BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **GOLDEN STATE FC, LLC** **2021 7th Avenue** **Seattle, WA 98121** **Employer**	Inspection No. **1310525** **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

Golden State FC, LLC, doing business as Amazon Fulfillment Center SJC7, and also known as Amazon.com, (Employer) is an online product sales company.

On April 23, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Mark Valadez, commenced an accident investigation of Employer's work site located at 188 S. Mountain House Parkway in Tracy, California (work site or SJC7). On July 6, 2018, the Division issued one citation for a violation of California Code of Regulations, title 8,[1] section 3385, subdivision (a) [failure to require appropriate foot protection for employees who are exposed to foot injuries from falling objects or crushing or penetrating actions].

Employer timely appealed the Citation. The matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the Board, in Modesto, California, on January 18, 2019, and March 26 and 27, 2019. Jeffrey Youmans and Joseph Hoag, attorneys with Davis Wright Tremaine LLP, and Jennifer Brown, attorney for Amazon, represented Employer. Kathryn Tanner, Staff Counsel, represented the Division. On May 29, 2019, the ALJ issued a Decision affirming the Citation.

Employer timely filed a Petition for Reconsideration of the ALJ's Decision on June 28, 2019, and the Division filed a timely answer. The Board granted Employer's petition. 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.

[1] All section references are to California Code of Regulations, title 8, unless otherwise indicated.

ISSUES

1. Was a violation of section 3385, subdivision (a), established by a preponderance of the evidence by the Division?

2. Shall the Board adopt the Federal Occupational Safety and Health Review Commission (OSHRC) standard for evaluating hazard exposure in the personal protective equipment (PPE) context?

FINDINGS OF FACT

1. The "Archangel area" of the outbound ship dock is involved in the shipment of boxes and has boxes in the area weighing up to 49.9 pounds.

2. Employer has employees in the outbound ship dock 24 hours per day, seven days per week, and the Archangel area has eight employees in the area per day.

3. In the Archangel area, employees move boxes by hand or push them on conveyor belts.

4. Employees in the Archangel area work around boxes at various heights including: boxes on conveyors three feet off the ground; boxes on pallets where the boxes are stacked to heights of up to six feet; walls of boxes in trucks where the boxes are stacked in excess of three feet high; and boxes carried by employees.

5. At the time of inspection, various administrative and engineering controls were not followed in the Archangel area.

6. Employer was aware that boxes fell off the conveyor belts approximately once per quarter.

7. Employer was aware of prior incidents of falling objects injuring employees' feet.

8. During the inspection an employee in the Archangel area was carrying a box.

9. Employer's policy permitted, but did not require or provide, steel- or composite-toed shoes.

10. Employer has between 850 and 1,150 employees at SJC7.

DISCUSSION

1. Was a violation of section 3385, subdivision (a), established by a preponderance of the evidence by the Division?

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, including, but not limited to, April 23, 2018, the employer failed to require appropriate foot protection for their employees that are exposed to foot injuries from falling objects, crushing or penetrating actions.

In *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018), the Board explained that, to establish a violation of section 3385, subdivision (a), the Division must establish by a preponderance of the evidence 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 adequate foot protection. (See also, *MCM Construction*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000); *Home Depot USA, Inc*., Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).) "Preponderance of the evidence" is defined "in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

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

Employee exposure to the hazard of foot injuries may be established in either of two ways. First, the Division may establish exposure by showing that an employee was actually exposed to "the zone of danger created by the violative condition". (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *Dynamic Construction Services, Inc*., Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016); *Home Depot USA, Inc*., *supra*, Cal/OSHA App. 1011071.) Or, the Division may establish exposure by showing that "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*.)

In this case, the ALJ reasoned that the zone of danger for foot injuries is around elevated objects that could fall, or be dropped from a standing position. (Decision, p. 4.) The ALJ first found that employees were actually exposed to the hazard of foot injuries from dropped or falling objects because they carried boxes by hand from the conveyor belt to the pallets and were in the zone of danger while working around conveyor belts, building pallets, and loading trailers. Next, the ALJ found that it was reasonably predictable that employees would be in the zone of danger from dropped or falling boxes.

