BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
99 CENTS ONLY STORES, LLC #383 **10765 Camino Ruiz** **San Diego, CA 92126** **Employer**	**1314092** **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

99 Cents Only Stores, LLC (Employer) is a retail store chain. Beginning on May 7, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Melissa Brittan, conducted an inspection of Employer's store number 383, located in San Diego, California, after a report of an employee injury where an employee suffered a serious injury when a manual pallet jack crushed her ankle.

On October 8, 2018, the Division issued three citations to Employer, alleging five violations of California Code of Regulations, title 8.[1] Citation 1, Items 1, 2, and 3, and Citation 2 were settled prior to hearing. The hearing proceeded as to Citation 3 (or, the Citation), which remains at issue. Citation 3 alleged a Serious violation of section 3385, subdivision (a) [failure to provide appropriate foot protection].

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the Board, on May 4, 2021, and June 2, 2022, 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.

At the time of the hearing, Ms. Brittan was no longer employed by the Division, and was unavailable to testify at the hearing. In lieu of her personal appearance, the ALJ admitted her earlier deposition testimony. No party moved to require Ms. Brittan to appear in person. Employer's Petition argues that Ms. Brittan's deposition testimony should not have been admitted.

The ALJ's Decision, issued October 17, 2022, affirmed Citation 3, its Serious classification, and the proposed penalty. Employer's timely Petition for Reconsideration (Petition)

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

followed. Employer argues the ALJ erroneously found that employees at the store were exposed to the hazard of foot injuries. Employer argues that its administrative controls were sufficient to negate exposure to the hazard, and that the ALJ failed to properly consider this evidence. In addition, Employer argues that Citation 3 was improperly classified as Serious. Issues not raised in the Petition are considered waived. (Lab. Code, § 6618.) The Division timely filed an Answer opposing the Petition.

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 the ALJ commit reversible error in admitting Ms. Brittan's deposition testimony?

2. Were Employer's employees exposed to the hazard of foot injuries?

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

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

FINDINGS OF FACT

1. Ms. Brittan conducted the investigation and issued the citations in this matter, but was no longer employed by the Division when the matter came to hearing.

2. Ms. Brittan was unavailable to testify at the hearing.

3. In lieu of Ms. Brittan's in-person testimony at the hearing, the ALJ admitted her sworn deposition testimony on the matter.

4. Employer owned and operated a retail business at the job site that had a back room to store merchandise.

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

6. Employer did not provide protective footwear to employees required to work in the back room.

7. Heavy items, such as gallons of milk or cases of eggs, may cause injuries if they fall onto an employee's unprotected foot, resulting in broken bones or injuries requiring surgery or amputation.

8. Heavy equipment such as pallet jacks may cause injuries if they strike or run over an employee's unprotected foot, resulting in broken bones or injuries requiring surgery or amputation.

9. Employee Esmeralda Oregon 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.

10. Ms. Reyes was not wearing foot protection.

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

12. Ms. Reyes suffered a fractured right tibia of her ankle.

13. Ms. Reyes's injury required surgery, and hospitalization for more than 24 hours.

DISCUSSION

1. Did the ALJ commit reversible error in admitting Ms. Brittan's deposition testimony?

When a witness is unavailable to testify in a judicial proceeding, the witness's former testimony by way of a sworn deposition is admissible in place of live testimony. (Cal. Code Civ. Proc., § 2025.620, subd. (a);[2] Evid. Code, § 1291, subd. (a)(2).[3]) "Depositions are routinely used at trial … to present testimony in lieu of live testimony when the witness is unavailable." (*Doe v. Kim* (2020) 55 Cal.App.5th 573, 584.)

