BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GENESIS FRAMING CONSTRUCTION, INC.	)	**DOCKET NO. 22 W0206**
	)	
	)	
CITATION & NOTICE NO. 317970244	)	**DECISION AND ORDER**

Genesis Framing Construction, Inc., (Genesis Framing) is a framing contractor that was performing framing work at a residential jobsite in Seattle in August 2022. The Department of Labor and Industries inspected the jobsite and issued a citation against Genesis Framing, alleging nine violations of fall protection and other safety rules. Our industrial appeals judge affirmed the violations on the grounds that Genesis Framing had constructive knowledge of the violative conditions since they were readily observable in a conspicuous location in the area of Genesis Framing's crew. Our judge also found that Genesis Framing's history of prior violations supported enhanced penalties for repeat, willful, and serious violations.

Genesis Framing filed a Petition for Review, arguing that it didn't commit Violations 1-1, 1-2, 1-4, and 2-2; the violations were not repeat or willful; it didn't have constructive knowledge of the violations; unpreventable employee misconduct applies; and the penalties should be reduced based on the size of Genesis Framing's workforce. We agree with our judge that the violations should be affirmed. We granted review, however, to specifically address Violations 1-1, 1-2, and 2-2; strike the Department inspector's testimony regarding roof pitch contained in the project specifications; amend Violation 1-4 under CR 15(b) to conform to the evidence; take judicial notice of the Board of Industrial Insurance Appeals record in previous appeals under ER 201; address constructive knowledge, willfulness, unpreventable employee misconduct, and the penalty calculation; and adopt the federal substantial continuity test for successor liability. Citation & Notice No. 317970244 is **AFFIRMED AS MODIFIED**. We amend Violation 1-4 to be a violation of WAC 296-880-30030(2), instead of WAC 296-880-30030(1).

DISCUSSION

Genesis Framing is a framing contractor based in Snohomish, Washington. Cecilio Solorio Nuñez, Genesis Framing's owner, formed the company in April 2020. Mr. Solorio previously owned and operated Solorios Framing, another framing contractor. He explained that his new company, Genesis Framing, is operating much more safely than the previous entity. They now conduct weekly walk-arounds and daily inspections. Mr. Solorio hired a third-party safety company, Safety Matters,

to provide accident prevention training, including fall protection classes, and to conduct jobsite inspections.

Ana Iglesias is Mr. Solorio's former romantic partner. In 2017, she formed Chilos Builders LLC, also a framing contractor. Ms. Iglesias testified that she ran the administrative and financial sides of the business, while Mr. Solorio ran the company's daily operations. She formed Chilos Builders "[b]ecause the company Solorio's Framing was having problems with safety, with safety of employees and accidents."[1] Mr. Solorio denied that he managed the framing operations, claiming that he was just a worker for Chilos Builders, and that Ms. Iglesias and the third-party safety company were in charge of safety, not him. Chilos Builders went out of business in 2020.

Ian Seiler is a Department safety compliance supervisor who inspected the Genesis Framing job site on August 29, 2022. When Mr. Seiler arrived on site, he observed several fall protection and other safety violations including workers on a steep pitched roof who were not wearing fall arrest systems. Genesis Framing worker Ever Quintanilla was not wearing fall protection gear during the inspection. When asked why, he said: "I just found it easier to get up on that day without the harness and the rope. I don't know what was actually happening with me that day, but unfortunately that's how it happened."[2] He claimed that he had been wearing his harness earlier that morning, but when he went back up later in the afternoon, he forgot.

Jairo Preza was the foreman on the day of the inspection. He confirmed that Mr. Solorio conducted daily inspections of his crew. Mr. Preza conceded that when his crew failed to obey safety rules, he did nothing because he was related to them. Mr. Preza explained that the fall protection plan wasn't on the jobsite on the day of the inspection because he had inadvertently taken it home. Mr. Preza is not proficient in English, so he couldn't adequately explain these circumstances to Mr. Seiler during the inspection. Several months after the inspection, Mr. Solorio fired Mr. Preza for failing to adhere to the company's rules such as not wearing safety equipment. Mr. Solorio gave three warnings prior to terminating Mr. Preza. Mr. Solorio also fired Ever Quintanilla for the same reason. Mr. Preza's work crew was composed of family members, which made it difficult for him to enforce safety rules. Mr. Solorio explained: "Well, with a group like Jairo's, the family members, at first they would listen to him and take in what he was saying. But then, with time, he lost control of

[1] 4/16/24 Tr. at 8.
[2] 4/22/24 Tr. at 43.

them because they have a comfort level, a casualness with each other because they're family, and that made him lose control."[3]

Violations 1-1, 1-2, 1-4, and 2-2

Genesis Framing argues that violations 1-1, 1-2, 1-4, and 2-2 should be vacated. To prove a violation under the Washington Industrial Safety and Health Act (WISHA), the Department must prove the following: "(1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition." For a serious violation, the Department must also prove a fifth element: that "'there is a substantial probability that death or serious physical harm could result' from the violative condition."[4]

Violation 1-1: Fall Protection.

