

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

In the Matter of the Appeal of:

**INTERLINE BRANDS, INC.  
2455 Paces Ferry Road  
Atlanta, GA 30339**

**Employer**

Inspection No.  
**1251604**

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (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**

Interline Brands, Inc. (Employer) is a company supplying maintenance products and specialty equipment to commercial and multi-family residential customers. On August 1, 2017, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Lex Eaton (Eaton), opened an accident inspection at a workplace maintained by Employer at 1110 East Mill Street, San Bernardino.

On December 12, 2017, the Division cited Employer with four alleged violations of title 8 health and safety standards. Citation 1, Item 1, alleges a General violation of section 3380, subdivision (f)(1)(A). Citation 1, Item 2, is an alleged General violation of section 3668, subdivision (f). Citation 2 is an alleged Serious violation of section 3385, subdivision (a), and Citation 3 is an alleged Serious violation of section 3650, subdivision (t)(30).

The matter was heard by Howard Chernin, Administrative Law Judge (ALJ) for the Board, in Riverside, and West Covina, California on May 31, August 23, and August 24, 2018. Clara Hill-Williams, Staff Counsel, represented the Division. Matthew Deffebach, and Mini Kapoor, attorneys with Haynes and Boone, LLP, represented Employer. On July 1, 2019, the ALJ issued a Decision affirming Citation 1, Items 1 and 2, and Citation 3, and vacating Citation 2.

The Division timely filed a Petition for Reconsideration of the ALJ's Decision on February 14, 2019, and the Employer filed a timely response. The Board took the ALJ's decision under reconsideration. Issues not raised in the Petition for Reconsideration are deemed waived. (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 the ALJ commit error in rescinding the previous ALJ's order granting the Division's motion to amend?
2. Did the ALJ err by finding that the Division failed to establish employee exposure to foot hazards?
3. Assuming a violation exists, is the citation properly classified as serious?

## **FINDINGS OF FACT**

1. Approximately 100 employees work at Employer's facility.
2. About half of the facility's employees operate industrial trucks. These industrial truck operators are also referred to as "pickers".
3. The facility handles approximately 3000 orders per day.
4. Employer uses totes, or stackable containers, to hold and move items that are picked by the industrial truck operators.
5. The average load in a single tote is about 15 to 20 pounds, and industrial truck operators typically carry about 10 totes on their vehicle at a time. Pickers may also need to move heavier, bulky, or odd shaped products, that may weigh up to 60 pounds.
6. After the picker has gathered all of their items, they must dismount the industrial truck and place the totes on a conveyor, where they are then packed and readied for shipping by other employees.
7. Employees who do not operate industrial trucks work in areas protected from contact between workers and trucks by guard rails, bollards, and other barriers. These workers are protected from exposure to the hazard of foot injuries.
8. Employees at Employer's facility were not required to wear safety shoes.

## **DISCUSSION**

1. Did the ALJ commit an error in rescinding the previous ALJ's order granting the Division's motion to amend?

Prior to hearing, on March 13, 2018, the Division filed a motion to amend the Employer's name from "Interline Brands, Inc." to "Home Depot USA, Inc., Interline Brands Inc." On April 10, the ALJ assigned to the matter at that time, Rheeah Avelar (Avelar), issued an order granting the Division's motion. Because of an issue with OASIS<sup>1</sup>, ALJ Avelar did not receive the Employer's objection to the motion. OASIS also failed to properly serve the parties with the ALJ's order, meaning that both parties were unaware of the status of the Division's request to amend until the hearing.

The case was subsequently reassigned to ALJ Chernin. On May 31, 2018, ALJ Chernin held the first full day of hearing in the matter, and granted oral argument regarding the Division's request to amend the Employer's name. ALJ Chernin concluded that the prior order had been

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<sup>1</sup> OASIS is the Board's online scheduling and document filing portal.

issued in error, and on June 5, 2018, issued a new order, denying the Division's request to amend the name. ALJ Chernin's order concluded that Interline Brands, Inc. is a wholly owned subsidiary of Home Depot, and operates as a legally separate entity conducting business independent of its corporate parent. The Division's petition does not explain how the ALJ's conclusion on this point is in error. The Board will not consider a party's argument that is unsupported by authority. (*People ex re. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 873; Labor Code section 6616 and 6618.)

