

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

In the Matter of the Appeal
of:

HOME DEPOT USA INC.
11559 Venture Drive
Mira Loma, California 91752

Employer

DOCKETS 15-R3D3-2298
and 2299

DECISION

Statement of the Case

Home Depot USA Inc. (Employer) operates a warehouse distribution center. Beginning November 14, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Harpreet Dhillon (Dhillon), conducted an accident inspection at 11650 Venture Drive, Mira Loma, California (the site). On April 24, 2015, the Division cited Employer for failing to implement the required elements of its Injury & Illness Prevention Program (IIPP), failing to assess the work place to identify work place hazards, failing to require appropriate foot protection to be worn and failing to ensure that industrial trucks were operated in a safe manner.¹

Employer filed timely appeals for each citation, contesting the existence of the violation, the classification, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalties. Employer also alleged certain affirmative defenses for each citation².

This matter was heard by Jacqueline Jones, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Riverside, California on October 26 and 27, 2015, and January 25, 2016. Matthew Deffebach and Punam Kaji, Attorneys of Haynes and Bone, LLP represented Employer. William Cregar, Staff Counsel, represented the Division. The submission date was extended to July 25, 2016, on the ALJ's own motion.

¹ At hearing, Employer withdrew its appeal to Citation 1, item 4, alleging failure to timely report a serious injury to the Division. Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

² The affirmative defenses for which no evidence was presented are not discussed. They are deemed waived.

Issues

1. Did Employer fail to effectively implement and maintain its Injury and Illness Prevention Program (IIPP) by failing to identify and evaluate hazards, failing to correct hazards and failing to ensure that industrial trucks were operated in a safe manner?
2. Did Employer effectively assess the workplace to identify work place hazards which would necessitate the use of appropriate foot protection?
3. Did the Division correctly classify Employer's violation of section 3380, subdivision (f)(1), and Employer's violation of section 3650, subdivision (t)(9) as general violations?
4. Did Employer fail to ensure that industrial trucks were operated in a safe manner by: 1) maintaining a safe distance from other vehicles; 2) keeping the truck under positive control at all times; and, 3) ensuring that all established traffic regulations were observed?
5. Did Employer carry its burden of proof on the issue of the Independent Employer Action Defense pursuant to *Mercury Service Inc.*?
6. Did Employer require appropriate foot protection for employees who were exposed to foot injuries from falling objects or crushing or penetrating actions of industrial trucks?
7. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?
8. Did Employer rebut the presumption that Citation 2 was properly classified as serious?
9. Were the proposed penalties for all Citations reasonable?
10. Were the abatement requirements reasonable?

Findings of Fact

1. Dhillon opened the inspection in this case on November 14, 2014, at the site to investigate an October 25, 2014 incident.
2. The Division calculated the proposed penalties in accordance with the applicable title 8 regulations.³
3. Employer's IIPP had procedures in place to properly identify and evaluate hazards.
4. Employer's IIPP had procedures in place for correcting unsafe or unhealthy conditions in a timely manner.
5. Employer's IIPP provides for training and instruction for supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.
6. Employees walked in tennis shoes at the site near industrial trucks such as Electric Pallet Jacks (EPJ's). Employees were exposed to the hazard of

³ The Division and Employer stipulated to this during the hearing.

- an EPJ running over an employee's foot causing a crushing injury and to the hazard of merchandise falling off a pallet and onto an employee.
7. Employer did not determine what type of personal protective equipment (PPE) would be appropriate for its employees at the site.
 8. Employer failed to require affected employees to use appropriate foot protection.
 9. On October 25, 2014, an industrial truck operator, Nancy Rodriguez (Rodriguez) struck another industrial truck operator. This occurred when Rodriguez failed to maintain positive control while turning quickly and too hard in an attempt to position herself in anticipation of picking up a pallet.
 10. Employer failed to prove the following elements of the Independent Employee Action Defense as to Citation 1, item 3: 1) that the employee was experienced in the job being performed; and 2) the employee caused the safety infraction that he or she knew was contrary to the employer's safety requirements.
 11. Employees were exposed to foot injuries because Employer did not require protection from hazards such as from falling objects and or crushing or penetrating actions in that Employers industrial truck operators were driving within four to five feet of pedestrians and as a result, there is a realistic possibility of serious physical harm.
 12. The proposed penalties for all sustained Citations are reasonable.
 13. The changes required to abate and the time allowed to abate are reasonable.

Analysis

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program by failing to identify and evaluate hazards, failing to correct hazards and failing to ensure that industrial trucks were operated in a safe manner?

