WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GUADALUPE REYES PACHECO, *Applicant*

vs.

J&V PROPERTIES, INC.; WILLIAMSBURG NATIONAL INSURANCE COMPANY, administered by ILLINOIS MIDWEST INSURANCE AGENCY; *Defendants*

Adjudication Number: ADJ10085720
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the August 16, 2024 Findings of Fact, Award, and Opinion on Decision ("F&A"), wherein the workers' compensation administrative law judge ("WCJ") awarded applicant increased compensation under Labor Code section 4553 based on a finding that defendants had engaged in serious and willful ("S&W") misconduct. Defendant contends that the WCJ erred because the evidence does not support the WCJ's conclusion, instead showing that defendant complied with the relevant safety orders and that applicant's injury was caused by his own negligence.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, we will grant reconsideration, rescind the F&A, and return the matter to the WCJ for a new decision that resolves the areas of factual dispute and then analyzes the facts under the governing legal framework.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a specific injury to multiple body parts sustained on June 24, 2015 while employed by defendant as a roofer. The basic facts of applicant's injury are undisputed and as follows: applicant injured himself falling through a

skylight on defendant's property when his foot got tangled in equipment he was using while cleaning the roof surface as part of a renovation project, causing him to step backwards into the skylight. The skylight was covered by a plastic covering, which broke under applicant's weight. Applicant fell over twenty feet to the floor, landing on pallets that were stacked below him, sustaining considerable injuries, the nature of which the parties do not dispute.

Applicant later filed a petition for increased compensation, pursuant to Labor Code section 4553, on the basis that his injury was attributable to serious and willful misconduct on the part of his employer. Applicant's underlying claim for compensation was resolved via a Compromise and Release approved on May 4, 2022, and is therefore no longer part of these proceedings.

A Cal/OSHA investigation done in connection with the accident resulted in the issuance of three citations for violation of Cal/OSHA safety orders, two related to the failure to properly secure the skylights on the property with covers capable of supporting 400 pounds of weight, labelled as "serious," and one for the failure to properly do a safety inspection, labelled "general." (J. Ex. 101.) However, the matter was ultimately settled on appeal, without any admission of wrongdoing. (D. Ex. 1.)

The S&W petition proceeded to trial over multiple trial dates from October 17, 2023 to June 5, 2024. The testimony at trial largely centered around whether and to what extent fall protection safety devices were provided, why applicant was not wearing such equipment at the time of the accident, and the condition of the skylights at the building site and what steps defendant had taken to secure them.

Devon Benbrook, the Cal/OSHA enforcement agent who investigated applicant's injury, testified that based on his investigation, fall protection devices were provided on site for the workers to use. (Minutes of Hearing / Summary of Evidence, 10/17/23, at p. 5.) According to the investigation, the skylights on the property were in poor condition – some were broken, some had plywood protection covers, while most did not. (*Id.*) For safety reasons, skylights must be covered with some sort of protection sufficient to hold 400 pounds without breaking, so that an employee who stepped onto one would not fall through. (*Id.* at pp. 5–6.) The skylights Benbrook saw were very brittle. (*Id.* at p. 5) The skylight applicant had fallen through had no plywood cover. (*Ibid.*) There were anchors or tie downs nearby that could have been used with the fall prevention devices to secure employees against the danger of falling. (*Ibid.*) On the ground, there were still pieces of the skylight in the area where applicant fell. (*Ibid.*)

Benbrook interviewed five employees as part of his investigation: Bryce Hovannisian, the site manager, Jorge Torres, applicant's immediate supervisor, and three of applicant's fellow employees, Juan Neri, Jose Neri, and Armando Neri. (MOH/SOE, 11/9/23, at p. 4–5.) Hovannisian told Benbrook that harnesses were provided, but that applicant chose not to wear his. (*Id.* at p. 5.) Torres told Benbrook that there were three other employees on the roof at the time of the accident. (*Id.* at p.6.) Torres himself was not on the roof; he was on the ground getting supplies. (MOH/SOE 10/17/23, at p. 5.) Torres was aware of the requirement to use fall protection devices. (*Ibid.*) Juan Neri told Benbrook that applicant had used fall protection previously; they were trained to use fall protection. (MOH/SOE 11/9/23, at p. 6.) He also said that applicant always separated himself with the other employees. (*Ibid.*) Armand confirmed they had been trained to use fall protection, including applicant. (*Ibid.*)

