

Tom Whitney Construction

SAFETY AND HEALTH

Grouped violations

When the department has grouped multiple items in a violation, the vacation of one item does not necessarily result in elimination of the penalty. If the remaining item supports a penalty, the penalty will be assessed. ...*In re Tom Whitney Construction, BHA Dec., 01 W0262 (2002)*

Scroll down for order.

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

1 **IN RE: TOM WHITNEY CONSTRUCTION) DOCKET NO. 01 W0262**
2)
3 **CITATION & NOTICE NO. 303655658) DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Employer, Tom Whitney Construction, by
8 Tom Whitney, Owner

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10 Employees of Tom Whitney Construction, by
11 Iron Workers Local #14,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Steven J. Nash, Assistant
17

18 The employer, Tom Whitney Construction, filed an appeal with the Board of Industrial
19 Insurance Appeals on April 2, 2001, from Corrective Notice of Redetermination No. 303655658,
20 issued by the Department of Labor and Industries on March 9, 2001. The order affirmed the
21 following violations alleged by Citation and Notice No. 303655658: Item 1-1a, alleging a serious
22 violation of WAC 296-155-24505(1) and assessing a penalty of \$1,200; Item 1-1b, alleging a
23 serious violation of WAC 296-155-24510 and assessing no penalty; Item 1-2, alleging a serious
24 violation of WAC 296-155-490(2)(b)(v) and assessing a penalty of \$1,200; Item 1-3, alleging a
25 serious violation of WAC 296-155-24510(2)(a)(ix) and assessing a penalty of \$1,200; and Item 1-4,
26 alleging a serious violation of WAC 296-155-525(2)(h) and assessing a penalty of \$800, for a total
27 proposed penalty of \$4,400. **AFFIRMED AS MODIFIED.**
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33 **DECISION**

34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
36 Proposed Decision and Order issued on August 9, 2002, in which Corrective Notice of
37 Redetermination No. 303655658 was affirmed as modified.
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40 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
41 no prejudicial error was committed. The rulings are affirmed.
42

43 On August 9, 2000, the Department of Labor and Industries conducted an inspection of the
44 Columbia Cold Storage building construction site in Othello, Washington. As a result of the
45 inspection, the employer, Tom Whitney Construction, was cited with five serious violations of the
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1 Washington Industrial Safety and Health Act. Item 1-1a is a serious violation for failing to have a
2 written fall protection work plan on the work site. This is a violation of WAC 296-155-24505(1). Our
3 industrial appeals judge found that the employer had a written fall protection work plan on the work
4 site, and vacated the violation. We agree with this analysis. Our review of the record persuades us
5 that the employer did indeed have a written fall protection work plan on the work site, and thus did
6 not violate WAC 296-155-24505(1).
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10 Item 1-2 is a serious violation, which alleges that workers working in a boom or basket from
11 an aerial lift were not wearing a full body harness and did not have a lanyard attached to the boom
12 or basket. This is a violation of WAC 296-155-490(2)(b)(v). Our industrial appeals judge found that
13 the employer violated this safety provision, but adjusted the penalty by finding that the good faith
14 element of the penalty calculation should be upgraded from fair to good. We agree with our
15 industrial appeals judge that the good faith element of the penalty calculation is best described as
16 good for this employer for this violation. We agree with the reduction set forth in the Proposed
17 Decision and Order for the penalty for Item 1-2.
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22 Item 1-3 is a serious violation of WAC 296-155-24510(2)(a)(ix). This violation alleges that
23 workers using a full body harness are required to have secured anchorages capable of supporting
24 5,000 pounds per employee, except when self-protracting lifelines or other deceleration devices are
25 used, which limit free fall to 2 feet, in which case anchorages shall be capable of withstanding
26 3,000 pounds. This violation alleges that the anchor point that was set up for the employees did not
27 meet the requirement for the 5,000-pound limit. We have reviewed the record and concur with our
28 industrial appeals judge that this violation was committed. Our industrial appeals judge reduced the
29 probability factor in computing the penalty for this violation from a 3 to a 2. Our review of the record
30 persuades us that our industrial appeals judge was correct in reclassifying the probability on this
31 violation. Additionally, the good faith element of the penalty calculation should be reclassified from
32 fair to good. We agree with the reduction of the penalty as set forth in the Proposed Decision and
33 Order for this violation.
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40 Violation 1-4 is a serious violation of WAC 296-155-525(2)(h). This violation alleges that an
41 operator was swinging and suspending loads over workers on the roof. Our review of the record
42 indicates that this violation was committed. We agree with our industrial appeals judge. The
43 penalty calculation set forth in the Proposed Decision and Order, which modified the good faith from
44 fair to good, and resulted in a penalty reduction, is correct.
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1 The remaining controversy in this matter focuses on Item 1-1b, which is a serious violation of
2 WAC 296-155-24510. This violation alleges that the employees were working at a height of 25 feet
3 or more without the use of fall protection, as required by the Washington Administrative Code. Our
4 review of the record persuades us that our industrial appeals judge was correct that this violation
5 was committed. The Department grouped Items 1-1a and 1-1b and assessed a penalty for the
6 grouped violations in the amount of \$1,200. Our industrial appeals judge, however, did not provide
7 a penalty for this serious violation.
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11 Our industrial appeals judge interpreted the Department action of grouping Items 1-1a and
12 1-1b as assessing a penalty only for Item 1-1a and no penalty for Item 1-1b. Since Item 1-1a was
13 vacated, our industrial appeals judge found that the Department had failed to assess a penalty for
14 Item 1-1b and affirmed that item without any penalty assessment.
15
16

