

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

Home Depot USA, Inc. #6617
Home Depot
1305 South Lone Hill Avenue
Glendora, CA 91740

Employer

Docket 10-R3D6-3284

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on May 6, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Home Depot (Employer). On September 29, 2010, the Division issued 1 citation to Employer alleging a serious violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 alleged a violation of section 3385(a) [inadequate foot protection]. This citation was classified as serious, and a proposed penalty of \$18,000 was assessed because the violation was alleged to be accident-related. Employer filed a timely appeal contesting the existence and classification of the violation, the penalty assessment, and the abatement requirement.² Employer

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

² The citations states: "Appropriate foot protection, such as steel toe shoes, was not provided an (sic) used while handling heavy loads. The injured employee was wearing tennis shoes at accident time." There is no evidence of abatement of any kind having occurred. Although employer raised the issue that the timing and requirements for abatement were unreasonable, no evidence was presented concerning abatement. Abatement has been stayed pending the administrative hearing process per section 362. This Decision After Reconsideration is a final order of the Appeals Board and operates to lift the stay of abatement. (§ 362.) Employer is required, as of the date of this decision, to provide toe and foot protection to employees exposed to falling loads as required by the safety order. ER and Division are free to discuss abatement means. This decision does not determine the appropriate method.

asserted several affirmative defenses, including the Independent Employee Action Defense (IEAD). At the hearing, the Division moved to amend the penalty calculation to reflect that the extent and likelihood ratings were incorrect, and that the penalty should be \$22,500 rather than \$18,000.

Following the hearing, an Administrative Law Judge (ALJ) of the Board issued a Decision affirming the violation, but concluded the serious classification was not established. The ALJ declined to modify the penalty as requested by the Division. The Decision also concluded Employer failed to establish the IEAD, or any other affirmative defense.

The Appeals Board ordered reconsideration on its own motion to consider whether the serious classification was established. Employer answered the Order of Reconsideration. Separately, Employer petitioned for reconsideration alleging the safety order was not violated because there was no employee exposure under normal circumstances, and that the IEAD was established for a variety of reasons.

The Division answered the Order of Reconsideration and the Petition for Reconsideration, asserting the Serious classification was established, that the IEAD was not, and that the violation was properly found. We agree with the Division that the serious classification has been established by the evidence, that the violation was shown to have occurred, and that Employer's arguments regarding employee exposure and IEAD lack merit for legal and factual reasons.³

EVIDENCE

On May 4, 2010, Benny Garcia (Garcia), a lot technician for Employer, was assisting another employee, forklift operator Matt Westad (Westad), load a customer vehicle with railroad ties. As Westad cut the second of two bands around the bundle of three ties, the load fell 3 to 4 feet from the forks of the forklift and landed on Garcia's toes. Garcia was wearing tennis-type shoes. He sustained a broken big toe, and lost the fleshy portion of the tip of the next toe when the metal band and the railroad ties struck his foot. The fabric of the shoe was cut through. The broken big toe healed in a crooked manner and now bends laterally and rests underneath the next toe. The event occurred in the open parking lot of the building materials retailer. Supervisors were within 50 feet of Garcia when the injury occurred.

Neither Garcia nor Westad were trained on how to safely un-band railroad ties. Westad loaded and drove the forklift, but had been doing so only for three months prior to the incident, and in that time, he operated the forklift

³ The ALJ did not sustain the accident-related classification and denied the Division's request for an increase in penalty amount. The Division does not contest these findings.

for approximately one half hour per day. This was the second or third time he had ever loaded railroad ties in to a customer's vehicle from a forklift. Garcia had never undertaken this task.

Employer's forklift rules allowed employees to stand next to loaded forklifts that are parked so long as the load is at a height preventing personnel from walking beneath the load. No policy required the forklift load to be lowered to ground level prior to unloading.⁴ The railroad tie load consisted of 3 50 pound railroad ties. No foot protection was provided to any employee. Employer's IIPP required some protective equipment be provided, but did not specifically require foot or toe protection for any workers.

Employee Westad was fired after the injury for failing to use good judgment, not for violating any identified portion of employer's work rules or practices.

ISSUES:

- 1) Was the serious classification established?
- 2) Was the IEAD properly rejected?
- 3) Did the Division establish employee exposure to the hazard?
- 4) Was abatement in issue?

