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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 90-2148
PHOENIX ROOFING, INC.,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue is whether former Administrative Law Judge E. Carter Botkin erred in finding a violation of 29 C.F.R. § 1926.500(b)(4)[1] for Respondent's failure to guard a skylight made of translucent material. The skylight, through which an employee fell to his death, was on the roof of a warehouse that Phoenix was re-roofing in Grand Prairie, Texas. We conclude that the judge properly held the cited standard applicable and properly rejected Phoenix Roofing's claim that it lacked fair notice of the standard's applicability. The judge also properly rejected Phoenix's claim that the Secretary failed to prove a hazard under the terms of the standard. We also find that the Secretary met his burden of proof

[1]The standard states that, "[w]herever there is a danger of falling through a skylight opening, it shall be guarded by a fixed standard railing on all exposed sides or a cover capable of sustaining the weight of a 200-pound person."

as to employee exposure and employer knowledge.[2] Accordingly, as set forth in this opinion, we affirm the serious citation.

APPLICABILITY

We first address the employer's claim that the standard does not apply because the term "skylight opening" in the standard does not encompass a skylight covered with translucent material. In interpreting a disputed term in a standard, "we look to the provisions of the whole law, and to its object and policy." *See Aulston v. U.S.*, 915 F.2d 584, 589 (10th Cir. 1990); *see also Smith v. U.S.*, 113 S.Ct. 2050, 2054 (1993) (definition of disputed phrase not limited to meaning "that most immediately comes to mind") *Peavey Grain Co.*, 15 BNA OSHC 1354, 1359, 1991-93 CCH OSHD ¶ 29,533, p. 39,873 (No. 89-3046, 1991) (narrow definition rejected as incapable of effectuating standard's evident purpose). *Compare FTC v. University Health, Inc.*, 938 F.2d 1206, 1216 (11th Cir. 1991) (examining overall statutory scheme rather than ascribing meaning to language taken out of context). At the same time, however, employers are entitled to fair warning of what a standard requires. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

Webster's defines "opening" as "something that is open" or "an open width," and specifies as synonyms the following terms: breach, aperture, spread, and span. *Webster's Third New International Dictionary, Unabridged* 1580 (1986). Also according to Webster's, a "breach" is "a broken, ruptured, or torn condition" or "an opening or gap (as in a wall, rampart, or other fortification) made by or as if by battering." *Id.* at 270. Although the accepted definition and synonyms do suggest that the usual meaning of "opening" is a gap or hole without anything in it, they also suggest that under certain circumstances the term "opening" can refer to certain places in which there is a less dense material creating a void in a denser one, as with an "opening" that is "an indentation of water into land." *Id.* at 1580. We find that this meaning is consistent with a reading of the standard as a whole. If we narrowly interpreted the term "skylight opening" in § 1926.500(b)(4) as merely an empty

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[2]*See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (Secretary must establish applicability of cited standard, existence of violative condition, employee exposure thereto, and employer knowledge thereof), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

skylight, as Phoenix insists, it would make this standard redundant of several other related standards: *(1)* § 1926.502(b), which generally defines a floor opening as an "opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall"; *(2)* § 1926.500(b)(1), which specifies that such "[f]loor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section"; and *(3)* § 1926.500(f)(1-5), which contains the specifications for guardrails or covers at these floor openings. The narrow interpretation of the term "skylight opening" as it is used in 29 C.F.R. § 1926.500(b)(4) would also make superfluous the related specifications provision at 29 C.F.R. § 1926.500(f)(6), which states that "[s]kylight openings that create a falling hazard shall be guarded with a standard railing, or covered in accordance with paragraph (f)(5)(ii) of this section." Moreover, two standards governing specialized openings would arguably become superfluous and therefore potentially disputable in the future: 29 C.F.R. § 1926.500(b)(5), regarding "[p]its and trap-door floor openings," and 29 C.F.R. § 1926.500(b)(6), regarding "[m]anhole floor openings." We conclude, therefore, that 29 C.F.R. § 1926.500(b)(4) as a whole, and the overall regulatory scheme of which 29 C.F.R. § 1926.500(b)(4) is a part, together with an accepted meaning of "opening," demonstrate that "skylight opening" includes intact skylights, as long as a hazard of falling through exists.[3] We therefore reject Phoenix's interpretation of 29 C.F.R. § 1926.500(b)(4).

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[3]This interpretation of § 1926.500(b)(4) underlies the earliest cases involving intact skylights. *See Ace Sheeting & Repair Co. v. OSHRC*, 3 BNA OSHC 1868, 1975-76 CCH OSHD ¶ 20,256 (No. 5284, 1975), *aff'd*, 555 F.2d 439 (5th Cir. 1977) (unquestioned application of cited standard to skylight filled with wire-reinforced translucent material through which employee fell); *Merit Constr. Co.*, 3 BNA OSHC 1378, 1974-75 CCH OSHD ¶ 19,828 (No. 4079, 1975) (ALJ) (unquestioned application of cited standard to skylight filled with translucent material through which employee fell). These cases did not expressly settle the standard's application to intact skylights since until now that application has not been disputed. This absence of litigation on the issue before the Commission does not dispose of the interpretation question, of course, but it does tend to indicate that the standard is sufficiently plain on its face.

