BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
99 CENT ONLY STORES, LLC #383 **4000 UNION PACIFIC AVENUE** **CITY OF COMMERCE, CA 90023**	**1314092**
Employer	**DECISION**

Statement of the Case

99 Cents Only Store, LLC, (Employer) is a retail store chain. Beginning May 7, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer, Melissa Brittan (Brittan), conducted an inspection of Employer's store (the store) located at 10765 Camino Ruiz, in San Diego, California (the site.)

On October 8, 2018, the Division issued three citations to Employer, alleging five violations of California Code of Regulations, title 8.[1] The Division alleges Employer failed to: timely report a serious injury; maintain complete training records; stabilize stacked items; maintain an Injury and Illness Prevention Program (IIPP) that included all of the required elements of an IIPP; and provide appropriate foot protection.

Employer filed a timely appeal of the citations, contesting the existence of the violations and reasonableness of the penalties as to all of the citations. Employer further appealed on the grounds of incorrect classification and reasonableness of the abatement requirements as to Citations 2 and 3. Employer also asserted the affirmative defense of independent employee action and raised a series of affirmative defenses as to all of the citations.[2] The parties entered into several stipulations including settling Citation 1, Items 1, 2 and 3 and Citation 2.[3] The hearing proceeded as to Citation 3.

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] Except where discussed in the 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).)
[3] The parties stipulate that the following citations are settled: Citation 1, Item 1, remains as issued, $5,000.00 penalty. Citation 1, Item 2, the citation remains as issued, the penalty is reduced to $350. Citation 1, Item 3, the citation remains as issued, the penalty is reduced to $525. Citation 2, Item 1, the citation and penalty of $18,000.00, remains as issued.

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On May 4, 2021, and June 2, 2022, ALJ Murad conducted the video hearing with all participants appearing remotely via the Zoom video platform. Attorneys Marco Pulido and Bianca Valencia of Haynes and Boone, LLP, represented Employer. Manuel Arambula, Staff Counsel, represented the Division. The matter was submitted for Decision on September 23, 2022.

Issues

1. Did Employer fail to provide appropriate foot protection?

2. Did the Division establish that Citation 3 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation 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. Is the proposed penalty reasonable?

Findings of Fact

1. Employer owned and operated a retail business at the job site that had a backroom to store merchandise.

2. Employees working at the job site are required to physically lift and move merchandise by moving pallets of goods from truck trailers into the backroom for storage.

3. Employer did not provide protective footwear to employees required to work in the backroom.

4. Pallets containing heavy weights, such as pallets of gallons of milk, may cause injuries if they fall on or run into an employee's unprotected foot, resulting in broken bones or injuries requiring surgery or amputation.

5. Employee Esmeralda Oregon Reyes (Reyes), suffered a fracture of her right ankle when she lost control of a manual pallet jack with a load of milk on a pallet.

6. Reyes was not wearing foot protection.

7. Employer acknowledged that its employees were not required to and did not wear foot protection at this store.

8. The parties further stipulated that the injured employee, Esmeralda Oregon Reyes, suffered a fractured right tibia of her ankle.

9. The proposed penalty for Citation 3, Item 1, was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to provide appropriate foot protection?

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.

In Citation 3, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on April 19, 2018, the employer failed to provide appropriate foot protection including, but, not limited to steel-toed safety shoes as required by section 3385 (a) to its employees exposed to falling objects, crushing and/or penetrating actions, while loading/unloading inventory using mobile equipment such as, but not limited to manual and/or electric pallet jacks.

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. (*Millennium Reinforcing, Inc.*, Cal/OSHA App. 1290766, Decision After Reconsideration (April 25, 2022.) "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. Applicability

Based upon photographs and a video of the accident offered by the Division, there is no dispute that the worksite is comprised of a retail store with a large storage room (backroom), located behind the shop. Heavy pallets of inventory, like milk, and the use of heavy equipment such as manual and electric pallet jacks, presented potential falling objects, or crushing or penetrating hazards causing foot injuries. Thus, the regulation applies.

b. Exposure

Employee exposure to the hazard of foot injuries may be established in one 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*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).) 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." (*Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (Apr. 14, 2021).)

There is no dispute that employees were required to work in the backroom and were required to move heavy pallets of merchandise and use heavy moving equipment. The backroom is the zone of danger.

The Division presented a video obtained from Employer that shows Reyes in the backroom of the store where Reyes became injured. The video shows Reyes using a manual pallet jack to unload a pallet of one gallon milk cartons from a truck trailer. It appears she is attempting to pull the pallet of milk out of the trailer and into the backroom of the store. Reyes loses control of the pallet jack and the weight of the load strikes her right ankle (the accident). There is no dispute the impact resulted in a fracture injury.

