

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

In the Matter of the Appeal of:

UNITED AIRLINES dba:
UNITED AIRLINES SFO SYC
San Francisco International Airport
San Francisco, CA 94128

Employer

Docket No. 00-R1D3-2844

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by United Airlines (Employer or United) in the above-entitled matter under submission, makes the following decision after reconsideration.

JURISDICTION

Between December 3, 1999, and August 10, 2000, the Division of Occupational Safety and Health (the Division) conducted a complaint inspection at a place of employment maintained by Employer at the San Francisco International Airport, San Francisco, California (the site or SFO).

At the closing conference held between the Division and Employer on August 10, 2000 in Employer's offices, the Division informed Employer it would be cited for violating section 3384(a) by not requiring ramp service workers to wear gloves. On August 11, 2000, the Division issued to Employer Citation 1, alleging a general violation of section 3384(a)¹ [hand protection] of the occupational safety and health standards and orders found in Title 8 of the California Code of Regulations.² The Division proposed a \$655 civil penalty for the alleged violation.

¹ Section 3384(a) reads: "Hand protection shall be required for employees whose work involves unusual and excessive exposure of hands to cuts, burns, harmful physical or chemical agents or radioactive materials which are encountered and capable of causing injury or impairments."

² Unless otherwise noted, all section references are to Title 8 of the California Code of Regulations.

Employer filed a timely appeal contesting the existence of the violation. A hearing was held on three separate dates before an Administrative Law Judge (ALJ) of the Board. The Division and Employer served and filed written post-hearing briefs and the matter was submitted on June 30, 2003. The ALJ issued a decision on July 26, 2003, denying Employer's appeal. On August 22, 2003 Employer filed a petition for reconsideration. The Division filed an answer on September 26, 2003.

WRIT OF MANDATE PROCEEDING

The Board filed its first Decision After Reconsideration in this matter on February 15, 2007. The Board's Decision After Reconsideration reversed the ALJ's decision and granted Employer's appeal. Within the time permitted by law, the International Association of Machinists and Aerospace Workers, Local Lodge 1781 (Union), and one of its individual members filed a petition for writ of mandate in superior court seeking judicial review of the Board's Decision. On October 31, 2008, the court issued a decision which held the Board had applied an incorrect legal standard in the February 15, 2007, Decision After Reconsideration. The court remanded the matter to the Board with instructions to set aside its February 15, 2007, Decision After Reconsideration and to issue a new decision after reconsideration applying the legal standard the court deemed correct.

This Decision After Reconsideration is filed in keeping with the court's order. We hereby set aside our February 15, 2007, Decision After Reconsideration.

For purposes of continuity and to preserve in one document those portions of our earlier Decision After Reconsideration which were not challenged in the writ of mandate or reversed by the court, we repeat below the "Law and Motion," "Prejudice was not established (etc.)," and "Employer's Motions (etc.," sections of our earlier Decision. This Decision After Reconsideration addresses anew the points in our original Decision with which the court took issue, and we have applied the legal standard articulated by the court in reaching this Decision.

LAW AND MOTION

During presentation of the Division's case-in-chief, Employer moved to have the citation dismissed as untimely. Employer contended there were two grounds for dismissal. First was that the Division failed to initiate its investigation of the complaint that led to issuance of the citation within 14 calendar days as required under Labor Code section 6309. The second contention was that the Division failed to issue the citation with "reasonable promptness", as directed by Labor Code section 6317.

Finally, Employer asserted that pursuant to Labor Code section 6317 the citation was void because more than six months elapsed between the time the Division's inspecting Compliance Officer determined the existence of the alleged violation and the issuance of the citation.

**PREJUDICE WAS NOT ESTABLISHED TO SUPPORT
EMPLOYER'S MOTION TO DISMISS ALLEGING
FAILURE TO COMPLY WITH LABOR CODE
SECTION 6309**

The Board has held that an employer's motion to dismiss a citation on the ground that the Division did not conduct a timely inspection may only be granted if the employer proves that it was prejudiced by the delay. (*Event Medical Services, Inc.*, Cal/OSHA App. 00-764, Denial of Petition for Reconsideration (Nov. 9, 2001).)

