

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

HOME DEPOT U.S.A., INC.
DBA HOME DEPOT #6683
1451 W. Foothill
Rialto, CA 92376

Employer

DOCKETS 15-R3D3-4516
through 4518

DECISION

Statement of the Case

Home Depot U.S.A., Inc. dba Home Depot #6683 (Employer) is a home improvement merchandise retailer. Beginning December 19, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Alfred Varela¹ conducted an accident inspection at a place of employment maintained by Employer at 1451 W. Foothill, Rialto, California (the site). On May 28, 2015, the Division cited Employer for failure to require appropriate foot protection to be worn, and failure to ensure that an industrial truck operator did not move the vehicle until he was certain that all persons were in the clear.²

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the changes required to abate, the time allowed to abate, and the reasonableness of the proposed penalties. Employer alleged multiple affirmative defenses³.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and

¹ Varela was promoted to District Manager in June, 2015, after the instant citations issued.

² At hearing, Employer withdrew its appeal to Citation 1, item 1, 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.

³ The affirmative defenses for which no evidence was presented are not discussed. They are deemed waived.

Health Appeals Board, at Riverside, California on April 21, 2016. Matthew T. Deffebach, Attorney, and Punam Kaji, Attorney, Hayes and Boone, LLP, represented Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted on May 31, 2016.

Issues

1. Did Employer require appropriate foot protection for employees who were exposed to foot injuries from falling objects or crushing actions?
2. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?
3. Did Employer rebut the presumption that Citation 2 was properly classified as serious?
4. Was the proposed penalty for Citation 2 reasonable?
5. Did an electric pallet jack (EPJ) operator look in the direction of travel and ensure that all persons were in the clear before moving the EPJ?
6. Did the Division establish a rebuttable presumption that Citation 3 was properly classified as serious?
7. Did Employer rebut the presumption of a serious violation by demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the existence of the violation?
8. Was Citation 3 correctly characterized as accident-related?
9. Was the proposed penalty for Citation 3 reasonable?
10. Were the required changes to abate the violations and the time allowed to abate the violations reasonable?

Findings of Fact

1. On December 4, 2014, Merchandising Execution Team (MET) Associate Alfio Arcifa (Arcifa) and his supervisor, MET Manager Jimmy Guillen (Guillen), worked on Aisle 24 restocking roofing merchandise in bays 1 through 4. Guillen drove an electric pallet jack (EPJ). Arcifa manually moved merchandise.
2. Employer routinely used EPJs to move merchandise inside the store. Employees could walk beside an EPJ when it was moving and could operate an EPJ by walking alongside it. Employees were exposed to the hazard of a rear wheel of an EPJ running over an employee's foot.
3. Employees were exposed to the hazard of merchandise transported by the EPJs, and roofing merchandise in bays 1 through 4, falling on an employee's foot and causing crushing injuries.
4. The foot protection Employer required did not address the foot injury hazard.
5. Serious physical harm as a result of an accident caused by lack of appropriate foot protection is a realistic possibility.
6. The proposed penalty for Citation 2 was not calculated in accordance with the regulations.

7. On December 4, 2014, Guillen moved an EPJ to Aisle 24 and stopped in front of bays 1 to 4 where Arcifa was moving product out of the way by hand so that the EPJ could enter. Guillen got off the EPJ and manually helped Arcifa move product. When they were done, they moved in opposite directions. Before Arcifa was out of the way of the EPJ, Guillen reached out for the EPJ controls with his left hand. The EPJ moved in response to Guillen's actions, striking Arcifa.
8. As a result of being struck by the EPJ, Arcifa suffered compound fractures to his left leg. His foot was not injured. Arcifa was hospitalized for treatment of his injuries.
9. Serious physical harm as a result of an accident caused by an operator moving the EPJ before being certain that all persons were in the clear is a realistic possibility.
10. The proposed penalty for Citation 3 was calculated in accordance with the regulations.
11. The changes required to abate and the time allowed to abate are reasonable.

Analysis

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

The Division cited Employer for a violation of section 3385, subdivision (a), which reads as follows:

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

The alleged violation description reads as follows:

Prior to and during the course of the inspection, including but not limited to December 4, 2014 the employer did not ensure that appropriate foot protection shall be required for employees who are exposed to foot injuries from falling objects, crushing or penetrating actions, while working with and around industrial trucks, which may cause injuries.

