

Mt. Baker Roofing

SAFETY AND HEALTH

Repeat violations

"Final orders" as contemplated by safety and health regulations include Board orders dismissing appeals as well as Board orders remanding to the Department. These are properly included as final orders in the determination of the number of repeat violations.***In re Mt. Baker Roofing, BIIA Dec., 05 W0549 (2006)*** [Editor's Note: The Board's decision was appealed to superior court under Whatcom County Cause No. 07-2-00012-3.]

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

IN RE: MT. BAKER ROOFING, INC.) DOCKET NO. 05 W0549
CITATION & NOTICE NO. 308440205) DECISION AND ORDER

APPEARANCES:

Employer, Mt. Baker Roofing, Inc., by
Stanislaw Ashbaugh, LLP, per
J. Robert Smith

Employees of Mt. Baker Roofing, Inc.,
None

Department of Labor & Industries, by
The Office of the Attorney General, per
Michael Hall, Assistant

The employer, Mt. Baker Roofing, Inc., filed a Notice of Appeal with the Department of Labor and Industries on June 22, 2005, from Citation and Notice No. 308440205, which was issued on June 9, 2005. In its citation and notice the Department cited Mt. Baker Roofing, Inc., for a repeat serious violation of WAC 296-155-24510, with a penalty imposed of \$33,000, and for a repeat serious violation of WAC 296-155-24505(1), with no penalty imposed, for a total penalty imposed of \$33,000. The Department transmitted the Notice of Appeal to the Board of Industrial Insurance Appeals on June 24, 2005. The Department's citation and notice is **AFFIRMED AS MODIFIED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on August 9, 2006, in which the citation and notice issued by the Department was modified by the industrial appeals judge to reflect that Item No. 1-1a, Mt. Baker Inc.'s violation of WAC 296-155-24510, is a repeat serious violation, the repeat violations should be listed as, a Board Order Denying Petition for Review dated March 20, 2002, in relation to Citation and Notice No. 303103832, Corrective Notice of Redetermination No. 3048323322, issued on March 8, 2002; and Citation and Notice No. 305686024, for a total penalty of \$10,800; and Item No. 1-1b should be designated a serious violation, with no repeats of WAC 296-155-24505(1), for a total penalty of \$10,800, and as modified, is affirmed. All contested issues are addressed in this order.

1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
2 no prejudicial error was committed. The rulings are affirmed. The matter was submitted by the
3 parties by way of summary judgment.

4 On March 17, 2006, the Department filed the Department of Labor and Industries' Motion for
5 Summary Judgment, the Declaration of Michael Hall in Support of Department's Motion for
6 Summary Judgment, and a copy of Exhibit CC, which should have been filed with the Declaration
7 of Michael Hall in Support of Department's Motion for Summary Judgment. On March 24, 2006, the
8 Department filed a Memorandum in Support of Department's Motion for Summary Judgment. On
9 March 28, 2006, the Department filed the Department's Response to Employer's Motion for Partial
10 Summary Judgment. On April 3, 2006, the Department filed the Second Declaration of Michael
11 Hall, Affidavit of Jon Sinclair and Department's Reply Brief. On April 4, 2006, the Department filed
12 the Declaration of Robert Parker, and the Declaration of Keith Koskela.

13 On March 17, 2006, the employer filed Employer Mt. Baker Roofing, Inc.'s Motion for Partial
14 Summary Judgment Excluding Evidence of Previously Settled Citations, and the Declaration of
15 J. Robert Smith in Support of Motion for Partial Summary Judgment. On March 24, 2006, the
16 employer filed Employer Mt. Baker Roofing, Inc.'s Response and Opposition to Department's
17 Motion for Summary Judgment, and the Declaration of J. Robert Smith in Support of Employer's
18 Response in Opposition to Department's Motion for Summary Judgment. On March 31, 2006, the
19 employer filed Mt. Baker's Reply to Department's Response to Employer's Motion for Partial
20 Summary Judgment, and the Declaration of J. Robert Smith in Support of Employer's Reply Brief
21 Re: Motion for Partial Summary Judgment.

22 On April 7, 2006, a hearing on the motions for summary judgment and partial summary
23 judgment was heard. At the April 7, 2006 hearing, the parties agreed that the pleadings in *In re Mt.*
24 *Baker Roofing*, Dckt. No. 05 W1084, be considered in deciding this appeal. On June 29, 2006, the
25 Department and the employer filed the Stipulation of Facts. Our Decision and Order is based upon
26 a careful review of the foregoing and the files and records in this appeal.

