BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
INTERLINE BRANDS, INC. **2455 PACES FERRY ROAD** **ATLANTA, GA 30339**	**1436480**
Employer	**DECISION**

Statement of the Case

Interline Brands, Inc. (Employer), is a wholesale distributor of maintenance and repair supplies. On October 8, 2019, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Robert Salgado (Salgado), commenced an investigation of Employer's warehouse located at 1110 E. Mill Street in San Bernardino, California (the job site), in response to an injury report. Associate Safety Engineer Brent Evins (Evins) subsequently took over the investigation.

On March 24, 2020, the Division issued one citation to Employer, alleging a failure to require appropriate foot protection for employees exposed to foot injuries. Employer timely appealed the citation, contesting the existence of the violation, the classification of the violation, the abatement requirements, and the reasonableness of the proposed penalty. Additionally, Employer asserted various affirmative defenses.[1]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on September 8, 2020, January 15, 2021, September 22 to 24, 2021, and October 6, 2021, with the parties appearing remotely via the Zoom video platform. Matthew Deffebach, Attorney, of Haynes & Boone, LLP, represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. The matter was submitted on August 30, 2022.

[1] Except as otherwise noted, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer require appropriate foot protection for employees exposed to foot injuries from crushing actions?

2. Did Employer establish the Independent Employee Action Defense?

3. Did Employer establish the *Newbery* defense?

4. Did the violation create a realistic possibility of serious physical harm?

5. Did Employer know of the presence of the violation?

6. Was the violation a cause of the serious injury?

7. Are the abatement requirements unreasonable?

8. Was the proposed penalty reasonable?

Findings of Fact

1. On September 24, 2019, John Osborn (Osborn) was operating an electric pallet jack. He parked the electric pallet jack in the battery charging area. As Osborn stepped down, the electric pallet jack lurched forward and ran over his foot.

2. Osborn was not wearing foot protection at the time of the accident.

3. Osborn was hospitalized for more than 24 hours. He received pain medication and underwent surgery while hospitalized. Approximately half of his foot was amputated.

4. Employer did not require employees to wear foot protection. Employer did not provide foot protection to employees.

5. Employer has an electric pallet jack training and certification program for employees. Employer trained and certified Osborn to operate an electric pallet jack.

6. Osborn had been operating an electric pallet jack for approximately one month prior to the accident.

7. Employer requires employees to perform a safety check prior to operating an electric pallet jack. Employees must complete and turn in a written checklist form.

8. Osborn did not complete the safety checklist prior to operating the electric pallet jack on the day of the accident.

9. Employer expects isolated incidents of safety rules violations.

10. Employer's Regional Asset Protection Manager Sergio Henriquez was aware of an operator jumping off of an electric pallet in a moment of panic prior to Osborn's accident.

11. Employer did not sanction Osborn for violation of any safety rules.

12. Employer does not enforce sanctions for safety rules violations related to foot injuries.

13. Completing the safety checklist would not have prevented Osborn's accident.

14. Appropriate foot protection would have prevented Osborn's injury or mitigated the extent of his injury.

15. Employer does not restrict electric pallet jacks to operation in battery charging areas. Operators drive electric pallet jacks throughout the warehouse.

16. The Division calculated the proposed penalty in accordance with the penalty-setting regulations.

Analysis

1. Did Employer require appropriate foot protection for employees exposed to foot injuries from crushing actions?

California Code of Regulations, title 8, section 3385, subdivision (a),[2] 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.

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

Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation, including, but not limited to September 24, 2019, the employer failed to require and provide appropriate foot protection for employees exposed to foot crushing injuries. As a result, an employee's toes were amputated when the Electric Pallet Jack he was operating ran over and crushed his toes.

To prove a violation of section 3385, subdivision (a), the Division must establish that (1) employees were exposed to foot injuries from conditions such as crushing or penetrating actions, and (2) the employer failed to require or provide appropriate foot protection. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).) The Division holds the burden of proving this violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).)

A. Employee exposure to foot injuries from crushing actions

Employer contends that employees were not exposed to foot injuries. In particular, Employer argues that the Division did not establish the zone of danger and that Employer's engineering and administrative controls eliminate employee exposure to foot injuries.

