it is contrary to the substantial weight of the record.

V. ARGUMENT

A. Standard of Review.

The standard of review under WISHA is set forth in RCW 49.17.150(1). In a WISHA appeal, the courts directly review the Board's decision based on the record before the agency. *See J.E. Dunn Northwest.,*

Inc. v. Dep't of Labor & Indus, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Court reviews the findings of fact to determine whether they are supported by substantial evidence. *Mowat Constr. Co. v. Dep't of Labor & Indus*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Id.* The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. RCW 49.17.150; *Mowat Constr.,* 148 Wn. App. At 925.

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *See Dep't of Labor & Indus. v. Gongyin,* 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *See Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *See The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

B. The Department failed to establish Employer knowledge as required by RCW 49.17.180(6).

The Department bears the initial burden to prove a violation. WAC 263-12-115(2)(b); *Mowat Constr.*, 148 Wn. App. at 924. To establish a prima facie case of a "serious" violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (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 conditions; (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. RCW 49.17.180(6); *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006); *Washington Cedar & Supply Co., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

Moreover, as WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6).

Here, the Department failed to establish that Pro-Active had knowledge of any violative conduct; therefore, the Board and Superior Court erred in affirming the C&N. To prove a violation, the Department must prove that the Employer had actual or constructive knowledge of the violation's existence. RCW 49.17.180(6); *see also BD Roofing, Inc. Dep't of Labor & Indus.*, 139 Wn. App. 98, 108, 161 P.3d 387 (2007) (determining that constructive knowledge is sufficient).

An Employer who could not have known of the violation by exercising reasonable diligence does not have constructive knowledge of the violation. *See Erection Co. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011). Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate

hazards to which employees may be exposed, and to take measures to prevent the occurrence. *Id.*

Constructive knowledge of a violative condition may be demonstrated by the Department in numerous ways, including evidence showing that the violative condition was readily observable or in a conspicuous location in the area of the employer's crews. *Id.* at 207. Constructive knowledge of a violative condition can also be demonstrated by the existence of similar past violations. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor and Indus.*, 119 Wn. App. 906, 916, 83 P.3d 1012 (2003)

C. Pro-Active did not have actual knowledge of any of the alleged vioaltive conduct.

First, the Department failed to establish that Pro-Active had actual knowledge of any violative conduct, as there is no evidence to suggest that any member of Pro-Active's management either saw or were otherwise informed by their employees of any violative conduct. CSHO De Leon testified that Mr. Valadez was the exposed employee at issue under Violation 1-1, but also testified the "superintendent/foreman [Mr. Hodges] was not aware of this particular instance." (Tr. 12/8/14, p. 60). CSHO De Leon further testified that he "would venture to say the same applies to Violations 1-1 through 1-6" regarding the fact that Mr. Hodges was never made aware of the alleged instances at issue. (Tr. 12/8/14, p. 61, lines 3-4). Indeed, Mr. Hodges was not on site at the time of the CSHO De Leon's inspection.

Via impeachment, CSHO De Leon also confirmed that at the time of his arrival, management was not aware of the issue of a deficient scaffold. In

fact, management was not made aware until CSHO De Leon informed them. (Tr. 12/8/14, p. 68-69). Simply put, the Department failed to offer any evidence that Pro-Active had actual knowledge of any violative conduct.

D. Pro-Active did not have construction knowledge of the fall protection violations contained in Items 1-1 and 1-5.

The Board and Superior Court erred in determining that Pro-Active had constructive knowledge of the fall protection violations because the violations were not readily observable, in a conspicuous area, or in the presence of Pro-Active's crew. First, regarding Items 1-1 and 1-5, the Board erred in determining that Mr. Valadez's fall protection violations were in plain view. Under the Board's "plain view" analysis, knowledge per RCW 49.17.180(6) is established because the CSHO, from his vantage point, could plainly see Mr. Valadez not tied off for a brief, discrete period of only two minutes.

