

Silverbow Roofing

SAFETY AND HEALTH

Repeat violations

A repeat violation occurs when the employer has been formerly cited for the same type of hazard; the Department is not required to establish that the employer had been previously cited for the same behavior.***In re Cobra Roofing Services, BIIA Dec., 00W0760 (2002);*** [Editor's Note: The Board's decision was appealed to superior court under Asotin County Cause No. 02-2-00051-2.]***In re Silverbow Roofing, BIIA Dec., 15 W1275 (2017)***

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IN RE: SILVERBOW ROOFING INC) DOCKET NO. 15 W1275
)
CITATION & NOTICE NO. 317936220) DECISION AND ORDER

A safety and health inspector for the Department of Labor and Industries initiated an inspection after observing six Silverbow Roofing, Inc. workers on a residential roof in Finley, Washington without fall protection. The Department alleged four violations in its Corrective Notice of Redetermination (CNR). Silverbow contested only violation Item 1-1 that alleged a repeat serious violation for employees not wearing fall protection when working on a roof, presenting evidence at hearing in an effort to show unpreventable employee misconduct. Our industrial appeals judge did not find unpreventable employee misconduct, but reduced the repeat penalty from \$8,800 to \$4,400 based on finding two of Silverbow's three previously cited serious violations did not involve a similar or related hazard because they cited different fall protection rules. The Department petitioned for review, asking that we affirm the citation without modification because all prior violations involved the same or similar hazard (injury due to lack of fall protection on a construction site), making its calculation correct. We agree. The key inquiry in determining whether a violation is a repeat violation is whether the current violation involves a substantially similar hazard to the hazard involved in a prior violation whose order became final in the previous three years. The Corrective Notice of Redetermination is **AFFIRMED**.

DISCUSSION

Our industrial appeals judge accurately summarized the evidence presented by the parties. We discuss only that evidence needed to explain our decision.

The evidence is undisputed that Silverbow had three final WISHA citations prior to the initiation of the inspection underlying this appeal. The first, Citation and Notice No. 316575265, was issued on January 4, 2013. It cited Silverbow for a serious violation of WAC 296-155-24510 for failing to ensure that employees were protected from falls by using a system of fall protection, and for a serious violation of WAC 296-155-24505(1) for failing to ensure that the site-specific fall protection work plan was implemented. Silverbow did not appeal the January 2013 Citation and Notice.

Silverbow was cited twice again in September 2013. On September 5, 2013, the Department cited Silverbow for two repeat serious violations. The first was for not ensuring that an employee was protected from fall hazards greater than 10 feet associated with roofing work, as required by WAC 296-155-24611(1)(a). The second repeat serious violation was of WAC 296-155-24611(2)(b),

1 for failure to develop a fall protection work plan for the site.¹ Silverbow appealed the citation but not
2 the ensuing Corrective Notice of Redetermination No. 316653591, issued on December 13, 2013.

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4 On September 20, 2013, the Department cited Silverbow for a repeat serious violation for
5 failing to ensure that an employee was safe from falls associated with roofing work on steep roofs
6 4 feet high or greater. The rule cited was WAC 296-155-24609(7)(a). After reassumption, the
7 Department issued Corrective Notice of Redetermination No. 316756295 on December 13, 2013,
8 which Silverbow did not appeal.
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11 The contested violation in this appeal is based on observations a safety and health inspector
12 made on April 27, 2015. She observed six Silverbow employees working on a residential roof without
13 fall protection. Corrective Notice of Redetermination No. 317936220, issued on October 6, 2015,
14 cited Silverbow with a repeat serious violation, citing WAC 296-155-24609(7)(a). The Department
15 assessed a penalty of \$8,800, based on multiplying the base penalty of \$2,200 by 4 (the current fall
16 protection violation and the three prior violations, which became final in 2013 and 2014).
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18 Under RCW 49.17.180(1), the Department may assess enhanced penalties when an employer
19 willfully or repeatedly violates a safety or health standard promulgated under the authority of WISHA.
20 The Department's rules implementing this grant of authority consistently define repeat violation.
21 WAC 296-800-370 provides that "A violation is a repeat violation if the employer has been cited one
22 or more times previously for a substantially similar hazard." WAC 296-900-180 defines a repeat
23 violation as one "where the employer has been cited one or more times previously for a substantially
24 similar hazard, and the prior violation has become a final order no more than three years prior to the
25 employer committing the violation being cited."² Under WAC 296-900-14020 the base penalty may
26 be "[m]ultiplied by the total number of citations with violations involving similar hazards, including the
27 current inspection."
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29 Key to each of the WAC provisions is that a repeat violation is determined on the basis of
30 **similarity of the hazard** addressed by the cited standards, not similarity of worksite, worker conduct,
31 or conditions giving rise to the violation. Washington court decisions, as well as a Board decision,
32 bear this out.
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44 ¹ We note that the rule cited in the September 5 citation differed from the rule cited in the January 4, 2013 citation. This
45 is because The Department's reworked and renumbered construction fall protection rules went into effect April 1, 2013.
46 See, WSR 13-04-073.