The evidence demonstrated that there were employees in Archangel around the clock, every day. The employees carried boxes weighing up to 49.9 pounds by hand from rolling spur conveyors to pallets, for a distance of as few as three feet but up to 20 feet, exposing them to the risk of foot injuries from dropping the boxes. Boxes also sometimes, although infrequently, fell

from the conveyors, which were approximately three feet high. Employees manually built the pallets to six feet high, and stacked larger boxes in trailers at heights over three feet. The Board concurs with the ALJ's conclusion that employees were in the zone of danger from dropped or falling objects while carrying boxes, working around conveyor belts, building pallets, and loading trailers. The Board also concurs with the ALJ's conclusions, under the reasonable access standard, that it was reasonably predictable that employees would be in the zone of danger. Employees were therefore exposed to the hazard of foot injuries from dropped or falling boxes.

The Division also presented evidence of two previous incidents in Archangel that resulted in foot injuries from falling boxes. Employee Delbert Haynes (Haynes) testified that, on or about April 4, 2018, a box fell from a pallet he was building and struck his foot with sufficient force to cause an injury that required "icing it down two or three times a day for a couple of weeks." (Exhibit 9; Hearing Transcript, pp. 85-87.) Haynes admitted that he was not following Employer's safety controls for building pallets when the box fell and struck him. (Hearing Transcript, p. 86.) Employer's site Environmental Safety and Health manager, Kendris Cabral (Cabral), testified that Archangel employee Danyell Adams (Adams) dropped a box on her foot on March 4, 2018, causing a "contusion/bruise" to her left foot that necessitated medical work restrictions. (Exhibit 16.)

Employer dismisses these injuries as minor, and asserts that the fact that only two such foot injuries occurred in Archangel over a period of two and a half years demonstrates that employees in that area were not exposed to foot injuries. The Board does not agree with Employer's dismissal of these prior injuries, but concludes that these incidents supplement its conclusion that exposure to foot injuries exists at this worksite when employees work around elevated objects that could fall, or be dropped from a standing position. Further, even if we were assume, arguendo, there were no previous incident, it would not necessarily support a finding in favor of Employer. The Board has rejected past safety history as a defense to a citation, stating, "The fact that injuries have not occurred in the past cannot be used to defeat a violation which has been proven." (*Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901, quoting *Zero Corporation*, Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984).)

To defeat the finding of exposure, Employer argues that the Board has never held that there is a certain weight threshold for objects which in itself is sufficient to establish exposure, and that the ALJ did not sufficiently consider the "nature" of the objects in question. Employer asserts that, due to the weight (under 50 pounds) and nature (packaged in corrugated cardboard boxes) of items handled in Archangel, employees were not exposed to foot injuries from dropped or falling boxes, because the cardboard box distributes the weight of packaged items and provides a protective layer, making the boxes less likely to cause foot injury than unboxed items of the same weight. (Hearing Transcript, p. 498; Petition, p. 20.) Employer asserts that the corrugated cardboard boxes in which items are packed for shipping are an engineering control which provides workers with protection from foot injuries. Employer argues that packing the items in corrugated cardboard boxes alters the nature of the items sufficiently to distinguish them from other cases in which the Board has found that protective footwear was required. Employer asserts that the protective layer and weight distribution provided by the cardboard box makes the difference between being struck by "a brick and a bag of laundry" weighing the same amount. (Petition, p. 19.) However, Employer presented only general testimony in support of this position and offered no specific evidence of the extent to which cardboard boxes rendered foot protection unnecessary.

The Board has long held that where employees must physically lift items in the workplace, exposure may be demonstrated by the nature and weight of the objects carried. (*Home Depot USA*, *supra*, Cal/OSHA 1011071.) The Board has found exposure under section 3385, subdivision (a) when employees lifted concrete blocks weighing 20 pounds (*Truestone Block Inc*., Cal/OSHA App. 82-1280, Decision After Reconsideration (Nov. 27, 1985)), machine castings weighing 40 pounds (*General Electric Co. Vertical Motor Plant*, Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29. 1984)), and buckets of roof coating weighing 40 pounds (*Home Depot #6683*, *supra*, Cal/OSHA 1014901), based on the nature and weight of these items.