27 The parties agree that the computation of the base penalty by the Department should be
28 modified to change the probability factor from a 4 to a 3, thus reducing the base penalty from
29 \$5,500 to \$4,500. The resultant adjusted base penalty, which represents a reduction of 40 percent
30 based on the size of the company, should then be reduced from \$3,300 to \$2,700. The only issue
31 remaining to be resolved is the number of repeat violations used to increase the adjusted base
32 penalty.

1 The Department seeks review of the Proposed Decision and Order issued on August 9,
2 2006. The Department used a total of nine previous violations as repeat violations under
3 WAC 296-800-35040, to assess an increased penalty for the violation cited in the current citation
4 and notice. In his Proposed Decision and Order, the industrial appeals judge reduced the number
5 of prior violations, finding that only three qualified as repeat violations, and reduced the penalty
6 accordingly. The Department challenges the reasoning set out in the Proposed Decision and
7 Order, in which the industrial appeals judge rejected six of the prior violations as repeat violations
8 under WAC 296-800-35040.

9 The controversy in this case focuses on the definition of "final order" under WAC 296-800-
10 35040 and WAC 296-800-370. These WACs provide, as follows:

11 **WAC 296-800-35040 Reasons for increasing civil penalty**
12 **amounts.**

13 . . .

14 **Repeat Violations:**

15 A violation is a repeat violation if the employer has been cited one
16 or more times previously for a substantially similar hazard.

17 •WISHA cites such violations if the final order for the previous
18 citation was dated no more than three years prior to the employer
19 committing the violation being cited.

20 •The adjusted base penalty will be multiplied by the total number
21 of citations with violations involving similar hazards, including the current
22 inspection.

23 •The maximum penalty cannot exceed \$70,000 for each violation.

24 **WAC 296-800-370**

25 **Final order**

26 Any of the following (unless an employer or other party files a
27 timely appeal):

28 •Citation and notice;

29 •Corrective notice;

30 •Decision and order from the board of industrial insurance
31 appeals;

32 •Denial of petition for review from the board of industrial
insurance appeals; or

•Decision from a Washington State superior court, court of
appeals, or the state supreme court.

1 **Final order date**

2 The date a final order is issued.

3 In the Proposed Decision and Order the industrial appeals judge accurately sets forth the
4 facts contained in this record, as well as the legal arguments presented by both parties. We have
5 granted review because we disagree with the analysis set forth in the Proposed Decision and Order
6 regarding the definition of a final order under WAC 296-800-35040 and WAC 296-800-370.

7 The Department issued the current citation and notice in which it cited a violation of
8 WAC 296-155-24510 and WAC 296-155-24505(1). The Department alleged that there were nine
9 previous violations of the same or similar standard with final orders within three years of the current
10 violations. Under WAC 296-800-35040, which allows for an increase in the penalty for repeat
11 violations, the Department used the nine previous orders as repeat violations and increased the
12 penalty for the current violations.

13 The nine previous orders break down into three categories. First, there are two earlier
14 violations with final orders that are not challenged by the firm. One is a citation and notice, which
15 was not appealed to this Board and thus became a final order. The second is a Proposed Decision
16 and Order, which was ultimately adopted by this Board and not appealed. Both final orders in these
17 previous violations are within three years of the current violations. These two earlier orders clearly
18 meet the requirements of WAC 296-800-35040 and WAC 296-800-370. The parties agreed that
19 these orders can be used as repeat violations on the current citation and the penalty increased
20 accordingly.

21 The second category consists of dismissal orders issued by this Board. Here there are five
22 previous citations and notices, or corrective notices of redetermination, which were appealed to this
23 Board. These appeals were dismissed following an agreement between the firm and the
24 Department. The third category of orders consists of two orders issued by this Board in which
25 appeals from the citations and notices were remanded to the Department of Labor and Industries.

26 In the Proposed Decision and Order, our industrial appeals judge found that the orders in
27 which this Board dismissed the appeals, are not "final orders" as contemplated by WAC 296-800-
28 35040 and WAC 296-800-370. In addition, our industrial appeals judge found that the date of the
29 "final order" for the purpose of determining whether the violation is a repeat violation is the date of
30 the citation and notice or the date of the corrective notice of redetermination issued by the
31 Department. Our industrial appeals judge found that the date of the citation and notices, and the
32 corrective notice of redetermination, were beyond the three-year period set forth in
WAC 296-800-35040 and the violations, which were the subject of the dismissal orders issued by

1 this Board, cannot be used as previous violations for repeat purposes in computing the increased
2 penalty.