Benbrook also interviewed applicant, who stated that he was "eager to work" and would go off on his own. (*Ibid.*) The accident occurred because he got tangled up with the leaf blower cord and fell. (*Ibid.*) Applicant told Benbrook he felt fall protection was not needed. (*Ibid.*) He also stated that fall protection was not provided to him or to the Neri brothers on the day of the fall. (*Ibid.*) Applicant denied that any safety training was provided. (*Ibid.*)

Applicant testified next, through a Spanish language interpreter. Applicant testified that he had previously been trained to use fall protection harnesses and ropes on other jobs, and knew how to use the equipment. (*Id.* at p. 7.) The record is somewhat unclear, but Applicant appears to have testified that he was provided some safety training by defendant, but not with regard to how to use the fall protection harnesses. (*Ibid.*) Later, upon being shown an exhibit, he stated that "someone named Ivan" provided him safety instruction on how to use a harness, but that he was not given any training in how to work around skylights. (*Id.* at p. 9.)

On the day of the accident, Applicant testified that no one told him to put on a harness. (*Ibid.*) He did not see Torres before he went to work on the roof, and he was not sure what the Neri brothers were doing. (*Ibid.*) On cross-examination, Applicant initially testified that he had not worked on roofs with skylights previously during his ten-year career, but later changed his testimony to state that some of the roofs he had worked on had skylights. (MOH/SOE, 3/19/24, at p. 3.) He had used safety harnesses and lanyards previously, and understood fall protection measures and understood how to use it prior to working for defendant. (*Ibid.*)

Applicant remembered being interviewed by Benbrook. (*Id.* at p. 3.) Applicant appeared to acknowledge that Benbrook's report showed that he had told Benbrook that that fall protection harnesses were placed in 5-gallon buckets on the roof and that these were normally provided for his use. (*Ibid.*) He was also advised that Juan and Armando Neri had stated that fall protection was provided to the crew. (*Id.* at pp. 3–4.) However, applicant testified that he had never seen the fall protection devices described at the work site, and that "nobody used fall protection." (*Ibid.*) On the day of the accident, nobody told him to wear fall protection. (*Id.* at p. 4.)

Hovannisian testified next, confirming that fall protection harnesses were placed in buckets on the roof and that lanyards and d-rings were available to secure workers to the roof. (*Id.* at p. 5.) Failure to use fall protection could result in termination. (*Ibid.*) Hovannisian also testified that he had inspected the skylights from the floor of the warehouse and identified those that needed to be removed and covered with plywood. (*Ibid.*) He did not know whether the skylights were able to support 400 pounds. (*Ibid.*) After the accident, a stop work order was issued, and the skylights were modified to install cages over them that would prevent anyone from falling through them. (*Ibid.*) Describing the results of the Cal/OSHA inspection, Hovannisian testified that they were issued three Cal/OSHA citations, but that none of them were issued as serious and willful violations. (*Id.* at p. 7.) Hovannisian testified that the violation relating to the failure to conduct a safety inspection was later dismissed after they provided proof they had conducted such an inspection. (*Ibid.*)

On cross-examination, Hovannisian testified that defendant had hired a safety consultant in 2012, three years before the accident, to evaluate safety issues. (*Ibid.*) Hovannisian had walked on the roof about five times prior to the accident and looked out onto it approximately a hundred times to see how the work was progressing. (*Ibid.*) The pictures of the roof taken in March 2014 were taken by Hovannisian himself. (*Ibid.*) They did not depict the area of the roof where applicant fell. (*Id.* at p. 8.) The yellow bucket in the picture shows where the fall protection harnesses are kept. (*Ibid.*)

Hovannisian explained that each worker was responsible for his own fall protection equipment, and that harnesses were to be put on before going out onto the roof; the buckets contain extra fall protection equipment in case a worker needs to supplement their own from the bucket. (*Ibid.*) Hovannisian saw the employees wearing their fall protection harnesses. (*Ibid.*) He did not see applicant wearing fall protection on the day of the accident, or recall reprimanding applicant

in the past for refusing to wear such equipment; Torres was the direct supervisor who would be responsible for such things. (*Ibid.*) Torres never told Hovannisian that applicant was not wearing safety equipment. (*Ibid.*)

Torres testified that he talked to applicant about safety, including the use of harnesses. (*Id.* at p. 10.) There was a company safety training in June 2015. (*Ibid.*) It was Torres' responsibility to make sure the employees had fall protection equipment. (*Ibid.*)