In order to establish a violation, the Division must prove that 1) employees were exposed to foot injuries from a number of conditions, including

falling objects or crushing or penetrating actions⁴, and 2) Employer did not require protection against those hazards.

Electrical pallet jacks (EPJ) were used to transport roofing merchandise in shrink-wrapped pallets to Aisle 24. Employees might assist customers break shrink-wrapped pallets. When the shrink wrap was removed, individual items could be dropped and strike an employee's foot. A customer could request employee assistance in loading one or more roofing shingle packages that weighed 50 to 60 pounds onto a customer shopping cart. These packages could be dropped and strike an employee's foot. Employees, including Arcifa, manually lifted drums of roof coating weighing 30 and 50 pounds each from pallets and placed on the lower portion of the display bays. These drums could fall and strike an employee's foot. Some of the sixty pound rolls of roofing paper were unrestrained on Aisle 24, standing on end in front of a restraining wire⁵. They could fall on an employee's foot. Just before the accident, Arcifa manually moved a small display of merchandise on Aisle 24 in front of bays 1 to 4. One of the objects he moved could have been dropped on his foot. Therefore, it is found that employees were exposed to the hazard of objects falling on their feet.

On the day of the accident, Guillen drove an electrical pallet jack (EPJ) of the type Employer routinely used to transport merchandise inside the store. EPJs could weigh up to 5,000 pounds. When an EPJ was moving, an employee could walk beside it and operate it. The rear drive wheel could run over an employee's foot⁶, regardless of how much Employer trained employees to stay away from the rear wheel.

District Manager Alfred Varela (Varela)⁷ testified, based upon his education, training, and experience over 22 years⁸, that when operators and

⁴ 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 (Arp. 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.*)

⁵ Exhibit T-15

⁶ Exhibits J-12, T-19

⁷ At the time of the inspection, Varela was an Associate Safety Engineer.

⁸ Varela earned a Bachelor of Science in business and economics and a Bachelor of Arts in Spanish from St. Mary's College of California in December 1981. In 1993, he was hired by the State Compensation Insurance Fund (SCIF) as a loss control consultant, which is a safety consultant hired to assist employers with their safety programs. In 2006, he was promoted to

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 EPJ wheel running over a foot.

Varela testified that other protection would minimize or avoid the injury because a steel toe creates a barrier between the toe and the forklift wheel or the falling object or the object being struck against. Employer did not require the kind of foot protection that would protect an employee's foot from crushing injuries due to falling objects or being run over by an EPJ wheel.

Manager of Safety Operations Kristine Pounds (Pounds) acknowledged that Employer did not require foot protection that would protect against falling objects or being run over by an EPJ wheel. The only footwear required was that of soft closed toed shoes⁹. She was of the opinion that there was no hazard that required more than closed toe shoes because there had not been any accidents where a forklift or EPJ caused foot injuries. She believed that Employer's various safety rules and physical safety measures were adequate.

However, lack of any past accidents does not prove lack of a hazard. Occurrence or non-occurrence of an accident does not affect the existence of a hazard; it only affects the likelihood of the hazard causing an accident. (See *National Cement Co.*, Cal/OSHA 91-310, Decision After Reconsideration (Mar. 10, 1993); *Industrial Maintenance Corp.*, Cal/OSHA 87-377, Decision After Reconsideration (Aug. 31, 1982); *Christeve Corporation*, Cal/OSHA App. 79-712, Decision After Reconsideration (Aug. 20, 1984).) Employer's measures reduced the likelihood of a foot injury, but they did not eliminate the possibility of an EPJ or forklift running over a foot or the possibility of a heavy object falling on a foot. Thus, a preponderance of the evidence supports a finding that employees were exposed to the hazard of foot injuries, and that Employer did not require appropriate foot protection.

Therefore, the Division established a violation of section 3385, subdivision (a).

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

senior loss control consultant. In March, 2012, he left SCIF and began working for Cal/OSHA. He was promoted to District Manager in June 2015. He has conducted approximately 150 inspections. About half were accident-related. Two inspections involved forklift accidents. While he was with SCIF, he reviewed about half a dozen accidents involving forklifts.

