

## Cobra Roofing Services

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### 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., 00 W0760 (2002)** [*Editor's Note*: The Board's decision was appealed to superior court under Asotin County Cause No. 02-2-00051-2.]

Scroll down for order.

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

1 **IN RE: COBRA ROOFING SERVICES, INC. ) DOCKET NO. 00 W0760**  
2 )  
3 **CITATION & NOTICE NO. 303201669 ) DECISION AND ORDER**  
4

5 **APPEARANCES:**

6  
7 Employer, Cobra Roofing Services, Inc., by  
8 McCormick, Dunn & Black, P.S., per  
9 Kevin W. Roberts

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11 Employees of Cobra Roofing Services, Inc.,  
12 None

13  
14 Department of Labor and Industries, by  
15 The Office of the Attorney General, per  
16 G. Ward McAuliffe, Assistant  
17

18 The employer, Cobra Roofing Services, Inc., filed an appeal with the Board of Industrial  
19 Insurance Appeals on July 3, 2000, from a Corrective Notice of Redetermination of the Department  
20 of Labor and Industries dated June 21, 2000. The Corrective Notice of Redetermination affirmed a  
21 serious repeat violation (Citation 1, Item 1) of WAC 296-155-24510, and an assessed penalty of  
22 \$3,200; affirmed a serious violation (Citation 2, Item 1) of WAC 296-155-480(2)(a), and an  
23 assessed penalty of \$640; affirmed a serious violation (Citation 2, Item 2) of WAC 296-155-  
24 24515(4)(f), and an assessed penalty of \$1,360; and affirmed a general violation (Citation 3, Item 1)  
25 of WAC 296-155-505(2)(h), without penalty (total assessed penalties of \$5,200). **AFFIRMED AS**  
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29 **MODIFIED.**  
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31 **DECISION**

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33 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
34 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
35 Proposed Decision and Order issued on July 30, 2001, in which the Corrective Notice of  
36 Redetermination of the Department dated June 21, 2000, was affirmed as modified.  
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39 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
40 no prejudicial error was committed and the rulings are affirmed.  
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42 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,  
43 the Employer's Response to Department's Petition for Review, and a careful review of the entire  
44 record before us, we are persuaded that with regard to Item 1-1, the violation of WAC 296-155-  
45 24510 should indeed be affirmed, and further, that the penalty attached to this violation should be  
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1 doubled to reflect that a previous violation occurred. Moreover, with regard to Item 2-1, we hold  
2 that the facts presented are sufficient to establish a violation of WAC 296-155-480(2)(a). In all  
3 other respects we agree with our industrial appeals judge's Proposed Decision and Order.  
4

5 As a preliminary matter, we wish to note that the employer has filed a motion for attorney  
6 fees and costs, pursuant to RCW 4.84.350(1). That statute provides that a court shall award a  
7 qualified party that prevails in judicial review of an agency determination, fees and expenses,  
8 including reasonable attorney's fees, unless the court finds that the agency action was substantially  
9 justified. We do not believe that our review of the Department of Labor and Industries action  
10 satisfies the definition of judicial review as contained in that statute. Therefore, we do not believe  
11 the statute was intended to apply to proceedings before the Board of Industrial Insurance Appeals.  
12 We thereby decline to determine whether the employer is entitled to attorney's fees and costs under  
13 this statute. Pursuant to RCW 4.84.340, judicial review is indicated to be as defined by  
14 RCW 34.05, which is Washington's enactment of the Administrative Procedures Act (APA). The  
15 APA, however, does not provide a specific definition of the term judicial review, although it devotes  
16 Part V of the act to judicial review and civil enforcement. These are sections .410 through .598 of  
17 Chapter 34.05. Pursuant to RCW 34.05.030(2)(a), the provisions of Washington's version of the  
18 APA do not apply to proceedings before the Board of Industrial Insurance Appeals. Because of this  
19 exclusion, we conclude the provisions of RCW 4.84.350 do not apply to proceedings before the  
20 Board. They apply only to proceedings which fit the APA construction of judicial review as provided  
21 by RCW 34.05.410-.598.  
22