In its petition for reconsideration, the Division also argues ALJ Chernin did not have authority to reconsider ALJ Avelar's order, but fails to provide any authority to support its position that the ALJ erred in his action. Section 350.1 of the Board's rules of practice and procedure provide Board ALJs with extensive authority. That section grants the ALJ full power, jurisdiction, and authority to:

hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter, or take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, status conference, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act. Final orders, findings, and decisions issued by an Administrative Law Judge shall be the orders, findings, and decisions of the Appeals Board unless reconsideration is granted.

The Division argues that ALJ Avelar's order was final. However,

"A judgment is final 'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.' [Citation.]" (David v. Goodman (1948) [89 Cal. App. 2d 162](#), 165-166 [200 P.2d 568].) "In determining whether a judgment is final or merely interlocutory the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties the judgment is interlocutory only; but where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, the decree is final. [Citation.] This general test must be adapted to the particular circumstances of the individual case. [Citation.]" (Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) [65 Cal. App. 3d 121](#), 129 [135 Cal. Rptr. 192].)

(*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.)

ALJ Avelar's order regarding the amendment was not final, as the term has been understood by the Board. (See, *FedEx Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014).) The Supreme Court of California recognizes the ability of courts to correct an

erroneous prior interim order. (*Le Francois v. Goel* (Jun. 9, 2005) 35 Cal. 4th 1094, 1108.) The Board finds ALJ Chernin’s order to be an appropriate correction of the earlier, erroneous order. Employer Interline Brands, Inc., is the properly cited entity.

2. Did the ALJ err by finding that the Division failed to establish employee exposure to foot hazards?

Citation 2, Item 1 alleges a violation of section 3385, subdivision (a), which requires:

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.

The alleged violative description states:

Prior to and during the course of the investigation, including, but not limited to August 1, 2017, the employer failed to provide the required appropriate foot protection including, but not limited to steel toe shoes for employees who are exposed to foot injuries including, but not limited to falling objects and/or crushing action from working in the zone of danger of industrial trucks.

In order to establish a violation, the Division must show both that appropriate foot protection was not required by the employer, and that employees were exposed to the hazard of foot injuries. There is no dispute in the record regarding the first element; Employer’s employees were not provided with foot protection and wore sneakers and other casual shoes to work at the facility. The Division also has the burden of demonstrating employee exposure to the hazard that the safety regulation attempts to correct—here, the Division’s burden is to establish employee exposure to foot injuries from “falling objects, crushing or penetrating actions.” (Section 3385; *Home Depot USA Inc. dba Home Depot #6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (Jul. 24, 2017).) The only issue for the Board is whether exposure to foot injuries existed in Employer’s facility.

Exposure may be shown either by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition, or by demonstrating 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. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

The Decision of the ALJ concludes that the Division “offered little credible evidence to establish employee exposure to foot hazards resulting from interaction between pedestrians and powered industrial trucks.” (Decision, p. 11.) It also concludes that the Employer “offered substantial evidence that it effectively eliminates employee exposure to foot hazards through training and other administrative and engineering controls[,]” and dismisses the citation. (*Id.*)

The Board disagrees with the ALJ's assessment on the matter of exposure. While Employer has instituted a number of engineering controls, as well as administrative controls, such as clearly-marked walking paths, aisles for industrial truck traffic, barriers, and rules for both drivers and pedestrians, those measures do not eliminate all exposure to foot hazards. The ALJ's analysis fails entirely to consider ample evidence in the record regarding industrial truck operators' lifting of goods and containers, both placing them onto trucks, as well as unloading items onto conveyors for shipment. When lifting and moving goods, employees are exposed to the hazard of dropping the load on a foot, which may cause injury. Industrial truck drivers must leave their vehicles to unload and load product, also exposing them to the hazard of a foot injury from dropped items.

Moreover, while many employees in the workplace may be completely outside the zone of danger created by industrial trucks coming into close proximity with workers and their feet, those controls have not completely eliminated the danger for every employee. Despite Employer's efforts, not all employees have been excluded from the zone of danger created by industrial trucks or by the hazards of lifting and moving items that can be dropped onto a workers' feet. These exposed employees are not provided with foot protection, as required by the safety standard.