WAC 296-880-20005(6) provides:

> Fall protection on steep pitched roofs. Regardless of the work activity, the employer must ensure that employees exposed to fall hazards of four feet or more while working on a roof with a pitch greater than four in 12 use one of the following:
> (a) Fall restraint system. Safety monitor systems and warning line systems are prohibited on steep pitched roofs;
> (b) A personal fall arrest system; or
> (c) A positioning device system.

During the inspection, Mr. Seiler observed two workers on a pitched roof at a height of 26 feet not wearing any fall protection equipment.[5] When Mr. Seiler asked to see the workers' fall protection gear, "it was balled up in the back of a work truck."[6] Mr. Seiler asked Mr. Solorio why no fall protection was used and was told "multiple times that he was too busy."[7]

Genesis Framing argues the cited standard doesn't apply because the inspector didn't use tools to verify that the roof pitch was greater than 4:12. Mr. Seiler conceded that he never measured the roof pitch. Instead, he relied on a project specification document to obtain that information. Genesis Framing lodged a hearsay objection to Mr. Seiler's testimony, which our judge overruled. We agree with Genesis Framing that the project specification is inadmissible hearsay, because it is

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[3] 4/22/24 Tr. at 29.
[4] *Washington Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914 (2003).
[5] Ex. 1 through 9.
[6] 4/15/24 Tr. at 93.
[7] 4/15/24 Tr. at 36. Mr. Solorio's statement is not hearsay because he is the owner of the company who clearly has speaking authority. Therefore, it is an admission of a party-opponent under ER 801(d)(2).

an out-of-court statement by a declarant that is offered to prove the truth of that statement.[8] Mr. Seiler cannot rely on inadmissible hearsay to establish the roof's pitch, and his statement is stricken from the record.

However, Mr. Seiler testified that he also relied on his years of personal experience to visually assess the pitch. "After observing 4:12 roofs over and over and over again, you look at them and like 'that was steep.' How do I know? Because I have experience. So I was able to look at it and say 'that's a steep roof.'"[9] We find Mr. Seiler's visual estimate based on personal experience to be a reliable indicator of the roof pitch given that Genesis Framing never argued or presented evidence that the pitch was less than 4:12. Mr. Seiler's estimate remains unrebutted, which is sufficient to establish the first prong of the Department's prima facie case that the cited standard applies.

Even if we found Mr. Seiler's estimate of the roof pitch to be unreliable, the cited standard would still apply. The general language at the beginning of WAC 296-880-20005, says:

> **Fall protection required at four feet or more.**
>
> The employer must ensure that fall arrest systems, fall restraint systems, or positioning device systems are provided, installed, and implemented in accordance with WAC 296-880-400 Fall protection system specifications when employees are exposed to fall hazards of four feet or more to the ground or lower level. (Emphasis in original).

There is no mention of roof pitch in this portion of the rule. This language is the general rule requiring employers ensure that fall arrest systems are used at 4 feet or higher. Genesis Framing clearly violated this portion of the rule. The general language at the beginning of the rule is still part of the rule. Subsection (6) cannot be read in a vacuum, but must be interpreted in the context of the entire provision. One principle of statutory construction is to read the statute as a whole.[10] In *In re Carma Newton,* a significant decision, we said:

> We try to place the language in the context of the overall legislative scheme. 'Each provision must be viewed in relation to other provisions and harmonized, if at all possible . . . .' Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous. Statutes are not interpreted to reach absurd and fundamentally unjust results. We should avoid constructions of a statute 'that yield unlikely, strange, or absurd consequences.'[11]

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[8] ER 801(c).
[9] 4/15/24 Tr. at 106.
[10] *Miller v. City of Tacoma,* 138 Wn.2d 318 (1999); *Sehome Park Care Ctr.,* 127 Wn.2d 774, 778 (1995).
[11] BIIA Dec., 00 13742 (2001) (internal citations omitted); *see also In re Mikel Burns,* Dckt. No. 94 6460 (March 22, 1996).

