

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

*In the Matter of the Appeal of:*

**READY ROAST NUT COMPANY, LLC**  
**2805 Falcon Drive**  
**Madera, CA 93637**

Employer

**DOCKET 13-R2D5-0452**

**DECISION**

**Statement of the Case**

Ready Roast Nut Company, LLC (Employer) is a nut processing company. Beginning September 13, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ron Harris, conducted a safety inspection at a place of employment maintained by Employer at 2805 Falcon Drive, Madera, California. On January 25, 2013, the Division cited Employer for a violation of Title 8, California Code of Regulations, section 3212(b), failure to secure a cover in place to prevent accidental removal or displacement.<sup>1</sup>

Employer filed a timely appeal of the citation, contesting the existence of the violation and the classification of the violation. Employer also asserted the affirmative defenses of logical time and independent employee action.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Fresno, California on December 5, 2013. Tom Finn, Managing Member, represented Employer. Jerry Walker, District Manager, represented the Division. The parties presented oral and documentary evidence. Subsequent to the hearing Robert Peterson, of the Robert D. Peterson Law Corporation, substituted-in as Employer's representative of record. The parties filed post-hearing briefs. Employer filed a post-hearing reply brief. The matter was submitted for decision on December 13, 2013. The submission date was extended to June 6, 2014 by the Administrative Law Judge.

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<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

## Issues

1. Did Employer fail to secure a cover in place on a mezzanine floor to prevent accidental removal or displacement?
2. Was there a realistic possibility that a serious injury would occur as a result of Employer's failure to properly secure a cover over the mezzanine floor opening?
3. With the exercise of reasonable diligence, would Employer have known prior to the accident of the absence of a proper cover over the mezzanine floor opening?
4. Did the work process prevent employer from compliance with the requirement to cover the floor opening such that the safety order did not apply at the time of the employee exposure to the hazard?

## Findings of Fact:

1. Employer failed to secure a cover in place over the mezzanine floor opening to prevent accidental removal or displacement.
2. The evidence that an employee fell through the improperly covered floor opening, and fell nine feet, seven inches to the floor below, suffering several serious injuries, proves that there was a realistic possibility of serious injury resulting from the violation.
3. The injured employee was assigned to work in the area of the floor opening.
4. With the exercise of due diligence, Employer would have been aware of the failure to cover the mezzanine floor opening properly.
5. There was no evidence that compliance with the safety order prior to the time of the accident would have been more hazardous than compliance, or that the logical time to secure the cover properly had not yet arrived.

## Analysis:

- 1. Employer failed to secure a cover in place to prevent accidental removal or displacement. The violation of section 3212(b) is established.**

Section 3212(b), under "Floor Openings, Floor Holes and Roofs," provides the following:

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.

In the citation, the Division alleges the following:

On 8/29/12, an employee from Ready Roast Nut Company, L.L.C. had sustained serious lumbar fracture at work while cleaning the mezzanine platform. EE had fallen through a 2 ft. by 2 ft. floor opening to the concrete floor below. The employer had failed to secure the cover in place to prevent accidental removal or displacement.

The elements of the regulation are: (1) floor and roof opening covers shall be designed by a qualified person; and (2) 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; (3) shall be secured in place to prevent accidental removal or displacement; and (4) shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove," and chalk or keel shall not be used to make those markings.

When a safety standard includes two or more distinct requirements, if an employer violates any one, it is in violation of the safety standard. (Golden State Erectors, Cal/OSHA App. 85-0026, DAR (Feb. 25, 1987). Also: California Erectors Bay Area Inc Cal/OSHA App. 93-503, DAR (Jul 31, 1998).) Here, if Employer failed to satisfy any one of those elements in its efforts to cover the floor opening, it has violated §3212(b).