Ms. Brittan was deposed by Employer on August 14, 2019. (Exhibit 27.) The Division subpoenaed Ms. Brittan as a witness on April 28, 2022. (Exhibit 28.) She responded through counsel that she was unavailable to testify in person due to physical infirmity, would not appear pursuant to the subpoena, and would move to quash any effort to enforce the subpoena. (HT 6/2/2022, pp. 10-13; Exhibit 28.) Neither the Division nor Employer moved to compel Ms. Brittan's attendance pursuant to section 372.5. [4]

Instead, the Division entered the deposition transcript into evidence, and read a portion of the transcript into the record. (Exhibit 27.) Employer raised a number of objections to this, all of which the ALJ overruled. (HT 5/4/2022, pp. 24, 29, 30-31, 40.) Before permitting the Division to do so, the ALJ warned the Division that by offering Ms. Brittan's deposition testimony, rather than compelling her presence, the Division made a conscious decision not to put forth its "best and most

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[2] The ALJ's Decision refers to Code of Civil Procedure, section 2025.610, subdivision (a). This appears to be a typographical error. Civil Procedure Code, section 2025.620, subdivision (a), provides, "Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code."

[3] Evidence Code, section 1291, subdivision (a)(2), provides:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: […]
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

[4] Section 372.5, subdivision (a), provides, in relevant part, "If any witness refuses to attend or testify or produce any papers required by a subpoena issued by the Appeals Board, a party may file with the Appeals Board a petition for judicial enforcement."

accurate evidence." (HT 6/2/2022, pp. 16-17.) Employer also read a portion of the deposition transcript into the record for purposes of cross-examination.

Employer's Petition argues that Ms. Brittan's deposition testimony should not have been admitted. Employer argues that it was denied the opportunity to cross-examine Ms. Brittan, not on her deposition testimony, but regarding a statement made in a Verified Complaint (the Complaint) (Exhibit V) which Ms. Brittan filed against the Division in the San Diego County Superior Court, on January 10, 2022, well after her August 2019 deposition testimony was taken. The Complaint alleged that the Division discriminated against, harassed, and retaliated against Ms. Brittan, in violation of the California Fair Employment and Housing Act. Paragraph 21 of the Complaint stated, "Plaintiff has also been told by her supervisor to take actions inconsistent with her job duties, such as being told to issue serious citations not merited by the facts of her investigation." Employer asserts that this statement "tainted" the earlier deposition testimony and rendered it "unreliable." (Petition, pp. 2, 15.) Employer therefore argues that Ms. Brittan's live testimony should have been required for affirmance of Citation 3, and suggests that the remedy should be to vacate the ALJ's Decision and remand the matter to Hearing Operations. (*Id.* at p. 9, fn. 1.)

We are not persuaded by Employer's argument.

First, as noted, the Board's rules permit either party to file a petition for judicial enforcement of a subpoena. (§ 372.5, subd. (a).) Employer here had the opportunity to file such a petition, but declined to do so. (HT 6/2/2022, p. 46.)

Second, the Board's rules give the ALJ broad authority "to regulate the course of a hearing" and "to rule on objections, privileges, defenses, and the receipt of relevant and material evidence[.]" (§ 350.1, subd. (a). See also §§ 376.1, 376.2.) Here, the ALJ was made aware of the statements in the Complaint, and admitted the Complaint into evidence as a substantive cross-examination regarding these statements. (HT 5/4/2022, pp. 68, 71; Exhibit V.) The ALJ therefore had the opportunity to assess the credibility of Ms. Brittan's deposition testimony. Contrary to Employer's implication, the ALJ did not rely exclusively upon Ms. Brittan's deposition testimony. Section 376.2 provides, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The ALJ here applied this rule. The ALJ relied on other evidence, primarily video footage of the accident, as well as testimony from Employer's own witnesses, to find that employees were exposed to the hazard of foot injuries.

Finally, Employer was not prejudiced or disadvantaged by the introduction of Ms. Brittan's deposition testimony, rather than her live testimony. The allegation in Ms. Brittan's Complaint, if true, and assuming it had any potential bearing on this particular matter, could reasonably relate only to the serious classification of Citation 3, not the alleged violation itself. However, not only did the record evidence demonstrate that Ms. Reyes was exposed to the hazard of foot injuries, the parties stipulated that Ms. Reyes suffered a fracture, and as a result was hospitalized for more than 24 hours. (HT 5/4/2022, p. 130.) There is thus no dispute that Ms. Reyes suffered serious physical harm as a result of the violation. (Lab. Code, § 6432, subd. (e).) Even if Ms. Brittan's deposition testimony were excluded from the record, it would not change the outcome of the ALJ's Decision.