Under this rule of statutory interpretation, the general language at the beginning of WAC 296-880-20005 must be read in conjunction with subsection (6). Reading subsection (6) standing alone could lead to the absurd result that the violation would be vacated because the inspector didn't directly measure the roof pitch, when Genesis Framing readily concedes that its employees were not wearing any form of fall protection while working on a roof. This conduct is covered by the introductory language of the rule, regardless of roof pitch, and as such, the cited standard applies. Violation 1-1 is affirmed.

Violation 1-2: Unguarded Openings.

> WAC 296-880-20005(4) provides:
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> Guarding of openings. The employer must ensure that each employee **working on, at, above, or near openings** (including those with chutes attached) where the outside bottom edge of the opening is four feet or more above a lower level and the inside bottom edge of the opening is less than 39 inches above the working surface, are protected from falling by the use of a guardrail system, a safety net system, a personal fall arrest system, or personal fall restraint system.

(Emphasis added.)

Mr. Seiler observed "multiple unguarded window and door openings" more than 4 feet outside and less than 39 inches inside.[12] He also saw Mr. Quintanilla and Mr. Preza descending a ladder that was next to the window openings. They were not wearing fall protection equipment.[13] Mr. Solorio also instructed Mr. Preza, on multiple occasions, to install guardrails. But Mr. Preza claimed he was too busy.[14]

Genesis Framing argues that no employees were exposed to the violative condition because Mr. Seiler did not actually observe employees near the unguarded openings during his inspection. However, Genesis Framing ignores Mr. Seiler's unrebutted testimony that he saw two workers descending the ladder next to unguarded window openings not wearing fall protection. WAC 296-880-20005(4) applies to employees "working on, at, above, or near openings." Workers at the job site were not using fall protection during the inspection. This testimony establishes that employees were exposed to the hazard. Violation 1-2 is affirmed.

[12] 4/15/24 Tr. at 55-56; Ex. 10.
[13] 4/15/24 Tr.at 63.
[14] 4/15/24 Tr. at 111.

Violation 1-4: Fall Protection Gear on Scaffold.

WAC 296-880-30030(1) provides: "The employer must protect each employee on a scaffold from falling ten feet or more to a lower level, by providing either: (a) A personal fall arrest system; or (b) Guardrails." Genesis Framing argues that it met the requirements of the cited standard because it "provided" fall arrest systems to Jairo Preza and Ever Quintanilla who simply chose not to use the gear. We agree with Genesis Framing on this point. Subsection (1) of the rule only requires that the employer "provide" the equipment. It doesn't require the employer to ensure the workers use it.

However, subsection (2) of the rule requires employers to "ensure" that fall protection systems are implemented. WAC 296-880-30030(2) states: "The employer must ensure personal fall arrest systems are attached by a lanyard to one of the following: (a) Vertical lifeline; (b) Horizontal lifeline; or (c) Appropriate structural member of the scaffold." We amend the citation to a violation of WAC 296-880-30030(2), instead of WAC 296-880-30030(1). We have broad discretion to amend the citation to conform to the evidence under CR 15(b), as long as the employer had a fair opportunity to address the issues raised in the amended citation.[15] We find that Genesis Framing had this opportunity. Genesis Framing concedes that the workers chose not to wear their fall arrest systems. This necessarily means that Genesis Framing failed to "ensure" that its workers attached their fall arrest systems to a lifeline or to a structural member of the scaffold, as required by WAC 296-880-30030(2). Violation 1-4 is affirmed as modified.

Violation 2-2: Employee Retraining.

WAC 296-880-10015(4) provides:

> Retrain employees who use fall protection, if necessary. Retrain an employee when the employer has reason to believe the understanding, motivation, and skills required to use fall protection has not been retained. Circumstances where retraining is required include:
> (a) Changes in the workplace that make previous training out of date;
> (b) Changes in the types of fall protection to be used make previous training out of date; and
> (c) **Work habits or demonstrated knowledge indicate that the employee has not retained the necessary understanding, skill, or motivation to use fall protection.**

(Emphasis added.)

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[15] *In re Guy F. Atkinson Construction, LLC,* Dckt. No. 04 W0274 (October 16, 2006); *In re Basin Paving Co.,* Dckt. No. 04 W0069 (April 25, 2005); *In re Jeld-Wen of Everett,* BIIA Dec., 88 W144 (1990); *In re ABB Power Generation, Inc.*, BIIA Dec. 93 W469 (1994).

