

FILED  
Court of Appeals  
Division II  
State of Washington  
12/19/2017 2:49 PM

NO. 51047-2-II

---

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

---

PRO-ACTIVE HOME BUILDERS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT W. FERGUSON  
Attorney General

Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
(206) 464-6993

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
	1. An employer knows of a safety violation if an employer is not reasonably diligent in discovering safety violations and if a violation is in plain view. Home Builders left a worker who violated safety rules unsupervised and in charge of safety. The fall protection and scaffolding violations were in plain view. Does substantial evidence support the Board’s finding there was constructive knowledge? .....	2
	2. To prove unpreventable employee misconduct, an employer must show it enforces safety requirements. Home Builders left a worker who violated safety rules unsupervised and in charge of safety. It also did not verify it had ever disciplined any other worker for fall protection and scaffolding violations. Does substantial evidence support the Board’s finding that Home Builders did not take adequate steps to correct violations and to enforce its safety program?.....	2
III.	STATEMENT OF THE CASE .....	2
	A. A Department Inspector Observed a Home Builders Employee Working Without Fall Protection on an Unsafe Scaffold.....	2
	B. Home Builders Appealed to the Board, Which Upheld the Citation.....	4
IV.	STANDARD OF REVIEW.....	6
V.	ARGUMENT .....	7
	A. Substantial Evidence Supports the Board’s Finding About Knowledge .....	8

B. Substantial Evidence Supports the Board’s Findings That Home Builders Did Not Take Adequate Steps to Correct Safety Violations and That It Did Not Effectively Enforce Its Safety Program.....	16
VI. CONCLUSION .....	21
APPENDIX ATTACHED	

## TABLE OF AUTHORITIES

### Cases

<i>Asplundh Tree Expert Co. v. Dep't of Labor &amp; Indus.</i> , 145 Wn. App. 52, 185 P.3d 646 (2008).....	13, 15, 17
<i>Aviation W. Corp. v. Dep't of Labor &amp; Indus.</i> , 138 Wn.2d 413, 980 P.2d 701 (1999).....	13
<i>BD Roofing, Inc. v. Dep't of Labor &amp; Indus.</i> , 139 Wn. App. 98, 161 P.3d 387 (2007).....	passim
<i>Brock v. L.E. Myers Co.</i> , 818 F.2d 1270 (6th Cir. 1987) .....	14
<i>Erection Co. v. Dep't of Labor &amp; Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085 (2011).....	10, 12
<i>Frank Coluccio Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014).....	6, 7, 9, 18
<i>Joy v. Dep't of Labor &amp; Indus.</i> , 170 Wn. App. 614, 285 P.3d 187 (2012).....	16
<i>Kokosing Constr. Co. v. Occupational Safety &amp; Hazard Review Comm'n</i> , 232 Fed. Appx. 510 (6th Cir. 2007).....	10
<i>Legacy Roofing, Inc. v. Dep't of Labor &amp; Indus.</i> , 129 Wn. App. 356, 119 P.3d 366 (2005).....	19
<i>N &amp; N Contractors, Inc. v. Occupational Safety &amp; Health Review Comm'n</i> , 255 F.3d 122 (4th Cir. 2001) .....	10
<i>Pilchuck Contractors, Inc. v. Dep't of Labor &amp; Indus.</i> , 170 Wn. App. 514, 286 P.3d 383 (2012).....	7

<i>Potelco, Inc. v. Dep't of Labor &amp; Indus.</i> , 191 Wn. App. 9, 361 P.3d 767 (2015), <i>review denied</i> , 185 Wn.2d 1023 (2016).....	9, 13
<i>Potelco, Inc. v. Dep't of Labor &amp; Indus.</i> , 194 Wn. App. 428, 377 P.3d 251 (2016), <i>review denied</i> , 186 Wn.2d 1024 (2016).....	12, 13, 14
<i>Ramos v. Dep't of Labor &amp; Indus.</i> , 191 Wn. App. 36, 361 P.3d 165 (2015).....	20
<i>Sec'y of Labor v. Hamilton Fixture</i> , 1993 O.S.H.D. (CCH), 1993 WL 127949 .....	14
<i>Wash. Cedar &amp; Supply Co., v. Dep't of Labor &amp; Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003).....	9, 18
<i>Zavala v. Twin City Foods</i> , 185 Wn. App. 838, 343 P.3d 761 (2015).....	6, 7