⁹ Employer's Dress Code required employees on the Merchandising Execution Team (MET), like Guillen and Arcifa, to wear "Shoes appropriate for the working environment without presenting a safety hazard." "Flip-flops, sandals, open-toed shoes, or open-heeled shoes" were unacceptable. Exhibits I-5, T-12. Tennis-type shoes without steel toes, like the ones Arcifa wore on the day of the accident (Exhibit 3E) were acceptable.

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 harm¹⁰ 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).)

Opinions about possibility must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); (*R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

District Manager Varela 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 when an employee’s foot is hit by a falling object, struck against an object due to being

¹⁰ Labor Code section 6432, subdivision (e)(1), provides as follows: “Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following: (1) Inpatient hospitalization for purposes other than medical observation....

pushed by a forklift, or run over by a forklift wheel. The most likely injuries were crushing injuries.

Varela earned a Bachelor of Science in business and economics and a Bachelor of Arts in Spanish from St. Mary's College of California in December 1981. In 1993, he was hired by the State Compensation Insurance Fund (SCIF) as a loss control consultant, which is a safety consultant hired to assist employers with their safety programs. In 2006, he was promoted to senior loss control consultant. In March, 2012, he left SCIF and began working for Cal/OSHA. He was promoted to District Manager in June 2015. He has conducted approximately 150 inspections. About half were accident-related. Two inspections involved forklift accidents. While he was with SCIF, he reviewed about half a dozen accidents involving forklifts.

Having worked as a safety consultant for the State Compensation Insurance Fund (SCIF) for about 19 years and having worked for Cal/OSHA as an Associate Safety Engineer and a District Manager for four years, which included forklift accident investigations, it is found that Varela's opinion was adequately based upon his training and experience. Employer did not offer any evidence in rebuttal. Therefore, Varela's opinion is credited.

Accordingly, the Division established a rebuttable presumption that the violation was properly classified as serious.

3. 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 which 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); *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *Newberry Electric Corporation v. Occupational Safety and Health*

Appeals Board (1981) 123 Cal.App.3d 641, 648; *Gaehwiler v. Occupational Safety and Health Appeals Board* (1981) 141 Cal.App.3d 1041, 1044.)

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).)

Here, the conditions that created the hazards were open and visible to anyone. Guillen's knowledge is attributed to Employer because Guillen was a supervisor responsible for safety. Guillen personally observed the hazardous conditions. He knew that employees were exposed to the hazard of a rear wheel of an EPJ running over an employee's foot and the hazard of merchandise falling on an employee's foot. The fact that accidents caused by these hazards never occurred at this site, but had only occurred at other places, does not decrease employee exposure to the hazards or eliminate Employer's knowledge of the hazards.

Therefore, Employer did not rebut the presumption that Citation 2 was properly classified as serious.

4. Was the proposed penalty for Citation 2 reasonable?

Penalties calculated in accordance with the penalty setting regulations (sections 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (sections 333-336) In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

Using the proposed penalty worksheet¹¹, Varela testified that he calculated the proposed \$8,100 penalty in accordance with the Division's policies and procedures, with the exception of the penalty adjustment for good

¹¹ Exhibit 2

faith¹². A review of the calculations shows that Varela's ratings were reasonable except for the ratings for likelihood and good faith.

Likelihood

Likelihood is defined in section 335, subdivision (a)(3) as follows:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

Employer presented evidence that it had a number of safety rules, such as requiring employees to be in safety zones, and a number of safety practices, such as shrink-wrapping pallets, and interlocking tops, that reduced the probability of an accident occurring. Although Employer is a nationwide employer, it has not experienced an accident where an employee's foot was injured by a falling object or a forklift wheel. Under these circumstances, the rating for likelihood should be reduced to low, lowering the penalty by \$4,500.