23 The facts in this matter are well set forth in the Proposed Decision and Order, and we shall  
24 only repeat them as necessary to explain the basis for our decision. With regard to Item 1-1, we  
25 completely agree with our industrial appeals judge in that not only did a violation of WAC 296-155-  
26 24510 occur, we also agree that the employer failed to establish the occurrence of unpreventable  
27 employee misconduct. However, our industrial appeals judge determined that the Department  
28 failed to establish a basis for doubling the penalty, as it failed to do more than simply establish that  
29 the firm had previously been cited for violation of the same rule.  
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31 In determining that the Department was not justified in multiplying the base penalty by a  
32 factor of 2, our industrial appeals judge relied on *Commissioner of Labor & Industry v. Bethlehem*  
33 *Steel Corp.*, 684 A.2d 845, 344 M. D. 17 (1966). In *Bethlehem Steel*, the court determined that to  
34 establish a basis for multiplying the base penalty due to repeat violations, there must be a  
35 substantial similarity of violative elements between the current and prior violations. As such, our  
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1 industrial appeals judge determined that in order to establish a repeat violation for purposes of  
2 multiplying the base penalty, the Department must present evidence that the two violations were  
3 substantially similar.  
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5 We are, however, mindful of WAC 296-27-16001(9), in effect at the time of this violation.  
6  
7 WAC 296-27-16001(9) defined "repeat violation" as:

8 any violation of a standard or order when a violation has previously been  
9 cited to the same employer when it identifies the same type of hazard.  
10

11 It is important to note that the federal standard focuses on the **behavior**, while the Washington  
12 regulation focuses on the **hazard** caused by the behavior. Certainly, WAC 296-155-24510  
13 encompasses many different types of situations. It addresses use of fall protection, types of  
14 adequate personal fall protection devices, safety nets, and more. However, the entire regulation  
15 identifies the same hazard: that of falling 10 feet or more. We do not see any reason to refer to  
16 federal standards when the state standard is in place and is valid on its face. Accordingly, we  
17 believe that the evidence presented establishes the existence of a repeat violation.  
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22 We note also that Item 1-1 of this Citation and Notice, as well as the previous violation,  
23 involves a violation of WAC 296-155-24510, and not one of the subsections. The first part of the  
24 regulation is as follows:  
25

26 When employees are exposed to a hazard of falling from a location 10  
27 feet or more in height, the employer shall ensure that fall restraint, fall  
28 arrest systems or positioning device systems are provided, installed,  
29 and implemented according the following requirements.  
30  
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32 Clearly, this speaks simply to exposing employees to a fall hazard of 10 feet or more. The section  
33 is no more specific than this. There may well be other regulations that deal with more than one  
34 hazard, and thus evidence that the firm has violated that regulation, may, without more, be  
35 insufficient. In this instance, however, we believe that the evidence presented adequately  
36 establishes a repeat violation. We would thus affirm Item 1-1, and find that it was appropriately  
37 determined to have a severity of 6 and a probability of 2, resulting in a base penalty of \$2,000.  
38 From this base penalty we would deduct as adjustments \$400 for "good" good faith (as modified at  
39 the hearing), and \$800 for the size of the employer, for a total penalty of \$800. In accordance with  
40 our decision herein, we hold that it is appropriate to double this penalty, for a total penalty of \$1,600  
41 for Item 1-1.  
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47 With regard to Item 2-1, the firm was cited for violation of WAC 296-155-480(2)(a), which  
requires a firm, when using portable ladders to access an upper landing surface, to ensure that the