On the day of the accident, Torres was not on the roof, he was in his truck. (*Ibid.*) The employees knew not to go start work on the roof until Torres came up to give them instructions. (*Ibid.*) Torres did not know why applicant disregarded those instructions. (*Ibid.*) Torres asked the Neri brothers about the accident, and they said that applicant walked onto the roof and started pulling on a water hose, lost his balance, and fell through the skylight. (*Ibid.*)

Applicant had been issued a warning for not following the defendant's illness and injury prevention program prior to the injury. (MOH/SOE, 6/5/24, at p. 3.) Torres testified that the warning was issued for starting work without a supervisor present and without the use of a harness. (*Ibid.*) Torres did not memorialize this warning in writing, and did not report it to Hovannisian because he thought everyone deserved a second chance, and it seemed that applicant had stopped violating the safety rules. (*Ibid.*) Aside from that one time, Torres never saw the applicant not using a safety harness. (*Ibid.*)

He did not see applicant climb up to the roof on the day of the accident. (*Ibid.*) The crew had climbed up to the roof even though he wasn't there because they were supposed to go up on the roof and put on their safety harnesses and then wait. (*Ibid.*) He subsequently issued verbal warnings to the Neri brothers and applicant after the accident for not waiting for him to start work. (*Ibid.*) The Neri brothers told Torres that they had told applicant to wear a harness. (*Id.* at p. 5.) The Neri brothers themselves did not have their harnesses on because they were sitting down and hadn't started working. (*Ibid.*)

Torres had been up on the roof many times before the accident. (*Id.* at p. 4.) Some of the skylights had been inspected, with broken skylights replaced with plywood coverings if the plastic covering was broken or racked. (*Ibid.*) The skylight applicant fell through was covered with plastic. (*Id.* at p. 6.)

After Torres' testimony, the matter was taken under submission, and the parties submitted post-trial briefs. Defendant's post-trial brief includes a section arguing that the specific OSHA

code section defendant was alleged to have violated, Code of California Regulations, Title 8, section 1632, did not apply to the situation because the skylights were pre-existing. (Defendant's Post-Trial Brief, at p. 9.) Defendant argued instead that its provision of fall prevention harnesses met the requirements of the section that did apply, Code of California Regulations, Title 8, section 3212. (*Ibid.*) Accordingly, defendant argued there was no Cal/OSHA violation upon which to base a S&W finding. (*Ibid.*)

The WCJ issued his F&A on August 16, 2024. The F&A finds that defendant failed to ensure that the skylights were able to support 400 pounds of weight, that applicant's injury was proximately caused by the violation of Cal/OSHA Safety Orders pursuant to Labor Code section 4553.1, and that employer had actual knowledge of the safety violations before the accident. (F&A, at ¶¶ 2–4.) The appended Opinion on Decision makes clear that the F&A was based upon the finding in the Cal/OSHA investigation report that the skylights were not guarded by covers sufficient to support the weight of 400 pounds. (Opinion on Decision, at p. 4.) According to the Opinion on Decision, the conditions making this safety order applicable were "obvious" and known to Hovannisian. (*Ibid.*) The F&A also states that Hovannisian hired an expert on safety three years before the accident and that "a safety expert would have advised the employer of the safety violations concerning the skylights." (*Ibid.*) The Opinion on Decision opines that "[m]uch was made about the use of the failure to safety harness. However, the employer cannot delegate the safety issue to the employee because the employer has the control of the building and has to provide a safe work environment." (*Id.* at pp. 4–5.)

This Petition for Reconsideration followed.

DISCUSSION

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 20, 2024, and 60 days from the date of transmission is November 19, 2024. This decision is issued by or on November 19, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 20, 2024, and the case was transmitted to the Appeals Board also on the September 20, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 20, 2024.

II.

Labor Code section 4553 states:

> The amount of compensation otherwise recoverable shall be increased one–half, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured by reason of the serious and willful misconduct of any of the following:
> The employer, or his managing representative.
> If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
> If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

Where a finding of serious and willful misconduct is based upon violation of a safety order, the findings must include: (1) the specific manner in which the order was violated, (2) the specific manner in which the violation of the safety order proximately caused the injury or death, and (3) that the safety order, and the conditions making the order applicable, were known to and violated by the employer or its representative, or that the condition was obvious and that the failure of the employer or representative to correct the condition constituted a reckless disregard for the probable consequences. (Lab. Code, § 4553.1.)