The requirement of *securing the cover in place to prevent accidental removal or displacement* was not met here. The accident leading to the citation occurred in the following circumstances. On August 29, 2012, Valbina Hernandez Castanon (Castanon), the injured employee, was cleaning the floor on Employer's mezzanine level. Castanon testified that she had received instructions from her supervisor, Celia, to clean the mezzanine level of the plant. Castanon first cleaned the floor of the roasting room on the mezzanine level. When the air compressor, which was used to dispense foam to clean the floor, became inoperative, Celia told Castanon to go and work at the old plant, and then come back and clean the mezzanine when the air compressor came

back on. Celia told Castanon to wash the mezzanine floor when the electricians had finished working.<sup>2</sup>

Castanon decided to pick up the trash on the mezzanine level before mopping the floor. Castanon observed what appeared to be a white box, approximately three feet square, on the floor. Further testimony revealed that the “box” at issue was actually a three foot square insulated metal-clad panel (Exhibit 6). Castanon jumped on the “box” in order to crush it, not knowing that it was actually being used to cover a two foot square opening in the floor of the mezzanine level. When Castanon jumped on the cover she fell through a two foot square opening to the concrete floor nine feet, seven inches below. Castanon was not told that there was an opening in the floor, and was not told to not move any covers over any openings. Employer provided no testimony that Castanon was warned of the existence of the opening on the mezzanine level, or that Castanon was warned to avoid the area of the opening. The cover had not been secured to prevent accidental movement or displacement.

David Wissing (Wissing), Employer’s Director of Operations, testified that, according to Celia, Castanon was not instructed to be on the mezzanine at the time of the accident, and that Castanon was instructed to be at another location when the accident occurred. Wissing testified that he was not present when Celia gave Castanon her instructions to clean the mezzanine. Employer did not call Celia, Castanon’s supervisor, to offer testimony regarding Castanon’s specific job assignments on the day of the accident. Greater weight is given to Castanon’s direct testimony than Wissing’s testimony detailing Celia’s purported statements given to him in reference to any work assignment instructions given by Celia to Castanon on the day of her injury.

It is the Division’s burden to show employee exposure to a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 Decision After Reconsideration (Apr. 24, 2003), citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) The Division proved that Employer sent Castanon to work on the mezzanine level where there existed an opening without a cover secured in place to prevent accidental removal or displacement. That opening was located approximately 17 feet from the Roasting Room on the mezzanine level (Exhibit C).

Employer, in its post-hearing brief, concedes that “a floor opening did exist, which although covered with a material, said material acting as a cover over the opening was not secured to the mezzanine floor.” Employer exposed its employee to the hazards associated with an unsecured cover over an opening in the floor at the workplace. The above facts are sufficient to establish a violation of § 3212(b).

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<sup>2</sup> Employer, in its Post-hearing Reply Brief, argues that “On cross-examination, Ms. De Castanon acknowledged that her assignment was only to clean the floor of the Roasting Room; that she had not been assigned to clean the entire mezzanine floor.” A review of the record finds no such acknowledgment by Castanon; the record does not support this argument.

**2. The Division provided sufficient evidence to establish the Serious classification and the Accident-related characterization.**

The Division presented sufficient evidence to prove the Serious violation, along with the Accident-related characterization. Labor Code §6432(a) creates a rebuttable presumption of a serious violation if there is “a realistic possibility of death or serious physical harm” that results from the hazard created by the violation. If serious physical harm actually results from the citation hazard, the realistic possibility standard has been satisfied because it is no longer a possibility but an actuality. Further, a violation is characterized as accident-related if it is a “serious violation . . . [that] caused death or serious injury . . .” Regulation §336(d)(7).

Castanon fell through the opening and landed on a concrete floor, nine feet, seven inches below. Castanon sustained a fractured lumbar spine, requiring surgery, and injuries to her shoulder, and legs, all of which required one week of hospitalization. Castanon, as a result of her fall, sustained a Serious injury, as defined in §330(h).

The Division presented uncontroverted evidence that Castanon suffered a serious injury when she fell through the opening in the floor. Because Castanon suffered a serious injury resulting from the hazard created by the violative condition, the presumption of a Serious violation, pursuant to §6432(a), applies. And the same evidence supports the accident-related characterization.

**3. Employer failed to carry its burden of proof to establish lack of employer knowledge of the existence of the violation as an affirmative defense.**

Employer argues the serious violation under §334(c)(2)<sup>3</sup> should not be upheld based on the Employer’s lack of knowledge of the violation. Section 334(c)(2) states:

Notwithstanding subdivision (c)(1), a serious violation shall not be deemed 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.