47 ² This definition was incorporated into Table 6 of WAC 296-900-14020, the penalty calculation regulation in effect at the
time the citation was issued.

1 In *Washington Cedar & Supply Co., Inc. v. Department of Labor & Indus.*,³ Washington Cedar
2 was cited for a repeat serious violation of WAC 296-155-24510 based on Department records
3 showing two prior fall protection violations in the preceding three years. The decision does not identify
4 what rules Washington Cedar previously violated, only that the Department classified them as fall
5 protection violations.⁴

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8 The WAC definition of repeat violation in effect in Washington Cedar was similar to the current
9 definition. It defined repeat violation as a violation that "has previously been cited to the same
10 employer when it identifies the same type of hazard."⁵ The court of appeals upheld the Department's
11 citation, saying:

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14 Given the evidence that Washington Cedar committed prior, **similar violations** and
15 considering the deference we accord the Board's findings, we cannot say that the
16 Board's finding of a repeat violation was clearly erroneous.⁶ (Emphasis added.)

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18 Trailing shortly after *Washington Cedar* was the *Cobra Roofing Services, Inc.*⁷ case, where
19 the WAC definition of repeat violation was the same as in *Washington Cedar*. Cobra Roofing was
20 cited for a repeat violation under WAC 296-155-24510 after an inspector observed three of its
21 employees working on a roof without wearing fall protection or using a fall restraint system. The basis
22 for the repeat violation was that Cobra Roofing had a prior citation for violating that same rule.

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24 In the Board's decision upholding the repeat violation, it rejected Cobra Roofing's argument
25 that the evidence must show similar conduct to support a repeat violation. In reaching its decision,
26 the Board observed that the language in the **definition of repeat violation focused on the hazard**
27 caused by violative behavior.⁸

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42 ³ 119 Wn. App. 906 (2004).

43 ⁴ *Washington Cedar* at 913.

44 ⁵ WAC 296-27-16001 repealed, effective August 1, 2000. Wa. St. Reg. 00-11-098.

45 ⁶ *Washington Cedar* at 918.

46 ⁷ *In re Cobra Roofing Services*, BIIA Dec., 00 W0760 (2002) and *Cobra Roofing Services, Inc., v. Department of Labor &*
47 *Indust*, 157 Wn.2d 90 (2006).

⁸ *In re Cobra Roofing Services*, BIIA Dec., 00 W0760 (2002) at 3.

1 Cobra Roofing renewed its argument before the court of appeals and it was again rejected. In
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3 its decision, the court of appeals observed:

4 WISHA unambiguously defines "repeat" with respect to the **nature of the hazard** and
5 requires the government to **prove only that the violations involve the same type**
6 **of hazard**, not the same underlying conduct.⁹ (Emphasis added.)
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8 The definition of repeat violation in effect in *Washington Cedar* and *Cobra Roofing* was
9 changed effective August 1, 2000. Since then it has consistently defined to be "where the employer
10 has been cited one or more times previously for a substantially similar hazard," even though the
11 Department has amended the section or section number where the definition has appeared.¹⁰ The
12 change in definition from same type of hazard to substantially similar hazard does not, in our
13 judgment, alter the relevancy of the Board and court of appeals decisions in *Cobra Roofing*: that the
14 focus is on the **hazard** caused by violative behavior. The more recent decision of *The Erection*
15 *Company, Inc. v. Department of Labor & Indus.*,¹¹ where the current "substantially similar hazard"
16 language applied to the repeat violation at issue, bears this out.
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21 The Erection Company appealed various safety violation citations issued following the death
22 of a worker who was killed when a bundle of decking material to which he had affixed his safety
23 lanyard fell from the roof structure. Two of the violations were cited as repeat serious violations, one
24 for a violation of WAC 296-155-24505, the other of and WAC 296-155-24510. The basis for the
25 repeat citation was a prior citation for a serious violation of WAC 296-155-24510. On appeal, The
26 Erection Company did not dispute that it committed the prior violation of WAC 296-155-24510. Its
27 argument was the same argument that had been made in *Cobra Roofing*: that absent evidence of
28 what hazardous conduct was involved in the prior violation, there was insufficient evidence to
29 determine if the same or substantially similar hazard was involved in the current violation.
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34 Evidence in the record supporting the repeat citation consisted of the industrial appeals judge
35 taking judicial notice, without objection, of the prior final order. The court of appeals found that
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42 ⁹ *Cobra Roofing Services, Inc.*, 157 Wn.2d at 98.

43 ¹⁰ Currently WAC 296-800-370; WAC 296-900-180; WAC 296-900-14020. By amendments effective August 1, 2000, the
44 current "substantially similar hazard" language was first codified at WAC 296-350-15045. That section was repealed by
45 amendment effective September 1, 2001, and moved to WAC 296-800-370. (Wa. St. Reg. 01-11-038.) The September
46 1, 2001 amendments were further amended by a housekeeping amendment effective December 1, 2001, and repeat
47 violation was defined as occurring "when WISHA cited an employer more than one in the last 3 years for a substantially
similar hazard." (Wa. St. Reg. 01-23-060, adopting former section 296-800-35040.)

¹¹ 160 Wn. App. 194 (2011)

evidence to be sufficient to support affirmance of the citation, stating the Department must "demonstrate 'the same type of hazard, not the same underlying conduct.'"¹²

The evidence before us undisputedly shows that Silverbow had three prior final citations of construction safety standards relating to fall protection in the three years prior to April 27, 2015. While the fall protection rules were amended between Silverbow's first and second citations, the **substance** of the rules was unchanged. The Code Reviser's records show the amendment was done to consolidate fall protection requirements for construction "into one coherent set of requirements."¹³ We note too that published with the amended rules was explanatory and descriptive information about how the new rules incorporated the prior rules. Specific to this case, for example, the amendment published in the Washington State Register showed how requirements of former WAC 296-155-24510 (the rule cited in Silverbow's January 4, 2013 citation) are now be found in WAC 296-155-24609 and WAC 296-155-24611 (the rules cited in Silverbow's other prior citations).

An employer is put on notice of a violation of WISHA safety standards by the issuance of a citation. When Silverbow was cited on January 4, 2013, it was put on notice of its need to comply with the fall protections standards for construction. Each of Silverbow's three prior citations were for the substantially similar hazard of falling from heights while working in construction. Each of those prior citations became final within the three years of the April 27, 2015 inspection underlying this appeal.

DECISION

The employer, Silverbow Roofing, Inc., filed an appeal with the Board of Industrial Insurance Appeals on October 20, 2015. The employer appeals Corrective Notice of Redetermination No. 317936220 issued by the Department on October 6, 2015. In this notice the Department alleged one repeat serious violation of WAC 296-155-24609(7)(a), one repeat general violation of WAC 296-155-110(9)(b), and two general violations, one of WAC 296-155-200(2)(a) and one of WAC 296-155-120(1). For the repeat serious violation the Department assessed a penalty of \$8,800. The penalty assessed for the repeat general violation was \$200. The Corrective Notice of Redetermination is correct and is affirmed.

¹² *The Erection Company* at 215.

¹³ Wa St. Reg. 13-04-073.