On this record Labor Code section 6309 is not a basis for dismissal. That statute directs the Division to investigate a non-serious safety and health complaint from an employee representative, "...as soon as possible, but not later than ... 14 calendar days after receipt of [the] complaint[.]" and also grants the Division scheduling flexibility.³ The Division did not begin to investigate the complaint until 21 days after it was made. This is not an unreasonable amount of extra time where the evidence is that the working conditions observed were typical of day-to-day operations. (*See, infra*, pp. 5 and 8.) We affirm the ALJ's ruling that Employer did not prove it had been prejudiced by the Division's delay.

**EMPLOYER'S MOTIONS CITING LABOR CODE
SECTION 6317'S 6-MONTH LIMITATION PERIOD
AND "FAILURE TO CITE WITH REASONABLE
PROMPTNESS"**

Employer's motion to dismiss the citation as untimely was properly denied and we affirm the ALJ's ruling.

For purposes of determining whether the Division has issued a citation, "after six months have elapsed since occurrence of the violation" (Labor Code § 6317), the six months runs from the last occurrence of the violation. *Los Angeles County Dept. of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002). In that case, the Board quoted the Federal OSHRC with favor: "Therefore, it is of no moment that a violation first occurred more than six months before the issuance of a citation, so long as the

³ The following sentence states that, "The division shall attempt to determine the period of time in the future that the complainant believes the unsafe condition may continue to exist, and shall allocate inspection resources so as to respond first to those situations in which time is of the essence."

instances of noncompliance and employee access providing the basis for the contested citation, occurred within six months of the citation's issuance." *Central of Georgia Railroad*, OSHRC Docket No. 11742, 1977--1978 OSHD, ¶ 21,688, April 5, 1977. Thus, even if the Division knows for more than six months that a violation exists at a worksite, the Division may cite an employer for the violation if it last occurred six months or less before the citation is issued. In this case the citation was issued on August 11, 2000. Employer and Division witnesses testified consistently that Employer has never provided ramp service workers with hand protective gloves or required them to wear gloves. The Division contends that the violation "occurred" on August 11, 2000, and every day in the six months before the citation was issued. The citation was issued within six months of the occurrence of the alleged violation and is not barred by the six months limitation specified in Labor Code section 6317.

In *Vial v. California Occupational Safety and Health Appeals Board* (1977) 75 Cal. App. 3d 997, the appellate court ruled that a citation issued within six months of an inspection disclosing a violation is to be deemed issued with reasonable promptness (Lab. Code § 6317) unless the employer demonstrates that it was prejudiced by the delay. Since this citation was issued while the violation was occurring, the ALJ concluded that Employer demonstrated no prejudice.

REVIEW OF EVIDENCE REGARDING VIOLATION OF SECTION 3384(a)

To begin our review of the evidence in this case, we believe it will be helpful to include a brief list of the more common terms we encountered and will repeat, as it may be helpful to avoid confusion.

The general term used to refer to the work involved in this proceeding is "ramp service" work or "ramp operations," and the individuals so engaged are known as "ramp service employees" or "ramp servicemen." Ramp service work includes four separate functions. One is "planeside" work, which deals with the loading or unloading of passenger baggage, mail, and air freight or air cargo onto or off of airplanes parked at gates at SFO. There is a "bag room" function, which involves taking baggage checked in by passengers at the terminal to the airplanes, and taking baggage from arriving aircraft to the terminal so the passengers may reclaim their items. There is a "mail room" operation which handles outgoing and incoming mail. Finally there is an "air cargo" or "air freight" function which processes outgoing and incoming shipments.

At "planeside" the various items to be loaded onto an airplane are usually taken to the airplane on carts (also called "dollies") or in pre-loaded enclosed containers that are placed in the cargo hold or "belly" or "pit" of the airplane. (Those three terms refer to the lower section of an aircraft fuselage, the section below the deck(s) occupied by passengers and crew.) Items not containerized

or palletized are loaded individually onto the airplane. The reverse process is involved for unloading an airplane: Containers and individual items are removed from the plane, loaded onto carts and then taken to the appropriate areas of the airport for delivery to various customers or further transport.

