

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

In the Matter of the Appeal of:

**UNITED PARCEL SERVICE
3480 EAST JURUPA STREET
ONTARIO, CA 91761**

Employer

Inspection No.

1158285

**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

United Parcel Service (Employer) engages in cargo delivery services. Beginning June 23, 2016, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Leticia Reyes conducted an accident inspection at a place of employment maintained by Employer at 3480 E. Jurupa Street, Ontario, California (the worksite).

On November 23, 2016, the Division cited Employer with a serious, accident-related violation of California Code of Regulations, title 8, section 3385, subdivision (a)¹ [appropriate foot protection shall be required for employees exposed to foot injuries from falling objects, crushing or penetrating actions]. Employer filed a timely appeal contesting the existence of the alleged violation, its classification, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalty. Employer also alleged affirmative defenses.²

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the Board, at West Covina, California on May 17, 2017 and August 10, 2017. Carla J. Gunnin, Attorney, represented Employer. William Cregar, Staff Counsel, represented the Division.

¹ Unless otherwise specified all references are to the California Code of Regulations, title 8.

² As noted within the ALJ's Decision, the Board will not consider affirmative defenses for which Employer did not present evidence at the hearing; they are deemed waived.

On September 12, 2017, the ALJ issued a Decision vacating the citation and setting aside the penalty. The Board took the ALJ's decision under reconsideration on its own motion. The Division filed an Answer to the Board's order.

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

ISSUES

1. Did Employer fail to require appropriate foot protection for employees exposed to foot injuries from falling objections, crushing or penetrating actions?
2. Did the Employer establish all of the elements of the Unforeseeable Extreme Departure Defense?
3. Did the Division establish a rebuttable presumption, under Labor Code section 6432, subdivision (a), that the citation was properly classified as serious?
4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not
5. Did the Division prove a causal nexus between a violation and a serious injury to an employee?
6. Were the abatement requirements reasonable?

FINDINGS OF FACT

1. On May 24, 2016, Steven Sanchez (Sanchez), an employee of Employer, suffered an injury at Employer's worksite while he was working within the course of his employment and performing his duties.
2. Sanchez was offloading an air cargo container. A butterfly lock became stuck, preventing the container from moving. Sanchez tried to free the container by putting pressure on top of the butterfly lock with his foot. Sanchez placed his foot on the lock to press it down and, as he did so, the container rolled over his foot and the edge of the butterfly lock pierced his foot and clamped on his toes.
3. Sanchez suffered serious physical harm as a result of the accident.
4. Sanchez was exposed to foot injuries from crushing or penetrating actions.
5. When the accident occurred, Sanchez did not depart from any reasonable understanding of his work duties, nor did he know that his duties did not encompass this particular activity.
6. Employer did not require its employees to wear appropriate foot protection. Employer failed

to require foot protection meeting the requirements of American Society for Testing and
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7. Appropriate foot protection, particularly as contemplated by
, could have prevented or ameliorated the injuries, or the extent of injuries, suffered
by Sanchez.

DISCUSSION

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

Citation 1, Item 1 asserts a violation of section 3385, subdivision (a), which states,

(a) 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 violation description states,

Prior to and during the course of the inspection, including, but not limited to, June 23, 2016, the employer did not require employees to wear adequate foot protection when employees were exposed to crushing injuries in the process of handling air containers, during off-loading operations. As a result, on or about May 24, 2016, an employee suffered a Serious injury.

The Division holds the burden of proving a violation by a preponderance of the evidence. (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).) "Preponderance of the evidence" is usually defined in terms of 'probability of truth,' for example as evidence that, 'when weighed with that opposed to it, has more convincing force and greater probability of truth.'" (*Leslie G. v Perry & Associates* (1996) 43 Cal.App.4th 472, 483, citing 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 157, p. 135; BAJI No. 2.60 (8th ed. 1994).) To prove a violation of section 3385, subdivision (a), the Division must establish that employees were (1) exposed to foot injuries from, among other things, crushing or penetrating actions, and (2) the employer failed to require or provide adequate foot protection. (*MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000); *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)³

³ While the Decision states there are three elements that must be established for a violation to exist, rather than two, with the third being that an employee was exposed "while performing his duties," we disagree with such an analysis. If an employee is "exposed" to the listed foot injuries during the course of his employment and employer fails to require appropriate foot protection, a violation of the safety order is established irrespective of whether the employee

a. First Element: Were Employer's employees exposed to foot injuries from crushing or

Exposure to foot injuries from crushing or penetrating actions may be established in two different 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. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [other citations omitted]; *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).) The Division may also establish 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.* [other citations omitted.]) “The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent.” (*Ibid.* [other citations omitted.])