Genesis Framing argues that the cited standard doesn't apply because it had no reason to believe that its workers hadn't retained their training, since neither Mr. Preza nor Mr. Quintanilla had ever been documented for failure to use fall protection. We disagree that a documented disciplinary history is required to determine whether employees have retained their training. The bolded language in the rule above indicates that retraining is required when an employee's "work habits" indicate a lack of retention. Mr. Preza and Mr. Quintanilla were not wearing any fall protection on the day of the inspection, as documented by several photographs. Their fall protection gear was "balled up" in a truck. There were no guardrails on multiple window and door openings. Mr. Solorio's excuse for these violations was that they were "too busy." These work habits demonstrate that Mr. Quintanilla and Mr. Preza lacked the necessary understanding, skill, or motivation to use fall protection. Thus, the cited standard applies, and the violation is affirmed.

Constructive Knowledge

Genesis Framing argues that it didn't have constructive knowledge of the violative conditions and that our judge essentially imposed a strict liability standard by requiring the employer to maintain "constant vigilance." Under the doctrine of strict liability, a party is liable regardless of intent or knowledge. That is not the case here. A required element of every WISHA violation is knowledge, either actual or constructive. Here, our judge affirmed the violations based on the presence of constructive knowledge, which negates the employer's assertion that our judge imposed strict liability.

Constructive knowledge is established through evidence that a violative condition was in plain view or "was readily observable or in a conspicuous location in the area of the employer's crews."[16] In *In re Tradesmen Int'l, LLC*[17] we said: "Knowledge may be found when a hazard was in plain view or was readily observable in the vicinity of the employer's crew, or when the hazard is open and visible to any bystander." Here, it is undisputed that the violative conditions were in plain view in the area of the Genesis Framing crew.

As our judge correctly pointed out, there is no duration requirement for constructive knowledge to exist. In *Pro-Active Home Builders v. Department of Labor & Indus.*, the Court of Appeals stated: "Washington has not included duration as a required element to prove an employer's constructive knowledge; rather we look to whether the violative condition was readily observable or in a

[16] *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194 (2011); *see also Potelco, Inc. v. Dep't of Labor & Indus.,* 194 Wn. App. 428, 439-40 (2016); *Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.,* 7 Wn. App. 2d 10, 18 (2019).
[17] Dckt. No. 16 W1262 (March 15, 2018) (citing *Erection Co.* and *Potelco)*.

conspicuous location."[18] Therefore, the length of time a violative condition existed is not part of the analysis in determining whether there was constructive knowledge. Genesis Framing had constructive knowledge under applicable case law.

Willfulness

Genesis Framing argues that the violations weren't willful because it hired a third-party safety professional to conduct training and inspect worksites, and it terminated employees who broke safety rules. Moreover, Genesis Framing has a lower per capita rate of workplace injuries compared to the average framing contractor. This, Genesis Framing argues, is evidence that their safety program is effective. However, Genesis Framing did not cite the correct legal standard for willfulness. A violation is willful if the employer acted with intentional disregard or plain indifference to the rule.[19] A violation may be willful if the employer substitutes its judgment in determining whether safety procedures are required, or if the employer fails to provide safety equipment.[20] "An employer need not harbor malicious motives or possess a 'specific intent' to violate a provision of the Act in order to commit a willful violation." [21] In order to be willful, the offender doesn't have to be consciously aware that the conduct is prohibited at the time they perform it, "but [their] state of mind must be such that, if [they] were informed of the rule, [they] would not care."[22]

Mr. Solorio and Mr. Preza both told Mr. Seiler during the inspection that they were aware of the fall protection requirements but were "too busy" to ensure they were followed. Mr. Solorio admitted that guardrails weren't installed because the site wasn't located on a busy street, the implication clearly being that they wouldn't get caught for the violations. These actions demonstrate the employer's substitution of its own judgment in deciding whether safety rules are followed as well as an intentional disregard or plain indifference to the rule. Violations 1-1, 1-2, 1-3, and 1-4 were willful.

Unpreventable Employee Misconduct

RCW 49.17.120(5)(a) provides that an employer asserting unpreventable employee misconduct must show the existence of: "(i) a thorough safety program, including work rules, training,

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[18] *Pro-Active,* at 19.
[19] *Erection Co. v. Dep't of Labor & Indus.,* 121 Wn.2d 513 (1993).
[20] *In re Cam Construction,* BIIA Dec., 90 W060 (1992).
[21] *Elder Demolition, Inc. v. Dep't of Labor & Indus*., 149 Wn. App. 799 (2009) (quoting *Ensign-Bickford Co. v. Occupational Safety & Health Review Comm'n,* 717 F.2d 1419, 1423 (D.C. Cir. 1983)).
[22] *Elder Demolition, Inc. v. Dep't of Labor & Indus*., 149 Wn. App. 799 (2009) (quoting *Brock v. Morello Bros. Constr., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987)); *In re The Roof Doctor Inc.,* Dckt. No. 14 W1457 (March 31, 2016).

