

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

1 **IN RE: CDK CONSTRUCTION**) **DOCKET NO. 19 W1143**
2 **SERVICES, INC.**)
3)
4 **CITATION & NOTICE NO. 317953967**) **DECISION AND ORDER**

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6 The employer, CDK Construction Services, Inc., (CDK) appealed a Corrective Notice of
7 Redetermination, alleging one repeat serious, one serious, and one general violation. Our industrial
8 appeals judge affirmed the repeat serious and the serious violations, but vacated the general
9 violation. CDK filed a Petition for Review asking the Board to reweigh the evidence and vacate the
10 repeat serious and the serious violations. CDK also objected to our industrial appeals judge sua
11 sponte reviewing the Board's records and taking judicial notice that a November 2, 2018 Corrective
12 Notice of Redetermination was a final order. We agree with our industrial appeals judge's ultimate
13 conclusions but grant review solely to address the employer's objection to the taking of judicial notice.
14 The Corrective Notice of Redetermination is **AFFIRMED AS MODIFIED**. The violations and penalties
15 associated with Items 1-1 and 2-1 are correct and affirmed. The alleged general violation in Item 3-1
16 is vacated.
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DISCUSSION

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24 Following an inspection on August 12, 2019, the Department issued Citation and Notice
25 No. 317953967, which alleged two serious violations against CDK Construction Services, Inc.:

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27 Item 1-1: Repeat Serious: WAC 296-155-24609(1): failure to ensure that an
28 appropriate fall protection system was installed, and implemented where employees
29 were exposed to fall hazards greater than 4 feet; and

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31 Item 2-1: Serious: WAC 296-876-40030(1): failure to ensure ladder placed at edge
32 of second floor balcony deck extended at least three feet above the landing surface.

33 For each of the serious citations, the gravity level was 4, resulting in a base penalty of \$4,000,
34 per WAC 296-900-14010. For Item 1-1, the penalty was reduced to \$3,200 due to the size of the
35 workforce. However, because Item 1-1 was cited as a repeat violation, the penalty was multiplied by
36 2, for a total penalty in the amount of \$6,400. For Item 2-1, the penalty was reduced to \$2,800 due
37 to the size of the workforce and above average history. Item 2-1 was not cited as a repeat violation.
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40 CDK appealed the Corrective Notice of Redetermination. Its primary challenge was to one
41 element of the Department's burden of proof: actual or constructive notice of the violative conditions.
42 CDK also asserted the affirmative defense of unpreventable employee misconduct.
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45 The record establishes that in October 2018, CDK Construction Services, Inc., a general
46 contractor, began a large construction project in Des Moines, Washington called the "Bayshore
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1 Condominiums." The job involved a complete reclud and new roof on a structure of two-story
2 condominiums. The building had 12 second-story balconies that were more than 10 feet above
3 ground level. In preparation for the work, CDK removed all of the guard rails from the balconies. On
4 April 12, 2019, at about 12 p.m., a Safety Compliance Officer for the Department of Labor and
5 Industries, Edgar Alvarez, was driving on Redondo Beach Drive in Des Moines, when he observed
6 two men working from the second-floor deck without harnesses or lifelines tied to an anchor.
7 Mr. Alvarez parked his car to take photos. By the time he was able to take photos, one of the men
8 had already climbed down a ladder.
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13 Mr. Alvaraz began an inspection and walked the job site with CDK employee John Hutton,
14 who was instructed to accompany Mr. Alvarez in the absence of the superintendent, John Petri.
15 Mr. Alvarez observed that each unit on the second floor of the building had an exposed balcony with
16 no railing. He observed that the balcony where the worker had been working had no anchor for a
17 lifeline installed on the wall.
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21 Oscar Lerma testified that on April 12, 2019, he was setting doors on the second-floor decks.
22 He was working with Hector Rodriquez, a CDK carpenter who was cutting plywood at ground level.
23 Mr. Lerma replaced about four to six doors while wearing a safety harness. He contends that while
24 working on a door, the steel line from his harness got caught around his neck. He was afraid that he
25 was going to fall with the door and felt it would be safer to work without wearing the safety harness.
26 He then continued to work for about an hour without a safety harness. At some point, while working
27 on the deck, someone took his ladder. Then, while attempting to install a door, something snagged,
28 and he needed help. Hector Rodriquez saw that he needed help and rushed to put up a ladder that
29 did not extend at least 3 feet above the landing space.
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34 Hector Rodriquez corroborated Mr. Lerma's testimony. He testified that while cutting material
35 at ground level, he saw that Oscar Lerma was having problems with a door weighing about
36 40 pounds. He thought Mr. Lerma was going to fall, so he quickly put up the ladder to help him on
37 "an emergency basis."¹ He elected to help Mr. Lerma without putting on his harness because he
38 thought it would take too much time to put it on in an emergency situation.
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42 The two other CDK workers, Ignacio Rodriquez and John Hutton, were working on the other
43 side of the building.
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¹ 4/16/20 Tr. at 67.