The containers (or "cans") mentioned above come in several different types or sizes, with such designations as LD-2, LD-3, and so on. Ramp service men "build" or fill the containers with freight and take them to an airplane for transit. Alternatively, they may unload and empty such containers arriving at SFO. When filling a container it is sometimes necessary for a worker to get into it to properly load the intended contents. Some containers have some small tears and punctures in their sides that could cut a hand. Larger holes are covered with sheet metal patches riveted to the sides of the containers.⁴ The penetrating ("anvil") ends of the rivets project through the insides of the containers, allegedly presenting a hazard for employees reaching or working inside them.

Containers are towed on dollies or carts to and from the cargo or mail facilities and the airplane. The tongues and handles on the dollies sometimes got nicked or burred through contact with other metal objects, presenting a cutting hazard to those who contact them. Employees handle dolly tongues each of the several times per day they hook and unhook the dollies to tow and drop them off. The tongues or tow bars which are used to connect carts to each other to form a train of carts have handles on them which are designed and installed in a fashion intended to protect the handles from contact with other metal parts of equipment. The purpose is to eliminate or at least reduce the possibility of damage and burring to the handle, and so provide ramp servicemen with a safe means of handling the tow bars or tongues.

The Division's evidence consisted of testimony by its inspector, Mr. Vic Doromal; Steven Rice, the Union's ⁵ representative; and four individuals who worked in ramp service at SFO for United Airlines. Documents and photographs were also received into evidence. The administrative record in this proceeding consists of several volumes of transcript of the hearing,⁶ the evidentiary exhibits, and other documents.

⁴ It should be noted that sealant was applied to the exterior surfaces of the patches and rivets to reduce the hazard.

⁵ International Association of Machinists and Aerospace Workers, Local Lodge 1781 (IAMAW or Union).

⁶ The hearing was recorded by a certified court reporter that prepared and certified the transcript. Due to problems with the tape recording equipment used at the hearing, the parties stipulated that the reporter's transcript would be the official record. The transcript is six volumes consisting of approximately 1,800 pages.

On November 12, 1999, Gerald Munkholm, the Union's Chairman of Safety and Health, filed a complaint with the Division's San Mateo District Office alleging that Employer was not furnishing free hand protection to its "ramp service workers." Employer had about 1,600 ramp service workers at SFO during the period of the complaint and inspection.⁷

The complaint was assigned to Division Compliance Officer Vic Doromal (Doromal) who opened his inspection on December 3, 1999. Doromal testified that he inspected United's SFO ramp operations on two occasions, December 3 and December 13, 1999. Each inspection lasted 30 to 45 minutes of actual observations of work and working conditions, although Doromal was at United's SFO facilities for longer. Mr. Doromal also testified that he had formed his opinion that a violation was occurring by December 10, before his second inspection on December 13, and before he had conducted additional employee interviews, arranged by the Union, in August 2000.

On December 3, Doromal observed the "planeside" operation of baggage being unloaded from an airplane and took photographs of baggage loaded on three or four of the carts used to transport it to and from airplanes and the terminal. Doromal testified to seeing "a lot" of damaged or defective luggage that presented cut hazards, but took no photographs of any such damaged bags despite taking several photographs which were received into evidence. He was also unable to quantify his statement. He made no attempt to record a count of the number of pieces of "broken" luggage he observed. One photograph he took showed two workers, one wearing gloves, the other not. His testimony was that all the employees but one was wearing gloves. He opined that "[T]here is really no way that a piece of luggage can be picked up to prevent being cut[.]" Other evidence, however, indicated no reported incidences of employees being cut by damaged luggage. The employees Doromal interviewed told him that cuts could also occur by contacting a metal burr on the tow bar of a luggage cart when hooking it up to another cart or a tug. One of the later witnesses, Mr. Fedoroff, testified he suffered such a cut, apparently in the spring of 1999.⁸

