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

| In the Matter of the Appeal of: | **Inspection No. 1436480** |
|---|---|
| **INTERLINE BRANDS, INC.**<br>**2455 PACES FERRY ROAD**<br>**ATLANTA, GA 30339** | **DECISION AFTER RECONSIDERATION** |
| **Employer** | |

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it, and having taken Interline Brands, Inc.'s (Interline or Employer) Petition for Reconsideration (Petition) under submission, renders the following decision after reconsideration.

## JURISDICTION

Interline operates a distribution warehouse. On October 8, 2019, the Division of Occupational Safety and Health, through Senior Safety Engineer Robert Salgado (Salgado), commenced an investigation of Interline's warehouse located at 1110 E. Mill Street in San Bernardino, California (the job site), in response to the report of an employee injury. Associate Safety Engineer Brent Evins (Evins) subsequently completed the investigation.

On March 24, 2020, the Division issued one citation to Interline alleging a Serious, Accident-Related violation of section 3385, subdivision (a) [failure to require appropriate foot protection for employees exposed to foot injuries]. Interline timely appealed the citation, contesting the existence of the violation, the classification, the abatement requirements, and the reasonableness of the proposed penalty. Interline also asserted various affirmative defenses.

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on September 8, 2020, January 15, 2021, September 22 to 24, 2021, and October 6, 2021, with the parties appearing remotely via the Zoom video platform. Matthew Deffebach, Attorney, of Haynes Boone, represented Interline. Clara Hill-Williams, Staff Counsel, represented the Division. The matter was submitted on August 30, 2022.

On September 23, 2022, the ALJ issued a Decision affirming the citation and its Serious, Accident-Related classification and rejecting Interline's affirmative defenses.

Interline filed a timely Petition challenging the ALJ's Decision. Interline alleges that the Decision improperly affirmed the citation, improperly denied its affirmative defenses, and asserts that the abatement requirements were unreasonable. The Division filed an answer.

The Board took Employer's Petition under submission. Issues not raised in the Petition are deemed waived. (Lab. Code, § 6618.)

In making this decision, the Board engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

## ISSUES

1. Did Interline require appropriate foot protection for employees exposed to foot injuries from falling objects, crushing, or penetrating actions?
2. Did Interline establish the Independent Employee Action Defense?
3. Did Interline establish the *Newbery* defense?
4. Did the violation create a realistic possibility of serious physical harm?
5. Did Interline rebut the presumption that the citation was properly classified as Serious?
6. Was the violation a cause of the serious injury?
7. Are the abatement requirements unreasonable?

## FINDINGS OF FACT

1. Interline operates a warehouse distribution center.
2. John Osborn (Osborn) was an employee of Interline.
3. On September 24, 2019, Osborn was involved in an accident while operating an electric pallet jack (EPJ).
4. Osborn attempted to park the EPJ in the battery charging area and, as he stepped down from the EPJ, the EPJ malfunctioned, lurched forward, and ran over his foot and crashed into the wall.
5. Interline did not require that its employees wear protective footwear.
6. Osborn sustained a foot injury as a result of the accident, eventually resulting in the amputation of approximately half of his foot.
7. It is inferred that appropriate foot protection would have prevented Osborn's injury or mitigated the extent of his injury.
8. The EPJ utilized in the accident had a prior history of mechanical issues. However, Interline had made efforts to repair the EPJ prior to the accident, and the problems were reportedly resolved.
9. Although Interline provided Osborn some training on the EPJ, and authorized Osborn to operate it, Osborn was not an experienced EPJ operator.
10. Interline had only evaluated and qualified Osborn to operate the EPJ on approximately September 11, 2019, less than two weeks prior to the accident.
11. Interline failed to enforce a policy of sanctions for employees who violate safety policies.

## ANALYSIS

### 1. Did Interline require appropriate foot protection for employees exposed to foot injuries from falling objects, crushing, or penetrating actions?

The Division cited Interline for a Serious, Accident-Related violation of section 3385, subdivision (a). That section states,

> Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations.

The alleged violation description states:

> Prior to and during the course of the investigation, including, but not limited to September 24, 2019, the employer failed to require and provide appropriate foot protection for employees exposed [sic] foot crushing injuries. As a result, an employee [sic] toes were amputated when the Electric Pallet Jack he was operating ran over and crushed his toes.

