

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

1 **IN RE: UNITED ROOFING**)
2 **SOLUTIONS, INC.**)
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4 **CITATION & NOTICE NO. 317968210**)
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On March 31, 2022, Department of Labor and Industries' Compliance Safety and Health Officer Zachary Dunham inspected roofing work being done at 8934 Milbanke Drive in Olympia, Washington. He determined that United Roofing Solutions committed five safety violations with a total penalty of \$305,254 under Citation and Notice 317968210:

- Item 1-1, a willful repeat serious high-pitched roof fall protection violation.
- Item 1-2, a willful repeat serious violation for failure to guard a skylight while performing roofing work.
- Item 2-1, a repeat serious violation for failure to ensure a site-specific fall protection work plan.
- Item 2-2, a repeat serious violation for failure of two employees to use eye protection.
- Item 3-1, a repeat general violation for failure to ensure a walk-around safety inspection.

United Roofing appealed the citation. But before trial, the Department moved to amend the citation to do the following: change Item 1-1 from a high-pitched roof violation to a low-pitched roof violation; vacate Item 1-2; and change Item 2-2 from two employees failing to wear eye protection to only one employee failing to wear eye protection. As a result of the amendments, the Department reduced the penalty sought to \$160,227. Our industrial appeals judge granted the Department's request.

After hearings, our industrial appeals judge issued a Proposed Decision and Order. He modified Item 1-1. He characterized it as a "third-time" repeat serious violation (holding it wasn't willful) with a penalty of \$7,500. He vacated Item 1-2 as requested by the Department. He affirmed Item 2-1 with a penalty of \$7,500. He modified Item 2-2 with a penalty of \$7,500 and affirmed Item 3-1 with a penalty of \$200. He assessed a total penalty of \$22,700. Both the Department and United Roofing filed Petitions for Review. After careful consideration of the record and the law, we agree with our judge's resolution of the appeal. We granted review solely to address a legal argument the Department raised in its Petition for Review about the calculation of the penalty in items 1-1, 2-1, and 2-2. For reasons explained below, we hold that the judge assessed proper penalties.

Citation and Notice No. 317968210 is **AFFIRMED AS MODIFIED**. Item 1-1 is modified from willful to a second repeat serious violation with a penalty of \$7,500; Item 1-2 is vacated; Item 2-1 is

1 affirmed; Item 2-2 is amended in part and is affirmed with a penalty of \$7,500; and Item 3-1 is affirmed
2 with a penalty of \$200. The penalty for Citation and Notice No. 317968210 is \$22,700.

4 DISCUSSION

5 The question here is whether our judge assessed the correct penalties for repeat serious
6 violations of the fall protection safety standards in Items 1-1 and 2-1 and eye protection requirements
7 in Item 2-2.
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10 WAC 296-900-14020 contains Table 12. Table 12 gives the multipliers that must be used to
11 increase penalties for repeat violations: For a first time repeat, we must multiply the penalty by 2.
12 For a second time repeat, we must multiply the penalty by 5. And for a third time repeat, we must
13 multiply the penalty by 8.
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16 In his order, our judge referred to the violations found in Items 1-1, 2-1, and 2-2 as *third time*
17 *repeat violations*. These were the third violations by United Roofing, but by the terms of the very
18 citation at issue these were only second repeat violations. The word *repeat* is used as an adjective,
19 it means "of, relating to, or being one that repeats an offence, achievement, or action."¹ So, the
20 second time a violation occurs it is considered a repeat. For purposes of WAC 296-900-14020, the
21 proper nomenclature for a third violation is a *second repeat*. All three violations at issue were second
22 repeats for multiplier purposes. And our judge properly multiplied the base penalties by a factor of 5.
23 This is a correct application of WAC 296-900-14020.
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26 The parties stipulated that there were no issues as to the correctness of the penalty factors of
27 size, good faith, and history. United Roofing did argue the probability of an injury, illness, or disease
28 in Item 1-1 was 1. WAC 296-900-14010 defines probability as "the likelihood that an injury, illness,
29 or disease will occur." The Department calculated the probability of injury, illness, or disease as a 1
30 in Items 2-1, 2-2, and 3-1. The same likelihood applies to Item 1-1 because the time of exposure
31 was limited to 45 minutes and the weather was clear, sunny, and dry. The net gravity-based penalty
32 was \$3,000, minus \$1,800 for size of the employer, plus \$300 for history rating, resulting in an
33 adjusted base penalty of \$1,500 for Items 1-1, 2-1, and 2-2. The proper multipliers for Items 1-1, 2-1,
34 and 2-2 was 5.
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47 ¹ "Repeat." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/repeat>. Accessed 13 May. 2024.

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DECISION

In Docket No. 22 W0250, the employer, United Roofing Solutions, Inc., filed a timely appeal with the Department of Labor and Industries' Safety Division. The Department transmitted the appeal to the Board of Industrial Insurance Appeals on August 31, 2022. The employer appeals Citation and Notice No. 317968210 issued by the Department on August 16, 2022. Citation and Notice 317968210 is affirmed as modified. Item 1-1 is modified to a second-time repeat serious violation with a penalty of \$7,500. Item 1-2 is vacated. Item 2-1 is affirmed. Item 2-2 is amended in part and is affirmed with a penalty of \$7,500. Item 3-1 is affirmed with a penalty of \$200. The total penalty for Citation and Notice No. 317968210 is \$22,700.