**Statutes**

RCW 49.17 .....	1
RCW 49.17.010 .....	7, 13
RCW 49.17.050(2).....	13
RCW 49.17.120(5).....	4, 15
RCW 49.17.120(5)(a) .....	17
RCW 49.17.120(5)(a)(iii) .....	17
RCW 49.17.120(5)(a)(iv).....	17
RCW 49.17.150(1).....	6
RCW 49.17.180(6).....	9, 11

**Regulations**

WAC 296-155-24609.....	2, 3
WAC 296-155-24609(7)(a) .....	16
WAC 296-874-20004.....	3, 5
WAC 296-874-20052.....	3, 16

## I. INTRODUCTION

An employee worked over 11 feet off the ground without fall protection, balanced on a jerry-rigged scaffold. The Board of Industrial Insurance Appeals properly upheld the Department of Labor & Industries citation for this unsafe activity under the Washington Industrial Safety & Health Act (WISHA), RCW 49.17.

Pro-Active Home Builders, Inc. (Home Builders) asks this Court to reweigh the evidence to determine that it did not violate WISHA. Appellant's Opening Brief (AB) 7. But the Court does not reweigh evidence and instead views it in the light most favorable to the prevailing party—here the Department. Substantial evidence supports the Board's finding that Home Builders knew of the fall protection and scaffolding violations because it was not reasonably diligent in determining safety violations. Home Builders left an unsupervised employee in charge of safety whom a supervisor observed committing a safety violation without ensuring the employee would act safely. And, the hazardous conditions were in plain view giving constructive knowledge. Home Builders' haphazard approach to safety also defeats its attempt to raise the defense of unpreventable employee misconduct. The Court should affirm the Board.

## II. ISSUES

1. An employer knows of a safety violation if an employer is not reasonably diligent in discovering safety violations and if a violation is in plain view. Home Builders left a worker who violated safety rules unsupervised and in charge of safety. The fall protection and scaffolding violations were in plain view. Does substantial evidence support the Board's finding there was constructive knowledge?
2. To prove unpreventable employee misconduct, an employer must show it enforces safety requirements. Home Builders left a worker who violated safety rules unsupervised and in charge of safety. It also did not verify it had ever disciplined any other worker for fall protection and scaffolding violations. Does substantial evidence support the Board's finding that Home Builders did not take adequate steps to correct violations and to enforce its safety program?

## III. STATEMENT OF THE CASE

### A. A Department Inspector Observed a Home Builders Employee Working Without Fall Protection on an Unsafe Scaffold

On January 13, 2014, Home Builders installed siding on two adjacent houses, using two separate crews. AR de Leon 6-7; AR Hodges 151; AR Picazo 20. The superintendent, John Hodges, visited the site that day. *See* AR Hodges 151. He saw a worker, Onofre Valadez Gomez, working without fall protection and yelled at him to tie off. AR Valadez 108; AR Hodges 153 (Tying off means connecting a harness to an anchor with a safety line. An employer must require fall protection when work conditions expose workers to fall hazards. WAC 296-155-24609.) Hodges

considered this a verbal warning. AR Hodges 153. He only yelled at Valadez and did not discuss the consequences for violating a safety rule. *See* AR Hodges 153. Despite seeing a safety violation, Hodges left Valadez, a lead, in charge of safety at the site. AR Hodges 152.

Later that day Valadez constructed a scaffold (a plank without rails) that used a ladder to hold up the plank. AR Valadez 113; Ex 3.<sup>1</sup> Valadez was not a competent person allowed to construct a scaffold. AR de Leon 21; AR Valadez 113. (WAC 296-874-20004 allows only qualified persons to construct a scaffold.) This precarious scaffold was potentially unstable and if it fell could cause death or serious injury. *See* AR de Leon 23, 37, 40.

While Valadez worked on the roof, Department inspector Raul de Leon arrived at the site and observed from the street Valadez walking on the roof without fall protection. AR de Leon 8, 10, 20; Ex 1. Valadez then walked on the scaffold without fall protection. AR de Leon 10; Ex 3. While de Leon visited the site, only Valadez was in charge. AR Hodges 152. Home Builders admitted that Valadez violated safety rules when he worked without fall protection. AR Valadez 130-31; WAC 296-155-24609; WAC 296-874-20052.

---

<sup>1</sup> Exhibit 3 is attached as an appendix.

