

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

In the Matter of the Appeal of:

MORROW MEADOWS CORPORATION
231 Benton Court
Walnut, CA 91789

Employer

Docket. 09-R3D3-2295

**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 taken the petition for reconsideration filed by Morrow Meadows Corporation (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 6, 2009 the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Chino, California maintained by Employer. On June 18, 2009 the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Serious violation of section 3212(e) [failure to protect employees from the hazard of falling through a skylight].

Employer filed a timely appeal of the citation.

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 August 29, 2013. The Decision denied Employer's appeal and upheld the citation's Serious classification, imposing a civil penalty of \$18,000.

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

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

ISSUE

Did Employer violate Section 3212(e)?

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. The parties stipulated to a number of facts, as outlined in the ALJ's summary of evidence. (Decision, p. 2-3).

On April 6, 2009, employees Michael Blanton (Blanton) and James Bean (Bean) were engaged in installing solar panels on a large warehouse roof. The work involved carrying the panel as a team to a rack, placing the panel in the rack, and then repeating the steps until the entire railing was full of panels. Blanton testified that there were multiple teams of employees carrying out the work, walking back and forth on the roof. As Blanton and Bean were making a trip with a panel, Bean lost his balance, and his hand landed on one of the 350 skylights that were on the roof. The skylight broke and Bean fell through the roof, onto the concrete floor. He died shortly thereafter.

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 Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e).

Employer was cited for failure to protect its employees from the hazard of existing skylights, which required employer to use a skylight screen, guardrails, personal fall protection systems, covers, or a fall protection plan. The regulation, Section 3212(e), reads as follows:

(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 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.

There is no disagreement that Employer, at the time of Bean's fall, was not utilizing guardrails or personal fall protection systems for employees working around the skylight. (Decision, p. 2-3 [stipulations]). Employer did not attempt to demonstrate that it required use of a fall protection plan due to impracticality or the creation of a greater hazard. (Section 3212(e)(5)).

Testimony from Blanton, as well as Rubin Carr (Carr), the Division's Associate Safety Engineer, established that Employer did not have skylight screens in place on the day of the accident. Skylight screens, described in section 3212(e)(1), consist of grillwork with openings of 4 inches by 4 inches or less or slatwork with openings of 2 inches wide, and are 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 screen at any one time. Neither Carr nor Blanton had seen screens of this kind on the roof. (Ex. 2-7 [photographs of roof, broken skylight, intact skylights]). No screens were present at the time of the accident.

The evidence also preponderates to a finding that no cover, as defined by the regulation, was in place. A skylight cover as defined by the regulation, must meet the requirements of section 3212(b), and be "installed over the skylight[]". While Employer suggests that the skylight itself may be used as a cover, this interpretation of the regulation is not in agreement with the plain language. The Board interprets regulations based on the plain meaning and ordinary usage of the words, and will avoid constructions that render terms surplusage. (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal. App. 4th 684, 695). For the Board to decide that the skylight and skylight cover are one and the same would effectively render the word "over" surplusage. In other words, a cover is generally understood to cover an existing skylight, and the Board understands the term in this usual and ordinary way. Had the Standards Board meant to refer to a roof opening where a skylight was to be placed in the future, the term "skylight opening" would have been more accurate, and indeed, the Standards Board does use the term in section 1632, to refer to the hole in the roof where a skylight will be installed.

No skylight cover, as defined by section 3212(b)(4), was present on the roof on the day of the accident. Again, as testified to by Blanton, as well as Carr, the skylights on the roof were not covered by any kind of cover or screen. As none of the guarding options were present at the time of Bean's fall through the skylight, a violation is established.

CLASSIFICATION OF THE VIOLATION

Employer also appeals the serious, accident related classification of the citation. To sustain a serious classification, the Division must demonstrate a substantial probability of serious physical harm as a result of the accident or exposure.² The parties stipulated that there was a substantial probability that an employee would suffer serious physical harm or death from falling 37 feet and 7 inches (or, the height of the roof) onto concrete. (Decision, p. 11). The serious classification is established.

Employer argues the serious violation under section 6432 should not be upheld based on the Employer's lack of knowledge of the violation. Section 6432(b) states:

notwithstanding subdivision (a), a serious violation shall be deemed not to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

While Employer claims that it could not have known of the existence of the violation, the lack of protection from falls through skylights, which could have been provided through one of the five enumerated measures of fall protection in section 3212(b), was open and obvious. Employer's representative Richard Thomas testified to the daily presence of a foreman on the job, as well as walkthroughs by management officials of Employer who examined the skylights and were aware that they did not have covers, screens, or guardrails. Employer had both constructive and actual notice of the violation. (See, *ThyssenKrupp Elevator Corp.*, Cal/OSHA App. 11-2217 Denial of Petition for Reconsideration (Mar. 11, 2013).)

Employer's research into the ability of the skylight to hold a dead load ultimately had no relevance to meeting the Cal/OSHA standard, which on its face does not include skylights as acceptable fall-protection. A misreading of a safety order is not a defense to a violation (*Lusardi Construction Co. v. California Occupational Safety and Health Appeals Bd.* (1991) 1 Cal.App.4th 639, 646). Should Employer wish to use a skylight rated for fall protection in lieu of a cover or screen, it would be best served to seek a variance from the Standards Board. We also note that the Standards Board is currently considering amendments to section 3212, and that employers may wish to engage in that process to ensure that their concerns are heard.

² Labor Code section 6432 was amended effective January 1, 2011. The rule is applied as it was in effect at the time of the violation.

The "accident-related" designation is based upon regulation 336(d)(7) which provides: "The penalty for any Serious violation determined by the Division to have caused death or serious injury. . . .as defined pursuant to Labor Code section 6302, shall not be adjusted pursuant to this subsection, except for Size, as set forth in part (1) of this subsection." (See, *Jensen Precast*, Cal/OSHA App. 05-2377, Decision After Reconsideration (Mar. 26, 2012).) As the serious violation has caused a death of an employee, the accident-related designation will be upheld. The \$18,000 penalty is appropriate and upheld.

Therefore, we affirm the result of Decision sustaining the citation but for the different reasons stated above.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: September 4, 2014