Good Faith

Good faith is defined in section 336, subdivision (3)(c), as follows:

The Good Faith of the Employer—is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such

¹² Serious violations begin with a base severity of \$18,000. He rated extent as low because only two employees were exposed to the forklift and the associated hazard to their feet, thereby lowering the penalty by \$4,500. He rated likelihood as high, raising the penalty to \$4,500. He applied penalty adjustment factors of zero for good faith, zero for size, and 10% for history. No adjustment was available for size because Employer had over 100 employees. The penalty adjustment for history was the maximum allowable. He applied a 50% abatement credit, resulting in a proposed penalty of \$8,100.

safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:

GOOD—Effective safety program.

FAIR—Average safety program.

POOR—No effective safety program

Varela testified that his rating of poor (0%)¹³ was in error, and that it should have been at least fair (15%). The rating for good faith depends on the quality and extent of Employer's safety program. Employer has an extensive safety program and requires extensive training, as demonstrated by its copious exhibits¹⁴. Employer is acutely aware of Cal/OSHA and revealed a genuine desire to comply with all relevant safety orders. It has a good history, which reflects a lack of serious violations in California for the three years preceding the accident. Under these circumstances, Employer's rating for good faith should be raised to good (30%).

Therefore, the proposed \$8,100 penalty for Citation 2 is not reasonable. Recalculating the penalty with a rating of "low" for likelihood and a rating of "good" for good faith, results in a penalty of \$2,700, which is found reasonable.

5. Did an EPJ operator look in the direction of travel and ensure that all persons were in the clear before moving the EPJ?

The Division cited Employer for a violation of section 3650, subdivision (t)(12), which reads as follows:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules: ...

(12) Operators shall look in the direction of travel and shall not move a vehicle until certain that all persons are in the clear.

The alleged violation description reads as follows:

Prior to and during the course of the inspection, the employer did not ensure that an industrial truck operator using an electric pallet jack shall not move until certain that all persons are in the clear. As a result on or about December 4, 2014 an employee was

¹³ Section 336, subdivision (d)(2) provides for a zero penalty adjustment for a rating of "poor", a 15% adjustment for a rating of "fair", and a 30% adjustment for a rating of "good."

¹⁴ Exhibits I, K, L, M, Q, R, S

struck by the moving electric pallet jack and seriously injured the employee's lower left leg.

Section 3649 defines "industrial truck" as "A mobile power-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is normally confined within the boundaries of a place of employment."

An EPJ is a type of forklift. It has long been established that forklifts are industrial trucks. (See *Western Pacific Roofing Corp.*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996); *Underground Construction*, Cal/OSHA App. 78-684, Decision After Reconsideration (Nov. 28, 1979).)

It is undisputed that Guillen was the EPJ operator, the EPJ moved, and that the EPJ hit Arcifa because Arcifa was not in the clear when the EPJ moved.

Guillen insisted that the EPJ took off on its own when he put his hand on the handle, but did not activate the controls. Some evidence supports this position. Three operations were required to move the EPJ—lowering the handle, moving the handle left or right, and turning the throttle handle to move it forward or backward. Guillen testified that his hand was next to the throttle, but he could not engage in the three operations necessary to move the EPJ just by touching the handle. When the EPJ moved, it did not move in a normal manner; rather, it turned sideways instead of going straight forward.

However, other evidence points to the contrary. In his interview on February 13, 2015, Arcifa told Chaudhry that Guillen activated the EPJ controls¹⁵. This is hearsay¹⁶ evidence, but hearsay evidence may be used to supplement or explain other evidence¹⁷. The other evidence that Guillen activated the EPJ controls causes Arcifa's hearsay statement to carry more weight and be more credible than Guillen's denial at hearing. Arcifa's testimony at hearing was contradictory. Guillen told Arcifa to get out of the way before he moved the EPJ. On cross-examination, Arcifa testified that he saw Guillen's hand close to the throttle and watched Guillen to make sure that he was out of the way before Guillen moved the EPJ. He testified that he was able to see where Guillen's hand was on the EPJ, and that Guillen did not do anything to cause the EPJ to move. However, on direct examination, Arcifa testified that he gave Guillen a nod of acknowledgement, walked back, then looked back and saw the EPJ coming towards him. He implied that he did not see Guillen's hand. Arcifa testified that Guillen was one of his favorite

¹⁵ Exhibit F-4

¹⁶ Evidence Code § 1200(a) defines hearsay evidence as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

¹⁷ Section 376.2

supervisors. It follows that Arcifia has a bias for Guillen and he would not want Guillen to be disciplined or lose his job for moving the EPJ before Arcifia was out of the way. The first statement that Arcifia made to Varela is likely to be more accurate before Arcifia realized the possible negative consequences if Arcifia said Guillen activated the controls.