However, the Board's analysis fails to consider whether the violative conduct existed for a sufficient period for it be identified, and whether Pro-Active failed to exercise reasonable diligence in discovering the violative conduct. *See Latshaw Drilling and Exploration, LLC,* 26 BNA OSHC 1307 (No. 15-1561) (determining that considering the length of time and visibility help to decipher whether an Employer had the opportunity to observe the condition, and, thus, provide context for applying the reasonable diligence factors); *see also Texas ACA, Inc.,* 17 BNA OSHC 1048 (No. 91-3467) (determining the Employer's duty is to take reasonably diligent measures to inspect its worksite and discover hazardous conditions; so long as the Employer has done so, it is not in violation simply because it has not detected or become aware of every instance of a hazard).

Here, Mr. Valadez was not tied off for only two minutes, which is not enough time for Pro-Active to spot and correct the violative conduct under the facts of this case; especially considering Mr. Valadez was the only person working on the house where the violation occurred; Mr. Gonzalez and Mr. Picazo could not observe Mr. Valadez working from the scaffold at their jobsite; and Mr. Hodges, the superintendent, was not present at the jobsite when the violation occurred. CSHO De Leon even admitted that he was not aware of any situation where there was a fall protection issue that Pro-Active knew about that it did not address. (Tr. 12/8/14, p. 64).

If the Board's analysis is adopted, and the duration of the violation is not considered, then a roofer who steps onto a roof without being tied off for just a few seconds would establish knowledge for an Employer who has, otherwise, developed an excellent safety program. For instance, Mr. Valadez testified that he had received safety training and attending safety meetings on fall protection. (Tr. 12/8/14, p. 119); Exhibit 14). Mr. Valadez also testified that he knew that Pro-Active had rules for fall protection, and he was aware that Pro-Active had disciplinary penalties specifically for fall protection violations. (Tr. 12/8/14, p. 120-21, 127). Mr. Valadez further testified that he received a verbal warning to tie off on the morning of the inspection date. (Tr. 12/8/14, p. 120). The record even demonstrates that Mr. Valadez had all the necessary fall protection equipment available on site at the time of the inspection. (Tr. 12/8/14, p. 8).

Fall protection violations in this matter would be contrary to the Board's holding in *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009)[1] where the Board concluded that an employer should not be held strictly liable for a safety violation if the violation could only have been discovered by exercising absolute vigilance of the worker and the worksite. *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009) (citing *Sec'y of Labor v. Precision Concrete Constr.*, 19 (BNA) O.S.H.C. 1404 (April 25, 2001)).

Furthermore, the record also establishes that the Department double cited Pro-Active for the fall protection violations contained in both Item 1-1 and Item 1-5. CSHO De Leon testified that both violation items deal with the same exposed employee, as well as, the same fall hazard. (Tr. 12/8/14, p. 70-71). Moreover, abatement of one violation item would abate the other violation item. That is, if Mr. Valadez had been tied off, that would have abated both Item 1-1 and Item 1-5. (Tr. 12/8/14, p. 70-71). Furthermore, the areas where Mr. Valdez was exposed to the fall hazards were in the relatively same locations. (Tr. 12/8/14, p. 70-71). Thus, assuming the Department establishes a prima facie case for violations of Item 1-1 and Item 1-5, the issuance of penalties for both violations was in error.

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[1] While persuasive, the Board's decisions are not binding on this Court although they are entitled to great deference. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

E. Pro-Active did not have construction knowledge of Mr. Valadez's scaffold violations contained in Items 1-2, 1-3, 1-4, and 1-6.

Here, Mr. Hodges agreed that Mr. Valadez had the knowledge to erect scaffolds correctly. (Tr. 12/8/14, p. 155, lines 14-17). Mr. Valadez testified that he had received safety training on scaffolding and ladder safety, and the Employer provided the scaffold manufacturer's safety instructions to its employees. (Tr. 12/8/14, p. 118; 164-65; Tr. 12/16/14, p. 6-7).

However, specific to the incident on appeal, Mr. Hodges acknowledged Mr. Valadez did not correctly erect the scaffold, and Mr. Hodges did not witness the erection, but if he had, Mr. Valadez would have been stopped. (Tr. 12/8/14, p. 155, lines 18-26). Likewise, Mr. Gonzalez and Mr. Picazo testified that they did not observe Mr. Valadez build the scaffold or work from his scaffold at their jobsite. (Tr. 12/8/14, p. 141; Tr. 12/16/14, p. 23). In fact, Mr. Gonzalez testified that he did not have any communication with Mr. Valadez while he was on the roof around the time the inspector showed up. (Tr. 12/8/14, p. 142). Upon notice to Pro-Active, Mr. Valadez was given a verbal warning as per its discipline policy. (Tr. 12/8/14, p. 157, lines 10-22).