The ALJ did not depart from that logic here. The ALJ concluded, and the Board agrees, that the nature and weight of the boxes employees handled in Archangel was sufficient to establish exposure to injuries to unprotected feet from the hazard of dropped or falling objects weighing up to 49.9 pounds. The ALJ also concluded that the cardboard packaging did not sufficiently alter the "nature" of the items to eliminate exposure to the hazard. The Board finds that this was a reasonable inference and will not disturb it. Employer further argues that the Division incorrectly characterized the weight of the boxes coming through Archangel as weighing up to 100 pounds. The ALJ's Decision did not rely on this characterization, however. As the Board pointed out in *Home Depot #6683*, *supra*, Cal/OSHA App. 1014901, "It is a matter of ordinary intelligence that were an employee to drop an item weighing 40 pounds or more on an unprotected foot, even from a relatively small height, it will produce sufficient force to cause some injury from falling or crushing action." The same logic would seem to apply regardless of whether or not that 40-pound item is in a cardboard box.

Finally, Employer argues that establishing exposure requires the Division to demonstrate a "realistic potential for 'serious' injury." (Petition, p. 21.) The ALJ rejected this argument, as do we. The plain language of section 3385, subdivision (a) is silent as to the severity of the foot injuries it addresses. There is no Board precedent that supports Employer's interpretation. Employer relies on *Performance Team Freight Systems*, Cal/OSHA App. 1183505, Decision After Reconsideration (May 1, 2019), in support of its argument. In that decision, however, the Board held only that the Division proved that a potential for serious injury existed in that particular case. The Board has previously held that to prove the existence of a violation of section 3385, subdivision (a), as opposed to the classification of the violation, "it is unnecessary to demonstrate that serious physical harm would result, to a substantial probability, from such an accident." (*Times-Advocate Company*, Cal/OSHA App. 90-1242, Decision After Reconsideration (Dec. 16, 1991).) Employer's argument, if adopted, would render the General classification obsolete. We will not interpret regulations in a fashion that does harm to the regulatory scheme.

In addition to its use of cardboard boxes, Employer argues that its other engineering and administrative controls effectively limited employee exposure to foot injuries from falling objects to a degree that foot protection was not required. We now briefly review these controls.

First, Employer's controls required warning stickers on boxes weighing over 40 pounds. (Hearing Transcript pp. 356, 371; Exhibit C.) Employer's Environmental Safety and Health manager, Cabral, testified that the purpose of the stickers was to "alert our workers" when a box weighed between 40 and 49.9 pounds, so that employees knew before attempting the lift that the box was heavy, and could ask for help in lifting the box if the employee felt assistance was

necessary. (Hearing Transcript, pp. 356-357.) This demonstrates that Employer did consider boxes heavier than 40 pounds sufficiently hazardous to require a warning.[2] Assuming Employer's estimation that only three to four percent of the boxes passing through Archangel weighed over 40 pounds, this still amounts to hundreds of boxes in a given employee's ten hour shift. In addition, Archangel employee Haynes testified that heavy boxes did not always carry these stickers. (Hearing Transcript, p. 91.) There was also confusion, during the hearing, about the weight of the boxes requiring these stickers. Haynes testified that he believed the warning stickers were placed on boxes weighing over 50 pounds, rather than 40 pounds. (*Id*.) Division inspector Valadez testified that he was told by employees in Archangel that the warning sticker was required for boxes over 50 pounds, not 40. (Hearing Transcript, pp. 104, 118, 142, 210.) This evidence indicates that this control was not effectively implemented: not all heavy boxes were marked with a warning, and employees were not adequately trained on the meaning of the warning.

Employer's safety controls also required employees in Archangel to wear nitrile work gloves designed to improve grip and prevent hand injuries. (Exhibits G, 12, 13.) Adams's foot injury in Archangel was determined by Employer to have been caused by the employee's worn-out gloves allowing a box to slip from her grasp. (Employer's Post-Hearing Brief, p. 4.) This suggests that this control was not sufficiently implemented to prevent employee exposure to foot injuries from dropped boxes resulting from the boxes slipping from employees' hands. In addition, not all boxes are dropped due to the employee's poor grip. Other variables, such as tripping or simple lack of strength, can cause an employee to drop a box.