FINDINGS OF FACT

1. On December 23, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On January 4, 2013, the Department issued Citation and Notice No. 316575265 to Silverbow Roofing for serious violations of WAC 296-155-24510, for failing to ensure that six employees were protected from falls by using a system of fall protection, and WAC 296-155-24505(1), for not ensuring that the site-specific fall protection work plan was implemented. Silverbow did not appeal this citation.
3. On September 5, 2013, the Department issued Citation and Notice No. 316653591 to Silverbow, citing a repeat serious violation of WAC 296-155-24611(1)(a), for not ensuring that an employee was protected from fall hazards greater than 10 feet, a repeat serious violation of WAC 296-155-24611(2)(b), for failing to develop a site-specific fall protection work plan; a serious violation of WAC 296-155-110(2), for failing to develop a formal, complete Accident Prevention Program; a serious violation of WAC 296-155-428(1)(a), for failing to ensure that an employee was safe from electrical injuries related to roofing work.; and a general violation of WAC 296-876-15005 for failing to provide ladder training to employees. Silverbow appealed the citation. Following reassumption, the Department issued Corrective Notice of Redetermination No. 316653591 on December 13, 2013, in which it affirmed all cited violations. Silverbow received the Corrective Notice of Redetermination on December 21, 2013, which it did not appeal on or before January 14, 2014.
4. On September 20, 2013, the Department issued Citation and Notice No. 316756295 to Silverbow citing a repeat serious violation of WAC 296-155-24609(7)(a), for failing to ensure that an employee was safe from falls associated with roofing work on steep roofs (4/12 or greater) at 4 feet high or greater, without fall protection; a repeat serious violation of WAC 296-155-24611(2)(b), for failing to develop a site-specific fall protection work plan; a serious violation of WAC 296-876-40030, for failing to ensure employees were safe from accidents associated with ladders used for roof access; and a violation of WAC 296-155-110(9)(b), for failing to ensure weekly walk-around safety inspections were documented. Silverbow appealed. On December 13, 2013, the Department issued Corrective Notice of Redetermination No. 316756295 that affirmed the citation. Silverbow received the Corrective Notice of Redetermination on December 21, 2013, which it did not appeal on or before January 14, 2014.
5. On April 27, 2015, six Silverbow employees working on a residential roof in Finley, Washington. Nathan Lisenbee, Silverbow's on-site

foreman/crew leader, was one of the six employees working on the roof. The roof had a pitch of 6/12 and the work surface was four or more feet above ground. Neither Mr. Lisenbee nor any of the other five workers was using a fall restraint system, in violation of WAC 296-155-24609(7)(a) (Item 1-1). One of the workers was not wearing a shirt while working on the roof, in violation of WAC 296-155-200(2)(a) (Item 3-1).

6. A substantial probability existed that Silverbow workers working on a residential roof with a 6/12 pitch without fall protection would suffer serious physical harm or death if they were they were to fall.
7. On April 27, 2015, neither Mr. Lisenbee nor any other employee of Silverbow conducted a walk-around inspection and no documentation was available on-site to show such an inspection had been done, in violation of WAC 296-155-110(9)(b) (Item 2-1).
8. None of the employees working on the residential roof in Finley, Washington on April 27, 2015, had a valid first aid certificate, in violation of WAC 296-155-120(1) (Item 1-4).
9. As foreman/crew leader on April 27, 2015, Mr. Lisenbee was responsible for the safety of the crew, had the authority to stop workers from working unsafely and to correct the safety violations he observed, and was responsible for making sure safety rules were followed. He failed to take action on April 27, 2015, to correct safety violations occurring in his presence. Mr. Lisenbee was aware that Silverbow had been cited in 2013 for safety violations involving failure of workers to use fall protection when working on roofs. Silverbow did not take adequate steps to enforce its safety program because Mr. Lisenbee was not disciplined for his failure to take corrective action as to others and or for the disregarded his own safety.
10. The Department appropriately rated the severity of the hazard for Silverbow Roofing, Inc.'s violation of WAC 296-155-24609(7)(a) (failing to assure employees were using fall restraint) at 6, and the probability at 4, for a gravity of 24. The Department correctly calculated the base penalty of \$2,200 for this violation when taking into account Silverbow's average faith and history, and small size.
11. Silverbow had been cited three times previously for substantially similar hazards to the hazard addressed by WAC 296-155-24609(7)(a). The prior violations had become final within the three year period prior to April 27, 2015. So, the Department correctly multiplied the base penalty for Item 1-1 by 4 (the number of violations), and correctly assessed a total penalty of \$8,800.00.
12. Silverbow had been cited one time previously for violating WAC 296-155-110(9)(b), Item 2-1 within the three-year period prior to April 27, 2015, and the violation had become final. The Department

