BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
MILLENNIUM REINFORCING, INC. **P.O. BOX 73698** **SAN CLEMENTE, CA 92673** **Employer**	**1290766** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Millennium Reinforcing, Inc. (Employer) is a structural reinforcing concrete contractor. Beginning January 29, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Paul Grier (Grier), conducted an accident inspection at a construction site at 1122 West Washington Boulevard in Los Angeles, California (the job site), in response to an injury report involving an employee whose foot was run over by a forklift. On July 2, 2018, the Division issued one citation to Employer for failure to require appropriate foot protection in accordance with California Code of Regulations, title 8, section 3385, subdivision (a).[1] Employer filed a timely appeal of the citation.

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Board), in West Covina, California, on January 18, 2019, March 7, 2019, and June 6, 2019. Attorney Manuel Melgoza, of Donnell, Melgoza & Scates LLP,[2] represented Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted for decision on August 27, 2019.

The ALJ's Decision, issued on September 24, 2019, affirmed the citation, the serious classification, the accident-related characterization, and the proposed penalty of $10,800.

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] During the actual dates of hearing, Employer was represented by The Robert Peterson Law Office, Attorney Manuel Melgoza. Employer's Petition for Reconsideration was filed by Roger M. Mason, of Sweeney, Mason, Wilson, & Bosomworth.

Employer timely filed a Petition for Reconsideration[3]; the Division filed a timely Answer. The Board took the petition under submission on December 12, 2019.

Employer argues that the Division failed to establish that employees had reasonably predictable access to the zone of danger around moving forklifts, and that footwear meeting ASTM standards would not have provided the injured employee with any protection against the injury he suffered. Employer also argues that the citation was not properly classified as Serious and Accident-Related. Employer does not contest the ALJ's findings of actual exposure or the reasonableness of the penalty, waiving these issues. All objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought, other than those set forth in the petition for reconsideration, are deemed waived and established as a matter of law. (Lab. Code § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer fail to require appropriate foot protection for employees who were exposed to foot injuries from falling objects, crushing, or penetrating actions?

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation in Citation 1 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 Employer's failure to require appropriate foot protection for employees exposed to foot injuries from falling objects and crushing or penetrating actions cause a serious injury?

FINDINGS OF FACT

1. Employer is a structural steel reinforcing concrete contractor.

[3] Employer's Petition included an attachment. Attachment A purports to be a transcript of the hearing from the Board's digital audio record, although in reality it is not the complete hearing transcript, but a selection of pages from the hearing record. Board rule 376.7, subdivision (c) requires that the parties must stipulate, and the ALJ must order, that such a post-hearing transcript be made the official hearing record, so as to ensure its accuracy. Employer does not state that it has complied with rule 376.7, subdivision (c). In addition, the transcript is not a complete or accurate record of the entire hearing. Attachment A must therefore be disregarded.

2. On January 18, 2018, the day of the accident, Employer was engaged in erecting a parking structure at 1122 Washington Boulevard, Los Angeles, California. Employer was in the process of cleaning up the site.

3. The structure was ten stories high. The levels of the structure were connected by poured-concrete ramps which allowed vehicles to travel between levels.

4. The ramps of the parking garage were accessible for employees to walk on to travel between levels.

5. Employees physically lifted and carried pieces of scrap rebar weighing up to 25 pounds, and bundles of rebar weighing up to 100 pounds.

6. Bundles of rebar, weighing up to 100 pounds per bundle, were placed on pallets and transported by forklift.

7. On January 18, 2018, two forklift drivers were using the ramps to transport palletized rebar bundles from the ninth floor to the first floor of the parking structure.

8. Employer required employees to wear work boots, not safety shoes.

9. Employee Edgar Isidoro (Isidoro) walked on a parking garage ramp in close proximity to a forklift operated by Raphael Lopez (R. Lopez).