DECISION

1) The Division established the serious classification.

A serious classification is shown when there is a substantial probability of serious physical harm resulting from accidents assumed to occur as a result the violation. (Labor Code § 6432 (West 2009).) The circumstances of the violation are used to determine what accident will be assumed to occur. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2977, Decision After Reconsideration (Apr. 24, 2003) [division may use the "worst-case scenario" when assuming the accident that results from the violation].) The result of the accident which actually occurred is some evidence of the severity of injury that may occur under existing conditions at the time of the violation.

⁴ Petitioner asserts on page 5 of its petition for reconsideration that "the Operator is required to fully lower to the surface the load of materials on the forks *before* exiting the forklift." This assertion is not supported by any evidence. Rather, the employees lowered the load to waist / vehicle trunk/truck bed height to move the load from the forklift to the customer vehicle. Such practice is fully consistent with all policy documentation supplied by Home Depot. Other instances exist where Employer asserts facts that are simply not in the record. In Employer's initial statement to the Division asserting the IEAD, Employer states Westad was an experienced forklift driver, having performed that work for three years. However, the evidence shows Westad had been operating a forklift for only three months prior to the incident, and in that time, only did so for approximately one half hour of each work day. And, Employer asserts Westad was fired for not following company policy. However, the record shows Westad was fired for using poor judgment that resulted in the injury to Garcia, not that any rule was violated that led up to his termination.

Here, the Decision states that the Division failed to establish the substantial probability of serious injury because the inspector's opinion did not prove the violation was serious. Specifically, the Decision concludes Inspector Gupta failed to articulate the specific facts of the three serious injuries he has investigated that resulted when similar weights fell on to workers.⁵ The ALJ required some "opinion" evidence before sustaining the serious classification, and concluded the foundation for Gupta's opinion testimony was insufficient.

In this regard the ALJ erred. Gupta's opinion had an adequate foundation. Moreover, the Decision overlooked other competent direct and circumstantial evidence that supports the classification. Gupta testified that three railroad ties weighing 50 pounds fell from 3 to 4 feet off the ground, and thus created a force of 600 pounds at the point of impact with the ground. Other testimony corroborated these facts. It is reasonable to conclude that 600 pounds of force striking on top of an unprotected human foot would cause crushing that is substantially probable to cause permanent injury, or require treatment necessitating at least one day of hospitalization. Such result would not be a "freak" or speculative occurrence. Such an understanding of the circumstances is supported also by the extent of the injury which actually occurred, leaving the injured employee permanently disfigured. The evidence of the injury was provided by the injured worker's testimony.

The source of the opinion testimony appears to be language in the oft-cited case of *R. Wright & Associates db Wright Construction*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999) cited in the Decision: "[t]he Board has repeatedly held that opinions regarding the probability of serious injury must be supported by reasonable specific scientific or experienced based rationale, or generally accepted empirical evidence." This seems to have misled the ALJ in to concluding that opinion evidence, with the particular added details, is required in order to establish a serious classification.

To be clear, opinion evidence regarding the probable consequences of injuries resulting from a violation is not required in every case to uphold a serious classification. Circumstantial and direct evidence, as well as common knowledge and human experience can provide sufficient evidence to support the serious classification. (See *People v. Racy* (2007) 148 Cal.App. 4th 1327, 1333.) Opinion evidence may be offered in addition to this other valid evidence. If there is no direct or circumstantial evidence of the probability of serious physical harm, opinion evidence may be provided to meet the evidentiary

⁵ Specifically, the ALJ wrote: "The Board has consistently held that to support a serious classification an opinion about 'substantial probability of serious harm' should and must be based upon a valid evidentiary foundation such as expertise on the subject, reasonably specific scientific evidence, experienced-based rationale, or generally accepted empirical evidence." (Decision p. 13, relying on *R. Wright & Associates, dba R. Wright Construction*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

burden. When it is offered, the foundation of the opinion may be the subject of crossexamination, or other permissible scrutiny. By requiring the inspector to include all details of his “experience-based rationale” for his conclusion, but not examining the witness on the basis of the opinion, the decision creates an added proof requirement which is not part of any statute or regulation. Lay opinion may be relied on as tending to prove the substance of a claim. “If the facts cannot be adequately or accurately stated, and what the witness knows can be testified to only in the form of an opinion, testimony in that form may be admitted.” (Witkin, CA Evidence, 4th Ed, *Opinion* § 3, citing *Healy v. Visalia and Tulare R. Co.*, (1894) 102 Cal. 633, 638.) The testimony of Gupta that, in his experience, heavy (600 pounds of force) objects falling on to worker’s feet that lack foot protection will cause serious bodily harm is an opinion rationally based on his experience (2500 investigations, 5 similar accidents), and helpful to the understanding of the case.

