BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1486492**
NBC MANTECA MERCHANTS, INC. **912 SPRECKELS AVENUE** **MANTECA, CA 95336** **Employer**	**DECISION**

Statement of the Case

NBC Manteca Merchants, Inc. (Employer) operates a warehouse service center for retail stores TJ Maxx and Marshalls. On July 29, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Cierra Smith (Smith), commenced a complaint investigation of Employer's facility located at 912 Spreckels Avenue in Manteca, California (job site). On January 7, 2021, the Division issued two citations to Employer, one of which was appealed. The citation under appeal alleges that Employer failed to require appropriate foot protection for employees who are exposed to foot injuries from falling objects and crushing or penetrating actions.

Employer filed a timely appeal of Citation 2, contesting the existence of the violation, the classification of the violation, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalty. Employer also asserted numerous affirmative defenses.[1]

At the beginning of the hearing in this matter, the parties stipulated that the citation should be amended to reflect the correct name of Employer. The citation was amended from "The TJC Companies, Inc." to "NBC Manteca Merchants, Inc."

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on July 22 and August 11, 2021. Thomas Metzger and Benjamin Mounts, attorneys with Littler Mendelson, represented Employer. Lauren Taylor, Staff Counsel, represented the Division. This matter was submitted for Decision on September 30, 2021.

[1] Except where discussed in this Decision, 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); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Issues

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

2. Did the Division establish that Citation 2 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

4. Were the abatement requirements reasonable?

5. Is the proposed penalty reasonable?

Findings of Fact

1. Employees working at Employer's Manteca job site are required to physically lift boxes weighing up to 50 pounds.

2. Employer's employees are required to move boxes from stacks in truck trailers onto a conveyor belt and then move them off the conveyor belt onto pallets for shipping to various retail stores.

3. Employer does not require its employees to wear protective footwear. The only footwear requirements in Employer's safety program are that shoes are sturdy and have a closed toe and heel.

4. Employer has an effective safety program and its behavior-based safety training has reduced recordable injuries at the job site in the years 2019 and 2020, as compared to injuries recorded in 2018.

5. Employer's safety training has reduced injuries but has not eliminated hazards entirely.

6. Boxes containing up to 50 pounds of clothing or home goods may cause injuries if they fall on an employee's unprotected foot, resulting in broken bones or injuries requiring surgery or amputation.

7. Employer was aware of the hazard of falling objects, through its record of employee injuries and through Employer's own identification of the hazard for its hazard assessment.

8. Employer employs between 60 and 70 employees at the Manteca job site.

Analysis

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

The Division cited Employer for a violation of California Code of Regulations, title 8,[2] section 3385, subdivision (a), which 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 2 alleges:

> Prior to and during the course of the investigation, including, but not limited to, July 29, 2020, the employer failed to require appropriate foot protection for their employees that are exposed to foot injuries from falling objects, crushing or penetrating actions throughout [its] distribution center.

The Appeals Board explained in *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018):

> The Division holds the burden of proving a violation by a preponderance of the evidence. "'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.'" [Citations.] 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. [Citations.]

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

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

In *United Parcel Service, supra*, Cal/OSHA App. 1158285, the Appeals Board identified exposure as the first element of establishing a violation of section 3385, subdivision (a), and explained:

> First, the Division may establish exposure by showing that an employee was actually exposed to the zone of danger created by the violative condition. [Citations.] 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." [Citation.] "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." [Citation.]

The issue presented is whether the Division established that a hazardous condition existed at the job site and then whether employees were exposed to that hazardous condition in actuality or through reasonably predictable access to the hazardous condition.

