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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| HOME DEPOT U.S.A., INC.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD,<br><br>Defendant and Respondent;<br><br>DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,<br><br>Real Party in Interest and Respondent. | E071313<br><br>(Super.Ct.No. CIVDS1716416)<br><br>OPINION |

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed.

Haynes And Boone, Mary-Christine Sungaila, Allan Gustin, Matthew Deffebach, and Polly Fohn for Plaintiff and Appellant.

J. Jeffrey Mojcher, Chief Counsel, Aaron R. Jackson, Autumn R. Gonzalez, and Andia Farzaneh, Industrial Relations Counsel, for Defendant and Respondent.

Christopher Grossbart and Rocio Y. Garcia-Reyes, Assistant Chief Counsel, William Charles Cregar and Eric L. Compere, Staff Counsel, for Real Party in Interest and Respondent.

Morgan, Lewis & Bockius, Jason S. Mills, Sonia A. Vucetic, and Jonathan L. Snare for Retail Litigation Center, Inc. and National Federation of Independent Business as Amicus Curiae on behalf of Plaintiff and Appellant.

After a workplace accident and inspection at appellant Home Depot's Rialto retail store, real party in interest, Division of Occupational Safety and Health (Division), cited Home Depot for violations of workplace safety standards established by the state occupational safety and health law (Cal/OSHA; Lab. Code, § 6300 et seq.) and attendant regulations. Relevant to this appeal, the Division determined Home Depot had violated California Code of Regulations, title 8, section 3385, subdivision (a), which requires employers to ensure their employees who are exposed to foot injuries wear appropriate protective footwear.

Home Depot challenged the citation. Ultimately, the respondent, California Occupational Safety and Health Appeals Board (Board), affirmed the citation because Home Depot employees were exposed to foot injuries when they manually lift and carry heavy items and when they worked on foot close to industrial trucks. They found Home Depot's prohibition on open-toed or open-heeled shoes didn't adequately protect those employees, despite engineering and administrative controls meant to mitigate the risk.

Home Depot filed a petition for writ of mandate, asking the trial court to relieve them of the footwear citation on the ground the findings weren't supported by the record. The trial court declined, and Home Depot asks this court to make the same determination and to overturn the decision on due process grounds. We conclude Home Depot had adequate notice and the Board's decision is reasonable and supported by substantial evidence. We therefore affirm.

## I

## FACTS

A. *The Worksite*

At the time of these events, Alfio Arcifa worked for Home Depot's Merchandising Execution Team, rotating among five different retail locations. Merchandising Execution Team associates worked at night stocking shelves and preparing stores for customers. Arcifa's job was to place product on shelves and make sure it was clean, presentable, priced correctly, and displayed according to corporate plans.

On December 4, 2014, Arcifa was working the night shift at Home Depot's Rialto store, rearranging and stocking product in the store's roofing aisle. The roofing aisle contained, among many other things, five-gallon, three and a half-gallon and one-gallon buckets of roofing tar. Home Depot's merchandise standards allowed the five-gallon buckets to be stacked three containers high. The three and a half-gallon containers could be stacked five containers high. Arcifa said the buckets weighed about 40 pounds.

According to Arcifa, he and other workers lifted and carried these items by hand. He said the buckets arrived on a pallet and workers would lift the buckets by their handles and "hand-stack them onto the floor." Although he said he believed it unlikely a worker would drop one of these buckets, he conceded it could happen if an associate failed to hold it correctly and failed to follow Home Depot's training and standards.

The roofing aisle housed other heavy items, including gutters, roofing shingles, and rolls of roofing paper. Home Depot's Manager of Safety Operations, Kristine Pounds, identified a photograph of rolls of roofing paper in the aisle. The rolls stood on end behind a "safety restraint" wire cord, there in case any of the rolls tipped over. Pounds said the rolls "weigh . . . a fairly decent amount," describing them as "pretty . . . solid pieces of rolls of material." She also admitted there were rolls on the outside of the safety restraint that could fall if pushed, but denied staff exposure. Pounds said she believed a customer probably left the product outside the wire.

She also identified packages of roofing shingles resting on pallets. She said the shingles were moved to that location with equipment, not by hand. She said the majority of the packages of shingles were sold to builders by the pallet, but conceded an individual customer can "certainly buy one package." The packages of shingles weighed between 50 to 60 pounds and Pounds acknowledged customers could ask a store associate for help "physically lift[ing] that roofing material and put[ting] it in the cart." And while she did not believe an accident probable, she also admitted there was a potential for an employee to drop a package of shingles.

B. *The Accident*

The night of December 4, 2014, Arcifa asked his supervisor, Jimmy Guillen, for help with pallets of roofing tar. Guillen went to the receiving area to retrieve an electric pallet jack (EPJ), a small industrial truck like a forklift used to move pallets. Though small compared to other industrial trucks, EPJs are very heavy, weighing up to 5,000 pounds. EPJs have platforms where an operator may stand to operate the controls and Home Depot trains its employees to operate EPJs from their platforms. However, EPJs are designed so a person can operate them while standing on the ground. Both Pounds and Arcifa said there was a potential for an EPJ to run over the feet of anyone operating an EPJ from the ground or anyone else standing too near to the vehicle. As Pounds acknowledged, if an employee operated an EPJ from the ground there was a risk the "thing could run over his foot."