1 ladder side rails extend at least 3 feet above the upper landing surface to which the ladder is used  
2 to gain access. The inspector determined that there were two instances of this violation. In one  
3 instance, although the ladder's side rails did not extend above the top of the parapet, the ladder  
4 was secured, which obviates the need for the extension of the side rails. In the other instance,  
5 however, the ladder was not secured. Our industrial appeals judge determined that while the  
6 ladder did not extend 3 feet past the top of the parapet, it did extend 3 feet past the roof, and that  
7 the roof was the "upper landing surface" for purposes of the regulation.  
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11 However, the last sentence of that regulation states, "In no case shall the extension be such  
12 that ladder deflection under a load would, by itself, cause the ladder to slip off its support". This  
13 suggests that the purpose for the regulation is to have 3 feet above the top of the landing surface,  
14 so that the ladder will not slip. Clearly, it is the top of the parapet that bears the weight of the  
15 ladder, and it is the first surface to which the worker, as well as the top of the ladder, would come  
16 into contact. As such, we believe that the upper landing surface is the top of the parapet, not the  
17 roof 3 feet below. Accordingly, we believe that the Department has made a prima facie case that at  
18 least one of the ladders in use violated WAC 296-155-480(2)(a).  
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23 With regard to the penalty for Item 2-1, we agree with the Department's assessment. That  
24 is, a severity of 5, as this involved a fall of over 10 feet, and a probability of 1, as this involved good  
25 weather conditions and experienced employees. This equates to a base penalty of \$1,600, which  
26 was adjusted as follows: less \$320 for "good" good faith, less another \$640 for size, and with no  
27 modification for history, resulting in a total penalty assessment for Item 2-1 of \$640.  
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31 In accordance with the foregoing, we would affirm the violation specified in Item 1-1, as well  
32 as the attached penalty, affirming the violation specified in Item 2-1 as well as the attached penalty,  
33 vacating Item 2-2 and affirming Item 3-1, with no penalty. Corrective Notice of Redetermination  
34 No. 303201669 is hereby affirmed as modified, with a total penalty assessment of \$2,240.  
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### 37 **FINDINGS OF FACT**

- 38  
39 1. On February 22, 2000, the Department of Labor and Industries conducted  
40 an inspection of a job site of the employer, Cobra Roofing Services, Inc.,  
41 located at Lincoln Middle School, in Clarkston, Washington.

42  
43 On May 8, 2000, the Department issued Citation and Notice  
44 No. 303201669, which alleged a serious repeat violation (Citation 1,  
45 Item 1) of WAC 296-155-24510, set an abatement date of February 22,  
46 2000, and assessed a penalty of \$3,200; a serious violation (Citation 2,  
47 Item 1) of WAC 296-155-480(2)(a), set an abatement date of February 22,  
2000, and assessed a penalty of \$640; a serious violation (Citation 2,  
Item 2) of WAC 296-155-24515(4)(f), set an abatement date of

1 February 22, 2000, and assessed a penalty of \$1,360; and a general  
2 violation (Citation 3, Item 1) of WAC 296-155-505(2)(h), and set an  
3 abatement date of February 22, 2000, without an assessment of a  
4 monetary penalty. The total penalty assessed was \$5,200.

5  
6 On May 16, 2000, the employer filed a Notice of Appeal to Citation and  
7 Notice No. 303201669. Thereafter, the Department timely reassumed  
8 jurisdiction, and on June 21, 2000, the Department issued Corrective  
9 Notice of Redetermination No. 303201669, which: affirmed the serious  
10 repeat violation (Citation 1, Item 1) of WAC 296-155-24510, and an  
11 assessed penalty of \$3,200; affirmed the serious violation (Citation 2,  
12 Item 1) of WAC 296-155-480(2)(a), and an assessed penalty of \$640;  
13 affirmed the serious violation (Citation 2, Item 2) of WAC 296-155-  
14 24515(4)(f), and an assessed penalty of \$1,360; and affirmed the  
15 general violation (Citation 3, Item 1) of WAC 296-155-505(2)(h), without  
16 penalty. The total penalty assessed was \$5,200.

17  
18 On July 3, 2000, the Board of Industrial Insurance Appeals received the  
19 employer's Notice of Appeal from the Corrective Notice of  
20 Redetermination dated June 21, 2000. The appeal was assigned Board  
21 Docket No. 00 W0760.