17 The Department believes that the grouped violations of 1-1a and 1-1b collectively were
18 assessed the penalty set out for the group and that Item 1-1b should be affirmed with a penalty.
19 We agree with the Department.
20
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22 Item 1-1b is cited as a serious violation. We find on this record that it is a serious violation.
23 RCW 49.17.180(2) requires that all serious violations must be assessed a penalty. Although we
24 vacate Item 1-1a, the only reduction in the penalty for Item 1-1b will be the adjustment of good faith,
25 modified from fair to good. This is because Item 1-1b, standing alone, supports the proposed
26 penalty for the two grouped violations.
27
28

29 Corrective Notice of Redetermination No. 303655658, issued by the Department of Labor
30 and Industries on March 9, 2001, is affirmed as modified, as described above. As modified, the
31 violations by Tom Whitney Construction on August 9, 2000, result in a total penalty to be assessed
32 of \$2,000.
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34

35 **FINDINGS OF FACT**

- 36
- 37 1. On August 9, 2000, compliance safety and health officer Jeffrey L.
38 Krausse of the Department of Labor and Industries conducted an
39 inspection of the Columbia Cold Storage construction site in Othello,
40 Washington, where Tom Whitney Construction was installing a roof as a
41 subcontractor. On August 10, 2000, Mr. Krausse conducted a closing
42 conference with representatives from Tom Whitney Construction. On
43 January 10, 2001, the Department issued Citation and Notice
44 No. 303655658, alleging the following violations: in Item 1-1a, a serious
45 violation of WAC 296-155-24505(1) with a penalty of \$1,200; in
46 Item 1-1b, a serious violation of WAC 296-155-24510 with no penalty; in
47 Item 1-2, a serious violation of WAC 296-155-490(2)(b)(v) with a
corresponding penalty of \$1,200; in Item 1-3, a serious violation of

1 WAC 296-155-24510(2)(a)(ix) with a penalty of \$1,200; and in Item 1-4,
2 a serious violation of WAC 296-155-525(2)(h) with a penalty of \$800, for
3 a total proposed penalty of \$4,400.
4

5 On January 30, 2001, Tom Whitney Construction mailed its appeal from
6 Citation and Notice No. 303655658 to the Safety Division of the
7 Department of Labor and Industries. On February 2, 2001, the
8 Department issued a Notice of Reassumption of Jurisdiction.
9

10 On March 9, 2001, the Department issued Corrective Notice of
11 Redetermination No. 303655658, affirming each of the violations and
12 penalties assessed by Citation and Notice No. 303655658. On
13 March 29, 2001, Tom Whitney Construction placed its Notice of Appeal
14 from Corrective Notice of Redetermination No. 303655658 in the mail.
15 On April 2, 2001, the Department received the employer's Notice of
16 Appeal. On April 3, 2001, the Board issued a Notice of Filing of Appeal
17 for the appeal, which had been assigned Docket No. 01 W0262.
18

- 19 2. On August 9, 2000, Tom Whitney Construction had developed and
20 implemented an adequate site-specific written fall protection work plan
21 for its work on the Columbia Cold Storage project at Othello,
22 Washington.
23
- 24 3. On August 9, 2000, Tom Whitney Construction employees were working
25 on a roof, the eve of which was 26 feet from the ground and the peak of
26 the roof 36 feet from the ground. The workers were wearing body
27 harnesses with lanyards, but the lanyards were not secured in any
28 fashion to prevent the workers from falling to the ground. The
29 employees' actions could have resulted in substantial physical harm to
30 themselves. Tom Whitney Construction had knowledge of the hazard
31 presented by the employees' actions and that there was a substantial
32 probability that physical harm could result.
33
- 34 4. The violation committed by Tom Whitney Construction employees by
35 failing to secure them to the roof was cited as Item 1-1b and was
36 grouped with Item 1-1a.
37
- 38 5. The severity of any industrial injury resulting from the employees' failure
39 to secure themselves to the roof is most adequately rated as a 6 on an
40 ascending scale of 1 to 6 because the ground below the roof was
41 concrete flooring and a worker could be seriously injured or killed if he
42 were to fall from the roof to the ground.
43
- 44 6. The probability of an accident occurring due to the employee's failure to
45 secure himself to the roof is most adequately described as 3 on an
46 ascending scale of 1 to 6 because the metal roof was slick from dust.
47