Guillen had been certified to operate EPJs by Home Depot for approximately a year and a half by December 2014. But he hadn't used this particular EPJ, which had been in service for only a month. Guillen said another Home Depot employee told him the controls of the EPJ were sensitive. Arcifa said he overheard the other employee saying the EPJ was "really quick and sensitive." Guillen inspected the EPJ and then drove it to the roofing aisle.

After Guillen brought the EPJ to the roofing aisle, he and Arcifa moved a couple pallets out of the bays so they could rearrange the product. When they were done and preparing to move one of the pallets back into the bay, they found they needed to move

another display, which was blocking the path of the EPJ. Arcifa told Guillen he would move the display, and Guillen got down from the platform of the EPJ to wait. When he was done moving the display, Arcifa indicated he was ready. Guillen told him to get out of the way. Arcifa said he understood Guillen to mean he should move to the "zone of safety," which, under Home Depot's safety policy, requires a worker on foot be at least 10 feet ahead and four feet to the side of an operating EPJ. However, before he could get to the zone of safety, the EPJ swung toward Arcifa and struck him. The platform of the EPJ hit him and his "foot was pinned against the pallet." The impact broke his leg above the ankle, causing a compound fracture.

Guillen said he was not standing on the operator platform of the EPJ when the accident happened. Guillen said the movement of the EPJ was unexplained because he didn't engage in the hand movements required to operate the vehicle. Based on a reenactment photograph, Arcifa agreed that what Guillen did shouldn't have activated the EPJ. However, Guillen admitted placing his hand on the control right before the accident happened. Store personnel and the vendor tested the EPJ but could not duplicate what happened. Ultimately, Home Depot disciplined Guillen for operating the machine while Arcifa was in the zone of danger. Both the administrative law judge and the Board found Guillen had inadvertently activated the EPJ.

C. *Home Depot's Footwear Policy*

Home Depot's dress code required only closed-toed and close-heeled shoes, not shoes with any sort of protective toecap. Neither Arcifa nor Guillen wore protective

shoes. When the accident occurred, Arcifa was wearing Converse-brand sneakers.

Pounds said Home Depot had decided against requiring more protective footwear. She said of steel-toed boots in particular, "we don't feel it is necessary, number one, for ergonomic issues. And number two, they kind of provide a false sense of security." She said when employees wear steel-toed boots, they "[d]on't pay attention to like the zone of safety because they feel like the boots will protect them if something does fall on them and they are not as careful with merchandising items, et cetera." She said this was Home Depot's policy across all 1,978 of its retail stores around the country.

D. *The Inspection and Citation*

In response to a report about this accident, the Division opened an investigation of the retail store, conducted by Associate Safety Engineer Alfred Varela. Varela began his investigation on December 19, 2014 at Home Depot's Rialto store.

In May 2015, the Division issued three citations to Home Depot. Relevant to this appeal, Varela issued a citation finding a serious violation of California Code of Regulations, title 8, section 3385, subdivision (a), which says, "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, while working with and around industrial trucks, which may cause injuries." The citation says, "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."

Varela said he issued the citation based on the "nature of the use of forklifts," because in his 22 years of experience, "when employees, as well as operators work with forklifts . . . accidents have occurred where feet have been crushed by forklifts." Additionally, Varela said two employees, Arcifa and Guillen, had been exposed to foot injuries from (1) being struck by the pallet jack, (2) merchandise falling off the pallet jack, and (3) merchandise falling when employees moved it by hand. Varela said "foot protection would help, at minimum, minimize the injury . . . or avoid[] the injury," by creating a barrier protecting the foot from the forklift's wheels, an object falling on the foot, or other types of injuries.

E. *Home Depot's Attempts to Overturn the Citation*

1. *Administrative law judge*

Home Depot appealed the citation to the Board. (Lab. Code, §§ 6600, 6600.5.) The Board appointed an administrative law judge (ALJ) who held a one-day evidentiary hearing. (Lab. Code, §§ 6604, 6605, 6608.) On June 28, 2016, the ALJ issued a decision affirming the citation for a serious violation of California Code of Regulations, title 8, section 3385 (Section 3385).

The ALJ found Home Depot employees were exposed to foot injuries. "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 wire. 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."

The ALJ also found employees were exposed to crushing injuries caused by the operation of EPJs. "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 foot, regardless of how much Employer trained employees to stay away from the rear wheel." The ALJ credited Varela's testimony that "when operators and employees work around forklifts, accidents occur that crush feet through contact with the forklift, objects near the forklift, or falling objects."

Despite Pounds' testimony, the ALJ concluded "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."

2. *Board decision*

Home Depot filed a petition for reconsideration with the Board. (Lab. Code, § 6614.) The Board has authority to affirm, rescind, alter, or amend ALJ decisions. (Lab. Code, §§ 6620, 6621, 6622.) The Board may resolve conflicts in the evidence, make their own credibility determinations, and reject the ALJ's findings and make their own findings based on the record. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908.)