- 22  
23 2. On February 22, 2000, Cobra Roofing Services, Inc., was engaged in a  
24 re-roofing project at Lincoln Middle School, in Clarkston, Washington. The  
25 project involved work on a multi-level, flat roof. The Cobra Roofing  
26 employees at this work site were Dave Watkins, Mike Johnson, Jeremy  
27 Fields, and their foreman, Todd Bates.
- 28  
29 3. On February 22, 2000, employee Jeremy Fields was working on a roof  
30 providing hand signals to a forklift operator below. He was working near  
31 the edge of the roof and was exposed to the hazard of fall from a height  
32 of 10 feet or more, and was not wearing any fall protection equipment or  
33 otherwise protected by a fall restraint system.
- 34  
35 4. On February 22, 2000, employees Dave Watkins and Mike Johnson  
36 were working on and near the corner of the roof and were exposed to  
37 the hazard of a fall from a height of 10 feet or more. They were also not  
38 wearing any fall protection equipment or otherwise protected by a fall  
39 restraint system. There was a parapet wall extending from the roof  
40 edge, but in the location where they were working it was less than  
41 36 inches in height, and was therefore an inadequate guardrail system.
- 42  
43 5. On December 13, 1999, Cobra Roofing Services, Inc., was cited by the  
44 Department of Labor and Industries for a violation of WAC 296-155-  
45 24510. No other details concerning the nature of the violation, or the  
46 conduct giving rise to the citation, are known.
- 47

- 1 6. In addition to preparing an on-site fall protection plan, Cobra Roofing  
2 Services, Inc., provides employees with a written safety program,  
3 provides safety training with respect to fall protection, and holds weekly  
4 safety meetings, at which fall protection issues are discussed. Cobra  
5 Roofing Services, Inc., has a progressive discipline program to discipline  
6 employees for violation of safety rules, including fall protection safety  
7 rules, which includes verbal warnings, written warnings, and possible  
8 termination. Its work sites are also subject to safety inspections by  
9 Cobra Roofing employees and others to determine if safety violations  
10 are occurring. However, on February 22, 2000, there was a breakdown  
11 in communication concerning fall protection safety requirements  
12 between management and the employees, as evidenced by the fact  
13 three employees, within a period of hours, committed fall protection  
14 violations. Three fall protection violations would not occur within a  
15 period of hours absent some failure on the part of Cobra Roofing  
16 Services, Inc., to provide an effective fall protection program, and the  
17 violations cannot be attributed to unexpected and unpreventable  
18 misconduct on the part of its employees.  
19
- 20 7. On February 22, 2000, Cobra Roofing Services, Inc., was in violation of  
21 WAC 296-155-24510, in that employees of Cobra Roofing Services,  
22 Inc., were working at a height of 10 feet or more without required fall  
23 protection. This was a serious violation because it presented a fall  
24 hazard from which there was a substantial probability that death or  
25 physical harm could result from the failure to properly use fall restraint  
26 protection. This violation presented severity of 6, a probability of injury  
27 of 2, for a gravity of 12. An appropriate base penalty for this violation  
28 would be \$2,000. From this base penalty a deduction of \$400 should be  
29 made for the employers "good" good faith, and a deduction of \$800  
30 should be made for the size of the employer (26 to 100 employees). An  
31 appropriate penalty for this violation is therefore \$800. The hazard(s) to  
32 which employees were exposed in the citation of December 13, 1999,  
33 are the same as the hazards to which the firm's employees were  
34 exposed in Item 1-1, or violation of WAC 296-155-24510. The penalty  
35 for Item 1-1 should thus be doubled, for a total penalty of \$1,600.  
36
- 37 8. On February 22, 2000, Cobra Roofing Services, Inc., had placed a  
38 ladder against a wall of the building where work was being performed, in  
39 order to allow employee access to the roof. This ladder extended less  
40 than 3 feet above the top of the parapet wall against which it was  
41 resting, although it did extend in excess of 3 feet from the top of the roof  
42 itself. The top of the parapet was the upper landing surface used by  
43 employees to gain access to the roof from this ladder.  
44
- 45 9. On February 22, 2000, Cobra Roofing Services, Inc., engaged in the  
46 conduct described in Finding of Fact No. 8, which is in violation of  
47 WAC 296-155-480(2)(a). This was a serious violation because it  
presented a hazard from which there was a substantial probability that

1 death or physical harm could result from the failure to properly use or  
2 secure the ladder. This violation presents a severity of 5, as this  
3 involved a fall of over 10 feet, and a probability of 1, as this involved  
4 good weather conditions and experienced employees. An appropriate  
5 base penalty is \$1,600, which should be adjusted as follows: less \$320  
6 for "good" good faith, less another \$640 for size, and with no  
7 modification for history, resulting in a total penalty assessment for Item  
8 2-1 of \$640.