Therefore, the first inquiry is whether a hazardous condition existed at the job site. "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*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).) "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." (*Home Depot USA, Inc., dba Home Depot # 6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017).) Evidence adduced during the hearing supports a finding that the boxes at the job site weighed up to 40 or 50 pounds. Employer's Building Manager, Jonathan Atwood, told Smith that the maximum weight of the boxes at the job site was 40 pounds, but employee testimony indicated that the maximum weight was 50 pounds. Additionally, Employer's Job Hazard Assessment reflects an identified hazard from lifting boxes weighing "between 1 to 50 pounds." (Ex. L.) Therefore, a hazardous condition, elevated boxes weighing up to 40 or 50 pounds, existed at the job site.

Additionally, employees at the job site use manual pallet jacks to transport pallets with dozens of boxes stacked upon them. The Division established that manual pallet jacks create a hazardous condition because their wheels may cause a crushing injury to an employee's foot.

As hazardous conditions contemplated by section 3385, subdivision (a), existed at the job site, the next inquiry is whether there was employee exposure to the hazardous conditions. There have been numerous Decisions After Reconsideration in the past five years involving section 3385, subdivision (a). (*Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (Apr. 14, 2021); *Interline Brands, Inc*., Cal/OSHA App. 1251604, Decision After Reconsideration (Sept. 17, 2020); *Performance Team Freight Systems*, Cal/OSHA App. 1183505, Decision After Reconsideration (May 1, 2019); *United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *Home Depot USA, Inc., dba Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901; *Home Depot USA, Inc*., *supra,* Cal/OSHA App. 1011071.)

In every recent Decision After Reconsideration, the Appeals Board has found that employees are in a zone of danger when there are objects that can fall off an elevated area or there are items being carried, even short distances, by the employees. (*Golden State FC, LLC*, *supra*, Cal/OSHA App. 1310525; *Interline Brands, Inc*., *supra*, Cal/OSHA App. 1251604; *Performance Team Freight Systems*, *supra*, Cal/OSHA App. 1183505; *United Parcel Service*, *supra*, Cal/OSHA App. 1158285; *Home Depot USA, Inc., dba Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901; *Home Depot USA, Inc*., *supra,* Cal/OSHA App. 1011071.) Many of the recent Appeals Board decisions involved warehouse situations where employees were carrying boxes of varying sizes and weights. Most recently, in a warehouse situation similar to the one at issue here, the Appeals Board found 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." (*Golden State FC, LLC, supra*, Cal/OSHA App. 1310525.) The zone of danger for the instant matter is the area around elevated objects and the area around objects that had sufficient height where they could topple or fall from an elevated position. Additionally, there is a zone of danger in the vicinity of a manual pallet jack transporting pallets stacked with boxes from one area to another within the warehouse.

Turning to the question of whether there is exposure to the hazardous condition, it is notable that there are two stages of Employer's process at the job site where employees are manually lifting or moving boxes weighing up to 50 pounds. The first stage is when the boxes are being downstacked from the floor-to-ceiling loading pattern in truck trailers and put onto a conveyor belt, and the second stage is when the boxes are taken from the conveyor belt and placed on store-specific pallets. During this process, employees physically hold and carry boxes to the various locations. Additionally, employees stand adjacent to elevated boxes that are stacked in the trailer. Based on prior Appeals Board precedent, set forth above, this physical handling of boxes creates exposure to the hazardous condition because carrying boxes and standing next to, and downstacking boxes, places employees squarely within the zone of danger.

However, the Division did not establish that Employer's warehouse employees are exposed to the hazardous condition created by the operation of manual pallet jacks. There was no testimony that Employer's employees are operating the pallet jacks in a manner that exposes their feet to the wheels or that other employees are within the vicinity of a pallet jack in operation. The Division made reference to previous pallet jack-related foot injuries in Employer's Form 300 Log (Ex. 31), but none of those injuries occurred within the inspection period and Smith did not testify about observing any employee exposure to manual pallet jacks.