Home Depot argued the Board should rescind the citation because there was insufficient evidence of employee exposure to hazards requiring foot protection, the ALJ's determination of exposure improperly rested on a general determination that foot protection is required wherever forklifts operate in a retail store, and the ALJ failed to properly consider the American Society for Testing and Materials (ASTM) standards incorporated by Section 3385, subdivision (c).

The Board reviewed the evidence and expressed dissatisfaction with the support Varela provided for the footwear citation. In particular, the Board declined to accept Varela's generalized assertion that a risk of foot injury existed due simply to the "nature of the use of forklifts," noting there are situations where a forklift could be used in a workplace without persons on foot being exposed. The Board so concluded because an employer's controls might prevent exposure, such as proper enforcement of a zone of

safety policy.

The Board reviewed the evidence independently and acknowledged the validity of some of Home Depot's arguments. "[T]he Division should generally consider whether an employer adopted effective administrative and engineering controls, which would prevent exposure from occurring in the first instance . . . For example, under facts not present here, we can envisage a circumstance where an employer's adoption and appropriate enforcement of an appropriate zone of safety policy could prevent exposure to foot injuries caused by industrial trucks."

The Board also acknowledged some of Varela's testimony was not specific enough to the circumstances of Home Depot's store. "With regard to the lack of specificity in Varela's testimony, we also reiterate, as we recently said, 'While it may well be that industrial trucks, by their very nature present a hazard of crushing actions to feet, the assertion must still be proven by the Division through credible and sufficient evidence; it will not be assumed.'" (*Home Depot USA, Inc.*, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017), quoting *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

The Board nevertheless upheld the citation based on additional record evidence, concluding "on balance the record evidence demonstrates exposure occurred for several different reasons." The Board pointed to authority that "exposure to 'foot injuries' from 'falling objects, crushing or penetrating actions' may be demonstrated based on evidence as to the nature and weight of objects physically moved or lifted by employees." "Here,

the evidence demonstrates Arcifa was lifting and moving five-gallon (40 pound) buckets of roof coating. The nature and weight of items he lifted and moved is sufficient to demonstrate exposure to the hazard of the items falling and injuring his foot demonstrating a violation of the safety order. Indeed, exposure is demonstrated on this basis alone."

The Board also found the evidence supported finding it was reasonably predictable employees would be exposed to the zone of danger. "The evidence also demonstrated the existence of other heavy items in the same aisle, including packages of roofing shingles weighing as much as 50 to 60 pounds and large rolls of roofing paper, some of which were unrestrained. It is reasonably predictable that employees of Home Depot have been or will be required to lift such items during the course of their work, whereupon they would be within the zone of danger . . . Pounds admitted customers are permitted to ask a store associate to lift items such as the roof shingles, during which time the employee would be exposed to foot injuries from falling objects due to the nature and weight of the objects carried. . . . We find it reasonably predictable that a customer would ask for such assistance in the store, particularly since Arcifa testified that he personally attempted to lift the roofing tile to gauge its weight, but was unable to do so." The Board concluded this evidence further demonstrated the Division established the first element of a violation.

The Board also concluded the foot-injury citation should be affirmed because of the evidence the operation of industrial trucks posed a risk to workers on foot. "The

parties do not dispute that an EPJ is a heavy item. Pounds testified that they weigh 'a lot' and that a person could not pick them up. She estimated that they weigh up to 5,000 pounds. Despite Employer's administrative controls and zone of safety policy, the evidence demonstrates the EPJ struck Arcifa before he reached the zone of safety. Arcifa testified the EPJ broke his leg above the ankle and pinned his foot against the pallet. The latter testimony demonstrates that his foot was actually within a zone of danger. That he suffered a broken leg rather than a foot injury does not mean that a violation does not exist." In addition, "Pounds testified that Home Depot's procedures require an employee to operate an EPJ from the operator's platform. She testified it was possible for an employee to operate an EPJ from the ground, but that would be a violation of Employer's rules. Pounds admitted that an EPJ's wheels can roll over an employee's feet if they deviated from that rule. Arcifa also testified that if an employee departs from the zone of safety an EPJ could run over their foot in some circumstances."

In both instances, the Board specifically rejected Home Depot's argument that their engineering and administrative controls reduced the risk of injury adequately on their own, without added foot protection. "While we observe that Employer had adopted administrative and engineering controls, including things such as the stretch wrap and zone of safety, Employer failed to persuasively demonstrate that such administrative controls would prevent exposure during the time-period an employee is actually physically lifting and moving heavy objects." With respect to the danger posed by the EPJ, the Board found "despite Employer's administrative rules to the contrary, the

evidence demonstrates Guillen inadvertently activated the EPJ while he was not standing on the operator's platform" which "exposed him to having his foot run over, i.e. it placed him within a zone of danger."