NOTICE OF THE SECRETARY'S INTERPRETATION

We also conclude that Phoenix was not deprived of fair notice of this interpretation by the Secretary's failure to cite another roofing company in 1985. That failure to cite involved Cardinal Roofing, one of whose employees fell through a skylight made of translucent material. Phoenix was working on an adjacent worksite at the time, and at some point became aware of the OSHA inspection. Gary Price, Phoenix's vice-president testified at the hearing in this case that, "[t]o my knowledge, [OSHA] did not issue anything." Judge Botkin found this testimony "less than persuasive" evidence that Phoenix had relied on the outcome of Cardinal's inspection. We agree with the judge's finding, and with his conclusion that reliance on Cardinal's inspection would have been unreasonable as a matter of law under *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶ 29,442 (No. 88-821, 1991). "[A]n employer cannot deny the existence of or its knowledge of a cited hazard by relying on the Secretary's earlier failure to cite the condition." *Id.* at 1224, 1991-93 CCH OSHD at p. 39,681, *quoting Lukens Steel Co.*, 10 BNA OSHC 1115, 1126, 1981 CCH OSHD ¶ 25,724, p. 32,122 (No. 76-1053, 1981).[4] Accordingly, we hold that Phoenix could not have justifiably relied upon Cardinal's inspection for confirmation that § 1926.500(b)(4) only applied to empty skylights.

DANGER OF FALLING THROUGH

We also find that, in the words of the standard, "there [was] a danger of falling through [the] skylight opening." The separate opinion suggests that the danger was theoretical, but we cannot quarrel with the evidence that Osborne actually fell through and died. *See National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir.

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[4]Phoenix suggests that *Seibel* does not specifically resolve the issue because of *Cardinal Indus.*, 14 BNA OSHC 1008, 1987-90 CCH OSHD ¶ 28,510 (No. 82-427, 1989), which, in Phoenix's opinion, involved facts more similar to its own case. In *Cardinal*, the Commission held that an employer was deprived of fair notice of a standard's requirements where the Secretary cited as insufficient a method of abatement that had been installed after an earlier inspection and approved by a compliance officer. Here, however, as in a second citation item in *Cardinal*, the notice argument fails because there was no earlier citation or abatement and the mere presence of a compliance officer in the vicinity does not exculpate an employer. *See* 14 BNA OSHC at 1013, 1989 CCH OSHD at p. 37,803.

1973)(potential for injury shown by death). The 23-inch-square piece of cardboard that Phoenix presented at the hearing to represent the opening and Phoenix's claim that any con scious person would be easily able to spread his legs or arms to catch himself in an opening of this size does not detract from the clear evidence of the danger presented by the opening. As the facts here demonstrate, an employee falling through a skylight certainly cannot be relied upon to catch himself. Although not large, the skylight involved in this case does present, diagonally, an opening of nearly a yard -- 32 inches. Similar-sized openings have been the subject of affirmed citations. *See H.E. Weise, Inc.*, 10 BNA OSHC 1499, 1500, 1502-03, 1982 CCH OSHD ¶ 25,985, pp. 32,609, 32,611 (No. 78-204, 1982) (24-inch opening cited under § 1926.451(a)(13) requiring "safe access" to a scaffold). *National Indus. Constructors, Inc.*, 10 BNA OSHC 1081, 1094-95, 1981 CCH OSHD ¶ 25,743, pp. 32,135-36 (No. 76-4507, 1981) (18½-inch opening cited under § 1926.451(e)(4) requiring that a scaffold be "tightly planked"). In addition, the skylights were flush with the roof surface, had flimsy coverings of translucent material, and lacked any parapet or similar barricade around them. Accordingly, we hold that there was a hazard of falling through the 23-square-inch opening in this case, and we reject the employer's claim to the contrary.[5]

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[5]Chairman Weisberg notes that Osborne, the employee who fell to his death through the unguarded skylight, was a laborer performing, as they arose, various odd tasks ancillary to the main roofing work. The nature of his work was such that Price, Phoenix's vice-president, testified that it was about 30 minutes or more before Osborne's absence from the roof was even noticed. Further, the Chairman notes that the record does not establish, as the dissent suggests, that materials and equipment were only moved to the next section upon completion of the prior one or that, before Osborne's accident, no employee set foot beyond the materials and equipment as they were moved or after. Indeed, the record does not even establish that employees were instructed how close to place materials to unguarded skylights, much less that 12 or more feet was the appropriate distance. Thus, the Chairman would find that not only is 12 feet not the vast distance implied in the dissent, but also that it is unreasonable to assume on the facts of this case that employees, particularly temporary laborers such as Osborne, never would have occasion to move even short distances from the precise location of work or materials during the course of the project. Concededly there was no evidence that employees were *required* to approach unguarded skylights for their work or that they were instructed *to do so*. However, this is a far cry from stating that a hazard did not exist where an ordinary laborer who *had not been instructed to stay out* of the unguarded area fell through an unguarded opening which, as a practical matter, was

(continued...)