1. Employer's Arguments

Employer asserts that the nature of the boxes' contents is determinative with regard to whether an employee is exposed to a potential foot injury if the box is dropped. Prior Appeals Board decisions refer to "the nature and weight of the objects carried…" in analyzing employee exposure. (*Home Depot USA, supra,* Cal/OSHA App. 1011071.) In the instant matter, approximately 80 percent of the boxes at the job site contain clothing items. The remainder of the boxes contain home goods such as décor, towels and bedding. All of the items shipped into and out of the job site are in cardboard boxes.

While the Appeals Board has referenced the "nature" of objects carried as a factor for exposure analysis, none of the Appeals Board's decisions have found that the *contents* of a box are determinative. Employer's position is that the Division did not establish that dropping a box containing 40 pounds of clothes could injure an employee's foot in the same way that a box with 40 pounds of bricks would, for example. Employer presented only general testimony in support of this position and offered no specific evidence of the extent to which soft contents inside cardboard boxes rendered foot protection unnecessary.

Employer further asserted that it has eliminated hazards to employees' feet through its current training program. Employer offered testimony from its Environmental Health and Safety Manager, Kevin DiRenzo (DiRenzo), about Employer's safety program and the significant reduction in recordable injuries since the company began its current behavior-based safety (BBS) training. DiRenzo testified that Employer's studies show that nearly all of the injuries occurring in the workplace resulted from unsafe behaviors. Employer's position is that training people on proper work methods and safe behaviors eliminates the hazard so there is no need for protective equipment such as protective shoes.

In *Home Depot USA, supra,* Cal/OSHA App. 1011071, the Appeals Board explained:

> [W]hile Employer has an extensive program of engineering and administrative controls, ultimately, the program cannot protect employees who must physically lift heavy objects from the risk of foot injuries that may occur if a heavy object is

accidentally dropped. Such employees continue to be exposed to crushing injuries due to the nature and weight of the objects they must carry.

Employer's Form 300 Logs from 2018 through 2020 reflect a significant improvement in Employer's safety efforts, evidenced by the sharply decreased number of recordable injuries in 2019 and 2020 compared to the year 2018. DiRenzo attributed this improvement to Employer's BBS training and asserted that this reduction in injuries evidences an elimination of the hazards.

However, while the employees may have learned how to lift boxes more safely, this does not mean that the hazards are eliminated. Warehouse worker Claudia Mora Zarco testified that she sees employees drop boxes on a daily basis. Additionally, one of the few injuries recorded in the years 2019 and 2020 was a lower back strain, and the Form 300 Log (Ex. 31) indicates that the cause of the injury was lifting a heavy box. If an employee can hurt her back lifting a heavy box, she can also drop that box on her foot, despite having been trained how to properly lift heavy items. As the Appeals Board has repeatedly held, these types of administrative controls, implemented through an effective safety program, do not eliminate exposure. (*Home Depot USA, supra*, Cal/OSHA App. 1011071; *Golden State FC, LLC, supra*, Cal/OSHA App. 1310525; *Interline Brands, Inc., supra*, Cal/OSHA App. 1251604; *Home Depot USA, Inc., dba Home Depot # 6683, supra*, Cal/OSHA App. 1014901.) Rather, the controls decrease the likelihood of injury.

Pursuant to the foregoing, employees were handling boxes at the job site and were around elevated boxes, and it was reasonably predictable that they would be in situations where they would be exposed to the hazard of falling objects or to crushing actions that could result in injury.

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

In *United Parcel Service, supra*, Cal/OSHA App. 1158285, the Appeals Board identified a burden-shifting analysis of the requirement for foot protection required by section 3385, and explained:

> 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 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. [Citations omitted.] 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. [Citation.] 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. [Citation.] 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. [Citation.] 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.

As discussed above, the Division established exposure to foot injuries from falling objects or crushing actions. Therefore, appropriate foot protection is required. It is presumed that footwear meeting the ASTM specifications and standards referenced in section 3385, subdivision (c)(1), would be "appropriate."