About 100 employees work at Employer's facility, according to Gamino, Employer's assistant operations manager. (TR 370:19-23.) About half of those employees work as industrial truck operators. (TR 371:2-6.) The facility handles approximately 3000 orders per day. Employees pick items for individual orders, and put each order in its own plastic stackable tote. (TR 145:14-25.) These are generally small items that go into an individual order. A worker may have about 10 totes on their industrial truck, which they then drop off at shipping, where the order is then packed for UPS and other carriers. (TR 146:1-15.)

Gamino agreed that after picking items, the industrial truck operators get out of their vehicles to place cartons on the conveyor, but his testimony does not establish the frequency of the loading and unloading. (TR 404:18-22.) Eaton testified that most of the items were probably picked up by hand. (TR: 265:2-8.) Employee Daniel Zuno also testified that his job as a picker requires manually picking up orders and placing them in the totes on the industrial truck. (TR 145:14-23). Zuno also explained that once all of the items have been picked, the industrial truck driver has to drop the items off at shipping, by removing each tote from the industrial truck. (TR 146:7-13.) According to Gamino, the average load in a tote is about 15 to 20 pounds, although pickers may need to move heavier, bulky, or odd shaped products, and utilizes team lift procedures for those less usual situations. (TR 376:1-4, 406:3-20.) For instance, Eaton testified that the bifold doors that may be loaded can weigh 60 pounds. (TR: 358:11-15.) These facts demonstrate actual employee exposure to the hazard of foot injuries caused by falling objects, should a stack of totes fall over, or an employee accidentally drop the tote or the goods being placed in the tote.

Employer has a program of administrative and engineering controls to minimize employee interactions with the industrial trucks that operate throughout the facility, including rules that govern operation of the industrial trucks, such as honking when driving, stopping for pedestrians, signage that instructs drivers of stopping, demarcation of certain aisles as being only for industrial trucks, and barriers. Nonetheless, there are areas, such as the main aisle, where employees and industrial trucks come into close proximity, particularly during breaks and lunch. Eaton testified that "in my short time there, I saw probably ten people that were in close proximity to a powered industrial truck that was in operation," meaning that employees, despite Employer's efforts, were

exposed to foot injuries from crushing by an industrial truck. (TR: 288:3-7.) Additionally, the industrial truck operators themselves come into the zone of danger created by their vehicles, whenever they mount or dismount to pick up or drop off items. While Employer may be unaware of any such foot injuries having occurred in its facility, as the Board explained in *Home Depot USA, Inc.*, Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017),

"A violation of the safety order is not based on previous history of accidents or injuries resulting from the exposure but rather on the existence of the danger which may cause injury." (*General Electric Company, Vertical Motor Plant*, Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29, 1984), citing *General Motors Corporation*, OSHAB 77-573, Decision After Reconsideration (Aug. 9, 1978); see also *Zero Corporation*, Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984)--"The fact that injuries have not occurred in the past cannot be used to defeat a violation which has been proven; it is relevant only to the determination of a proper civil penalty if one is to be proposed.")

The Board acknowledges the strong safety program that Employer has created; its concern lies only with the gaps in that program that have been shown to exist. The Board stated in *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017), that regardless of an employer's "extensive program of engineering and administrative controls, ultimately, the program cannot protect employees who must physically lift heavy objects from the risk of foot injuries that may occur if a heavy object is accidentally dropped." Such is the situation here. The Board has upheld a finding of employee exposure in instances where employees are lifting items that weighed as little as ten pounds. (*Zero Corporation*, Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984).) Unrebutted evidence establishes that employees may daily be required to lift and handle a variety of items, some of which may weigh 60 pounds or more. These industrial truck operators must necessarily enter the zone of danger created by the industrial truck whenever they must dismount the vehicle to pick up or unload items from the industrial truck. Exposure to a hazard of a foot injury is therefore shown.

While Employer has a program that provides most employees with effective protection from exposure to foot injuries, a number of employees remain exposed to the hazard of foot injuries from loading and unloading items. Employer has failed to provide those employees with required foot protection. The Division has established a violation of section 3385, subdivision (a).