Serious and willful conduct is defined as conduct that "necessarily involves deliberate, intentional, or *wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom*." (*Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 117 [18 Cal.Comp.Cases 3], emphasis in original.) "Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences." (*Ibid.*)

"'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described . . . as being something 'much more than mere negligence, or even gross or culpable negligence' and as involving 'conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences' . . . The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be

apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. . . ." (*Mercer-Fraser, supra,* at p. 117.)

In comparison, "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. (Rest. Torts, secs. 282, 283, 284; Prosser, Torts, secs. 30 et seq.) A negligent person has no desire to cause the harm that results from his carelessness, (Rest. Torts, sec. 282(c)), and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. (Prosser, Torts, p. 261.) Willfulness and negligence are contradictory terms. . . . [Citations.] If conduct is negligent, it is not willful; if it is willful, it is not negligent. It is frequently difficult, however, to characterize conduct as willful or negligent. A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm will result. (Rest. Torts, sec. 500 et seq.; Prosser, Torts, pp. 260, 261.) Such a tort has been labeled 'willful negligence,' 'wanton and willful negligence,' 'wanton and willful misconduct,' and even 'gross negligence.' It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know, will very probably cause harm. . . . [Citations.] Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct." (*Mercer-Fraser, supra,* 40 Cal.2d at pp. 116-117.)

"The basis for serious and willful misconduct has been aptly summarized as including three alternatives: '(a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge that serious injury is a probable result; or (c) an intentional act with a positive and reckless disregard of its possible consequences.' [citation omitted] It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action." (*Johns-Manville Sales Corp. v. Workers' Compensation Appeals Bd.* (*Horenberger*) (1979) 96 Cal.App.3d 923, 933 [44 Cal.Comp.Cases 878] citing *Mercer-Fraser, supra,* 40 Cal.2d 102; *Hawaiian Pineapple Co.* v. *Ind. Acc. Com*. (1953) 40 Cal.2d 656 [18 Cal. Comp. Cases 94]; *Dowden* v. *Industrial Acc. Com.* (1963) 223

Cal.App.2d 124, 130-131 [1963 Cal. App. LEXIS 1507]; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1979) § 17.02 [2][a].)

Furthermore, "the minimum level of care required of the employer to avoid being found guilty of serious and willful misconduct is not constant. As the peril to the employee intensifies, the minimum level of care required by the employer rises. Inattention to lethal danger may constitute serious and willful misconduct, while inattention to a mild hazard may only constitute negligence." (1-10 Hanna, Cal. Law of Employee Injuries & Workers' Comp. (2017) § 10.01, citing *Dowden, supra,* 223 Cal.App.2d at 131 and *Johns-Manville, supra,* 96 Cal.App.3d at 934.)

For a conduct to be serious and willful, "the conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences." (*Hawaiian Pineapple, supra,* 40 Cal.2d at 663.) "A 'reckless disregard' of the safety of employees is not sufficient in itself unless the evidence shows that the disregard was more culpable than a careless or even a grossly careless omission or act. It must be an affirmative and knowing disregard of the consequences. Likewise, a finding that the 'employer knew or should have known had he put his mind to it' does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful. The standard requires an act or omission to which the employer *has* 'put his mind.'" (*Ibid.*)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Further, decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the

responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set [] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

Here, the WCJ's conclusion that defendant engaged in serious and willful misconduct appears to be premised upon the violation of a safety order, namely the failure to properly secure the skylights such that they could support 400 pounds of weight pursuant to Code of California Regulations, Title 8, section 1632. That applicant was able to fall through the skylight in the manner he did supports the conclusion that it was unable to support 400 pounds of weight. However, the WCJ's decision fails to address defendant's argument – raised in the post-trial brief as well as the Petition – that the safety order in question explicitly references a different safety order, Code of California Regulations, Title 8, section 3212, which authorizes the provision of fall protection equipment as an alternative method of securing workers from injury when working around preexisting skylights.