The Division thus demonstrated that exposure to foot injuries from falling objects, or crushing or penetrating actions is found under both standards.

c. Violation

Where there is exposure to foot injuries, it is incumbent on Employer to provide safety footwear that will protect against the hazards found in the workplace. (*Home Depot USA, Inc.,* Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

The Division presented Brittan's August 14, 2019 deposition.[4] Brittan testified that a manager for Employer admitted that no safety shoes were required or provided to their employees working at this store. Management from Employer told Brittan that Reyes was not to use the manual pallet jack. There was no Personal Protective Equipment (PPE) for unloading pallet jacks, just normal work clothes and shoes.

[4] Testimony by way of a sworn deposition is allowed pursuant to California Code of Civil Procedure § 2025.610 (a) and California Evidence Code § 1291(a) (2).

Brittan further testified that she watched a video of the accident that showed loads that were unsecured. Brittan was concerned about objects falling off the pallet while in transit and falling on an employees' feet. She was also concerned about the raised pallet jack forks and employees' toes or feet getting caught under the forks. Another concern was that an employee can also run over the foot or toes of an employee with a pallet jack. She testified in her deposition that Reyes told Brittan that she, Reyes, was not wearing foot protection on the day of the accident.

Employer's Senior Health and Safety Manager, Angela Alexander (Alexander) testified at hearing that Assistant Store Manager Reyes was not wearing safety shoes on the day of the accident. Alexander further testified that Employer investigated the accident and concluded that foot protection would not have prevented the injuries Reyes sustained. Alexander also testified that foot protection is for toe protection. Employer argued that no foot protection is required because Reyes did not suffer a foot injury. Alexander further testified that Employer had an effective safety program which eliminated the risk of injuries. However, the affirmance of a citation, and a finding of exposure, does not require the existence of an actual injury to the foot or a history of prior foot injuries. Employees were exposed to foot injuries. Reyes suffered a foot related injury. Employees need to be protected. Indeed, to hold otherwise would be to ignore the goals of the Occupational Safety and Health Program. "The goal of the Occupational Safety and Health program in California remains preventive in nature, that is, to prevent an injury from ever taking place." (*Labor Ready*, Cal/OSHA App. 99-350, Decision After Reconsideration (May 11, 2001).)

Alexander further testified that since there was a history of safety at this store, with only one accident from 2016 to 2018, that being the Reyes accident, the safety program Employer had in place did not trigger the need for foot protection. The Appeals 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, Decision After Reconsideration (July 24, 2017).), quoting *Zero Corporation*, Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984).) The violation has been proven. Foot protection is required.

Employer's expert witness Dominick Zackeo (Zackeo), was retained after the accident to perform a job safety analysis of the operation at the backroom of the store. He observed the unloading and distribution of materials in the backroom. He was of the opinion that the controls the Employer had in place to protect employees from injuries was effective and that no foot protection was needed.

Zackeo was aware that on the day of the accident, Reyes was moving a pallet of 20, one-gallon plastic milk cartons, (each weighing 8 ½ pounds) with a total weight of approximately 400 pounds, when she lost control of the manual pallet jack. He concluded that this much weight

hitting an employee would cause a crushing or penetrating type injury. Zackeo agreed that Reyes suffered a crushing injury.

Reyes, as well as other employees working in the backroom of the store, were exposed to the hazards of falling objects or to crushing or penetrating actions that could result in foot injury. Reyes suffered an injury while operating a manual pallet jack without wearing foot protection. Employer's safety program did not eliminate injuries on the job site.

Employer failed to require all employees working in the backroom appropriate foot protection. The resulting injury to Reyes confirmed that Employer knew or should have known of the potential of foot injuries. Accordingly, the Division established a violation of section 3385, subdivision (a). Therefore, Citation 3, Item 1, is affirmed.

2. Did the Division establish a rebuttable presumption that Citation 3 was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) 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 actual hazard may consist of, among other things:
> [...]
> (b) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Further, 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.

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).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment

that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation" or "the loss of any member of the body." (Lab. Code § 6432, subd. (e).)

The Division presented Safety and Health Compliance Officer, Louis Vicario (Vicario). He testified that he never visited the store. He received the original accident report from Employer. He had no other involvement in the investigation of the citations issued in this case. In the absence of Brittan, Vicario reviewed the investigative file and authenticated all of the investigative file documents. He further testified that he verified the citations and the penalty calculation worksheet were accurate, complete and prepared pursuant to title 8 and the Division's policy and procedures.