3 In the Proposed Decision and Order, our industrial appeals judge found that the Board
4 orders remanding matters to the Department are not "final orders" under WAC 296-800-35040 and
5 WAC 296-800-370. Our industrial appeals judge then looked to the action taken by the Department
6 following the Board's order on remand to determine whether a final order exists at the Department
7 level. In one situation the Department took action following the remand from the Board. Here the
8 Department and the firm agreed to amend the citation and notice following the remand from the
9 Board and agreed that the violation could be used as a repeat violation. On this citation and notice,
10 our industrial appeals judge found that based on the agreement, the violation lies within the
11 three-year repeat period and can be used as a repeat violation when computing the current penalty.
12 On the remaining remand order from this Board, our industrial appeals judge found that the
13 Department took no action following the remand, and hence there was no "final order" at the
14 Department. Absent any "final order," the violation could not be used as repeat history in
15 calculating the current penalty. The end result of the Proposed Decision and Order is that only
16 three of the nine earlier violations are used as history for computing repeat violations and
17 increasing the current penalty.

18 The Department argues for a definition of "final order" under WAC 296-800-370, which
19 includes the dismissal orders issued by this Board and the orders issued by this Board in which the
20 Board remanded the matter to the Department. If the dates of these Board orders are used as the
21 date of the "final order," then all nine of the previous violations would have "final orders" issued
22 within the three-year period set forth in WAC 296-800-35040 and all must be used as repeat
23 violations for calculating the increased penalty.

24 We agree with the Department. The definition of "final order" in WAC 296-800-370 includes
25 decision and orders from the Board of Industrial Insurance Appeals unless otherwise appealed.
26 The Board orders dismissing the appeals, as well as the Board orders remanding to the
27 Department following the appeal are "final orders" of this Board. These orders terminated the
28 proceedings. There can be no further action as contemplated by WAC 296-800-370 from the
29 Board's dismissal orders or orders on remand to the Department. Therefore, under the plain
30 reading of WAC 296-800-370, these orders are "final orders" for the purpose of calculating the
31 penalty under WAC 296-800-35040.

1 The effect of following the Proposed Decision and Order is to effectively eliminate a portion
2 of the time in which the firm is exposed to the three-year repeat violation penalty. The Department
3 cannot use the earlier violations during the pendency of an appeal at the Board because they are
4 not "final orders" as defined in WAC 296-800-370. Thus, a firm would be able to appeal a
5 corrective notice of redetermination or a citation and notice, hold the matter at the Board level, and
6 any period of time that the appeal was pending at the Board would be subtracted from the
7 three-year period of exposure for the repeat violations. The firm could then move to dismiss the
8 appeal and the Department would effectively have lost a portion of the three-year period for repeat
9 violations.

10 The Board orders dismissing the prior appeals filed by the firm to the earlier citations and
11 notices and corrective notices of redetermination, as well as the orders from this Board in which the
12 Board remanded the matters to the Department, are "final orders" under the definition as set forth in
13 WAC 296-800-370, and since the dates of the final orders are within the three-year period set forth
14 in WAC 296-800-35040, the Department was correct in using the prior violations as repeat
15 violations in computing the penalty. The citation and notice is affirmed.

16 **FINDINGS OF FACT**

- 17 1. On December 10, 2004, the Department inspected a work site of
18 Mt. Baker Roofing, Inc., in Bellingham, Washington.

19 On June 9, 2005, the Department issued Citation & Notice
20 No. 308440205, alleging two violations of the Washington Industrial and
21 Safety and Health Act, Item No. 1-1a a repeat serious violation of
22 WAC 296-155-24510, with a penalty of \$33,000, and Item No. 1-1b, a
23 repeat serious violation of WAC 296-155-24505(1), with no penalty, for a
24 total penalty of \$33,000.

25 On June 22, 2005, the employer filed a Notice of Appeal with the
26 Department.

27 On June 24, 2005, the Department transmitted the Notice of Appeal to
28 the Board of Industrial Insurance Appeals.

29 On June 27, 2005, the Board issued a Notice of Filing of Appeal
30 pursuant to Washington Industrial Safety and Health Act, and assigned
31 the appeal Docket No. 05 W0549.