For these reasons, we find the ALJ acted within his authority in permitting the Division to enter Ms. Brittan's deposition testimony into evidence.

2. Were Employer's employees exposed to the hazard of foot injuries?

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 alleged:

> 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 demonstrate by a preponderance of the evidence that (1) employees were exposed to foot injuries from, among other things, falling objects, crushing, or penetrating actions, and (2) the employer failed to require adequate foot protection. (*Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017) (*Home Depot USA*); *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018); *MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000).) "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).)

Here, there is no dispute that Employer did not require protective footwear. Rather, Employer asserts that the ALJ erred by finding employee exposure to the hazard of foot injuries. Employer offers two arguments in support of this claim: (1) the ALJ's "zone of danger" analysis was flawed; and (2) the ALJ failed to give adequate weight to Employer's administrative and engineering controls, which Employer asserts eliminated exposure to foot injuries.

a. Were Employer's employees exposed to the zone of danger around pallet jacks and heavy items that could cause foot injuries?

Exposure to a hazard may be demonstrated in two different ways. First, the Division may demonstrate exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Actual exposure is established when

the evidence preponderates to a finding that employees actually have been or are in the zone of danger surrounding the violative condition. (*Dynamic Construction Services, Inc*., Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) Or, the Division may establish exposure by showing that the zone of danger "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*.)

"The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) With regard to foot injuries, objects that could fall from elevated areas and strike employees' feet create a zone of danger. (*Home Depot USA, Inc. dba Home Depot* #6683, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017) (*Home Depot # 6683*); *Golden State FC, LLC*, Cal/OSHA App. 1310525 (Apr. 14, 2021).) There is also a zone of danger "where employees and industrial trucks come into close proximity." (*Interline Brands, Inc.*, Cal/OSHA App. 1251604, Decision After Reconsideration (Sept. 17, 2020); *Millennium Reinforcing, Inc*., Cal/OSHA App. 1290766, Decision After Reconsideration (April 25, 2022).)

Here, the zone of danger is the area around heavy objects in the back room which could fall or be dropped onto employees' feet, and the area around heavy moving equipment such as pallet jacks. To be clear, it is irrelevant to either the violation or its classification that the injury was to Ms. Reyes's ankle. A finding of exposure to the hazard of foot injury does not require an actual foot injury. As the ALJ correctly pointed out, "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." (*Home Depot # 6683, supra*, Cal/OSHA App. 1014901, citing *Labor Ready*, Cal/OSHA App. 99-350, Decision After Reconsideration (May 11, 2001).) The Board has long held, "A violation of the safety order is not based on previous history of accidents or injuries resulting from the exposure but rather on the existence of the danger which may cause injury." (*Home Depot USA, Inc., supra*, Cal/OSHA App. 1011071 [citations omitted].) The only issue is therefore whether employees were exposed to the hazard of foot injuries.

The Division's primary evidence consisted of security video footage, obtained from Employer, showing the moments leading up to and when Ms. Reyes's injury occurred. (Exhibit 19.) The video depicts Ms. Reyes attempting to move a pallet of product from a truck trailer, and into the back room, using a manual pallet jack (MPJ). Ms. Reyes appears to struggle with the weight of the unloaded MPJ as she pushes it up an inclined ramp into the trailer. (Exhibit 19, 1:15-1:20.) As she emerges from the trailer, Ms. Reyes is on the downslope from the loaded MPJ, and walking backwards. (*Id*. at 1:59-2:02.) The milk jugs are in plastic crates, which appear to be shrink wrapped together. There are also several large boxes on top of the milk crates that are neither wrapped nor secured. The weight of the milk alone, not including the additional boxes or the MPJ, was estimated to be approximately 400 pounds. (HT 6/2/2022, pp. 240-241.) Ms. Reyes appears to lose control of the loaded pallet jack, which strikes her, pinning her against the doorway of the loading dock. (Exhibit 19, 2:03-2:07.)