1 Oscar Lerma, Hector Rodriquez, Ignacio Rodriguez, and John Hutton were aware that
2 Superintendent John Petri had left early that day. Mr. Lerma was not sure who was in charge in
3 Mr. Petri's absence. Ignacio Rodriquez understood that Mr. Petri left him in charge, but he denied
4 that Mr. Petri actually gave him a supervisory role related to safety. He stated, "He just assigned me
5 with making sure that everything would be left in order, that everything would be left clean, and that
6 everything would be left secure."² Mr. Hutton was aware that Mr. Petri left Ignacio Rodriguez in
7 charge that afternoon.
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11 Mr. Petri confirmed that he left the job site around noon for a doctor's appointment. Before he
12 left, he observed Mr. Lerma working on the second floor of the building, and Ignacio Rodriguez
13 working in the front of the building doing repairs with Mr. Hutton. Mr. Petri put Ignacio Rodriguez in
14 charge before he left. It was his understanding that Ignacio Rodriguez would make sure everyone
15 did their jobs correctly.
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19 As a superintendent, Mr. Petri was responsible for workplace safety. He had not taken any
20 safety training classes besides first aid and CPR. If he had questions, he would ask Bill Livermore,
21 the Safety Director at the time. Mr. Livermore or someone else would come out once a week, or
22 more often if needed. When asked about discipline, Mr. Petri stated that he has the authority to
23 discipline employees but he has never had to. When asked about the disciplinary process, he stated,
24 "If I'm not mistaken, you get a warning, a verbal warning, and then you get written up and it goes on
25 your personal file. And then after the third time, it goes up to upper management and they consider
26 what their next step is."³ Mr. Petri has never had to give a verbal warning. He has never seen anyone
27 take disciplinary action at the Bayshore project. If he did see inappropriate behavior on the job site,
28 he would have taken action.
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34 Brett Devries, CDK Safety Officer, and William ("Bill") Livermore, CDK Safety Director, both
35 provided detailed testimony establishing that CDK has an excellent and thorough written safety
36 program. CDK has regular "tool box meetings" on-site every day, and it provides about 4 hours of
37 orientation to new employees that includes ladder safety and fall protection training. When
38 encountering a worker engaged in an unsafe activity on the job site, CDK supervisors counsel the
39 worker to follow the company's safety rules. No further action is taken unless the unsafe conduct
40 was repeated.
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 ² 7/30/2020 Tr. at 20.

47 ³ 7/30/2020 Tr. at 71.