and equipment designed to prevent the violation; (ii) adequate communication of these rules to employees; (iii) steps to discover and correct violations of its safety rules; and (iv) effective enforcement of its safety program as written in practice and not just in theory." In *BD Roofing, Inc. v. Department of Labor & Indus.,* the court held that for unpreventable employee misconduct to apply, the employer must prove that the employee's conduct was an isolated occurrence and not foreseeable.[23]

Genesis Framing asserts that unpreventable employee misconduct applies. Genesis Framing first argues that our judge incorrectly stated that Genesis Framing provided no evidence of a safety program, when the inspector testified that an accident prevention program binder was present at the worksite. Mr. Seiler testified that although Genesis Framing provided him with its accident prevention program binder, it was incomplete because it was missing a fall protection work plan. The form was completely blank. The accident prevention program also failed to document walk-around safety inspections and safety meetings. While Genesis Framing's assertion that the accident prevention program binder was present on the jobsite is true, Genesis Framing fails to mention that it was incomplete.

Genesis Framing makes several other arguments in its Petition for Review, none of which address the fact that it has a lengthy history of fall protection violations as evidenced by the repeat nature of the violations at issue in this appeal. This violation history shows that the employees' failure to follow safety rules was not an isolated incident. Thus, the unpreventable employee misconduct defense isn't available to Genesis Framing.

Judicial Notice and Admissibility of Exhibits

At hearing, Genesis Framing objected to our judge taking judicial notice of the hearing transcripts and decisions from a prior appeal that Genesis Framing filed with the Board under Docket No. 22 W0103,[24] on the grounds that the Department failed to submit a written motion.[25] Our judge reserved ruling on the issue. Exhibits 18 and 19 are hearing transcripts from the prior appeal. In his Proposed Decision and Order, our judge overruled all objections made under reserved rulings, effectively taking judicial notice of the hearing transcripts in Docket No. 22 W0103.

[23] 139 Wn. App. 98, 111 (2007).
[24] *In re Genesis Framing Construction, Inc.*, Dckt. No. 22 W0103 (Proposed Decision and Order, August 16, 2023).
[25] 4/16/24 Tr. at 20; 4/19/24 Tr. at 21.

Evidence Rule 201 allows a court to take judicial notice of adjudicative facts:

> JUDICIAL NOTICE OF ADJUDICATIVE FACTS
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> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> (c) When Discretionary. A court may take judicial notice, whether requested or not.
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> (e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

ER 201 does not require a written motion, and Genesis Framing has offered no authority for its assertion. It is well settled law that courts can take judicial notice of its record in prior decisions.[26] In *In re Robert Diedriche,*[27] we said: "In order to properly resolve this appeal, we have taken judicial notice of the entire Board record and the Proposed Decision and Order in Docket No. 54,948." Under ER 201, we take judicial notice of the entire Board record in Docket No. 22 W0103, including Exhibits 18 and 19.

WAC 263-12-135 provides that the Board record "shall consist of the order of the department . . . ." Exhibits 24 and 25 are Department citations that became part of the Board record by operation of WAC 263-12-135 in two previous appeals: Board Docket Nos. 19 W1162 and 20 W1216.[28] Because Exhibits 24 and 25 are part of the Board record in previous litigation before us, we take judicial notice of these citations under WAC 263-12-135. Moreover, we take judicial notice of the entire record in Board Docket Nos. 19 W1162 and 20 W1216 under ER 201.

Exhibits 20, 21, 22, 23, and 26 are citations that the Department previously issued to Solorios Framing and Chilos Builders but were not further litigated at the Board. Genesis Framing objected to the admission of these exhibits as hearsay, which our judge reserved ruling on.[29] After

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[26] *Cloquet v. Dep't of Labor & Indus.,* 154 Wn. 363 (1929); *Perrault v. Emporium Department Store Co.,* 83 Wn. 578 (1915).
[27] Dckt. No. 60,849 (December 13, 1990).
[28] *In re Chilos Builders, LLC*, Dckt. No. 19 W1162 (Proposed Decision and Order, May 20, 2021); *In re Chilos Builders, LLC,* Dckt. No. 20 W1216 (Proposed Decision and Order, February 2, 2022).
[29] 4/15/24 Tr. at 52.

careful consideration, we conclude these exhibits are admissible under the business records exception of RCW 5.45.020, which provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Justin Frost is the Department's records custodian. As the custodian, he testified to the identity and mode of preparation of Exhibits 20, 21, 22, 23, and 26. He also testified that they were made in the regular course of business at or near the time of the events they describe. The Department has satisfied the requirements of RCW 5.45.020 and Exhibits 20, 21, 22, 23, and 26 are admissible.