Evidence Code section 802 states a court in its discretion may require that a witness, before testifying in the form of an opinion, be examined concerning the matter on which the opinion is based. This provision relates to all witnesses who testify in the form of an opinion, not just experts. (See Law Revision Commission Comments to Rule 802.)

In addition, the Division offered Gupta’s opinion that the circumstances of the violation created a substantial probability of serious physical harm. Gupta testified that three of the 2500 investigations he has undertaken involved items falling on the feet of workers with 600 pounds of force. Based on this experience, Gupta believed there to be a substantial probability of serious physical harm from this similar violation. There was no contradictory evidence, Gupta’s conclusion was not impeached or cross examined by the Employer or the ALJ, and we therefore have no basis on which to disregard this evidence. (See *Joseph v. Drew* (1950) 36 Cal.2d 575, 579 [“It is the general rule that ‘the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact.’ (Citations.)”]; see also *Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011).)

When weighed against no contrary evidence,⁶ Gupta’s unimpeached opinion based on his investigation of three prior similar incidents, along with the disfigurement that actually occurred, provide sufficient evidence to establish the serious classification. (See 3 Witkin, Cal. Evidence (4th ed. 2000)

⁶ Employer offered the testimony of a former engineer with the Standards Board. He testified beyond his expertise when he opined as to the medical effects of Garcia’s injury, i.e. that the toe was dislocated rather than permanently deformed. He did not provide evidence that being struck on the foot with 600 pounds of force would only cause minor or temporary injury. Nor did he rebut Gupta’s estimate that the force of three 50 pound railroad ties falling from 3-4 feet generated a force approximately equivalent to 600 pounds.

Presentation at Trial § 89; *R & L Brossamer*, Cal-OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011).⁷

As a defense to the serious classification, Employer asserted it neither knew nor could have known, with the exercise of reasonable diligence, of the existence of the violation, and as such the affirmative defense in Labor Code section 6432 was established. Employer bears the burden of proof to show it neither knew nor could have known of the failure to provide foot protection as required by section 3385(a). “[I]n order for lack of knowledge to be used as an affirmative defense, an employer must show that even with a diligent inquiry, it still would not have known of the violation. (Labor Code § 6432; *Kirkland Enterprises Inc*, Cal/OSHA App. 08-2803, Denial of Petition for Reconsideration (Mar. 30, 2011).)” (*WF Hayward Co.*, Cal/OSHA App. 10-2021, Denial of Petition for Reconsideration (Feb. 15, 2012).)

The evidence showed supervisors were on site, that railroad tie loading in to customer vehicles was work assigned to Garcia and Westad by Employer, and that no foot protection of any kind was required or provided by Employer despite the hazard of the heavy objects falling on Garcia’s and other employees’ feet when performing similar tasks. Employer does not argue it was unaware its employees were loading railroad ties into customer vehicles from forklifts without foot protection, but rather that the “momentary” nature of the violation occurred when Westad failed to follow company policy and lower the forks to the ground. (Petition, pp. 24-25.) This argument is rejected because it rests on several false assertions.

First, the record shows Westad was complying with Employer’s rules when he left the forklift at 3-4 feet above the ground before turning off the engine, and that employees were allowed to stand next to the load of the forklift. Also, Westad was not terminated for failing to follow any rule of Employer, but rather for using poor judgment during the unload incident. Thus, the evidence established that Westad did not fail to follow company policy.