At the adjacent house, de Leon observed another worker, Martin Gonzalez Verdozco, using a pump jack scaffold that Home Builders had not secured to the ground with spikes. AR de Leon 30-32, 34-35. Although Home Builders later claimed that it always secures scaffolding, neither Gonzalez nor Hodges (who had been on-site) confirmed that the scaffold had been tied down that day. AR Hansen 39; AR Gonzalez 138-39; AR Hodges 170. And de Leon testified that the picture he took would have shown any spikes if Home Builders had used them, but there were none. AR de Leon 30-32, 34-35.

**B. Home Builders Appealed to the Board, Which Upheld the Citation**

The Department cited Home Builders for seven WISHA violations AR 67-76. Home Builders appealed to the Board, arguing that unpreventable employee misconduct excused its violations. AR 51; AR Valadez 130. To argue unpreventable employee misconduct, an employer must show a thorough safety program, communication of the program, steps taken to discover violations, and effective enforcement of the program. RCW 49.17.120(5). Home Builders presented testimony about its safety program and communication of its plan.

On the other elements, Home Builders did not provide any documentary evidence that it had disciplined any worker besides Valadez.

AR Hodges 156-57. Gonzalez, who had worked for Home Builders for two years, never saw Home Builders disciplining anyone besides hearing about Valadez's January 13, 2014 incident. AR Gonzalez 143-44.

The Board rejected the defense, deciding that Home Builders did not prove the elements that it took adequate steps to correct violations of its safety rules and that it effectively enforced its safety program. AR 1, 56; *see also* AR 170. The Board affirmed the citation. AR 1, 57; *see also* AR 171.

Home Builders appealed to superior court, which also rejected Home Builders' unpreventable employee misconduct defense. AR 160. The court remanded for a further finding of fact regarding employer knowledge. AR 160.

On remand, the Board found that Home Builders had knowledge. AR 169. The Board emphasized that Hodges observed Valadez on the roof without being properly tied off. AR 164-65. Even though Hodges knew that Valadez worked at a level that he could only reach by scaffolding or ladder, Hodges did not check to see if Valadez had the proper equipment to work safely. AR 165, 166, 169. And Hodges did not direct a competent person to construct the scaffold. AR 166, 169. (A competent person has the training to properly construct a scaffold. WAC 296-874-20004.) Valadez worked in plain sight and was readily observable. AR 167, 169.

Home Builders had also constructed the unsecured pump jack scaffold that day and Hodges had been present at the site and could see it. AR 164, 169. Had Hodges inspected the scaffold, he would have seen the violation, which was in plain sight. AR 166-67, 169.

The Board concluded that “Home Builders failed to properly inspect the work area, anticipate the hazards to which its employees may be exposed, and then direct its employees to take appropriate safety measures.” AR 167.

Home Builders appealed again to superior court, which affirmed the Board’s order. CP 70-73. Home Builders appealed.

#### **IV. STANDARD OF REVIEW**

In WISHA appeals, this Court reviews the Board’s decision directly based on the record before the agency. *Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). The Board’s findings are conclusive if substantial evidence supports them. *Id.*; RCW 49.17.150(1). Evidence is substantial if it will convince a fair-minded person of the truth of the declared premise. *Frank Coluccio*, 181 Wn. App. at 35. Under substantial evidence review, courts will not reweigh the evidence even though they “might have resolved the factual dispute differently.” *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015) (citation omitted). Rather, courts view the evidence

in the light most favorable to the prevailing party at the Board—here, the Department. *See Frank Coluccio*, 181 Wn. App. at 35.

The court reviews questions of law, including an agency’s construction of a regulation, *de novo*. *Pilchuck Contractors, Inc. v. Dep’t of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012). The Court construes WISHA statutes and regulations “liberally to achieve their purpose of providing safe working conditions for workers in Washington.” *Frank Coluccio*, 181 Wn. App. at 36; RCW 49.17.010. The Court gives substantial weight to the Department’s interpretation of WISHA. *Frank Coluccio*, 181 Wn. App. at 36.

## V. ARGUMENT

Viewing the evidence in the light most favorable to the Department, substantial evidence shows that Home Builders had knowledge. AR 169 (FF 10). Home Builders asks this Court to reweigh the evidence. AB 7 (asking for reversal because the Board’s decision “is contrary to the substantial weight of the record”). But the court does not reweigh evidence on substantial evidence review. *Zavala*, 185 Wn. App. at 867.