The Division may establish the element of employee exposure in two ways. First, the Division may demonstrate that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) Second, the Division may establish the element of employee exposure to the violative condition by showing employee access to the zone of danger based on evidence of reasonable predictability that employees 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. (*Ibid.*) 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. (*Ibid.*)

Here, the job site is a wholesale distribution warehouse for maintenance and repair supplies. The warehouse is 314,000 square feet. It contains 60 rows of storage racks on which supplies are stored.

Osborn was employed as a "Picker," which involves collecting items from storage racks in order to fulfill customer orders. Pickers use powered industrial trucks (PIT's) to traverse the warehouse and transport collected items. Different items require the use of different PIT's.

Employer's PIT's include forklifts, electric pallet jacks, and "cherry-pickers" (also known as stock pickers or order pickers).

Employer requires employees to perform a safety check prior to operating a PIT. The safety check includes filling out a written checklist, which employees submit when they finish operating the PIT.

Osborn testified that he was operating an electric pallet jack (EPJ) on the day of the accident. He was not wearing foot protection. He did not complete the safety checklist prior to operating the EPJ. He drove the EPJ to a battery charging area so that he could park it and take a lunch break. He parked the EPJ and stepped to the ground. The EPJ lurched forward, running over his foot. Osborn's foot went numb immediately.

The EPJ used by Osborn had a documented history of not slowing or stopping properly. The slowing or stopping function is known as "plugging." Three months before Osborn's incident a review found: "EPJ plugging not responding when unit is in travel and needs to be slowed down." (Exhibit H, p. 6.) The EPJ was serviced and returned to operation. Sergio Henriquez (Henriquez), Regional Asset Protection Manager, testified that the manufacturer of the EPJ inspected the vehicle after Osborn's accident. No problems were found with the EPJ.

Osborn testified that a co-worker drove him to a hospital. He received pain medication and was transferred by ambulance to a different hospital, where he underwent surgery the following day. (Exhibit SS.) Osborn further testified that metal rods were inserted in his foot to see if his toes and skin would heal. The treatment was not successful, resulting in the need to amputate half of his foot.

In the present matter, Osborn suffered a foot injury from the tire of the EPJ. The tire of the EPJ presented a crushing action to Osborn's foot. The violative condition is that Employer did not require Osborn to wear foot protection despite exposure to foot injuries from crushing actions. Osborn was actually exposed to the hazard created by the violative condition. Thus, the element of employee exposure is established.

B. Appropriate foot protection

The Appeals Board has established a burden-shifting framework for analyzing whether foot protection is "appropriate" under section 3385.

When the Division demonstrates that employees were exposed to the foot injuries addressed by section 3385, subdivision (a), then a presumption is created that footwear meeting the specifications and standards referenced in section 3385, subdivision (c), constitutes

"appropriate" foot protection. (*Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (Apr. 14, 2021).) Section 3385, subdivision (c), incorporates the foot protection 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.

The burden then shifts to the employer to rebut the ASTM standard by showing that footwear meeting the ASTM standard would provide no protection or would be inappropriate. If an employer fails to successfully rebut application of the ASTM standard, then the presumption controls and "appropriate" foot protection means footwear meeting the ASTM standard. However, if an employer successfully rebuts application of the ASTM standard, then the Division must show that Employer's foot protection is not appropriate, separate and apart from consideration and application of the ASTM standard. (*Ibid.*)

Here, the evidence shows that Osborn was exposed to a foot injury from a crushing action. This establishes the presumption that footwear meeting the ASTM standard is "appropriate," and shifts the burden to Employer to show that footwear meeting the ASTM standard would provide no protection at all or would be otherwise inappropriate.

Employer does not dispute that it did not provide Osborn with, or require him to wear, foot protection. Additionally, Employer did not introduce evidence that footwear meeting the ASTM standard would provide no protection at all.

