

Framers, Inc.

SAFETY AND HEALTH

Corporate officers

To determine whether "corporate officers" exposed to a hazard are exempted from coverage of safety and health rules, the only relevant factor is whether the corporate officers actually exercised any control over the running of the corporation.*In re Framers, BIA Dec., 01 W0465 (2003)*

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: FRAMERS, INC.)** **DOCKET NOS. 01 W0465 & 02 W0366**
2)
3 **CITATION & NOTICE NOS. 304113996 &)** **DECISION AND ORDER**
4)
5)6

6 **APPEARANCES:**

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8 Employer, Framers, Inc., by
9 Steven B. Wells, President

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11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Leslie V. Johnson, Assistant
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16 **Docket No. 01 W0465:** The employer, Framers, Inc., filed an appeal with the Safety Division
17 of the Department of Labor and Industries on April 16, 2001, from Citation and Notice
18 No. 304113996, dated April 3, 2001. The appeal was transmitted to the Board of Industrial
19 Insurance Appeals on June 12, 2001. In the Citation and Notice, the Department alleged three
20 violations of WAC 296-155, and assessed a penalty of \$1,860. The Citation and Notice is
21 **AFFIRMED.**

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24 **Docket No. 02 W0366:** The employer, Framers, Inc., filed an appeal with the Safety
25 Division of the Department of Labor and Industries on April 9, 2002, from Corrective Notice of
26 Redetermination No. 305008369, dated March 25, 2002. The appeal was transmitted to the Board
27 of Industrial Insurance Appeals on April 11, 2002. In the Corrective Notice, the Department alleged
28 four violations of WAC 296-155, and assessed a penalty of \$2,000. The Corrective Notice of
29 Redetermination is **AFFIRMED.**
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DECISION

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35 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
36 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
37 Order issued on March 19, 2003, in which Citation and Notice No. 304113996, dated April 3, 2001,
38 and Corrective Notice of Redetermination No. 305008369, dated March 25, 2002, were vacated.
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40 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
41 no prejudicial error was committed. The rulings are affirmed. We have granted review because we
42 find that Framers, Inc., was the "employer" of the "employees" exposed to hazard at the Framers,
43 Inc., worksites, as those terms are used in Chapter 49.17 RCW, the Washington Industrial Safety
44 and Health Act (WISHA).
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1 This appeal involves a Citation and Notice arising from a January 24, 2001 inspection at
2 4300 Pacific Highway, in Bellingham, Washington (Citation and Notice No. 304113996); and a
3 Corrective Notice of Redetermination arising from a November 13, 2001 inspection at 5115 100th
4 St. N.E., in Marysville, Washington (Citation and Notice of Redetermination No. 305008369).

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7 As a result of the January 24, 2001 inspection, Department inspector Denise Guadamuz
8 cited the employer for three alleged violations. She observed six workers on a roof, measured at
9 14 feet 6 inches above the ground, who were not wearing fall protection, in violation of WAC 296-
10 155-24510 (Item No. 1-1). She recommended a \$960 penalty for this repeat serious violation. The
11 second alleged violation was based on a worker using powered hand tools (a portable skill saw and
12 pneumatic nailer), without eye protection, in violation of WAC 296-155-350(3) (Item No. 1-2). A
13 \$900 penalty was recommended for this serious violation. The third alleged violation was a general
14 violation of WAC 296-155-480(2)(d) (improper use of a ladder), without a penalty assessed (Item
15 No. 3-1). Ms. Guadamuz identified Board Exhibit No. 5, showing a worker using a hand tool while
16 on a ladder, with his back to the rungs. The total penalty amount, calculated with reference to the
17 Department's penalty worksheet, was \$1,860.

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19 During the January 24, 2001 inspection, Kevin Scroggins identified himself to
20 Ms. Guadamuz as the job's superintendent. She interviewed workers Howard Mortimer, Jay Troxel,
21 and Randy Pheifer. Ms. Guadamuz was told that the people working on the roof owned from one to
22 five percent shares of Framers, Inc. Jay Troxel stated that he was paid every two weeks at \$16 per
23 hour, plus 5 percent of any job bonus.