Substantial evidence supports the Board’s finding about knowledge. Home Builders had a duty of reasonable diligence, yet knowing that an employee violated safety rules Home Builders left him

unsupervised and in charge of safety. It did not try to arrange for or to inspect the scaffolding. And the violations were in plain view, which the Board may consider when determining if an employer had constructive knowledge.

Substantial evidence supports the Board's findings about unpreventable employee misconduct. Home Builders left unsupervised and in charge of safety an employee who had shown he would ignore safety regulations. Home Builders also presented no documentary evidence it disciplined anyone else besides the violative employee for violations of safety regulations. Case law allows the Board to rely on the lack of documentary evidence to find that an employer has not proven unpreventable employee conduct. Substantial evidence shows that the unsafe conduct was preventable.

**A. Substantial Evidence Supports the Board's Finding About Knowledge**

Substantial evidence supports the Board's finding about knowledge. It found:

Pro-Active Home Builders, Inc. had constructive knowledge of all seven serious violations because it could have discovered or prevented them by exercising reasonable diligence. The violations involved in Items 1-1, 1-4, 1-5, 1-6, and 1-7 were in plain sight. On January 13, 2014, Mr. Valadez accessed and worked on jerry-rigged scaffolding, without using fall protection, within sight of his coworkers. A second pump jack scaffold had been

erected on January 12 or 13, but its site superintendent, John Hodges, had failed to inspect it to determine whether it had been constructed safely. Had he done so, he could have readily observed its base was not secured. Mr. Hodges knew or should have known that Mr. Valadez was going to work on the exterior of the second floor of the home being built. Home Builders failed to provide Mr. Valadez with a safe scaffold to use to do this work. Mr. Valadez was not qualified to construct a scaffold. Mr. Hodges failed to determine there was a scaffold on-site Mr. Valadez could use to do his work and failed to designate a qualified worker to construct a scaffold he could use. Pro-Active Home Builders, Inc. therefore had constructive knowledge of Items 1-2 and 1-3.

AR 169 (FF 10).

At the Board, to establish a prima facie case of a serious WISHA violation, the Department must show that “the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.” *Potelco, Inc. v. Dep’t of Labor & Indus.*, 191 Wn. App. 9, 34, 361 P.3d 767 (2015) (quotation omitted), *review denied*, 185 Wn.2d 1023 (2016). On appeal, the Court reviews only for substantial evidence, with the burden on Home Builders as the appellant to disprove the Board’s knowledge finding. *See Frank Coluccio*, 181 Wn. App. at 35.

To establish the knowledge element at the Board, the Department need only show that the employer could have known of the violative condition if it exercised reasonable diligence. RCW 49.17.180(6); *Wash. Cedar & Supply Co., v. Dep’t of Labor & Indus.*, 119 Wn. App. 906, 914,

83 P.3d 1012 (2003). ““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.”” *Erection Co. v. Dep’t of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quoting *Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm’n*, 232 Fed. Appx. 510, 512 (6th Cir. 2007)). “Employer knowledge” means knowledge of the hazardous condition, not knowledge of a specific incident. *See Erection Co.*, 160 Wn. App. at 207 (knowledge of “violative condition.”).

Here, the record supports the Board’s finding about knowledge in at least five ways. First, the superintendent observed Valadez working without being tied-off and still left him to work unsupervised at the job site and in charge of safety. AR Valadez 108; AR Hodges 152-53. The *Erection* Court noted that notice of prior citations may substantiate a finding of knowledge. *Erection Co.*, 160 Wn. App. at 207. So too would notice of prior misconduct, as here.

Second, relevant to reasonable diligence is the duty to adequately supervise employees. *See N & N Contractors, Inc. v. Occupational Safety & Health Review Comm’n*, 255 F.3d 122, 127 (4th Cir. 2001). Although an employer has no duty to perform minute-by-minute supervision, it has a duty to undertake reasonable diligence, and here it knew of violation of

rules. RCW 49.17.180(6). The superintendent yelled at Valadez to tie off but he did not bring Valadez down and inform him this was a disciplinary step nor talk about the importance of tying off. *See* AR Valadez 108; AR Hodges 152-53. The Board could surmise that merely yelling at someone from the sidewalk without more—such as a plan to supervise the conduct—is not reasonable diligence.

Third, the superintendent knew that Valadez was working at a site that would require scaffolding to access it, and Valadez was not a competent person who can construct scaffolding, yet he left Valadez on his own without inquiring about who would construct the scaffold. AR Ex. 3; AR de Leon 21; AR Valadez 113.

