

COMMONWEALTH OF KENTUCKY  
OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. 19-KOSH-0026

KOSHRC #5544-19

COMMISSIONER OF WORKPLACE STANDARDS,  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v.

CENTRAL FARM SUPPLY OF KENTUCKY, INC.

RESPONDENT

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**DECISION AND ORDER**  
**OF THE REVIEW COMMISSION**

I. Request for Reconsideration

On December 22, 2020 Central Farm Supply Company of Kentucky (hereafter "Central Farm") submitted a Petition for Reconsideration to this commission. Central Farm requested review of two matters. First, it disagrees with the hearing officer's finding that the work on its roof is properly cited under a construction standard. Central Farm argues the work was maintenance and therefore should have been cited to a general industry standard. Second, it asks this commission to consider whether citation 1, items 1 and 2 were duplicative because possible abatement methods were the same.

We granted review of the hearing officer's findings of fact and recommended order and set a schedule for briefs.<sup>1</sup> We note that Central Farm

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<sup>1</sup> The commission's authority to conduct review is found in KRS 338.071 and 338.081 and further explained in 803 KAR 50:010, sections 47 (3) and 48 (5).

did not request review of the hearing officer's findings regarding citations 2 and 3 or their associated items. We therefore limit this review to citation 1, items 1 and 2.

## II. Application of Construction Standards

The commissioner of workplace standards presented his case with citations in the alternative.<sup>2</sup> For item 1, the alternatives were fall protection standards 29 CFR 1926.501(b)(4)(i) and 29 CFR 1910.28 (b)(3)(i). For item 2, the alternatives for fall protection were 29 CFR 1926.501(b)(10) and 29 CFR 1910.28 (b)(13)(iii)(A). Central Farm disagrees with our hearing officer's determination that each item is properly cited under 1926.

We begin our review with recitation of a lodestar principle of Occupational Safety and Health general industry standards:

If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it *shall prevail over any different general standard* which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Sect 1910.5 Applicability of standards., 29 C.F.R. § 1910.5 (emphasis added)

Consideration of the general industry standard is necessary if a particular standard does not apply.<sup>3</sup> We therefore look to the construction standard to see if the activities on the warehouse roof meet the requirements for a construction citation. Under 29 C.F.R. § 1910.12, construction standards apply "to every

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<sup>2</sup> 29 CFR 1926 contains construction standards while 29 CFR 1910 includes general industry standards.

<sup>3</sup> Id.

employment and place of employment of every employee engaged in construction work.” We find ample evidence throughout the record that Central Farm is an employer with employees.<sup>4</sup> The more critical assessment is whether the employees at Central Farm engaged in construction work on the warehouse roof.

Construction work is defined as “work for construction, alteration, and/or repair, including painting and decorating.”<sup>5</sup> Counsel for the commissioner of workplace standards presented evidence that alterations on the roof were construction by matching the facts to the activity. The record shows two sets of Central Farm employees accessed the roof to effect repairs. It shows these repairs included detaching and removing translucent skylight panels. It also establishes that those translucent panels were replaced with new metal panels. Our hearing officer determined the activities fit into the requirements for construction work and were properly cited to a construction standard.

Central Farm argues citation 1, items 1 and 2 should have been issued under a general industry standard because the rooftop work was maintenance and because it is not a construction company.<sup>6</sup> Central Farm asks the commission to disregard 29 § 1910.5 and give weight to a federal OSHA interpretation letter which describes general industry maintenance as:

[W]ork that is anticipated, routine and done on a regularly schedule/periodic basis to help maintain the original condition of the component....If the work consists of repair as opposed to replacement, a key factor is whether those repairs are extensive. If

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<sup>4</sup> For example: TE 203, line 18 – 204, line 3; TE 214, line 23 – 216, line 15.

<sup>5</sup> 29 CFR 1910.12 (b).

<sup>6</sup> We reject Central Farm’s argument that only construction companies can be cited for violations of construction standards. See 29 C.F.R. § 1910.12 (a).

the work consists of removal and replacement of equipment, an important factor is whether the new equipment is of an improved type. In addition to the concept of one-for-one replacement versus improvement, the scale and complexity of the project are relevant. This takes into consideration concepts such as the amount of time and material required to complete the job.

OSHA Interpretation Letter October 1, 2019

We understand Central Farm's call for a more expansive evaluation of whether an exposure should be classified as maintenance. However, the OSHA letter of interpretation cannot overrule or alter the requirement of 29 C.F.R. § 1910.5 that specific standards "prevail over any different general standard which might otherwise be applicable to the same condition."

