BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1462745**
WONDERFUL CITRUS PACKING LLC **1901 S. LEXINGTON ST** **DELANO, CA 93215**	**DECISION**
Employer	

Statement of the Case

Wonderful Citrus Packing LLC[1] (Employer) is a fruit packer and distributor. Beginning February 14, 2020, the Division of Occupational Safety and Health (the Division) through Compliance Officer Daniel Pulido (Pulido), conducted an accident investigation at Employer's worksite located at 1901 South Lexington Street, in Delano, California (the site).

On June 5, 2020, the Division issued two citations to Employer for alleged violations of the California Code of Regulations, title 8.[2] Citation 1, Item 1, classified as Regulatory, alleges that Employer failed to provide documentation certifying that a powered industrial truck operator had been trained and evaluated as required. Citation 2, Item 1, classified as Serious Accident-Related, alleges that Employer failed to ensure that powered industrial truck operators maintained a safe distance from other vehicles.

Employer filed a timely appeal contesting the existence of both alleged violations and the reasonableness of the proposed penalties. In addition, Employer appealed Citation 2, Item 1, on the ground that the classification is incorrect. Employer also raised numerous affirmative defenses.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California on May 11, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. District Manager Efren Gomez represented the Division, and Rhonda Steffen, attorney at Roll Law Group, represented Employer.

During the hearing, Employer withdrew its appeal of Citation 1, Item 1.

The matter was submitted on August 10, 2022.

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[1] Employer was originally cited as "Wonderful Citrus II, LLC." During the hearing, the parties stipulated to amend the citations to reflect Employer's correct entity name, which is "Wonderful Citrus Packing LLC." Good cause appearing, the citations are amended accordingly, and the order approving such amendment is incorporated into this decision.

[2] Unless otherwise specified, all references are to California Code of Regulations, title 8.

Issues

1. Did Employer fail to ensure that industrial trucks were operated in a safe manner, by failing to ensure that employees maintained a safe distance from other vehicles?

2. Did the Division establish that Citation 2 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

4. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

5. Did Employer establish any of its affirmative defenses?

6. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. On January 9, 2020, at the time of the accident, employee Juan Antonio Hernandez Gonzalez (Gonzalez) was operating an Electric Pallet Jack (EPJ) in the palletizer area of Employer's warehouse facility at the site.

2. Also at that time, employee Rigoberto Mosqueda (Mosqueda) was operating a forklift in the same area of the warehouse.

3. An EPJ is a vehicle that moves pallets.

4. A forklift is an industrial truck.

5. The palletizer area of the warehouse is a high traffic area where containers of fruit are stacked in pallets. Industrial trucks such as EPJs and forklifts move pallets of fruit in and out of the palletizer area.

6. Gonzalez drove his EPJ into the palletizer area where Mosqueda was operating his forklift in reverse while lifting a pallet. Mosqueda stopped his forklift and instructed Gonzalez to proceed.

7. While Gonzalez passed Mosqueda, Mosqueda placed his forklift into motion, causing it to swing around toward Gonzalez, striking Gonzalez's ankle with the forks.

8. As a result, Gonzalez suffered a serious ankle injury that required him to be hospitalized for treatment for more than 24 hours.

9. The palletizer area is busy. It is not uncommon for multiple industrial trucks, including EPJ's and forklifts, to operate simultaneously in the area. The area is open and accessible to employees of the warehouse.

10. The Division's proposed penalty is reasonable.

Analysis

1. Did Employer fail to ensure that industrial trucks were operated in a safe manner, by failing to ensure that employees maintained a safe distance from other vehicles?

Section 3650, subdivision (t)(9), provides:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

> […]
> (9) Vehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed. For trucks traveling in the same direction, a safe distance may be considered to be approximately 3 truck lengths or preferably a time lapse – 3 seconds – passing the same point.

In citing Employer, the Division alleges:

Prior to and during the course of the investigation, the Employer failed to ensure that industrial truck operators maintain a safe distance from other vehicles. As a result, on or about January 9, 2020, an employee operating an electric pallet truck suffered a serious injury when the forks of a forklift being operated in close proximity struck him.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA

App. 11-2385 and 2386, Decision After Reconsideration (Oct. 7, 2016.) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Applicability

Section 3650, subdivision (t), enumerates safe operating rules for industrial trucks and tow tractors. Here, the parties do not dispute that the EPJ that Gonzalez was operating at the time of the accident, and the forklift that Mosqueda was operating, are industrial trucks as the term is used in section 3650. An EPJ is a piece of equipment that is used for low-level lifting and moving pallets. Forklifts are used for higher lifting and moving pallets. Both pieces of equipment meet the definition of an industrial truck. Thus, the safety order applies.