The second false premise in Employer’s argument is that this was a “momentary” violation. Even if the momentary nature of any violation were relevant, Employer was not cited for the narrow period of time wherein one of its employees improperly unloaded a forklift. Rather, Employer was cited for its policy not to provide protective foot covering, which is a conscious omission by Employer. Employer necessarily knew of its own policy, and indeed continues to argue it need not provide foot protection to its workers, despite the

⁷ In Petitioner’s response to the Board Order of Reconsideration, four authorities are cited for the argument that the serious classification was improper. All, *Kelseyville Lumber and Supply* (Apr. 23 2007), *Padre Dam Municipal Water District* (Feb 10, 2010), *Samson Motorcycle Products* (Nov. 1, 2007), and *Beutler Heating and Air* (April 21, 2005) are ALJ decisions, have no precedential value, and are not citable. (*T & C General Contractors*, Cal/OSHA App. 91-1199, Decision After Reconsideration (May 20, 1994).)

uncontradicted evidence of Garcia's exposure to the hazard. There is no evidence presented that Employer was unaware, let alone reasonably unaware, that 50-plus pound loads were being moved by hand from forklifts into customer vehicles without its employees having foot protection exposed such employees to the hazard. Additionally, since Westad did not fail to follow a rule of Employer and was not provided foot protection, Employer cannot claim it was unaware of the violation. (See *Forklift Sales of Sacramento, Inc.*, *supra.*) [Employer's lack of a rule prohibiting the work method used by employee prevented employer from establishing it was reasonably unaware that employee was utilizing the work practice that was a violation of the safety order].⁸

Many years ago the Board concluded that evidence that employees were exposed to the hazard of heavy (50 lb.) objects falling on their feet, though the injury rate was less than one injury per year, established a violation of section 3385(a). (*General Electric Company Vertical Motor Plant*, Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29, 1984).) Here, since Employer knowingly failed to require foot protection, it has not shown it was unaware of the violation of section 3385(a).⁹

2) Since neither Westad nor Garcia was experienced in this task, the ALJ correctly concluded the IEAD was not established.

The IEAD requires an employer to prove all of the following elements: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program which 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 policy which it enforces of sanctions against employees who violate the safety program; and (5) the employee causing the infraction knew he was violating the safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The evidence showed Westad, the forklift operator, had only been driving a forklift for 3 months, for approximately one half hour per day, and that he had only delivered railroad ties to a customer's vehicle via forklift 1 or 2 times prior to this instance. Since he had worked as a fork lift operator for

⁸ Even if Employer required forklift loads to be lowered to the ground level prior to a driver turning off the engine, employees would still be exposed to the hazard of heavy objects falling on their feet. Lifting a 50 pound object from the ground and moving it to a customer's vehicle exposes the employee to the risk the item will be dropped, and unprotected feet will be injured.

⁹ Employer attempts to show reasonable ignorance by arguing it had administrative controls that eliminated the hazard of falling objects. However, the asserted "controls" did not eliminate the hazard. A failed attempt at administrative controls is not a defense to the classification of a violation. Employer's claimed effort to eliminate the hazard shows it is aware that heavy objects are in the workplace, are moved by employees, and that such exposes the workers to foot injury from falling objects. Moreover, the failed administrative control resulted from a policy that allowed the forklift forks to be raised while loaded and parked.

approximately 30 hours (i.e. less than a full workweek), we cannot conclude he was experienced in this task. Likewise, employee Garcia had never loaded railroad ties from a forklift to a customer's vehicle. He was not experienced in this portion of his job. The Independent Employee Act Defense does not relieve employers of the penalties associated with violations that are committed by inexperienced and untrained employees, even if those employees have been on the payroll for many years. On this basis, the ALJ rejected the proffered defense, and doing so was a correct application of the defense. Absent substantial evidence to the contrary, the Board will not disturb an ALJ's factual finding. (*Kimes Morris Construction, Inc.*, Cal/OSHA App. 02-1237, Decision After Reconsideration (Aug. 8, 2008).) The ALJ concluded, rightly, that a single missing element defeats the affirmative defense.

3) The element of employee exposure was established by the injury.

Employer asserts, illogically, that employee exposure was not established because, under its plan, there should have been no exposure. Tellingly, no citable authority is given for this theory.¹⁰ It is true that employee exposure is a required element of any citation. (*Ford Motor Co.*, Cal/OSHA App. 76-706, Decision After Reconsideration (Jul. 20, 1979).) And, the Division must prove an employee was exposed to the hazard the safety order was designed to protect against. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).)

