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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HOME DEPOT U.S.A., INC.,

Plaintiff and Appellant,

v.

CALIFORNIA OCCUPATIONAL
SAFETY AND HEALTH APPEALS
BOARD,

Defendant and Respondent;

DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF
OCCUPATIONAL SAFETY AND
HEALTH,

Real Party in Interest and
Respondent.

E070417

(Super.Ct.No. RIC1710947)

OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge.

Affirmed.

Haynes And Boone, Mary-Christine Sungaila, Allan Gustin, Matthew Deffebach, Polly Fohn, and Christina Crozier, 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 James D. Clark, 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 Mira Loma distribution warehouse, the real party in interest, Division of Occupational Safety and Health (Division), cited Home Depot for several 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 appropriate foot protection for employees exposed to foot injuries (the footwear citation), and section 3650, subdivision (t)(9), which sets standards for the safe operation of industrial trucks and requires employers to make sure their employees comply (the truck-operation citation).

Home Depot challenged the citations. Ultimately, the respondent, California Occupational Safety and Health Appeals Board (Board), affirmed the footwear citation because Home Depot employees were exposed to foot injuries when they manually lift heavy loads and when they worked on foot or walked in close proximity to industrial trucks. They found Home Depot's safety policies and prohibition on open-toed or open-heeled shoes didn't adequately protect those employees. The Board affirmed the truck-operation citation because Home Depot did not establish the employee caused the infraction despite knowing her conduct was contrary to the employer's safety requirements.

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. The trial court declined, and Home Depot asks this court to make the same determination. Home Depot's petition also seeks relief from the truck-operation citation on the ground they did establish the independent employee action affirmative defense.

We conclude the Board's decision on the footwear citation is reasonable and supported by substantial evidence. We also agree with the Board's determination Home Depot did not establish the affirmative defense that their employee knowingly violated a safety rule. We therefore affirm.

I
FACTS

A. The Accident

In October 2014, two Home Depot warehouse workers, Eileen Mejia and Nancy Rodriguez, had an accident while driving vehicles called electric pallet jacks (EPJs) at Home Depot’s Mira Loma distribution warehouse.¹ Mejia had picked up some pallets and Rodriguez attempted to use her EPJ to pick up some pallets nearby. According to Mejia, Rodriguez “hit my pallet jack” because “she backed it in too fast and lost control.” Rodriguez told an investigator she lost control because “as she was turning, she turned too hard too fast.” Mejia said Rodriguez, who was standing on the back of the EPJ, “dropped her foot” when “she lost control,” instead of maintaining her feet on the machine as trained. Rodriguez was injured when her foot was caught between the two EPJs. Rodriguez told Mejia she dropped her foot because she’d panicked.

B. The Inspection and Citation

¹ Many of these warehouse workers were employees of Pinnacle Workforce Solutions (Pinnacle). However, the Board and the trial court concluded Home Depot was their secondary employer, and therefore responsible for a failure to require or provide appropriate foot protection. Home Depot does not challenge this conclusion on appeal. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [failure to raise an issue in opening brief waives the issue].) Consequently, for ease of exposition and understanding, we will refer to these workers as Home Depot employees.

In response to a telephone report about this accident, the Division opened an investigation of the warehouse, conducted by Associate Safety Engineer Harpreet Dhillon. The investigation was not limited to the accident, since under Cal/OSHA the Division may undertake a complete inspection of the worksite. (Lab. Code, §§ 6307, 6308, 6309, 6314.5.)

Dhillon initiated the investigation on November 14, 2014 at an opening conference with representatives of Home Depot at the Mira Loma warehouse. When Home Depot's representatives walked him to the site of the accident, Dhillon observed "the industrial truck operators wearing, you know, like sneakers, tennis-type tennis shoes while they were operating industrial trucks. He said, "there were employees that were on foot, including the management that was with me walking to the site, to the scene. That management of Home Depot personnel were not wearing steel-toed or work boots."

He said he asked "the Employer about their shoe policy, if they had one, and they said the only requirement they have is that the employees, the associates who operated the industrial trucks or work in the warehouse wear closed-toed shoes and that was a requirement and that they did not have a requirement for a steel-toed shoe or . . . other appropriate shoe." He said the assistant general manager of the warehouse, who enforced safety and health measures with employees, later confirmed that was the policy. Asked what kind of foot protection could have eliminated or reduced Rodriguez's injuries in the accident that prompted the investigation, Dhillon said steel-toed or hard-toed shoes. Dhillon said he had written citations for similar failures in other cases.

Dhillon said he believed steel-toed shoes would be appropriate based on his experience and data from prior accident investigations. “From reviewing those . . . other cases investigated by other colleagues, and we have, I believe, a document that kind of summarizes foot injuries that the Division has investigated where either objects, heavy objects have fallen on an employee’s foot which have resulted in serious injuries or, in fact, I investigated an accident where the wheel of a sit-down forklift actually rolled over on top of an employee’s foot who was walking or was working in the area. [¶] The operator did not see the employee on foot. The employee was not wearing steel-toed shoes. He was wearing some type of sneakers. His foot was impacted. The wheel of the—left wheel of the forklift, front left wheel of the forklift went over this employee’s foot resulting in a serious injury. He was hospitalized for multiple days.” Based on these observations, he concluded “there [was] a realistic possibility for serious injury to occur if the employee’s foot is not safe guarded by an effective means either through appropriate foot protection or steel-toed shoe.”

Dhillon elaborated on the warehouse conditions he considered in reaching his conclusion. He said he concluded Rodriguez and Mejia were both exposed to risk as workers who operated EPJs and walked in the vicinity of EPJs during work, as well as coming and going from shifts. He said they are exposed to risk of injury over the course of their entire work shift. “[T]here’s a realistic possibility that they’re exposed throughout the duration of their workday because things can happen. They can strike another industrial truck, they can strike a stationary piece of equipment or object, they

can be exposed by falling off of the electric pallet jack from the platform and be struck by another forklift going by.” However, he also said he didn’t recall observing anyone operate an EPJ to pick up or stage pallets.