Rather, Employer argues that safety shoes have their own downsides and hazards. Employer's expert witness, Dominick Zackeo (Zackeo), testified that "steel-toed boots or safety shoes" can be uncomfortable, less supportive, heavier, and hotter than other shoes. Zackeo further testified that such shoes can give a false sense of security and lead employees to put "themselves in a dangerous situation more frequently, feeling that personal protective equipment will protect them." Employer introduced evidence that safety shoes can lead to ankle, toe, and knee fatigue; ingrown toenails; strained backs, shoulders, and arms.

The Appeals Board has previously rejected similar arguments in other foot protection cases. (*See, e.g.*, *Golden State FC, LLC*, *supra*, Cal/OSHA App. 1310525.) The Appeals 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.*)

In sum, Employer did not provide or require foot protection meeting the ASTM standard, and did not establish that footwear meeting the ASTM standard would provide no protection or be inappropriate. This establishes the second element of a violation of section 3385.

The Division proved both elements of a violation of section 3385. Accordingly, Employer violated the safety order.

2. Did Employer establish the Independent Employee Action Defense?

Employer raises the Independent Employee Action Defense (IEAD) to the violation. The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

A. Osborn's experience in the job being performed

The first element requires a showing that the employee was experienced in the job being performed. (*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 15-0828, Decision After Reconsideration (May 15, 2017).)

Employer argues Osborn was experienced in the job being performed because he had been performing the job for six to seven months. However, with respect to other elements of its appeal, Employer introduced evidence and argument that Osborn was not authorized to operate an EPJ because Employer had not certified him to operate an EPJ. Specifically, Henriquez testified that Osborn was not fully trained to operate an EPJ. Additionally, Operations Maintenance Manager Luis Gamino (Gamino) testified that Osborn had finished the classroom component of the EPJ training, but had not completed the full certification process. Gamino further testified that Osborn should not have received EPJ assignments and was not authorized to operate an EPJ in any manner. This evidence suggests that Osborn was not experienced in the job being performed.

Osborn testified that Employer hired him approximately seven months before the accident. He had not operated PIT's of any type in his previous employments. With Employer, Osborn originally operated a cherry-picker. He started using an EPJ approximately one month

before the accident. Osborn further testified that he was trained and certified by Employer to operate EPJ's. He explained the EPJ training process in detail and compared it to the cherry-picker training process. Osborn also explained the process of receiving assignments for EPJ's and cherry-pickers.

Evins testified that Employer provided EPJ certification documents for Osborn, and that Employer would have been cited for a separate violation if Osborn had been operating an EPJ without certification. Osborn's safety training documentation contains records for EPJ's and for cherry-pickers. (Exhibit D.) The EPJ document refers to a trainer observing and evaluating a trainee, rather than classroom or written training. It states: "Instructions: Use this checklist during the field session to evaluate operator proficiency." It identifies various actions and behaviors to observe and rate, such as "look for damage," "look over both shoulders," and more. The form is signed at the bottom and states: "Based on my evaluation, the operator has successfully completed the evaluation and is qualified to operate the following equipment: Electric Pallet Jack."

The weight of the evidence indicates Osborn was trained and authorized to operate an EPJ. The training records receive the most weight because they are a contemporaneous record. Additionally, although all of the witnesses are credited with testifying honestly on this issue, the testimony of Osborn and Evins is more consistent with the evidence overall. Notably, the testimony of Henriquez and Gamino is not substantiated by contemporaneous records. For example, there is no investigation report that states a cause of the incident was that Osborn operated equipment for which he lacked certification. Additionally, Employer's emails regarding the incident do not indicate Osborn lacked certification or authorization to operate an EPJ. Nor do the emails suggest that Employer was surprised to learn that Osborn operated an EPJ. (Exhibit SS.)

Accordingly, it is found that Osborn's training and experience with EPJ's was sufficient for him to safely complete the tasks involved here, namely, driving and parking the EPJ.

B. Employer's safety program

The second element requires the employer to demonstrate that it has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Synergy Tree Trimming*, supra, Cal/OSHA App. 15-0828.)

Employer provided evidence of an extensive safety program: classroom training, field evaluations, mobile supervisor stations, traffic lanes, speed limits, signs, lights, alarms, barricades, and more. Employer's safety program relies on engineering and administrative controls to justify the absence of foot protection.

