

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

In the Matter of the Appeal of:

**MTM BUILDERS, INC.
1480 Frontage Road
Chula Vista, CA 91911**

Employer

Inspection No.

1101230

**DENIAL OF PETITION FOR
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above-entitled matter by the California Department of Industrial Relations, Division of Occupational Safety and Health (Division).

JURISDICTION

The Division issued three citations to MTM Builders, Inc. (Employer), alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer timely appealed.

After the appeal was filed, administrative proceedings before an administrative law judge (ALJ) of the Board followed, including a duly-noticed evidentiary hearing. At the hearing Employer withdrew its appeals of some of the violations alleged in Citation 1, and the other allegations proceeded to hearing. After completion of the hearing, the ALJ issued a decision (Decision) holding Employer had violated the contested items of Citation 1 and granting Employer's appeal of Citations 2 and 3.

The Division timely filed a petition for reconsideration of the Decision as to Citations 2 and 3.

Employer filed an answer to the petition for reconsideration.

ISSUE

Was the ALJ correct in granting Employer's appeals of Citations 2 and 3?

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

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.

The Division asserts in its petition that the Decision was issued in excess of the Board's authority and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The facts are well articulated in the Decision, and we incorporate those portions of the Decision here by reference. For context and convenience of the reader, we summarize the circumstances involved next.

Employer, a general contractor, was retained to rebuild the frames of existing skylights on a building. In the course of that work one of its employees, who had removed his fall protection equipment moments before, fell through the dome of an existing skylight to the floor below and was injured.

Citation 2, Section 1632, subdivision (b)(1).

The Division, after investigating the accident, cited Employer (as at issue here) for violating section 1632, subdivision (b)(1), of the Construction Safety Orders (CSO), which states: "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or covers." The Division's description of the alleged violation stated, in part, the employee "tripped and fell onto the skylight, breaking the skylight lens[.]"

The Decision points out that one element of the alleged violation is that there be a floor, roof, or skylight opening and that the evidence established that the skylight was intact immediately prior to the accident, covered by its dome-shaped lens. (Decision, pp. 9-11.) We have held that a skylight and skylight opening are not synonymous terms for purposes of section 1632, subdivision (b). (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).) Thus, there was no opening which required guarding under the terms of section 1632, subdivision (b)(1). Further, subdivision (a) of section 1632

states, “This section shall apply to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways.” The skylight involved was not a temporary fixture, and there is no indication that there was an emergency condition at the time of the accident. It is well established that the Division has the burden to prove by a preponderance of the evidence all elements of an alleged violation. (*Home Depot USA, Inc.*, Cal/OSHA App. # 1011071, Decision After Reconsideration (May 16, 2017).) We agree with the ALJ that the Division did not prove all necessary elements of the violation alleged in Citation 2.

We note also two further points.

First, the Division declined the opportunity to amend Citation 2 to allege a violation of section 3212, subdivision (e), which appears to pertain to the circumstances. As the ALJ pointed out, the Division had already successfully moved to amend Citation 2, had further opportunity again to move to amend Citation 2, and declined to do so. (Decision, pp. 11-12.) We will not upset the ALJ’s exercise of discretion.

Second, the Division failed to exercise its option, which it has exercised in numerous other instances, effectively to plead in the alternative by citing Employer for violating both section 1632, subdivision (b)(1) and section 3212, subdivision (e). Its failure to do so reinforces our decision to deny reconsideration.

Citation 3, section 1670, subdivision (a).

Section 1670, subdivision (a) provides in part:

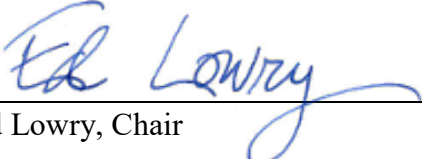
Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders.

In Citation 3 the Division alleged that an employee fell through a skylight more than 7.5 feet to the floor below. The injured employee admitted he was not wearing his fall protection immediately before he fell, and Employer effectively conceded the roof where the work was being done was more than 7.5 feet above the next level below. There was, however, no evidence that the injured employee’s work exposed him to a fall hazard from the perimeter of the building, or unprotected sides and edges, leading edges, through shaftways and openings, what the slope of the roof was, or whether there were other sloped surfaces not adequately protected. As we held above, the skylight through which he fell was not an opening. As stated earlier, the Division has the burden to prove all elements of an alleged violation (*Home Depot USA, Inc.*, Cal/OSHA App. # 1011071, *supra*) and has not met that burden here. Again, we agree with the ALJ that Employer’s appeal be granted.

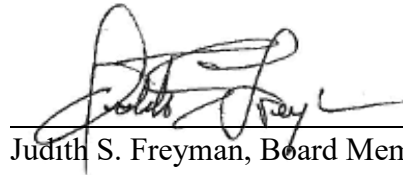
DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **06/12/2020**