24
25 As a result of the November 13, 2001 inspection, Department inspector John Kiely cited the
26 employer for four alleged violations. The first alleged violation was a serious violation of WAC 296-
27 155-615(3)(h)(i), for failure to have a secure and appropriate platform for an employee working on
28 the forks of a forklift (Item No. 1-1). He recommended a penalty assessment of \$500. The second
29 alleged violation was for a serious violation of WAC 296-155-615(3)(h)(ii), based on the use of a
30 forklift to support a worker where there was no evidence that the lift was designed for that purpose
31 (Item No. 1-2). Mr. Kiely recommended a penalty assessment of \$500. The third alleged violation
32 was a serious violation of WAC 296-155-615(3)(h)(iii), for failure to install a safety strap or lock the
33 control lever to prevent the boom from tilting (Item No. 1-3). The recommended penalty
34 assessment was \$500. The fourth alleged violation was a serious violation of WAC 296-155-
35 615(3)(h)(iv), based on his observation that the forklift operator was not at the controls of the forklift
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1 while the worker was on the lift. The recommended penalty for this was \$500. The total penalty
2 assessed was \$2,000.
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4 Framers, Inc., through its pro se representative, Steven B. Wells, did not challenge the
5 evidence of violations alleged by the Department, nor did the employer contest the penalties.
6 12/16/02 Tr. at 3-5. Mr. Wells relies on the contention that the workers exposed to hazard on
7 these worksites were corporate officers exempted from coverage of health and safety rules.
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10 Mr. Wells is President, Secretary, and Treasurer of Framer's Inc., which was incorporated in
11 March 1998. Most of the shareholders worked for him as employees prior to incorporation. Most
12 served as superintendents on occasion, before and after incorporation. At least one was not a
13 superintendent before or after incorporation. Mr. Wells testified that the value brought to the
14 company by the shareholders was the framing work they did. All shareholders were directors. On
15 occasion, the corporation does hire "employees," but usually the shareholders can complete the
16 jobs themselves.
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20 Mr. Wells testified that directors, other than him, were onsite performing framing work
21 95 percent of the time. Those with supervisory positions rotate the job of foreman. At the time of
22 the January 2001 inspection, the directors were Jay Troxel, Randy Pheifer, Howard Mortimer,
23 Roger McCombs, Roger Edmonds, Jeremiah Aven, Frimann Sigfusson, Kevin Scroggins, and
24 Mr. Wells. By the time of the November 2001 inspection, Mr. Mortimer, Mr. Sigfusson, and
25 Mr. Scroggins had left. Mr. Troxel stated that the decision about whom to hire and what jobs to
26 take were made by all the shareholders. Mr. Wells testified that the job foreman is in charge of
27 firing. The foreman on the job is designated "to call the shots on the organization." 12/16/02 Tr. at
28 46.
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34 Mr. Wells is primarily responsible for contracting and for writing company checks. The
35 evidence reveals only one instance where an officer other than Mr. Wells signed a contract. Roger
36 McCombs, who signed that contract, was also the only shareholder (other than Mr. Wells)
37 authorized to sign checks. Stephanie LeBlanc, Framers' contract controller since 1999, testified
38 that Kevin Scroggins once signed a change order, but only because Mr. Wells was incapacitated
39 due to a heart attack. In that instance, "Kevin Scroggins stepped in to take care of the corporate
40 matters." 12/16/02 Tr. at 71.
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44 At its inception in 1998, Mr. Wells owned 91 out of 100 shares of company stock and the
45 other directors owned one share apiece. Later that year, the corporation reorganized. Mr. Wells'
46 shares were reduced to 55 and the other nine shareholders were given five shares each. Mr. Wells
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1 testified that, at a subsequent meeting, the by-laws were changed to give each shareholder an
2 equal vote and to allow decision making by majority vote. There exists no documentation of these
3 changes. Ms. LeBlanc, a credible witness, testified that the current by-laws provide for one vote
4 per share.
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7 The Department argues that Framers, Inc., should be paying workers' compensation
8 premiums for its shareholders and, therefore, the WISHA regulations apply. Although we find that
9 the WISHA rules apply to these workers, we disagree with the Department's reasoning. As
10 explained below, the laws governing workers' compensation coverage have little applicability to this
11 case.
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14 WISHA requires that employers provide employees with a work environment free from
15 recognized hazards likely to cause physical harm. RCW 49.17.060. "Employer" and "employee"
16 are defined in a rather circular fashion:
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19 The term "employer" means any person, firm, corporation, partnership,
20 business trust, legal representative, or other business entity which
21 engages in any business, industry, profession, or activity in this state and
22 employs one or more employees or who contracts with one or more
23 persons, the essence of which is the personal labor of such person or
24 persons and includes the state, counties, cities, and all municipal
25 corporations, public corporations, political subdivisions of the state, and
26 charitable organizations: PROVIDED, That any person, partnership, or
27 business entity not having employees, and who is covered by the
28 industrial insurance act shall be considered both an employer and an
29 employee.
30

