

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

B & B ROOF PREPARATION, INC.
127 and ½ S. Manchester Avenue
Anaheim, CA 92802,

Employer.

DOCKET 12-R3D6-2946
and 2947

DECISION

Statement of the Case

B & B Roof Preparation, Inc. (hereinafter referred to as Employer or B&B) does preparatory work on roof surfaces before a roofer installs a new roof. Beginning March 7, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Jerry Young (Young), conducted a complaint inspection at a worksite located at 19852 E. Business Parkway, City of Industry, California (the site). On September 7, 2012, the Division cited Employer for one regulatory and three general violations:

- Citation 1, Item 1 a Regulatory violation of Section 1509(c) (Failure to post or have readily available a code of safe practices at the worksite) with a proposed penalty of \$325;
- Citation 1, Item 2, a General violation of Section 1524 (a)(2) (failure to supply single-service cups for drinking water or take other measures to ensure access to water) with a proposed penalty of \$650;
- Citation 1, Item 3, a General violation of Section 3395(c)(failure to provide drinking water) with a proposed penalty of \$650;
- Citation 1 Item 4, a General violation of Section 3395(3¹) (deficient Heat Illness Prevention Program (HIPP)) with a proposed penalty of \$650.

¹ There is no Section 3395(3). The Division made a clerical error on the citation.

The Division also cited Employer for one “serious willful” violation of Section 3212(e) (failure to protect employees from the hazard of falling through skylights) with a proposed penalty of \$36,565 (Citation 2).

Employer filed a timely appeal contesting the violations and the reasonableness of all proposed penalties. With respect to the alleged violation of section 3212(e), Employer contended that the fiberglass skylight domes at the site were sufficient to support 5000 pounds and no further protection was needed.

This matter came on regularly for hearing before Sandra L. Hitt, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on December 17, 2013. William Loupe, Safety Consultant, represented Employer. William Cregar, Staff Counsel, represented the Division. The parties presented oral and documentary evidence on the hearing date. The parties were given time to file written closing briefs and this time was extended at the request of the parties. On her own motion, the ALJ extended submission of the matter to May 13, 2014.

At the outset of the hearing, the Division moved to amend Citation 1, Item 1 to allege a violation of Section 3395(f)(3). There being no objection, the motion was granted for good cause.

The parties stipulated that the penalties were calculated in accordance with the Division’s policies and procedures.

Issues

1. On March 7, 2012, was a Code of Safe Practices posted or readily available at the worksite?
2. On March 10, 2012, did Employer supply single-service cups or take other measures specified in Section 1524(a)(2) to ensure employee access to drinking water at the worksite?
3. On March 10, 2012, did Employer provide drinking water for its employees at the worksite?
4. On March 15, 2012, was Employer’s Heat Illness Prevention Program (HIPPP) missing elements concerning procedures for responding to symptoms of heat illness, for contacting emergency medical services and transporting employees to points where they may be reached by an emergency medical service provider, and for providing to emergency responders clear and precise directions to the work site, all as required by subsections (f)(1)(G), (H) and (I).

5. On March 7, 2012, were Employees at the worksite protected from falling through skylights by any of the methods contained in subsections (e) (1)-(4) of Section 3212?
6. Did the Division establish a willful violation of Section 3212(e)?
7. Was there a realistic possibility that death or serious physical harm would result from the actual hazard created by the violation of Section 3212(e)?
8. Were the penalties proposed for each alleged violation reasonable?

Findings of Fact and Conclusions of Law

1. No Code of Safe Practices was posted or readily available at the worksite on March 7, 2012.
2. Employer did not provide drinking water or ensure access to drinking water at the worksite for its employees on March 7, 2012 and March 10, 2012.
3. Employer's HIPP was missing elements concerning procedures for responding to symptoms of heat illness; for contacting emergency medical services and transporting employees to points where they may be reached by an emergency medical service provider; and for providing to emergency responders clear and precise directions to the work site, elements required by subsections (f)(1) (G), (H) and (I).
4. On March 7, 2012, Employees at the worksite were not protected from falling through skylights by any of the measures contained in subsection (e) (1) – (4) of Section 3212.
5. The Division established a willful violation of Section 3212(e).
6. There was not a realistic possibility that the violation of section 3212(e) in the circumstance described would result in serious physical harm or death.
7. The penalties for Citation 1, Items 1-4 were reasonable.
8. The penalty for Citation 2 must be re-calculated to reflect a "general willful" classification

Reasons or Grounds for Decision²

Issue 1: Was a Code of Safe Practices posted or readily available at the worksite?