The record demonstrates Employer's footwear policy required sturdy shoes with closed heels and toes. The witnesses testified that they had never been told they needed to wear any specific shoes and that they regularly wore sneakers. Employer's Job Hazard Assessment identifies the footwear required for employees sorting boxes onto pallets to be shipped as sturdy and closed toe. (Ex. L.) Employer's policy provided no indication that it required footwear that satisfied the requirements and testing set forth in the ASTM specifications for impact resistance, compression resistance, or metatarsal protective footwear. Therefore, Employer's policy did not require foot protection meeting the ASTM specifications.

As Employer's policy did not require foot protection meeting the ASTM specifications, the burden shifts to Employer to demonstrate that the ASTM-compliant foot protection would be

inappropriate by demonstrating that it would not offer protection or that it would be inappropriate for the workplace hazards. (*Morrison Knudsen Corp.*, Cal/OSHA App. 94-2771, Decision After Reconsideration (Apr. 6, 2000); *MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000).) Employer offered no evidence demonstrating that footwear meeting the ASTM standard would not provide protection or that it would be inappropriate for the workplace hazards.

Therefore, Employer failed to require appropriate foot protection where the Division established exposure to foot injuries from falling objects or crushing actions. Accordingly, the violation is established.

2. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a),[3] in relevant part states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
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> […]
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> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an 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

[3] Labor Code section 6432 was amended effective January 1, 2021, however, the portions discussed reflect Labor Code section 6432 as it was in effect at the time of issuance of the citation.

> worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Smith testified that she was current on her division-mandated training at the time of the hearing. As such, she was competent to offer testimony regarding the classification of the citation as Serious. Smith testified that employee exposure to falling objects created a realistic possibility of serious injury including amputations or hospitalization greater than 24 hours for a surgery due to fractures or amputations. Therefore, the Division offered sufficient uncontested evidence to establish there was a realistic possibility that serious physical harm could result from exposure to falling objects.

Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

3. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(Lab. Code §6432, subd. (c).)

The evidence showed that Employer was aware of the hazard of falling objects, through employee injuries and through Employer's own identification of the hazard for its hazard assessment. Despite possessing this knowledge, Employer did not require footwear complying with the ASTM standard and, therefore, did not demonstrate that it took all the steps a reasonable and responsible employer in like circumstances would be expected to take before the violation occurred to anticipate and prevent the violation. Employer has implemented an effective safety training program, but Appeals Board precedent holds that such controls cannot eliminate exposure to foot injuries when employees are physically lifting heavy items. (See *Home Depot USA, Inc., supra*, Cal/OSHA App. 1011071.) Furthermore, it is predictable that employees will drop carried items or that items stacked above the ground will fall such that even if Employer effectively implemented its controls, it would not eliminate exposure. Such hazards are not eliminated through training alone as commonplace failures and mistakes are both foreseeable and predictable. (*Id*.)

Accordingly, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

4. Were the abatement requirements reasonable?

Section 3385, subdivision (a), requires appropriate foot protection for employees exposed to foot injuries from falling objects or crushing or penetrating actions. Here, Employer provided insufficient 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, United Parcel Service, supra*, Cal/OSHA App. 1158285.) Therefore, Employer is required to comply with the safety order. However, consistent with the Appeals Board's previous precedent concerning abatement, this Decision does not specify the method of abatement. (*Id*.) Employer may select the least burdensome means of meeting the requirements of the cited

section. (*Id.*; *The Daily Californian/Calgraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

5. Is 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. (*RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

However, the Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board ... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Appeals Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).) The Appeals Board has held that, when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

An initial penalty of $18,000 is assessed for all Serious violations. (§336, subd. (c).) The penalty may be further adjusted based on Extent and Likelihood, resulting in the Gravity-based penalty. Where Extent or Likelihood is rated as High, the Base Penalty is increased by 25 percent, where it is rated as Medium, the Base Penalty is not adjusted, and where it is rated as Low, the Base Penalty is decreased by 25 percent. (§336, subd. (c).)

