

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

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

Employer

Dockets: 12-R3D6-2946 and 2947

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the Decision of the Administrative Law Judge (ALJ) on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on March 7, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in City of Industry, California maintained by B & B Roof Preparation, Inc. (Employer). On September 7, 2012, the Division issued two citations to Employer. Citation 1, alleged one regulatory and three general violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 2, the citation at issue in this decision after reconsideration, alleged a Serious Willful violation of section 3212(e) [failure to protect employees from the hazard of falling through skylights].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on June 12, 2014. The Decision denied Employer's appeal of

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Citation 2, but reclassified the violation from Serious Willful to General Willful, imposing a civil penalty of \$6,500 from a proposed penalty of \$36,565.²

The Board ordered reconsideration on its own motion. Employer did not file an answer to the order of reconsideration. The Division filed an answer to the order.

ISSUE

Was the ALJ's Decision regarding Citation 2 correct?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On March 7, 2012, an anonymous complaint was lodged with the Division regarding work being done on the roof of a building in City of Industry, California. Division Associate Safety Engineer Jerry Young (Young) took the call and was assigned to investigate. Young spoke with the building tenants and a manager with Employer, Oswaldo Gutierrez (Gutierrez), and toured the roof where employees were at work. Employees were at work on the roof, which was 25 to 30 feet high. Skylights without covers, screens, or guards were present on the roof. Employees were not wearing fall protection equipment. Young took photographs of the conditions. (Ex. 4A-4D).

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the Division's answer to its order of reconsideration.

Employer was cited by the Division for failure to protect employees from the hazard of falling through skylights. The safety order, found at section 3212(e), requires use of a skylight screen, guardrails, personal fall protection systems, covers, or a fall protection plan:

- (e) Any employee approaching within 6 feet of any skylight shall be protected from falling through the skylight or skylight opening by any one of the following methods:
 - (1) Skylight screens. The design, construction, and installation of skylight screens shall meet the strength requirements equivalent to

² Citation 1, Items 1 through 4 were affirmed, as were the proposed penalties. The total penalty assessed by the ALJ was \$8,775.

that of covers specified in subsection (b) above. They shall also be of such design, construction and mounting that under design loads or impacts, they will not deflect downward sufficiently to break the glass below them. The construction shall be of grillwork, with openings not more than 4 inches by 4 inches or of slatwork with openings not more than 2 inches wide with length unrestricted, or of other material of equal strength and similar configuration, or

(2) Guardrails meeting the requirements of Section 3209, or

(3) The use of a personal fall protection system meeting the requirements of Section 1670 of the Construction Safety Orders, or

(4) Covers meeting the requirements of subsection (b) installed over the skylights, or

(5) A fall protection plan as prescribed in Section 1671.1 of the Construction Safety Orders when it can be demonstrated that the use of fall protection methods as contained in subsections (e)(1-4) of this Section is impractical or creates a greater hazard.

Exception: When the work is of short duration and limited exposure such as measuring, roof inspection, electrical/mechanical equipment inspection, etc., and the time involved in rigging and installing the safety devices required in subsections (e)(1) through (e)(4) equal or exceed the performance of the designated tasks of measuring, roof inspection, electrical/mechanical equipment inspection, etc.; these provisions may be temporarily suspended provided that adequate risk control is recognized and maintained.

The referenced subsection (b) of section 3212 states:

(b) Floor and roof opening covers shall be designed by a qualified person and be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove." Markings of chalk or keel shall not be used.

The record establishes that Employer, on March 7, 2012, the date of Young's inspection, failed to implement any of the five options for fall protection that are provided by the standard. Young's un rebutted testimony established that guardrails, covers, screens, and personal fall protection were not in use as employees worked on the roof within six feet of the existing

skylights. Young also testified that Employer did not have a fall protection plan in place, which Employer did not dispute. Nor did Employer argue that it qualified for the exception in the standard, which allows use of a fall protection plan due to impracticality or the creation of a greater hazard. (Section 3212(e)(5)).

The Board interprets the safety order with principals of statutory construction in mind. (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 786–787 [Look to plain meaning of language used.]) Employer’s contention, that a skylight itself may be classified as a cover under the safety order based on that skylight’s ability to bear a load, is not supported by the plain language of section 3212(e). A skylight cover, as described in the regulation, is placed over the skylight itself; the safety regulation does not contemplate the use of the skylight as a fall protection measure. (*Pictsweet Frozen Foods*, Cal/OSHA App. 97-1896, Decision After Reconsideration (Apr. 16, 2001).) Employer’s argument, that a skylight may be used in lieu of a cover was properly rejected by the ALJ. A violation is found.

Classification of the Citation

According to the revised Labor Code Section 6432(a), “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 created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious.” In other words, the Division must demonstrate that there was a realistic probability that death or serious physical harm could result from the actual hazard created by the violation.

The actual hazard created by the violation is the possibility of a fall through a skylight not protected by one of the measures outlined in the safety order. The parties stipulated that in 2007 a lab had tested and rated the same kind of material which composed the skylights on the roof, and rated the material as holding a weight of 5000 pounds. The actual installed skylights were not tested, and had been installed in 1992, giving the skylights 20 years of exposure to the sun and elements, which the parties stipulated cause deterioration to fiberglass material.³ No testimony or evidence established the exposure or deterioration level, if any, of the material tested by the lab.