- 1 7. The gravity of the violation cited in Item 1-1b is most adequately rated
2 as 18 (6x3), for a base penalty of \$3,000.
3
- 4 8. Tom Whitney Construction demonstrated good "good faith" in that it had
5 an appropriate site specific fall protection plan in place for the job, all the
6 proper equipment had been provided to the employees prior to
7 beginning the job, and the employees had all been given instructions on
8 the proper use of the safety equipment. The corresponding deduction
9 and penalty for good faith should be 20 percent, or \$600 for Item 1-1b.
10
- 11 9. On August 9, 2000, Tom Whitney Construction had less than
12 25 employees working in the State of Washington, which entitled Tom
13 Whitney Construction to a 60 percent or \$1,800 deduction for violation of
14 Item 1-1b.
15
- 16 10. The appropriate adjusted penalty for Item 1-1b is \$600.
17
- 18 11. Tom Whitney Construction's history was most appropriately rated as
19 average with no corresponding penalty reduction because, although
20 Tom Whitney Construction had a lower than average experience rating,
21 it had been cited for similar violations three years earlier.
22
- 23 12. On August 9, 2000, a Tom Whitney Construction employee was working
24 from a basket on a man-lift approximately 26 feet from the ground. The
25 employee was not secured to the basket in any manner to prevent him
26 from falling from the basket to the ground. Tom Whitney Construction
27 had knowledge of the hazard presented by the employee's actions and
28 that there was a substantial probability that physical harm could result.
29
- 30 13. The violation committed by the Tom Whitney Construction employee by
31 his failure to secure himself to the basket is best classified as serious
32 because there was a substantial probability of serious injury if the
33 employee was to fall 26 feet from the basket to the ground.
34
- 35 14. The severity of any industrial injury resulting from the employees' failure
36 to secure themselves to the basket is most adequately rated as 6 on an
37 ascending scale of 1 to 6 because the ground below the basket was
38 hard-packed earth and a worker could be seriously injured or killed if he
39 were to fall 26 feet from the roof to the ground.
40
- 41 15. The probability of an accident occurring due to the employee's failure to
42 secure himself to the basket is most adequately described as 3 on an
43 ascending scale of 1 to 6 because the employee was crawling in and out
44 of the basket to and from the roof, and the roof was somewhat slick.
45
- 46 16. The gravity of the violation cited in Item 1-2 is most adequately rated as
47 18 (6x3) for a base penalty of \$3,000.

- 1 17. Tom Whitney Construction demonstrated good "good faith" in that it had
2 an appropriate site specific fall protection plan in place for the job, all the
3 proper equipment had been provided to the employees prior to
4 beginning the job, the employees had all been given instruction on the
5 proper use of the safety equipment, and when Heith E. Belton had left
6 the jobsite all employees were properly tied off to appropriate anchor
7 points, and the job was being performed in a safe manner. The
8 corresponding deduction in penalty for good faith should be 20 percent,
9 or \$600 for Item 1-2.
- 10
11 18. Tom Whitney Construction's history was most appropriately rated as
12 average with no corresponding penalty reduction because, although
13 Tom Whitney Construction had a lower than average experience rating,
14 Tom Whitney Construction had been cited for similar violations three
15 years earlier.
- 16
17 19. On August 9, 2000, Tom Whitney Construction had less than
18 25 employees working in the State of Washington, entitling Tom
19 Whitney Construction to a 60 percent, or \$1,800 deduction for the
20 violation cited as Item 1-2.
- 21
22 20. The appropriate adjusted penalty for Item 1-2 is \$600.
- 23
24 21. On August 9, 2000, Tom Whitney Construction employees were using
25 C-clamps as attachment points for body harnesses and were not using a
26 system that was capable of supporting 5,000 pounds per employee.
27 Tom Whitney Construction had knowledge of the hazard presented by
28 the employees' actions and that there was a substantial probability that
29 physical harm could result.
- 30
31 22. The severity of any industrial injury resulting from the employees' failure
32 to use attachment points for body harnesses that were capable of
33 supporting 5,000 pounds per employee is most adequately rated as 6 on
34 an ascending scale of 1 to 6 because the ground below the roof was
35 cement inside the building and hard-packed earth outside the building,
36 and a worker could be seriously injured or killed if he were to fall
37 26 to 35 feet from the roof to either surface.
- 38
39 23. The probability of an accident occurring due to the employees' failure to
40 use attachment points for body harnesses that were capable of
41 supporting 5,000 pounds per employee is most adequately rated as 2 on
42 an ascending scale of 1 to 6 because the C-clamps used would have
43 reduced the risk of falling to the ground below, resulting from the failure
44 to tie off to any anchor point at all.
- 45
46 24. The gravity of the violation cited as Item 1-3 is best rated as 12 (6x2) for
47 a base penalty of \$2,000.