Here, the ALJ's decision concluded the Division established the first element of the violation, that an employee was exposed to a crushing or penetrating injury. (Decision, p. 3.) We concur. Steven Sanchez (Sanchez) was employed by Employer. He loaded and unloaded air cargo containers from aircraft. The containers weighed 499 pounds when empty—more when full. On May 24, 2016, Sanchez suffered an injury while offloading an air cargo container. A butterfly lock became stuck preventing the container from moving. Sanchez tried to free the container by putting pressure on top of the butterfly lock with his foot. The lock is designed to go down when pressure is applied. Sanchez placed his foot on the lock and, as he did so, the container rolled over his foot and the edge of the butterfly lock pierced his foot and clamped on his toes. Consequently, the evidence demonstrates Sanchez was actually exposed to foot injuries from crushing or penetrating actions.

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

While the ALJ's Decision concluded that the Division failed to demonstrate that Employer did not require appropriate foot protection, we depart from the ALJ's analysis, particularly since the Decision failed to follow Board precedent pertaining to the analysis of this element.

In determining whether Employer provided appropriate foot protection, the Board does not consider section 3385, subdivision (a), in isolation, but looks to the requirements of the whole regulation. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016) [“Legislative intent must be assessed according to the language of the whole regulation.”].) When reviewing section 3385 as a whole, while an employer has some latitude to select appropriate foot protection, an employer's latitude is circumscribed by the contents of subdivision (c). Relevant here, subdivision (c)(1), states, “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

was exposed while performing his or her specific duties. However, that is not to say that the Board will not consider an employee's departure from his or her specific duties in some circumstances. For example, an employer may excuse a violation, in limited circumstances, by raising and proving certain affirmative defenses based upon an employee's departure from his duties, as discussed further herein.

Protection and ASTM F 2413-05, Standard Specification for Performance Requirements for Foot Protection which are hereby incorporated by reference.”

To reconcile the requirements of section 3385, subdivision (a), which requires that an employer provide “appropriate foot protection” with the more-restrictive requirement that purchased foot protection meet the ASTM requirements in subdivision (c)(1), the Board has adopted and applied a burden shifting analysis. (See, e.g., *Morrison Knudsen Corp.*, Cal/OSHA App. 94-2771, Decision After Reconsideration (April 6, 2000); *MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000); *Zero Corporation*, Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984); *Home Depot USA, Inc. dba Home Depot #6683*, Cal/OSHA Inspection No. 1014901, Decision After Reconsideration (July 24, 2017).) First, under the burden-shifting analysis, when the Division demonstrates employees were exposed to foot injuries from falling objects, crushing or penetrating actions, a presumption is created that footwear meeting the ASTM standards, referenced in section 3385, subdivision (c), is appropriate. (*Ibid.*) Next, the burden shifts to employer to rebut the ASTM standard by showing that footwear meeting the respective ASTM standards would provide no protection or would be inappropriate. (*Ibid.*) If an employer fails to successfully rebut application of the ASTM standard, the presumption controls and appropriate foot protection means footwear meeting the referenced standards. (*Ibid.*) However, if an employer successfully rebuts application of the ASTM standards, the Division must show that Employer’s foot protection is not appropriate, separate and apart from consideration and application of those standards.

Applying the burden shifting analysis, since the Division established exposure to foot injuries from crushing or penetrating action, a presumption was created that footwear meeting the ASTM specifications and standards referenced in section 3385, subdivision (c)(1) were “appropriate.”

The record demonstrates Employer failed to provide or require foot protection meeting the referenced ASTM specifications. Sanchez, the sole witness to testify, said he selected his own footwear with limited guidance from Employer. Employer advised him to purchase a non-slip work shoe. Employer’s footwear policy merely required that footwear have adequate arch and foot support, a non-slip sole, and that it be in good repair, recommending “a sturdy, all leather, well-built shoe or boot.” (Exhibits J-1 and J-2.) The policy prohibited loafers, tennis shoes, sandals, running shoes, and sneakers. (*Ibid.*) Employer stipulated that it did not provide foot protection to employees unloading aircraft. Employer’s post-hearing brief next conceded that it did not require its employees to wear steel-toed shoes. In short, Employer’s policies and directions to Sanchez concerning foot protection do not correspond to the ASTM standards. The Board must, and does take, official notice of the contents of the ASTM standards incorporated by reference into subdivision (c)(1). (See *Morrison Knudsen Corp.*, *supra.*) Those standards set forth foot protection specifications and test methods governing impact resistance for the toe area of the footwear, compression resistance of the toe area, metatarsal impact protection, and puncture resistance of footwear bottoms. (See ASTM F 2412-05 and ASTM F 2413-05.) Employer’s policies and directives failed to adhere, nor meaningfully correspond, to the specifications set forth in those standards. Consequently, unless Employer rebuts the presumption under the burden shifting analysis, the Division established the second element of a violation.