3. Assuming a violation exists, is the citation properly classified as serious?

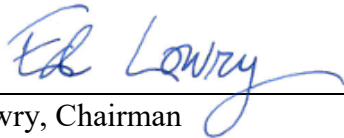
The citation is classified by the Division as serious. Labor Code section 6432, subdivision (a), states, "There shall be a rebuttable presumption that a 'serious violation' exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." The term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (April 24, 2015).)

It is the Division's burden to show that serious physical harm is a "realistic possibility" from the hazard created by the safety violation in question. Here, the Division's brief discussion of the classification of the citation does not provide sufficient information for the Board to find that such a realistic possibility of serious physical harm exists, and the Board declines to uphold the serious classification.

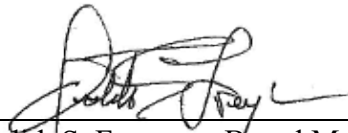
### DECISION

Citation 2 is reinstated, with a General classification and penalty of \$1500, based on medium severity, extent, and likelihood factors.

#### OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chairman



Judith S. Freyman, Board Member



Marvin Kropke, Board Member



FILED ON: **09/17/2020**

**SUMMARY TABLE**  
**OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD**

Inspection Number: **1251604**

In the Matter of the Appeal of: **INTERLINE BRANDS, INC.**

Site address: **1110 EAST MILL STREET, SAN BERNARDINO**

Citation Issuance Date: **12/13/2017**

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	3380 (f) (1)(A)	G	Affirmed by ALJ as set forth in Decision	A		\$850.00	<b>\$850.00</b>
1	2	3668 (f)	G	Affirmed by ALJ as set forth in Decision	A		\$850.00	<b>\$850.00</b>
2	1	3385 (a)	G	Affirmed by Board as set forth in Decision after Reconsideration	A		\$15,300.00	<b>\$1,500.00</b>
3	1	3650 (t) (30)	S	Affirmed by ALJ as set forth in Decision	A		\$18,000.00	<b>\$18,000.00</b>
<b>Sub-Total</b>							\$35,000.00	<b>\$21,200.00</b>
<b>Total Amount Due**</b>								<b>\$21,200.00</b>

\*See Abbreviation Key

\*\*You may owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call 415-703-4310 or email [accountingcalosha@dir.ca.gov](mailto:accountingcalosha@dir.ca.gov) if you have any questions.



**SUMMARY TABLE**  
**OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD**

Inspection Number: **1251604**  
 In the Matter of the Appeal of: **INTERLINE BRANDS, INC.**  
 Site address: **1110 EAST MILL STREET, SAN BERNARDINO**  
 Citation Issuance Date: **12/13/2017**

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**PENALTY PAYMENT INFORMATION**

Please make your cashier's check, money order, or company check payable to: **Department of Industrial Relations**  
 Write the **Inspection Number** on your payment.

If sending via US Mail:  
 CAL-OSHA Penalties  
 PO Box 516547  
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:  
 US Bank Wholesale Lockbox  
 c/o 516547 CAL-OSHA Penalties  
 16420 Valley View Ave.  
 La Mirada, CA 90638-5821

Credit card payments can also be made on-line at [www.dir.ca.gov/dosh/calosha\\_paymentoption.html](http://www.dir.ca.gov/dosh/calosha_paymentoption.html)

**DO NOT** send payments to the California Occupational Safety and Health Appeals Board.

\*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
<b>FTA</b>	Failure to Abate	<b>RR</b>	Repeat Regulatory	<b>WR</b>	Willful Regulatory
<b>G</b>	General	<b>RS</b>	Repeat Serious	<b>WRG</b>	Willful Repeat General
<b>IM</b>	Information Memorandum	<b>S</b>	Serious	<b>WRR</b>	Willful Repeat Regulatory
<b>NL</b>	Notice in Lieu of Citation	<b>SA</b>	Special Action	<b>WRS</b>	Willful Repeat Serious
<b>R</b>	Regulatory	<b>SO</b>	Special Order	<b>WS</b>	Willful Serious
<b>RG</b>	Repeat General	<b>WG</b>	Willful General		