EXPOSURE

Exposure to a violative condition may be established either by showing actual exposure *or* that access to the hazard was reasonably predictable. Actual exposure to the fall hazard involved in this case is unquestioned, for an employee not only fell through the skylight but died as a result. However, even if we were to ignore this evidence of actual exposure, as the separate opinion does, the evidentiary record still establishes that access to the violative condition was reasonably predictable.[6] According to the record, thirteen to fifteen employees under the supervision of Price, Phoenix's vice president, were re-roofing a warehouse roof having 72 skylights arranged in rows of four or five across the roof's 272-foot width, and approximately 50 feet apart. The job was accomplished in stages by re-roofing the length of the roof in 30 to 40-foot-wide strips. The first task in each of these strips was to remove the skylight fixtures and install plywood covers capable of sustaining the weight of a 200-pound person. Adjacent to each of the strips where work was in progress were strips with unprotected skylights where work had not yet begun. Phoenix knowingly left these skylights unguarded. Some employees actually went into the area of

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[5](...continued)
relatively proximate to where materials had been moved. The presence of a hazard is amply born out by the accident which occurred and, contrary to the dissent, the Chairman would not require evidence that similar incidents had occurred in the past to sustain it. As stated by the Fifth Circuit Court of Appeals, "[t]he goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Brown & Root, Inc. v. OSAHRC and Marshall,* 639 F.2d 1289, 1294 (5th Cir. 1981).

[6]Contrary to the view expressed in the separate opinion, "reasonable predictability" is relevant only to the element of exposure and not to the knowledge element. In *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976), we held that the Secretary may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on "reasonable predictability." Reasonable predictability, in turn, may be shown by evidence that employees while in the course of assigned work duties, personal comfort activities and normal means of ingress/egress would have access to the zone of danger. Thus, under *Gilles & Cotting, Inc.*, "reasonable predictability" is an objective standard and is not analyzed from a subjective view point. Accordingly, the Secretary does not have to show that Phoenix *knew* that access to a violative condition was reasonably predictable.

unguarded skylights as a regular and known practice, to deposit materials, according to the testimony of Price. Although the record does not establish the exact proximity of these materials to unguarded skylights, in this case the materials were located about 12 feet from the unprotected skylight at which the fatality later occurred.[7] This is not a great distance, particularly on a construction site where employees can be expected to go into areas where materials are stored. *See Bechtel Power Co.*, 7 BNA OSHC 1361, 1364-65, 1979 CCH OSHD ¶ 23,575, pp. 28,575-76 (No. 13832, 1979). We think it entirely reasonable for Osborne or another laborer on the roof to have believed they were permitted on the unprotected part of the roof. Osborne had worked with the crew for more than a week prior to the day in question and his tasks were not complicated or absorbing, "just basically picking up trash, paper, gravel, sweeping, general labor work," according to Price. We therefore find that despite the testimony of Price and Guidroz suggesting that no one would expect Osborne to leave the guarded strip because his work did not require it, it was reasonably predictable that Osborne or another laborer would to go into the unprotected area if, for example, he needed to get out of the way or sit down.

EMPLOYER KNOWLEDGE

Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not, as Phoenix argues, be shown that the employer understood or acknowledged that the physical conditions were actually hazardous. *East Texas Motor Freight v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982); *Vanco Constr.*, 11 BNA OSHC 1058, 1060 n.3, 1983-84 CCH OSHD ¶ 26,372 n.3 (No. 79-4945, 1982).

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[7]A little over twelve feet was Price's measurement. The compliance officer only provided an estimate, of 3-5 feet, based on a photograph in evidence. The judge, who heard the differing testimony, did not reconcile the difference. Based on our examination of the photograph admitted as exhibit C-3, we are unable to resolve the dispute. Under these circumstances, we decline to rely on the compliance officer's estimate as against the vice-president's measurement.

There can be no question that Phoenix had knowledge of the unguarded skylight openings in the roof. Price, its vice-president, was on the roof daily, and he knew that Phoenix employees worked in proximity to unguarded skylights while positioning and storing materials. Indeed, Phoenix does not argue that it lacked such knowledge, only that it *thought there was no danger* from intact and 23-square-inch skylights.

Given that the record establishes actual knowledge, we need not address the question of constructive knowledge. However, with respect to constructive knowledge we note that the Secretary establishes it by showing that an employer could have known of the violative conditions if it had exercised reasonable diligence. *J.H. MacKay, Electric Co.*, 6 BNA OSHC 1947, 1950-51, 1978 CCH OSHD ¶ 23,026 at p. 27,824 (No. 16110, 1978).[8] Here, the record establishes that Phoenix did not instruct its employees to stay away from the unguarded skylights while depositing materials or to stay out of the unguarded area entirely if not assigned any work there. Indeed there was no evidence that the employee who fell was violating any work rules or instructions when he went to the area of the roof where the violative condition was present. Phoenix's written safety rule requiring that all openings on the roof deck must be barricaded or covered, was also clearly not followed. Phoenix may not have barricaded or covered the skylight openings because it took the view that skylights having translucent material in them were not openings in a roof. However, as we found *supra*, Phoenix did not establish that it lacked notice of the requirements of the standard. We therefore conclude that Phoenix had knowledge, or with reasonable diligence would have known, of the violative conditions.