Employer points to other controls as well. Employer's expert witness, Zackeo, testified that these included engineering controls such as the use of extendable spur conveyors to minimize the distance employees must carry boxes. (Hearing Transcript, p. 511.) Zackeo also testified, however, that railing along conveyors are an important safety control to prevent boxes from falling from conveyors; the spur conveyors in Archangel did not have railings. (Hearing Transcript, p. 492; Exhibit 3.) Employer additionally asserts that administrative controls, such as frequent safety inspections and audits, and comprehensive safety training including pallet building and package handling, effectively reduced exposure to foot injuries from falling objects. (Hearing Transcript, pp. 405-407.) Employer's safety training on pallet building (Exhibit H) included instruction on the T-method on pallets, wrapping pallets in stretch wrap at multiple stages as they are built, and not stacking boxes so that they overhang the edges of the pallet. Employer's Body Mechanics Training (Exhibit F) demonstrated proper lifting techniques and instructs workers not to lift items over 50 pounds without assistance. Cabral testified that employees are trained not to stack boxes on conveyors. (Hearing Transcript, p. 370.)

However, even if we were to assume that Employer's controls negated exposure to the hazard, these controls would only be effective if they were uniformly and correctly implemented. The record demonstrates that not all of employer's controls were followed on the day of the Division's inspection. Valadez observed unwrapped pallets, vertically stacked and overhanging boxes on pallets, and boxes stacked on the spur conveyor, all contrary to Employer's internal safety controls. (Exhibits 3, 4, 7, 8.) In his testimony, Zackeo agreed that, based on the Division's photographic evidence of Archangel at the time of the inspection, not all of Employer's controls

[2] A Team Lift sticker was required on boxes over 50 pounds, but these were not handled in Archangel. (Hearing Transcript, pp. 357, 362; Exhibit C.)

were properly implemented. (Hearing Transcript, pp. 584-5, 587.) The citation was issued based on Valadez's observations and investigation at the time of the inspection, and the evidence presented by the Division supports the conclusion that employees in Archangel were exposed to foot injuries from dropped or falling objects.

Effective engineering and administrative controls are important measures to protect workers. In some circumstances, such controls may indeed prevent exposure. (See, e.g., *Home Depot #6683*, *supra*, Cal/OSHA App. 1014901.) Even if other controls limit exposure, however, the Board has recognized that engineering and administrative controls alone are not sufficient to "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 employees continue to be exposed to crushing injuries due to the nature and weight of the objects they carry." (*Home Depot USA, Inc*., supra, Cal/OSHA App. 1011071.) The employees in Archangel carried boxes weighing up to 49.9 pounds from the conveyors to the pallets. This evidence further supports the Board's conclusion that employees were exposed to the risk of foot injuries from dropped or falling objects despite Employer's safety controls. We accordingly reject Employer's argument that its controls limited employee exposure to foot injuries to a sufficient degree render the requirements of section 3385, subdivision (a), inapplicable.

Based on the evidence presented by the Division, the Board concurs with the ALJ's conclusion that employees in Archangel were exposed to foot injuries from falling objects, crushing, or penetrating actions. The ALJ's analysis and conclusion were consistent with previous Board decisions on foot protection.

b. Second Element: Did Employer fail to require appropriate foot protection for Archangel employees?

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. 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 foot protection. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *MCM Construction Inc*., Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000); *Morrison Knudsen Corp*., Cal/OSHA App. 94-2271, Decision after Reconsideration (Apr. 6, 2000).) 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.

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.)

Having concluded that the Division established the workers in Archangel were exposed to foot injuries from falling objects, crushing, or penetrating actions, the ALJ correctly found that appropriate foot protection was required, and that footwear meeting ASTM specifications and standards would satisfy this requirement.