The Board also found Home Depot did not require or provide appropriate foot protection for its exposed employees. The Board acknowledged employers have some discretion to determine what kind of foot protection qualifies as appropriate under Section 3385, subdivision (a). However, it pointed out an employer's discretion is not unrestricted. In particular, Section 3385, subdivision (c)(1) specifies that protective footwear "meet the requirements and specifications in American Society for Testing and Materials (ASTM) F 2412-05 . . . which are hereby incorporated by reference." As the Board recognized, "[i]n most cases where an employee is exposed to foot injuries from falling objects or crushing hazards, the footwear will need to meet the minimum specifications referenced in subdivision (c)." Though the employer retains discretion, there are dozens of different styles of foot protection and the "employer must also ensure that the selected footwear protects against the existing hazards."

The Board considered whether Home Depot established footwear meeting the ASTM standard would be inappropriate. "In [this] case, since the Division has demonstrated exposure to foot injuries, it has demonstrated that footwear meeting the standards set forth in subdivision (c) is appropriate. The evidence is undisputed that Employer failed to provide such footwear, and a violation of the safety order is established unless Employer proceeds with evidence on the point." "Pounds testified that

Employer conducted personal protective equipment (PPE) assessments in the workplace and conducted various other safety audits . . . Employer determined engineering and administrative controls were the preferred method for addressing foot-related hazards. Pounds testified that the administrative and engineering controls in place are adequate and eliminated the need for PPE. She also testified protective footwear such as steel-toed shoes present ergonomic issues and provide a false sense of security. Arcifa and Guillen also testified that they did not feel that steel-toed shoes were necessary."

The Board found Home Depot's evidence wanting. "Pounds failed to offer any persuasive evidence demonstrating that such assessments were of sufficient value or quality. She did not identify the specific nature of the PPE assessments, the evaluative factors considered, whether site-specific criteria were considered, nor what specific metrics were evaluated. Indeed, the sufficiency and quality of Employer's PPE assessments were called into question when Pounds stated that foot protection provides employees a false sense of security, as employees will be less careful when merchandising and fail to follow Employer's other safety rules. Rather than suggesting that employees are not exposed to foot injuries, a necessary implication from Pounds' testimony is that there is an actual danger of exposure to foot injuries for which foot protective footwear would provide assistance. [¶] In addition, as we have already discussed, Employer's administrative and engineering controls were insufficient to prevent exposure from occurring in the immediate matter for multiple reasons."

The Board concluded Home Depot failed to require or provide appropriate foot protection for its employees exposed to foot injuries.

F. *Judicial Review*

Home Depot filed a petition for a writ of mandate in the trial court. (Lab. Code, § 6627.) The parties stipulated abatement was not an issue in the proceeding, so the remedy ordered in the citation is not before us.

Home Depot asked the trial court to determine whether the Board's decision was reasonable and supported by substantial evidence. The trial court denied the petition, and Home Depot filed a timely notice of appeal in this court.

## II

## ANALYSIS

A. *The Statutory and Regulatory Background*

The Legislature enacted Cal/OSHA "for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions." (Lab. Code, § 6300.) Under the act, employers have a duty to maintain a safe work environment for employees. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 312-314.) Cal/OSHA's "statutory provisions make clear that the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment." (*Carmona,* at p. 313.) "Every employer shall furnish employment and a place of employment that is safe and healthful

for the employees therein." (Lab. Code, § 6400, subd. (a).) The employer "shall furnish and use safety devices and safeguards, and shall adopt and use practices . . . which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety and health of employees." (Lab. Code, § 6401.) "No employer shall fail or neglect . . . [t]o provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe." (Lab. Code, § 6403.)

The Occupational Safety and Health Standards Board promulgates safety orders. (Lab. Code, §§ 140, 142.3.) These safety orders give effect to, flesh-out, and further the purposes of, the Labor Code, and employers must comply with them. (*Southern California Edison*, Cal/OSHA App. 81-663, Decision After Reconsideration (Aug. 26, 1985); Lab. Code, § 6407.)[1] When interpreting regulatory safety standards adopted by the Occupational Safety and Health Standards Board under Cal/OSHA, courts have rejected narrow agency constructions of safety standards that do not take into account the "comprehensive sweep" of the enabling worker safety legislation. (*Carmona*, *supra*, 13 Cal.3d at pp. 311-314*; Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 107.)

[1] We grant the Board's unopposed motion for judicial notice, which attached copies of 20 Board decisions after reconsideration. (Evid. Code, §§ 451, 452, subd. (c), 459.) California courts cite such Board decisions to show Board interpretations of relevant safety regulations. (E.g., *Elsner v. Uveges* (2004) 34 Cal.4th 915, 930.)

The Division is responsible for enforcing Cal/OSHA and holds "general enforcement powers over any 'place of employment.'" (*Solus Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316, 329.) The Division inspects workplaces and issues citations for violations of the safety orders. (Lab. Code, §§ 142, 6307, 6308.) When investigating an incident, the Division may undertake a complete inspection of the worksite. (Lab. Code, §§ 6307, 6308, 6309, 6314.5.)