PENALTY

The Secretary proposed and the judge affirmed a penalty of $640. Based on the penalty factors in section 17(j) of the Act, we find that the record supports this assessment.

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[8]This "reasonable diligence" test is distinct from "reasonable predictability" which, in any event, the separate opinion mistakenly suggests is applicable to knowledge. As noted above at fn. 5, reasonable predictability is relevant instead to the element of exposure.

ORDER

To summarize, § 1926.500(b)(4) applies to a skylight made of translucent material, and the Secretary established a violation of the cited standard. Accordingly, we affirm the judge's decision finding a violation of the cited standard and assessing a penalty of $640.

Stuart E. Weisberg
Chairman

Velma Montoya
Commissioner

Dated: February 24, 1995

Foulke, Commissioner, concurring in part, dissenting in part.

I concur with the majority opinion that Phoenix was not deprived of fair notice of the Secretary's interpretation of 29 C.F.R. § 1926.500(b)(4), insofar as that interpretation specifically addressed coverage of a skylight made of a translucent material. I also agree with my colleagues that the term "skylight opening" encompasses a skylight covered with translucent material.

The plain language of this standard, however, clearly limits the duty of an employer to adequately cover or guard a skylight opening to "*[w]henever there is a danger of falling through*" (emphasis added). Because I believe Commission law requires the Secretary to show more than the occurrence of an isolated accident in mysterious circumstances to sustain a violation of this type of standard, and because I believe that the evidence in this case goes no further, I must dissent.

In *Anoplate Corp.*, 12 BNA OSHC 1678, 1986-87 CCH OSHD ¶ 27,519 (No. 80-4109, 1986), the Commission ruled that a standard not expressly or impliedly based upon the Secretary's finding that noncompliance will result in a "significant risk" of harm, requires the introduction of evidence establishing such. Standards using terms such as "where there is a hazard" or "whenever there is a danger" quite plainly do not incorporate this finding and thus do not presume a hazard; they necessarily require a factual determination as to the existence of a hazard constituting a "significant risk" made by the Commission on a case-by-case basis. *Id.*

The Commission's ruling in this regard was guided by the reasoning of the Second Circuit Court of Appeals in the decision of *Pratt & Whitney Aircraft Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96 (2nd Cir. 1981) (*Pratt & Whitney I*). In *Pratt & Whitney I*, the court held that the Secretary must prove the existence of a hazard of "significant risk" in each case where he proceeds under a standard that does not incorporate that finding. To interpret an OSHA standard to apply in the absence of a hazard of "significant risk," the court ruled, was to *enlarge the standard's scope beyond that permitted by the Act. Id.* at 103-104. The Commission quite correctly pointed out in *Anoplate* that the Second Circuit's reasoning was, in turn, guided by that of the Supreme Court in *Industrial Union Dept., AFL-CIO, American Petroleum Institute*, 448 U.S. 607 (1980). In that case, the Court held that the Act "was not designed to require employers

to provide absolutely risk-free workplaces" but to "require the elimination, as far as feasible, of significant risks of harm." *Id.* at 641.[1]

Since that time, in such cases the Commission has focused on whether the record, viewed prospectively, establishes more than "a theoretical possibility" that an employee would encounter a possible danger. *See Schulte Corp.*, 12 BNA OSHC 1222, 1985 CCH OSHD ¶ 27,210, p. 35,127 (No. 80-2666, 1985). In *Schulte* the standard at issue provided that goggles be used "*[w]henever* there is a danger of [chemical] splashing" (emphasis added). In contrast to the majority's findings here, in *Schulte* evidence of a single incident of an employee being splashed clearly seems to have been viewed as insufficient. Rather, the Commission made clear that in finding a hazard within the scope of the standard, it was relying on evidence that nine employees had received chemical burns in the past year. Additionally, in that case, evidence established that employees regularly worked directly next to chemical hazards by "dipping racks of parts into tanks" containing these chemicals. In *Schulte*, then, the evidence differentiates conditions which would violate a requirement for a risk-free workplace from conditions employers should recognize as within the scope of their duty. In *Schulte*, because employees were regularly placing parts into the chemical tanks and, thus, clearly in a zone of danger, and because they had, in fact, been splashed some nine times previously under these conditions, the evidence was such that there was "more than a theoretical possibility of being injured by a chemical splash." *Id.* at 1225.

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[1]The Court stated in this case:

> By empowering the Secretary to promulgate standards that are reasonably necessary or appropriate to provide safe and healthful employment and places of employment, the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But 'safe' is not the equivalent of 'risk-free.' There are many activities that we engage in every day--such as driving a car or even breathing city air -- that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities 'unsafe.' Similarly, a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm.