Repeat Violations/Successor Liability

We now consider an issue of first impression: whether a change in an employer's legal identity precludes attributing the violation history of its earlier form (predecessor) to a new form (successor) for purposes of ascribing a repeat characterization. In this case, the issue is whether the citation history of Chilos Builders can be attributed to Genesis Framing for purposes of establishing a repeat violation. There are no Washington cases that address this issue. Under WISHA, employers are responsible for the health and safety of their employees.[30] The Occupational Safety and Health Act of 1970 (OSHA)[31] is the federal version of our WISHA statute. In *Potelco v. Department of Labor & Indus.,* the Court of Appeals said, "Washington courts look to federal cases interpreting . . . OSHA as persuasive authority on how to apply the provisions of WISHA because WISHA parallels OSHA."[32]

The Occupational Safety & Health Review Commission (Review Commission) is the federal agency that resolves disputes of OSHA citations.[33] In *Secretary of Labor v. Sharon & Walter Construction, Inc*.,[34] the Review Commission considered the circumstances under which a predecessor's citation history may be attributed to a cited successor employer and set forth the "substantial continuity" test. The Review Commission observed that it is important to look beyond the name of the corporation; otherwise, employers can avoid penalties by simply dissolving and reincorporating under a new name.[35] To determine if a predecessor's violation history can be

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[30] *See* RCW 49.17.060.
[31] 29 U.S.C. Ch. 15.
[32] 191 Wn. App. 9, 30 (2015).
[33] 29 U.S.C. § 659.
[34] 23 O.S.H. Cas. (BNA) 1286 (O.S.H.R.C. 2010).
[35] *Sharon & Walter Constr., at 8.*

attributed to a successor for purposes of establishing a repeat characterization, the Review Commission developed the "substantial continuity" test, which we adopt here.[36] The test involves three factors: (1) continuity in the nature of the business, including the type of business, products or services offered, and customers; (2) continuity in the jobs and working conditions; and (3) continuity of personnel who control decisions related to safety and health.[37]

Applying the three-part test to the facts here, we find that there was substantial continuity between Genesis Framing and Chilos Builders. In 2017, Ms. Iglesias, Mr. Solorio's romantic partner at the time, started Chilos Builders, which closed in 2020. A few months later, Mr. Solorio incorporated Genesis Framing. With respect to the first prong, we find there was continuity in the nature of the business because both companies were engaged in the same type of business and offered the same services to customers; namely, framing construction. The inherent safety considerations involved in framing construction remain unchanged between the two entities. As for the second prong, both companies had the same jobs and working conditions given that they both provided framing services. The employees of both companies worked on construction sites, performed the same tasks, and were subject to the same fall hazards.

Regarding the third prong, we find substantial continuity in the personnel who made safety decisions. Mr. Solorio managed the daily operations and made the safety decisions for both entities. We credit Ms. Iglesias's testimony that she managed the administrative aspect of Chilos Builders, while Mr. Solorio managed the actual framing operations, including making safety-related decisions. We do not find credible Mr. Solorio's testimony that Ms. Iglesias and the third-party safety company were in charge of safety, not him. In 2023, Ms. Iglesias testified that she was a longtime housekeeper and continued to do that work after the formation of Chilos Builders.[38] We find it unlikely that she undertook the responsibility for the safety of a framing construction business with no background or expertise in the industry. We conclude that all three elements of the substantial continuity test have been satisfied, and the violation history of Chilos Builders can be attributed to Genesis Framing.

WAC 296-900-14020, Table 12, allows for increases to the adjusted base penalty by a factor of 2, 5, 8, 12, and 15 for repeat violations. To be considered a repeat violation, the Department must prove that Genesis Framing (or its predecessor) was previously cited for a substantially similar hazard

[36] *Sharon & Walter Constr.,* at 9-11.
[37] *Scalia v. Wynnewood Ref. Co.,* 978 F.3d 1175, 1197 (10th Cir. 2020).
[38] Docket No. 22 W0103, 5/9/23 Tr. at 169, 172.

no more than three years before it committed the violations at issue in this appeal.[39] Mr. Seiler testified that the Department characterized the following violations as repeat:

- Violation 1-1: repeat of Violation 1-1 in Citation & Notice No. 317959065 issued against Chilos Builders on August 11, 2020;[40]
- Violation 1-2: repeat of Violation 1-1 in Citation & Notice No. 317959065 issued against Chilos Builders on August 11, 2020, and Violation 1-1 in Citation & Notice No. 317958271 issued against Chilos Builders on August 11, 2020;[41]
- Violation 1-3: repeat of Violation 1-2 in Citation & Notice No. 317958271 issued against Chilos Builders on August 11, 2020;[42]
- Violation 3-1: repeat of Violation 2-1 in Citation & Notice No. 317958271 issued against Chilos Builders on August 11, 2020;[43] and
- Violation 3-2: repeat of Violation 3-1 in Citation & Notice No. 317958271 issued against Chilos Builders on August 11, 2020.[44]

We have already judicially noticed Citation & Notice No. 317958271 in this decision. And we admitted Citation & Notice No. 317959065 under the business records exception to hearsay. Moreover, the Department inspectors who issued these citations testified that these citations were issued against Chilos Builders.[45] The violations contained in Citation & Notice Nos. 317959065 and 317958271 issued against Chilos Builders are substantially similar violations cited within three years of the violations at issue in this appeal. Accordingly, Violations 1-1, 1-2, 1-3, 3-1, and 3-2 were properly characterized as repeat violations, which justified increasing the adjusted base penalties.

Penalty Reduction for Workforce Size

Mr. Solorio testified that Genesis Framing had 18 employees on the day of the inspection.[46] Therefore, Genesis Framing argues, the penalty should be reduced by 60 percent instead of 40 percent. Under WAC 296-900-14015, employers with 11 to 25 employees are entitled to a 60 percent reduction in the base penalty, and employers with 26 to 100 employees are entitled to a 40 percent reduction. Mr. Seiler testified that Genesis Framing had 30 employees, and on this basis, the

[39] *Cobra Roofing Services, Inc. v. Dep't of Labor & Indus.,* 157 Wn.2d 90 (2006).
[40] Ex. 26; 4/15/24 Tr. at 50.
[41] Ex. 25 and 26; 4/15/24 Tr. at 66.
[42] Ex. 25; 4/15/24 Tr. at 69.
[43] Ex. 25; 4/15/24 Tr. at 78.
[44] Ex. 25; 4/15/24 Tr. at 79.
[45] 4/17/24 Tr. at 27, 41.
[46] 4/22/24 Tr. at 16-17.

Department reduced the base penalty by only 40 percent.[47] Genesis Framing did not produce any documentation, such as payroll records, to corroborate Mr. Solorio's claim. We do not find Mr. Solorio's uncorroborated testimony, standing alone, sufficiently reliable. Genesis Framing is not entitled to a further reduction of the penalty based on workforce size.

DECISION

The employer, Genesis Framing Construction, Inc., filed an appeal with the Board of Industrial Insurance Appeals on December 21, 2022. The employer appeals Citation and Notice No. 317970244 issued by the Department of Labor and Industries on November 30, 2022. In this notice, the Department alleged a willful serious violation of WAC 296-880-20005(6); a willful serious violation of WAC 296-880-20005(4); a willful serious violation of WAC 296-880-10020(1); a willful serious violation of WAC 296-880-30030(1); a serious violation of WAC 296-874-20010; a serious violation of WAC 296-874-20008(1); a serious violation of WAC 296-880-10015(4); a repeat general violation of WAC 296-155-110(9); and a repeat general violation of WAC 296-155-110(7). Citation and Notice No. 317970244 is affirmed as modified. We amend Violation 1-4 to be a violation of WAC 296-880-30030(2), instead of WAC 296-880-30030(1).

FINDINGS OF FACT

1. On April 14, 2023 an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Genesis Framing Construction, Inc. is a framing construction contractor formed in April 2020 by Cecilio Solorio, its sole owner and operator.

3. Chilos Builders LLC was a framing contractor formed in 2017 by Ana Iglesias, Mr. Solorio's romantic partner at the time. Ms. Iglesias managed the administrative side of the business, while Mr. Solorio managed the framing operations side of the business, including making safety decisions. Chilos Builders went out of business in 2020, a few months before the formation of Genesis Framing.

4. On August 29, 2022, Genesis Framing was performing framing work on a residential job site located at 8034 40th Avenue NE, Seattle, WA 98115.

5. On August 29, 2022, Ian Seiler, a Department safety compliance supervisor, inspected the job site. He observed several fall protection violations and other safety violations, including two workers on a roof at a height of 26 feet who were not wearing fall arrest systems.