Dhillon said management employees, and specifically those who accompanied him through the warehouse during his inspection, also were exposed to a realistic risk of injury. About one of those employees, he said, “As long as he’s out on the floor, walking the floor, and when he becomes in close proximity to an industrial truck, which there is realistic possibility, industrial truck approaching him as he’s walking by, he could be an exposed employee if he’s not wearing appropriate foot protection.” Dhillon said he didn’t measure how close those employees got to industrial trucks and didn’t recall asking them how often they were in fact near such vehicles when they were on the floor of the warehouse. Instead, he said he determined there was a realistic possibility they could be exposed based on their testimony that they walked through the facility daily.

Dhillon also said lumpers were exposed to a realistic risk of injury. “There’s a realistic possibility where a lumper . . . [when] they’re either building a pallet or they’re breaking down a pallet and shrink wrapping or unshrink wrapping a pallet or they’re stacking it. You have multiple lumpers working on the stacking a pallet, items could fall off while they’re being put together, and as industrial trucks are coming in close proximity to pickup those pallets that have merchandise on them.” Again, however, he said he didn’t recall actually observing any employees performing those jobs at the warehouse.

At the investigation, Home Depot management raised certain administrative controls they believed functioned to provide adequate protection for the workers. According to Dhillon, management pointed out they had painted lines to direct the flow of EPJ traffic and that they trained drivers to avoid coming into proximity to workers on foot. Dhillon concluded those controls were not sufficient to protect workers from the injury risk he identified. Again, he said he didn't recall doing an assessment of the warehouse to see if Home Depot was attempting to use administrative controls to address the foot exposure risk. He said mere administrative controls can't eliminate risks posed by the operation of industrial vehicles in the vicinity of pedestrians. Because people make mistakes and violate their training, engineering safeguards (like guardrails) or personal protective equipment (like steel-toed shoes) are required to supplement administrative controls and protect workers.

On April 24, 2015, the Division issued a citation (Citation 2, Item 1) regarding the Home Depot footwear policy signed by Dhillon. The citation noted the regulation requiring: "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." (Cal. Code Regs., tit. 8, § 3385, subd. (a).)

The citation concluded, "Prior to and during the course of the investigation, including, but not limited to, November 14, 2014, the employer did not ensure that industrial truck operators and employees working in the zone of danger were provided

with appropriate foot protection, including but not limited to steel-toed safety shoes, in a work environment where affected employees are prone to, but not limited to, penetrating foot injuries from falling objects and injuries sustained from crushing actions of industrial trucks.” The citation classified the violation as serious, called for the violation to be abated by May 20, 2015, and proposed a penalty of \$11,250.

The Division also issued a citation (Citation 1, Item 3) related to the unsafe operation of industrial trucks. The citation noted the regulation requiring “Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules: . . . Vehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed. For trucks traveling in the same direction, a safe distance may be considered to be approximately 3 truck lengths or preferably a time lapse - 3 seconds - passing the same point.” (Cal. Code Regs., tit. 8, § 3650, subd. (t)(9).)

The citation concluded, “Prior to and during the course of the investigation, including, but not limited to, November 14, 2014 the employer did not ensure that industrial trucks were operated in a safe manner in that vehicles (industrial trucks) maintained a safe distance from other vehicles (industrial trucks), keeping the truck under positive control at all times and that all established traffic regulations shall be observed.” The citation described as one instance of the violation the accident between Mejia and Rodriguez. It cited as a second instance “the common practice of disengaging the forks

of a ‘stuck’ pallet by the means of other industrial truck operator making contact and securing the stuck pallet with the forks of their industrial trucks and or electric pallet jacks.”

Dhillon based the citation in part on interviews with Rodriguez and Mejia. From those, he said he concluded “it was clear[] that she did not maintain positive control of her EPJ, of her industrial truck or pallet jack when she was attempting to maneuver and position herself in anticipation of picking up the pallets.” He said he concluded “she was turning, she turned too hard too fast. [¶] That movement or the momentum when she said she lost positive control of the truck, her foot from the energy, the jerkiness of when she turned, because she said it was jerking, the EPJ was jerking as she was trying to maneuver herself and position herself, caused her foot to come off the platform of the EPJ, causing her foot to become caught between the bottom frame of her EPJ, in between the frame of the—Mrs. Mejia’s EPJ that was stationary. So her foot was caught in between the two EPJs, the one that she was operating and the one that was stationary in which Mrs. Rodriguez was on at the time of the incident.”

C. The Home Depot Warehouse

Home Depot challenged the citation by petition to the Board. The Board appointed an administrative law judge (ALJ) to hold a hearing and decide the petition. The ALJ held a three-day evidentiary hearing, which included Dhillon’s testimony (recounted above) and the testimony of certain Pinnacle employees who supervised the day-to-day operations of the warehouse. We recount their testimony here.

The Mira Loma warehouse is a distribution center serving Home Depot's retail stores. The warehouse is a large rectangular building, close to a mile long on its north and south sides. Trucks deliver product to approximately 100 docks on the north side of the warehouse, where workers called "lumpers" off-load the product from trailers, sort it, and move it onto racks in the middle of the building. The south side of the warehouse is where workers called "pickers" prepare orders for delivery to individual retail stores. Pickers receive orders for product, pull the product from the racks, and "build" orders for delivery by placing boxes on pallets and securing them with stretch wrap. The pallets are then put on trailers on the south side of the warehouse for delivery to retail stores. The citation at issue in this appeal concerns primarily the working conditions of lumpers and pickers.