- 1 25. Tom Whitney Construction is entitled to a 60 percent or \$1,200
2 deduction for size and a 20 percent or \$400 deduction for a good faith
3 rating of good, resulting in an adjusted penalty of \$400 for Item 1-3.
4
- 5 26. On August 9, 2000, a Tom Whitney Construction employee suspended
6 a load from a crane above another worker. Tom Whitney Construction
7 had knowledge of the hazard presented by the employee's actions and
8 that there was a substantial probability that physical harm could result
9 from the violation cited as Item 1-4.
10
- 11 27. The severity of any industrial injury that could result from the load being
12 suspended above a worker is best rated as 6 on an ascending scale of 1
13 to 6 because the load could have knocked the worker from the basket,
14 causing a fall of 26 feet to hard-packed ground or the load itself could
15 have fallen onto the worker, resulting in serious injury or death.
16
- 17 28. The probability of an injury occurring due to the load being suspended
18 above a worker is best rated as 2 because, although the likelihood that
19 the load would knock the worker from the basket is low, there is the
20 additional possibility that the load could injure the worker by falling on
21 him.
22
- 23 29. The gravity of the violation cited as Item 1-4 is best rated as 12 (6x2) for
24 a base penalty of \$2,000.
25
- 26 30. Tom Whitney Construction is entitled to a 60 percent or \$1,200
27 deduction for size and a 20 percent or \$400 deduction for a good faith
28 rating of good, resulting in an adjusted penalty of \$400 for
29 Item 1-4.
30
- 31 31. The appropriate total aggregate penalty to be assessed against
32 Tom Whitney Construction for all violations committed is \$2,000.
33

CONCLUSIONS OF LAW

- 34
- 35 1. The Board of Industrial Insurance Appeals has jurisdiction over the
36 parties to and subject matter of this appeal, which was timely filed.
37
- 38 2. Item 1-1a: No violation of WAC 296-155-24505(1) has been established.
39
- 40 3. Item 1-1b: The failure of Tom Whitney Construction to ensure that all
41 employees exposed to a hazard of falling from a location 10 feet or more
42 in height were wearing appropriate fall restraint devices constitutes a
43 serious violation of WAC 296-155-24510.
44
- 45 4. Item 1-2: Tom Whitney Construction's failure to ensure that all
46 employees working in an aerial boom or basket wear a full body harness
47 and lanyard attached to the boom or basket constitutes a serious
violation of WAC 296-155-490(2)(b)(v).

- 1
2 5. Item 1-3: Tom Whitney Construction employees' failure to use
3 attachment points for body harness systems capable of supporting
4 5,000 pounds per employee constitutes a serious violation of
5 WAC 296-155-24510(2)(a)(ix).
6
7 6. Item 1-4: Tom Whitney Construction employees' actions of carrying or
8 suspending a load on a crane over people constitute a serious violation
9 of WAC 296-155-525(2)(h).
10
11 7. Corrective Notice of Redetermination No. 303655658, issued on
12 March 9, 2001, is modified as follows: Grouped Items 1-1a, alleging a
13 serious violation of WAC 296-155-24505(1) and assessing a penalty of
14 \$1,200 for the grouped violations, is vacated; Grouped Item 1-1b,
15 alleging a serious violation of WAC 296-155-24510 and assessing a
16 \$1,200 penalty for the grouped violations, is modified to assess a
17 penalty of \$600; Item 1-2, alleging a serious violation of WAC 296-155-
18 490(2)(b)(v) and assessing a penalty of \$1,200, is modified to assess a
19 penalty of \$600; Item 1-3, alleging a serious violation of WAC 296-155-
20 24510(2)(a)(ix) and assessing a penalty of \$1,200, is modified to assess
21 a penalty of \$400; and Item 1-4, alleging a serious violation of
22 WAC 296-155-525(2)(h) and assessing a penalty of \$800, is modified to
23 assess a penalty of \$400. As modified, Corrective Notice of
24 Redetermination No. 303655658 is affirmed, with the total penalty
25 assessed reduced from \$4,400 to \$2,000.
26

27 It is so ORDERED.

28 Dated this 22nd day of November, 2002.
29

30 BOARD OF INDUSTRIAL INSURANCE APPEALS
31

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33
34 /s/ _____
35 THOMAS E. EGAN Chairperson
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38
39 /s/ _____
40 FRANK E. FENNERTY, JR. Member
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