To establish a violation of section 3385, subdivision (a), the Division must prove two elements: (1) Interline employees were exposed to "foot injuries" from conditions such as "falling objects, crushing or penetrating actions," and (2) Interline did not require or provide appropriate foot protection. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).) We address each element in turn.[1]

### *A. First Element: Were employees exposed to foot injuries from falling objects, crushing, or penetrating actions?*

Under longstanding precedent, exposure may be demonstrated in two different ways: by showing "actual exposure" to the zone of danger, or by demonstrating reasonably predictable access to the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) (*Benicia Foundry*); *Dynamic Construction Services, Inc*., Cal/OSHA App. 1005890, Decision After Reconsideration (Dec. 1, 2016) (*Dynamic Construction*).) "Actual exposure" may be found when the Division demonstrates an employee was actually exposed to a hazard created by the violation, i.e., the employee has been or is within a zone of danger created by the violative condition. (*Dynamic Construction, supra*, Cal/OSHA App. 1005890 [other citations omitted].) The Division may also establish exposure by "showing the area of the hazard was 'accessible' to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (*Dynamic Construction, supra*, Cal/OSHA App.

[1] When analyzing these two elements, we note that our analysis and our review of the warehouse operations is necessarily constrained by the limited nature of the Division's inspection. The Division's inspection predominantly focused on the accident site, not other warehouse operations. Evins and Salgado failed to inspect or evaluate the whole facility. We do observe that we have previously upheld a similar citation against Interline based on its other warehouse operations in a prior appeal. However, the Division's evidentiary showing, and the relevant witness testimony in the present matter markedly differs from that prior appeal.

1005890 [other citations omitted].) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Ibid*.)

The ALJ found that Osborn's accident demonstrated exposure to a zone of danger. (Decision, pp. 4-5.) The Decision stated:

> Osborn testified that he was operating an electric pallet jack (EPJ) on the day of the accident. He was not wearing foot protection. He did not complete the safety checklist prior to operating the EPJ. He drove the EPJ to a battery charging area so that he could park it and take a lunch break. He parked the EPJ and stepped to the ground. The EPJ lurched forward, running over his foot. Osborn's foot went numb immediately.
>
> […]
>
> In the present matter, Osborn suffered a foot injury from the tire of the EPJ. The tire of the EPJ presented a crushing action to Osborn's foot. The violative condition is that Employer did not require Osborn to wear foot protection despite exposure to foot injuries from crushing actions. Osborn was actually exposed to the hazard created by the violative condition. Thus, the element of employee exposure is established.

(Decision, p. 5.)

Interline's Petition, in contrast, argues that the citation should be vacated because the Division never demonstrated exposure to a zone of danger. (Petition, pp. 14-17.) Interline argues that no employees were within a zone of danger created by industrial trucks because it had adopted effective administrative and engineering controls. (Petition, pp. 17-22.) Interline contends that Osborn's accident is insufficient to demonstrate exposure, reasoning that no accident would have occurred if Osborn had followed all safety rules and procedures. (Petition, pp. 17-22.) Interline contends that Osborn violated multiple safety rules: he was not assigned or authorized to operate the EPJ, he did not complete the required checklist, he parked the EPJ in an improper location, and he improperly jumped from the EPJ.

After considering all arguments and evidence, we concur with the ALJ and conclude that the record demonstrates actual exposure to a foot crushing action.

As a preliminary matter, before addressing exposure, we resolve some disputes of fact that are relevant to the exposure analysis (and to other issues as addressed herein). First, although Interline contends that Osborn was not authorized to operate the EPJ, we concur with the ALJ's finding that Osborn was trained and certified to operate an EPJ. (Decision, p. 2 [Finding No. 5].) This conclusion is supported by Osborn's testimony and documentary evidence. Further, an Interline form was introduced into evidence that said Osborn was evaluated and qualified to operate the EPJ. (Ex. D.) We, like the ALJ, also find it significant that there was no investigation

report that identifies, as a cause of the incident, that Osborn operated equipment without certification. (Decision, p. 8.) We also find it significant that "Employer's emails regarding the incident do not indicate Osborn lacked certification or authorization to operate an EPJ," and nor do they "suggest that Employer was surprised to learn that Osborn operated an EPJ." (Decision, p. 8, citing Exhibit SS.) On balance, the evidence supports the conclusion that Osborn was trained and certified to operate the machine in question.