Favio Arriega, an employee of Pinnacle who supervised workers in the receiving portion of the warehouse, described the duties of lumpers. He said Home Depot sends 18-wheel trucks to the warehouse, where they place the trailers full of boxed merchandise in a dock door to be unloaded. They usually assign a team of two lumpers to remove the boxes from each trailer. The workers typically pick up boxes, carry them to a pallet, and stack them to a height that would allow the pallets to fit on one of the racks in the middle of the warehouse, about six feet tall. They use hand jacks to move the pallets out of the trailers, use stretch wrap to secure the boxes on the pallets, and then place the pallets in stacks of two or three to be delivered to the racks. When the pallets are ready, a lumper

summons a worker called a “receiver,” who uses an EPJ to transport the pallets to the racks.

EPJs are heavy vehicles with four wheels and long forks used for picking up and transporting pallets. They are essentially forklifts, but can raise pallets only about three feet. Receivers stand on the EPJs while operating them. Receivers use EPJs to pick up the pallets and drive them to the appropriate location in the racks, which are high sets of heavy shelving in the center of the warehouse. Receivers deposit their loads at the appropriate location for an operator of a forklift with greater reach to lift them onto the racks. Once on the racks, the pallets remain there until a worker on the shipping side of the warehouse needs access to fill an order.

Nicholas Kokkinos, a site manager for Pinnacle, described the duties of pickers. Kokkinos said he supervised the part of the Home Depot warehouse which filled orders for Home Depot retail stores. He said pickers use EPJs to move boxes of product. Pickers start by going to the “pick desk,” where they receive orders that call for them to retrieve a certain number of boxes or cases of various products. Pickers drive an EPJ around the racks to retrieve the ordered products. When pickers arrive at the location of a product, they dismount from the EPJ, take the requested number of boxes or cases from the racks, and place them on a pallet. Though the racks are very high, pickers take from the lower levels which they can reach from the ground. The stacks of merchandise they prepare are generally not very high. Pickers then prepare the pallets to be sent to the

stores. Pickers use EPJs to transport the completed pallets to the dock so they can be taken out of the warehouse.

D. Warehouse Worker Exposure to Injury

Arriega and Kokkinos also testified about certain conditions of lumpers' and pickers' work that may put them at risk of injury.

1. Lumpers

According to Arriega, lumpers are sometimes exposed to falling items when unloading trailers and moving product. When they're unloading, they lift and move boxes that range in weight "from five to about 160, 180 pounds." The heavier items include things like grills or toilets. The boxes have signs stating their weight, and heavier boxes say "team lift," indicating they shouldn't be lifted by a single worker. It takes two lumpers to lift the heavier items weighing as much as 180 pounds. The employees typically move heavier items only about a foot to the pallet.

Lumpers stack merchandise on the pallets to a height of seven or eight feet using step stools, but don't typically stack the heavy items that high. Arriega said boxes often fall when lumpers are building a pallet, but also said he had not seen heavy boxes fall because the preferred procedure is to stack them at the bottom of the pallet. He also said the motion of a hand pallet jack can cause lighter items to fall off the pallet, but lumpers are generally situated away from the falling items. He said the heaviest items that can be stacked on top of a pallet are toilets, which weigh 120 to 130 pounds.

Arriega also said lumpers sometimes are exposed to injury from the operation of EPJs. Although an EPJ operator is not supposed to approach a lumper when they're wrapping a pallet, and is supposed to maintain a distance of five to six feet, Arriega said he had observed EPJ operators come closer than five feet from lumpers when they were picking up pallets. "[Y]ou have a lumper that is finishing up wrapping a pallet in the back and then you have a driver coming in to pick up the first three pallets, then that driver will be too close because his forks would be almost—well, the pallet would almost be touching the associate, the lumper." Arriega said he had seen an EPJ get within about two feet of a lumper at least once or twice in the last five months.

2. Pickers

Like lumpers, pickers must move heavy boxes by hand. Pickers retrieve the product they need and put it on a pallet. According to Kokkinos, the boxes vary in weight from a few pounds to a few hundred pounds. He said the heavy boxes are things like "furniture, grills, toilets, [and] tool chest[s]." Kokkinos said when pickers are gathering items, the boxes sometimes fall from the stacks, but the boxes that fall are usually lighter, not heavy enough to hurt someone. Sometimes boxes are awkward or unstable and fall as a result. Kokkinos said he had personally seen boxes fall.

Although pickers operate EPJs, they also face some risk as pedestrians because their job requires them to dismount their EPJs to pick up the boxes and put them on their pallet. When pickers get off their vehicles, other EPJ operators sometimes drive too close

to them, sometimes within “a few feet to four or five feet.” Kokkinos said EPJs get within “two or three [feet]” of workers, “maybe even closer.”

3. Pedestrians

The warehouse has “drive aisles” to facilitate the movement of product. A drive aisle is an aisle where many EPJs drive up and back, moving product around the warehouse. A drive aisle runs the length of the warehouse and is as wide as a city street.

Arriega said there is a lot of pedestrian movement in the drive aisles. Home Depot and Pinnacle supervisors as well as other employees walk in the drive aisles, including employees going to and coming from bathroom breaks. Although Home Depot has rules designed to prevent accidents, Arriega said he has observed vehicles, such as EPJs, come within “half a foot to a foot in distance” to pedestrians and lumpers.

E. Policy Regarding Protective Gear

Home Depot did not require their employees to wear protective shoes when they worked in the warehouse. Their policy required only that they wear “closed-toed and closed-heeled shoes.” Home Depot’s policy said “Flip-Flops, sandals, open-toed shoes, or open heeled shoes” are unacceptable. Pinnacle didn’t require protective footwear either, though it did recommend steel-toed boots. Arriega said Pinnacle allowed employees to wear any kind of tennis shoe, just not open-toed shoes like sandals. At the time, another company, Capstone Logistics, supplied warehouse workers and required their employees wear steel-toed boots. Capstone and Pinnacle later merged and they now follow Capstone’s policy.