Furthermore, the Department failed to present any evidence on when this scaffold was erected; the Department only presented evidence that Mr. Valadez erected the scaffolding by himself. *See Ragnar Benson, Inc.,* 18 BNA 1937 (No. 97-1676, 1999) (determining that a violation cannot be proven because the court could not determine how long the violative condition existed and, therefore, could not determine whether the Employer could have known of the violation with the exercise of reasonable diligence; *see also Texas ACA,*

Inc., 17 BNA OSHC 1048 (No. 91-3467) (determining the Employer's duty is to take reasonably diligent measures to inspect its worksite and discover hazardous conditions; so long as the Employer has done so, it is not in violation simply because it has not detected or become aware of every instance of a hazard).

Thus, because the Department failed to establish how long the violative condition existed, it calls into questions whether the Employer had the opportunity to observe and correct the violation. *See Latshaw Drilling and Exploration, LLC,* 2006 WL 6472835 (No. 15-1561, 2016) (determining that considering the length of time and visibility help to decipher whether an Employer had the opportunity to observe the condition, and, thus, provide context for applying the reasonable diligence factors). After all, an Employer is not required to supervise its employees on a continual basis. *See Summit Contractors, Inc.,* 21 BNA 1375 (No. 04-0492, 2005). That is, an employer should not be held ***strictly liable*** for a safety violation if the violation could only have been discovered by exercising absolute vigilance of the worker and the worksite. *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009) (citing *Sec'y of Labor v. Precision Concrete Constr.*, 19 (BNA) O.S.H. Cas. 1404, 2001 WL 422968 (O.S.H.R.C.) (emphasis added)).

Without evidence in the record of how long the violative condition existed or how aggressively Pro-Active would have had to investigate the site, the Board erred in determining that Pro-Active had constructive knowledge of the violative conduct.

F. Pro-Active did not have constructive knowledge of Mr. Sanchez's, Mr. Gonzalez's, and Mr. Aguilar's alleged scaffold violation contained in Item 1-7.

Finally, regarding Item No. 1-7, the Board and Superior Court erred when failing to recognize that CSHO De Leon did not observe the alleged violation at the time of his inspection. The Department alleges a hazard to the pump jack scaffold used by the employer based upon a displacement that could occur. (Tr. 12/8/14, p. 81). Item 1-7 is known as a performance standard, rather than a specification standard. (Tr. 12/8/14, p. 75). Therefore, CSHO De Leon agreed that, as a performance standard, Pro-Active would be allowed to use either spikes or recessing the poles into the ground to secure the pump jack scaffold, so long as the spikes were adequate. (Tr. 12/8/14, p. 78). Yet, the Department takes issue that the pump jack scaffold was set-up according to the manufacturer's instructions, which does not meet the standards of the Department. (Tr. 12/8/14, p. 87).

However, on January 13, 2014, CSHO De Leon never requested that Mr. Gonzalez come down from the pump jack scaffold. (Tr. 12/8/14, p. 75). Nor did CSHO De Leon request that the Employer move the pump jack scaffold on January 13, 2014. (Tr. 12/8/14, p. 78). The record reflects the Department did not know the following pertinent information: it did not know when the pump jack scaffold was erected; it did not know who erected the pump jack scaffold; it did not know how long the pump jack scaffold took to erect; nor did it know the pump jack scaffold's erection procedure. (Tr. 12/8/14, p. 76).

Most importantly, CSHO De Leon testified that he did know if there were spikes in the pump jack scaffold on January 13, 2014, as he did not see them. (Tr. 12/8/14, p. 77). Nor did CSHO De Leon have any evidence to support any contention that spikes are not an adequate method to secure the pump jack scaffold. (Tr. 12/8/14, p. 78).