Next, we concur with the ALJ's assessment regarding the mechanism of the accident. The ALJ concluded that after Osborn parked the EPJ in the battery charging area, and as he stepped down, the EPJ lurched forward and ran over his foot. (Decision, p. 2 [Finding No. 1].) The record supports this conclusion. Osborn credibly testified that he pulled into the parking/charging spot and waited for the EPJ to come to complete stop. He then put the steering wheel up and let it go, grabbed the left handrail, and put his right foot down. As he was doing that, the EPJ jerked forward, running over his right foot and crashing into the wall. (Transcript Day 2, pp. 98-102.) His foot was crushed in the incident. When describing the injury to his right foot, Osborn said, "It got caught on the -- on the right side. I didn't really get to land. I just -- it happened too fast. It happened. It took my foot with it, ran it over and mashed against the wall, and it bounced[.]" (Transcript Day 2, p. 130.) In support of this conclusion, it is also noted that this particular EPJ had prior mechanical issues.

Here, the record demonstrates that Osborn's foot was crushed by the EPJ when it lurched forward and ran over his foot. As a result of the accident, Osborn's foot was actually exposed to a zone of danger. The zone of danger is that area surrounding the industrial truck that presents a danger of foot injury. There is no doubt that Osborn's foot was in the zone of danger presented by the EPJ because his foot was actually injured by the EPJ.[2] Regardless of whether the exposure was intentional or accidental, "[a]ctual exposure is established when the evidence preponderates to a finding that employees actually *have been* or are in the zone of danger created by the violative condition." (*Dynamic Construction*, *supra*, Cal/OSHA App. 1005890 [emphasis added].) Consequently, we find that "actual exposure" was demonstrated.

### *B. Second Element: Did Interline fail to require or provide appropriate foot protection?*

The second element of a violation of section 3385, subdivision (a), requires the Division demonstrate that Interline did not require "appropriate foot protection" for its exposed employees. (*United Parcel Service*, *supra*, Cal/OSHA App., 1158285.) The term "appropriate foot protection" is not specifically defined in the regulation. However, there are other related subdivisions within the same regulation that shed light on the meaning of the phrase. Section 3385, subdivision (c), states that purchased protective footwear must comply with specific American Society for Testing and Materials (ASTM) standards.[3] When determining the meaning

[2] Although Interline's witnesses, including its expert witness, repeatedly opined that there were no foot injury hazards in the warehouse, their testimony was not particularly compelling when compared to the nature of the injury *actually* suffered by Osborn in the warehouse.

[3] Section 3385, subdivision (c)(1), states, "Protective footwear for employees purchased after January 26, 2007, shall meet the requirements and specifications in American Society for Testing and Materials (ASTM) F 2412-05, Standard Test Methods for Foot Protection and ASTM F 2413-05, Standard Specification for Performance Requirements for Foot Protection which are hereby incorporated by reference."

of the term "appropriate foot protection" in this context, the Board has harmonized subdivisions (a) and (c) through a burden-shifting analysis. (*United Parcel Service*, *supra*, Cal/OSHA App., 1158285; *Home Depot USA, Inc. dba Home Depot #6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017); *Morrison Knudsen Corp.*, Cal/OSHA App. 94-2771, Decision After Reconsideration (April 6, 2000) (*Morrison Knudsen*); *MCM Construction Inc*., Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000) (*MCM Construction*); *Zero Corporation* Cal/OSHA App. 79-1161, Decision After Reconsideration (Nov. 15, 1984).) Under the burden shifting analysis, when the Division establishes exposure to foot injuries from crushing or penetrating actions, a presumption is created that "appropriate foot protection" means footwear meeting the ASTM footwear standards set forth in subdivision (c). (*United Parcel Service*, *supra*, Cal/OSHA App., 1158285; *Home Depot USA, Inc. dba Home Depot #6683*, *supra*, Cal/OSHA App. 1014901; *Morrison Knudsen*, *supra*, Cal/OSHA App. 94-2771; *MCM Construction*, *supra*, Cal/OSHA App. 94-246; *Zero Corporation, supra,* Cal/OSHA App. 79-1161.)