In addition to this accident, Exhibit 19 depicts pallets of stacked items, which are not secured with plastic wrap, throughout the back room. Some of these pallets consist of large boxes, and some appear to contain heavy items, such as cases of canned food and soft drinks. Exhibit 19 also depicts haphazardly arranged boxes, of various sizes, which are piled as if thrown, almost to the level of the security camera. Employees are seen in close proximity to these pallets and boxes. Although the Division's citation specifically refers only to injuries caused while loading and unloading inventory, using pallet jacks, these conditions also present a risk of foot injuries.

The Division's evidence demonstrates that employees working in the store's back room, including Ms. Reyes, were exposed, under both standards, to foot injuries from objects which could cause injuries if these objects were to fall or be dropped onto an employee's unprotected foot. Employees were also exposed, under both standards, to foot injuries from accidental contact with heavy moving equipment such as pallet jacks. The ALJ's Decision therefore correctly identified the entire back room as the zone of danger. (Decision, p 4.)

Employer disputes this finding. Employer argues, first, that the Division failed to meet its burden of proof, by presenting the deposition testimony of Ms. Brittan and by "roping in another inspector, [Louis] Vicario, to testify at the hearing." (Petition, p. 15.) As discussed above, the ALJ acted within his authority in allowing, and giving some weight to, Ms. Brittan's deposition testimony. Mr. Vicario testified primarily to authenticate some Division documents related to Ms. Brittan's investigation, including the jurisdictional documents, penalty worksheet, and Ms. Brittan's field notes; the ALJ did not rely upon Mr. Vicario's testimony in finding that employees were exposed to foot injuries. (Decision, p. 7.)

Employer also argues that, in the absence of Ms. Brittan's live testimony, the ALJ over-relied upon the video evidence in Exhibit 19. Employer asserts, "The video does nothing to dispel (or otherwise rebut) the effectiveness of the safety controls in place at [the store]." (Petition, p. 15.) Employer argues, essentially, that the ALJ, and the Board, should not believe their own eyes. We reject this argument, and find that Ms. Reyes was exposed to the hazard of foot injuries. We next address the question of whether Employer's safety controls eliminated employee exposure to foot injuries to a degree that foot protection was not required.

b. Did Employer's administrative controls eliminate the need for foot protection?

Employer argues that its administrative and engineering controls eliminated employee exposure to foot injuries. These arguments are summarized as follows.

Employer argues that "most" of the items sold by Employer were "lightweight and small to medium in size." (Petition, pp. 17, 18; HT 6/2/2022, pp. 203, 230.) This argument is irrelevant to the hazard of foot injuries caused by accidental contact with pallet jacks. In addition, the video footage in Exhibit 19 depicts a variety of merchandise in the back room, including some items that are unquestionably heavy enough to cause injuries if they were to fall or be dropped and strike an employee. The Board has previously rejected the argument that foot protection is unnecessary in situations where employees are required to move, carry, or work in close proximity to, only *some* items heavy enough to cause foot injuries. (*Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (Apr. 21, 2021).)

Employer argues that its practices for building pallets – which are prepared in distribution centers and then shipped to retail stores – required the pallets to be built with heavier items on the bottom, and wrapped in plastic, to prevent items from becoming displaced during unloading of merchandise. (Petition, p. 17; HT 6/2/2022, pp. 147-148.) However, the video evidence shows large unsecured boxes stacked on top of the pallet of milk which Ms. Reyes was attempting to unload. (Exhibit 19.) The boxes, clearly labeled "Eggs" are large enough to contain up to one dozen cartons of eggs, each of which weighs approximately one and a half pounds. We therefore infer that that each box weighed enough to cause foot injury." The control of wrapping all palletized items was not followed on the day of the accident.