The alleged violation description (AVD) states:

On March 7, 2012, the employer's Code of Safe Practices was not posted at a conspicuous location and was not readily available at

² Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

the job site located at 19852 E. Business Parkway, City of Industry. The Manager/Foreman did not have a copy of the Code of Safe Practices in his vehicle. There were 27 employees engaged in roof tear off work on a commercial building.

Section 1509(c) provides: "The Code of Safe Practices shall be posted at a conspicuous location at each job site office or be provided to each supervisory employee who shall have it readily available."

The safety standard may be satisfied by an Employer who takes either step: the Code of Safe Practices may be posted at a conspicuous location at each job site office, or it may be provided to each supervisory employee who shall have it readily available. *Griffith Company*, Cal/OSHA App. 86-1202, Decisions After Reconsideration, (Mar. 20, 1987).

In *Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004) the Appeals Board held that where the Division presents evidence which, if believed, would support a finding, if unchallenged (prima facie case), the burden of producing evidence shifts to the employer to present convincing evidence to avoid an adverse finding.

When Young arrived to inspect the work site on March 7, 2012, Oswaldo Gutierrez (Gutierrez) presented himself as a manager for B&B. Employer did not have posted or readily available, a Code of Safe Practices, nor did Gutierrez have a copy of the Code of Safe Practices in his vehicle. (Young testimony). This was sufficient to establish a prima facie violation of section 1509(c). Employer did not present any evidence to dispute Young's testimony. The evidence supports the citation. The appeal of Citation 1, Item 1 is denied.

Issue 2: Did Employer supply single service cups or take other measures specified in Section 1524(a)(2) to ensure employee access to drinking water at the worksite on March 10, 2012?

Section 1524(a) (2) provides:

The employer shall take one or more of the following steps to ensure every employee has access to drinking water:

- (A) Provide drinking fountains
- (B) Supply single-service cups. Where single service cups are supplied, a sanitary container for the unused cups and a receptacle for disposing of the used cups shall be provided.

- (C) Supply sealed one-time use containers. Where sealed one-time use containers are supplied, a receptacle for disposing of the used containers shall be provided.
- (D) Ensure re-usable, closable containers are available for individual employee use. Where re-usable containers for individual use are relied upon for compliance with this section, the employer shall ensure the containers are marked to identify the user and maintained in a sanitary condition.

The AVD states, in pertinent part:

At the time of the inspection on March 10, 2012, the employer did not provide single-service cups and did not take any other steps to ensure every employee had access to drinking water, as required by this standard.

Section 1524(a) requires each employer to ensure that every employee has access to drinking water, and allows an employer to accomplish that purpose in any one of the four ways set forth in Section 1524(e).

On March 10, 2012, the employees brought their own water to the job. Later, on that same date, Employer provided gallon containers of water, but did not supply single service cups (Young testimony).

Young's testimony established a prima facie violation of Section 1524(a)(2). On March 10, 2012, Employer did not ensure employee access to drinking water, as employer was not providing *any* water or *any* containers until the inspector instructed Employer to do so. The employees were bringing their own water and containers. Employer did not present any evidence at hearing to dispute the Division's prima facie case on this point. The evidence supports the citation. The appeal of Citation 1, Item 2 is denied.

Issue 3: Did Employer provide drinking water at the worksite for its employees on March 7, 2012?

Section 3395(c) (Provision of water) states:

Employees shall have access to potable drinking water meeting the requirements of 1524, 3363 and 3457 as applicable. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective

procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (f)(1)(C) shall be encouraged.

The AVD states:

On March 7, 2012 and March 10, 2012, employees of B&B Roof Preparation Inc., a roofing contractor, were observed and engaged in roof tear off work at job site location 19852 E. Business Parkway, City of Industry, CA. The employer did not provide any drinking water.

Section 3395(c) requires each employer to ensure that every employee has access to drinking water, and allows an employer to accomplish that purpose in any one of four ways. Paragraph (A) describes one easily defined way to accomplish that. Paragraphs (B), (C), and (D) describe other means of satisfying the requirement; each of those includes several related actions.