- 9
- 10 10. On February 22, 2000, roofing materials were being stored by Cobra  
11 Roofing Services, Inc., on the roof of Lincoln Middle School. The  
12 materials were on pallets, and some or all of them had been delivered  
13 and placed on the roof just prior to the lunch break. The materials  
14 extended beyond the warning line, which had originally been placed  
15 6 feet from the roof edge. However, when the materials were placed on  
16 the roof, Jeremy Fields had moved the warning line in to make room for  
17 the materials and, as of the time of the inspection by the Department of  
18 Labor and Industries, had not moved the warning line back. It is  
19 therefore not known whether the materials were within 6 feet of the roof  
20 edge. Further, at no time during the course of the inspection by the  
21 Department were any employees of Cobra Roofing Services, Inc.,  
22 working with these materials or in the area where they were stored.  
23 Following lunch, the employees of Cobra Roofing Services, Inc., were  
24 engaged in the process of protecting the roof from rain, and had not yet  
25 proceeded to use or unload the pallets of materials.

### 26 **CONCLUSIONS OF LAW**

- 27
- 28 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
29 parties to and the subject matter of this appeal.
- 30
- 31 2. The employer, Cobra Roofing Services, Inc., did violate the provisions of  
32 WAC 296-155-24510 on February 22, 2000 (Citation 1 Item 1), in that  
33 employees of Cobra Roofing Services, Inc., were working at a height of  
34 10 feet or more without required fall protection. This was a serious  
35 violation because it presented a fall hazard from which there was a  
36 substantial probability that death or physical harm could result from the  
37 failure to properly use fall restraint protection. This violation of  
38 WAC 296-155-24510 was not the result of unpreventable employee  
39 misconduct. Further, this violation was a repeat of a prior violation of  
40 WAC 296-155-24510, which occurred on December 13, 1999, as the  
41 hazard involved in the violation committed on December 13, 1999, is the  
42 same type of hazard that occurred on February 22, 2000. The penalty  
43 for the serious, repeat violation of WAC 296-155-24510, which occurred  
44 on February 22, 2000 (Citation 1, Item 1), is \$1,600, and with this  
45 penalty the citation is affirmed, as modified.
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- 47



- 1 3. Evidence that an employer was previously cited for a violation of  
2 WAC 296-155-24510 is, in this matter, sufficient to establish that a  
3 current violation is a repeat of the prior violation.  
4
- 5 4. The employer, Cobra Roofing Services, Inc., violated the provisions of  
6 WAC 296-155-480(2)(a) (Citation 2, Item 1) on February 22, 2000, in that  
7 the side rails of the ladders being used on the work site did not extend at  
8 least 3 feet (.9 m) above the upper landing surface. This was a serious  
9 violation because it presented a hazard from which there was a  
10 substantial probability that death or physical harm could result from the  
11 failure to properly use or secure the ladder. The penalty for the serious  
12 violation of WAC 296-155-480(2)(a) is \$640.  
13
- 14 5. The employer, Cobra Roofing Services, Inc., did not violate the  
15 provisions of WAC 296-155-24515(4)(f) (Citation 2, Item 2) on  
16 February 22, 2000, because either (1) it was not shown that on that date  
17 materials were stored within 6 feet of the roof edge; or (2) employees  
18 were not working with the materials or in the area where the materials  
19 were stored. This citation and the \$1,360 penalty, therefore, are  
20 vacated.  
21
- 22 6. The employer, Cobra Roofing Services, Inc., did commit a general  
23 violation of the provisions of WAC 296-155-505(2)(h) (Citation 3, Item 1)  
24 on February 22, 2000. This citation, with no penalty, is affirmed.  
25
- 26 7. Corrective Notice of Redetermination No. 303201669, issued June 21,  
27 2000, is affirmed as modified.  
28

29 It is so ORDERED.

30 Dated this 16th day of January, 2002.  
31

32 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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37 /s/ \_\_\_\_\_  
38 THOMAS E. EGAN Chairperson  
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42 /s/ \_\_\_\_\_  
43 FRANK E. FENNERTY, JR. Member  
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