Employer argues that "pallets are moved using an EPJ, not physically lifted." (Petition, p. 16.) There is no allegation by the Division that employees were ever required to physically lift entire pallets. A pallet is a roughly six by six foot cube of packed items. In addition, there is no dispute that Ms. Reyes was using an MPJ, not an electric pallet jack (EPJ), at the time of her injury, although she was certified to use an EPJ. (HT 6/2/2022, p. 147.) The video evidence, corroborated by testimony from Employer's witnesses, shows Ms. Reyes attempting to control an MPJ, on a downhill incline, with unsecured boxes stacked on top of milk crates weighing over 400 pounds. (Exhibit 19; HT 6/2/2022, pp. 234-235, 242.) Although Employer suggests that Ms. Reyes should have used an electric rather than manual pallet jack, Employer did not present evidence in support of the Independent Employee Action Defense during the hearing. The ALJ therefore considered the defense waived. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) Nor does Employer explicitly raise the defense in its Petition, confirming that it has been waived. (Lab. Code, § 6618.)

Employer argues that employees were trained on the safe use of pallet jacks. (Petition, pp. 17-18.) However, Ms. Reyes's injury occurred while using an MPJ on an incline. Employer expanded its safety training on MPJs after her injury, to include warnings against using MPJs on ramps and inclines. (Exhibits K-3, M.) There is no evidence in the record that Ms. Reyes's training included this warning.

Employer argues that the ALJ failed to give proper weight to evidence of these and other controls, in particular regarding the testimony of Employer's expert witness, Dominick Zackeo. Mr. Zackeo has previously appeared as an expert witness before the Board on behalf of a number of employers cited for foot protection violations. (See *Golden State FC, LLC*, *supra*, Cal/OSHA App. 1310525; *Home Depot USA*, *supra*, Cal/OSHA App. 1011071; *Interline Brands, Inc.*, *supra*, Cal/OSHA App. 1251604.) Here, Mr. Zackeo testified that he did not review the safety training employees received prior to the accident. (HT 6/2/2022, pp. 236, 238.) He also did not review the conditions or the practices in the back room as they existed on the day of the accident. (HT 6/2/2022, p. 236.) Mr. Zackeo opined, based on an assessment conducted after the accident, that foot protection was not required for employees in the back room area. This conclusion was based on Employer's engineering and administrative controls, including enhanced safety training on the use of pallet jacks, some of which were implemented only after the accident. (Petition, pp. 20-21.)

Although effective administrative and engineering controls are important measures to protect workers, and may prevent exposure in some circumstances, such controls do not appear to

have been sufficient here. (*Home Depot # 6683*, *supra*, Cal/OSHA App. 1014901; *Golden State FC, LLC*, *supra*, Cal/OSHA App. 1310525.) The Division's evidence demonstrates that Employer's controls were either not followed, or not effective. Exhibit 19, as discussed, shows boxes haphazardly stacked, pallets not shrink-wrapped, and Ms. Reyes using an MPJ rather than an EPJ to move a pallet down an inclined ramp. Mr. Zackeo testified that an MPJ, loaded with a weight exceeding 400 pounds, presented a hazard of injury if it were to strike or roll over an employee's unprotected foot. (HT, 6/2/2022, p. 242.)

When, as here, an employer's administrative controls amounted to "instructing employees not to expose themselves or others to the hazards contemplated by the safety order," the Board has consistently found that such controls were insufficient, particularly where "exposure in fact occurred" despite them. (See, e.g., *Home Depot USA*, *supra*, Cal/OSHA App. 1011071; *Millennium Reinforcing, Inc*., *supra*, Cal/OSHA App, 1290766.) We agree with the ALJ that employees were exposed to the hazard of foot injuries in Employer's back room, and that Employer's administrative controls did not eliminate employee exposure.

3. 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 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:
> [...]
> (b) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The 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).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, broken bones, or "[i]npatient hospitalization for purposes other than medical observation." (Lab. Code, § 6432, subd. (e).)

Here, the ALJ correctly concluded that the Division met its burden to establish the requisite presumption. Employees, including Ms. Reyes, used heavy equipment such as pallet jacks, and worked around pallets of unsecured merchandise from which items could potentially fall and crush or penetrate an employee's foot. The parties stipulated that Ms. Reyes suffered a fractured tibia at her ankle, requiring hospitalization for surgery, which is serious physical harm.