The Division cited employer under Section 3203. Section 3203, subdivision (a) provides as follows:

Effective July 1, 1991, every Employer shall establish, Implement and maintain an effective Injury and Illness Prevention Program (Program).

The Program shall be in writing and, shall, at a minimum:

- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.
- ...

- (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
 - (A) When observed or discovered; and,
 - (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
- (7) Provide training and instruction:
 - (A) When the program is first established...
 - (B) To all new employees...
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The citation alleges the following:

Prior to and during the course of the investigation, including, but not limited to, November 14, 2014, the employer failed to effectively implement the required elements of an Injury & Illness Prevention Program including, but not limited to the following essential elements:

1. The employer failed to timely identify and evaluate the hazards associated with the common practice of electric pallet jack operators relying on other industrial truck operators to assist in disengaging the forks from a "stuck" pallet by the means of other industrial truck operator making contact and securing the stuck pallet with the forks of their industrial trucks and or electric pallet jacks.
2. The employer failed to correct the hazard associated with industrial truck operators not maintaining a safe distance from other industrial truck operators during the common practice of disengaging the forks of a "stuck" pallet by the means of other industrial truck operator making contact and securing the stuck pallet with the forks of their industrial trucks and or electric pallet jacks.
3. The employer failed to ensure that supervisors to which employees under their immediate direction and control were trained and given instruction on the hazards associated with the common practice of electric pallet jack operators relying on other industrial truck operators to assist in disengaging the forks from a "stuck" pallet by the means of other industrial truck operator making contact and securing the stuck pallet with the forks of their industrial trucks and or electric pallet jacks.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal App. 4th 472, 483, review denied.)

To establish an Injury Illness Prevention Program (IIPP) violation, the Division must prove that flaws in the Employer’s written IIPP amounted to a failure to “establish” or “implement” or “maintain” an “effective” program. The Appeals Board has consistently held that a failure to implement or maintain an IIPP cannot be based on an isolated or single violation. (*GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991; *David Fischer, DBA Fischer Transport, A Sole Proprietor*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Instance 1

The Division alleged that Employer failed to evaluate unsafe work practices as required under section 3203, subdivision (a)(4). In order to prove a violation of section 3203, subdivision, (a)(4), the Division must establish the following: 1) Employer failed to implement its IIPP. While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan—in this case, through failing to inspect, identify and evaluate the hazards with the ATV. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

Here, Dhillon⁴ testified that a violation of section 3203, subdivision (a)(4) existed. The Division identified that the hazard was the practice of EPJ operators relying on other industrial truck operators to assist in disengaging the forks from a “stuck” pallet by the means of other industrial truck operators making contact and securing the stuck pallet with the forks of their industrial trucks. Dhillon testified that the managers, including Assistant General Manager William Chung (Chung) and Operations Manager Timothy Ratley (Ratley), knew about the hazard which was the practice of EPJ operators

⁴ Dhillon earned a Bachelor of Science in Environmental Sciences from California State University at Fresno in 1995. He previously worked for the County of Tulare as an Environmental Health Specialist I and II. He has worked for the Division since 2005. Dhillon is current on all Division mandated training. He has conducted 36 to 38 investigations as a Division inspector every year since 2005. Dhillon has conducted 5 industrial truck accident investigations involving serious foot injuries for the Division.

relying on other industrial truck operators to assist in disengaging the forks from a “stuck” pallet, but did not identify and evaluate the hazard created by this practice. Dhillon testified that managers were not capable of identifying or evaluating that hazard as required by the safety order because management did not look into the hazard and allowed the practice to continue as recently as one day prior to the date of the incident.

Here, the testimony of Chung confirmed that Employer identified and evaluated the hazard of EPJ operators relying on other industrial truck operators assisting in disengaging the forms from a stuck pallet. The testimony of Chung confirmed that Employer implemented a system to eliminate the hazard by installing pallet removal plates. This system does not require using another industrial truck to disengage the forms from a stuck pallet.

Instance 2

The Division alleged that Employer failed to correct the hazard associated with industrial truck operators not maintaining a safe distance from other industrial truck operators during the common practice of disengaging the forks of a “stuck” pallet by means of other industrial truck operators making contact and securing the stuck pallet with the forks of their industrial trucks. Here, the Division is alleging that section 3203, subdivision (a)(6) is applicable because the IIPP is not being implemented through failure to correct the hazard associated with the stuck pallet. In order to prove a violation of section 3203, subdivision (a)(6), the Division must establish the following: 1) Employer did not have methods and or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures, and 2) the methods and procedures were not implemented in a timely manner. Section 3203, subdivision (a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well as to respond appropriately to correct the hazards. *BHC Fremont Hospital, Inc.*, (Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014).