Employer, in its post-hearing brief, argues that the evidence fell short of establishing that Employer had actual knowledge, or with the exercise of reasonable diligence, could have known of the state of the conditions which existed in the north end of the mezzanine floor.

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<sup>3</sup> Section 334 was subsequently amended. The references herein refer to § 334 as it existed on the date of the violation, September 13, 2012.

Lack of knowledge of a violation is an affirmative defense which requires that the Employer demonstrate that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (*C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).) Employer is responsible for the safety of its employees, and cannot delegate those duties to another. Through the exercise of reasonable diligence, Employer should have been able to recognize the violation. Wissing testified that the site, prior to the accident, had been inspected by the city inspectors numerous times, and that none of those inspections revealed issues with the opening. In *Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sept. 28, 1984) the Board held that the statutory duties relating to employee safety “cannot be delegated by an employer.” Employer presented no evidence that it had conducted its own inspections of the work area. Reasonable diligence on Employer’s part should have included Employer conducting its own inspection of the work site which would have made it aware of the unsecured cover over the opening in the floor. Employer failed to establish that, even if it acted with reasonable diligence, it could not, and did not, know that the cover over the opening in the floor was not secured in place to prevent accidental removal or displacement.

To prove employer knowledge, the Division need not show that the employer's principals or owners were actually aware of an unsafe condition. Hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence. (*Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, DAR (June 21, 1991).) In the instant matter, the covered opening was visible to the naked eye. A reasonably diligent Employer would have inspected the cover over the opening to make sure that it was secured in place to prevent accidental removal or displacement. A reasonably diligent Employer would have inspected the cover to make sure that it was labeled “Opening--Do Not Remove,” which is the specific warning language required by the regulation (Exhibit 8). Employer provided no evidence that it conducted any such inspection.

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, DAR (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, DAR (March 19, 1986), pp. 4-5.). Likewise, a hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (*Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, DAR (July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, DAR (July 19, 1994).) A safety inspection would have revealed to Employer that the cover

over the opening was not secured. Such an inspection would have revealed the hazard. Employer, therefore, failed to exercise reasonable diligence to ensure worker safety.

Employer, in its closing brief, argues that Castanon was not assigned to work in the vicinity of the floor opening, and as such, Employer could not have any knowledge of the actions of Castanon, or with the exercise of reasonable diligence, should have known of her conduct. Employer asserts that Castanon exceeded the scope of her work assignment. In *Anderson Tile Company*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000), the Board addressed this very issue. In that matter the Board found that it was necessary to make a determination whether Employer should have anticipated the actions of its employee in exceeding his work assignment. In *Anderson Tile, supra*, the evidence failed to establish "that Employer should have known that the employee would *both* exceed his job assignment *and* use a ladder in a dangerous manner on the day of the accident. Applying the standard set out in *Anderson Tile, supra*, Employer failed to anticipate that Castanon might stray 17 feet from what Employer claims was her assigned work area, an area where there existed an opening in the floor with a cover which had not been secured to prevent accidental movement or displacement. The instant matter is distinguishable from *Anderson Tile, supra*, as the Division proved that Castanon was, in fact, working within the scope of her assignment. Employer's argument is therefore unpersuasive.

Castanon's testimony regarding her job assignments on the day of the accident is consistent and credible. The record supports a finding that Castanon was assigned to work on the mezzanine level, which included the area of the floor opening. Employer failed to make the work area safe and exposed its employees to hazards §3212(b) was designed to address.

The Serious classification of the citation is upheld.

**4. There was no evidence that compliance with the safety order prior to the time of the accident would have been more hazardous than compliance, or that the logical time to secure the cover properly had not yet arrived.**

The "logical time" defense is an affirmative defense in which employer bears the burden of proof. "The logical time defense is a Board created rule which provides that the requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard." (*JSA Engineering, Inc.*, Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002) citing to *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) This concept recognizes that employers can comply with the requirements only when the logical time has come, given the normal sequence of the construction or work activities, and that a reasonable

amount of time is necessary for employers to achieve compliance and make the area safe.