1 Mr. Stranne, a safety expert retained by CDK, testified that based on his review, CDK had all
2 of the elements of an effective safety program, and all employees were provided with complete fall
3 protection systems. In his opinion, if the employees were not wearing their safety harnesses
4 (Item 1-1), it was due to unpreventable employee misconduct. He also was of the opinion that the
5 ladder violation (Item 2-1), was excused because it occurred due to an employee being in imminent
6 danger.
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10 After hearing the evidence, our industrial appeals judge issued a Proposed Decision and Order
11 affirming the two serious violations. He determined that the Department met its initial burden that the
12 safety violations occurred, which included a determination that CDK had actual or constructive
13 knowledge of the violative conditions. The knowledge element was satisfied in part because
14 Mr. Lerma admitted he had been working without fall protection in plain view for nearly an hour before
15 he was spotted by the Department inspector who happened to drive by at 12:02 p.m., only a couple
16 of minutes before Mr. Petri left for the day. Our industrial appeals judge also found that CDK failed
17 to establish unpreventable employee misconduct, in part because CDK failed to establish that it
18 effectively enforced its safety program as written in practice, not just in theory.
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24 Regarding whether Item 1-1 was a repeat violation, our industrial appeals judge accepted
25 Mr. Alvarez's testimony that CDK was cited for a violation of WAC 296-155-24609(1) on November 2,
26 2018, and that based on his review of the Department's "WIN" system (WISHA Information), the
27 appeal period for this order had expired, making it a final order. In his Proposed Decision and Order,
28 our industrial appeals judge noted that the Department's witness, Mr. Alvarez, struggled to lay a
29 proper foundation, but ultimately, he was able to do so. Additionally, our industrial appeals judge did
30 as we did in *In re LaFond Framing Inc.*,⁴ and took judicial notice that "Board records establish that
31 CDK has filed three appeals since 2017, that none of them were taken from the order dated
32 November 2, 2018, and the appeal period for this order has expired, making it a final order."⁵
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37 *In re LaFond Framing Inc.*, was also an appeal involving an allegation of repeat serious
38 violations. In that appeal, it was undisputed that the employer had been cited for four fall protection
39 violations within three years of the Department's inspection. If those citations had been appealed
40 and ultimately adjudicated against the employer, resulting in final and binding orders, the adjusted
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46 ⁴ Dckt. No. 06 W1099 (July 17, 2007).

47 ⁵ *In re CDK Construction Services, Inc.*, Dckt. No. 19 W1143 (Proposed Decision and Order, October 20, 2020).

1 base penalty would have been multiplied in accordance with WAC 296-800-35040.⁶ Based on the
2 particular facts of that case, we agreed with the employer that the Department failed to establish that
3 the four citations became final orders.
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5 We determined, nevertheless, that it was appropriate to take judicial notice of the finality of the
6 orders. We stated,
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8 Although the Department failed to show that it was entitled to increase the base penalty
9 by the prior violations, this Board can take judicial notice of its own records to determine
10 whether the employer appealed the three prior Corrective Notices of Redetermination.
11 ER 201 authorizes judicial notice of adjudicative facts which are not subject to
12 reasonable dispute. A court may take judicial notice of its own records in the same
13 case. *Cloquet v. Department of Labor & Indus.*, 154 Wash. 363 (1929). In addition,
14 judicial notice may be taken at any stage in the proceedings, whether requested or not.
15 ER 201(c).⁷
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17 The distinction between *LaFond* and the present appeal is that in *LaFond* we gave the parties
18 prior notice and an opportunity to be heard with respect to our intent to take judicial notice of our
19 records. The employer did not respond and the Department indicated it had no objection. In the
20 present appeal, our industrial appeals judge took judicial notice sua sponte, and the employer
21 exercised its opportunity to object when it filed Petition for Review. The employer, however, objected
22 only on procedural grounds and did not dispute the accuracy of the facts of which judicial notice was
23 taken. We note that ordinarily the finality of a Department order is not the subject of a factual dispute.
24 Considering the entire record, we find that it was proper for our industrial appeals judge to have taken
25 judicial notice of the finality of the November 2, 2018 order. The employer's objection is overruled.
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31 **DECISION**