Young testified to visiting the manufacturer of the skylights, Bristolite, and speaking with the Director of Engineering, Carl S. Smith (Smith). The parties stipulated to the introduction of stickers which Smith told Young are placed on all Bristolite skylights. (Ex. 2). One sticker states, in bold,

³ The parties stipulated to the fact that fiberglass material deteriorates over time due to weather, Ultraviolet radiation and other conditions.

capitalized lettering: “Danger, Risk of Fall, Keep Off, Plastic Dome Surfaces Will Not Support Body Weight.” Another Bristolite sticker has a more detailed warning:

WARNING. This skylight is designed to withstand normal elements of the weather. It is not designed to withstand human impact or falling objects. This skylight should not be walked upon under any circumstances. The owner or designer should restrict access only to authorized personnel who have been adequately cautioned as to the location of the skylights and informed of the warnings above, or said owner should provide protective guardrails, internal safety grills or screens, or external cages around the skylights.

Smith explained to Young that the manufacturer does not recommend or suggest that anyone work or walk around skylights because of the hazard of falling. He stated that when a product has been on a roof for ten or twenty years, “you just don’t know.”⁴ An actual hazard of falling through the skylight was shown through the Division’s evidence and testimony.

Young also testified regarding his experience and training with the Division, as well as his 22 years of experience as a loss control consultant with the State Compensation Insurance Fund (SCIF). He had recently had experience with a fall through a skylight, and had interviewed the employee who fell through the skylight 5 months after the incident. The employee involved would likely never walk again. Young also stated that at his time at SCIF, falls were one of the top five kinds of incidents he dealt with, and the most costly incident he ever dealt with in his career was a fall from a roof. He stated it was “absolutely” a realistic possibility that a fall from a height of 25 to 30 feet onto a concrete floor would result in a serious injury or death. His testimony, based on his education and experience in the field of safety, is credited. (See, Labor Code section 6432(g); *Brunton Enterprises, dba Plas-Tal Mfg. Co.*, Cal/OSHA App. 09-2239, Decision After Reconsideration (Mar. 26, 2014), citing *Duke Pacific, Inc.*, Cal/OSHA App. 08-574, Decision After Reconsideration (Aug. 30, 2012).)

While Employer’s witness, Vice President Brian Moore, testified to watching an internet video provided by Bristolite regarding the strength of the skylight, and his belief based on reviewing the video, as well as testing data provided by Bristolite, that the skylight could withstand the weight of 5000

⁴ Employer objected the testimony regarding Schmidt as hearsay. Hearsay is admissible under section 376.2, which states in part: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded.” We use these hearsay statements for the limited purpose of supplementing and explaining evidence (in particular, Exhibit 2) properly admitted into the record.

pounds, this does not overcome the Division's showing that there is a realistic probability of serious accident or injury of a physical harm resulting from the actual hazard.⁵ The Board has interpreted "realistic possibility" using the ordinary meaning of the words—it is a possibility which is within the bounds of reason, and not one of pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) The parties stipulated that the skylight material deteriorates over time. At the time of the Division's investigation, the skylights had been present on the roof for 15 years, subject to deterioration from the elements. The warning stickers provided by Bristolite unconditionally state that the skylights "will not support body weight" and suggest the provision of protective guardrails, screens, or cages for the safety of those coming near the skylights.

While Employer may have in good faith researched the skylights, Employer did not rebut the Division's demonstration that there is a realistic possibility that death or serious physical harm could result from the hazard of the unguarded skylights, which had deteriorated to an unknown degree over the course of years, and which were not intended to support body weight at any time, according to manufacturer warning labels. A serious violation is established.

The Division alleged a willful violation of section 3212(e). A willful violation is defined as follows:

334(e) Willful Violation is 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.

Section 334(e) establishes two alternate tests for determining whether a violation is willful. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034). Essentially, the Division may prove a willful violation either by demonstrating that the employer knowingly committed a violation of the safety order, or alternatively, that he committed the violation, not consciously, but with an awareness that there was an unsafe condition and without making any reasonable effort to abate that condition.

In order to demonstrate a willful violation, the Division introduced evidence related to a prior violation by Employer of section 3212(e) on December 19, 2011. (Ex. 7, 8). In that instance, an employee of Employer suffered a serious injury after falling through an unguarded skylight.

⁵ Neither the video, nor the testing data, were offered as evidence.

Employer, having already recently been issued a citation related to skylight guarding, had first-hand knowledge of the relevant safety order. The standard requires guarding of skylights in all instances, and does not include an exception for skylights made of materials which may be capable of bearing a load. Employer had knowledge that failure to guard the skylight by one of the methods designated by the safety order was a violation of the standard, but chose not to comply with any of those enumerated methods.

While Employer may have been informed that the skylight was capable of holding 5000 pounds, and that the skylight made other safety measures redundant, Employer was familiar with the safety order's specific requirements from its recent experience with an employee falling through a skylight. Although Employer may have believed, based on information from the manufacturer, that the skylights were safe without guarding, an Employer may not substitute its own safety measures for those created by the Standards Board. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).) Should an employer wish to use an alternative measure to comply with the safety order, an application for a variance may be filed with the Standards Board. The violation is properly classified as willful.

Citation 2, a serious willful violation of section 3212(e), is affirmed. The proposed penalty of \$36,565 assessed by the Division is reinstated.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: OCTOBER 6, 2014