Home Depot says they don't require their warehouse employees to wear steel-toed boots or similar footwear because such footwear can cause ergonomic problems, tripping hazards, and fatigue, and they can be "cumbersome," "uncomfortable" and "bulky."

F. Home Depot's Administrative Controls

Home Depot said they had chosen not to require steel-toed boots for their warehouse workers because the risks identified in the footwear citation could be addressed better using administrative and engineering controls.

Home Depot presented the testimony of an expert in warehouse safety operations, Dominick Zackeo, and their safety director, Kristine Pounds, who explained what they call the "hierarchy of controls." Zackeo said federal and state occupational safety agencies and the environmental health and safety community assess hazards by reference to three types of controls: (1) engineering controls, (2) administrative controls, and (3) personal protective equipment. Pounds said Home Depot uses the hierarchy of controls approach in assessing their own facilities for safety. Engineering controls involve changing the physical work environment to eliminate potential hazards. According to Zackeo, engineering controls are the preferred way of mitigating a hazard.

If engineering controls can't eliminate a hazard, the employer will try changing how their employees work, instituting safe work practices. Such administrative controls, in the best cases, may reduce hazards to "a point that there is not a reasonable expectation for an accident." According to Zackeo, "with the combination of engineering work practices and administrative controls, especially when you have a situation where the

administrative controls are enforced and you have strong management teams[,] strong safety cultures, which is what I observed at the Mira Loma facility.”

According to Zackeo, employers generally resort to personal protective equipment (PPE) only if the risk can't be reduced sufficiently by engineering and administrative controls. “[W]e look to make sure that there are engineering controls where possible and where feasible first in terms of the controls that would mitigate the hazard or take the hazard away. [¶] The next thing that we do is look towards safe work practices or administrative controls so that if we can't . . . engineer the [hazard] out . . . we'd like to remove the hazard through administrative practices or work practices . . . and then finally if that can't be done, we'll recommend Personal Protective Equipment.”

According to Pounds, Home Depot follows that practice. “So we obviously look at your engineering or administrative controls as ways to avoid any hazards first, and then if we cannot successfully protect associates through any of those controls, then we can look at personal protective equipment. But we try to kind of engineer or administrative control those if possible.”

Home Depot witnesses described the engineering and administrative controls they have in place for their workers at the Mira Loma warehouse. Though it's true lumpers lift heavy boxes and stack them on wooden pallets, Home Depot says they train those employees to handle the boxes in ways that mitigate the risk of injury. Lumpers move lighter weight boxes on their own, but teams lift heavy boxes. All heavy boxes are marked with signs saying the box must be team lifted. Home Depot trains lumpers to

place heavy boxes on the bottoms of pallets, to prevent them from falling. Home Depot also trains them to “brick” pallets, meaning to stack boxes so they interlock to minimize the risk they will fall.

Lumpers use hand jacks to remove merchandise from a trailer. Though it’s common for light boxes to fall off pallets when they’re being moved by hand jacks, the boxes fall backward, away from the lumper who pulls the jack from the front. Some witnesses said it was “possible” for heavy boxes to fall, but Arriega said he’d never seen a heavy box fall. Once pallets are staged, lumpers stretch-wrap them to minimize the chance of boxes falling off them. According to Pounds, if a pallet is properly wrapped, it’s “virtually impossible” for a box to fall off.

According to Arriega, Home Depot has policies for EPJ drivers that minimize risk. Home Depot policy requires EPJs to stay at least five to six feet away from lumpers. Their policies prohibit receivers from approaching pallets if lumpers are still wrapping them. They train receivers to inspect the wrapping and not to pick up a pallet if it’s not properly wrapped. Although a witness testified to seeing lumpers within half a foot of an EPJ, Arriega said those are “rare situations” and employees are immediately counseled. Receivers are also trained to drive slowly in the main drive aisle, stay aware of their surroundings, keep a minimum of three vehicle lengths between other trucks, and use their horns to alert pedestrians and other drivers to their presence. When a receiver reaches the staging area, they place their pallets at least four feet from the drive aisle to give employees room to work around the pallet safely.

Kokkinos described policies and training Home Depot says protect pickers from injury. Other than EPJ operators, pedestrians are not allowed in the picking aisles. Kokkinos acknowledged when pickers step off the EPJ to retrieve heavy items, they might come within a few feet of another picker's machine. But he said Home Depot trains EPJ drivers to stay away from each other. He said talking is "something we kind of prohibit." And, in any event, pickers drive slowly because they stop frequently to pick out new merchandise.

Though there is limited foot traffic in the drive aisles, Home Depot has safeguards in place there too. Markings on the floor separate zones for pedestrian traffic and industrial truck traffic and their policy is for pedestrians to stay four to five feet away from trucks in the aisle. In addition, Home Depot has stop signs at every intersection, and drivers are subject to speed limits.

G. Home Depot's Attempts to Overturn the Citation

1. The ALJ decision

After the hearing, the ALJ issued a decision affirming both the footwear citation and the truck-operation citation. The ALJ found "the employees were clearly exposed to foot injuries" from falling objects or crushing or penetrating actions. The ALJ also found Home Depot did not require foot protection despite the fact that "the conditions that created the hazards were open and visible to anyone," including supervisors whose knowledge was attributable to Home Depot. The ALJ concluded the Division established

a violation of California Code of Regulations,² title 8, section 3385, subdivision (a) because Home Depot did not require appropriate foot protection, the violation was serious, and the penalties and abatement requirements were reasonable.

The ALJ also determined “the Division presented evidence sufficient to establish that Employer failed to ensure that industrial trucks were operated in a safe manner. Thus, a violation of section 3650, subdivision (t)(9) has been proven.” The ALJ also concluded Home Depot had not established the affirmative defense that Rodriguez caused the accident because she independently departed from Home Depot’s safety standards. According to the ALJ, Home Depot failed to carry their burden of proving two elements of the defense—that Rodriguez had performed the task enough times to become reasonably proficient and she knew her conduct was contrary to Home Depot’s safety requirements. As a result, the ALJ ruled the Division had established a violation.