- 32 2. Mt. Baker Roofing, Inc., is a roofing contractor. On December 10, 2004,
it had two employees at a worksite in Bellingham, Washington. On that
day, the worksite was inspected by Keith Koskela, a Compliance and
Safety Health Officer with the Department. At the time of Mr. Koskela's

1 inspection it was raining and there was a wind of approximately 10 mph.
2 He observed two Mt. Baker Roofing, Inc., employees, Rene Martinez
3 and Santos Ramirez, on a roof. They were wearing fall protection
4 harnesses, there was a fall arrest system secured to the roof, but neither
5 employee had his harness connected to the fall arrest system.
6 Mr. Martinez and Mr. Ramirez had been working for approximately
7 1 hour and 40 minutes, at least part of that time at the edge of the roof
8 without fall protection because the distance from the edge of the roof to
9 where they were working was too far from the anchor. The distance
10 from the edge of the roof, where Mr. Martinez and Mr. Ramirez were
11 working to the ground was 22 feet.

- 12 3. At the Mt. Baker Roofing, Inc.'s worksite inspected by Mr. Koskela, on
13 December 10, 2004, Mt. Baker Roofing, Inc., had employees exposed to
14 a fall hazard of greater than 10 feet, without fall restraint, a fall arrest
15 system, or a position device being implemented.
- 16 4. At Mt. Baker Roofing, Inc.'s worksite, inspected by Mr. Koskela, on
17 December 10, 2004, Mt. Baker Roofing, Inc., had a fall protection work
18 plan, but it had not been completed. In particular it did not identify each
19 area of the worksite where employees were assigned where fall hazards
20 of 10 feet or more exist, or provide information on how
21 Mt. Baker Roofing, Inc.'s employees were expected to protect
22 themselves from fall hazards.
- 23 5. Mt. Baker Roofing, Inc., at the time of Mr. Koskela's inspection of
24 Mt. Baker Roofing, Inc.'s worksite on December 10, 2004, either knew or
25 with the exercise of reasonable diligence could have known that its
26 employees were exposed to a fall hazard from 10 or more feet without
27 fall restraint, a fall arrest system, or a position device system being
28 implemented.
- 29 6. Mt. Baker Roofing, Inc., at the time of Mr. Koskela's inspection on
30 December 10, 2004, either knew, or with the exercise of reasonable
31 diligence could have known, that the fall protection work plan had not
32 been completed.
7. On December 10, 2004, at the Mt. Baker Roofing, Inc., worksite
inspected by Mr. Koskela, Rene Martinez was the lead worker who had
supervisory authority at the jobsite and was authorized to direct the work
performed by Mr. Ramirez. Further Mr. Martinez was authorized to
direct Mr. Ramirez to use fall protection at the jobsite and to direct
Mr. Ramirez to attach Mr. Ramirez's safety harness to a lifeline
anchored on the roof at the jobsite.

- 1 8. If a Mt. Baker Roofing, Inc. employee at the jobsite, inspected by
2 Mr. Koskela, on December 10, 2004, had fallen due to the failure to use
3 adequate fall protection there is a substantial probability that the fall
4 would have resulted in serious physical harm or death.
- 5 9. If a Mt. Baker Roofing, Inc., employee had fallen at the worksite
6 inspected by Mr. Koskela on December 10, 2004, as a result of failure to
7 adequately complete the fall protection work plan there is a substantial
8 probability that the fall would have resulted in serious physical harm or
9 death.
- 10 10. The Department, in determining the penalty for the violation it cited
11 Mt. Baker Roofing, Inc., for in Item No. 1-1a, of Citation and Notice
12 No. 308440205, correctly determined that the severity of the violation
13 was a 6, since a fall from 22 feet could cause a death or a permanent
14 severe disability. The probability however should have been 3. The
15 gravity of the violation therefore is 18. Further, the Department was
16 correct in determining that Mt. Baker Roofing, Inc.'s good faith was
17 average because while Mt. Baker Roofing, Inc., had the knowledge of
18 the Washington Industrial Safety and Health standards, it did not apply
19 that knowledge to the worksite Mr. Koskela inspected on
20 December 10, 2004. Further, the Department was correct in
21 determining that Mt. Baker Roofing, Inc.'s history was average because
22 a repeat multiplier was used to increase the penalty.
- 23 11. Mt. Baker Roofing on December 10, 2004, had between 26 and
24 100 employees.
- 25 12. Mt. Baker Roofing, Inc., was cited for a substantially similar hazard as
26 Item No. 1-1a of Citation and Notice No. 308440205, in Corrective
27 Notice of Redetermination No. 304832322, issued on March 8, 2002,
28 which was not appealed.
- 29 13. Mt. Baker Roofing, Inc., was cited for a substantially similar hazard as
30 Item No. 1-1a of Citation and Notice No. 308440205, in Citation and
31 Notice No. 303103832, which was appealed to the Board, and assigned
32 Docket No. 00 W0668. The violation was affirmed by a Proposed
Decision and the Order and then by an Order Denying Petition for
Review dated March 20, 2002.
14. The Department, on September 25, 2002, in Citation and Notice
No. 305686024, cited Mt. Baker Roofing, Inc., for a violation of
WAC 296-155-204510. The Department on December 9, 2002, issued
Citation and Notice No. 305922007 citing Mt. Baker Roofing, Inc., for a
violation of, among other things, WAC 296-155-24510.
Mt. Baker Roofing, Inc., appealed both Citation and Notices to the
Board. The Board, in an order dated December 1, 2003, remanded the
Citation and Notices to the Department for further consideration.