31 RCW 49.17.020(4).

32
33 The term "employee" means an employee of an employer who is
34 employed in the business of his employer whether by way of manual labor
35 or otherwise and every person in this state who is engaged in the
36 employment of or who is working under an independent contract the
37 essence of which is his personal labor for an employer under this chapter
38 whether by way of manual labor or otherwise.
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40 RCW 49.17.020(5).

41
42 These statutory definitions shed little light on the question of whether Framers Inc., was an
43 "employer" for purposes of WISHA. At the urging of the alleged employer, this appeal was argued
44 and decided, based primarily on the interpretation of subsection (8) of RCW 51.12.020. This
45 section of the Industrial Insurance Act sets forth "the only employments which shall not be included
46 within the mandatory coverage of [Title 51]." Subsection (8) excludes certain corporate officers.
47

1 We find no basis for analogy between workers' compensation coverage and WISHA
2 coverage because Title 51 and Title 49 effectuate two distinct programs and purposes. The intent
3 of WISHA is clearly set forth in RCW 49.17.010:
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5 in the public interest for the welfare of the people of the state of
6 Washington and in order to assure, insofar as may reasonably be
7 possible, safe and healthful working conditions for every man and
8 woman working in the state of Washington, the legislature in the
9 exercise of its police power, and in keeping with the mandates of Article
10 II, section 35 of the state Constitution, declares its purpose by the
11 provisions of this chapter to create, maintain, continue, and enhance the
12 industrial safety and health program of the state, which program shall
13 equal or exceed the standards prescribed by the Occupational Safety
14 and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).
15

16 Nowhere in Chapter 49 RCW does the statute exclude shareholders of a corporation from WISHA
17 coverage, if those shareholders should properly be considered "employees" working for a
18 Washington "employer."
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20 This Board previously decided, with reference to industrial insurance law, an appeal
21 factually similar to the present appeal. *In re L&K Smith Construction, Inc.*, Dckt. No. 01 W0112
22 (April 24, 2002), concerns a corporation in business as a roofing and light construction contractor.
23 L&K Smith contended that at the time of the Department inspection, the business was not an
24 "employer" subject to WISHA. L&K Smith did not raise the defense relied on by Framers, Inc.
25 Instead, the alleged employer argued that the employer-employee relationship issue must be
26 analyzed under the "economic realities test." This test was adopted by the Board in *In re Skills*
27 *Resources Training Center*, BIIA Dec., 95 W253 (1997).
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30 As restated in *L&K Smith Construction, Inc.*, the "economic realities test" consists of the
31 following factors:
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33 (1) who the workers consider their employer; (2) who pays the workers'
34 wages; (3) who has the responsibility to control the workers; (4) whether
35 the alleged employer has the power to control the workers; (5) whether
36 the alleged employer has the power to fire, hire, or modify the
37 employment conditions of the workers; (6) whether the workers' ability to
38 increase their income depends on efficiency rather than initiative,
39 judgment, and foresight; and (7) how the workers wages are
40 established.
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43 *L&K Smith Construction, Inc.*, at 2-3. *Skills Resources Training Center* set forth this test to
44 determine the employer of particular workers on a joint employer worksite. In *L&K Smith*, we noted
45 that the first three factors were irrelevant to that case because L&K Smith was the sole alleged
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1 employer. In an attempt to tailor the "economics realities test" to the sole alleged employer
2 situation, we looked to the industrial insurance laws for guidance. Factors (4) through (7) of the
3 "economic realities test" were considered relevant, as they bear upon the "control" and "consent"
4 elements of *Novenson v. Spokane Culvert*, 91 Wn.2d 550 (1979).
5