2. The 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.

Home Depot argued the Board should rescind the foot-protection citation because there was insufficient evidence of employee exposure to foot injuries. Home Depot

² Unlabeled statutory citations refer to this code

argued, they employed administrative and engineering controls adequate to prevent and eliminate exposure to foot injuries. They also argued the Division and the ALJ applied an improper legal standard—that it was “realistically possible” rather than “reasonably predictable” their employees would be exposed to foot injuries. Even if there was exposure, Home Depot argued the standards of the American Society for Testing and Material (ASTM) governed and gave them discretion to decline to provide any protective footwear.

The Board reviewed the evidence and expressed dissatisfaction with the support Dhillon provided for the foot-wear citation. “After a careful review of Dhillon’s testimony, while it had some probative value, we conclude it was insufficient considered alone to satisfy the Division’s burden of proof on the section 3385, subdivision (a) citation. There were several issues which significantly weakened the evidentiary value of Dhillon’s testimony. First, he admitted he did not actually observe anyone operating industrial trucks or electric pallet jacks (EPJ) to perform any specific task at the warehouse, nor did he measure how close industrial trucks would come to others. Second, he admitted he did not actually observe the lumpers perform any particular work assignment. Third, Dhillon also admitted, during an earlier deposition, he did not conduct an assessment at the warehouse to determine whether Employer utilized any administrative or engineering controls to address foot exposure hazards. This demonstrated significant weaknesses in his inspection . . . Dhillon’s testimony was simply too speculative to satisfy the Division’s burden of proof. 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.”

The Board nevertheless upheld the citation based on additional record evidence, particularly the testimony of Arriega and Kokkinos. The Board recounted their detailed description of the work, including Arriega’s testimony that lumpers “use step-stools in order to place merchandise on the top” of pallets, place some boxes weighing as much as 120-130 pounds on the top, and that lighter boxes sometimes fall when the employees are pulling the pallets out of the trailer with the hand pallet-jack. Kokkinos said pickers were often required to lift boxes weighing up to a few hundred pounds. Arriega said lumpers “on foot will often work in the same areas where EPJs or other industrial trucks operate.” He said he had seen merchandise fall from an EPJ during transport and said employees on foot will often work in the same areas where EPJs and other industrial trucks operate. Though both said there are rules designed to decrease accidents, including rules against coming too near workers, Arriega said he had seen vehicles come within a half a foot to a foot of pedestrians and he’d seen industrial trucks come within two feet of lumpers once or twice in the past five months. Kokkinos said pickers have to get off their EPJs while retrieving boxes, and when they do other vehicles sometimes come within a few feet of them.

The Board concluded the foot-protection citation was warranted. “After an independent review of the record, we conclude Arriega and Kokkinos’s testimony

persuasively demonstrates that Home Depot’s joint employees were exposed to ‘foot injuries’ from conditions such as ‘falling objects, crushing or penetrating actions,’ constituting a violation of section 3385, subdivision (a).” “We conclude the evidence as the nature and weight of objects manually lifted and moved by employees was sufficient, in and of itself, to establish actual exposure to injuries to unprotected feet from the hazard of dropped objects.”

The Board also concluded the footwear citation should be affirmed because of the evidence the operation of industrial trucks posed a risk to workers on foot. “Arriega and Kokkinos both testified Employer utilized multiple industrial trucks in the warehouse, which were occasionally used in close proximity to employees on foot. Arriega indicated industrial trucks would on occasion come within two feet or less of employees, claiming that they have come within half a foot to a foot to persons on foot. Kokkinos also indicated that such trucks would come close to workers on foot during the picking process. Arriega also observed merchandise fall from an EPJ during transport. The testimony of Arriega and Kokkinos . . . demonstrates employees have actually been exposed to ‘foot injuries’ from conditions such as having their feet run over by the industrial trucks. At the very least, the existence of industrial trucks working on occasion in close proximity to workers on foot makes it reasonably predictable by operational necessity or otherwise, including through inadvertence, that employees will be in the zone of danger.”

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. "First, while Employer has an extensive program of engineering and administrative controls, ultimately, the program cannot protect employees who must physically lift heavy objects from the risk of foot injuries that may occur if a heavy object is accidentally dropped. Such employees continue to be exposed to crushing injuries due to the nature and weight of the objects they must carry. Second, with respect to the operation of industrial trucks, the Board observes that many of Employer's administrative controls ultimately amount to no more than instructions directing employees not to expose themselves or others to the hazards contemplated by the safety order." The Board concluded that "a preponderance of the evidence demonstrates Employer violated section 3385 by failing to require appropriate foot protection for employees exposed to the foot injuries from conditions such as falling objects, crushing or penetrating actions."

The Board rejected Home Depot's argument that the ASTM standard gives employers discretion to decline to provide any protective footwear. Section 3385, subdivision (c)(1) says, "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." The standard also incorporates language saying, "This standard does not purport to address all of the safety concerns, if any,

associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.” Home Depot argued the language warning it does not address all safety concerns gives users, like Home Depot, the discretion to balance the risks and limitations on foot protections and make their own decisions about whether to provide protection when considered in view of other protections such as engineering and administrative controls.

The Board rejected this interpretation of the standard. “[W]e conclude the referenced portion of the ASTM standard, when read in context, merely stands for the unremarkable proposition that there may exist hazards not contemplated or ameliorated by the standard. There may also exist other pertinent regulations or regulatory provisions that apply to an employer’s conduct, which an employer must consider and evaluate. They do not give an employer the discretion to determine not to comply with section 3385, subdivision (a).” The Board also concluded the citation correctly designated the violation serious, an aspect of the ruling Home Depot has not appealed.