B. *Standard of Review*

The Division issued the citation against Home Depot, an ALJ upheld the citation, and the Board affirmed it. Home Depot brought a petition for writ of mandate in the superior court, but the court denied the petition. Home Depot now asks us to intervene.

We perform the same function as the trial court in ruling on the writ. '"We must determine whether based on the entire record the Board's decision is supported by substantial evidence and whether it is reasonable. [Citations.] Where the decision involves the interpretation and application of existing regulations, we must determine whether the administrative agency applied the proper legal standard. [Citation.] Since the interpretation of a regulation is a question of law, while the administrative agency's interpretation is entitled to great weight, the ultimate resolution of the legal question rests with the courts . . . An agency's expertise with regard to a statute or regulation it is charged with enforcing entitles its interpretation of the statute or regulation to be given great weight unless it is clearly erroneous or unauthorized. [Citations.] The [Cal/OSHA Appeals] Board is one of those agencies whose expertise we must respect. [Citation.]'

[Citation.] However, '[a]n administrative agency cannot alter or enlarge the legislation, and an erroneous administrative construction does not govern the court's interpretation of the statute.'" (*Overaa Construction v. California Occupational Safety & Health Appeals Bd.* (2007) 147 Cal.App.4th 235, 244-245.)

C. *There was Substantial Evidence of Exposure to Foot Injuries*

Home Depot argues the Board erred by affirming the citation for a serious violation of section 3385, subdivision (a) (Section 3385(a)) because there was no substantial evidence their employees were exposed to foot injuries.

Section 3385(a) directs, "Appropriate foot protection shall be required for employees who are exposed to foot injuries from . . . falling objects, crushing or penetrating actions, which may cause injuries." In the citation, the Division said, "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."

The ALJ and the Board affirmed the citation and the penalty of $8,100 on the ground Home Depot failed to provide their employees with adequate protection from injury from falling items or from crushing by the operation of industrial trucks. Home Depot argues the Division did not meet their burden of proof to show their employees were exposed to the hazard addressed by the citation.

The Division bears the burden of proving employee exposure by a preponderance of the evidence. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, p. 3, Decision After Reconsideration (Dec. 1, 2016).) The Division may establish exposure in two ways. First, it may show an employee was actually exposed to the zone of danger or hazard created by a condition. (*Ibid*.) Actual exposure is established by evidence employees actually have been or are in the zone of danger created by the violative condition. (*Ibid.*)

Second, "'the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.'" (*Dynamic Construction, Inc.*, *supra*, Cal/OSHA App. 14-1471, p. 3.) Thus, employee exposure may be established "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. [Citations.] Under this 'access' exposure analysis, the Division may establish exposure by showing that it was reasonably predictable that during the course of their normal work duties employees 'might be' in the zone of danger. [Citations.] 'The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended

to prevent.' [Citation.] The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue." (*Id.* at pp. 3-4.)

"Reasonable predictability is an objective standard and is *not* analyzed from a subjective point of view requiring that the [agency] show that the employer knew that access to a violative condition was reasonably predictable." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, p. 18, Decision After Reconsideration (Apr. 24, 2003).) Deciding whether it is reasonably predictable that an employee would be in the zone of danger requires consideration of "the nature of the work, the work activities required, and the routes of arrival and departure." (*Ibid.*)

The citation was based on the fact that employees routinely lifted heavy items, were in the proximity of falling items, and worked in proximity to industrial trucks. We agree with the Board that some of Associate Safety Engineer Varela's testimony concerned the likelihood of exposure was insufficiently tied to conditions in the workplace to provide substantial evidence on its own. He said he based the citation on the "nature of the use of forklifts" and his knowledge from 22 years of experience that "when employees, as well as operators work with forklifts . . . accidents have occurred where feet have been crushed by forklifts." That is objectionable. However, Varela also based the citation on his observations of operations in the Rialto store. Based on his investigation, he said Arcifa and Guillen had been exposed to foot injuries from (1) being struck by the pallet jack, (2) merchandise falling off the pallet jack, and (3) merchandise

falling when employees moved it by hand. These observations about operations at the store supplemented and substantiated his general observations.

Along with the testimony of other witnesses, Varela's observations provide substantial evidence that employees were in fact exposed to injuries due to lifting and carrying heavy items and working on foot near EPJs. With respect to the risk employees would drop heavy items on their feet, Arcifa said he and other workers would lift buckets of roofing tar weighing about 40 pounds by their handles and put them in stacks of three to five buckets. Although he said he believed it unlikely a worker would drop one of the buckets, he conceded it could happen if someone failed to follow Home Depot's training and standards. Further, Home Depot's safety director said rolls of roofing paper "weigh … a fairly decent amount," describing them as "pretty… solid pieces of rolls of material." She admitted there were rolls in the aisle that could fall if pushed. She also admitted workers may be asked to lift 50 to 60 pound packages of roofing shingles, and that there was a risk an employee would drop a package of shingles. The Board concluded this evidence established employees were actually exposed to foot injuries, it was reasonably predictable workers would be within the zone of danger in the normal course of carrying out their duties, and that administrative controls such as training on lifting heavy items were not sufficient to reduce the risk acceptably. The Board's conclusion is reasonable and supported by substantial evidence, so we are required to affirm.