What seems in *Schulte* a clear demarcation of the evidence needed to sustain a violation under standards triggered by "whenever there is a danger" finds solid support in the case law. For instance, in *Anoplate*, *supra*, also dealing with chemical splashes, the Commission clearly relied upon evidence of several "splashing injuries to the body [which] had occurred within the past three years" in affirming a violation. Once again, evidence of past incidents were supported by testimony that employees were seen "using almost all the chemical tanks" where splashes would occur. *Id.* at 1682. And again, in *Pratt & Whitney Aircraft Group, Div. of United Technologies Corp.*, 12 BNA OSHC 1770, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986)(*Pratt & Whitney II*), in affirming a violation the Commission noted that the evidence established that "a lot of times, acid splashes from parts rapidly descending into tanks had occurred . . . not far from [the employee's] face," and that medical records introduced by the Secretary showed eleven instances of acid splashes that had occurred at the workplace. As in *Schulte*, based on the strength of this evidence, a Commission majority found that "given the unpredictable height of splashes and the hazardousness of the acids, the record as a whole demonstrates a significant risk." *Id.* at 1776-78.

My colleagues, herein, clearly choose to make an exception to the weight of evidence which would seem appropriately necessary to affirm an alleged violation under this standard. This is readily apparent because any analysis of the strength of the evidence in this case reveals that the majority's finding is based exclusively on evidence of one employee's accident, which occurred under what must be termed unusual circumstances. I submit that the evidence in this record cannot reasonably support any finding or inference outside of the following. Phoenix worked on this 585 foot-long, 272 foot-wide roof in clearly defined strips 30-40 feet long. There was a total of 72 skylights on this warehouse roof. Work was confined to each of these sections until completion, and only upon completion of one section, in preparation for work on the next, was equipment moved into a new section by Phoenix. When equipment was moved into a new section, employees did not, at any time before the accident, get closer than 12 feet from any unprotected skylight opening. Neither the work assignments, nor the means of ingress or egress of employees, nor their leisure

activities ever carried Phoenix employees into a "zone of danger" (an area immediately surrounding unguarded skylight openings)[2].

I argue that no findings greater than these are appropriate because the testimony of Phoenix's foreman, Gary Price, is without rebuttal, and clearly establishes that: (1) employees did not have to travel to other, unprotected areas of the roof to get equipment because it was brought up by crane *after* work had begun on that section; (2) debris or waste was only disposed of as the old roof was torn up and skylights removed and covered in the section where work was ongoing; (3) disposal of waste only occurred on the section of roof under work; (4) waste materials were at no time moved or cast onto unprotected areas of the roof where work was not ongoing;[3] and (5) *only* following the completion of work on one section was any equipment moved onto a new section to prepare for work on that section. The only employee to testify, Keith Guidroz, clearly states that employees did not work around parts

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[2]The concept of a "zone of danger" has for some time been used by the Commission to guide an inquiry into whether an employee has access to a specific hazard. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976). As the Commission recently observed in the case of *Seyforth Roofing, Co.*, 16 BNA OSHC 2031, 2033 n.4, 1994 CCH OSHC ¶ 30,599 n.4 (No. 90-86, 1994), "[t]he 'zone of danger' is determined by the hazard presented by the violative condition. Normally, it is that area surrounding the violative condition that presents the danger to employees to which the standard is addressed." *See also Gilles & Cotting*, 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425. Recent Commission cases leave no doubt that a 12-foot distance from a hazard is well outside the "zone of danger." *See North Berry Concrete Corp.*, 13 BNA OSHC 2055, 2056, 1987-90 CCH OSHD ¶ 28,444, p. 37,644 (No. 86-0163, 1989); *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1962, 1965-66, 1986-87 CCH OSHD ¶ 27,651, pp. 36,033-033-2 (No. 82-0928, 1986); *Anoplate, supra*; *Cornell & Co.*, 5 BNA OSHC 1736, 1738, 1977-78 CCH OSHD ¶ 22,095, pp. 26,607-08 (No. 8721, 1977). Moreover, even if one were to trip and fall in such a situation, falling through a 23-inch opening from a distance of 12-feet is of such a remote possibility as to defy the usefulness of the concept of a zone of danger.

[3]While the judge states that photographs show trash or spent work materials close to the skylight, and finds this to constitute evidence of workers having been in this area because of the need for them to have been in this area for clean-up, a close scrutiny of this photograph reveals this more in the nature of conjecture than fact. First, the distance of the equipment from the skylight is simply impossible to judge from the angle and quality of these photos. Moreover, direct testimony to the contrary on this point exists in this record and is not rebutted.

of the roof where skylights were not covered and that Osborne should not have been where he was.[4]

In other testimony not directly rebutted, Price states that when the employees had moved this equipment in preparation for work on the next section of roof, which was to begin on the Monday coming (the accident occurred on Friday), they never got closer than about 12 feet from an unguarded skylight in these unprotected areas. Price states that he bases this testimony on knowledge obtained through personally measuring the distance from the equipment stack to the skylight opening; that distance, he clearly testifies, was "a little over 12 feet." The only rebuttal offered by the Secretary comes in the form of testimony by its inspection officer, that in his "estimation" the equipment rested from three-to-five feet from the unguarded skylight. On cross-examination, however, the compliance officer stated that he had not taken any measurements. The judge reconciles these differences only in observing that the compliance officer's testimony was based upon his "recollection" of "visualizing the distance." Of particular note in this regard is that the lead opinion accepts the proposition that the equipment was stacked no closer than about 12 feet from the unguarded skylight.