6
7 Having looked more closely at *Novenson*, we now conclude that the "control" element is the
8 only "economic realities" factor relevant when there is a sole alleged WISHA "employer." The
9 court, in *Novenson*, determined a claimant's ability to obtain damages from Spokane Culvert, based
10 on negligence, a cause of action unavailable to an employee covered under Title 51. The
11 importance of consent to employment in the workers' compensation context was addressed by the
12 *Novenson* court, with reference to the following section of Professor Larson's treatise:
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15 Compensation law [in contrast to the law of vicarious liability], is a
16 mutual arrangement between the employer and employee under which
17 both give up and gain certain things. Since the rights to be adjusted are
18 reciprocal rights between employer and employee, it is not only logical
19 but mandatory to resort to the agreement between them to discover their
20 relationship. To thrust upon a worker an employee status to which he
21 has never consented would not ordinarily harm him in a vicarious liability
22 suit by a stranger against his employer, but it might well deprive him of
23 valuable rights under the compensation act, notably the right to sue his
24 own employer for common-law damages. . . .
25

26
27 1 Larson, *Workmen's Compensation Law* § 47.10 (1952).
28

29 The rationale behind *Novenson* is inapplicable to the inquiry before us. The determination
30 of whether there is an "employer" responsible for employee safety should not rely on the element of
31 mutual consent to an employer-employee relationship; rather, it must focus on whether the alleged
32 employer is in control of the work environment and therefore responsible for worker safety. This
33 "control" test was applied to find WISHA liability in an independent contractor situation in *Kelley v.*
34 *Howard S. Wright Construction Co.*, 90 Wn.2d 323 (1978). Ability to control the workplace
35 conditions also formed the basis for a general contractor's duty in *Stute v. P.B.M.C. Inc.*, 114 Wn.2d
36 454 (1990).
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38
39 The purpose of WISHA is to "assure, insofar as may reasonably be possible, safe and
40 healthful working conditions for **every man and woman working in the state of Washington.**"
41 RCW 49.17.010 (emphasis added.) The existence of a safe workplace is not a choice for the
42 employees of an employer who has the power and obligation to make their workplace safe.
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44
45 Based on this framework, we conclude that Framers, Inc., is a WISHA "employer." The
46 incorporation of Framers, Inc., did little to change the balance of power within the group of framers.
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1 Those who served as superintendents prior to incorporation continued in that role. The
2 shareholders' skills as laborers and their ability to help the business turn a profit were the value
3 they brought to the organization. Other than Mr. Wells, the directors' primary responsibility was
4 framing work, which took up 95 percent of their time.
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7 Mr. Wells is the only shareholder who received a salary, rather than hourly wages. He is the
8 President, Secretary, and Treasurer of Framers, Inc., and is almost exclusively responsible for
9 contracting, check writing, and other key corporate matters. A preponderance of credible evidence
10 shows that Mr. Wells owns 55 percent of the company's shares and that the existing by-laws
11 require one vote per share. Although Mr. Troxel testified that the group participated in decision-
12 making, Mr. Wells retained the power to override all votes. This business, although incorporated,
13 maintains a supervisory structure identical to that of a typical construction firm. Framers, Inc.
14 cannot escape the requirements of WISHA by hiding behind a corporate identity.
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19 Framers, Inc. maintained the power to ensure a safe workplace for the employee-directors
20 performing the company's work on January 24, 2001 and November 13, 2001. Therefore, Framers,
21 Inc. is an "employer" pursuant to RCW 49.17.020 and is therefore citable for the unchallenged
22 offenses alleged in Citation and Notice No. 304113996 and Corrective Notice of Redetermination
23 No. 305008369. Citation and Notice No. 304113996 and Corrective Notice of Redetermination
24 No. 305008369 are affirmed.
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28 **FINDINGS OF FACT**