Employer presented no evidence that the logical time had not yet arrived to secure the cover over the opening. Celia, Castanon's supervisor, sent her to clean in an area where construction activities were almost, but not yet complete. Employer presented no evidence that compliance with the safety order at the time of the accident would have created a greater hazard in the work area. The logical time to correct the violation was *before* sending Castanon to clean the mezzanine floor. Employer thus failed to establish the logical time defense. Additionally, pleading an affirmative defense, but neither offering proof nor including it in the closing arguments is a voluntary relinquishment of a known right, and thus serves as a waiver. Such is the case here.

**5. The IEAD is not available to Employer because §3212(b) has a positive guarding requirement.**

Employer, as one basis for its appeal, asserts the independent employee act defense. The Board has held that the independent employee act defense enunciated in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, (October 16, 1980) is unavailable in failure to guard cases because "such [an] administrative policy cannot substitute for mechanical protection [required by the safety order]." *City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration, (Dec. 31, 1986).

Guarding requirements are designed to protect employees who have a lapse of common sense, engage in horseplay, or otherwise may not know or may forget the apparent danger. (*Sierra Pacific Industries*, Cal/OSHA App. 77-891, Decision After Reconsideration (Aug. 30, 1984).) In the instant matter, there was a cover over the opening, but it was not secured in place to prevent accidental removal or displacement. Employer failed to ensure that the opening through which Castanon fell was properly covered (guarded.) Section 3212(b) has a positive guarding requirement. As a result, the independent employee action defense is not available to employer. Additionally, pleading an affirmative defense, but neither offering proof nor including it in the closing arguments is a voluntary relinquishment of a known right, and thus serves as a waiver. Such is the case here.

**Conclusions**

The evidence supports a finding that Employer violated §3212(b) by failing to secure a cover in place to prevent accidental removal or displacement, which exposed its employees to hazards § 3212(b) was designed to address. The Serious classification is supported by the evidence and is upheld. Employer did not contest the reasonableness of the proposed \$18,000 penalty.

The Division, during the hearing, conceded that Employer should have been afforded a 10 per cent reduction on the proposed penalty based on size. Employer did not object to this reduction. Therefore, a total penalty of \$16,200 is assessed for the reasons described herein, and as set forth in the attached Summary Table.

**ORDER**

The citation is sustained and a penalty of \$16,200 is assessed for the violation.

Dated: June 10, 2014

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**KEVIN J. REEDY**  
Administrative Law Judge

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**READY ROAST NUT COMPANY, LLC**

**Docket 13-R2D5-0452**

**Date of Hearing – December 5, 2013**

**Division’s Exhibits – Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1.	Jurisdictional documents
2.	Ronald Harris, PD&TU letter, dated 12/2/13
3.	Color photo of covered opening
4.	Cal/OSHA Document Request
5.	Er response to Doc Request, dated 9/18/12
6.	Photo of Mezzanine and First Floors
7.	Photo of subject opening and cover
8.	Photo of subject cover
9.	Cal/OSHA 1BY
10.	Er response to 1BY
11.	Penalty calculation worksheet

**Employer’s Exhibits – Admitted**

A.	Cal/OSHA Narrative Summary
B.	Emails with header “Hortencia Gabriel”
C.	Map of Mezzanine Level

Witnesses Testifying at Hearing

1. Ron Harris
2. Valbina Hernandez Castanon
3. David Wissing

CERTIFICATION OF RECORDING

*I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled 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

<i>In the Matter of the Appeal of:</i>  <b>READY ROAST NUT COMPANY, LLC</b> <b>DOCKET 13-R2D5-0452</b>						<b>ABBREVIATION KEY:</b>  Reg=Regulatory G=General S=Serious ER=Employer <span style="float: right;">                     DOSH=Division                      W=Willful                      R=Repeat                 </span>				
IMIS No. 315077651										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
13-R2D5-0452	1	1	3212(b)	S	ALJ affirmed violation	X		\$18,000	\$16,200	<b>\$16,200</b>
						<b>Sub-Total</b>		\$18,000	\$16,200	<b>\$16,200</b>
						<b>Total Due</b>				<b>\$16,200</b>
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> <b>All penalty payments must be made to:</b>						(INCLUDES APPEALD CITATIONS ONLY)				
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142						*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 if you have questions				

**ALJ: KR**  
**POS: 06/10/14**