With respect to the risk to employees from EPJs operated nearby, it's not disputed EPJs weigh approximately 5,000 pounds and pose a risk of injury to workers when they

operate the vehicles on foot. Home Depot's safety director testified as much. Though the safety director said Home Depot trains its employees not to operate EPJs from the ground, the accident that gave rise to the investigation and citation occurred because Guillen did just that and the EPJ struck Arcifa before he reached the zone of safety, breaking his leg. This evidence provides substantial support for the Board's conclusion that operators of EPJs were exposed to foot injuries and that it was reasonably predictable they would be within the zone of danger. In addition, Arcifa testified that an EPJ could run over your foot if you're standing directly in front of the vehicle and it was in a "more lifted up" position. Although he testified that pallets on a loaded and lowered EPJ would block the tires from hitting your *foot* (though not your leg), his testimony is nevertheless substantial evidence it is reasonably predictable employees would be within the zone of danger.

In both instances, the Board found Home Depot's engineering and administrative controls did not adequately reduce the risk of injury on their own, without added foot protection. Though Home Depot trained employees how to lift safely, such training is not sufficient to safeguard against the risk of employees dropping such objects while lifting and carrying them. With respect to the danger posed by EPJs, the Board found the accident that triggered this case occurred despite Employer's administrative rules to the contrary, the evidence shows Guillen inadvertently activated the EPJ while he was not standing on the operator's platform, which exposed him to having his foot run over. The accident also shows it's reasonably predictable an employee would be within the zone of

danger despite safety rules to the contrary. Moreover, Home Depot's safety director admitted an EPJ's wheels can roll over an employee's feet if they broke the rule.

We conclude this testimony constitutes substantial evidence supporting the Board's determination that Home Depot Merchandising Execution Team associates who worked at night stocking shelves and preparing stores for customers were both actually exposed and that it was realistically predictable they would be exposed to foot injuries. The regulation seeks to ensure employers protect employees from foot injuries from "falling objects, crushing or penetrating actions, which may cause injuries." (§ 3385(a).) Falling items, heavy items lifted and dropped, and being run over by the wheel of an industrial truck pose exactly such threats, and the unrebutted testimony is sufficient to show those Home Depot employees at the Rialto store were actually exposed to such injuries as well as that it was realistically predictable that they would be exposed in the future. We cannot overrule the Board when faced with such substantial evidence.

D. *There was Substantial Evidence Home Depot Didn't Require Adequate Footwear*

Home Depot argues they did require their employees to wear adequate footwear and the Board's decision that they didn't was both unreasonable and not supported by substantial evidence.

When exposure to foot injuries has been established, Section 3385(a) requires the employer to provide "appropriate foot protection." Section 3385, subdivision (b) provides, "Footwear which is defective or inappropriate to the extent that its ordinary use creates the possibility of foot injures shall not be worn." Section 3385, subdivision (c)(1)

directs “Protective footwear . . . 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.”

In keeping with these provisions, the Board has found that where the Division establishes employee exposure to foot injuries, it has demonstrated a presumption that footwear meeting the ASTM standards is appropriate. (See *MCM Construction Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000); *Morrison Knudsen Corp.*, Cal/OSHA App. 94-2271, pp. 3-4, Decision After Reconsideration (Apr. 06, 2000).)

As a result, the first question the Board faced was whether Home Depot required protective footwear that met the ASTM standards. The answer is unequivocally no. The standard recommends impact resistance and compression resistance for the toe area of footwear and metatarsal impact protection that reduces the chance of injury to the metatarsal bones at the top of the foot. (ASTM F2413, http://tyndaleusa.com/fr-clothing-safety-library/standards-and-test-methods/protective-footwear-standards/astm-f2413/.) Home Depot does not argue they required or provided footwear that met those specifications. It is uncontested Home Depot required closed-toed and closed-heeled shoes, nothing more, and that Arcifa wore soft Converse sneakers. There is no evidence Home Depot required footwear with any kind of toe-cap or metatarsal impact guard.

The second question for the Board was whether Home Depot provided evidence sufficient to show shoes compliant with the ASTM standard would not provide protection or were inappropriate for other reasons. (*Morrison Knudsen Corp.*, *supra*, Cal/OSHA App. 94-2271, at pp. 3-4.) On this question, the Board found Home Depot did not carry their burden. Home Depot provided testimony by their safety director that the company had evaluated whether personal protective equipment was necessary and concluded engineering and administrative controls were adequate and eliminated the need for protective footwear. She also testified that protective footwear like steel-toed shoes caused ergonomic problems and made employees violate safety rules by giving them a false sense of security.

We agree with the Board that the safety director's testimony was not sufficient to show Home Depot should be relieved of the ASTM standard. Her testimony was conclusory. She didn't provide any information about the nature of the assessments or how Home Depot reached their judgment. Moreover, as the Board found, her remark that protective footwear was inappropriate because it causes employees to ignore safety rules and be overcautious tended to undermine her credibility. Further, there was substantial evidence that Home Depot's administrative and engineering controls were not in fact sufficient. Training employees how to lift heavy items does not eliminate the substantial risk that an employee will drop such an item on their foot, and training about a zone of safety evidently does not remove the risk that an employee on foot will be hit by an EPJ.