To rebut the presumption that "appropriate foot protection" means ASTM-compliant footwear, Interline has the burden to prove that footwear meeting the ASTM standards would either: (1) not provide protection, or (2) would be inappropriate for other reasons. (*Golden State FC, LLC*, Cal/OSHA App. 1310525, Decision After Reconsideration (April 14, 2021); *MCM Construction*, Cal/OSHA App. 94-246; *Home Depot*, *supra*, Cal/OSHA App. 1014901.) It is, however, difficult for an employer to demonstrate that ASTM-compliant footwear would not offer protection. An employer must do more than merely argue that protective footwear would not provide complete protection in a worst-case scenario or argue that the weight of the hazard exceeds the specifications in the ASTM standard. (*Morrison Knudsen, supra*, Cal/OSHA App. 94-2771; *Home Depot*, *supra*, Cal/OSHA App. 1014901.) The employer must show that footwear meeting the respective ASTM standard would provide no protection at all, not even to mitigate injury. (*United Parcel Service*, *supra*, Cal/OSHA App., 1158285; *Home Depot, supra,* Cal/OSHA App. 1014901; *MCM Construction*, *supra,* Cal/OSHA App. 94-246; *Morrison Knudsen, supra*, Cal/OSHA App. 94-2771.) Next, to show that protective footwear would be inappropriate, the employer must demonstrate that protective footwear would be unsuitable for the particular time, place, activity and location, such as requiring librarians who sometimes carry heavy books to wear safety shoes. (*Golden State FC, LLC*, *supra*, Cal/OSHA 1310525.) The opportunity to show that protective footwear would be inappropriate is designed to prevent extreme or absurd applications of the safety footwear requirement, not to address mere inconveniences caused by, or undesirability of, protective footwear.

As noted above, the evidence shows that Osborn was exposed to a foot injury from a crushing action, establishing the presumption that footwear meeting the ASTM standard was "appropriate," and shifting the burden to Interline to show that footwear meeting the ASTM standard would provide no protection or would be otherwise inappropriate.

Interline's Petition does not directly address the second element or its burden-shifting analysis, waiving the point. (Lab. Code, § 6618.) However, even assuming, *arguendo*, that Interline did not waive the second element, we agree with the ALJ's Decision, which concluded that Interline failed to rebut the presumption that appropriate foot protection means ASTM-compliant foot protection. (Decision, p. 7.)

Interline's witnesses offered testimony regarding the negative ramifications of protective footwear. David Bell, Interline's Environmental Health and Safety Manager, said that they had utilized protective footwear at a nearby Mira Loma facility following another Division inspection and citation. (Transcript Day 4, pp. 417-418.) He stated that the associates offered negative feedback and complaints regarding the protective footwear. (Day 4, pp. 418-419.) Sergio Henriquez, Interline's Regional Asset Protection Manager, said that employees complained that protective footwear caused ankle, toe, and knee fatigue and injuries, along with ingrown toenails. (Day 4, pp. 445-449.) He additionally asserted that employees grew lax in their compliance with safe lifting techniques. Interline's expert witness, Dominick Zackeo, testified that "steel-toed boots or safety shoes" can be uncomfortable, less supportive, heavier, and hotter. (Day 6, pp. 177-178.) He also testified that they give employees a false sense of security. (*Ibid*.)

We conclude that Interline failed to rebut the presumption that "appropriate foot protection" means ASTM-compliant footwear. The testimony of Interline's witnesses, discussing the alleged negative ramifications of foot protection was too vaguely characterized to credit. Interline cannot rebut the presumption that appropriate foot protection means ASTM compliant footwear through generalized testimony suggesting that *all* protective footwear is heavy, uncomfortable, and dangerous. We have repeatedly rejected generalized assertions that *all* safety footwear shares the same negative qualities. As the Board has repeatedly noted, there have been repeated advancements in the styles and types of protective footwear and the materials utilized. (*Home Depot, supra,* Cal/OSHA App. 1014901; *Golden State FC, LLC*, *supra*, Cal/OSHA App. 1310525.) Protective shoes are available in sneakers, tennis shoes, basketball shoes, and boots. Given the advancements in protective footwear and the numerous alternative designs, Interline must do more than offer vague assertions that all protective footwear is unsuitable for its workplace.[4]

We are also not persuaded by the argument that personal protective equipment offers employees a false sense of security. The argument is, at best, specious. Indeed, we believe that it calls into question the expertise of Interline's expert witness on this particular point. Interline suggests no principle whereby a "false sense of security" justifies the elimination of *some* protective measures without justifying the elimination of *all* protective measures.

