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Court of Appeals  
Division II  
State of Washington  
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NO. 51047-2-II

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

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PRO-ACTIVE HOME BUILDERS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondent.

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**REPLY BRIEF OF APPELLANT  
PRO-ACTIVE HOME BUILDERS, INC.**

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## **I. REPLY TO RESPONDENT'S ARGUMENTS**

### **A. Substantial Evidence Does Not Support the Board's Finding of Employer Knowledge.**

The Department mistakenly asserts that the record supports the Board's finding of employer knowledge, as its interpretation subjects Pro-Active to strict liability for the unforeseeable acts of its workers. First, regarding the fall protection violations, the Department asserts that Mr. Hodges, Pro-Active's superintendent, observed Mr. Valadez working without being tied-off and still left him to work unsupervised at the job site. (Dept. Br., p. 10). The Department also mistakenly asserts that Mr. Valadez was inadequately supervised by Mr. Hodges. (Dept. Br., p. 11).

These assertions lack adequate evidence in the record. Mr. Hodges regularly supervised Mr. Valadez, he gave Mr. Valadez a fall protection warning on the day of the inspection, and he corrected Mr. Valadez's unsafe behavior. (Tr. 12/8/14, p. 153). Moreover, Mr. Hodges had communicated the dangers of not using fall protection to Mr. Valadez in the past. (Tr. 12/8/14, p. 153-54).

Mr. Valadez's testimony also establishes that Pro-Active adequately trained its employees on fall protection requirements and ensured its employees had the necessary fall protection equipment available. Indeed, Mr. Valadez testified that he received safety training and attended safety meetings regarding fall protection, and he knew that Pro-Active had rules and disciplinary penalties regarding fall protection. (Tr. 12/8/14, p. 119, 120-21, 127; Exhibit 14). 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). Clearly, Mr. Valadez was appropriately trained, his training was refreshed the day of the Department's inspection, and he was aware of Pro-Active's fall protection rules. However, despite Pro-Active's training, rules, and warning, Mr. Valadez failed to tie off for a period of only two minutes. (Tr. 12/8/14, p. 20).

The Department also asserts that Mr. Valadez's fall protection violation and scaffold violations occurred in plain view and, when a hazardous condition is in the open and visible to any bystander, the employer knows of that condition. (Dept. Br. p. 12). However, the Department's analysis is highly flawed because it 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).

Regarding Mr. Valadez's fall protection violation, it only occurred for a matter of minutes. This is hardly enough time for Pro-Active to spot and correct the violative conduct 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.

Moreover, regarding Mr. Valadez's scaffold violation, the Department failed to present any evidence on when Mr. Valadez's scaffold was erected; the Department only presented evidence that Mr. Valadez erected the scaffold 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.

Yet, under the Department's analysis, knowledge is established because the CSHO, from his vantage point, could plainly see Mr. Valadez not tied off and working on an improper scaffold for a brief, discrete period of only two minutes. This analysis, which fails to consider the duration, would hold an employer strictly liable for a safety violation because, in this instance, the violative conduct could only have been discovered by exercising absolute vigilance over 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)).

Significantly, the Department acknowledges that an employer has no duty to perform minute-by-minute supervision; however, that is exactly what the Department is requiring Pro-Active to do in this case. (Dept. Br., p. 10).

The Department attempts to downplay the durational consideration by stating that it "would encourage inspectors to leave workers in hazardous positions to prove a violation." (Dept. Br., p. 13). This is not true because the Department could establish the duration of alleged violative conduct through its investigation and questioning. However, the Department's analysis holding employer's strictly liable for its workers' violative conduct would discourage employers from taking appropriate corrective actions because they would always be found to have knowledge of a violation despite their training, rules, inspections, and warnings.

Next, regarding the pump jack scaffold, the record reflects that the Department did not even know if there were spikes in the pump jack scaffold, as he did not see them. (Tr. 12/8/14, p. 77). In addition, the Department failed to establish when the pump jack scaffold was erected; it failed to establish who erected the pump jack scaffold; it failed to establish how long the pump jack scaffold took to erect; and it failed to establish the pump jack scaffold's erection procedure. (Tr. 12/8/14, p. 76). Clearly, the record lacks any evidence that Pro-Active violated the alleged standard or that it had knowledge of the alleged standard.

Finally, contrary to the Department's assertion, Pro-Active diligently inspected and supervised the work site given the known dangers. That is, in addition to teaching safety, Pro-Active monitored its jobsites with its superintendent and the builders' superintendents. (Tr. 12/16/14, p. 29-30). In fact, Pro-Active's superintendents performed random jobsite inspections, and whenever a superintendent is at the jobsite, for any reason, they were always looking at safety. (Tr. 12/16/14, p. 30-31). Indeed, Mr. Hodges was at the jobsite for approximately two hours prior to the Department's inspection. (Tr. 12/8/14, p. 151).

Given the above, the Department failed to meet its burden in establishing actual or constructive knowledge of the violations and, as such, the violations must be vacated.

**B. Substantial Evidence Does Not Support the Board's Findings that Pro-Active Did Not Take Adequate Steps to Correct Safety Violations and That It Did Not Effectively Enforce its Safety Program.**

Contrary to the Department's assertions, substantial evidence does not support the Board's findings that Pro-Active failed to adequately correct safety violations and effectively enforce its safety program. First, Pro-Active established that it routinely inspected and consistently corrected safety violations to ensure that its employees complied with its safety and health rules. For instance, Pro-Active monitored its jobsites with its superintendents and the builders' superintendents. Moreover, Pro-Active's superintendents performed 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).

Second, Pro-Active provided evidence that it punished its employees for violating safety rules, as Pro-Active consistently disciplined 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 Pro-Active's

disciplinary program. (Tr. 12/8/14, p. 156-57; Tr. 12/16/14, p. 40). This is true regardless of whether Pro-Active ever fired someone for violating its safety rules, as alleged by the Department. (Dept. Br., p. 19).

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 Citation and Notice must be vacated.

## II. 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 18th day of January 2018.

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**CERTIFICATE OF SERVICE**

I certify that on January 18, 2018, I caused the original and copy of the **Employer's/Appellant's Reply 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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**Transmittal Information**

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