COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 006381-91

Jean Drumm	Employee
Viale Florist	Employer
Florists Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
Alma R. Arlos, Esq., for the employee
Carey H. Smith, Esq., for the insurer and employer

HORAN, J. The insurer appeals from a decision awarding the employee double compensation benefits under § 28.[1] For the reasons that follow, we affirm the decision.

On February 14, 1991, the employee sustained serious injuries at work when she fell into an unguarded trap door floor opening measuring eight feet by three feet, and tumbled to the floor below. In a decision filed on April 13, 1999, an administrative judge found the employee to be permanently and totally incapacitated. In 2002, the employee filed a § 28 claim, which the judge denied in a decision filed on August 30, 2004. The employee appealed, claiming the judge erred when he refused to admit and consider certain state and federal safety regulations offered into evidence. We agreed with the employee and, in a decision filed on August 2, 2005, recommitted the case for the judge to reconsider the claim

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[1] General Laws c. 152, § 28, provides, in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

in light of the safety regulations. See Drumm v. Viale Florist, 19 Mass. Workers' Comp. Rep. 206 (2005).

With the regulations in evidence, the judge concluded the employer had indeed failed to comply with the requirement that a railing be in place when the trap door was open. (Dec. 3-4.) The judge correctly noted this safety violation is some evidence of the employer's serious and willful misconduct. (Dec. 3.); see Armstrong's Case, 19 Mass. App. Ct. 147, 150 (1984). The judge also found that, in addition to failing to adhere to safety regulations, the employer's decision to place warning cones and chains around the trap door opening on prior occasions indicated "the employer was aware of the risk of serious physical injury." (Dec. 4.) Moreover, the employer acknowledged the cones and chains were insufficient to prevent someone from falling into the opening, *and* that they were *not* in use on the day of the accident. (Dec. 4.) The judge concluded:

> The enforcement of the warning system was not consistent, and there was no evidence that the employer made any attempt to see that it was implemented on a consistent basis. Such an attitude is problematic for several reasons: the floor opening was not always in use, and therefore, employees had no consistent notice of the danger present. Certainly on February 14, 1991, the date of the employee's injury could reasonably be anticipated to be an especially busy day at the flower shop, and that safeguards of any level should be in place. As found in the original decision, the cones and chains were not in place, a departure from the employer's own stated policy.

(Dec. 4.) Based on his evaluation of all the evidence, the judge found the employee's injury was due to the serious and willful misconduct of the employer. (Dec. 5.)

The insurer raises three issues on appeal. We address them in turn.

The insurer first argues the employee's § 28 claim is untimely. It urges us to ignore the holding in Green v. Town of Brookline, 46 Mass. App. Ct. 910 (1999), because the employee offered no excuse for waiting for over eleven years post injury to file her claim. The law imposes no such burden on the employee.

In Green, the court noted § 41's plain language that "payment of compensation for any injury pursuant to [c. 152] . . . shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury." Id. at 911. The court rejected the self-insurer's argument that the claim was barred by the four year statute of limitations found in G. L. c. 152, § 41. Accordingly, the judge did not err by deciding the employee's claim on its merits.

The insurer also argues that while safety regulations "can be used as some evidence of a Section 28 violation . . . they must be offered through a recognized expert on safety engineering in order to have any effect." (Ins. br. 5.) In other words, the insurer contends that because the employee failed to utilize an expert at hearing, her claim must fail. This misstates the law. See Perry v. Medeiros, 369 Mass. 836 (1976)(opinion of building inspector that condition of stairway was in violation of building code was properly excluded, but it was error to exclude the pertinent code provisions, as it was the function of the jury to decide if code was violated). It was the judge's duty, as factfinder, to determine and weigh the issue of the employer's compliance with the applicable safety regulations. See Drumm, supra at 207-208, n.6-10. Expert testimony was unnecessary because the regulations, on their face, clearly applied to the employer's premises. Id. The facts reveal that, on the date of injury, there was no cover in place, nor was there a standard railing with toeboards. See 454 Code Mass. Regs. §§ 10.110, 10.111 (1) and (2)(c).[2] Furthermore, on the date of injury, the employer had failed to employ its occasional use of cones and chains to guard the opening. (Dec. 4.)

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[2] 454 Code Mass. Regs. § 10.110, provides, in pertinent part:

> Floor opening. An opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall.