Unlike the evidence in *Schulte*, *supra*, *Anoplate*, *supra*, or *Pratt & Whitney II*, *supra*, or any other case dealing with a standard of the type before us now, there is no evidence which establishes a violation other than evidence surrounding the circumstances of a single accident. Clearly, then, under this evidentiary standard, the only way Phoenix could have avoided being found in noncompliance was to have guarded all 72 skylight openings, regardless of whether work was to have been conducted in that area of this massive roof on that day, the next week, or even a month's time forward. Just as clearly, under this evidentiary standard, there is no definable difference between working 2 feet, 12 feet, or 120 feet from a skylight opening. In sum, then, my colleagues accomplish precisely what the court warned against in *Anoplate* -- they expand the scope of a standard giving rise to a duty

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[4]The judge reconciles this straightforward testimony by ruling it not credible in "light of other testimony." However, the judge not only does not provide specifics about which "other testimony" he refers to, but a thorough review of this record leaves one without an answer to this question.

"whenever there is a danger of falling" and transform this duty into a virtual absolute. Under their revised evidentiary standard the only way to escape being found in violation is to establish an affirmative defense of unpreventable employee misconduct.[5]

The points made above also demand that I more specifically mention my disagreement with the majority's finding of employer knowledge. As I have argued, the majority has based its findings solely on the fact that Phoenix knew of the existence of 72 skylight openings all of which, except for those in the section where work was actually being conducted, were unguarded and that employees got as close as 12 feet from one of these openings. On this basis alone, my colleagues reason, Phoenix had actual knowledge that each constituted a violative condition.

I would point out that not even the cases cited by my colleagues as authority for their simplistic and restrictive reading of the law surrounding employer knowledge support finding a violation on such weak evidence. For instance, in *Vanco Construction, Inc.*, 11 BNA OSHC 1058, 1060-61, 1982 CCH OSHD ¶ 26,372 (No. 79-4945, 1982), the Commission chose to proceed on a theory of constructive knowledge. The Commission stated the issue as "whether a reasonable person could ascertain that the use of [a] hammer to chip concrete presented a potential for injury." The Commission's analysis focused on facts establishing that "[c]oncrete chips were actually propelled with force up to four feet through the air by the hammers" and that "[b]ecause the employees were about five feet tall, and crouched as they worked, their faces were in striking distance of the chips." Thus, the Commission concluded that "it is enough that with reasonable diligence Vanco could have known that chips were flying into the faces of the employees." While I would agree that a reasonably diligent employer would have recognized a hazard under the conditions in *Vanco*, I would have disagreed on this question of reasonableness, if the evidence established only that one employee has been struck by a concrete chip under mysterious conditions, while performing no assigned work, and under circumstances where no employee had ever been struck, or had

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[5]Phoenix does present testimony that the deceased employee had been sleeping behind the materials and that an odor of alcohol was detected on the body when the deceased employee was found.

even come close to being struck, before. An analogous situation, here, would have required the employer to witness employees actually working, or wandering into the zone of danger.

These vast dissimilarities in the quantum of evidence supporting a finding of knowledge are also quite apparent in *East Texas Motor Freight, Inc.*, 671 F.2d 845 (5th Cir. 1982). In this case, the Fifth Circuit found that "the evidence indicated that [a] defective condition ha[d] existed for quite some time [and that the employer] had received at least three written complaints from employees shortly before the OSHA inspection." Again, if Phoenix had received any prior notice of the conditions posing a hazard, I would be compelled to accept my colleague's finding of actual knowledge. As discussed above, however, there is not even a shred of evidence to support actual knowledge of a violative condition.

In sum, I must repeat that finding a violation based upon only evidence of a single accident having occurred under mysterious circumstances is, I believe, inconsistent with the Commission's approach to weighing the evidence of record in any case where a subjective standard is before it. The narrow approach of my colleague's reasoning raises the notion that an employer's duty extends to protection against all possible hazards regardless of the foreseeability of exposure,[6] the remoteness of the hazard, or the limited scope of the standard. In short, the majority opinion approaches the strict or absolute liability of employers and, as such, is a theory not envisioned by the Act. *See Secretary of Labor v.*

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[6]I agree with the judge's use of a "reasonable predictability" test as a means to establish knowledge or "foreseeability." Without the use of some reasonable criteria, findings based upon unwarranted inferences otherwise require an affirmative defense, thus imposing a strict liability theory of knowledge. The test adopted by the Commission in *Gilles & Cotting, Inc.*, 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425, would avoid this by virtue of its requirement that to establish access, "the proofs must show that employees while in their assigned work duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned work duties will be, are, or have been in a zone of danger." An isolated occurrence of an accident, viewed retrospectively, may show actual exposure, but it does not address whether a reasonable employer would have foreseen that circumstance arising. That which is not foreseeable does not seem to justify sanction under a system geared toward prevention.