Adequacy and timeliness of the actions Employer took to correct the hazard

Section 3203, subdivision (a)(6) is a “performance standard,” which establishes a goal or requirement for employers to meet, while leaving the employer latitude in designing an appropriate means of compliance.” *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (Ma7 30, 2014), citing, *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012).) Chung testified that Employer was in the process of installing pallet removal plates that eliminate the necessity of the disengaging the forks of a stuck pallet. Fabia Ariaga (Ariaga), Supervisor of Subcontractor Pinnacle testified that Employer had installed pallet removal plates by April 2015. Dhillon testified that Employer did not stop the practice of using industrial trucks to unstick pallets.

Although Employer took steps after the inspection began (installing pallet removal plates) to minimize the hazard, these steps were not adequate and they were not timely because the pallet removal plates had not been installed throughout the entire warehouse in a timely manner. According to Dhillon Employer was still allowing the use of industrial trucks to unstick pallets up to and including April 8, 2015. Although, it was commendable that Employer was attempting to address the problem, it is not sufficient to show that Employer was in the process of correcting/abating the problem. Pursuant to the testimony at the time of the inspection Employer was allowing the practice of using industrial trucks to unstick pallets. The Division established a violation of section 3203, subdivision (a)(6) by showing that the Employer was required to implement a plan to stop the industrial truck stuck pallet problem in a timely fashion and did not do so.

Instance 3

The Division alleged that Employer failed to ensure that supervisors were familiar with, or employees under their immediate direction and control were trained and given instruction on, the hazards associated with the common practice of electric pallet jack operators relying on other industrial truck operators to assist in disengaging the forks from a "stuck" pallet by the means of other industrial truck operators making contact and securing the stuck pallet with the forks of their industrial trucks. Section 3203, subdivision (a)(7)(F) requires an employer to provide training and instruction for supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed. The purpose of section 3203(a)(7) is to provide employees and their supervisors with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).)

Training is the touchstone of any effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002), citing section 3203 subdivision (a)(7). The Division may prove a violation of section 3203, subdivision (a)(7) by showing that the implementation of the training required by this section is inadequate. (*see e.g., Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), *citing, Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).)

Here, the Division did not prove that the implementation of the training required by this section was inadequate. The inspector did not testify regarding requesting training records regarding the stuck pallet hazard. The Board has held that lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided. (*Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration

(Dec. 9, 2008). Here, there was no showing by the Division that a request for training records was ever made regarding the stuck pallet problem. Additionally, there was no employee testimony indicating that no training was provided regarding the stuck pallet hazard. The Division failed to establish a violation of section 3203, subdivision (a)(7)(F).

2. Did Employer effectively assess the workplace to identify work place hazards which would necessitate the use of appropriate foot protection?

Section 3380, subdivision (f)(1) provides as follows:

- (f) Hazard assessment and equipment selection.
- (1) The employer shall assess the workplace to determine if hazards are present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
 - (A) Select and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
 - (B) Communicate selection decisions to each affected employee; and
 - (C) Select PPE that properly fits each affected employee

The citation alleges the following:

Prior to and during the course of the investigation, including, but not limited to, November 14, 2014 the employer did not effectively assess the workplace to identify work tasks which would necessitate the use of appropriate foot protection, including but not limited to steel-toed shoes, for affected employees prone to foot injuries, but not limited to penetrating foot injuries from falling objects and injuries sustained from crushing actions of industrial trucks.

In order to establish a violation, the Division must show the following elements: 1) a foot injury hazard existed at the site; 2) Employer failed to select the type of shoes or PPE that protect the affected employees from the hazards; 3) Employer failed to communicate the decision to the affected employees; 4) Employer failed to supply properly fitted PPE to the affected employees, and 5) Employer failed to require affected employees to use them.

Employer maintains a large warehouse where merchandise is received from suppliers, stored and then shipped to various locations. Boxed merchandise such as charging cords, light bulbs, barbeque grills and toilets are taken out of trucks, stacked on pallets and wrapped by employees employed by a subcontractor (Pinnacle). Boxes can weigh between five to 130

pounds. Pallets are then moved around by hand jacks⁵. Dhillon testified that because of the hazard of falling objects personal protective equipment such as steel toed shoes would provide a barrier to falling objects.