Reyes was not wearing protective footwear, she was injured, and the same kind of injuries could occur from falling objects, crushing or penetrating actions. Employees, including Reyes, used heavy equipment such as manual and electric pallet jacks, and moved heavy pallets of merchandise that could also come loose, fall and crush or penetrate an employees' foot. The need for foot protection was in plain view and apparent. The Division established that foot protection would have mitigated or protected Reyes from the injury she suffered. Based upon the facts and evidence presented, foot protection was required to protect employees at this store.

The Division provided no evidence that Brittan or Vicario were current in their Division-mandated training. As such, Labor Code section 6432, subdivision (g), cannot be used to deem Brittan or Vicario presumptively competent to testify regarding the serious classification of Citation 3. Vicario has never investigated an incident which involved the required use of foot protection and thus he is not competent to testify about the realistic possibility of such an injury being serious. "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Labor Code section 6432, subdivision (e).) The Division's form 36, identified as the Accident Report, found in Exhibit 3, (which was admitted into evidence,) confirmed that Reyes was hospitalized for surgery from April 19, 2018 until her discharge on April 21, 2018, a hospitalization of more than 24 hours. The parties stipulated that Reyes suffer a fractured tibia at her right ankle, which is serious physical harm. This fracture injury demonstrates that there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

Accordingly, the Division has met its burden to establish a rebuttable presumption the violation cited in Citation 3 was properly classified as Serious.

3. Did Employer rebut the presumption that the violation in Citation 3 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 that:

> (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.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and
> (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The burden is on Employer to rebut the presumption that the citation was properly classified as Serious. Further, the Board has held that a failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence and will not excuse a violation on a claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990).) (See also *Gateway Pacific Contractors*, Cal/OSHA App. 10-R2D3-1502-1508, Decision After Reconsideration (Oct. 4, 2016).)

Employer provided training records in use before the accident, but none that were relevant to foot protection. Alexander testified that Employer had no policies regarding the use of safety shoes by employees who unload trucks such as what Reyes was doing on the day of the accident. Employer did not discuss at any time before the accident with any of the employees at the store the use of safety shoes. Reyes was to use an electric pallet jack and not use a manual pallet jack to unload trucks or trailers. She used a manual pallet jack.

The Board has long held that hazardous conditions in plain view constitute serious violations since the employer could detect them by exercising reasonable diligence. (*Fibreboard*

Box & Millwork Corp., Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991); *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014), see also *Millennium Reinforcing, Inc.,* Cal/OSHA App. 1290766, Decision After Reconsideration (April 25, 2022).)

Here, the hazards to employees' feet were in plain view. Employer observed employees each day working in the storage room using pallet jacks to move stock. Employer determined that it was not necessary to require protective footwear despite the readily visible hazards presented by heavily loaded pallets and the use of heavy equipment such as manual and electric pallet jacks. Employer here thus cannot be said to have taken all reasonable steps to anticipate and prevent, or eliminate, employee exposure to the hazard.

Therefore, Employer did not meet its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer has not rebutted the presumption that the citation was properly classified as Serious. Accordingly, Citation 3 was properly classified as Serious and is affirmed.

4. Is the proposed penalty for Citation 3 reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Here, the Division submitted its Proposed Penalty Worksheet and Employer did not present evidence that the calculations were incorrect. Accordingly, the proposed penalty is affirmed.

Citation 3 is a Serious classified citation. Based upon the evidence presented, the penalty set for Citation 3, was calculated within the Division's policies and procedures. The penalty of $13,500.00 is reasonable.

Conclusion

The Division established 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 or penetrating actions. The violation was properly classified as Serious. The proposed penalty of $13,500.00 is reasonable.

Order

Citation 3, Item 1, is affirmed as issued and as set forth in the attached Summary Table.

The proposed settlement of the remaining citations presented by the parties by stipulation are approved and the items are resolved as follows:

Citation 1, Item 1, remains as issued. The $5,000.00 penalty is affirmed.

Citation 1, Item 2, remains as issued but with adjustment factors applied, the penalty is reduced to $350.00, and is affirmed.

Citation 1, Item 3, remains as issued but with adjustment factors applied, the penalty is reduced to $525.00, and is affirmed.

Citation 2, Item 1, remains as issued. The $18,000.00 penalty is affirmed.

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

Dated: 10/17/2022

Leslie E. Murad, II
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.**