Fourth, the superintendent was on-site and did not ensure the pump jack scaffold was secured to the ground. Home Builders mistakenly argues that the inspector “testified that he did not know if there were spikes in the pump jack scaffold” and that the Department did not present evidence to support there was no spikes securing it. AB 17-18. This is an improper attempt to reweigh the evidence. The inspector said there were no spikes visible in the picture he took, and if Home Builders used the required spikes, the picture would have shown them. AR de Leon 30-32, 34-35. So, since Home Builders did not use spikes, Home Builders did not properly construct the scaffolding.

Finally, the hazardous conditions were in plain view. An employer has constructive knowledge if a hazardous condition is readily observable or in a conspicuous location in the area of the employer's crews (i.e. "plain view"). *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 109-10, 161 P.3d 387 (2007). Plain view constructive knowledge is established where the hazard was "readily observable or in a conspicuous location in the area of the employer's crews." *Erection Co.*, 160 Wn. App. at 207. When a hazardous condition is in the open and visible to any bystander, the employer knows of that condition. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 439-40, 377 P.3d 251 (2016), *review denied*, 186 Wn.2d 1024 (2016). Here, working at heights that required fall protection was in plain view, and Home Builders does not deny that Valadez needed fall protection. AR Valadez 130. Just as the inspector saw the hazardous condition from the street, so could Home Builders. AR de Leon 20. Just as the inspector examined the base of the pump jack scaffold to see if it was secure, so could have Home Builders. AR de Leon 30-32, 34-35.

The length of time the inspector observed the violation is not determinative, contrary to Home Builder's arguments. AB 11-12, 14-15. The inspector took only the time necessary to take the pictures before he brought Valadez safely down. AR de Leon 57. Home Builders' argument

about duration would encourage inspectors to leave workers in hazardous positions to prove a violation. This would undermine WISHA's purpose, which is to ensure safe and healthful working conditions for everyone working in Washington. RCW 49.17.010; *Potelco*, 191 Wn. App. at 21.

Home Builders looks to federal administrative law that focuses on duration. AB 11. But Washington has not taken this approach. RCW 49.17.050(2) requires the Department to adopt occupational health and safety standards at least as effective as those adopted under the federal Occupational Safety and Health Act. Courts often look to federal case law. *See Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008). But Washington may have stricter standards. *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999). In Washington, the standard is that hazardous conditions "in the open" establishes constructive knowledge:

Potelco's failure to establish an EPZ was appropriately characterized as a serious violation. Here, the entire work site was "in the open." Because the work site was exposed, any bystander—but especially the project foreperson—could have observed that an EPZ had not been created. On this basis alone, Potelco had sufficient knowledge of the violative condition.

*Potelco*, 194 Wn. App. at 440. In *Potelco*, the violation was in the "open" and this established knowledge. *Id.* Similarly here, the violation was in the open. The inspector and anyone at the site could see the violation and so

could Home Builders. In *Potelco*, there was someone in charge of safety present, a foreman who participated in the violation. *Id.* Similarly, Valadez was the lead in charge of safety and could observe the unsafe conditions like in *Potelco*. AR Hodges 152. That Valadez violated safety rules shows that enforcement of safety rules at the site was lax. Where a person in charge of safety, like a supervisor or foreperson, participates in a safety violation, “such circumstance raises an inference of lax enforcement and/or communication of the employer’s safety policy.” *Potelco*, 194 Wn. App. at 437 (quoting *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987)).

Additionally federal administrative law, if the court looks to it, examines the whole picture about reasonable diligence. *Sec’y of Labor v. Hamilton Fixture*, 1993 O.S.H.D. (CCH) P 30034, 1993 WL 127949, \*16 (Occupational Safety & Health Review Comm’n Apr. 20, 1993) (finding if inspector could observe the problem, then company’s management, “who would be much more familiar with the site,” could have identified the problem with the exercise of reasonable diligence). Home Builders does not deny that Valadez was working on the site at heights that require fall protection and was readily observable in his work, so it could observe him. Home Builders’ focus on duration is too narrow a focus because reasonable diligence requires inspection and supervision of a site with

known dangers and Home Builders did not fulfill that duty despite notice of Valadez's disregard for fall protection requirements and the need for access on the site where the scaffold was constructed. Had the superintendent followed up on Valadez's unsafe behavior with reasonable diligence, he, like the inspector, could have prevented the violation. The Board considered all the circumstances regarding the Home Builder's lack of diligence, including plain view, and found constructive knowledge. AR 169 (FF 10).