Due to this failure to engage with defendant's argument, the WCJ appears to have treated the evidence related to the provision and use of safety harnesses as essentially irrelevant, writing that "[m]uch was made about the use of the failure to safety harness. However, the employer cannot delegate the safety issue to the employee because the employer has the control of the building and has to provide a safe work environment." (Opinion on Decision, at pp. 4–5.) However, in light of the above argument about whether the provision of such equipment did satisfy the Cal/OSHA rules, we cannot agree with the WCJ that this factual dispute was beside the point. If the provision of such equipment would have met Cal/OSHA safety standards, whether it was actually provided – and why it was not worn by applicant at the time of his injury – appear to be critical issues to assess in deciding whether (1) the safety order actually was violated, and (2), if so, the specific manner in which the violation of the safety order was the proximate cause of the injury. (See Lab. Code, § 4553.1.)

Labor Code section 4553.1 also requires a specific finding that that the safety order, and the conditions making the order applicable, were known to and violated by the employer or its representative, or that the condition was obvious and that the failure of the employer or representative to correct the condition constituted a reckless disregard for the probable consequences. (Lab. Code, § 4553.1(3).)

It is not entirely clear from the Opinion on Decision which path the WCJ was relying on to meet the requirements of this subsection. To the extent that the Opinion on Decision states that Hovannisian was actually made aware of the violation of the safety order by an expert "hire[d] to consult with on safety three years before the accident," and that "[c]ertainly a safety expert would have advised the employer of the safety violations concerning the skylights," we do not believe the evidence supports the WCJ's conclusion. The building site in question was bought in 2014; because the safety expert was consulted several years prior to that, it is unclear how the safety expert possibly could have advised Hovannisian of safety violations related to skylights on a building that defendant had not yet even purchased. It is not enough that defendant may have received generalized safety guidance at some unspecified date in the past, the statute requires proof that defendant was aware both of the specific safety order and the specific conditions making the order applicable to the situation that led to the injury.

The Opinion on Decision also states that the failure to secure the skylights was "obvious," suggesting reliance on the second prong, that the condition was obvious and the failure of the employer to correct the condition constituted a reckless disregard for the probable consequences. (Opinion on Decision, at p .4.) Although the evidence certainly supports a finding that the need to take safety measures with regard to the skylights was obvious (and, indeed, known to defendant and its representatives), the question is not whether safety measures were required, but whether defendant's representatives ignored a specific, obvious condition requiring the application of a safety order, and whether the failure to correct the condition constituted a reckless disregard for the probable consequences.

Here, according to all the witnesses who testified at trial aside from applicant himself, fall protection safety harnesses were provided and mandated in order to prevent the sort of injury applicant sustained. Applicant himself, however, testified that this was not the case, at least on the day of the injury. This represents a serious disagreement about a key fact in the case, and, as such, it was incumbent on the WCJ to evaluate the evidence and choose which testimony to credit.

Moreover, resolution of the factual discrepancies relating to the provision and use of the safety harnesses was, for the reasons described above, critical in order to evaluate whether defendant or defendant's representatives acted with any degree of reckless or intentional disregard for applicant's safety, or indeed, in light of defendant's argument that the provision of safety harnesses satisfied the requirements of the safety order, whether they failed to act to cure an obvious safety condition at all. The failure to properly cover a skylight when safety harnesses are provided and mandated may be negligent, but it represents a very different level of culpability than the case of an employer who fails to provide any such protection while also failing to secure the skylight. Similarly, the culpability of an employer who diligently required and enforced the use of safety harnesses but whose safety rules were unilaterally disregarded by an employee without the employer's knowledge is very different than the culpability of an employer who nominally required the use of such safety harnesses, but in fact proceeded with the knowledge that its workers were routinely violating those rules and thereby exposing themselves to serious danger.

As the trier of fact who had the opportunity to observe the demeanor of the witnesses and their credibility, the WCJ is best placed to resolve such factual disputes in the first instance. (*Garza, supra,* 3 Cal.3d at 318-319.) Accordingly, we will rescind the F&A and return the matter to the trial level for a new decision which resolves the areas of factual dispute in the witnesses' testimony and then analyzes thoroughly each requirement of Labor Code sections 4553 and 4553.1. We emphasize that the fundamental inquiry is whether defendant or its representatives behaved not merely negligently, but with intentional or reckless disregard for probable injury. As noted above, it is not enough that an employer "should have known better." (*Hawaiian Pineapple, supra,* 40 Cal.2d at 663.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the August 16, 2024 Findings & Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 16, 2024 Findings & Award is **RESCINDED**, and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 19, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GUADALUPE REYES PACHECO
DAVIS VANWAGENEN
OGLETREE DEAKINS

AW/*pm*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*