Smith testified that Extent was determined to be Low because the Division determined that the lack of foot protection was just a single violation for the particular hazard. As such, the Division reduced the Base Penalty by 25 percent.

Smith testified that Likelihood was determined to be High based on Employer's previous recorded injuries and her observations during the inspection. Therefore, the Likelihood was

sufficiently substantiated as High. Accordingly, the resulting Base Penalty was increased by 25 percent.

The Base Penalty of $18,000 was adjusted by reducing it by $4,500 for Extent and increased by $4,500 for Likelihood, resulting in a Gravity-based Penalty of $18,000.

Section 336 also provides for adjustment of the Gravity-based Penalty pursuant to the factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

> (c) The Good Faith of the Employer--is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:
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> GOOD-- Effective safety program.
>
> FAIR-- Average safety program.
>
> POOR-- No effective safety program.

Smith testified that she credited Employer with a 15 percent reduction for a Fair rating of Good Faith, which means that the Division rated Employer's safety program as average. (§336, subd. (d)(2).) Smith testified that her Division training led her to conclude that a 15 percent Good Faith rating is appropriate when an employer is cooperative and "works with you, is knowledgeable of safety health hazards, and things like that." However, Employer was not cited for any safety program deficiencies, Smith did not allege that Employer's safety program was insufficient, and a review of the safety program reveals a thorough program that appears to have made a dramatic improvement in overall safety, as evidenced by the Form 300 Log showing a significant decrease in injuries in the past two years. Accordingly, the adjustment factor for Good Faith is hereby modified to Good, which results in a reduction of 30 percent of the Gravity-based Penalty.

Size

Section 335, subdivision (b), defines the "Size of the Business of the Employer" as "the number of individuals employed at the time of the inspection/investigation." Application of the adjustment factor is based on section 336, subdivision (d)(1), which provides:

(1) The Size of the Business If the Size of the Business (as provided under section 335(b) of this article) is:

10 or fewer employees - 40% of the Gravity-based Penalty shall be subtracted.

11-25 employees - 30% of the Gravity-based Penalty shall be subtracted.

26-60 employees - 20% of the Gravity-based Penalty shall be subtracted.

61-100 employees - 10% of the Gravity-based Penalty shall be subtracted.

More than 100 employees - No adjustment shall be made.

Smith testified that she did not make a reduction to the Gravity-based Penalty for Size because Employer has more than 100 employees. However, Smith's estimate of the number of employees was based on speculation of a large number of employees working for "all the different entities the parent company oversees." There was no evidence supporting this interpretation of the regulation as encompassing all the separate corporate entities owned by a single parent corporation. Indeed, there was no testimony about a parent corporation or any other entities that are related to Employer. Timothy Gilliam, Employer's Assistant Vice President-Director of Service Centers, testified that the Manteca job site employs between 60 and 70 employees. As such, Employer is entitled to a credit of 10 percent for Size.

History

Section 335, subdivision (d), provides:

(d) The History of Previous Violations--is the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:

GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

For the purpose of this subsection, establishment and the three-year computation, shall have the same meaning as in Section 334(d) of this Article.

Section 335, subdivision (d), references section 334, subdivision (d), for "establishment" and the computation of three years. A review of the current version of section 334, subdivision (d), reveals no use of the word establishment and contains a five-year computation rather than three years. Section 334, subdivision (d), was amended effective 2017. The last time section 335 was amended was 1977. As such, to interpret the provisions of section 335, subdivision (d), it is necessary to review section 334, subdivision (d), as it existed prior to the 2017 amendment.

Section 334, subdivision (d), in relevant part, previously provided:

(d) Repeat Violation

(1) General--is a violation where the employer has corrected, or indicated correction of an earlier violation, for which a citation was issued, and upon a later inspection is found to have committed the same violation again *within a period of three years immediately preceding the latter violation*. For the purpose of considering whether a violation is repeated, a repeat citation issued to *employers having fixed establishments (e.g., factories, terminals, stores . . .) will be limited to the cited establishment*; for employers engaged in businesses having no fixed establishments (e.g., construction, painting, excavation . . .) a repeat violation will be based on prior violations cited within the same Region of the Division.