Home Builders argues it had an "excellent safety program" and so it could not know about Valadez's violation. AB 12. Home Builders conflates the knowledge inquiry with the unpreventable employee misconduct defense. An employer may know of a violation, but then argue that the conduct was unpreventable employee misconduct as shown in part by an effective safety program. RCW 49.17.120(5). But the availability of the unpreventable employee misconduct defense does not by itself negate knowledge. *Asplundh Tree Expert*, 145 Wn. App. at 61-62. More significantly, however, as a factual matter, the Board found that Home Builders did not enforce its safety program, and Home Builders cannot claim its safety program is effective in practice to show it lacked knowledge. AR 170 (FF 20).

Home Builders argues that the Department should not have cited it for violating both WAC 296-155-24609(7)(a) (violation 1-1) for no fall protection on the roof and WAC 296-874-20052 (violation 1-5) for no fall protection on the scaffold because purportedly abatement of one violation would abate the other. AB 13. Home Builders provides no authority to support its argument and the failure to provide authority in an opening brief means the court does not consider the issue. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012). The court does not consider an argument given only passing treatment. *Id.* at 629. In any event, protecting a worker on a roof differs from protecting the worker on a scaffold, and the Board could determine that there were not duplicate citations because of the different locations of the violations, with different locations of tying off for fall protection needed. Ex 1, 3.

**B. Substantial Evidence Supports the Board's Findings That Home Builders Did Not Take Adequate Steps to Correct Safety Violations and That It Did Not Effectively Enforce Its Safety Program**

Substantial evidence supports the Board's findings that Home Builders did not adequately try to correct safety violations and that it did not effectively enforce its safety program. AR 170 (FF 18-20). The Board correctly concluded that Home Builders did not meet its burden to show unpreventable employee misconduct.

After the Department establishes that the employer has committed a safety violation, the employer may be relieved of responsibility for the violation if the employer can prove it has:

1. Established a thorough safety program, including work rules, training, and equipment designed to prevent the violation;
2. Adequately communicated these rules to its employees;
3. Tried to discover and correct safety rule violations; *and*,
4. Effectively enforced its safety program as written, in practice, and not just in theory.

RCW 49.17.120(5)(a); *BD Roofing*, 139 Wn. App. at 110-11. This affirmative defense is deliberately hard to prove: applying only in “situations in which employees disobey safety rules despite the employer’s diligent communication and enforcement.” *Asplundh Tree*, 145 Wn. App. at 62.

Here, Home Builders failed to establish that it tried to “correct violations of safety rules” and to show “[e]ffective enforcement of its safety program as written in practice and not just in theory.” RCW 49.17.120(5)(a)(iii), (iv); AR 170.

First, Home Builders failed to show it tried to discover and correct safety violations. To prove unpreventable employee misconduct, the employer must show that the conduct was idiosyncratic and not

foreseeable. *BD Roofing*, 139 Wn. App. at 111; *Wash. Cedar*, 119 Wn. App. 913, 916. Here, the conduct was foreseeable because the superintendent witnessed the employee violating a safety rule that day. Despite seeing Valadez commit a safety violation, the superintendent left him in charge of safety and made no further attempt to monitor Valadez's compliance with safety rules. AR Hodges 152-53.

Home Builders admits that previous conduct can show that an employee's behavior was foreseeable. AB 22. But it attempts to reweigh the facts by saying that 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." AB 22. Even were this a reasonable inference from the facts, which the Department disputes, the opposite inference may be raised by knowledge that an employee is flouting safety rules—that the employee may require monitoring to make sure the employee does not repeat the dangerous behavior or at the very least something more serious than yelling at someone from the sidewalk. This Court draws the inferences in the Department's favor. *Frank Coluccio*, 181 Wn. App. at 35.

Second, Home Builders allowed a non-competent person to erect a scaffold. The job site required access to work in the location where

Valadez erected the scaffold, and the superintendent left Valadez at the house even though he was not a competent person and the superintendent did not verify that a competent person would erect the scaffold. AR Ex. 3; AR de Leon 21; AR Valadez 113.

Third, Home Builders does not show that the superintendent inspected the pump jack scaffold at the second house to look for safety violations and, indeed, he does not testify that the scaffold was properly secured.