Employer's policy on Dress and Grooming Standards required "closed-toe, closed-heel shoes that do not expose the top of the foot," but Employer did not require or provide foot protection meeting ASTM specifications. (Exhibits 17, Q, and R.) It permitted, but discouraged, employees from wearing steel-toed shoes on the basis that these might cause delays in employee security screening, which required passing through metal detectors when entering SJC7. Employees were permitted, but not required, to wear composite-toed shoes. Employer did not provide these shoes if employees chose to wear them. Employer's internal safety assessment for building pallets identified falling objects as a potential hazard, but required only safety vest and gloves as PPE, not foot protection. (Exhibit 13.) Employer does not dispute that it did not require or provide ASTM-compliant footwear. The burden therefore shifts to Employer to demonstrate that footwear meeting the ASTM standard would be inappropriate or would provide no protection.

In its petition, Employer asserts that Amazon established that ASTM-compliant foot protection would be inappropriate for Archangel employees. In their hearing testimony, Zackeo and Cabral opined that ASTM-compliant shoes would be inappropriate for workers in Archangel, because ASTM-compliant footwear could pose a risk of ergonomic injuries, due to their heavy weight and lack of flexibility, which would outweigh any potential safety benefit. (Hearing Transcript pp. 527-27, 554-5, 556-8.) Employer provided no additional evidence in support of its claim that ASTM compliant shoes would be inappropriate in Archangel. The Board has previously rejected similar arguments in other foot protection cases. (See, e.g., *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." (*Id.*)

On this basis, the Board concurs with the ALJ's conclusion that Employer failed to require or provide appropriate foot protection under this burden-shifting analysis. The ALJ's Decision comports with the standards set forth in previous Board decisions on foot protection.

2. Shall the Board adopt the Federal Occupational Safety and Health Review Commission (OSHRC) standard for hazard analysis in the personal protective equipment (PPE) context?

In its petition, Employer contends that the ALJ incorrectly concluded that the violation was established because, in his exposure analysis, the ALJ failed to apply the Federal Occupational Safety and Health Review Commission (OSHRC) standard for hazard exposure analysis in the

personal protective equipment (PPE) context, which asks, first, whether employees were exposed to a "significant risk of harm," and, second, whether "a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard" requiring PPE, including foot protection. (Petition, p. 9.) Employer urges the Board to invalidate the hazard exposure analysis established in its previous line of foot protection decisions, and adopt the OSHRC standard to determine when foot protection is required. Employer argues that, under this analysis, the Division would not have been able to establish the violation.

The preeminence of the Board in interpreting and applying the California Occupational Safety and Health Act (Cal/OSHA or the Act), and the regulations which implement it, has long been established. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006). See also, e.g., *Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal. App. 4th 639, 643; *Rick's Elec. v. Occupational Safety & Health Appeals Bd*. (2000) 80 Cal. App. 4th 1023, 1033-1034.) The Board is not required to look to or follow analogous Federal OSHA (Fed/OSHA) case law, but must be at least as protective in applying the Act to workers, as our Federal counterpart in applying Fed/OSHA. (*MCM Construction, Inc.,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016); *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).) On occasion, the Board has adopted the reasoning of federal authority "when persuasive and appropriate," and if "equally applicable to California's Act," but it is not bound to do so. (*Key Energy Services, Inc*., Cal/OSHA App. 15-0255 & 15-0256, Decision After Reconsideration, (Oct. 7, 2016); *Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003); *McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016).)

Employer further argues that there is "no material difference" between section 3385, subdivision (a), and its Fed/OSHA counterpart, 29 C.F.R section 1910.136 (a), which provides:

> The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, or when the use of protective footwear will protect the affected employee from an electrical hazard, such as a static-discharge or electric-shock hazard, that remains after the employer takes other necessary protective measures.

Employer overlooks a significant material difference between the regulations and how they are interpreted. The Federal standard is less protective of workers, and this alone is reason for the Board not to adopt it.