Although CSHO De Leon asserts Pro-Active's pump jack was in violation as of January 13, 2014, the record reflects it was moved by the time CSHO De Leon arrived onsite on January 14, 2014, and he did not recall seeing spikes. (Tr. 12/8/14, p. 77). Mr. Gonzalez was the designated competent person by the Employer to erect scaffolds, and he was working on January 13, 2014 when CSHO De Leon arrived on the worksite. (Tr. 12/8/14, p. 137, lines 1-19). In relevant testimony, Mr. Gonzalez acknowledged that based on Exhibit 6, you cannot tell whether there was a spike in the base. (Tr. 12/8/14, p. 147, lines 20-24).

Furthermore, Chad Hansen's testimony reveals that a Department consultant came out and walked one of Pro-Active's previous jobsites. (Tr. 12/16/14, p. 38-39). When the consultant walked the jobsite, it noted that Pro-Active was not securing the base of its poles to the ground, which the Department deemed an acceptable correction. (Tr. 12/16/14, p. 39). Since that time, approximately two and a half years ago, Mr. Hansen testified that Pro-Active has spiked the still plates to the ground to secure the base of pump jack scaffolds. (Tr. 12/16/14, p. 39). Mr. Hansen further testified that prior to January 13, 2014, Pro-Active never received a citation by the Department for not properly securing the base of a pump jack scaffold. (Tr. 12/16/14, p. 41).

Indeed, Pro-Active had never been cited for a scaffold violation. (Tr. 12/16/14, p. 41). Clearly, Pro-Active could not have anticipated these violations.

The Department has failed to present any evidence to support an argument that there were no spikes in the pump jack scaffold on January 13, 2014, or that spikes are not adequate to secure the base of the pump jack scaffold. (Tr. 12/8/14, p. 78). As such, where the Department has failed to meet its burden in establishing actual or constructive knowledge of the violations at issue and WISHA does not impose strict liability, the violation must be vacated.

G. Even if the Department can demonstrate Employer knowledge, the facts support Pro-Active's affirmative defense of unpreventable employee misconduct.

As set forth above, the Department failed to establish Employer knowledge for any of the alleged violations. Regardless, even if the Department can meet its burden of proof for any of the alleged violations, the C&N should be vacated under the affirmative defense of unpreventable employee misconduct. Before the burden of establishing unpreventable employee misconduct is shifted to the Employer, the Department must first establish a prima facie case that a violation occurred. *See* RCW 49.17.120(5)(a); *see also Legacy Roofing, Inc. v. Dep't of Labor and Indus.*, 129 Wn. App. 356, 362-63, 119 P.3d 366 (2005).

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The affirmative defense of unpreventable employee misconduct is codified in RCW 49.17.120(5)(a), which provides:

> No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:
>
> (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 does not negate an element of the Department's prima facie case. *See Asplundh Tree Expert Company v. Dept. of Labor and Indus.*, 145 Wn. App. 52, 61-62 (2008). The defense addresses situations in which employees disobey safety rules despite the Employer's diligent communication and enforcement. *Id.* at 62. It defeats the Department's claim, even when the Department has proved all the elements of the violation. *Id.* at 61-62.

To establish unpreventable employee misconduct, the Employer must show that its safety program is effective "in practice as well as in theory." *Legacy Roofing, Inc.,* 129 Wn. App. at 366. In order for the Employer to prove that the enforcement of its safety program is effective, it must prove that the employee's misconduct was not foreseeable. *Id.*

Here, the uncontroverted evidence demonstrates that Pro-Active clearly met the elements set forth in RCW 49.17.120(5). First, the Employer had a thorough safety program, including work rules, training, and equipment designed to prevent violations. Specifically, Pro-Active has an accident prevention program in writing, in English and Spanish, to ensure adequate communication. (Tr. 12/16/14, p. 27). When employees are hired, Pro-Active reviews the accident prevention program with its employees to ensure they clearly understand its contents. (Tr. 12/16/14, p. 27). Pro-Active has this safety orientation and goes over its safety rules for two reasons: (1) to make sure the employees understand what is required of them; and (2) to make sure the employees have the safety equipment necessary to do the job. (Tr. 12/16/14, p. 27-28). If employees do not have the equipment necessary to do their job, Pro-Active ensures that they get it. (Tr. 12/16/14, p. 28). To assist employees in purchasing equipment, Pro-Active has a 5-percent bonus of the pay on the piecework that is provided; 2.5-percent of which relates to safety. (Tr. 12/16/14, p. 24-25, 28). Significantly, CSHO De Leon did not see any problems with Pro-Active's written safety program after he reviewed Pro Active's Accident Prevention Program and safety minutes. (Tr. 12/8/14, p. 16).