Gutierrez told Young that the employees bring their own water to the site. Another B&B employee named DeLeon told Young that he brings his own water to the job and when it runs out, the driver goes to get more water and DeLeon pays him for it. B&B Vice President Moore confirmed that the employees had been supplying their own water. As alleged, Employer was not providing water for its employees on March 7 and March 10, 2012.

For these reasons, the appeal of this citation is denied.

Issue 4: Was Employer's HIPP lacking elements required in subsection (f) (1) (B), (G), (H) and (I) as of March 15, 2012?

Section 3395(f)(3) provides in pertinent part:

The employer's procedures required by subsections (f)(1)(B), (G), (H) and (I) shall be in writing and shall be made available to employees and to representatives of the Division.

Section 3395 (f)(1) sets forth the requirements of subsections B,G, H and I:

(B) The employer's procedures for complying with the requirements of this standard;

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary;

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider;

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

The AVD states in pertinent part:

On March 15, 2012, B&B Roof Preparation, Inc. provided upon request to Cal/OSHA their written Heat Illness Prevention Procedures. The program lacked subsections (B), (G), (H) and (I) as referenced above for CCR 3395(f)(1). The program lacked the employer's written specific procedures for compliance with these subsections.

The safety standard sets out a series of requirements for an employer's HIPP. Among those requirements are: the employer's procedures for responding to symptoms of possible heat illness [subsection (f)(1)(G)]; the procedures for contacting emergency medical services, including procedures for transporting employees to a point where they can be reached by an emergency medical service provider [subsection(f)(1)(H)]; and procedures for ensuring that clear and precise directions to the work site will be provided to emergency responders [subsection (f)(1)H).

The written HIPP Young received from Employer on March 15, 2012, did not cover all the elements required by (G) (Employer's procedures for responding to symptoms of possible heat illness), (H) (procedures for contacting emergency medical services) and (I) (procedures for providing clear directions to the work site)³ (Young testimony)⁴. Young's testimony established a prima facie violation of Section 3395(f)(3). Employer did not present any evidence at hearing to dispute Young's testimony on this issue.

³ Subsection B is a general requirement for procedures for compliance with the standard. Whether the Division proved that Employer's HIPP was lacking the required elements in subsection (f)(1) (B), it nonetheless proved that Employer's HIPP was deficient for lacking the elements of the other subsections.

⁴ The Division did not submit Employer's HIPP into evidence.

For these reasons the appeal of this citation is dismissed.

Issue 5: On March 7, 2012, were B&B employees at the worksite protected from falling through skylights by any of the methods contained in subsections (e) (1)-(4) of Section 3212(e)?

Section 3212(e) provides that employees approaching within six feet of a skylight shall be protected from falling through the skylight or skylight opening by (1) skylight screens which can hold the weight of at least 400 pounds (referencing 3212 (b)), (2) guardrails, (3) a personal fall protection system (4) temporary covers which can hold the weight of at least 400 pounds installed over the skylights, or (5) A fall protection plan.

The AVD states:

On March 7, 2012, approximately 27 employees of B&B Roof Preparation Inc. were observed working within six feet of fiberglass dome skylights at a job site located at 19852 E. Business Parkway, City of Industry, CA without any protection from falling through the skylights. These 27 employees were tearing off the existing roof of the building. Management stated they had skylight screens that were being used on another job.

The employer did not ensure employees were protected from falling through the skylights by any of the methods required by this standard.

The building on which the employees were performing the roof preparation was 25 to 30 feet high. Young testified that when he arrived to inspect on March 7, 2012, workers were walking around skylights with no protection (from the hazard of falling through skylights). See, also, Ex. 4(b) (photograph of workers on the roof). Manager Gutierrez told Young that the employees depicted in Exhibit 4(b) were B&B employees.

Employer believed the skylight domes were covers which met the standard in Section 3212(b). This position was rejected in *Pictsweet Frozen Foods*, Cal/OSHA App. 97-1896 Decision After Reconsideration (April 16, 2001). There the Board upheld the ALJ's determination that even if the dome of a skylight was capable of withstanding the specified load limit, it still was not compliant with Section 3212(e) because there was no screen or cover over the skylight and the employees were not using personal fall protection. The same reasoning applies here. Therefore, the Division established a violation of Section 3212(e).