The Board also affirmed the truck-operation citation because Home Depot did not establish that the independent employee action defense applies. The Board based their decision on the fact that “the evidence offered by Employer was insufficient to meet its burden of proof to show that Rodriguez knowingly, as opposed to inadvertently, violated the rule.” The Board noted that “the testimony of Eileen Mejia lends itself to a stronger inference that Rodriguez inadvertently, rather than intentionally, caused the collision.”

Home Depot filed a petition for a writ of mandate in the trial court. (Lab. Code, § 6627 [“Any person affected by an order or decision of the appeals board may, within the time limit specified in this section, apply to the superior court of the county in which he resides, for a writ of mandate, for the purpose of inquiring into and determining the lawfulness of the original order or decision or of the order or decision following reconsideration”].) 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.” (*Id.* 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.)³ 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.)

The Division is responsible for enforcing Cal/OSHA and holds “general enforcement powers over any ‘place of employment.’” (*Solus Industrial Innovations*,

³ 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.)

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

In this case, the Division issued several citations against Home Depot, two of them at issue in this appeal. An ALJ upheld the citations, and the Board affirmed them. 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. The Footwear Citation

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

The ALJ and the Board affirmed the citation and the penalty of \$11,250 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 boxes, were in the proximity of falling boxes, and worked in proximity to industrial trucks. We agree with the Board that much of Associate Safety Engineer Dhillon’s testimony concerned the likelihood of exposure was too speculative to provide substantial evidence on its own. He based his conclusion on his general observations of the workplace, rather than careful inspection of the conditions faced by particular employers. That is objectionable. However, as the Board determined, supervisors at the job site supplemented and substantiated his observations with specific testimony about operations at the warehouse, which they both observed and supervised.

The supervisors testified both lumpers and pickers were exposed to foot injury by lifting heavy boxes. According to Arriega, lumpers lift and move boxes that range in

weight from five to about 180 pounds. They stack merchandise on pallets to a height of seven or eight feet using step stools. Arriega said the heaviest items that can be stacked on top of a pallet are toilets, which weigh 120 to 130 pounds. Pickers also move heavy boxes by hand. Pickers retrieve the product they need and put it on a pallet. According to Kokkinos, the boxes vary in weight from a few pounds to a few hundred pounds. He said the heavy boxes are things like “furniture, grills, toilets, [and] tool chest[s].” Kokkinos said when pickers are gathering items, the boxes sometimes fall from the stacks, but the boxes that fall are usually lighter or awkward in size and fall for that reason when not properly secured.

Both supervisors also testified that lumpers and pickers are exposed to foot injury from the operation of EPJs. According to Arriega, “[Y]ou have a lumper that is finishing up wrapping a pallet in the back and then you have a driver coming in to pick up the first three pallets, then that driver will be too close because his forks would be almost—well, the pallet would almost be touching the associate, the lumper.” Arriega said he had seen an EPJ get within about two feet of a lumper at least once or twice in the last five months. Pickers also face some risk as pedestrians because their job requires them to dismount their EPJs to pick up the boxes and put them on their pallet. When pickers get off their vehicles, other EPJ operators sometimes drive too close to them, sometimes getting within two or three feet of workers, if not closer.

They also substantiated Dhillon’s concern that pedestrians walking in drive aisles near EPJs were exposed to injury. A drive aisle is a wide lane running the length of the

warehouse which EPJs use to move product. Arriega said there is a lot of pedestrian movement in the drive aisles. Home Depot and Pinnacle supervisors, as well as other employees, walk in the drive aisles, including employees going to or coming from bathroom breaks. Although Home Depot has rules designed to prevent accidents, it is obvious such rules may be and have been broken. Arriega said he has observed vehicles, such as EPJs, come within “half a foot to a foot in distance” to pedestrians and lumpers.

We conclude this testimony constitutes substantial evidence supporting the Board’s determination that Home Depot employees were both actually exposed and realistically likely to 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 boxes, boxes lifted and dropped, and being run over by the wheel of an industrial truck pose exactly such threats, and the testimony of these supervisors is sufficient to show that Home Depot warehouse lumpers and pickers were actually exposed to such injuries in the normal conduct of their jobs, 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.

This case presents facts similar to *General Electric Company Vertical Motor Plant*, Cal/OSHA App. 81-1130, Decision After Reconsideration (Feb. 29, 1984), where the Board determined “[t]he nature of the work being performed by the two employees observed by the Division’s representative, (moving heavy castings from one place to

another) in itself demonstrates an exposure to dangers of these parts falling. The Employer argues that the parts are rarely if ever dropped and that company medical records show only one foot injury in the previous five years. A violation of the safety order is not based on previous history of accidents or injuries resulting from the exposure but rather on the existence of the danger which may cause injury.” (*Id.* at p. *1.) Here, it’s uncontested that Home Depot employees lifted heavy boxes, by themselves and in teams, weighing up to a few hundred pounds. Moreover, the supervisors’ testimony provides just as strong support for the conclusion that the operation of EPJs in proximity to lumpers and pickers put them within the zone of danger.

Home Depot argues the administrative controls they already had in place were sufficient to protect their employees. They point to the testimony of their safety expert that the administrative and engineering controls at the warehouse reduced the risk of injury to “a point where there is not a reasonable expectation for an accident.”

We don’t find this argument persuasive. First, the question of exposure turns on whether it’s “reasonably predictable by operational necessity or otherwise, including inadvertence, employees have been, are, or *will be in the zone of danger*,” not whether there’s a reasonable expectation *for an accident*. (*National Retail Transportation, Inc.*, Cal/OSHA App., Decision After Reconsideration (May 28, 2019) 2019 WL 2369649, at *3, italics added.) The testimony of Home Depot’s supervisors provides substantial evidence that, despite their engineering and administrative controls, their workers have been in the zone of danger in the normal course of their jobs *and* that it’s reasonably

predictable they will be in the zone of danger again. Second, that same testimony is substantial evidence for the Board's finding that the administrative controls Home Depot relies on have not reduced the likelihood of such danger below reasonable predictability. As we've already recounted, they acknowledged seeing boxes fall from pallets and seeing EPJs come within feet of workers on foot, all within the normal conduct of their jobs with Home Depot's engineering and administrative controls in place.