In addition to its new employee safety orientation, Pro-Active conducts mandatory weekly safety meetings and an annual meeting to provide a reliable system for communicating safety and health matters to its staff. (Tr. 12/16/14, p. 29). Fall protection, scaffolding, and ladders were specifically addressed in safety meetings, and the scaffolding's manufacturer's safety instructions were provided to the employees. (Tr. 12/8/14, p. 117-19; Tr. 12/16/14, p. 32-33).

Pro-Active further teaches safety, monitors the jobsites with its superintendents and the builders' superintendents, and gives safety awards to promote a culture of safety throughout the company. (Tr. 12/16/14, p. 29-30). As stated by Chad Hansen, the Pro-Active's owner and president, the Employer has zero tolerance for unsafe employees. (Tr. 12/16/14, p. 30).

Pro-Active also has procedures for identifying, evaluating, and correcting hazards at its worksites; as well as, for verifying that its employees complied with the safety and health rules in the workplace. For instance, the Pro-Active's superintendents perform random jobsite inspections. (Tr. 12/16/14, p. 30). In fact, whenever a superintendent is at the jobsite, for any reason, they are always looking at safety. (Tr. 12/16/14, p. 30-31).

Finally, Pro-Active consistently disciplines its employees for using unsafe work practices. Pro-Active's disciplinary program functions as follows: the first offense is verbal; the second offense is written; the third offense is one day at home without pay; the fourth offense is a week at home without pay; and the fifth offense is termination. (Tr. 12/16/14, p. 31). Pro-Active has a separate penalty for fall protection, as it is its number one priority. (Tr. 12/16/14, p. 32). Pro-Active's disciplinary program is also consistently followed and documented. For instance, Mr. Valadez was given a verbal warning and a written warning for the violative conduct that occurred during CSHO De Leon's inspection, which is consistent with the Pro-Active's disciplinary program. (Tr. 12/8/14, p. 156-57; Tr. 12/16/14, p. 40).

In the Board's initial decision, it determined that Mr. Valadez's actions were not isolated instances, as Mr. Valadez engaged in similar conduct, a fall

protection violation, in front of Mr. Hodges. (CABR 35). However, the existence of a prior violation does not absolutely bar use of the unpreventable employee misconduct defense; it is mere evidence that the employee conduct was foreseeable. *See Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.,* 119 Wn. App. 906, 913, 83 P.3d 1012 (2004).

Here, Mr. Hodges was onsite for approximately two hours prior to Mr. De Leon arriving onsite. (Tr. 12/8/14, p. 151). During that time, Mr. Hodges gave a verbal warning to tie off to Mr. Valadez. (Tr. 12/8/14, p. 153). In fact, Mr. Hodges had communicated the dangers of not using fall protection equipment to Mr. Valadez in the past, and Mr. Valadez was reminded of the Pro-Active's fall protection requirements the morning the violative conduct occurred. Mr. Valadez even testified that he knew that Pro-Active had rules for fall protection, and he was aware that Pro-Active had disciplinary penalties specifically for fall protection violations. (Tr. 12/8/14, p. 120-21, 127). The true finding is that where an employee has just been reminded of the safety requirements, those safety standards are fresh in their mind and it would be foreseeable that the employee would be cognizant and abide by the rules.

Given the above, the record overwhelmingly establishes that the Employer met its burden of proving the affirmative defense of unpreventable employee misconduct. Therefore, the Board and Superior Court erred in determining that Pro-Active did not establish the requirements of unpreventable employee misconduct and the C&N must be vacated.

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VI. CONCLUSION

For the reasons set forth above, Pro-Active respectfully urges the Court to reverse the Decision & Order of the Board because substantial evidence does not exist in the record to support the Board's legal conclusions.

Respectfully submitted this 23rd day of October 2017.

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CERTIFICATE OF SERVICE

I certify that on October 23, 2017, I caused the original and copy of the Employer's/Appellant's Opening Brief to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

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