Doromal inspected the cargo and mail operations on December 13 although he did not interview any employees at that time. He watched about 12 employees doing mail and cargo work for approximately 30 to 45 minutes,

⁷ Employer's records indicate that in 1999 there were approximately 232 ramp service workers assigned to cargo and 1417 to plane loading and unloading, the bag room and the mail room, a total of 1649. For 2000 the numbers were 226 and 1401, a total of 1627. For 2001 they were 210 and 1245, a total of 1455. For 2002 they dropped to 180 and 775, a total of 955, and for the first three months of 2003 the numbers were 130 and 654, a total of 784. (Employer Exhibit R)

⁸ He testified that he had been cut by a burr "a little over two years ago" when he testified on May 4, 2001. The time during which the alleged violations in this case occurred was from February 11, 2000 to August 11, 2000. In the hearing transcript that period was frequently called the "window period." Events occurring prior to February 11, 2000, are not subject to enforcement action by the Division by virtue of Labor Code section 6317. Since August 11, 2000, the Division has not, to our knowledge, issued any further citations alleging section 3384(a) violations to this Employer.

and he also viewed pallets, securing bands and straps, containers and the carts and other equipment used to move the containers about the airport. He testified that "two or three" (of about 1400) employees told him anecdotally they had been cut by such straps, though such events, if any, were not reported to Employer. He was also concerned with wooden pallets used in the cargo operation because they could cause employees to get a splinter or nail in their hands.

The Division called four ramp service workers as witnesses. Their testimony is summarized below.

Michael Fedoroff began working in ramp service for United in about November 1994. At the time he concluded his testimony, he had worked in ramp service for almost eight years. He estimated that 15 to 20 percent of baggage is damaged. He also testified that badly damaged bags were removed from normal processing and stored for the customer service department, which would deal with the affected customers and ultimately discard the bags. His hands had been hurt twice by a damaged bag over the course of his career, both injuries requiring only first aid, and neither occurring within the relevant period of February 11 through August 11, 2000. He also had a cut requiring stitches from a burr on a tow bar in or about May 1999, and an electrical burn caused by defective equipment in "about [19]96."

Mr. Eric Grogans testified that he had been a ramp serviceman for "about 13½ years" as of late October 2002, i.e. since about April 1989. He normally wore gloves while working. Between February and June 2000 he worked in the mail function, and from June until August was in the air freight function. He testified about his work filling the containers or "cans" that are used to hold freight items to be transported in United's airplanes. He testified that the containers' bodies are made of thin sheet aluminum and almost all of them have some degree of damage. Sometimes that damage consists of a tear in the sheet metal which can present a cutting hazard. Also, when damage to the sheet metal is repaired there can be sharp rivet ends exposed on the inside of the container which also can cut someone working in them. He testified that when working in the air freight function he climbs into the containers three or four times a shift. During the course of his career he has reported various unsafe conditions to his superiors but never reported any conditions he thought presented hazards to his hands. He also testified he had the authority to take equipment that presents a safety hazard, such as a damaged container, out of service, and has frequently done so. That authority extends to damaged pallets. In his thirteen and a half years of working for United in ramp service he never reported a hand injury.

Mr. Schoenamsgruber testified that passenger bags can have many cutting hazards such as broken wheels and rivets sticking up. Passengers sometimes put pins, knives and other sharp objects in luggage made of nylon or fabric. These objects can poke through the bag and penetrate an employee's

hand. Schoenamgruber was scratched on his wrist by a rivet on the outside of a container and the scratch left a half-inch scar. He was wearing gloves at the time and did not report the injury. He had an earlier hand injury in 1986 as well. He testified that the plastic straps used to secure mail in its packing boxes can cut someone's hand, and had suffered such a cut once in 1989 and not since.⁹ Photographs of the boxes entered into evidence show they have openings on their ends which are intended to be used as hand holds or handles for lifting. Schoenamgruber was asked if he had hurt his hand on any luggage during his career. He responded, "Just from poking it [i.e. his hand] with safety pins (sic) . . . Once. Just put little scrapes and - - you know, just little scrapes from the luggage." Question: "With your gloves on?" Answer: "No. From - - from without wearing my gloves." As to the safety pin hazard, Schoenamgruber reiterated that he had only been stuck the one time. He had learned to look for pins in the future: "[A]nd then I started looking for them." He stated that when he was handling baggage he would handle about 5,000 bags a week, of which "maybe two or three" would have a safety pin sticking out. He further testified that in the course of his career he had observed only one person getting cut by luggage. He started working in ramp service in 1986. Schoenamgruber also testified that rivet points should not be on the outside of the containers, and that he has "expressed to Steve [Rice] about the rivets." Further, he had "never" been injured by a rivet in the inside of a container, and had never heard anybody complain that they were getting injured by rivets and repairs on the inside of a container.