Jefferson Smurfit, 15 BNA OSHC 1419, 1421-23, 1991-93 CCH OSHD ¶ 29,551, pp. 39,652-55 (No. 89-0553, 1991).

Edwin G. Foulke, Jr.
Commissioner

Dated: February 24, 1995

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SECRETARY OF LABOR, Complainant, v. PHOENIX ROOFING, INC., Respondent.	:	Docket No. 90-2148

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 24, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

February 24, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2148

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
PHOENIX ROOFING, INC.
Respondent.

OSHRC DOCKET
NO. 90-2148

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 2, 1993. The decision of the Judge will become a final order of the Commission on May 3, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 22, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 2, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-2148

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SECRETARY OF LABOR, Complainant, v. PHOENIX ROOFING, INC., Respondent.	OSHRC DOCKET NO. 90-2148

APPEARANCES:

Terry Goltz Greenberg, Esquire
Dallas, Texas
For the Complainant.

Robert E. Rader, Jr., Esquire
Dallas, Texas
For the Respondent.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On March 26, 1990, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at a warehouse in Grand Prairie, Texas, pursuant to a tragic accident on March 23 which caused the death of one of Respondent's employees. As a result of the inspection, a serious citation alleging a violation of 29 C.F.R. § 1926.500(b)(4) was issued.[1] Respondent contested the citation, and a hearing was held on February 15,

[1]The citation, as issued, also alleged a violation of 29 C.F.R. § 1926.500(g)(1); however, the Secretary withdrew this item at the hearing. (Tr. 3-4).

1991. A background of the facts of this case is set out below, followed by a discussion of the alleged violation.

Background

The record shows that Respondent, Phoenix Roofing ("Phoenix"), was engaged in re-roofing the warehouse. The roof was 585 feet long and 272 feet wide and had seventy-two skylights on it; the skylights, which were made of plastic or glass set in an aluminum frame, were about 50 feet apart and approximately 1 foot high.[2] The job consisted of removing the old roofing and skylights in a 30 to 40-foot section across the width of the roof each day and then installing new roofing and skylights on that section the same day; when an old skylight was removed the opening was covered with 3/4-inch plywood until the new skylight was installed. New materials were raised up to the roof by crane, and the old roofing materials were disposed of in a trash chute that was moved from section to section each day.

On the day of the accident, Phoenix had completed installing new roofing and skylights on the south half (292 feet) of the roof. A crew of thirteen to fifteen workers, consisting of regular Phoenix employees and a few day laborers, was engaged in performing detailing work on the expansion joint in the center of the roof and general cleanup work. Since it was Friday, the crew was to finish up around noon and begin the north half of the roof the following Monday. Late in the morning Keith Guidroz, one of the regular Phoenix employees, noticed a broken skylight on the north half of the roof. He walked over to see what had happened, and discovered that Melvin Osborne, one of the day laborers, had fallen through the skylight to the concrete floor approximately 26 feet below.

Discussion

1926.500(b)(4) provides as follows:

> Wherever there is danger of falling through a skylight opening, it shall be guarded by a fixed standard railing on all exposed sides or a cover capable of sustaining the weight of a 200-pound person.

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[2]The skylights were either 23 or 28 inches square, based on the respective measurements of Gary Price, the vice president of Phoenix at the time of the accident, and Charles Moore, the OSHA compliance officer ("CO") who inspected the worksite. (Tr. 35-36; 44-45; 49-53).

The skylights in this case were capable of sustaining only 40 pounds, and the manufacturer's specifications warn that they are not designed to support the weight of people. *See* G-4. Phoenix contends, however, that the term "skylight opening" refers only to an actual hole, and that it did not violate the standard because all the openings at the site were covered with either a skylight or a plywood cover. I disagree. In my view, the standard is clear on its face. Very simply, it assumes a danger of falling through a "skylight opening" when there is not a prescribed guard or a cover capable of sustaining a 200-pound person. The plain wording of this standard resolves any notice problems to this or any other similarly-situated respondent. As the Commission has held, "[t]he standard itself suggests feasible means of compliance (guardrails or covers) thus enabling Respondent to know the nature of the violation and the means for compliance." *Ace Sheeting & Repair Co.*, 3 BNA OSHC 1868, 1869, 1975-76 CCH OSHD ¶ 20,256, p. 24,156 (No. 5284, 1975), *aff'd*, 555 F.2d 439 (5th Cir., 1977).[3]

Nonetheless, Phoenix contends that the Secretary's position is inconsistent with her earlier interpretation of the standard. This contention is based on a 1985 inspection of a Cardinal Roofing worksite where a similar fatality occurred but no citation was issued. (Tr. 95-102; R-5). However, a 1984 OSHA interpretational letter addressing 1910.23(a)(4) and 1910.23(e)(8), which, read together, are the equivalent of 1926.500(b)(4), states that skylights to which employees are exposed that cannot support at least 200 pounds must have standard railings or screens capable of withstanding such weight. *See* G-5. Why the CO's finding in the 1985 inspection of the Cardinal site was permitted to stand is not apparent, but it is simply not material. Assuming *arguendo* that Phoenix relied on the disposition of the Cardinal inspection, there is no legal justification for having done so. *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223-24, 1991 CCH OSHD ¶ 29,442, pp. 39,679-81 (No. 88-821, 1991). In fact, I found the testimony of any such reliance to be less than persuasive.[4] (Tr. 86-88). Respondent's contention is therefore rejected.