However, Employer's engineering and administrative controls do not eliminate employee exposure to foot injuries. As with Osborn's accident, PIT's can malfunction. Additionally, Employer acknowledged at hearing that employees sometimes panic and do not follow the training on which Employer's program relies. Employer's Environmental Health and Safety Manager David Bell (Bell) testified that instincts and human reactions cause employees to go against training and policies:

> One challenge for every safety professional is as long as you are employing human beings, despite all of the training, the policies, procedures, leadership, the oversight, people still violate policy, and they go against their training, and they have human reactions. You know, that's kind of the -- the Holy Grail, I guess, of getting there, when you can prevent somebody from having an instinctive reaction, jumping off, or putting their foot out or their hand out when they see they're going to hit something. That is extremely difficult to do.

(Tr.: 432:16-433:1.) Bell further testified that there will be "isolated incidents" because humans react "poorly":

> There's going to be isolated incidents. Humans are going to react poorly from time to time, but all in all, we have -- we believe we have an excellent, world class safety program. So if we -- if we began to see we are -- a lot of foot injuries, we would have addressed that with just as much passion. It's not that we don't care about people's toes or that we don't care about -- or we want to avoid dealing with safety shoes. We're just going to use the scientific, well-managed approach to hit things, kind of a Pareto effect. Go after the 80 percent -- the 80 percent that's doing most of -- providing most of the risk.

(Tr.: 433:10-21.)

In particular, Employer is aware of the exposure presented by EPJ's. Henriquez testified that he is aware of situations in which an operator jumped off an EPJ in a moment of panic:

> So when I heard that [Osborn] had mentioned that he jumped off, that made sense, with my experience with the EPJ and the foot injury, and that's what took place.

(Tr.: 499:10-13.) Henriquez reiterated:

> No, what I said, based on what Mr. Osborn said, and in my experience what I've seen, it made more sense that he jumped off the equipment versus the equipment jumping forward and catching his foot.

(Tr.: 502:21-24.)

Moreover, testimony from Zackeo, Employer's expert witness, does not meet Employer's burden with respect to this element of the IEAD. Zackeo and his team audited the job site in 2018 and 2020. Zackeo opined that foot protection is not necessary at the job site. He based his opinion on the fact that he and his team did not observe exposures to foot injuries. For example, he repeatedly testified: "There were no exposures noted or observed"; "No foot hazards were reported or observed"; "Still no foot hazards were reported"; "And we did not observe any foot hazards." Although this testimony regarding observations is credited, Zackeo's opinion drawn from the observations is not accepted. The observations concern limited periods of time. They do not establish that exposures did not occur outside the periods of observation or outside the places of observation. Zackeo's testimony does not outweigh the testimony of Bell and Henriquez, which shows that Employer expects isolated incidents and has knowledge of employees jumping off of EPJ's.

For these reasons, Employer understood its program did not eliminate employee exposure to foot injuries. Yet Employer did not provide foot protection pursuant to the safety order. Accordingly, Employer's safety program is not "well-devised" such that it justifies relieving Employer of responsibility for the cited violation.

C. Employer's enforcement of its safety program

Employer provided substantial evidence that it enforces its safety program. Employer introduced classroom training records and field assessments. It introduced photographs of barricades, traffic lanes, alarms, mirrors, mobile supervisor stations, and more. Employer introduced evidence of its reward program for employees who work safely. Accordingly, Employer enforces its safety program.

D. Employer's policy of sanctions for violations of its safety program

Employers may show compliance with this element through producing records of disciplinary actions related to safety. (*Synergy Tree Trimming*, supra, Cal/OSHA App. 15-0828.)

Gamino testified that Employer has policies and procedures for sanctioning employees who violate its safety policies. However, Employer did not sanction Osborn. According to

Gamino, Osborn returned to work for a short and inconsistent period, which prevented Employer from convening its safety committee and performing an investigation.