Bill Aivaliklis (Aivaliklis) testified he has been a ramp service worker for 12 years. Aivaliklis estimated that ramp service workers handled 300 to 400 bags per shift when loading and unloading airplanes. He estimated that 35 percent of the baggage he handled was damaged. Although he also estimated that 95 percent of ramp service workers wear gloves when handling bags, mail, pallets, containers and carts, he later testified that in his experience one or two of the employees out of four would not wear gloves; and also that of a group of 6, 1 or 2 would not and 3 or 4 would wear gloves. The ratio could vary from area to area or shift to shift. It was his view that most ramp servicemen wore gloves on his shift, but he acknowledged he did not know what preferences the "guys" on other shifts had regarding wearing gloves. Aivaliklis testified that he wears gloves for varying percentages of his work time depending on the duties involved, but takes them off to write on loading cards.

As Aivaliklis recalled, he had reported one hand injury during his 12 years of ramp service work when his hand was struck by a piece of equipment and bruised but not cut. He was wearing gloves when the injury occurred. He had never personally seen anyone get a hand injury. Aivaliklis testified that a

⁹ Regarding the plastic straps used to secure boxes of mail, the ALJ held in his decision that the "Division failed to prove that lifting boxes of mail by the plastic straps exposed workers to a hand cut hazard within the meaning of § 3384(a)." We agree and do not disturb that finding. We note for the sake of completeness that the ALJ upheld the citation as it applied to workers handling mail for other reasons, which we reject in this Decision After Reconsideration.

ramp service worker could come into contact with a rivet inside a container and get cut. He had not been cut in that manner himself. He had not been cut by luggage, and none "of [his] colleagues cut their hand on a damaged bag" to his knowledge.

Stephen Rice, the Union safety coordinator for United, also testified. After Mr. Doromal's inspection, Rice took several photographs which were admitted into evidence during the hearing. He was selective in what he photographed, looking for the worst examples of damaged bags he could find in an hour. He did not know what percentage of total baggage was represented by his photographs. Question: "[Y]ou weren't trying to take a representative snapshot of what the situation was out at SFO. You were trying to look for specifically things that you thought might cause injuries to hand; correct?" Answer: "Correct." Question: "And you were doing that to help the Division prepare for its case; correct?" Answer: "Yes, yes." For example, Mr. Rice photographed a particularly badly damaged suitcase to illustrate the type of damage that could be done by the "kicker."¹⁰ It is noteworthy that baggage so damaged by the kicker are removed from the normal flow of cargo handling and sequestered. Thus, employee contact with them is very limited; in fact, it appears that customer service personnel, not ramp service personnel, deal with such items. Of the pictures Mr. Rice took in order to support the Division's case, only one was not staged and showed a person in the actual course of his normal duties.

EMPLOYER'S EVIDENCE

Max Malone (Malone), Corporate Manager of Occupational Safety, testified for Employer. He is a mechanical engineer and has been a UAL employee for 18 years. He started as an engineer, was a safety specialist for six years and has held his current position for eight years. During his career, he has spent thousands of hours observing ramp service work. Based upon observations of SFO ramp service workers Malone made over a period of eight to ten hours covering the peak work periods of the morning and afternoon shifts on a day in early 2001, he estimated that approximately 50 to 60 percent wore gloves some of the time while handling bags, mail and cargo and the remainder did not.