The OSHRC standards require PPE, including foot protection, when (1) employees are exposed to a "significant risk of harm," and (2) either the employer had actual knowledge of the need for PPE, or "a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard" requiring PPE. (*Wal-Mart Distribution Center #6016*, 25 BNA OSHC 1396 (No. 8-12-92, 2015),

aff'd in part and vacated in part on other grounds, 819 F.3d 200 (5th Cir. 2016).) Whether there is a significant risk of harm depends on "both the severity of [the] potential harm and the likelihood of its occurrence." (*Envision Waste Services, LLC*, 27 BNA OSHC 1001 (No. 12-1600, 2018), citing *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003).) Whether a "reasonable person familiar with the circumstances … would recognize a hazard" requiring PPE depends on the history of relevant injuries at the worksite, the severity of those injuries, and whether it is industry practice to provide PPE for the type of work in question. (*Wal-Mart Distribution Center #6016*, *supra*, 25 BNA OSHC 1396; *Weirton Steel Corp.*, *supra*, 20 BNA OSHC 1255.)

By contrast, the Board's reliance on its actual exposure analysis, or alternative reasonably predictable access standard, is far more protective of employees. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *Dynamic Construction Services, Inc*., Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016); *Home Depot USA, Inc*., *supra*, Cal/OSHA App. 1011071.) The Board's standard does not solely hinge on whether there is a significant risk of harm. (*Ibid*.) The Board's standard does not rely on industry standards. (*Ibid*.) The Board has also rejected evidence of common industry practice and an employer's past safety history as defenses to alleged PPE violations (See, e.g., *CE Buggy, Inc. v. Occupational Safety and Health Appeals Board* (1989) 213 Cal. App.3d 1150, 1155-1158; *Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901, quoting *Zero Corporation*, *supra*, Cal/OSHA App. 79-1161.) The Board's analysis is consistent with the longstanding rule that the terms of the Act "are to be given a liberal interpretation for the purpose of achieving a safe working environment." (*Dept. of Industrial Relations v. Occupational Safety and Health Appeals Board* (2018) 26 Cal. App. 5th 93, citing *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.) Further, the Board acted well within its authority in choosing not to follow the Federal PPE analysis, as did the ALJ in not applying it here. A state, such as California, with a federally approved OSHA plan may not adopt less protective workplace safety standards than those developed by Fed/OSHA, but is free to establish more stringent standards. (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772; *Overaa Construction v. California Occupational Safety & Health Appeals Bd.* (2007) 147 Cal.App.4th 235, 247.)

Finally, Employer argues that the Board's current exposure analysis does not provide a standard that puts employers on reasonable notice of when foot protection is required. To this end, Employer posits that the Board's interpretation of section 3385, subdivision (a) "amounts to a de facto rule" that employers must provide protective footwear for not only all warehouse workers, but any worker who ever carries an object such as a "file box," "computer," or "heavy dictionary." (Petition, p. 12.) This concern is unwarranted. Far from imposing a de facto rule for all warehouse workers, as Employer acknowledges, the ALJ's ruling in this case applies only to workers in the Archangel area, not to all Amazon warehouse workers or even all employees in SCJ7, because Archangel was the focus of both the Division's investigation and Arcadis's observations and inspections. (Petition, p. 6.) These workers did not lift heavy boxes on limited or isolated occasions; it was integral to their regular duties. As noted earlier, Employer did consider boxes heavier than 40 pounds sufficiently hazardous to require a warning, and employees handled hundreds of those boxes a day. Such circumstances are distinguishable from the far-reaching impact that Employer envisions.

The Board's own long-held policy is that the Board must "adopt the reasonable meaning of the standard," and must reject interpretations that would lead to "an absurd result" of the type Employer envisions. (*Home Depot, USA*, *supra*, Cal/OSHA App. 1011071.) In addition, the second element of the test permits, under the burden-shifting analysis, a showing that protective footwear would be inappropriate for some contexts. This element prevents extreme or ridiculous applications such as requiring steel-toed shoes for librarians who sometimes carry heavy books. An employer has the opportunity to show that foot protection would not be useful or appropriate in a particular workplace. A case alleging such a violation of section 3385 has not come before the Board; if and when it does, the Board will have the opportunity at that time to clarify the limits of the safety order.

DECISION

For the forgoing reasons, the ALJ's Decision is upheld.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chairman

Judith S. Freyman, Board Member

Marvin Kropke, Board Member

FILED ON: 04/14/2021