Dhillon testified that on November 14, 2014, his observations were that industrial truck operators⁶ were wearing tennis shoes and or sneakers while working. Dhillon observed other employees including management⁷ walking in the warehouse and they were not wearing steel-toed or work boots or appropriate footwear. Dhillon testified that an employee walking through the site in close proximity to an industrial truck would be exposed to the hazard of foot injuries from objects or merchandise falling off a pallet or forks.

An inspector's opinions that are sufficiently supported by education, training, or experience support a finding. (See *Home Depot USA, Inc.*, #6617, *Home Depot*, Cal/OSHA App. 10 3284, Decision After Reconsideration (Dec., 24, 2012); *Davis Brothers Framing Inc.*, Cal/OSHA app. 05-634, Decision After Reconsideration (Apr. 8, 2010).) Dhillon had training regarding accidents and experience from investigations of accidents including forklift accidents. The hazard here is that an employee walking in the warehouse is exposed to objects falling from stacked pallets. The objects that could fall weigh up to 130 pounds. It is found that his opinion had a sufficient foundation and was not speculation. Therefore, his opinion that a foot hazard existed at the site is credible and credited. As a result, the first element is established.

Dhillon testified that Employer failed to assess the workplace to determine if hazards were present or likely to be present which necessitate the use of personal protective equipment in the form of foot protection. Chung testified that he was unaware of a foot protection assessment being conducted at the site. Chung stated that the only foot policy is the dress code requirement prohibiting open toed shoes. Kristine Pound (Pound), Corporate Safety Manager for Employer testified that Exhibit T is a hazard assessment that was completed for the entire company nationwide in 2007. Pound testified that there was no assessment done of employees prone to foot injuries and no determination of what type of personal protective equipment would be appropriate. Consequently, the four remaining elements are met. Employer failed to select the shoes or PPE that would protect the affected employees from the foot injury hazard⁸. Employer failed to communicate the decision to the affected employees⁹. Employer failed to supply properly fitted PPE to the affected employees¹⁰. Employer failed to require affected employees to use

⁵ A hand maneuvered version of industrial truck which the operator has to push or pull.

⁶ EPJ operators were Home Depot employees.

⁷ Chung and Ratley were observed by Dhillon walking near EPJs.

⁸ Element 2

⁹ Element 3

¹⁰ Element 4

them¹¹. The un rebutted testimony of Dhillon establishes a violation of section 3380 subdivision (f)(1).

3. Did the Division correctly classify Employer's violation of section 3380, subdivision (f)(1), and Employer's violation of section 3650, subdivision (t)(9)¹² as general violations?

The Division classified Citation 1, item 2 as a General violation. A General violation is defined as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." (Cal. Code Regs., tit 8,§334, subd. (b).) Employer's failure to assess the work place to determine if hazards were present necessitating foot protection directly relates to its employees' safety and health. Therefore, the violation was properly classified as general.

4. Did Employer fail to ensure that industrial trucks were operated in a safe manner by: 1) maintaining a safe distance from other vehicles; 2) keeping the truck under positive control at all times; and 3) ensuring that all established traffic regulations were observed?

Section 3650, subdivision (t)(9) provides as follows:

- (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
- (9) Vehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed. For trucks traveling in the same direction, a safe distance may be considered to be approximately 3 truck lengths or preferably a time lapse-3 seconds-passing the same point.

The Division alleges that prior to and during the course of the investigation, including but not limited to, November 14, 2014, the employer did not ensure that industrial trucks were operated in a safe manner in that vehicles (industrial trucks) maintained a safe distance from other vehicles (industrial trucks) keeping the truck under positive control at all times and that all established traffic regulations shall be observed.

Instance 1¹³

On or about October 25, 2014, an electric pallet jack operator Nancy Rodriguez (Rodriguez) struck another parked electric pallet jack (operator-Eileen Mejia (Mejia) while maneuvering her electric pallet jack in an attempt

¹¹ Element 5

¹² The analysis regarding whether Employer's violation of section 3650, subdivision (t)(9) is correctly classified as a general is discussed in issue 4.

¹³ Citation 1, Item 3, Instance 2 is duplicative of Citation 1, Item 1 Instance 2.

to position herself to retrieve a pallet from the receiving dock. The employee did not maintain electric pallet jack under positive control when she turned quickly and too hard in attempt to position herself in anticipation of picking up a pallet.

In order to establish a violation of section 3650, subdivision (t)(9), the Division is required to establish that 1) Rodriguez was the a driver of an industrial truck or tow tractor; and either 2) that Rodriguez failed to maintain the industrial truck under positive control at all times; or, 3) that Rodriguez failed to observe all established traffic regulations.