Amicus curiae, Retail Litigation Center, Inc. and National Federation of Independent Business, who support Home Depot, object that the Board's opinion articulates an "uncertain standard [that] will have far-reaching consequences for employees in a wide range of businesses, including large retailers and small independent businesses that may have industrial trucks or pallet jacks in the facility even though the majority of employees encounter them only rarely." They object specifically to the Board's statement that "the existence of industrial trucks working on occasion in close proximity to workers on foot makes it reasonably predictable by operational necessity or otherwise, including through inadvertence, that employees will be in the zone of danger."

We agree the language in the Board's opinion can be read to sweep too broadly, so we emphasize our holding is limited to the facts and evidence of the case. Specifically, we hold there was substantial evidence that lumpers and pickers, who lift heavy items and are on foot in the proximity of EPJs as a normal part of doing their jobs, were and likely will be exposed to foot injuries as a result. Moreover, the holding is further limited by the fact that substantial evidence supported the finding that Home Depot's

administrative controls were not sufficient to protect their employees. Nothing in our opinion should be taken to suggest employers must adopt footwear requirements to address shortcomings in their existing administrative and engineering controls. Improvements in administrative and engineering controls may be adequate as well, depending on the circumstances.

Home Depot argues the Board used the wrong standard for concluding their employees were at risk of injury. They say the Board determined it was “realistically possible” they would be within the zone of danger, whereas it should have been asking whether it was “reasonably predictable.” This argument is without merit. Though it is true that Associate Safety Engineer Dhillon used the phrase “realistic possibility” repeatedly in his testimony before the ALJ, the Board did not adopt that terminology. Instead, it explicitly asked whether it was reasonably predictable that the work conditions of Home Depot’s warehouse employees would put them in the zone of danger of suffering foot injuries. Applying that correct standard, the Board answers the question in the affirmative. We will not overturn the Board on the basis of the loose terminology of the inspector during live testimony.

2. There was substantial evidence Home Depot didn’t provide or require adequate footwear

Home Depot argues that, notwithstanding that their employees were exposed to foot injuries, it did require their employees to wear adequate footwear. The Board concluded “there is no dispute, nor could there be” regarding whether adequate footwear was provided because “foot protection such as steel toed shoes was not required.” Home

Depot argues this decision was based on a misinterpretation of the regulation and corresponding standard. They also complain the Board's assumption led it to fail to evaluate the limitations of steel-toed boots, which, they say, are not superior to closed-toed shoes for the types of work their employees perform.

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, Decision After Reconsideration (Apr. 06, 2000).) In proceedings before the ALJ and the Board, Home Depot conceded the ASTM standards referred to in subdivision (c) apply.

As a result, the first question the Board faced was whether Home Depot required protective footwear that met the ASTM standards. The standard says footwear should

provide, among other things, “(1) impact resistance for the toe area of footwear; (2) compression resistance for the toe area of the footwear; [and] (3) metatarsal impact protection that reduces the chance of injury to the metatarsal bones at the top of the foot.” The standard says footwear must be designed, constructed, and manufactured “so that a protective toe cap is an integral and permanent part of the footwear” and “a metatarsal impact guard is positioned partially over the protective toe cap and extended to cover the metatarsal bone area . . . [and] shall be an integral and permanent part of the footwear.”

The standard also specifies how *much* protection these features of the footwear must provide, measured in terms of the minimum interior height clearance in the toe of the shoe when exposed to set amounts of impact energy and compressive force. For example, to meet the impact resistance standard as a Class 75 product, women’s footwear “shall demonstrate a minimum interior height clearance of 11.9 mm (0.468 in.) during exposure to impact energy of 101.7 J (75 ft-lbf),” and during “exposure to a compressive force of 11 121 N (2500 lbf),” and “the height of the wax form used to measure metatarsal protection shall be a minimum of 23.8mm (0.937 in.) after exposure of impact energy of 101.7 J (75 ft-lbf).” The standard also specifies “[t]he workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer.”

Home Depot does not argue they require or provide footwear that met those specifications. It is uncontested Home Depot required closed-toed and closed-heeled shoes, nothing more. There is no evidence Home Depot required footwear with any kind

of toe-cap or metatarsal impact guard, never mind toe caps and metatarsal impact guards meeting the precise specifications set out in the ASTM standard. Thus, there is no question whether Home Depot provided footwear meeting the ASTM standard, the only question is whether Home Depot provided a justification for declining to apply the standard to its workers in this case. (*Morrison Knudsen Corp., supra*, Cal/OSHA App. 94-2271, at pp. 3-4.)

Home Depot argues the ASTM standard governing footwear “gives it leeway to consider the downsides of protective footwear in a particular work environment” and therefore the discretion to decline to use steel-toed boots. They find the supposed source of this discretion in boilerplate language in the standard noting, “[t]his standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.”

The Board interpreted this provision as a warning that the ASTM standard might not address all safety concerns and compliance with the standard would not relieve employers of responsibility for other safety problems. The Board explained the standard sets forth the “unremarkable proposition that there may exist hazards not contemplated or ameliorated by the standard. There may also exist other pertinent regulations or regulatory provisions that apply to an employer’s conduct, which an employer must consider and evaluate.” We agree with this interpretation.