10. Forklift driver R. Lopez ran over Isidoro's right foot.

11. Isidoro's injury resulted in broken toes, and required hospitalization and surgery.

12. Employer's managers were aware that rebar bundles on pallets could fall onto employees' feet and could result in foot injuries.

13. Employer's managers were aware of forklifts being driven in areas where employees are exposed to foot injury from accidental contact with the forklifts' wheels.

DISCUSSION

1. Did Employer fail to require appropriate foot protection for employees who were exposed to foot injuries from falling objects, crushing, or penetrating actions?

Section 3385, subdivision (a), provides:

> Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating

actions, which may cause injuries or who are required to work in abnormally wet locations.

Citation 1 alleges:

> Prior to and during the course of the inspection, appropriate foot protection such as steel toe boots, was not required for employees exposed to foot injuries from crushing and falling object actions. As a result on or about January 18, 2018 an employee sustained serious injuries to the right foot while spotting a forklift truck maneuvering with a load.

To prove a violation of section 3385, subdivision (a), the Division must establish that employees were (1) exposed to foot injuries from, among other things, falling objects, crushing or penetrating actions, and (2) the employer failed to require appropriate foot protection. (*MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000); *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017); *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018).)

First Element: Were Employer's employees exposed to foot injuries from falling items, crushing or penetrating actions?

The Division may demonstrate employee exposure in two ways. First, by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc*., Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) In this case, the zone of danger would be the areas around carried or elevated rebar or rebar bundles, and around moving forklifts.

In addition to demonstrating actual employee exposure to the hazard, "the Division 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 evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc*, *supra*, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable "by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (*Id*., citations omitted.)

The ALJ's Decision identified two hazards posing a danger of foot injuries to employees: 1) exposure to falling objects, specifically elevated pieces and bundles of rebar, and 2) exposure to industrial trucks such as forklifts. The ALJ's Decision found both actual exposure to the zone of danger, and reasonably predictable access to the zone of danger, with regard to both of these hazards.

However, Employer's Petition challenges only whether the Division established that it was reasonably predictable that employees would have access to the zone of danger around forklifts. The ALJ's determinations regarding both actual employee exposure to falling objects, and actual exposure to the zone of danger around industrial trucks, are accordingly established. The petitioner for reconsideration is deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration. (Lab. Code, § 6618; *Kaiser Foundation Hospitals v. Occupational Safety and Health Appeals Board* (1984) 155 Cal.App.3d 282, 286, fn. 2.) This alone would be sufficient to affirm the ALJ's finding of exposure. We briefly review those findings here.

The Hazard of Dropped or Falling Rebar

The record shows that employees were exposed to the hazard of foot injuries from falling rebar in two ways: 1) from dropping rebar that they manually carried, and 2) from elevated rebar that could fall from forklifts or pallets. With regard to rebar that employees physically lifted and carried, exposure to "foot injuries" from "falling objects, crushing or penetrating actions" may be demonstrated based on evidence as to the nature and weight of objects physically moved or lifted by employees." (*Home Depot USA*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

First, with regard to rebar that employees physically lifted and carried, exposure to "foot injuries" from "falling objects, crushing or penetrating actions" may be demonstrated based on evidence as to the nature and weight of objects physically moved or lifted by employees." (*Home Depot USA*, *supra*, Cal/OSHA App. 1011071.) Here, employees lifted and carried pieces and bundles of rebar that created a hazard of foot injury. S. Lopez testified that employees manually collected rebar scrap pieces weighing, on average, 10 pounds, and up to 25 pounds. Isidoro testified that his job duties included picking up this scrap rebar, tying the pieces into bundles, and placing the rebar bundles on pallets, which were then moved by forklift. S. Lopez estimated that each bundle contained 10 to 15 pieces of rebar in varying lengths and thickness. When employees physically lift and move objects, their feet are constantly in the zone of danger that the safety order addresses. Here, the nature and weight of the items lifted and moved is sufficient to demonstrate actual exposure to the hazard of the items falling onto and crushing or puncturing the unprotected feet of employees.