Employer disputes the existence of an "actual hazard," arguing that the Division presented no evidence of any "unsafe practice adopted or in use by the employer." (Petition, p. 22.) Employer points to its various engineering and administrative controls, discussed above, and argues that the injury would not have occurred if Ms. Reyes been using an electric, rather than manual, pallet jack. (*Id*.) Employer also argues that the injury was not to Ms. Reyes's foot, and would not have been prevented by protective footwear. (*Id*.)

These arguments are speculative. Employer also misapprehends the proper standard for the Serious classification. The violative condition here was the unsafe practice of moving and unloading heavy pallets without foot protection. Even if foot protection would not have prevented or mitigated this particular injury, which is not at all certain, that is irrelevant. Exposure to foot injuries existed, and Ms. Reyes's ankle injury, which the ALJ reasonably described as "foot related" (Decision, p. 5), demonstrates a realistic possibility that these injuries could be serious.

4. Did Employer fail to rebut the presumption that the violation in Citation 3 was Serious by demonstrating that it did not know, and with the exercise of reasonable diligence could not know, 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.

Here, the hazards to employees' feet were in plain view. (Exhibit 19; Decision, p. 7.) Hazardous conditions in plain view, by their very nature, can be detected by the exercise of reasonable diligence. (*Home Depot USA, Inc.*, Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017), citing *Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).) Employer knew that its employees moved heavy pallets, and used heavy equipment such as pallet jacks, on a daily basis. Yet, Employer concluded that it was not necessary to require protective footwear, despite these readily visible hazards. The Division's evidence demonstrated actual exposure to the hazard of foot injuries, as well as reasonably predictable access to the hazards presented by pallet jacks and elevated heavy items. Thus, the ALJ concluded, Employer cannot be said to have taken all reasonable steps to anticipate and prevent, or eliminate, employee exposure to the hazard.

Employer argues it was unforeseeable that Ms. Reyes would use a manual, rather than electric, pallet jack. (Petition, pp. 22-23.) Again, Employer misinterprets the standard. It is not the foreseeability of an employee's actions that are at issue when a hazard is in plain view. It is the hazardous condition itself. (See, e.g., *Millennium Reinforcing, Inc*., *supra*, Cal/OSHA App. 1290766.) The appropriate standard is whether Employer knew, or could have known, had it exercised reasonable diligence, that employees working in the back room were exposed to the hazard of foot injuries. (*Andersen Tile Co.*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000).)

Employer also narrowly reads the "plain view doctrine" to apply only to specific examples in which the Board has previously applied this rule. (See, e.g., *Millennium Reinforcing, Inc*., *supra*,

Cal/OSHA App. 1290766 [hazard presented by elevated bundles of rebar and forklifts in plain view]; *Fibreboard Box & Millwork Corp.*, *supra*, Cal/OSHA App. 90-492 [hazard presented by exposed machinery parts in plain view]; *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) [hazard presented by cranes in plain view].). (Petition, p. 23.) Employer's reading, if adopted, would effectively stymie the Board from ever finding a hazard in plain view if that exact hazard had not been the subject of a previous Board Decision After Reconsideration. For example, Employer would permit the Board to consider a forklift to present a hazard in plain view, but not a pallet jack. Such a reading would lead to absurd results, and would be contrary to promoting workplace safety. (See, e.g., *National Steel and Shipbuilding Company (NASSCO)*, Cal/OSHA App. 10-3793, Denial of Petition for Reconsideration (Sep. 20, 2012) [interpretations leading to absurd results are to be avoided].)

Finally, Employer argues that its safety training and other controls constituted "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." (Lab. Code, § 6432, subd. (c)(1).) However, Employer's Senior Health and Safety Manager, Angela Alexander, testified that Employer had no policies regarding the use of foot protection by employees using pallet jacks or unloading trucks. (HT 6/2/2022, p. 161.) Nor, as noted, did Ms. Reyes's safety training prevent her from using an MPJ on an inclined surface. A reasonable and responsible employer would have taken these additional measures to eliminate exposure to foot injuries. Employer therefore failed to rebut the presumption that the violation was properly classified as Serious.

DECISION

For the reasons stated, the ALJ's Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 11/08/2023