With respect to other incidents, Employer did not introduce evidence of sanctions to other employees. This is significant because other injuries and rules violations were discussed in detail during the hearing. Gamino testified that employee David Acosta suffered a crushed or broken ankle when he "violated a couple of safety processes, which led to him and his injury." Another employee, Jose Romero, suffered crushed toes. (Exhibit J.) Zackeo testified: "Romero failed to do a team lift and lifted an appliance, a returned appliance, and dropped it on his big toe."

Gamino's testimony of a policy to sanction employees does not outweigh the lack of sanctions against Osborn combined with the absence of evidence of other sanctions. Accordingly, Employer did not meet its burden on this element of the IEAD.

E. Did Osborn cause a safety infraction that he knew was contra to safety requirements?

Osborn acknowledged that he did not complete a required safety checklist prior to using the EPJ. Although Osborn committed a safety infraction, Employer did not demonstrate a connection between the infraction and the cited violation. In particular, there is no reason to conclude that completing the safety checklist would have prevented Osborn's accident. For example, Employer did not show that the checklist would reveal a problem with the PIT's capacity for slowing, stopping, or lurching. Accordingly, Osborn's safety infraction does not relieve Employer of responsibility for the cited violation.

In sum, Employer did not establish the IEAD.

3. Did Employer establish the *Newbery* defense?

Employer also asserts the *Newbery* defense. The *Newbery* defense is as follows: A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:

(1) the employer knew or should have known of the potential danger to employees;
(2) the employer failed to exercise supervision adequate to assure safety;
(3) the employer failed to ensure employee compliance with its safety rules; and
(4) the violation was foreseeable.

(*Bellingham Marine Industries, Inc.*, Cal/OSHA 12-3144 Decision After Reconsideration (Oct. 16, 2014).)

A. Employer's knowledge of the potential danger to employees

As discussed above, at least two other foot injuries occurred at the work site (Acosta and Romero) involving employees without foot protection. Employer also had incidents at its facility in Mira Loma, California. As Henriquez and Bell testified, Employer had experience with employees jumping off of EPJ's, and Employer expected "isolated incidents." Accordingly, Employer knew of the potential danger to employees.

B. The adequacy of Employer's supervision to assure safety

Employer provided evidence of classroom training, field evaluations, safety checklists, mobile supervisor stations, a safety committee with both management and non-management employees, and more. Thus, Employer's supervision is extensive. Although such supervision can assure safety in some regards, it does not assure safety with respect to the types of foot injuries addressed by the cited safety order because an accident can happen at any moment due to human reactions or vehicle malfunctions. In fact, Employer expects "isolated incidents." Accordingly, supervision is not adequate to assure safety from the foot injuries at issue here.

C. Did Employer ensure employee compliance with its safety rules?

Employer introduced evidence regarding classroom training, field evaluations, safety checklists, mobile supervisor stations, traffic regulation, rewards programs, and more. Although Osborn testified that safety rules are not always followed (e.g., EPJ's parked in spaces designated for cherry-pickers, and vice versa), his testimony was not corroborated by other evidence. Additionally, it was not established that Employer knew or should have known of the violations referenced by Osborn. Accordingly, Employer met its burden to show it ensured compliance with its safety rules.

D. The foreseeability of the violation

As discussed above, Employer had prior experience with employees jumping off of EPJ's. Additionally, Employer expected "isolated incidents" of employees not following training and policies. Yet Employer did not provide foot protection. Accordingly, the violation was foreseeable.

In sum, Employer did not establish the *Newbery* defense.

4. Did the violation create a realistic possibility of serious physical harm?

The Division classified the citation as a "serious violation." Labor Code section 6432, subdivision (a), defines a serious violation as follows:

> 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.

"Serious physical harm," as used in subdivision (a), is defined as any 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).)

Here, Osborn was hospitalized for several days while he underwent surgery and recovered. Ultimately, half of his foot was amputated. Thus, serious physical harm resulted from the violation. Accordingly, the Division established the rebuttable presumption that the citation was properly classified as a serious violation.