Malone first became aware that gloves for ramp service workers at SFO were an issue in approximately May of 1999. Gerald Munkholm, who was then the safety chairman of IAMAW Local 1781, informed him that the local union felt that Employer should be providing gloves to ramp service workers at no cost as it did for mechanics. Mr. Malone testified that Munkholm considered the issue to be primarily who would pay for the gloves (employees or Employer),

¹⁰ We understand the "kicker" to be a device which pushes pieces of luggage from one conveyor belt (or similar device) onto another. The testimony was that sometimes the kicker badly damaged bags when it pushed on them but they were not free to move in the intended direction.

and that Munkholm did not express safety concerns regarding furnishing or use of gloves.

Malone estimated that less than five percent of the passenger luggage handled by ramp service workers was damaged so as to present a hand-cut hazard. He testified that ramp service work exposed employees to some hand-cut hazards but that the exposure was not unusual or excessive.

A few months later, at Munkholm's request, members of Employer's SFO Safety Department did a study of SFO ramp service worker exposure to hand-cut hazards to determine if they needed to wear gloves for safety reasons. Joan O'Neill (O'Neill) and other qualified Safety Department personnel spent approximately 300 hours over a two-month period observing ramp service work, evaluating the work tasks and collecting and analyzing injury data. Employer's records indicated that in 1999, SFO ramp service workers reported a total of 26 hand injuries of all types, including five "Cuts/Lacerations/Puncture" injuries and one wood splinter injury.¹¹ The Safety Department concluded that ramp service work did not expose employees to unusual and excessive hand-cut hazards.

O'Neill, Steve Rice, a union safety official, Munkholm and others met with a Division Consultation Service representative identified as "Beth Mohr, PhD, CIH, an Industrial Hygiene Consultant for Cal/OSHA" (Employer Exhibit A) on August 2, 1999. At the meeting, O'Neill presented her findings to Mohr and contended that they did not indicate excessive exposure to hand cuts. The Union representatives argued that the reported injury data presented an inaccurate picture of the extent of exposure to cuts because many cut, puncture and splinter type injuries were not reported. Based upon what was presented to her at the meeting, Mohr was unable to determine if the section 3384(a) hand protection requirements applied to ramp service work.^{12,13}

Daryl Korpela (Korpela), a witness for Employer, testified that ramp service work is much the same at all airlines and, thus, exposes the workers to

¹¹ Only two are of interest here; one hand injury and one splinter injury.

¹² Employer asserted that it had been concerned earlier that it might violate section 3384(b) for ramp service workers to wear gloves because the gloves of some workers had gotten entangled in pinch points created by moving parts of conveyors and other loading and unloading equipment with which they have frequent contact. Section 3384(b) provides that, "Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials." New ramp service equipment was being acquired at the time. Employer analyzed the ramp service glove-entanglement hazards that occurred on belt-loaders used to load and unload airplanes. Modifications were made to existing belt loaders. Employer concluded that modifications to existing belt loaders, the acquisition of new belt loaders with improved guarding and Employer's safety training and rules abated the hazards to the extent that the wearing of gloves did not violate section 3384(b).

¹³ We also note that when asked about Dr. Mohr's statement, Mr. Doromal dismissed it, saying he disagreed with it. He testified that he had made up his mind about the Mohr report by December 10, 1999, before his second SFO inspection on December 13, 1999. Further, he appears to have been under the misimpression that Dr. Mohr's report concerned United's operations at the Oakland International airport, possibly because a meeting among Employer, Union representatives and Dr. Mohr was held at the Oakland airport. Dr. Mohr was, however, referring to United's SFO ramp operations.

the same types of hand-cut hazards. The day before he testified, Korpela spent approximately one hour at SFO watching UAL ramp service work at plane-side, in the bag and mail rooms and the cargo facility. At each area, approximately half of the workers were wearing gloves and half were not. Some were handling bags, mail and equipment and others were not. He saw pallets in the cargo area with broken boards that could have caused hand injuries but he did not think it was likely.

It was Korpela's opinion that the work of Employer's SFO ramp service employees did not expose them to unusual and excessive hand cut hazards.