Second, with regard to the hazard of elevated rebar bundles that could fall from forklifts or pallets, manager Tony Ortega (Ortega) testified that the rebar bundles placed on pallets could weigh as much as 100 pounds per bundle and, cumulatively, 1000 pounds per pallet. Ortega further testified that palletized rebar bundles could slip or roll off a pallet during transport, and fall onto

an employee's feet. Employees were therefore exposed to the actual hazard of foot injuries from dropped or falling pieces or bundles of rebar.

In addition to actual exposure to elevated rebar that could fall or be dropped, it is reasonably predictable that employees would lift and move pieces of rebar and heavy rebar bundles, as Employer is in the business of installing rebar and employees were engaged in the task of removing scrap rebar. For the same reason, it is also reasonably predictable that employees would be in the zone of danger around elevated rebar bundles on pallets or forklifts. Employees were therefore exposed to the hazard of foot injuries from dropped or falling objects.

The Hazard of Accidental Contact With Forklifts

The evidence demonstrates that Isidoro was actually exposed to foot injuries from crushing or penetrating actions as the result of accidental contact with a moving forklift. As noted above, Employer has not challenged this finding. This alone is sufficient to demonstrate exposure.

Notwithstanding that actual exposure has already been established, Employer's petition challenges the ALJ's finding that it was reasonably predictable that employees would access the parking garage ramps and come into the zone of danger around forklifts. Nonetheless, we address Employer's argument.

When the accident occurred, the ramps of the parking garage had been constructed, but the stairwells and elevators were still under construction, so the only way for employees to travel between levels was by walking on the ramps or by using scaffold ladders. Two forklift drivers were taking palletized rebar bundles from the ninth floor to the first floor of the parking structure, by descending on the ramps. At times, the lengths of rebar protruded beyond the sides of the pallet and forklift, requiring a spotter on foot to assist in guiding the forklift down the ramps and around sharp corners.

Witness accounts of the circumstances leading up to the accident conflicted. Isidoro testified that he had been assigned to act as R. Lopez's spotter. Isidoro testified that, at the time of the accident, R. Lopez was on his phone, and as a result of this distraction did not see Isidoro in time to stop the forklift before he ran over Isidoro's foot. Isidoro stated that he was too close to the wall to jump out of the way of when he realized the forklift was approaching him.

In contrast, three witnesses – R. Lopez; the site foreman, and R. Lopez's brother, Salvador Lopez (S. Lopez); and the second forklift driver, Oscar Chavez (Chavez) – all testified that Isidoro had not been assigned to act as a spotter. R. Lopez, the only eyewitness to the accident other than Isidoro, testified that Isidoro told him he was using the ramp to access a restroom on another floor. R. Lopez denied that he had been on his phone. He further testified that Isidoro, in fact, was the one on his phone, was not paying attention to where he was going, ignored R. Lopez's multiple directives to step away from the forklift, and engaged in horseplay around the forklift, forcing R. Lopez to stop and start the forklift several times while Isidoro was in close proximity to it.

All agreed, however, that Isidoro was walking near the forklift on the ramp at the time the accident occurred. As a consequence of the accident, Isidoro received a disciplinary warning for failure to maintain a safe distance from moving equipment, and R. Lopez's forklift license was suspended pending re-training. (Exhibit G.)

Employer argues that Isidoro was using the ramp to access a restroom on another floor when he was injured, contrary to Employer's safety rules, and was thus not acting within the "course of his assigned work duties." Therefore, Employer concludes, it was not "reasonably predictable" that he would walk on the ramp and have access to the danger zone around the forklift driven by R. Lopez.[4] (Petition, pp. 2-3.)