[47] 4/15/24 Tr. at 44, 49, 68, 74.

6. On November 30, 2022, the Department issued Citation and Notice No. 317970244 alleging the following: Violation 1-1: a willful serious violation of WAC 296-880-20005(6); Violation 1-2: a willful serious violation of WAC 296-880-20005(4); Violation 1-3: a willful serious violation of WAC 296-880-10020(1); Violation 1-4: a willful serious violation of WAC 296-880-30030(1); Violation 2-1a: a serious violation of WAC 296-874-20010; Violation 2-1b: a serious violation of WAC 296-874-20008(1); Violation 2-2: a serious violation of WAC 296-880-10015(4); Violation 3-1: a repeat general violation of WAC 296-155-110(9); and Violation 3-2: a repeat general violation of WAC 296-155-110(7).

7. Genesis Framing had a fair opportunity to address whether it ensured that the personal fall arrest systems it provided to workers were attached by a lanyard to a lifeline or a structural member of the scaffold, as required by WAC 296-880-30030(2). Genesis Framing is not prejudiced by amending Item 1-4 to conform to the evidence in the record.

8. There was a substantial probability that death or serious physical harm could result from the hazards identified in Violations 1-1, 1-2, 1-3, 1-4, 2-1, and 2-2.

9. Genesis Framing had constructive knowledge of the violative conditions because they were plainly visible in the vicinity of the job site. *Erection Co. v. Dep't of Labor & Indus*., 160 Wn. App. 194 (2011).

10. With respect to Violations 1-1, 1-2, 1-3, and 1-4, Genesis Framing acted with intentional disregard or plain indifference to the safety rules. These violations were "willful" as that term is defined in *Erection Co. v. Department of Labor & Indus*., 121 Wn.2d 513 (1993).

11. There was substantial continuity between Chilos Builders and Genesis Framing. First, there was continuity in the nature of the businesses because both companies were framing contractors that were engaged in the business of framing construction. Second, there was continuity in the jobs and working conditions because the employees of both companies worked on construction sites, performed the same tasks, and were subject to the same hazards. Third, there was continuity in the personnel who made safety decisions because Mr. Solorio made such decisions for both companies.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The violation history of Chilos Builders contained in Citation and Notice Nos. 317959065 and 317958271 is attributed to Genesis Framing for purposes of ascribing a repeat characterization to violations in Citation and Notice No. 317970244. Violations 1-1, 1-2, 1-3, 3-1, and 3-2 were

properly characterized as repeat violations under the substantial continuity test.

3. We take judicial notice of the record in Board Docket Nos. 22 W0103, 19 W1162, and 20 W1216.

4. Pursuant to CR 15(b), we amend Violation 1-4 to be a violation of WAC 296-880-30030(2), instead of WAC 296-880-30030(1).

5. On August 29, 2022, Genesis Framing committed the following violations, none of which were the result of unpreventable employee misconduct:

- Violation 1-1: willful serious violation of WAC 296-880-20005(6);
- Violation 1-2: willful serious violation of WAC 296-880-20005(4);
- Violation 1-3: willful serious violation of WAC 296-880-10020(1);
- Violation 1-4: willful serious violation of WAC 296-880-30030(2);
- Violation 2-1a: serious violation of WAC 296-874-20010;
- Violation 2-1b: serious violation of WAC 296-874-20008(1);
- Violation 2-2: serious violation of WAC 296-880-10015(4);
- Violation 3-1: repeat general violation of WAC 296-155-110(9); and
- Violation 3-2: repeat general violation of WAC 296-155-110(7).

6. Citation and Notice No. 317970244 is affirmed as modified. Item 1-4 is modified to a violation of WAC 296-880-30030(2).

Dated: January 17, 2025.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

ISABEL A. M. COLE, Member

ROBERT A. BATTLES, Member

Addendum to Decision and Order
In re Genesis Framing Construction, Inc.
Docket No. 22 W0206
Citation & Notice No. 317970244

Appearances

Employer, Genesis Framing Construction, Inc., by Beckett Law Firm, per Kristian S. Beckett

Department of Labor and Industries, by Office of the Attorney General, per William F. Henry and Brian L. Dew

Petition for Review

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 August 15, 2024, in which the industrial appeals judge affirmed Citation and Notice No. 317970244 dated November 30, 2022.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and reverses the following:

- Lines 13 through 15 on page 34 of the April 15, 2024 transcript are stricken under ER 802 as inadmissible hearsay.

The Board affirms all other evidentiary rulings.