Here, the safety order is designed to protect employees from industrial trucks that are not maintained under positive control. It is undisputed that Rodriguez was the driver of the electric pallet jack which struck Mejia's electric pallet jack on October 25, 2014. An industrial truck is defined as "mobile powered-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is usually confined within the boundaries of a place of employment." (Section 3649 of Article 25, Industrial Trucks, Tractors, Haulage Vehicles, and Earth moving Equipment of the General Industry Safety Order.) The electric pallet jack (sometimes called an electric pallet truck [see Exhibit A]) is a piece of equipment that is used for low-level lifting and moving pallets. Thus, the electric pallet jack meets the definition of an industrial truck.

There is no dispute between the parties that Rodriguez's foot came off the platform of her EPJ and that her foot was injured after coming into contact with Mejia's EPJ. Mejia testified that Rodriguez drove the EPJ too fast and lost control. Dhillon testified that the October 25, 2014, incident where Rodriguez struck Mejia occurred because Rodriguez failed to maintain positive control while driving an EPJ. Based on the information Dhillon collected during and after his site visit, his knowledge of other forklift accidents and the mechanism of injury, Dhillon was able to reach a conclusion about whether Rodriguez failed to maintain the industrial truck under positive control at all times. Dhillon concluded that Rodriguez failed to maintain positive control of her EPJ when she attempted to maneuver herself, this caused her foot to come off the platform of the EPJ and get stuck in between the frame of the two EPJs (hers and Mejia's). The Division presented evidence sufficient to establish that Employer failed to ensure that industrial trucks were operated in a safe manner. Thus, a violation of section 3650, subdivision (t)(9) has been proven.

The Division classified Citation 1, item 3 as a general violation. The rule regarding whether a violation is a general has been discussed previously. A failure to maintain the industrial truck under positive control at all times pertains directly to employees' safety and health because of the inherent risk of injury. Therefore, the citation is correctly classified as general.

5. Did Employer carry its burden of proof on the issue of the Independent Employer Action Defense pursuant to *Mercury Service Inc.*?

Employer alleged the Independent Employee Action Defense (IEAD) as to this citation. Employer carries the burden of proof for an affirmative defense. (See *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Roof Structures, Inc.* Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983) To prevail under the affirmative defense, Employer must establish all five of the elements set forth in *Mercury Service, Inc.*¹⁴ An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee's actions serve to circumvent or frustrate the employer's best efforts.

The first element requires proof that the employee was experienced in the job being performed. This can be shown by evidence that the worker had done the specific task "enough times in the past to become reasonably proficient". (*Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) Here, Rodriguez was not called as a witness for either side. Instead, Jerry Parham (Parham), General Warehouse Worker testified that Rodriguez was trained in all aspects of operating an EPJ. Parham found Rodriguez competent to be a certified Material Handling Expert (MHE). There was no testimony regarding whether the worker had done the specific task enough times in the past to become reasonably proficient. Element one was therefore not satisfied.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, *supra.*) Parham, testified that Rodriguez was trained making turns, making sharp turns, wide turns and going backwards and forwards. In all aspects of operating an EPJ and he found her competent enough to be a certified MHE. Parham testified about the existence of an In Focus Committee which meets every other week to review and discuss safety within the building, and furthermore that Employer has sufficient written policies and procedures for training employees in matters of safety respective to their particular job assignment (See Exhibit H). Element two was satisfied

¹⁴ The five elements in *Mercury Service* Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) are: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a sanctions policy which it enforces against employees who violate the safety program, and ; 5) the employee caused a safety infraction which s/he knew was against employer's safety requirement.

The third element requires the employer to effectively enforce the safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (September 15, 1999).) Parham and Pound both testified regarding the different aspect of Employer's safety program, such as the In Focus Program as mentioned previously. This is accomplished with Home Depot's safety program and progressive discipline documents (See Exhibit P). Employer included documents that show the following steps are taken: 1)coaching¹⁵; 2)counseling¹⁶; 3)warning and 4)final termination. Although Employer did not elaborate through testimony on the steps taken they appear to be thorough, adequate and deliberative per Exhibit P. Employer also included disciplinary write-ups which have issued to employees as a result of violations. In addition, the testimony of Pounds and Chung is credited for setting forth the consistent and meaningful aspects of Employer's safety program. Element three was satisfied.

The fourth element requires that Employer has a policy which it enforces, of sanctions against employees who violate the safety program. Employer, provided evidence of sanctions against employees who violate the safety program. (See Exhibit P). Element four was satisfied.