As the ALJ pointed out, this is a misunderstanding of the standard, which asks the Division to prove it is reasonably predictable that employees could access the zone of danger "by operational necessity or otherwise, including inadvertence," even while "pursuing personal activities during work." (*Dynamic Construction Services, Inc.*, *supra*, Cal/OSHA App. 14-1471.) Specifically regarding industrial trucks, the Board has found exposure "where employees and industrial trucks come into close proximity, particularly during breaks and lunch," clearly indicating that exposure is not limited to occasions directly related to an employee's assigned work duties. (*Interline Brands, Inc.*, Cal/OSHA App. 1251604, Decision After Reconsideration (Sept. 17, 2020).)

Whether or not Isidoro had been assigned to act as a spotter is therefore irrelevant. If he was assigned to act as R. Lopez's spotter, his job duties required him to walk on the ramp in proximity to the forklift, and it was reasonably predictable that these duties would bring him into the zone of danger around the moving forklift. The Division's evidence showed that there were no barriers or other means to separate forklift drivers and pedestrians on the ramps, and that the width of the ramps gave pedestrians little room to avoid forklifts. It was therefore reasonably predictable that employees would be in the zone of danger around forklifts while acting as spotters, through inadvertence or otherwise.

If Isidoro was not assigned to act as R. Lopez's spotter, it was nonetheless reasonably predictable that he would use the ramp to travel between floors while on break or pursuing personal activities such as going to the restroom, and that doing so might bring him into the zone of danger around a moving forklift, through inadvertence or otherwise. Furthermore, it was reasonably predictable that other employees would access the ramps for the same reasons, whether or not they were assigned to act as spotters.

Employer asserts that its administrative controls prevented employees from having reasonably predictable access to the danger zone around forklifts. Although effective administrative controls are important measures to protect workers, and may prevent exposure in some circumstances, such controls were not sufficient here. (*Home Depot, USA, Inc. dba Home*

[4] Although Employer asserted the Independent Employee Action Defense in its initial appeal, Employer did not present evidence in support of that affirmative defense at the hearing; such defenses are deemed waived. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Depot # 6683, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017) (*Home Deopt # 6683*).)

First, regarding its administrative controls, Employer argues that employees were regularly instructed not to walk on the ramps to travel between levels and instead to use ladders. Employer also asserts that the ALJ misrepresented the record in making the finding that, despite this control, employees could, and did, access the ramps to travel between levels. (Petition, pp. 2-3.) The ALJ found:

> S. Lopez testified that if employees wanted to they could walk on the ramp concurrent with the forklifts going up and down the ramps. S. Lopez further testified that although there was a bathroom on each floor workers would sometimes descend to lower floors to find a clean bathroom.
>
> (Decision, p. 4)

Employer protests that this finding is not supported by S. Lopez's actual testimony. On cross-examination by the Division, S. Lopez testified as follows:

> Q: Is it fair to say that employees were walking up and down the ramps to go to the bathrooms? Does that happen, ever?
> A: No.
> Q: They didn't have to go down the ramps for any reason, by walking?
> A: You could use the ramp to go down, but the main priority was to use the ladder to go down.
>
> (Hearing Recording, Day 3, Part 1, at 46:19-47:00.)

On re-direct examination by Employer, S. Lopez testified:

> Q: When forklifts were travelling up and down the ramps, were workers on foot supposed to also use the ramps?
> A: If the people wanted to, yes.
> Q: Did you instruct them to use the scaffold ladder, the stairs, instead of using the ramp?
> A: Yes.
>
> (Hearing Recording, Day 3, Part 1, at 58:10-58:56.)

The clear implication from this testimony is that although employees were instructed to use the ladders rather than the ramps, they did not always obey this instruction. As Isidoro's actions demonstrated, if he was not acting as R. Lopez's spotter, the control of telling employees not to walk on the ramps was ineffective at preventing employees from doing so.

Employer also argues that, as a part of its safety training, employees on foot were instructed to maintain a distance of at least six to ten feet from moving forklifts, while forklift operators were instructed not to move the forklifts if an employee on foot was within ten feet of the forklift.