Employer called graveyard shift cargo Supervisor Granvil Carr (Carr) as a witness. He has been a UAL employee for 36 years, starting as a ramp service worker, then serving as a cargo operation coordinator until he became a supervisor 25 years ago. He has observed employees wearing gloves and not wearing gloves. Some employees wear gloves for some types of work but not for others.

SFO Ramp Service Supervisor Bernard Haena (Haena) testified as a witness for Employer. He has been a supervisor for seven years. Before then he was a lead ramp service worker and a flight kitchen employee. He has worked for UAL for 14 years. Haena has supervised work in all ramp service functions. He estimated that approximately 50 percent of the workers wore gloves and 50 percent did not plane-side, in the bag and mail rooms and at the cargo facility.

Haena had never cut a hand lifting a mail strap or on a passenger's bag while working as a ramp service employee. He had handled pallets without gloves and had never cut or punctured his hands. No employee had reported such an injury to him. Haena opined that employees may have had their hands cut or punctured when handling bags, straps or pallets but could not specifically recall that happening.

Claire Florio (Florio) testified for Employer. She has been a corporate safety senior staff representative for a little over three years, was a management safety coordinator for three years before that, and previously worked as an aircraft maintenance mechanic and ramp service employee for Employer. When Florio worked ramp service for a year in 1998 and 1999 she sometimes wore gloves to avoid dirt and calluses. She never cut her hands working without gloves and did not know of any ramp service worker who cut a hand during that period.

Florio identified a list of the number of passenger bags that were processed through the SFO domestic flight baggage system on each day in July 2000. The numbers range from a high of 24,687 on July 1st to a low of 15,819 on July 4th. The average appears to be around 20,000 bags per day.

DISCUSSION

We begin our analysis by referencing the relevant safety order. Section 3384(a) provides, in pertinent part,

Hand protection shall be required for employees whose work involves unusual and excessive exposure¹⁴ of hands to cuts....¹⁵

As noted above, the Superior Court remanded this matter to the Board for issuance of a new Decision After Reconsideration applying the correct legal interpretation of the safety order. In its decision, the court stated that, when applying section 3384(a), the trier of fact is “to determine whether the exposure of the affected employees is ‘too great in amount or degree to be reasonable’ under the circumstances.” (Quoting from ruling issued October 31, 2008)¹⁶ The Court further held that the intent of section 3384(a) is “not to determine whether the exposure of the affected employees is ‘excessive’ as compared to other employees ‘performing the same type of work[.]’ ” We agree that the interpretation stated in the foregoing sentence is not the intent of the regulation.¹⁷

In light of the court’s direction, we need not discuss matters of regulatory interpretation when there are undefined terms in a safety order. The court has provided the definition and the legal standard to apply. Further, as the preceding footnote points out, the definition of “excessive” used in this proceeding has been consistent throughout.

We also note that the Standards Board used the terms “unusual and excessive” in the conjunctive, thus indicating that the exposure in question must be both of a certain kind (i.e. “unusual”) *and* of a certain amount or degree (i.e. “excessive”) for hand protection to be required.¹⁸

¹⁴ The meaning of “exposure”, as used in the phrase “unusual and excessive exposure” is well settled. If an employee works close enough to a hazard to make accidental contact with it, the employee is “exposed” to the hazard. (See, e.g., *Dee Lumber Company*, Cal/OSHA App. 80-351, Decision After Reconsideration (Feb. 26, 1981); see also *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990).)

¹⁵ The federal OSHA standard, section 1910.138, requires hand protection for, inter alia, “severe cuts or lacerations” “severe abrasions” and “punctures.”

¹⁶ The “too great in amount . . .” language comes from the definition of “*excessive*” used by the ALJ, by ourselves in the first Decision After Reconsideration in this matter, and by the court in its ruling. Section 3384(a) requires the exposure to be “unusual and excessive.” The wording is conjunctive; that is, both elements must be shown to exist. Although the court’s ruling did not focus on term “unusual” in its ruling, we understand that the court did not mean to suggest that we were to ignore the term “unusual.”