32 The employer, CDK Construction Services, Inc., filed an appeal with the Board of Industrial
33 Insurance Appeals on September 17, 2019. The employer appeals Citation and Notice
34 No. 317953967 issued by the Department on September 12, 2019. In this notice, the Department
35 alleged three violations: Item 1-1: a repeat serious violation of a fall protection provision in WAC 296-
36 155-24609(1); Item 2-1: a serious violation of an extension ladder provision in
37 WAC 296-876-40030(1); and Item 3-1: a general violation of an outdoor heat provision in WAC 296-
38 62-09530(1)(a). The Corrective Notice of Redetermination is incorrect with respect to Item 3-1, but
39 is otherwise affirmed as modified. Item 3-1 is vacated.
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46 ⁶ WAC 296-800-35040 is now codified under WAC 296-900-14020.

47 ⁷ *In re LaFond Framing Inc.*, Dckt. No. 06 W1099 (July 17, 2007).

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FINDINGS OF FACT

1. On November 26, 2019, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On April 12, 2019, CDK Construction Services, Inc., was the general contractor overseeing remodeling of the Bayshore Condominiums in Des Moines, Washington. At that time and place, two CDK carpenters, Oscar Lerma and Hector Rodriguez, were assigned to perform work on the west side of the Bayshore building.
3. On April 12, 2019, CDK had an adequate safety program, including safety rules and safety training for its employees.
4. On April 12, 2019, CDK did not take adequate steps to discover and correct violations of its safety rules.
5. On April 12, 2019, CDK did not effectively enforce its safety program, as demonstrated by a second failure—in less than three years—of its employees to use of proper fall protection when exposed to fall hazards.

Item 1-1

6. For an hour during the early afternoon of April 12, 2019, Oscar Lerma was working on an unguarded second story balcony of the Bayshore Condominiums, 10 feet 8 inches above ground level, and was not using fall protection equipment. For an unknown period of time, Hector Rodriguez was also working on the unguarded balcony without fall protection. At that time and place, the CDK employees were exposed to a violative condition prohibited by WAC 296-155-24609(1).
7. There was a substantial probability that death or serious physical harm could result if the carpenters fell from the second story balcony.
8. CDK knew, or with the exercise of reasonable diligence could have known, that its carpenters were working without fall protection on the unguarded second story balcony in violation of WAC 296-155-24609(1).
9. On November 2, 2018, less than six months before the April 12, 2019 violation of WAC 296-155-24609(1), a final order was issued that upheld a corrective notice of redetermination that cited CDK for a prior serious violation of WAC 296-155-24609(1), a substantially similar hazard.
10. Item 1-1 Penalty: The Department provided a rating of 2 for severity, due to the proximity of two workers to the unguarded balcony edge, their exposure to a fall of over 10 feet, and the potential of death or permanent disabling injury. Its assignment of a severity rating of 2 and a probability of 2 resulted in a gravity rating of 4. It also assigned a repeat factor of 2, resulting in a doubling of the penalty. The Department's penalty of \$6,400 for this repeat violation was supported by its calculation of the severity, probability, and gravity of the violation, when taking into account the size of the company (an \$800 reduction), its above average history for three

1 years preceding April 12, 2019 (no deduction), and a rating of average
2 faith for this violation (no deduction).
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4 **Item 2-1**