Other evidence supports a finding that Guillen activated the controls. The EPJ was new, having been used for approximately one month before the accident. After the accident, the vendor fully inspected the EPJ but found nothing wrong. To correct the problem, the vendor adjusted its speed. Guillen inspected the EPJ before using it. He did not find any defects, but noted that it was sensitive. There was no reason for Guillen to reach out towards the EPJ throttle before Arcifia was in the safety zone, as depicted in the photograph reconstructing his position¹⁸. Notably, Guillen's hand is almost touching the throttle. As a supervisor, Guillen knew he was required to wait for Arcifia to be in the clear before he moved the EPJ. Guillen had much to lose if he admitted that he moved the EPJ too soon, and substantially reduces the weight that can be given his testimony. It is not reasonable to believe that the EPJ moved all on its own. Guillen's testimony is not credible.

Therefore, a preponderance of the evidence supports a finding that Guillen caused the EPJ to move before he was certain that all persons were in the clear. Accordingly, the Division established a violation of section 3650, subdivision (t)(12).

6. Did the Division establish a rebuttable presumption that Citation 3 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 possibility¹⁹ that death or serious physical harm²⁰ could result from the actual hazard

¹⁸ Exhibits 3D, A

¹⁹ As discussed above, the Board defines "realistic possibility as a prediction that is within the bounds of human reason, not pure speculation. (*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).)

²⁰ Labor Code section 6432, subdivision (e)(1) provides as follows:

"Serious physical harm" as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following: (1) Inpatient hospitalization for purposes other than medical observation.

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.

As a result of the operator moving the EPJ before being certain that all persons were in the clear, the EPJ hit Arcifa. As a result of being hit by the EPJ, Arcifa suffered compound fractures to his left leg. He was hospitalized for treatment of his injury, which meets the definition of “serious physical harm.”

The fact that a serious physical harm occurred as a result of the violation is proof that a serious injury is a realistic possibility. Therefore, the Division established a rebuttable presumption that the violation was properly classified as serious.

7. Did Employer rebut the presumption of a serious violation by demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the existence of the violation?

As discussed above, Employer may rebut the presumption of a serious violation 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.

Employer bases its argument on the assertion that the EPJ movement was caused by an unforeseeable malfunction. It has been found that the EPJ did not malfunction; Guillen activated the controls. Guillen was Arcifa’s supervisor and was responsible for the safety of those he supervised, including Arcifa. Guillen was a member of management. Thus, his knowledge is attributed to Employer, even though upper management had no actual knowledge.

Therefore, Employer failed to establish a lack of Employer knowledge and did not rebut the presumption of a serious classification.

8. Was Citation 3 correctly characterized as accident-related?

A violation is accident-related where there is a causal nexus between the violation and the serious injury. (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016) p. 11.) In *MCM Construction, Inc.*, *supra*, the Board held that “The violation need not be the only cause of the accident, but the Division must make a showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011);

Siskiyou Forest Products, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).” (*Id.* p. 11-12)

As discussed above, Guillen did not ensure that all persons were in the clear before he moved the EPJ. If he had, Arcifa would not have been injured. The Division showed that the violation was more likely than not a cause of the injury because the EPJ moved and seriously injured the employee’s leg. Thus, the Division met its burden to prove a causal nexus between the violation and the serious physical harm suffered. The violation is accident-related.

9. Was the proposed penalty for Citation 3 reasonable?

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty 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 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).)

All serious violations begin with a base penalty of \$18,000. Where a serious violation causes a serious injury, the only downward penalty adjustment allowable is for size. (Labor Code section 6319, subdivision (d); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

Varela testified that the penalty setting regulations were followed to calculate the \$18,000 penalty for an accident-related serious violation. The only allowable reduction was for size. Since Employer had over 100 employees, no reduction was allowable.