454 Code Mass. Regs. § 10.111(1), provides, in pertinent part:

> General Provision 454 CMR 10.111 – 112 shall apply to conditions where there is danger of employees or materials falling through the floor, roof, or wall openings, or from stairways or runways.

454 Code Mass. Regs. § 10.111(2), provides, in pertinent part:

The insurer's final argument is that the employee failed to prove the employer's misconduct was serious and willful. While we agree with the insurer that the violation of safety regulations does not, *ipso facto*, compel a finding of such conduct, the judge's findings, grounded in the evidence, are sufficient to support his ultimate conclusion that the employee's injuries were "due to the serious and willful misconduct of the employer." (Dec. 5.) In O'Leary's Case, 367 Mass. 108 (1975), the court considered the employer's knowledge of an inherently dangerous condition, which it did nothing to alleviate, in violation of a construction contract:

> The contract between the employer and the union local to which the foreman, the employee, and [co-worker] belonged prohibited the field or job site erection of beams with shop-attached shear connectors. The board found, as it was warranted in doing, that this contractual prohibition was, as labeled in the contract, a safety provision. It is not difficult to understand why it would be dangerous to work with large steel beams covered by sharp steel protrusions. Indeed, the concern of those who drafted the contract for these protrusions proved to be justified by the injury to the employee.

Id. at 116. Likewise, it is not difficult to understand the danger attendant to working on Valentine's Day in a floral shop with an unguarded twenty-four foot

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> Guarding of Floor Openings and Floor Holes. Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in 454 CMR 10.111(7). In general, the railing shall be provided on all sides, except at entrances to stairways.

454 Code Mass. Regs. § 10.111(2)(c), provides, in pertinent part:

> Pits and trap-door floor openings shall be guarded by floor opening covers of standard strength and construction. *While the cover is not in place*, the pit or trap openings *shall be protected on all exposed sides by removable standard railings*. (Emphasis added.)

As noted in 454 Code Mass. Regs. § 10.111(2), the detailed specifications for the height, width and makeup of the railings and toeboards required for floor openings appear in § 10.111(7). We need not list these requirements in detail, as the employer concedes the trap door in the floor was unguarded, and a cover was not in place, on the date of injury. (Dec. 3-4.)

square hole in the floor, or to understand how the safety regulations were intended to prevent the employee's serious injuries.

We also reject the insurer's contention that the judge failed to identify the intentional acts of the employer to justify imposing § 28 liability. The type of intentional conduct that must be shown in the prosecution of a § 28 claim is not the specific intent to cause the resulting harm. It is instead the general intent to do an act, or to fail to do an act, that one has reason to know may result in serious injury. "Reckless conduct may consist of a failure to act, if there is a duty to act . . . . Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another." Pratt v. Martineau, 69 Mass. App. Ct. 680 (2007), quoting Sandler v. Commonwealth, 419 Mass. 334, 336 (1995). The employer has a general duty to provide a safe workplace. See Barrett v. Rodgers, 408 Mass. 614, 619 (1990); Longever v. Revere Copper & Brass, Inc., 381 Mass. 221, 223 (1980); see also Commonwealth v. Levesque, 436 Mass. 443, 449 (2002)("a duty to prevent harm to others arises when one creates a dangerous situation, whether that situation was created negligently or intentionally"). The employer also has a duty to refrain from serious and willful misconduct. G. L. c. 152, § 28. It is axiomatic that the quasi-criminal behavior necessary for a § 28 violation is the same as the reckless disregard of probable and greatly harmful consequences. Scaia's Case, 320 Mass. 432, 433-434 (1946); Burns's Case, 218 Mass. 8 (1914). There is simply no failure of proof of intent, relative to reckless conduct, to knowingly allow a life threatening workplace hazard to exist and persist.

With proper deference to the judge, whose job is to weigh and assess the credibility of the evidence, and to determine the factual question of whether the employee was injured by the serious and willful misconduct of the employer, we affirm the decision. See Thayer's Case, 345 Mass. 36, 40 (1962).

The employee's attorney is awarded an enhanced fee in the amount of $5,000 under the provisions of G. L. c. 152, § 13A(6), in view the amount of effort expended on these appellate proceedings, including oral argument.

So ordered.

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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Dept. of Industrial Accidents

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