Subsection 1.1 of the ASTM standard says it “covers minimum requirements for the design, performance, testing, and classification of footwear designed to provide protection against a variety of workplace hazards that can potentially result in injury.” Subsection 1.2 explains “[t]he objective of this specification is to prescribe fit, function, and performance criteria for footwear that is intended to be worn to reduce injuries.” Reading subsection 1.6 as allowing employers to avoid the “minimum requirements” that “prescribe fit, function, and performance criteria” based entirely on their own subjective evaluation of safety and necessity would effectively unwind the force of the specifications and the regulations which incorporate them. That is what the Board concluded. We agree with their interpretation, which, in any event, is entitled to deference because it’s not clearly erroneous. (*Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal.App.4th 639, 645 [“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”].)

Nevertheless, it is wrong to interpret the Board as holding that employers have no discretion to decide how they will address the safety of their employees, even in the face of a citation finding employees are exposed to foot injuries. Home Depot argues the Board interprets the regulation as prohibiting them from evaluating how best to keep their employees safe, and contends it violates their due process rights as a “novel interpretation of the ASTM Standard of which Home Depot had no notice.” We see no due process

violation because Home Depot misunderstands or misconstrues the Board's interpretation.

The Board didn't dictate steel-toed shoes as a means of abatement and didn't require all employees to wear them. To the contrary, the Board's decision explicitly says, "Employer is required, as of the date of this decision, to provide appropriate foot protection for all of its exposed joint employees as required by the safety order. This decision *does not dictate a specific means of abatement*, although it is observed that Capstone and Pinnacle employees are now currently required to wear steel toed shoes. *Employer and Division are free to discuss abatement means.*"⁴ (Italics added.) This aspect of the order is consistent with the standard, which does not require steel-toed footwear and specifies "[t]he workmanship in the production and assembly of the footwear shall ensure that the footwear provides functionality to the wearer." These provisions in the Board's decision and the ASTM standard leave room for Home Depot to accommodate the particular needs of their EPJ operators or other employees. We therefore conclude the Board's decision and the abatement order were reasonable and not overly broad. (*Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891.)

Moreover, as we discussed above, neither the citation nor the Board decision requires employers to adopt footwear requirements to the exclusion of improving their

⁴ The Board appears to be mistaken about Capstone, which did require steel-toed boots at the time.

administrative and engineering controls. (Opn. *ante*, at pp. 35-36.) 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.)

On this question, Home Depot did not carry their burden. Home Depot's safety director said 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. We conclude 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 to avoid accidents does not remove the risk that an employee on foot will be hit by an EPJ. As the Board found, "many of Employer's administrative controls ultimately amount to no more than instructions directing employees not to expose themselves or others to the hazards contemplated by the safety order." Thus, though Home Depot could have avoided a finding that protective footwear was appropriate, it did not do so as a factual matter.

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.

D. The Truck-Operation Citation

Home Depot asks us to rescind the citation for failing to ensure their industrial trucks are operated safely. They argue the evidence establishes the independent employee action defense, and the Board erred in determining they hadn't carried their burden of proof on showing the employee's violation was knowing.

Section 3650, subdivision (t)(9) directs, "Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules . . . [¶] . . . Vehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed."

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

The citation identified two incidents. First, it noted the accident where "an electric pallet jack operator struck another parked electric pallet jack while maneuver[ing] her electric pallet jack in [an] attempt to position herself to retrieve a pallet from the receiving dock. The employee did not maintain [the] electric pallet jack under positive control when she turned quickly and too hard in [an] attempt to position herself in

anticipation of picking up a pallet.” Second, the citation noted “the common practice of disengaging the forks of a ‘stuck’ pallet by the means of other industrial truck operator making contact and securing the stuck pallet with the forks of their industrial trucks and or electric pallet jacks.” This practice violated the requirement to keep a safe distance from other industrial truck operators. The citation said the violations were abated during the inspection and proposed a penalty of \$1,125.

The ALJ and the Board affirmed the citation and the penalty. The Board did so on the ground Home Depot failed to meet their burden of showing the accident between the two EPJs was the result of an employee’s knowing violation of the rule. That failure negated Home Depot’s defense that the accident resulted from a knowing violation of the rules for operating industrial trucks.

“The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees.” (*Mercury Service, Inc.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).) To establish the defense, an employer must show, among other things, that the employee caused a safety infraction they knew was contrary to the employer’s safety requirements. (*C.E. Buggy, Inc. v. Occupational Safety & Health Appeals Bd.* (1989) 213 Cal.App.3d 1150, 1155.) Home Depot had to demonstrate the violation was the result of a conscious disregard for a safety rule, rather than mere inadvertence or an “unfortunate one-time error.” (*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

The Board correctly concluded Home Depot failed to prove Rodriguez's violation was the result of a conscious disregard of safety rules. Rodriguez did not testify, so we have no direct testimony regarding her knowledge or intent. The only eyewitness to the accident, Mejia, said Rodriguez backed her EPJ in too quickly and lost control. She also reported that Rodriguez said she dropped her foot to the ground because she panicked. This evidence supports a finding of inadvertence. It certainly doesn't support a finding that Rodriguez was aware she was violating a safety policy at the time. We therefore agree with the Board and the trial court that Home Depot failed to establish the independent employee action defense.

Home Depot argues that the Board should have found they had established the defense because Rodriguez's "decision to drive her EPJ 'too fast' was an intentional act that Rodriguez knew was contrary to Home Depot's safety policies." They base this argument on Dhillon's testimony, but it's a mischaracterization. Asked whether he had "a theory about what happened based on [his] investigation," Dhillon responded that Rodriguez "did not maintain positive control of her EPJ, of her industrial truck or pallet jack when she was attempting to maneuver and position herself in anticipation of picking up the pallets." He said she lost control because "as she was turning, she turned too hard too fast." Dhillon said neither that Rodriguez made a decision to drive too fast, nor that she drove too fast at all. He said she lost control when she "turned too hard too fast." We find nothing in this testimony to support an inference that Rodriguez acted in conscious disregard for Home Depot's safety rules.

III

DISPOSITION

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

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.