²¹ sections 333-336

Therefore, a penalty of \$18,000 is found reasonable and is assessed.

10. Were the required changes to abate the violations and the time allowed to abate the violations reasonable?

The Division does not mandate any specific means of abatement. Employer is free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004), citing *The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) Costs associated with abatement do not render abatement infeasible or unreasonable. (*Id.*)

If Employer believes that it cannot successfully abate the violations, it may seek a variance from the Standards Board. (See Labor Code section 143; *Gates & Sons, Inc.*, Cal/OSHA App. 79-1365, Decision After Reconsideration (Dec. 15, 1980).)

Employer did not present evidence at hearing showing why it needed more time to abate or why the abatement requirements were not reasonable.

Therefore, it must be found that the changes required to abate and the time allowed to abate are both reasonable.

Conclusions

Employer's employees were exposed to crushing foot injuries. Employer did not require appropriate foot protection. As a result, serious physical harm was a realistic possibility. The proposed penalty for Citation 2 was not reasonable.

Guillen did not ensure that all persons were in the clear before moving the EPJ. As a result, Arcifa suffered serious physical harm. Employer did not establish that it did not know of the violation. The proposed penalty for Citation 3 was reasonable.

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

Order

Citation 2 is affirmed. The penalty is reduced.

Citation 3, and the \$18,000 penalty, is affirmed.

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

DALE A. RAYMOND
Administrative Law Judge

DAR: ao

Dated: June 28, 2016

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

THE HOME DEPOT, U.S.A., INC. DBA HOME DEPOT #6683

Dockets 15-R3D3-4516 through 4518

Date of Hearing: April 21, 2016

Division's Exhibits—All Admitted

Number	Description
1	Jurisdictional Documents
2	Form C-10, Proposed Penalty Worksheet
3A	Black and white photo 1/22/15 @ 21:13 Bays 1-6
3B	Black and white photo 1/22/15 @ 21:18
3C	Black and white photo 1/22/15 @ 21:19 Guillen looking down
3D	Black and white photo 1/22/15 @ 21:19 Guillen reaching towards electric pallet jack with left hand
3E	Black and white photo of lower left leg injury

Employer's Exhibits—All Admitted

Letter	Description
A	Color photo of Exhibit 3D
B	Color photo of Exhibit 3A
C	Cal/OSHA Form 170A – Narrative Summary
D	Division Witness List
E	Color photo of Exhibit 3A
F	Varela field documentation worksheets—4 pages
G	Cal/OSHA Form 1B Documentation Worksheet

- H California Injury and Illness Prevention Program—4 pages
- I Dress Code—14 pages
- J 12 color photographs of merchandise and close up of EPJ
- K Standard Operating Procedures—Safe Work Practices 36 pages
- L Lift Truck Safety Class 4460—100 pages [HD (6883) 0281-0381]
- M Class 4260: Safe Work Practices—106 pages [HD (6883) 0174-0280]
- N Floor Plan
- O Diagram of accident
- P Electric Pallet Jack Certification Check Ride—6 pages
- Q Training records for Jimmy Guillen—5 pages
- R Training records for Arcifa
- S Daily Lift Equipment Checklists for December 2014—26 pages [HD (6883) 0887-0913]
- T Color print out of power point slides—27 pages
- U Power point slides on disk (same as Exhibit T)

Witnesses Testifying at Hearing

Alfio Arcifa

Jimmy Guillen

Kristine Pounds

Alfred Varela

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.

DALE A. RAYMOND

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

HOME DEPOT U.S.A., INC. DBA HOME DEPOT #6683
Dockets 15-R3D3-4516 through 4518

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

IMIS No. 1014901

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R3D3-4516	1	1	342(a)	Reg	Employer withdrew its appeal	X		\$5,000	\$5,000	\$5,000
15-R3D3-4517	2	1	3385(a)	S	ALJ reduced penalty	X		8,100	8,100	2,700
15-R3D3-4518	3	1	3650(t)(12)	S	ALJ affirmed violation	X		18,000	18,000	18,000
Sub-Total								\$31,100	\$31,100	\$25,700

Total Amount Due*

\$25,700

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*
All penalty payments 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: DR/ao
POS: 06/28/2016