However, despite this rule, R. Lopez testified that he moved the forklift while Isidoro was within ten feet, no less than three times, immediately before he ran over Isidoro's foot. Employer's safety training was ineffective as an administrative control in preventing Isidoro from coming within the forklift's zone of danger.

Ultimately, Employer's administrative controls amounted to simply "instructing employees not to expose themselves or others to the hazards contemplated by the safety order." (*Home Depot USA*, *supra*, Cal/OSHA App. 1011071; *Home Depot USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec 24, 2012).) The Board has previously found that such controls were insufficient, particularly where "exposure in fact occurred" despite them. (*Ibid*.) The record therefore demonstrates that employees did have reasonably predictable access to the zone of danger around forklifts while walking on the ramps.

The first element is established.

Second Element: Did Employer fail to require appropriate foot protection?

To reconcile the requirements of section 3385, subdivision (a), that employers require and provide "appropriate foot protection," with the more restrictive requirements of subdivision (c), which requires foot protection meeting ASTM standards, the Board has adopted a burden-shifting analysis.

Subdivision (c) provides:

> (c)(1) Protective footwear for employees purchased after January 26, 2007 shall meet the requirements and specifications in American Society for Testing and Materials (ASTM) F 2412-05, Standard Test Methods for Foot Protection and ASTM F 2413-05, Standard Specification for Performance Requirements for Foot Protection which are hereby incorporated by reference.

When the Division demonstrates that employees were exposed to foot injuries from falling objects, crushing, or penetrating actions, a presumption is created that footwear meeting the specifications and standards referenced in section 3385, subdivision (c) would be appropriate. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *MCM Construction Inc.*, *supra*, Cal/OSHA App. 94-246; *Morrison Knudsen Corp.*, Cal/OSHA App. 94-2271, Decision after Reconsideration (Apr. 6, 2000).) The burden then shifts to the employer to demonstrate that ASTM-compliant foot protection would provide no protection or would be inappropriate for other reasons. (*Morrison Knudsen Corp., supra*, Cal/OSHA App. 94-2271.) If the employer fails to successfully rebut application of the ASTM standard, the presumption controls, and "appropriate foot protection" means footwear that meets the ASTM standard. (*United Parcel Service, supra*, Cal/OSHA App. 1158285.)

As discussed above, the Division established exposure to foot injuries here from falling objects, crushing, or penetrating actions, from both falling rebar and accidental contact with

forklifts. Therefore, appropriate foot protection is required. It is presumed that footwear meeting the ASTM specifications and standards referenced in section 3385, subdivision (c)(1), would be "appropriate."

Employer concedes that it did not require its employees to wear such foot protection. As Employer's policy did not require foot protection meeting the ASTM specifications, the burden shifts to Employer to demonstrate that ASTM-compliant foot protection would not offer any protection, or that it would be inappropriate for the workplace hazards. (*Morrison Knudsen Corp.*, Cal/OSHA App. 94-2771, Decision After Reconsideration (Apr. 6, 2000); *MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000).)

To rebut the application of the ASTM standard based on the weight of an object, the Employer must prove that the standard "would provide no protection at all." (*MCM Construction Inc*., *supra*, Cal/OSHA App. 94-246.) An employer will only be able to make the requisite demonstration in the "rarest of circumstances" where it proves that such footwear "would never be effective." (*Ibid*.) For example, an employer would need to demonstrate that footwear meeting the ASTM standards would provide no protection in the event of "gradually applied crushing action, glancing blows, lighter loads, or other exposures." (*Id.* ["In many plausible situations, such as glancing blows, or where a substantial part of the weight of the k-rail was supported by the crane or the ground, the injury to the employee might have been prevented or reduced"].) The Board has never considered the weight of an item, in and of itself, sufficient to rebut the appropriateness of the ASTM standard. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285.)