Issue 6: Did the Division establish a willful violation of Section 3212(e)?

A willful violation is defined in California Code of Regulations, Title 8 section 334(e) as follows:

A violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

See, also, *Rick's Elec. v. Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023.

Employer was previously cited for a violation of Section 3212(e) on December 19, 2011. This establishes Employer's awareness of the safety order. Prior to beginning work at the site, Employer Vice-President Moore had contacted the skylight manufacturer (Bristolite) to inquire about the model of skylight on the roof. Moore saw a video in which that model was subjected to a force of 5000 pounds and did not break. The manufacturer informed Moore that the skylight domes "met all standards." (Moore testimony).

At the time of the inspection in this matter, *Pictsweet Frozen Foods*, supra, had been precedent for over ten years. In *Pictsweet*, an employee fell through a skylight and, as a result, spent two months in the hospital with shattered bones and nerve damage. In that case, the employer believed the skylight in question had been tested to withstand a weight in excess of 200 pounds.⁵ However, the skylight in question was a different model from the one that had been tested. That is a difference from the facts in this case, in which the parties stipulated that the skylight material had been tested to withstand 5000 pounds. Nevertheless, the ALJ in *Pictsweet* held: "If Employer had established that the dome of the skylight could hold weight in excess of 200 pounds it still would not have complied with the regulation at issue which requires a screen or cover over a skylight, or fall protection when employees are working within six feet." The *Pictsweet* Board agreed with the ALJ's legal reasoning that even had the skylight dome been capable of holding the specified amount of weight, it still would not have been compliant with the safety order.

⁵ The standard at that time.

Here, Employer is charged with knowledge of the safety order because three months earlier, Employer had been cited for a violation of the same safety order. Employer knew it was not using safety screens or other protective measures specified in Section 3212(e). Employer simply believed it should not have to comply under the circumstances.⁶ Employer was conscious of the requirements of the safety order, but chose to ignore them, thus committing an intentional and knowing violation. Therefore, the Division established a willful violation.

Issue 7: Was there a realistic possibility that death or serious physical harm would result from the actual hazard created by the violation of Section 3212(e)?

Labor Code Section 6432(a) provides “There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious.”

Under Labor Code Section 6432(e)(1), the definition of serious physical harm is:

- (1) Inpatient hospitalization for purposes of other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree burns, crushing injuries, including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

The evidence was insufficient to establish the serious violation on this record. The hazard pointed to by the Division was the risk of breaking the skylight dome and falling to the floor below. Young testified that “fiberglass deteriorates over time” and the parties stipulated that the skylights in question were installed in 1992. However, the parties also stipulated that the skylight dome material had been tested to withstand 5000 pounds and no evidence whatsoever was presented with regard to whether a material that

⁶ This being the case, Employer could have sought a variance. Employer did not do this; rather, Employer knowingly acted in violation of the safety order.

was tested at a standard of 5000 pounds could have deteriorated to the point where it would not support 400 pounds in the elapsed time. The Division proved a violation, but the Division did not establish that an *actual hazard* existed. The existence of the violation is not sufficient to establish the serious violation.⁷ Failure to establish the existence of an actual hazard precludes the establishing of a serious violation.

What is more, the evidence was insufficient to establish that any injury would amount to “serious physical harm.” Young had experience with fall injuries as a loss control consultant at State Compensation Insurance Fund and also during his four and one half years as an associate safety engineer at the Division. He has met all of his training requirements for the Division. He opined that in this case, there was a realistic possibility of serious injury.

Young’s statement with regard to the possibility of serious injury was conclusory. His testimony regarding falls was that during his time at SCIF, they were the most expensive type of accident, and that he investigated a skylight fall earlier in the year in which the injured employee was still in a wheelchair five months after the accident.⁸ Young did not offer any testimony regarding the nature of injuries suffered by employees as a result of falls from various heights, or from 25 feet in particular. Young’s testimony was insufficient for purposes of establishing the serious classification. Establishing the possibility that death or serious physical injury will occur in a given situation is not a subject for official notice; rather it is a subject that is sufficiently beyond common experience that it requires either the opinion of an expert or a proper foundation by a witness giving the opinion. *Architectural Glass & Aluminum* Cal/OSHA App. 01-5031 Decision After Reconsideration (March 22, 2004); *Ja Con Construction Systems, Inc.*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006).