The fifth element requires that the Employer show that the employee caused a safety infraction which she knew was against Employer's safety requirement. Here, Rodriguez did not testify. Employer relied on the testimony of another employee, Mejia, to explain what Rodriguez knew. The fifth element has not been satisfied. Parham also testified that Rodriguez was trained to keep her hands and feet within the platform but here there was no testimony from Rodriguez as to what she knew.

Employer failed to prove the first, and fifth elements of the IEAD. A violation of section 3650, subdivision (t)(7) has been established.

6. Did Employer require appropriate foot protection for employees who were exposed to foot injuries from falling objects or crushing or penetrating actions of industrial trucks?

Section 3385, subdivision (a) provides as follows:

Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot corrosive, poisonous

¹⁵ It appears from the documents in Exhibit P that coaching includes advising and encouraging employees in safe practices.

¹⁶ Exhibit P provides information on Employer's procedures to assist employees who need correction in following Employer's safety program.

substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations.

The alleged violation description reads as follows:

Prior to and during the course of the investigation, including, but not limited to, November 14, 2014, the employer did not ensure that industrial truck operators and employees working in the zone of danger were provided with appropriate foot protection, including but not limited to steel-toed safety shoes, in a work environment where affected employees are prone to, but not limited to, penetrating foot injuries from falling objects and injuries sustained from crushing actions of industrial trucks.

In order to establish a violation of section 3385, subdivision (a), the Division has the burden of proving that (1) employees were exposed to foot injuries from a number of conditions, including falling objects or crushing or penetrating actions¹⁷ and 2) Employer did not require protection against those hazards.

As stated earlier¹⁸, Dhillon observed Employer's employees driving industrial trucks within four to five feet of pedestrians. There were no physical barriers between employees and the industrial truck. Dhillon observed employees walking in tennis shoes in close proximity to industrial trucks. Dhillon testified based upon his education, training, and experience over 20 years, that when operators and employees work around forklifts, accidents occur that crush feet through contact with the forklift, objects near the forklift, or falling objects. Employees are exposed to the hazard of crushing or penetrating injuries from falling objects or from an industrial truck wheel running over a foot. Dhillon testified that appropriate foot protection would have reduced the severity of Rodriguez injury. Here, employees were clearly exposed to foot injuries satisfying requirement one. Chung and Pound testified that Employer did not require foot protection.

¹⁷ The Division has the burden of proof to establish that there was employee exposure to a violative condition. (See, e.g., *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan 28, 1975).) To find exposure, there must be reliable proof that employees are endangered by an existing hazardous condition or circumstance. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, Decision After Reconsideration (July 26, 1977) (italics in original).) Actual exposure is not required. Exposure is established where it is reasonably predictable that employees have been, or will be, in the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Exposure may be established by showing that the area of the hazard was accessible to employees. (*Id.*) Access may be established whenever employees in the course of their work, their personal comfort activities while on the job, or their normal means of ingress and egress to their workplace are in a zone of danger. (*Id.*)

¹⁸ This was analyzed earlier on page 9.

Here, the conditions that created the hazards were open and visible to anyone. Chung and Ratley's knowledge are attributed to Employer because both were supervisors and responsible for safety. Chung and Ratley personally observed the hazardous conditions of employees exposed to foot injury from falling objects and industrial trucks potentially running over employees' feet. Employer did not provide appropriate foot protection for employees. Therefore, the Division established a violation of section 3385, subdivision (a).

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

Labor Code § 6432, subdivision (a) states:

(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: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Realistic possibility" is not defined in the safety orders. However, the Appeals Board has defined "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*MDB Management Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016, p. 4, citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015); *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

Dhillon testified that he classified the violation as serious because, in his opinion, serious physical harm was a realistic possibility in the event of an injury caused by lack of foot protection if an employee's foot is hit by a falling object, struck against an object due to being pushed by a forklift, or run over by a forklift wheel. The most likely injuries would be crushing injuries which could result in hospitalization for days.

Dhillon estimated that he has conducted approximately 360 to 380 inspections. Five inspections involved forklift accidents. All of the forklift accidents involved serious injuries to the foot.

Having worked in the safety field for over 20 years, and having worked for Cal/OSHA as an Associate Safety Engineer for ten years, which included forklift accident investigations, it is found that Dhillon's opinion was

adequately based upon his training and experience. Therefore, Dhillon's opinion was credited. The Division Established a rebuttable presumption that the violation was properly classified as serious.