Employer argues that ASTM compliant shoes would not provide any degree of protection from being run over by an all-terrain forklift like the one in question, weighing 9,760 pounds unloaded. The evidence Employer provided in support of this contention was a document describing a 2,500 pound impact and compression limit test on four pairs of Armortoes brand safety overshoes, dated from 2011. (Exhibit K.) However, Employer did not demonstrate that no type of ASTM compliant footwear could have prevented, or reduced, Isidoro's injuries; nor that the force of the forklift wheel on Isidoro's foot actually exceeded 2,500 pounds. (See, e.g., *Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901.) Employer also presented no evidence that ASTM-compliant footwear would provide no protection against injuries from falling rebar.

Employer also argues that wearing steel-toed boots while collecting scrap rebar could increase the risk of trip and fall injuries. (Petition, p. 4.) The Board has rejected similar arguments in other foot protection cases, where, as here, Employer failed to provide supporting evidence. (See, e.g., *Amazon.com dba Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (Apr. 14, 2021); *Home Depot # 6683, supra*, Cal/OSHA App. 1014901.) The Board has also noted, in similar circumstances, that there are many available styles of footwear which meet the ASTM specifications, and that employers have "flexibility in the selection of footwear to ensure that the footwear is tailored to meet the specific needs of an employer's workplace, which may include addressing ergonomic concerns." (*Ibid.*)

Employer thus failed to rebut the appropriateness of the standards referenced in section 3385, subdivision (c)(1). Therefore, the Division established the second element of the violation.

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

Labor Code section 6432, subdivision (a), states:

> (a) 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 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. [. . .]

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015).)

Grier testified that his Division-mandated training was current, and thus, by statute, the Board deemed him competent to offer testimony to establish each element of the serious violation. (Lab. Code § 6432, subd. (g).) Grier testified that a lack of appropriate foot protection creates a realistic possibility that employees could suffer serious physical harm such as amputations and broken bones. (Lab. Code § 6432, subd. (e).) Isidoro actually suffered broken bones which required hospitalization and surgery for treatment. The Division established a rebuttable presumption that the violation cited was properly classified as Serious.

3. Did Employer rebut the presumption that the violation in Citation 1 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, the employer must demonstrate both:

> (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.

The Board has long held that hazardous conditions in plain view constitute Serious violations since the employer could detect them by exercising reasonable diligence. (*Fibreboard Box & Millwork Corp*., Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991); *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).) Here, the hazards to employees' feet were in plain view. Employer observed employees each day, and deemed them sufficiently protected from foot injury if they wore work boots. Employer determined that it was not necessary to require protective footwear despite the readily visible hazards presented by elevated objects and heavy equipment such as forklifts. Employer here thus cannot be said to have taken all reasonable steps to anticipate and prevent, or eliminate, employee exposure to the hazard.

Employer argues that because Isidoro's actions in walking on the ramps were not authorized, and were a violation of Employer's safety rules, Employer could not anticipate the hazard through the exercise of reasonable diligence. Again, this misapprehends the standard. The Division's evidence demonstrated actual exposure to the hazards, as well as reasonably predictable access to the hazards, of falling objects and industrial trucks. These hazards were in plain view and were thus known, or could have been known through the exercise of reasonable diligence, to employer.

Employer failed to rebut the presumption that the violation was properly classified as Serious.

4. Did Employer's failure to provide appropriate foot protection for employees exposed to foot injuries from falling objects and crushing or penetrating actions cause a serious injury?

The Board requires a showing of a "causal nexus between the violation and the serious injury" to sustain an Accident-Related characterization. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) However, the Division need not show that the violation was the only cause of the injury. (*Id*.)

The ALJ concluded that the Division established a nexus between the violation and injury, inferring that appropriate foot protection, as contemplated by the ASTM standards, could have prevented the injuries, or the extent of the injuries, suffered by Isidoro. The record indicates it is more likely than not that the lack of protective footwear contributed to Isidoro's injuries, or the severity of his injuries.

Therefore, the Accident-Related characterization is established.

DECISION

For the reasons stated, the Board affirms the ALJ's Decision.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 04/25/2022