Ultimately, we agree with and affirm the ALJ's finding that Employer "did not provide or require foot protection meeting the ASTM standard, and did not establish that footwear meeting the ASTM standard would provide no protection or be inappropriate." (Decision, p. 7.)

Because the Division proved both elements, we find that Employer violated the cited safety order. Citation 1 is therefore affirmed. We next consider whether Interline established any affirmative defenses that would excuse the violation.

[4] Moreover, if we accepted Interline's assertion that *all* protective footwear is unsuitable for such workplaces, it would effectively mean that section 3385, subdivision (c), has no meaning as there would never be a need to purchase ASTM compliant footwear. We are bound to avoid a construction that renders words within a regulation surplusage. (*McCarthy Building Co., Inc*., Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016).)

**2. Did Interline establish the Independent Employee Action Defense?**

Interline asserts that it established the Independent Employee Action Defense (IEAD), which operates as a complete defense to a citation. The elements of the IEAD defense are: 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 of sanctions against employees who violate the safety program; and 5) the employee caused a safety infraction which he or she knew was contrary to Interline's safety requirements. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) The IEAD is an affirmative defense, therefore Interline bears the burden of proof and must establish all five elements of the IEAD in order to prevail. (*Ibid*.)

In evaluating Interline's IEAD defense, we focus on the first and fourth elements. However, before turning to the analysis of those two elements, we acknowledge the many administrative and engineering controls that Interline implemented throughout the warehouse, including the new controls implemented. The Board does recognize that Interline demonstrated many, if not most, of the aspects of a well-devised safety program. We also observe that Osborn did violate some relevant safety rules. In particular, he failed to conduct an inspection of the EPJ prior to operating it. However, we nonetheless conclude that Interline failed to establish two elements of the IEAD—the first and fourth—and consequently failed to establish the defense. Failure to prove any one of the elements negates the IEAD in its entirety. (*Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).)

First Element:

The first element requires the employee to be experienced in the job being performed. (*Synergy Tree Trimming*, *Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

In this case, there is evidence that Osborn received some training, and that he was certified, to operate the EPJ. An Interline form was introduced into evidence that stated that Osborn "had successfully completed the evaluation and is qualified to operate the" EPJ. (Ex. D.) Based upon this evidence, the ALJ concluded that that Osborn was experienced in the job being performed. (Decision, p. 8.) However, while we do find that Osborn received some training on the EPJ, and that he was and authorized to operate it, we disagree that he was an experienced EPJ operator.

To satisfy the first element of the IEAD, it is not enough to show that the employee received training and had *some* experience. The Employer must demonstrate that the employee performed the specific task in question enough times to become reasonably proficient. (See, e.g., *Solar Turbines Incorporated*, Cal/OSHA App. 90-1336, Decision After Reconsideration (July 13, 1992) ["For Employer to prove that Heller was experienced in the task of securing the pressure plates to the compressor, it had to prove that he had done the job enough times in the past to become reasonably proficient. Proof that he had completed the task a few times under the

watchful eye of his leadman did not meet that burden."] see also *Sacramento Bag Mfg. Co.*, Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992).)

Here, a training record indicates that Interline had only certified Osborn to operate the EPJ less than two weeks prior to the accident. (Ex. D.) Further, Osborn said he only been using the EPJ for about a month. (Transcript Day 2, pp. 95-96.) Given Osborn's limited experience, familiarity, and proficiency with the EPJ, along with the potential danger associated with operating such a heavy piece of equipment, we conclude that Interline failed to demonstrate that that the employee had performed the specific task in question enough times to become reasonably proficient. Indeed, the testimony from Interline's witnesses runs counter to the conclusion that Osborn was experienced. Therefore, we conclude that Interline failed to establish the first element.