Under the burden shifting analysis, an Employer may rebut the presumption that footwear meeting the referenced ASTM would be appropriate by demonstrating that it would not offer

protection or that it would be inappropriate for the workplace hazards. (*Morrison Knudsen Corp., supra; MCM Construction Inc., supra.*) However, Employer offered no evidence demonstrating that footwear meeting the ASTM standard would fail to provide protection. Employer failed to call a single witness. Even if we were to assume that a fully loaded container weighed 6000 to 7000 pounds as the ALJ Decision stated,⁴ the Board has never considered the weight of an item, considered by itself, sufficient to rebut the appropriateness of the ASTM standard. The Board has stated that “mere fact that the weight of the hazard exceeded the limits of the standard was insufficient to rebut the appropriateness of the standard.” (*Morrison Knudsen Corp., supra; MCM Construction Inc., supra.*) To rebut application of the ASTM standard based on the weight of an object, the Employer must prove that the standard “would provide no protection at all.” (*Ibid.*) An employer will only be able to make the requisite demonstration in the rarest of circumstances where it proves, due to the weight of an item, such footwear “would never be effective.” (*Ibid.*) For example, an employer would need to demonstrate that footwear meeting the ASTM standards would provide no protection in the event of gradually applied crushing action, glancing blows, lighter loads, or other exposures. (*Ibid.*) No such evidence was offered in the record and thus Employer failed to rebut the appropriateness of the standards referenced in subdivision (c)(1).

Employer failed to require appropriate foot protection. The Division established the second, and final, element of the violation, requiring affirmance of the citation.

2. Did the Employer establish all of the elements of the Unforeseeable Extreme Departure Defense?

Employer’s post-hearing brief argued that Employer should be relieved of liability because Sanchez engaged in a departure from his work assignments that no reasonably prudent employee would have anticipated. In support of its argument, Employer cited to cases such as *California Prison Authority*, Cal/OSHA App. 07-2171, Decision After Reconsideration (Jun. 03, 2010) and *J.R. Woods, Inc.*, Cal/OSHA App. 95-4431, Decision After Reconsideration (Oct. 14, 1999). However, the cases cited by Employer are inapposite and do not relieve it of liability for at least two reasons. First, the Board has rejected any assertion that those cases stand for the proposition that a citation may be dismissed based solely on proof of unforeseeability of an employee’s action. (*Blue Diamond Growers*, Inspection No. 1040471, Decision After Reconsideration (September 24, 2018).) Second, the underlying rationale for the cited cases was specific to, and concerned with, asserted violations of section 3314 [the lockout/tagout standard], a section not at issue. However, that is not to say that the Board does not recognize any defense grounded upon an employees’ gross departure from his or her work duties.

The Board does recognize a defense known as the Unforeseeable Extreme Departure Defense (UEDD) that will “in rare cases” relieve an employer from the consequences of employees’ extreme departure from the scope of their work duties. (*Blue Diamond Growers, supra.*) The Board discussed the elements of this defense in *Blue Diamond Growers*, where it stated,

For an employer to successfully establish this defense, it must prove the following elements: 1) employee engaged in an extreme

⁴ It is noted that the reference to 6000 to 7000 pounds in the ALJ’s decision is both speculative and unsubstantiated by the record. Further, even if the full container weighed that much, the empty weight of the container was only 499 pounds and there is no evidence that the ASTM standards would not offer some protection against that lesser weight.

departure from the scope of a reasonable understanding of assigned work duties; 2) employee knew his/her work duties did not encompass the specific activity; and 3) employer did not and could not have known through the exercise of reasonable diligence and supervision the employee would so act. (*Blue Diamond Growers, supra.*)