correctly assessed a penalty of \$200 for a repeat general violation of Item 2-1.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. The employer, Silverbow, Inc., violated the provisions of WAC 296-155-24609(7)(a) on April 27, 2015 (Citation 1 Item 1). This was a serious violation and not the result of unpreventable employee misconduct as provided by RCW 49.17.180(6). Further, this violation was a repeat of three prior violations that occurred on January 4, 2013, September 5, 2013, and September 20, 2013 involving violations of fall protection rules addressing a substantially similar or the same hazard as is addressed by WAC 296-155-24609(7)(a). The orders on those three prior violations became final no more than three years prior to April 27, 2015. The penalty for the serious, repeat violation of WAC 296-155-24609(7)(a), which occurred on April 27, 2015, (Citation 1, Item 1), is \$8,800. The citation and penalty for the violation of WAC 296-155-24609(7)(a) is affirmed.
3. Evidence that Silverbow Roofing, Inc., was previously cited for violating safety standards intended to mitigate the hazards construction workers face when working at heights in excess of four feet is, in this matter, sufficient to establish that a current violation is a repeat of the three prior violations.
4. Silverbow Roofing, Inc., committed a general violation of the provisions of WAC 296-155-110(9)(b) (Citation 2, item 1) on April 27, 2015 and this violation was not the result of unpreventable employee misconduct as provided by RCW 49.17.180(6). Further, this violation was a repeat of a prior violation of the same rule that occurred on September 20, 2013. The order on the September 20, 2013 violation became final no more than three years prior to April 27, 2015. The penalty for the general, repeat violation of WAC 296-155-110(9)(b), which occurred on April 27, 2015, (Citation 2, Item 1), is \$200. The citation and penalty for the violation of WAC 296-155-110(9)(b) is affirmed.
5. Evidence that Silverbow Roofing, Inc., was previously cited for violating WAC 296-155-110(9)(b) establishes that a current violation is a repeat of the prior violation.
6. Silverbow Roofing, Inc., committed a general violation of the provisions of WAC 296-155-200(2)(a) (Citation 3, Item 1) on April 27, 2013, when it failed to ensure that one of its workers met the minimum clothing requirements for workers at a construction site. This citation, with no penalty, is affirmed.
7. Silverbow Roofing, Inc., committed a general violation of the provisions of WAC 296-155-120(1) (Citation 3, Item 2) on April 27, 2013, when it failed to ensure that at least one person available at the work site held a valid first aid certificate. This citation, with no penalty, is affirmed.

1 8. Corrective Notice of Redetermination No. 317936220, issued October 6,
2 2015 is affirmed.
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4 Dated: January 18, 2017.

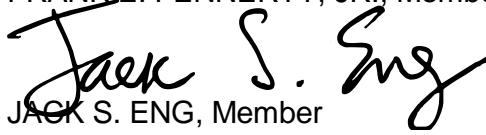
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**Addendum to Decision and Order
In re Silverbow Roofing Inc.
Docket No. 15 W1275
Citation & Notice No. 317936220**

Appearances

Employer, Silverbow Roofing, Inc., by Richard Hilburn

Employees of Silverbow Roofing, Inc., None

Department of Labor and Industries, by The Office of the Attorney General, per
Pamela V. Reuland

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 Department filed a timely Petition for Review of a Proposed Decision and Order issued on September 23, 2016, in which the industrial appeals judge modified the Department order dated October 6, 2015.

Evidentiary Rulings

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