To find employee exposure, there must be reliable proof that employees are endangered by an existing hazardous condition. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, Decision After Reconsideration, (Jul. 26, 1977).) As we recently held, employee exposure may be established by a showing of "actual" exposure, or by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise that employees have been, are, or will be in the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Reasonable predictability is an objective standard and is *not* analyzed from a subjective point of view requiring that the Division show that the employer knew that access to a violative condition was reasonably predictable. (*Id.*, citing *Phoenix Roofing, Inc.*, 17 OSHC 1076, 1079, 1993-95 OSHD ¶ 30,699 (1995).) The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to

¹⁰ Employer cites only to an ALJ decision, *M.S. Kahn Farms* (March 7, 2005), which is not a citable authority. There exist numerous citable Board Decisions After Reconsideration and Denials of Petitions for Reconsideration defining the element of employee exposure, but none were identified by Employer as supporting its novel theory here.

prevent. (*Id.*, citing *RGM Construction Co.*, 17 OSHC 1229, 1234, 1993-94 OSHD ¶ 30,754 (1995).)

(*River Ranch Fresh Foods-Salinas, Inc.*, Cal/OSHA App. 01-1977, Decision After Reconsideration (Jul. 21, 2003).)

Here, the safety order is designed to protect employees from the hazard of heavy objects falling on their feet. (*General Electric Company Vertical Motor Plant, supra.*) Garcia was exposed to this hazard when he was unloading the heavy railroad ties while not wearing foot protection, and further shown because the ties actually fell on his foot. Employee exposure was established, as was the violation¹¹.

4) No errors appear in the Decision regarding abatement.

The decision says little about the issue of abatement. Employer appealed the abatement requirement in the citation. The citation simply states Employer failed to comply with the safety order requiring foot personal protective equipment such as steel toe shoes. The ALJ stated no abatement credit was allowed because abatement had not taken place. She made no findings on the appropriateness of the abatement. Employer provided no evidence to support its assertion that complying with the safety order and providing foot protection to exposed workers was unreasonable or otherwise not required by the safety order. The violation was established and Employer is obligated to comply with the ordered abatement.

In *General Electric Company Vertical Motor Plant, supra*, the Board upheld the ALJs abatement order that “safety shoes, or their equivalent” be provided to employees exposed to falling object hazards shown to exist in that work location. Similarly, this citation requires abatement of the condition described as: “Appropriate foot protection, such as steel toe shoes, were not provided an (sic) used while handling heavy loads. The injured employee was wearing tennis shoes at accident time.” The citation states: “Date By Which Violation Must be Abated: 10/18/2010.” The condition of lack of appropriate foot protection must now be abated, since upon issuance of this Decision After Reconsideration, the stay of this abatement order effectuated by Employer’s filing of this appeal ends. (§ 362.)

The Notice of Penalty alleges the violation is properly classified as serious, and that since the violation caused a serious injury, no penalty adjustments other than for Employer’s size are allowed. (Labor Code section

¹¹ The Petition raises the issue of whether the violation was established only by challenging the finding of employee exposure. No other errors have been alleged regarding the existence of the violation.

6319; 336(d).) Since Employer has over 100 employees, no adjustments are allowed. The correct penalty under these rules is \$18,000.

Employer appealed the reasonableness of the penalty. The propriety of the accident-related penalty calculation was in issue, but was not resolved in the ALJ Decision due to the finding that the Serious classification was not established. Having reversed the classification determination, we must determine whether the accident-related classification is proper.

The record contains sufficient evidence to support the finding that this serious violation caused a serious injury. Injured employee Garcia testified that his toes were broken and permanently disfigured when railroad ties fell on his unprotected foot. Division inspector Gupta testified based on his training and experience with injuries from falling objects that the steel toed shoes or similar foot protection required by the safety order would have prevented this serious injury from occurring. Employer put on no evidence that the steel toed shoe, or foot protection requirement, would not have prevented this serious injury. The Division has met its burden of proof to establish a serious violation caused a serious injury, and that the penalty should be \$18,000 under the regulations.

Employer had every opportunity and motive to preserve the argument that, even if the classification was reversed and properly found to be serious, that the accident-related classification was still not established. (Labor Code § 6618.) However, this argument was not preserved in either the Answer to the Order of Reconsideration, nor the Petition for Reconsideration. Labor Code section 6623 allows the Board to affirm, alter or amend the original findings, order or decision following reconsideration so long as it does so in a decision specifying the details and reasoning for such decision. We thus make, in this decision, the determination that the violation was accident related (an issue before the ALJ, but not resolved in her decision).

Wherefore, the penalty of \$18,000 is hereby affirmed.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 24, 2012