8. Did Employer rebut the presumption that Citation 2 was properly classified as serious?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer has the burden to establish that the violation occurred under circumstances that could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003); (*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (November 17, 2014).

A supervisor who is responsible for safety is a management representative. (See *Louisiana-Pacific Corporation*, Cal/OSHA App. 82-1043, Decision After Reconsideration (Oct. 21, 1985).) As such, his knowledge is imputed to Employer, even though upper management has no actual knowledge. (*Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978).)

Employer offered the testimony of Dominic Zackeo¹⁹ in rebuttal. Zackeo based his testimony on his education and more than 20 years in health and safety training. Zackeo has testified 5 times in cases involving industrial trucks. Zackeo conducted a hazard assessment of the site in October 2015. Zackeo concluded that that based on the engineering, administrative and other work practice controls in place at the site that there was no realistic probability²⁰ of exposure to foot hazards. Here, Zackeo testified that managers were not exposed to hazards because they drove around in golf carts. Dhillon's testimony was that the managers walked the site with him on the day of

¹⁹ Zackeo was established as an expert, based on his 20 years in health and safety training (Cal. Evidence Code section 720)

²⁰ Zackeo testified about realistic probability but the standard is actually realistic possibility. The Board has defined "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation as discussed previously.

inspection in tennis shoes and were exposed to foot injuries. Dhillon also testified that he observed industrial truck operators in tennis shoes and exposed to foot injuries. Zackeo testified that there was very little foot traffic on the days that he was at the site. Dhillon testified that there was some foot traffic on the dates of inspection. Additionally, the subcontractor's employees (Capstone and Pinnacle) all wear steel toe shoes.

Employer contends that hazards were eliminated by use of administrative controls. Zackeo's testimony was credible but did not include the numerous human factors that are part of working at the site, as evidenced by the testimony of Arriaga, and Mejia. Two Witnesses that testified about human factors were Arriaga and Mejia. Arriaga testified that mechanical errors such as brake failure on industrial trucks could occur. Mejia testified regarding the bad driving of Rodriguez. Here after weighing all of the evidence, it cannot be said that hazards, such as brake failure and bad driving were eliminated by use of administrative controls. Therefore, Employer did not rebut the presumption that Citation 2 was properly classified as serious.

9. Were the proposed penalties for all citations reasonable?

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (Sections 333-336)

Penalties calculated in accordance with the penalty setting regulations²¹ are presumptively reasonable and will not be reduced absent evidence that the amount 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).) Therefore, the penalties as to all sustained violations are found reasonable and are assessed.

10. Were the abatement requirements reasonable?

In order to establish that abatement requirements are unreasonable an employer must show that abatement is not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

In *Paso Robles Public Schools*, Cal/OSHA App. 96-1722, Decision After Reconsideration, (Oct. 4, 2000), the Board upheld the ALJ's Decision that the regulations were clear and provided no exception. That Decision After Reconsideration held that the Division's abatement requirements were reasonable, that the ALJ had no authority to allow noncompliance with clear

²¹ Sections 333-336

regulations, and that Employer had to apply to the Standards Board for a variance if there was to be an exception to the safety orders. Further, if Employer cannot successfully abate, it may seek a permanent variance from the Occupational Safety and Health Standards Board. (see Labor Code section 143.)

Employer appealed contesting the reasonableness of abatement requirements. The cited regulations are clear and provide no exceptions. Here, the abatement requirements are clear: Provide appropriate foot protection, such as steel toe shoes. Employer failed to present evidence sufficient to establish that abatement was unfeasible, impractical or unreasonably expensive. For the above reasons, it is found that requiring an employer to provide foot protection is reasonable.

Conclusion

The Division failed to establish an HIPP violation.

Employer failed to effectively assess the workplace to identify hazards which would necessitate the use of appropriate foot protection.

Employer failed to ensure that industrial trucks were operated in a safe manner.

Employer did not require appropriate foot protection. Employer did not establish that it did not know of the violation.

The proposed penalties for all sustained violations were reasonable.

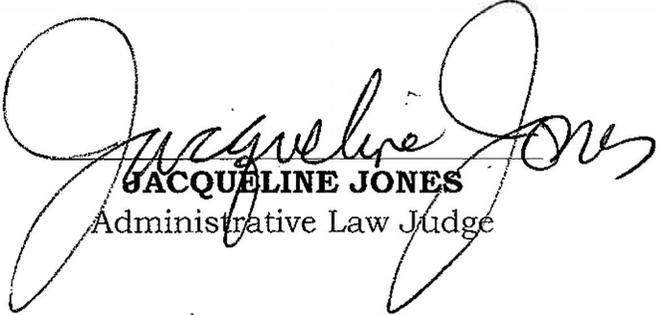
The abatement requirements and the time allowed to abate are reasonable.