Finally, Home Builders has provided no documentary evidence it punished any employees for violating safety rules before the violations here. In *BD Roofing*, the court emphasized that “showing a good paper program does not demonstrate effectiveness in practice.” *BD Roofing*, 139 Wn. App. at 113. The court held that the unpreventable employee misconduct defense fails when there was no evidence that an employer had fired employees because it violated safety rules, despite there being a written policy allowing for dismissal. *Id.* at 113-14. In *BD Roofing*, there was no documentary evidence showing it disciplined its employees or implemented its written discipline policy, and the court held that the employer did not show its safety program was effective in practice. *Id.* at 113-14; *see also Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 366, 119 P.3d 366 (2005) (inadequate documentation of

discipline supported Board determination of no unpreventable employee misconduct). Without showing actual enforcement of a company's disciplinary policy, the employer cannot meet its burden to show unpreventable employee misconduct. And the Board can rely on the lack of documented evidence to determine whether the program is effective in practice. *BD Roofing*, 139 Wn. App. at 113-14.

Although Home Builders believes it disciplined Valadez once verbally before the inspection, it did not verify by documentation that it disciplined any other Home Builder employee. AR Hodges 153. Gonzalez, who had worked for Home Builders for two years, had never seen Home Builders disciplining anyone besides hearing about Valadez's January 13, 2014 incident. AR Gonzalez 143-44. And he had seen others working without fall protection. AR Gonzalez 144.

Home Builders claims it "consistently disciplines its employees for using unsafe work practices." AB 21. But the Board could reject Home Builders' self-serving claim about discipline absent corroborating evidence. *See Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015) (a factfinder may disbelieve a witness's self-serving testimony). The Board could believe that failing to document discipline would mean that Home Builders could not effectively administer progressive discipline as required by its safety plan, and that this shows its

written plan is not effective in practice. AR Hansen 31; see *BD Roofing*, 139 Wn. App. at 113-14. The Board could believe that it is inconceivable that Valadez is the only Home Builders employee to ever violate fall protection and scaffolding regulations (particularly where Gonzalez saw other workers violating these regulations), and that Home Builders did not punish other employees. See AR Gonzalez 143-44. When viewing the evidence in the light most favorable to the Department, Home Builders has not proven it has taken steps to correct safety violations and that it has an effective safety program in practice.

## VI. CONCLUSION

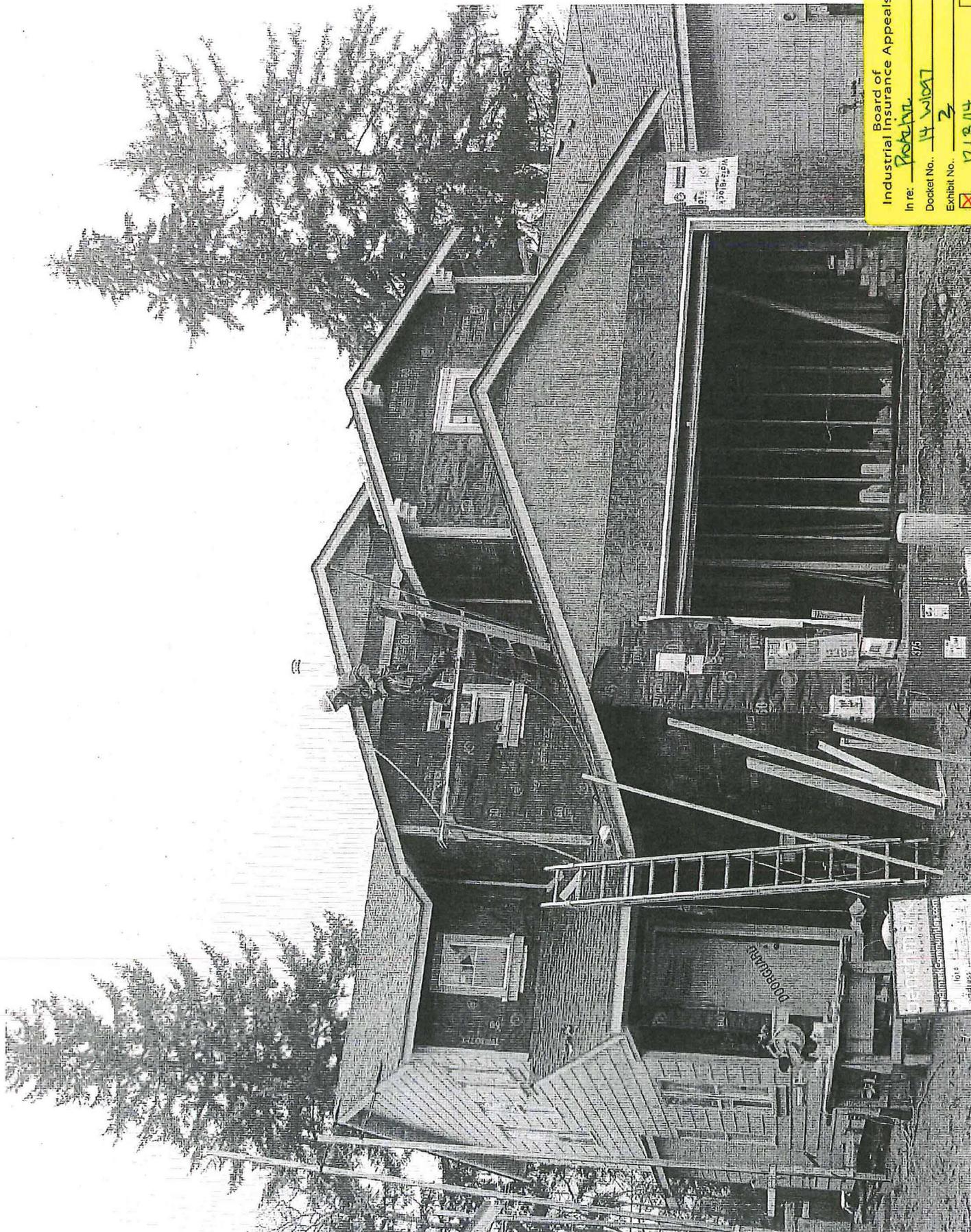
Home Builders did not protect its workers from hazardous conditions by exercising reasonable diligence to discover safety violations. Its employee's conduct was preventable. This Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of December, 2017.