Violation

In order to establish a violation of section 3650, subdivision (t)(9), the Division is required to establish that 1) a driver of an industrial truck or tow tractor 2) failed to maintain the industrial truck within the authorized or safe speed, or 3) failed to maintain a safe distance from other vehicles.

The parties dispute what the Division must prove in order to establish a violation of the safety order. Employer argues that the cited safety order must be read in the conjunctive; thus, Employer argues the Division had the burden of proving that the trucks failed to maintain positive control, that the trucks were driven at an excessive speed, that the trucks failed to maintain a safe distance and, that they failed to follow all traffic regulations. The Division, in contrast, reads the safety order in the disjunctive, and argues that a violation may be shown if it shows that an industrial truck was driven either at an unauthorized or unsafe speed, or that an industrial truck was driven an unsafe distance away from other vehicles. The Division's reading of the safety order is preferable, as it gives meaning to each word of the safety order. (*McCarthy Building Co., Inc.*, Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016).) Thus, a violation can be shown, for instance, where an industrial truck is driven at an unauthorized or unsafe speed, regardless of the distance between the industrial truck and other vehicles. Alternatively, a violation may be shown where an industrial truck is operated at an unsafe distance from other vehicles, irrespective of the speed at which it is operated.

It is undisputed that Mosqueda was the driver of a forklift which struck Gonzalez's ankle as he was operating an EPJ on January 9, 2020.

Gonzalez testified that the accident occurred while he was attempting to move pallets of oranges in the palletizer area of the warehouse. Gonzalez drove his EPJ past Mosqueda, who was lifting a pallet with his forklift, also in the palletizer area. Mosqueda asked Gonzalez to leave his pallet by Mosqueda's forklift, but Gonzalez refused, and continued past Mosqueda to fetch more pallets. When Gonzalez returned, Mosqueda was operating his forklift in reverse while lifting a pallet. Mosqueda stopped his forklift and instructed Gonzalez to pass by him on the EPJ. As Gonzalez was passing Mosqueda's forklift, Mosqueda swung his forklift around toward Gonzalez, causing the forks to strike Gonzalez's ankle.

Associate Safety Engineer Pulido testified that, based on his investigation, which included visiting the site of the accident and interviewing Gonzalez, he concluded that Mosqueda was operating his forklift an unsafe distance from Gonzalez. According to Pulido, the forklift measured approximately ten feet long, and the forks measured four feet long. The EPJ platform measured about three feet wide. Pulido measured about 12 feet of operating space in the area where the accident occurred, which is consistent with the photographs that Pulido took during his inspection. Gonzalez testified that there was about four feet of space between his EPJ and Mosqueda's forklift when Gonzalez attempted to pass. Pulido concluded that there was insufficient space for the two industrial trucks to safely maneuver in the area where the accident occurred.

Here, Pulido's testimony is credited, as is Gonzalez's. The evidence, as summarized above, demonstrates that Mosqueda swung his forklift around while Gonzalez was trying to pass within four feet of the forklift while operating an EPJ. Mosqueda's action caused the forks of his forklift to come into contact with Gonzalez's ankle as Gonzalez was driving past Mosqueda. Pulido correctly concluded, and the evidence firmly establishes, that Mosqueda failed to maintain a safe distance between his forklift and other vehicles.

Thus, for all of the foregoing reasons, the Division presented evidence sufficient to establish that Employer failed to ensure that industrial trucks were operated in a safe manner. Thus, a violation of section 3650, subdivision (t)(9), has been proven.

2. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6423, subdivision (a), in relevant part states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the

> violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code, § 6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Pulido testified that he has been employed as an Associate Safety Engineer with the Division since July, 2013. Prior to that, he was an Assistant Safety Engineer from March 2010 through July 2013. Pulido testified that his Division-mandated training was up to date. Pulido testified that he classified Citation 2, as Serious because he determined as part of his investigation that there was a realistic possibility of serious physical harm that could result from failing to maintain a safe distance from other vehicles while operating a forklift. Pulido also testified that the forklift's forks are heavy, and a forklift itself is a powerful piece of equipment. He further testified that in ten other accident investigations that he was aware of involving industrial trucks not maintaining safe distance from other vehicles, that employees had suffered serious injuries including, but not limited to, crushing injuries and amputation injuries. Pulido testified, and Employer does not dispute, that Gonzalez was hospitalized for more than 24 hours (i.e. inpatient) while he received treatment for the injuries he sustained during the accident. Here, it is found that Gonzalez in fact did suffer a serious injury when his ankle was struck by the forks of a forklift operated by Mosqueda.

Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.[3]

3. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

In order to satisfactorily rebut the presumption, an employer must demonstrate both that:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, although Employer was given an opportunity to present evidence at hearing to demonstrate the existence of the above elements, Employer offered no evidence to rebut the presumption that Citation 2 was properly classified as Serious. Photographic evidence and the testimony of Pulido and Gonzalez established during hearing that the area where the accident occurred was an area frequently accessed by employees, and that it was not uncommon for multiple industrial trucks such as EPJs or forklifts to operate simultaneously in this area. Thus, Employer was aware, or should have been aware through the exercise of reasonable diligence, that employees were operating industrial trucks in dangerously close proximity to one another.

Furthermore, Gonzalez denied during his testimony that he received training regarding the distance that he should maintain between himself and any other forklift operator in the area while operating an EPJ or forklift in the palletizer area. He also denied receiving training

[3] Labor Code section 6432 (b) (1) requires the Division, prior to issuing a citation classified as Serious to first "make a reasonable attempt to determine and consider" certain enumerated information. Under subdivision (b) (2), the Division meets its obligation if, "not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision." Here, the Division's IBY submitted into evidence demonstrates that the Division satisfied Labor Code section 6432 (b), and Employer did not offer any evidence suggesting that the Division failed to comply with this statutory obligation.

regarding hazards created by other vehicles like forklifts. Thus, Employer did not meet its burden of demonstrating that it took any reasonable steps to anticipate and prevent the violation that the Division identified in Citation 2. Although Gonzalez testified that after the accident, Employer eliminated the hazard, that alone is insufficient to rebut the Serious classification.

Accordingly, Employer failed to rebut the presumption that the Division correctly classified Citation 2, as Serious.

4. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury". (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer." (*id.)*

Here, the undisputed evidence shows that Gonzalez suffered a serious injury to his ankle when Mosqueda, in violation of the safety order, swung his forklift toward Gonzalez, striking Gonzalez's ankle. Gonzalez credibly testified that he was hospitalized for treatment for five days, and Employer offered no rebuttal evidence.

Thus, for all of the foregoing reasons, Citation 2 is properly characterized as Accident-Related.

5. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence. (*RNR Construction, Inc., supra* Cal/OSHA App. 1092600) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer did not present any witnesses on its behalf. Employer did cross-examine Gonzalez and Pulido, and introduced documentary evidence during cross-examination. However, even viewed in the light most favorable to Employer, Employer did not meet its burden of proof as to any of its affirmative defenses.

6. Is the proposed penalty for Citation 2 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

Here, the Division did not present its proposed penalty worksheet, but Pulido credibly testified as to the manner in which he calculated the penalties for each of the citations. Pulido testified that because Citation 2 was classified as Serious Accident-Related, that the based penalty is $18,000, and can only be adjusted based on the size of an employer. The parties do not dispute that Employer employed more than 100 employees at the time of the inspection. Employer offered no evidence that the Division miscalculated the penalties, or that Delos Reyes improperly applied the penalty regulations, or that the totality of the circumstances warrants a penalty reduction.

Accordingly, it is determined that the Division proposed a reasonable penalty for Citation 2.

Conclusion

The evidence supports a finding that Employer violated section 3650, subdivision (t)(9), by permitting an employee to operate a forklift at an unsafe distance from other vehicles. The violation was properly classified as Serious Accident-Related. The Division proposed a reasonable penalty for the alleged violation.

Order

Citation 1, Item 1, is affirmed in accordance with the parties' agreement and as set forth in the attached Summary Table.

Citation 2, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 09/08/2022

Howard I. Chernin
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**