However, Employer failed to raise any such defense (or any reasonable corollary) in its pleadings, waiving any such challenge. (See, e.g., *California Erectors Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998).) Next, even if we were to assume that the defense had properly been raised, Employer failed to demonstrate that Sanchez engaged in any extreme departure from his work assignments. Sanchez stepped on the butterfly lock in order to encourage the free movement of the air cargo container, while he was trying to offload the container. Despite evidence indicating that Employer was aware that locks became stuck, Sanchez had never been trained not to use his foot to release the lock. He was not taught procedures for releasing the locks. Sanchez noted that employees try to handle such issues themselves when able. As such, on this record, we cannot find that Sanchez departed from any reasonable understanding of his work duties, nor can we find that he knew his work activities did not encompass this particular activity. This defense fails and therefore the Board upholds the violation.

3. Did the Division establish a rebuttable presumption, under Labor Code section 6432, subdivision (a), that the citation was properly classified as serious?

The Division classified the citation 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.” As used therein, 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).)

In the immediate matter, not only does the record demonstrate a realistic possibility that serious physical harm could result, serious physical harm actually occurred. Sanchez said that when he applied downward pressure upon the butterfly lock with his foot, the container rolled over his foot, crushed his toes, the lock pierced his foot from the side and clamped on his toes. Sanchez underwent surgery following the accident. Employer’s Injury Prevention Report described the injury as “Crushing Injury of R Foot/Laceration/Partial amputation of One R Lesser Toe/Post Traumatic Stress Disorder/Dry Grangrene 3rd R. Toe.” (Exhibit 3.) The parties stipulated that Sanchez suffered a serious injury.

4. Did Employer rebut the presumption of a Serious violation by demonstrating that it did not know, and could not with the exercise of reasonable diligence have known, of the presence of the violation?

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

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.

For an employer to rebut the presumption of a serious violation, it must demonstrate it took “all” the steps a reasonable employer would have taken in like circumstances to prevent the violation, taking into account factors such as training, procedures for controlling or correcting the hazard, and supervision. (See Lab. Code §6432, subd. (b).) Employer failed to offer sufficient evidence to rebut the presumption.

Employer was aware the locks became stuck. Sanchez had informed supervisors on previous occasions of issues with the locks. Nevertheless, at the time of the incident, Sanchez had never been trained that he should not address such issues himself; he said he did not receive training on procedures for stuck locks. He also testified that other employees engaged in self-help when the locks stuck. As such, based on the lack of training and instruction regarding this issue, the record fails to demonstrate that Employer took all reasonable and responsible steps to anticipate and prevent the violation.

5. Did the Division prove a causal nexus between a violation and a serious injury to an employee?

In order to sustain an accident-related classification, the Division must demonstrate a "causal nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [other citations omitted]).) In other words, where the evidence indicates that a serious violation caused a serious injury the violation is properly characterized as accident-related. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015); *MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016).) The Division must make a “showing [that] the violation more likely than not was a cause of the injury.” (*Ibid.*) But the Division need not show that the violation was the only cause of the injury. (*Ibid.*)

In the immediate matter, the container rolled over Sanchez's foot, crushed his toes, the lock pierced his foot from the side, and clamped on his toes. It is inferred that appropriate foot protection, particularly as contemplated by the ASTM standards, could have prevented or ameliorated the injuries, or the extent of injuries, suffered by Sanchez. As such, the accident-related classification is upheld.

6. Were the abatement requirements reasonable?

Section 3385, subdivision (a), requires appropriate foot protection for employees exposed to crushing or penetrating actions. Employer provided no evidence to support the assertion that complying with the safety order and providing foot protection to exposed workers was unreasonable or otherwise not required by the safety order. The requirement that Employer provide appropriate foot protection is found reasonable. (*See, e.g., General Electric Company, Vertical Motor Plant*, Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29, 1984)–[the Board upheld the ALJ's abatement order that "safety shoes, or their equivalent" be provided to employees exposed to falling object hazards shown to exist in that work location.]) Employer is required as of the date of the decision to provide appropriate foot protection as required by the safety order. However, consistent with the Board's previous precedent concerning abatement, this decision does not specify the method of abatement. (*Home Depot USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec 24, 2012).) Employer may select the least burdensome means of meeting the requirements of the cited section. (*The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

DECISION

The Decision of the ALJ is reversed. The Division established a serious, accident-related violation of section 3385, subdivision (a). The penalty of \$18,000 is found reasonable and it is assessed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member



FILED ON: 11/15/2018