ROBERT W. FERGUSON  
Attorney General



ANASTASIA SANDSTROM  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740



Board of  
Industrial Insurance Appeals

In re: Proctor

Docket No. 14 W1047

Exhibit No. 3

ADM.  REV.

Date 12/3/14

No. 51047-2-II

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

PRO-ACTIVE HOME BUILDERS,  
INC.,

Appellant,

v.

DEPARTMENT OF LABOR &  
INDUSTRIES,

Respondent.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

**E-Filing via Washington State Appellate Courts Portal:**

Derek Byrne  
Court Administrator/Clerk  
Court of Appeals, Division II

**E-Mail via Washington State Appellate Courts Portal:**

Aaron Owada  
W. Scott Noel  
Sean Walsh  
Richard Skeen  
AMS Law, PC, d/b/a Owada & Noel, PC  
[aaron.owada@amslaw.net](mailto:aaron.owada@amslaw.net)  
[scott.noel@amslaw.net](mailto:scott.noel@amslaw.net)  
[Sean.Walsh@amslaw.net](mailto:Sean.Walsh@amslaw.net)  
[richard.skeen@amslaw.net](mailto:richard.skeen@amslaw.net)

DATED this 19th day of December, 2017.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a horizontal line underneath it.

SHANA PACARRO-MULLER  
Legal Assistant  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

**December 19, 2017 - 2:49 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51047-2  
**Appellate Court Case Title:** Pro-Active Home Builders, Appellant v. Washington State Department of Labor and Industries  
**Superior Court Case Number:** 16-2-02758-7

**The following documents have been uploaded:**

- 510472\_Briefs\_Plus\_20171219144635D2618698\_4942.pdf  
This File Contains:  
Affidavit/Declaration - Service  
Briefs - Respondents  
*The Original File Name was 171219\_BriefOfRespondent.pdf*

**A copy of the uploaded files will be sent to:**

- Sean.Walsh@amslaw.net
- aaron.owada@amslaw.net
- richard.skeen@amslaw.net
- scott.noel@amslaw.net

**Comments:**

Brief of Respondent w/ Appendix and Certificate of Service

---

Sender Name: Shana Pacarro-Muller - Email: shanap@atg.wa.gov

**Filing on Behalf of:** Anastasia R. Sandstrom - Email: anas@atg.wa.gov (Alternate Email: )

Address:  
800 Fifth Avenue, Ste. 2000  
Seattle, WA, 98104  
Phone: (206) 464-7740

**Note: The Filing Id is 20171219144635D2618698**