(Emphasis added.)

Section 336, subdivision (d)(3), provides that the adjustment percentages for History are 10 percent, five percent, and no adjustment, for Good, Fair, and Poor ratings, respectively. Smith testified that she applied an adjustment of five percent for History because she had looked at the United States Department of Labor website for the history of violations for Employer in the past five years and found that "The TJX Companies have quite a few general violations in their five year history."

There are multiple shortcomings in the Division's evidence for the History adjustment factor. Smith's testimony raised several issues, including the time period examined in her search for prior citations, the entity examined in her search for prior citations, and the number of prior citations issued in comparison to the number of employees Employer had at the relevant time.

First, Smith's reference to "quite a few" violations in five years is insufficient to establish the number of violations, how many employees Employer had at this establishment, how many of those violations were affirmed or if they were withdrawn by the Division, and when the alleged general citations were issued. Moreover, because Smith examined and testified only generally about a five-year period, there is no evidence that any of the violations she found in her search were within the operative three years contemplated by section 335, subdivision (d).

Additionally, Smith testified that she looked for the history of violations and found violations for "The TJX Companies." The parties stipulated at the beginning of the hearing that the citations should be amended from "The TJX Companies, Inc." to reflect the correct name for Employer, which is "NBC Manteca Merchants, Inc." However, there was no evidence of a relationship between Employer and The TJX Companies, Inc. and no evidence that any citations referenced by Smith were issued to NBC Manteca Merchants, Inc.

As set forth in the previous version of section 334, subdivision (d), above, the use of the word "establishment" has a particular meaning for evaluation of an employer's history. When an employer has a fixed warehouse location, such as in the instant matter, the definition of "establishment" relates only to the cited location. As such, the history of any previous violations would be applicable only to the warehouse located in Manteca, as that was the cited establishment. Smith testified generally about previous citations issued to The TJX Companies, without providing any information about where those violations occurred. There is no evidence of a history of violations for NBC Manteca Merchants, Inc. at the job site in Manteca.

Accordingly, the Division did not present sufficient evidence to support its rating of Fair for the History adjustment factor. Therefore, Employer is entitled to the maximum credit and the Gravity-based penalty is reduced by 10 percent. (*RII Plastering, Inc, supra*, Cal/OSHA App. 00-4250.)

The application of the adjustment factors discussed herein results in a total of 50 percent reduction to the Gravity-based Penalty. As such, the resulting Adjusted Penalty is $9,000.

An Adjusted Penalty may be further reduced if a violation is abated. However, Smith testified that Employer had not abated the violation alleged in Citation 2. (§336, subd. (e).)

Accordingly, the penalty in Citation 2 is amended to $9,000, which is found to be reasonable.

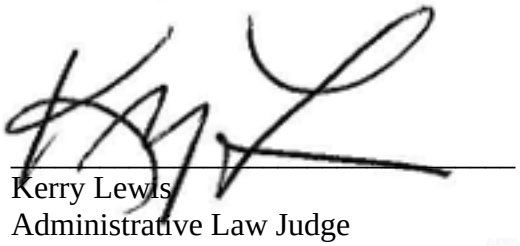
Conclusion

The evidence supports a finding that Employer violated section 3385, subdivision (a), by failing to require appropriate foot protection where employees were exposed to foot injuries from falling objects or crushing actions. The violation was properly classified as Serious. The proposed penalty, as amended herein, is reasonable. The abatement requirements are reasonable.

Order

It is hereby ordered that Citation 2 is affirmed and the associated penalty is modified to $9,000, as set forth in the attached Summary Table.

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



Dated: 10/28/2021

Kerry Lewis
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.**