Application of the interpretation letter would not substantiate Central Farm's claim that the roofing activities were general industry maintenance. First, there is no evidence that Central Farm replaced skylights on a regular or periodic basis to maintain their original condition. The four-inch holes in the skylights were not repaired and the skylights were not returned to service. Second, the record shows the original condition of the skylights and the roof were not restored. The damaged panels were not replaced with new translucent skylight panels. The skylights were removed, and their openings sealed up with solid metal panels. Third, the alterations to the roof and skylights were not like in-kind or one-for-one replacement. The new metal panels were an improvement over the fragile fiberglass panels they replaced. Finally, the job appears to have been extensive as twenty skylights were removed and replaced with metal panels. If we were to give weight to the letter of interpretation in this case, (we do not),

the facts do not support the conclusion that work on Central Farm's roof was general industry maintenance.

### III. Duplicative Citations

Central Farm asks we find items 1 and 2 of citation 1 duplicative because the abatement methods are the same. We first examine the abatement methods in the standards:

29 CFR 1926.501(b)(4)(i) – Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

29 CFR 1926.501(b)(10) - "Roofing work on Low-slope roofs." Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

(emphasis added)

We note personal fall arrest systems and guardrail systems are common to each standard, but other abatement measures are not. In support of its argument for duplicity, Central Farm directs us to *Secretary of Labor v. J. A. Jones Construction*, 1993 WL 61950 (2014) and *Secretary of Labor v. Big Sky Well Service*, 22 OSHC (BNA) 1642 (No. 07-1290, 2009).

*J.A. Jones* is instructive but not in a manner helpful to Central Farm's position. Under its ruling, the secretary of labor may cite a violation for each

individual instance of improper fall protection where the violations involve either a different floor or a different location on each floor. (emphasis added)<sup>7</sup> The record before us establishes two sets of Central Farm employees were exposed to fall hazards at two locations on the roof: unguarded skylights in the middle of the warehouse roof and unguarded perimeter edges of the warehouse roof. *J.A. Jones* validates the decision of the commissioner of workplace standards to separately cite violations for improper fall protection at each location on the warehouse roof.

The second case, *Big Sky*, also supports the hearing officer's findings and conclusions. In *Big Sky* the federal review commission dismissed two citations as duplicate because the abatement of one would in fact abate the other. Central Farm argues *Big Sky* would require the same outcome for Citation 1, items 1 and 2. However, the facts in that case are distinguishable from the present matter. In *Big Sky*, a crude oil tank exploded as an employee was affecting a repair by welding at a single location on the tank. The company was cited for two violations: allowing cutting or welding in the presence of explosive atmospheres or in explosive atmospheres that may develop; and permitting welding, cutting, or other hot work on a tank before it had been thoroughly cleaned. The federal review commission's administrative law judge determined the citations were

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<sup>7</sup> For purposes of these standards floor, roof, and walking work surface are the same. See 29 C.F.R. § 1910.21

duplicative because abatement of either condition would necessarily have abated the other.<sup>8</sup>

The record before us does not provide evidence from which we could conclude abatement of the hazard of falling through a skylight in the middle of the warehouse roof would necessarily abate the hazard of falling from the perimeter of the warehouse roof. The citations in *Big Sky* shared complete unity of location, time, and employee exposed. The circumstances on Central Farm's roof are not uniform; there is variation in the locations of the exposures, the times of the exposures, and the identities of employees exposed. Considering these variations, we find citation 1, items 1 and 2 are not duplicative because the potential abatement measures taken at one location on Central Farm's roof would not necessarily have abated the hazard at other location.

#### IV. Willful Serious Classification

Central Farm asks for reconsideration of the willful serious classifications. We agree with our hearing officer's determination that citation 1, items 1 and 2 were correctly classified as serious willful violations based on plain indifference to employee health and safety. The record establishes that Central Farm sent a second group of employees onto the roof hours after Mr. Ransdell suffered his fatal fall through a skylight.<sup>9</sup> Despite clear evidence of a hazardous condition

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<sup>8</sup> Cleaning the tank to remove the crude would have cleared the atmosphere and clearing the atmosphere would have required cleaning the tank of crude. If either measure had been taken, the explosion would not have happened; the abatement of either cited condition would necessarily have resolved both.

<sup>9</sup> See testimony of Filiatreau at TE 203, line 18 – page 206 line 20; testimony of Zoeller at TE 236, line 10 – 15


on the roof, Central Farm provided the second group of employees with no fall protection. (Zoeller, TE 237, lines 1-8) In so doing, Central Farm demonstrated plain indifference for the safety of these employees.


**DECISION AND ORDER**

After consideration of arguments submitted and examination of the record, we uphold and adopt our hearing officer's findings of fact and recommended order in toto as the final order of this commission.

It is so ordered.

September 1, 2021

  
Larry Clark  
Chairman

  
Frank Jeff McMillian  
Commissioner

  
Robert Leo Miller  
Commissioner



**Certificate of Service**

I certify that a copy of the foregoing order and decision has been served this 1<sup>st</sup> day of September, 2021, on the following as indicated:

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