- 29
30 1. In Docket No. 01 W0465, the Department of Labor and Industries
31 conducted an inspection of a work site of Framers, Inc., on January 24,
32 2001, at 4300 Pacific Highway, in Bellingham, Washington. On April 3,
33 2001, the Department issued Citation and Notice No. 304113996,
34 alleging three violations of WAC 296-155, and assessing a penalty of
35 \$1,860.
36

37 The employer filed a Notice of Appeal with the Department of Labor and
38 Industries Safety Division on April 16, 2001. The Department
39 transmitted the appeal to the Board of Industrial Insurance Appeals on
40 June 12, 2001.
41

42 In Docket No. 02 W0366, the Department conducted an inspection of a
43 work site of Framers, Inc., on November 13, 2001, at 5115 100th St.
44 N.E., Marysville, Washington. On January 16, 2002, the Department
45 issued Citation and Notice No. 305008369, alleging four violations of
46 WAC 296-155, and assessing a penalty of \$2,000.
47

1 The employer filed a Notice of Appeal with the Department of Labor and
2 Industries' Safety Division on January 28, 2002. On January 30, 2002,
3 the Department issued a Notice of Reassumption of Jurisdiction. On
4 February 13, 2002, the parties entered into an agreement that the
5 reassumption period would be extended an additional 15 working days.
6

7 The Department issued Corrective Notice of Redetermination
8 No. 305008369 on March 25, 2002. The employer filed a Notice of
9 Appeal with the Safety Division on April 9, 2002. The Department
10 transmitted the appeal to the Board on April 11, 2002.
11

- 12 2. Steven B. Wells is President, Secretary and Treasurer of Framers's Inc.,
13 which was incorporated in March 1998. At its inception, Mr. Wells
14 owned 91 out of 100 shares of company stock and the other nine
15 directors owned one share each. Later that year, the corporation
16 reorganized. Mr. Wells' shares were reduced to 55 and the other nine
17 shareholders were given five shares each. Most of the shareholders
18 performed construction work as employees of Mr. Wells, prior to
19 incorporation.
20
- 21 3. Mr. Wells received a salary and was primarily responsible for
22 contracting, check writing, and other corporate responsibilities. The
23 other shareholders, who are paid on an hourly basis, are on worksites
24 performing construction work 95 percent of the time. Those with
25 supervisory positions rotate the job of foreman. The foreman represents
26 Framers, Inc., on the jobsite.
27
- 28 4. On January 24, 2001, Denise Guadamuz, a Department safety
29 inspector, inspected the worksite of Framers, Inc., at 4300 Pacific
30 Highway, in Bellingham, Washington. Workers were performing
31 construction work as directed and controlled by a Framers, Inc.
32 superintendent.
33
- 34 5. At the time of the January 24, 2001 inspection, six Framers, Inc.,
35 workers were on a roof, without wearing fall protection, at a height of
36 14 feet-6 inches above the ground. A penalty of \$960 was assessed for
37 this alleged repeat serious violation, identified as Item No. 1-1.
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- 39 6. At the time of the January 24, 2001 inspection, a Framers, Inc., worker
40 was using a portable skill saw and pneumatic nailer, without eye
41 protection. A penalty of \$900 was assessed for this alleged serious
42 violation, identified as Item No. 1-2.
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- 44 7. At the time of the January 24, 2001 inspection, a Framers, Inc., worker
45 was using a hand tool while standing on a ladder, with his back facing
46 the rungs of the ladder. No penalty was assessed for this alleged
47 general violation, identified as Item No. 3-1.