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15. Mt. Baker Roofing, Inc., was cited for a violation of WAC 296-155-24510, in Corrective Notice of Redetermination No. 304431018, dated August 6, 2001; Corrective Notice of Redetermination No. 304297682, dated August 6, 2001; Corrective Notice of Redetermination No. 304431471, dated August 6, 2001; Corrective Notice of Redetermination No. 304431331, dated August 6, 2001; and Citation and Notice No. 3044621121, dated October 25, 2001. The foregoing Corrective Notices of Redetermination and the Citation and Notice were appealed to the Board. Mt. Baker Roofing, Inc., sent a letter or letters to the Board, which were received on July 23, 2002, asking that the appeals be dismissed. The appeals were dismissed by separate Orders Dismissing Appeal, all issued on July 26, 2002.
16. The repeat violations related to Item No. 1-1a of Citation and Notice No. 308440205 and identified as: (1) Formal Settlement Agreement 305922007 RS Violation 1 Item 1, Group A, issued on December 1, 2003; (2) Formal Settlement Agreement 304621121 RS Violation 1 Item 1, issued on July 26, 2002; (3) Formal Settlement Agreement 304297682 RS Violation 1 Item 1, Group A, issued on July 26, 2002; (4) Formal Settlement Agreement 304431471 RS Violation 1 Item 1, Group A, issued on July 26, 2002; (5) Formal Settlement Agreement 304431331 RS Violation 1 Item 1, Group A, issued on July 26, 2002; (6) Formal Settlement Agreement 304431018 RS Violation 1 Item 1, Group A, issued on July 26, 2002; (7) Formal Settlement Agreement 305686024 RS Violation 1 Item 1, Group A, issued on December 1, 2003, by the agreement of the parties; (8) Board Decision and Order 303103832, S Violation 1 Item 1, issued on March 20, 2002; and (9) Corrective Notice of Redetermination 304832322 RS Violation 1 Item 1, issued on March 8, 2002.
17. Pleadings submitted by the Department and Mt. Baker Roofing, Inc. in relation to Mt. Baker Roofing, Inc.'s Motion for Partial Summary Judgment, and the Department's Motion for Summary Judgment, along with the file and records, including the pleadings in Docket No. 05 W0184, demonstrated that there is no genuine issue of any material fact.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to, and the subject matter of, this appeal.
2. Both the Department and Mt. Baker Roofing, Inc., are entitled to summary disposition as a matter of law as contemplated by CR 56.
3. On December 10, 2004, Mt. Baker Roofing, Inc., committed a repeat, serious violation of WAC 296-155-24510, as alleged in Item No. 1-1a of

Citation and Notice No. 308440205. The violation was appropriately assigned a based penalty of \$2,700, for a serious violation.

4. Mt. Baker Roofing, Inc., on December 10, 2004, committed a repeat, serious violation of WAC 296-155-24505(1), as alleged in Item No. 1-1b of Citation and Notice No. 308440205. The violation was appropriately grouped with Item 1-1a.
5. Pursuant to RCW 49.17.180, WAC 296-800-35040, because there were nine repeat violations, the base penalty must be multiplied by ten resulting in a penalty of \$27,000.
6. Citation and Notice No. 308440205, is affirmed as modified.

It is so **ORDERED**.

Dated this 13th day of December, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
CALHOUN DICKINSON Member