In *Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001), the Board held that evidence to support a serious violation must, at a minimum, show the types of injuries that would more likely than not result from the condition which forms the basis of the violation. Otherwise, the Appeals Board is left only to speculate regarding the likelihood of a serious injury from a particular hazard. (See e.g., *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 23, 2002).) While these DARS were issued under the former standard of “substantial probability” rather than the current standard of “realistic possibility,” the comparison is apt nonetheless. The Appeals Board must not

⁷ As indicated in Labor Code Section 6432(a).

⁸ N.B: Unlike the facts of *Pictsweet*, supra, there was no injury involved here.

be left to speculate regarding the possibility of serious injury. There must be sufficient competent evidence in the record to support the classification.

For these reasons, the Division failed to establish the serious classification.

Issue 8: Were the proposed penalties reasonable?

The Division enjoys a rebuttable presumption that its proposed penalties are reasonable once it establishes that they were calculated in accordance with the Division's policies, procedures and regulations (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated that the penalties were calculated in accordance with the Division's policies and procedures. Employer did not present any evidence to rebut the presumption. Therefore, the proposed penalties for Citation 1, Items 1-4 are found reasonable.

The penalty for citation 2, which would have been reasonable for a "serious willful" violation, must be recalculated to reflect the correct penalty for a "general willful" violation. As the Division originally cited the violation as serious, we start with "high" severity and a \$2000 base penalty for the general violation. Using the adjustment factors set forth on the C-10 form (Ex. 11) of 20% for size and 15% for good faith brings us to the sum of \$1,300. There is no abatement credit for a willful violation (§336(e)). Pursuant to Section 336(h) a willful violation carries a multiplier of five. Therefore the final penalty for this citation is \$6,500.

Conclusion

The citations are upheld, with the exception of the "serious willful" classification for citation 2, as set forth above and in the attached summary table. Nothing herein shall prevent Employer from arranging an appropriate payment plan with the Department of Industrial Relations accounting office.

Dated: June 12, 2014

SANDRA L. HITT
Administrative Law Judge

SLH:ml

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD B&B Roof Preparation Docket 12-R3D6-2946 and 2947

Date of Hearing: December 17, 2013

Division Exhibits – Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Warning labels
3	Complaint (Cal/OSHA 7)
4(a)	Photograph of front of building
4(b)	Photograph of roof showing skylight and people
4(c)	Different view of 4(b)
4(d)	Photograph of another angle of the roof
4(e)	Photograph of skylights taken on March 8, 2012
4(f)	Photograph of screens over skylights on March 8, 2012
5(a)	Photograph of water bottles on March 10, 2012
5(b)	Photograph of gallon jugs of water
6	IBY letter
7	Prior citation for 3212 (e)
8	Police report
9	Document request sheet March 7, 2012
10	Document request sheet March 10, 2012
11	C-10 form

Employer Exhibits

Exhibit Letter	Exhibit Description
	NONE

Witnesses Testifying at Hearing

1. Jerry Young
2. Dennis Moore

CERTIFICATION OF RECORDING

I, Sandra L. Hitt, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

B&B ROOF PREPARATION
Docket 12-R3D6-2946 and 2947

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
ER=Employer	DOSH=Division

IMIS No. 312669633

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	A F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R3D6-2946	1	1	1509(c)	Reg	ALJ affirmed violation	X		\$325	\$325	\$325
		2	1524(a)(2)	G	ALJ affirmed violation	X		650	650	650
		3	3395(c)	G	ALJ affirmed violation	X		650	650	650
		4	3395(f)(3)	G	ALJ affirmed violation	X		650	650	650
12-R3D6-2947	2		3212(e)	SW	ALJ affirmed violation, but reclassified the violation from "serious willful" to "general willful."	X		36,565	36,565	6,500
Sub-Total								\$38,840	\$38,840	\$8,775

Total Amount Due*

\$8,775

NOTE:

Please do not send payments to the Appeals Board.

All penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 or (415) 703-4308 (payment plans) if you have any questions.

ALJ: SLH/ml
POS: 06/12/14