FINDINGS OF FACT

1. On September 26, 2022, and March 3, 2023, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On March 31, 2022, employees of United Roofing Solutions, Inc. (United Roofing) were re-roofing a residence at 8934 Milbanke Dr. in Olympia, Washington, the site identified in the Department's Citation and Notice No. 317968210.
3. **Item 1-1.** On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing employee roofers were on a roof with a potential fall hazard over 10 feet without wearing fall protection harnesses and without being tied off to roof anchors, in violation of WAC 296-880-30005(1)(a). Before trial, the industrial appeals judge granted the Department's motion to amend Item 1-1 from WAC 296-880-2005(6) (fall protection on a high pitch roof) to WAC 296-880-30005(1)(a) (low pitch roof). United Roofing did not effectively enforce its safety rules regarding the use of fall protection when its supervisor allowed workers to access fall hazards in excess of 10 feet without using adequate fall protection. Employees were exposed to this hazard and there was a substantial probability that employees could be injured. If harm resulted, it would be serious physical harm, including the possibility of death.
4. **Item 2-1.** On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing did not have an adequately completed fall protection work plan, as required by WAC 296-880-10020(2). Employees were exposed to this hazard and could be injured. If harm resulted, it would be serious physical harm, including the possibility of death.
5. **Item 2-2.** On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing did not ensure an employee, Jesse Iginmoef, used eye protection as required by WAC 296-155-350(3). A single

1 employee was exposed to the hazard and could be injured. If harm
2 resulted, it would be serious physical harm, including the possibility of
3 blindness or loss of an eye.

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5 6. **Item 3-1.** On March 31, 2022, at 8934 Milbanke Dr. in Olympia,
6 Washington, United Roofing did not ensure a Walk-Around Safety
7 Inspection was conducted and documented as required by
8 WAC 296-155-110(9)(b).
- 9 7. The severity of the hazard in Items 1-1, 2-1, and 2-2 was a 3 on a scale
10 of 1 to 3.
- 11 8. The probability that injury, illness, or disease would occur as a result of
12 the hazard in Items 1-1, 2-1, and 2-2 was 1 on a scale of 1 to 3.
- 13 9. United Roofing's history rating was below average resulting in a
14 10-percent penalty increase for Items 1-1, 2-1, and 2-2.
- 15 10. United Roofing's good faith rating was average, resulting in no adjustment
16 to the penalty for Items 1-1, 2-1, and 2-2.
- 17 11. United Roofing had between 11 and 25 employees as of the time of the
18 inspection on August 3, 2022, leading to an adjustment of 60 percent.
- 19 12. Based on United Roofing's history in the prior three years, Items 1-1, 2-1,
20 and 2-2 were United Roofing's third violations (second repeats), resulting
21 in the base penalty being multiplied by 5, for a penalty of \$7,500 for each
22 violation.
- 23 13. Based on United Roofing's history in the prior three years, Item 3-1 was
24 a repeat general violation with a total penalty of \$200.
- 25 14. The violations by United Roofing were not willful.
- 26 15. The total penalty to be assessed against United Roofing is \$22,700.
- 27 16. United Roofing's violations were not subject to the unpreventable
28 employee misconduct defense as United Roofing did not demonstrate
29 effective enforcement of its safety program.
- 30 17. Before trial, the industrial appeals judge granted the Department's motion
31 to amend the citation.
- 32 18. The pleadings and evidence submitted by the parties demonstrate that
33 there was no genuine issue of material fact related to Item 1-1 as to the
34 pitch of the roof and the application of the low-pitch safety standards. The
35 Order Granting Partial Summary Judgment, Amendment of Item of 1-1,
36 Vacation of Item 1-2 dated March 8, 2023, is affirmed.

42 **CONCLUSIONS OF LAW**

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
44 and subject matter in this appeal.
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2. On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing committed a third (second-repeat) serious violation of WAC 296-880-30005(1)(a), low-pitch fall protection standards, as alleged in amended Item 1-1 of Citation and Notice No. 317968210. This violation is amended to assign a penalty of \$7,500.
3. On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing did not commit a willful serious violation of WAC 296-880-20005(3)(b), fall protection standards, as alleged in Item 1-2 of Citation and Notice No. 317968210. This violation is vacated.
4. On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing committed second-repeat serious violations of WAC 296-880-10020(2) and WAC 296-155-350(3), as alleged in Items 2-1 and 2-2 of Citation and Notice No. 317968210, with penalties of \$7,500 for each violation.
5. On March 31, 2022, at 8934 Milbanke Dr. in Olympia, Washington, United Roofing committed a second repeat general violation of WAC 296-155-110(9)(b), as alleged in Item 3-1 of Citation and Notice No. 317968210, with a penalty of \$200.
6. The Department calculated the total penalty as \$160,227. That determination was incorrect. The correct penalty is \$22,700.
7. Citation and Notice No. 317968210 is affirmed as modified. Item 1-1 is modified to a second-repeat serious violation with a penalty of \$7,500; Item 1-2 is vacated; Items 2-1, 2-2, and 3-1 are affirmed as amended. The total penalty for Citation and Notice No. 317968210 is \$22,700.

Dated: June 3, 2024.

BOARD OF INDUSTRIAL INSURANCE APPEALS



HOLLY A. KESSLER, Chairperson



ISABEL A. M. COLE, Member

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**Addendum to Decision and Order,
In re United Roofing Solutions, Inc.
Docket No. 22 W0250
Citation & Notice No. 317968210**

Appearances

Employer, United Roofing Solutions, Inc., by Owada Law PC, per Aaron Owada
Department of Labor and Industries, by Office of the Attorney General, per Shawn W. Gordon
and Eric J. Lawless

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 and Department filed timely Petitions for Review of a Proposed Decision and Order issued on November 22, 2023, in which the industrial appeals judge affirmed as modified the Department order dated August 16, 2022.

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.