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[3]Respondent's suggestion that *Ace Sheeting* does not support the Secretary's position is rejected; it is clear that it does.

[4]Question: "Do you know whether they issued any citations to Cardinal in that case as a result of that fatality?" Answer: "To my knowledge, they did not issue anything." (Tr. 87).

Phoenix next contends that the employees at the site were not exposed to unguarded skylights, and that the accident was the result of unpreventable employee misconduct. Commission precedent is well settled that to demonstrate employee exposure, the Secretary must show there was a "reasonable predictability" of access to the hazard and that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). The evidence in this regard follows.

Keith Guidroz, who is still employed by Phoenix, testified he did not work near any skylights that were not covered with plywood, and that there was no reason for Osborne to be near the skylight through which he fell. Guidroz identified G-2 and G-3 as photos of the area where the accident occurred, and marked both exhibits with an "X" to show the subject skylight. He noted there was tarped equipment in that area, which was right on the other side of the expansion joint, and that someone on the crew had moved it there. He also noted the materials set up on the roof by crane were moved manually on carts to where the crew was working. (Tr. 21-34).

Gary Price, who is currently self employed, was vice president of Phoenix in March 1990; he was in charge of safety training and all field activities and was up on the subject roof every day. He testified that work activities were confined to the section being re-roofed, and that none of the employees had any reason to work around unguarded skylights. He further testified that Osborne was supposed to have been working in the area around the expansion joint picking up trash and sweeping on the day of the accident, and that he had no reason to be around the skylight through which he fell. Price identified G-1 as a rough drawing of the roof, circled the area where the crew was working on March 23, and marked the skylight through which Osborne fell. He said he had measured its distance from the equipment in G-2 and G-3 to be a little over 12 feet. Price noted most of the equipment in G-2 and G-3 was placed there on March 22 by employees, but that some of it was put there on March 23. He also noted the materials raised up to the roof by crane were set down over the edge of the section being worked on. (Tr. 35-48; 81-83; 88-91; 94-95).

Based on the foregoing, the Secretary has met her burden of demonstrating employee exposure to the unguarded skylights. G-2 and G-3 show work materials near the skylight through which Osborne fell, and the testimony of Guidroz and Price establishes employees moved the materials to that area on March 22 and 23. Price testified he measured the materials to be about 12 feet away from the skylight, and Charles Moore, the CO, testified he estimated them to be 3 to 5 feet away. (Tr. 54). However, whether the equipment was 3 to 5 feet or 12 feet from the skylight, it was reasonably predictable an employee placing materials in that area would have been near enough to the skylight to have tripped and fallen through it. Moreover, it is clear from the record the skylight openings in the section being worked on were only guarded from the time the old skylights were removed until the new ones were installed. Since the record shows employees walked back and forth through the section to move materials, clean up, and dispose of trash, it is apparent they were exposed to unguarded skylights on a daily basis.[5]

As noted *supra*, Phoenix contends the accident in this case was due to unpreventable employee misconduct. It asserts that Osborne had been drinking before beginning work and that he wandered over to the north side of the roof, passed out and fell through the skylight.[6] However, since the preceding discussion shows the Phoenix crew was exposed to unguarded skylights on a daily basis, Osborne's condition on the day of the accident and Respondent's assertion of unpreventable employee misconduct are irrelevant and need not be addressed. This citation item is accordingly affirmed as a serious violation, and the Secretary's proposed penalty of $640.00 is assessed.

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[5]In so finding, I have not overlooked the testimony of Guidroz and Price that employees had no reason to work around unguarded skylights; however, that testimony is simply not credible in light of the other statements made by the witnesses, set out *supra*. Moreover, the photographs show trash or spent work materials close to the skylight where the accident occurred. This is evidence of workers having been in this area, as well as their need to be there for general cleanup.

[6]I reject such speculation. In fact, the hard evidence reveals only .01 percent of ethanol either in Osborne's blood or vitreous. (R-6).

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear above. *See* Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law that are inconsistent with this decision are DENIED.

Conclusions of Law

1. Respondent, Phoenix Roofing, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. § 1926.500(b)(4).

3. Respondent was not in violation of 29 C.F.R. § 1926.500(g)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED, and a penalty of $640.00 is assessed.

2. Item 2 of serious citation number 1 is VACATED.

E. Carter Botkin
Administrative Law Judge

Date: MAR 26 1993