- 5 11. For an hour during the early afternoon of April 12, 2019, Oscar Lerma and
6 Hector Rodriguez used an extension ladder to gain access to an
7 unguarded second-story balcony of the Bayshore Condominiums, 10 feet
8 8 inches above ground level, and did not secure the ladder or extend the
9 rails of the ladder more than three feet above the landing surface. At that
10 time and place, these CDK employees were exposed to a violative
11 condition prohibited by WAC 296-876-40030(1).
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13 12. There was a substantial probability that death or serious physical harm
14 could result if the carpenters fell while using the ladder to ascend to or
15 descend from the second story balcony.
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17 13. CDK knew, or with the exercise of reasonable diligence could have
18 known, that its carpenters were using an improperly staged extension
19 ladder in violation of WAC 296-876-40030(1).
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21 14. Item 2-1 Penalty: The Department provided a rating of 2 for severity, due
22 to two workers' exposure to a fall of over 10 feet, and the potential of death
23 or permanent disabling injury. Its assignment of a severity rating of 2 and
24 a probability of 2 resulted in a gravity rating of 4. The Department's
25 penalty of \$2,800 for this violation was supported by its calculation of the
26 severity, probability, and gravity of the violation, when taking into account
27 the size of the company (an \$800 reduction), its above average history
28 for three years preceding April 12, 2019 (a \$400 deduction), and a rating
29 of average faith for this violation (no deduction).

30 **Item 3-1**

- 31 15. CDK started its work at the Bayshore Condominiums jobsite in
32 October 2018 and was cited for violating WAC 296-62-09530(1)(a) during
33 Inspector Alvarez's jobsite inspection on April 12, 2019.

34 **CONCLUSIONS OF LAW**

- 35 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
36 and subject matter in this appeal.
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38 2. On April 12, 2019, CDK committed a repeat serious violation of WAC 296-
39 155-24609(1), as alleged in Item 1-1 of Corrective Notice of
40 Redetermination No. 317953967. The Department appropriately
41 assessed a \$6,400 penalty for this repeat serious violation.
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43 3. On April 12, 2019, CDK committed a serious violation of WAC 296-876-
44 40030(1), as alleged in Item 2-1 of Corrective Notice of Redetermination
45 No. 317953967. The Department appropriately assessed a \$2,800
46 penalty for this repeat serious violation.
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4. On April 12, 2019, CDK did not commit a general violation of WAC 296-62-09530(1)(a), as alleged in Item 3-1 of Corrective Notice of Redetermination No. 317953967, because CDK was not working at the Bayshore Condominiums jobsite between May 1, 2019, and September 30, 2019, and the Department failed to show that the WAC 296-62-09530(1)(a) applied to CDK's jobsite. The Department did not assess a penalty for this alleged general violation
 4. On April 12, 2019, CDK did not commit a general violation of WAC 296-62-09530(1)(a), as alleged in Item 3-1 of Corrective Notice of Redetermination No. 317953967, because CDK was not working at the Bayshore Condominiums jobsite between May 1, 2019, and September 30, 2019, and the Department failed to show that the WAC 296-62-09530(1)(a) applied to CDK's jobsite. The Department did not assess a penalty for this alleged general violation.
 5. CDK's violations described in Corrective Notice of Redetermination No. 317953967 were not the result unpreventable employee misconduct as provided by RCW 49.17.120(5)(a).
 6. Corrective Notice of Redetermination No. 317953967, dated September 12, 2019, is affirmed as modified. Items 1-1 and 2-1, and their associated penalties, are correct. Item 3-1 is incorrect and is vacated.

23 Dated: April 21, 2021.

24 BOARD OF INDUSTRIAL INSURANCE APPEALS

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26 LINDA L. WILLIAMS, Chairperson

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28 ISABEL A. M. COLE, Member
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**Addendum to Decision and Order
In re CDK Construction Services, Inc.
Docket No. 19 W1143
Citation & Notice No. 317953967**

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Appearances

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Employer, CDK Construction Services, Inc., by Owada Law PC, per Aaron K. Owada
Employees of CDK Construction Services, Inc. (did not appear)
Department of Labor and Industries, by Office of the Attorney General, per Alexander Y.
Jouravlev

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Petition for Review

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As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on October 20, 2020, in which the industrial appeals judge modified the Department order dated September 12, 2019. The Department filed a response on February 7, 2021.

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Evidentiary Rulings

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The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

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Other Procedural Rulings

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The employer's objection to our industrial appeals judge sua sponte reviewing the Board's records and taking judicial notice that a November 2, 2018 Corrective Notice of Redetermination was a final order is overruled.