Order

Citation 1, item 1 is vacated. Citation 1, items 2 and 3, and Citation 2, item 1 are sustained.

Dated: August 24, 2016

JJ:lgf


JACQUELINE JONES
Administrative Law Judge

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

HOME DEPOT USA INC.
Dockets 15-R3D3-2298 and 2299

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 1011071

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
						F	A			
						I	C			
						R	A			
						M	T			
						E	E			
						D	D			
15-R3D3-2298	1	1	3203(a)	G	ALJ vacated		X	\$1,125	\$0	\$0
		2	3380(f)(1)	G	ALJ sustained	X		\$375	\$375	\$375
		3	3650(t)(9)	G	ALJ sustained	X		\$1,125	\$1,125	\$1,125
		4	342(a)	Reg	Er withdrew its Appeal	X		\$5,000	\$5,000	\$5,000
15-R3D3-2299	2	1	3385(a)	S	ALJ sustained	X		\$11,250	\$11,250	11,250
								\$18,875	\$17,750	\$17,750

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$17,750

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: JJ/lgf
 POS: 08/24/2016

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

HOME DEPOT USA, INC.

Dockets 15-R3D3-2298 AND 2299

DATES OF HEARING: October 26 and 27, 2015 and January 25, 2016

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1. 1	Jurisdictional documents
2. 2	1 BY
3. 3	C-10 penalty as amended

EMPLOYER'S EXHIBITS - Admitted

<u>Exhibit Letter</u>	<u>Exhibit Description</u>
1.A	Photo of electric pallet jacks (epj's)
2.B	Poster board-layout of site
3.C	Tape recorded statement of Mr. Arriaga
4.D	Photo of hand pallet jack
5.E	Photo of Arriaga drawing pages
6.F	OSHA 1B-17 pages
7.G	Tape recorded interview Ms. Alexis Ron
8.H	IIPP
9.I	Recent cases
10.J	Listing of other incidents
11.K	Home Depot decision

12.L	Home Depot DOSH witness list
13.M	Pinnacle witness list
14.N	Capstone witness list
15.O	OSHA 170b
16.P	Declaration of Henry Flores
17.Q	Declaration of William Chung (withdrawn)
18.R	Declaration of Timothy Ratley (withdrawn)
19.S	Standard operating procedures
20.T	PPE assessment
21.U	Dress code
22.V	Chart of inventory
23.W	Lift equipment-training module
24.X	Home Depot e-learning
25.Y	Safe operating tips bulletin
26.Z	Job description
27.AA	Recorded statement of William Chung
28.BB	Dominick Zackeo CV
29.CC	Fed OSHA fact sheet
30.DD	How do you control the hazard (withdrawn)
31.EE	Printout of power point-20 pages
32.FF	Power point presentation with animation

33.GG	3385 foot protection
34.HH	ASTM standard
35.II	Videos of job tasks
36.JJ	Videos of job tasks
37.KK	Videos of job tasks
38.LL	Videos of job tasks
39.MM	Videos of job tasks
40.NN	Videos of job tasks
41.OO	Videos of job tasks
42.PP	Videos of job tasks
43.QQ	Videos of job tasks
44.RR	Platform of the electric pallet jack
45.SS	Deposition

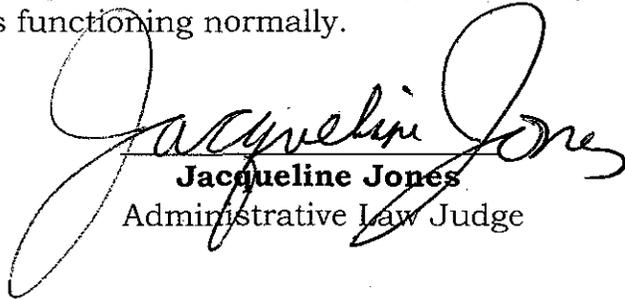
Witnesses Testifying at Hearing

1. Fabia Ariaga
2. Harpreet Dhillon
3. Eileen Mejia
4. Nicholas Kokkinos
5. Christine Pounds
6. Jerry Parham
7. Dominick Zackeo
8. William Chung

CERTIFICATION OF RECORDING

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Dated: August 24, 2016



Jacqueline Jones
Administrative Law Judge