Fourth Element:

To satisfy the fourth element, Interline must demonstrate that it has a policy of sanctions which it enforces against employees who violate the safety program. Interline "may show compliance through producing records of disciplinary actions related to safety." (*Synergy Tree Trimming*, *Inc*., *supra*, Cal/OSHA App. 317253953, citing *Paramount Farms, King Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration (Mar. 27, 2014).) However, the Board recognizes that in some workplaces, a lack of employee disciplinary records may not indicate a failure to effectively enforce a safety program. An employer can provide other information to meet this element. (*Synergy Tree Trimming*, *Inc*., *supra*, Cal/OSHA App. 317253953.)

Interline asserts it maintains a disciplinary policy for employees who violate its safety policies, which includes termination. Luis Gamino, Interline's Operations Manager, testified that Interline takes rule violations seriously and asserted there are consequences for violating the safety rules. Gamino also stated Osborn would have been disciplined had he stayed with the company for any length of time after his injury. Interline's witnesses also testified that its supervisors offered adequate supervision of its employees, sanctioned those employees that violate its rules, and rewarded those employees that comply. (Petition, pp. 27-28.)

The ALJ's Decision found that Interline failed to demonstrate compliance with the fourth element. The ALJ's Decision stated,

> Gamino testified that Employer has policies and procedures for sanctioning employees who violate its safety policies. However, Employer did not sanction Osborn.
> […]
> With respect to other incidents, Employer did not introduce evidence of sanctions to other employees. This is significant because other injuries and rules violations were discussed in detail during the hearing. Gamino testified that employee David Acosta suffered a crushed or broken ankle when he "violated a couple of safety processes, which led to him and his injury." Another

> employee, Jose Romero, suffered crushed toes. (Exhibit J.) Zackeo testified: "Romero failed to do a team lift and lifted an appliance, a returned appliance, and dropped it on his big toe."
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> Gamino's testimony of a policy to sanction employees does not outweigh the lack of sanctions against Osborn combined with the absence of evidence of other sanctions. Accordingly, Employer did not meet its burden on this element of the IEAD.
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> (Decision, pp. 10-11.)

Here, we concur with the ALJ's conclusion that Interline, on balance, failed to demonstrate that it enforces a policy of sanctions for employees who violate safety policies. In reaching this conclusion we, like the ALJ, find it significant that Interline failed to produce any record of discipline related to Osborn's accident, or related to the prior accidents and injuries listed on its Form 300 Log, which Interline asserted were caused by violations of multiple safety rules. Interline produced no records of discipline associated with any of those prior incidents and we infer no such documents existed.

For the reasons discussed herein, we find that Interline's IEAD defense fails.

**3. Did Interline establish the *Newbery* defense?**

Interline next argues that the citation should be dismissed under the unforeseeable employee act defense set forth in *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641, 649-651, otherwise known as the *Newbery defense*. To establish this defense, Interline must show: (1) Interline did not and could not have known of the potential danger to employees; (2) the violation was unforeseeable; (3) Interline exercised adequate supervision to ensure safety; and (4) Interline ensured employee compliance with its safety rules. (*Gaehwiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1045; *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board, supra,* 123 Cal.App.3d at 650.)

There are two facets of this record that persuade us that the hazard was foreseeable and that Interline could have known of the potential danger, negating the *Newbery* defense. First, as already discussed, the record demonstrates that Osborn was not an experienced EPJ operator. We conclude that a foreseeable hazard exists when an inexperienced equipment operator is allowed to utilize heavy machinery without immediate supervision, particularly where the EPJ had prior mechanical issues.

Next, Exhibit H, page 6, shows that the EPJ had a documented history of not slowing or stopping properly, commonly known as "plugging." Approximately three months before Osborn's accident a review found: "EPJ plugging not responding when unit is in travel and needs to be slowed down." (Ex. H.) Osborn also testified that there had been previous employee complaints about this particular EPJ. It is foreseeable that when an inexperienced operator is permitted to utilize a machine with a relatively recent history of mechanical issues, problems can

arise. An inexperienced operator may not recognize when, or what to do if, a machine malfunctions, leading to an accident.

Violations are also foreseeable when an employer fails to enforce a policy of sanctions against employees who violate the safety program.

For the reasons stated herein and also within the ALJ's Decision, we conclude that Employer failed to establish the *Newbery* defense.

**4. Did the violation create a realistic possibility of serious physical harm?**

Interline's Petition challenges the Serious classification of the violation. When determining whether a citation is properly classified as Serious, the relevant statute requires application of a burden-shifting analysis. The Division holds the initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).)