For all these reasons, we conclude the Board's finding that Home Depot did not provide adequate foot protection to be both reasonable and supported by substantial evidence.

E. *The Board's Application of Section 3385(a) Does Not Violate Due Process*

Home Depot argues that the Board's application of Section 3385(a) "violates Home Depot's constitutional due process rights by failing to limit the regulation only to the types of exposure that would be recognized by a reasonably prudent employer in the retail industry." Specifically, they object that the Board's application of the statute requires employers to "require their employees to wear steel-toed boots or other protective footwear anytime an employee lifted an item weighing 40 pounds or more or worked in a facility using EPJs."

We see no due process violation. The citation and the Board's decision are simply not as broad as Home Depot interprets them to be. First, as the Board held, Home Depot could have overcome the presumption that footwear meeting the ASTM standard was appropriate by providing evidence sufficient to show shoes compliant with the standard would not provide protection or were inappropriate for other reasons. (*Morrison Knudsen Corp., supra,* Cal/OSHA App. 94-2271, at pp. 3-4.) As we discuss above, Home Depot simply failed to make that case as a factual matter. (Opn. *ante*, at pp. 29-30.)

Second, the Board didn't dictate steel-toed shoes as a means of abatement, and the ASTM standard allows a broad range of protective footwear that may be appropriate under different circumstances. Moreover, nothing in the Board's decision forecloses Home Depot from resolving the risks identified in the citation by imposing new

engineering or administrative controls not already in place in its store. Indeed, the stipulation regarding abatement the parties submitted in the trial court specified Home Depot and the Division had reached an agreement regarding abatement that did not require employees to wear protective footwear. We take no position on the adequacy of this resolution, but note it undermines Home Depot's position that the Board's decision means any employee who occasionally lifts an item weighing 40 pounds must wear steel-toed boots. Evidently, that is not even true of all workers whose normal job duties involve a substantial amount of such lifting.

The Board's decision does not affect the status of every employee who "lift[s] an item weighing 40 pounds or more or work[s] in a facility using EPJs." Under the law, a violation occurs only if employees are exposed to foot injury of the type protected by the regulation or it was reasonably predictable that during the course of their normal work duties they might be in the zone of danger. The Division and the Board determined employees working to stock and display items in the roofing aisle of the Home Depot Rialto store were exposed to foot injuries in the normal course of their jobs, as well as that it was realistically predictable that they would be exposed in the future. It does not follow that workers, such as "waiters who reposition tables at restaurants [or] clerks who lift file boxes in courthouses," are or might be exposed to foot injuries in the normal course of their very different jobs.[2]

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[2] Home Depot argues the citation should be overturned because the regulation applies only to risk of serious injuries, not just the "risk that an employee might stub their toe when a light item falls." As we've already pointed out, this sort of hyperbole is

*[footnote continued on next page]*

So understood, there's no basis for Home Depot's claim they didn't have notice the regulation could be applied to employees on its Merchandising Execution Team who regularly lift heavy items and work on foot around EPJs.[3] Over the years, the Board has found exposure to foot injuries under Section 3385 when employees lift and move heavy objects weighing as little as 20 to 40 pounds. In *Truestone Block Inc.*, Cal/OSHA App. 82-1280, Decision After Reconsideration (Nov. 27, 1985), the Board applied the same regulation in concluding foot protection was required for an employee injured lifting a concrete block weighing approximately 20 pounds. In *FMC Corporation Food Processing Machinery Division*, Cal/OSHA App. 77-498, Decision After Reconsideration (Aug. 28, 1979), the Board found exposure to foot injuries where "employees mov[ed] by hand large sheets of metal that had sharp edges and an estimated weight of up to 100 pounds per square foot" as well as "[l]arge castings . . . estimated weighed 40 to 50 pounds." Similarly, in *General Electric Company Vertical Motor Plant*,

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*[footnote continued from previous page]*
unpersuasive. In any event, "an accident would cause even a minor injury, by crushing action, would support the existence of a general violation." (*Times Advocate Times-Advocate Company*, Cal/OSHA App. 90-1242, Decision After Reconsideration (Dec. 16, 1991).) Here, of course, the Director found a serious violation, not a general violation, meaning there was a "realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Cal. Code Regs., tit. 8, § 334.)

[3] Home Depot argues the Board decision violates their due process rights because it relies in part on evidence their employees were at risk of being injured by moving roofing shingles. This argument is without merit. The investigation occurred in the roofing aisle where roofing tiles were stacked and the citation noted it was based in part on the risk of exposure "to foot injuries from falling objects." Home Depot had adequate notice its employees might be questioned about injuries caused by falling or dropped packages of roofing tiles.

Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29, 1984), the Board found exposure to foot injuries where employees carried 40-pound castings around in the course of the machining work without safety shoes. The Board emphasized "approximately 20 to 25 percent of the employees' time is spent moving parts" which "constitutes a substantial portion of the employees' work." (*Id.* at p. *2.) The Board's decision in this case is in line with those opinions.

The employer in *FMC* made much the same argument Home Depot does here—"that the decision provides it with no guidance as to how it is to comply with the cited safety order." (*FMC Corporation Food Processing Machinery Division*, *supra*, Cal/OSHA App. 77-498, at p. *2.) The Board disagreed and explained, "An employer cannot abrogate its responsibilities to employee safety and health by pleading lack of direction or ignorance in the face of easily discernible hazards and common remedies." (*Ibid.*) Similarly here, Home Depot cannot avoid its responsibilities to employee safety by exaggerating the scope of a citation and minimizing prior Board decisions and claiming lack of notice.

Finally, Home Depot asks us to import from the Fifth Circuit United States Court of Appeal the requirement that safety regulations be applied only to hazards recognized by a '"reasonably prudent employer' in the industry." We decline the invitation. First, California courts have not adopted this approach in interpreting our state's employment

health and safety provisions, even decades after the Fifth Circuit articulated it.[4] Instead, our courts look to whether the regulations are sufficiently definite to provide reasonable employers with notice of their responsibilities. (E.g., *C.E. Buggy, Inc. v. Occupational Safety & Health Appeals Bd.* (1989) 213 Cal.App.3d 1150, 1155-1158; see also *Pacific Bell Wireless, LLC v. Public Utilities Commission* (2006) 140 Cal.App.4th 718, 744 ["As the United States Supreme Court has held, '[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk'"].) As we discussed above, despite Home Depot's hyperbolic characterizations, the foot protection regulation at issue in this case and the case law interpreting it are sufficiently definite to allay any due process concerns.

Second, the line of Fifth Circuit cases Home Depot relies on concern the application of very general regulations, much more subject to vagueness challenges and irregular application than Section 3385. As the court noted in *S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Commission* (5th Cir. 1981) 659 F.2d 1273,

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[4] Indeed, most federal Courts of Appeal differ with the Fifth Circuit's position. *Voegele Co., Inc. v. OSHRC* (3rd Cir. 1980) 625 F.2d 1075, 1077-1079 ["No other circuit has adopted the Fifth Circuit test . . . These courts have refused to limit the reasonable person test to the custom and practice of the industry because '(s)uch a standard would allow an entire industry to avoid liability by maintaining inadequate safety'"]; *Bristol Steel & Iron Works, Inc. v. OSHRC* (4th Cir. 1979) 601 F.2d 717, 722-724; *American Airlines, Inc. v. Secretary of Labor* (2d Cir. 1978) 578 F.2d 38, 41; *Brennan v. Smoke-Craft, Inc.* (9th Cir. 1976) 530 F.2d 843, 845; *Arkansas-Best Freight Systems, Inc. v. OSHRC* (8th Cir. 1976) 529 F.2d 649, 655; and *Cape & Vineyard Division of New Bedford Gas v. OSHRC* (1st Cir. 1975) 512 F.2d 1148, 1152.)

"[m]any, if not most, [health and safety] regulations . . . are sufficiently specific concerning the circumstances in which safety precautions must be taken that adequacy of notice is not a significant problem. The generality of [29 C.F.R.] § 1926.28(a), however, mandates that it be applied only in such a manner that an employer may readily determine its requirements by some objective external referent." (*Id*. at p. 1280.)

Section 3385, by comparison, has to do with protecting employees from foot injuries from "electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions." (§ 3385(a).) With respect to the risk from crushing or penetration, the regulation also incorporates detailed standards necessary to protect feet against injury by certain amounts of force. (§ 3385, subd. (c) [incorporating 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"].) Thus, the regulation itself includes a great deal of direction to employers.

Third, as the Fifth Circuit itself recognized, "the decision whether to fill the interstices in a statutory scheme by rulemaking or by ad hoc adjudication 'is one that lies primarily in the informed discretion of the administrative agency.'" (*S & H Riggers*, *supra*, 659 F.2d at p. 1283, fn. 12.) As we've discussed, the state has taken this route with Section 3385, and produced a consistent body of cases finding employees who regularly lift and carry heavy items in the normal course of their jobs are exposed to foot injuries. As the Fifth Circuit itself allowed "'authoritative judicial or administrative interpretations

which clarify obscurities or resolve ambiguities' may cure arguably vague regulations." (*S & H Riggers*, at p. 1282.) To the extent Section 3385 is not sufficiently plain on its own, the Board's consistent interpretation has cured any defect.

At bottom, we conclude the Board's decision and the citation were reasonable, tied to the specific facts of circumstances of Home Depot's Rialto store, and consistent with longstanding Board interpretation of the regulation. We therefore conclude the citation and the Board's decision upholding it did not violate Home Depot's due process rights.

## III

## DISPOSITION

We affirm the Board's decision upholding the citation. Home Depot shall bear the costs of defendant and real party in interest.

NOT TO BE PUBLISHED IN OFFICAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.