5. Did Employer know of the presence of the violation?

An employer may rebut the presumption that a violation is serious. Labor Code section 6432, subdivision (c), provides:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:

> (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).
>
> (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 reference to subdivision (b), of Labor Code section 6432, incorporates the following factors: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

As discussed above, Employer expected "isolated incidents" of employees not following training and policies. Employer had experience with employees jumping off of EPJ's. Indeed, Employer had actual foot injuries at the work site and at its facility in Mira Loma, California. Despite its expectation and experience, Employer did not provide foot protection. Thus, Employer did not take 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. Accordingly, Employer did not rebut the presumption that the violation is a serious violation.

6. Was the violation a cause of the serious injury?

In order to establish that the citation was properly classified as Accident-Related, the Division must establish that an employee suffered a "serious injury" and that a causal nexus exists between the violation of the safety order and the employee's serious injury. (*United Parcel Service, supra*, Cal/OSHA App. 1158285.)

A. Serious injury

At the time of Osborn's accident, a "serious injury" was defined as any injury or illness occurring in a place of employment that results in:

(1) inpatient hospitalization for a period in excess of 24 hours for other than medical observation;
(2) the loss of any member of the body; or
(3) any serious degree of permanent disfigurement.

(§ 330, subd. (h).)

Here, Osborn was hospitalized for several days while he underwent surgery and recovered. Ultimately, half of his foot was amputated. Thus, Osborn suffered a "serious injury" under section 330.

B. Causal nexus

The Division must make a showing that the violation more likely than not was a cause of the injury. The Division need not show that the violation was the only cause of the injury. (*United Parcel Service, supra*, Cal/OSHA App. 1158285.)

Here, the EPJ ran over Osborn's foot. It is inferred that appropriate foot protection, particularly as contemplated by the ASTM standard, would have prevented the injury or mitigated the extent of the injury. (*See United Parcel Service, supra*, Cal/OSHA App. 1158285.) Thus, the Division established a causal nexus between the violation and Osborn's injury. Accordingly, the accident-related classification is upheld.

7. Are the abatement requirements unreasonable?

The Appeals Board does not specify the method of abatement. (*United Parcel Service, supra*, Cal/OSHA App. 1158285.) Employer may select the least burdensome means of meeting the requirements of the cited section. (*Ibid.*)

Employer advances two contentions regarding abatement. First, Employer argues that any abatement should be limited to the area in or adjacent to the warehouse's battery charging station. Second, Employer argues that steel-toed shoes should not be required as a form of abatement.

With respect to the first contention, Employer argues that Evins and Salgado focused their inspection on the warehouse's battery charging area, and, therefore, any abatement should be limited to the battery charging area. However, the exposure to foot injuries was not caused by

the battery charging station. It was caused by the tires of the EPJ coming into proximity with an operator's foot. Moreover, the evidence establishes that operators drive EPJ's throughout the warehouse. Therefore, throughout the warehouse, an EPJ's tires can expose employees to foot injuries from crushing hazards. Accordingly, it is not reasonable to limit abatement to the area in or adjacent to the warehouse's battery charging station.

With respect to the second contention, Employer argues that steel-toed shoes should not be required as abatement because such shoes present downsides and hazards of their own. As discussed above, many styles of footwear are available which meet the ASTM specifications and Employer may choose the means of meeting the requirements of the cited section.

Accordingly, the requirement to provide appropriate foot protection is found reasonable. It is not reasonable to limit abatement to the area in or adjacent to the battery charging station. Footwear meeting ASTM specifications is not unreasonable.

8. Was the proposed penalty 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Here, the Division submitted its Proposed Penalty Worksheet (Exhibit 5) and supporting testimony from Evins. Employer did not present evidence that the calculations were incorrect. Accordingly, the proposed penalty is affirmed.

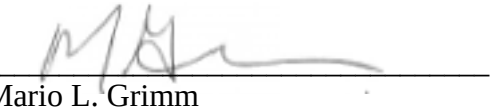
Conclusion

The evidence supports a finding that Employer violated section 3385, subdivision (a), for failure to require appropriate foot protection for employees exposed to foot injuries from crushing actions.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and a penalty of $18,000 is sustained.

It is further ordered that the penalty indicated above and as set forth in the attached Summary Table be assessed.



Dated**:** 09/23/2022

Mario L. Grimm
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.**