- 1 8. On November 13, 2001, John Kiely, a Department safety inspector,
2 inspected the worksite of Framers, Inc. at 5115 100th St. N.E.,
3 Marysville, Washington. Workers were performing construction work as
4 directed and controlled by a Framers, Inc., superintendent.
5
- 6 9. At the time of the November 13, 2001 inspection, a Framers, Inc.,
7 worker was performing work while standing on the forks of a forklift,
8 without a secure and appropriate platform. A penalty of \$500 was
9 assessed for this alleged serious violation, identified as Item No. 1-1.
10
- 11 10. At the time of the November 13, 2001 inspection, a Framers, Inc.,
12 worker was performing work while standing on the forks of a forklift that
13 was not identified as suitable for that purpose. A penalty of \$500 was
14 assessed for this alleged serious violation, identified as Item No. 1-2.
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- 16 11. At the time of the November 13, 2001 inspection, a Framers, Inc.,
17 worker was performing work while standing on the forks of a forklift,
18 without an installed safety strap or locked control level to prevent the
19 boom from tilting. A penalty of \$500 was assessed for this alleged
20 serious violation, identified as Item No.1-3.
21
- 22 12. At the time of the November 13, 2001 inspection, an operator was not at
23 the controls of the forklift while a Framers, Inc., worker was performing
24 work while standing on the forks of the forklift. A penalty of \$500 was
25 assessed for this alleged serious violation, identified as Item No. 1-4.
26

CONCLUSIONS OF LAW

- 27 1. The Board of Industrial Insurance Appeals has jurisdiction over the
28 parties to and the subject matter of these appeals.
29
- 30 2. On January 24, 2001 and November 13, 2001, the workers exposed to
31 hazards at the Framers, Inc., worksites were employees of Framers,
32 Inc., as defined in RCW 49.17.020(5).
33
- 34 3. On January 24, 2001 and November 13, 2001, Framers, Inc., was the
35 employer of the workers exposed to hazards at the Framers, Inc.,
36 worksite, as defined in RCW 49.17.020(4) .
37
- 38 4. On January 24, 2001, Framers, Inc., did commit a repeat serious
39 violation of WAC 296-155-24510, alleged in Item No. 1-1 of Citation and
40 Notice No. 304113996. The penalty for this repeat serious violation is
41 established at \$960.
42
- 43 5. On January 24, 2001, Framers, Inc., did commit a serious violation of
44 WAC 296-155-350(3), alleged in Item No. 1-2 of Citation and Notice
45 No. 304113996. The penalty for this serious violation is established at
46 \$900.
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2 6. On January 24, 2001, Framers, Inc., did commit a general violation of
3 WAC 296-155-482(2)(d), alleged in Item No. 3-1 of Citation and Notice
4 No. 304113996. The penalty for this general violation is established at
5 \$0.
6
7 7. On November 13, 2001, Framers, Inc., did commit a serious violation of
8 WAC 296-155-615(3)(h)(i), as alleged in Item No. 1-1 of Corrective
9 Notice of Redetermination No. 305008369. The penalty for this serious
10 violation is established at \$500.
11
12 8. On November 13, 2001, Framers, Inc., did commit a serious violation of
13 WAC 296-155-615(3)(h)(ii), as alleged in Item No. 1-2 of Corrective
14 Notice of Redetermination No. 305008369. The penalty for this serious
15 violation is established at \$500.
16
17 9. On November 13, 2001, Framers, Inc., did commit a serious violation of
18 WAC 296-155-615(3)(h)(iii), as alleged in Item No. 1-3 of Corrective
19 Notice of Redetermination No. 305008369. The penalty for this serious
20 violation is established at \$500.
21
22 10. On November 13, 2001, Framers, Inc., did commit a serious violation of
23 WAC 296-155-615(3)(h)(iv), as alleged in Item No. 1-4 of Corrective
24 Notice of Redetermination No. 305008369. The penalty for this serious
25 violation is established at \$500.
26
27 11. Citation and Notice No. 304113996, issued by the Department of Labor
28 and Industries on April 3, 2001, is correct and is affirmed, with a total
29 penalty of \$1,860. Corrective Notice of Redetermination
30 No. 305008369, issued by the Department on March 25, 2002, is correct
31 and is affirmed, with a total penalty of \$2,000.
32

33 It is so **ORDERED**.

34
35 Dated this 8th day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

36
37 /s/ _____
38 THOMAS E. EGAN Chairperson

39
40 /s/ _____
41 FRANK E. FENNERTY, JR. Member
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