Evins is up to date with his training (Day 3, p. 179) and, therefore, he is deemed competent by operation of law to offer testimony to establish each element of a Serious violation. (Lab. Code, § 6432, subd. (g).) Evins testified that there is a realistic possibility that a serious injury is going to occur due to the failure to have appropriate foot protection. Further, the evidence demonstrates Osborn was hospitalized for several days as a result of the accident, and eventually half of his foot was amputated. As such, the Division established a realistic possibility of serious physical harm for the citations.

**5. Did Interline rebut the presumption that the citation was properly classified as Serious?**

Labor Code section 6432, subdivision (c), provides a mechanism for Interline to rebut the presumption of a Serious violation. It states:

> (c) 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 Interline did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

For reasons already discussed at length when addressing Employer's affirmative defenses, Employer cannot demonstrate it took all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent this particular violation. Therefore, Employer did not rebut the presumption of a Serious violation.

**6. Was the violation a cause of the serious injury?**

To sustain an Accident-Related classification, the Division must demonstrate a "causal nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc.,* Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [other citations omitted]).) In other words, where the evidence indicates that a serious violation caused a serious injury the violation is properly characterized as Accident-Related. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015); *MCM Construction,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016).) The Division must show the violation "more likely than not was *a* cause of the injury," but need not establish the violation as the *sole* cause of the injury. (*Ibid* [emphasis added].)

When upholding the Accident-Related classification, the ALJ inferred that appropriate foot protection, as contemplated by the ASTM standard, would have prevented the injury or mitigated the extent of the injury, demonstrating a nexus between the violation and the injury, (Decision, pp. 14-15, See *United Parcel Service*, *supra*, Cal/OSHA App. 1158285.) Interline, in contrast, argues that there is no evidence that protective footwear would have offered protection.

Although Interline is correct that no witness offered specific testimony that protective footwear would have protected Osborn in this accident, we nonetheless agree with the ALJ's inference that protective footwear would have offered at least some protection. (Decision, p. 15.)

As recounted in detail in the preceding sections, when an Employer fails to rebut the presumption that ASTM compliant footwear constitutes appropriate foot protection, as occurred here, the presumption that ASTM-compliant footwear is appropriate for the particular hazard controls. (*MCM Construction*, *supra,* Cal/OSHA App. 94-246; *Morrison Knudsen, supra,* Cal/OSHA App. 94-2771; *Home Depot, supra,* Cal/OSHA App. 1014901.) Next, from the finding that ASTM compliant footwear was appropriate for the relevant hazards, it is inferred (in the absence of any contradictory evidence) that such footwear would have offered Osborn some protection, or at least ameliorated the extent of his injuries. As such, the Accident-Related classification is affirmed.

**7. Are the abatement requirements unreasonable?**

The ALJ's decision ordered Interline to provide protective footwear and ordered abatement throughout the entire facility, reasoning that the hazards posed by industrial trucks existed throughout the facility. (Decision, pp. 15-16.) The ALJ also held, "many styles of

footwear are available which meet the ASTM specifications and Interline may choose the means of meeting the requirements of the cited section." (*Ibid*.) Interline, in contrast, argues that abatement should be limited to the charging/parking area near the accident site and argued that protective footwear should not be required as the sole means of abatement. We agree with Interline.

First, due to the limitations in the Division's evidentiary showing, we decline to issue an order that extends abatement requirements to the entire warehouse. The Division's inspection focused almost exclusively on the accident site, not other warehouse operations in other portions of the warehouse. Neither Evins nor Salgado walked the whole facility. They also did not materially evaluate exposure in other areas of the warehouse. Further, Interline offered considerable testimony regarding its administrative and engineering controls in other areas of the warehouse, which was largely unrebutted.

Next, we do not mandate protective footwear as the sole means of abatement. Interline is free to choose the least burdensome means of abatement, provided that it appropriately addresses employee exposure to the hazard. (*United Parcel Service*, *supra,* Cal/OSHA App. 1158285.)

## DECISION

For the reasons stated herein, Citation 1, Item 1, is affirmed and the penalty of $18,000 is sustained. The abatement requirement is modified as stated herein.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 06/19/2025