¹⁷ We did not and do not interpret the safety order as the court thought. We regret the misunderstanding regarding our interpretation of the standard.

¹⁸ Earlier Decisions After Reconsideration addressing section 3384(a) have on occasion used the terms *unusual* and *excessive* in the disjunctive, but the decisions did not turn on that usage. We disapprove of those Decision After Reconsiderations to the extent they hold the terms “unusual” and “excessive” apply in the disjunctive.

We now proceed with our review of the present action.

To sustain the citation, the Division had to prove by a preponderance of the evidence that Employer violated section 3384(a). (See, *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Board has repeatedly stated that, "Preponderance of evidence' is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. *Harbor Sand & Gravel, Inc.*, Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003), citing, *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001). Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence, including that produced by the defendant." (Original emphasis; citations omitted, internal quotations omitted) *RII Plastering, Inc.*, Cal/OSHA App. 02-2679, Decision After Reconsideration (Jan 23, 2009); *Leslie G. v. Perry & Associates* (1996) 43 Cal. App. 4th 472, 483, review denied.

A violation may not be based on speculation, assumptions, or conjecture that employees will be exposed to the hazard which the safety order is designed to abate, but rather upon definite evidence of a past or existing danger. *Ford Motor Company Automotive Assembly Division*, Cal/OSHA App. 76-706, Decision after Reconsideration (July 20, 1979).¹⁹

Our decision is based on the facts presented in the record, which we have reviewed in its entirety. In analyzing the present situation, we ask whether there was "exposure," and, if so, whether it was "unusual and excessive."

"To find 'exposure' there must be reliable proof that employees are endangered by an *existing* hazardous condition or circumstance." *Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388, Decision After Reconsideration (Nov. 13, 2001).

¹⁹ In *Ford Motor Company* (*supra*), the employer was charged with violation of section 3381(a). Section 3381 requires head protection for "employees exposed to flying or falling objects and/or electric shock and burns..." While that regulation is distinct from one requiring hand protection, the logic of the decision applies here. Reliable proof that employees are endangered by an existing hazardous condition or circumstance, "may not be based on speculation, assumptions, or conjecture that employees will be exposed to the hazard..." (See *Stiles Paint Manufacturing*, Cal/OSHA App. 02-1630, Decision After Reconsideration (Aug. 16, 2006) citing *Ford Motor Company* (*supra*).)

We find that the evidence established that United's ramp service employees were exposed to the hazard of hand cuts during the period of February 11, 2000 through August 11, 2000. Thus, we must next determine whether the evidence proved that exposure was unusual and excessive. Under the interpretation stated by the court, this means "more than reasonable under the circumstances."

When considered in its totality, we find the evidence presented by the Division does not prove by a preponderance of the evidence that the exposure was "unusual and excessive" and thus does not prove the alleged violation. Although the Division put on considerable evidence, we find much of it was unpersuasive, qualified during cross examination, or sufficiently rebutted by evidence presented by Employer to prevent a finding that it preponderates in favor of upholding the violation

The testimony of the Division's witnesses contained broad generalizations and statements which, during cross examination, were shown to be exaggerated or speculative. There must be reliable proof that employees are endangered. *Rudolph & Sletten Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (March 5, 1981).

We begin by considering the testimony of the Division's inspector, Mr. Doromal. Mr. Doromal spent less than two hours inspecting the various operations comprising ramp service at United's SFO terminal, and he admitted to having formed his conclusion after the first of two visits. Given the brevity of his investigation prior to reaching a conclusion regarding the violation, we are not satisfied that his determination was well founded. Similarly, Mr. Doromal testified that he saw "at least over a dozen" pieces of "defective" luggage on one train of three or four carts.²⁰ We find this estimate and description too vague to give it much weight. This is particularly true given that he took several photographs of other items he thought presented examples of hand cut hazards, but Doromal did not photograph any of the defective baggage. That failure is revealing.²¹ When we consider Mr. Doromal's vague testimony in combination with his failure to provide photographic evidence of the "defective" luggage, we must discount the value of both.

Moreover, the deficiency of Doromal's testimony and evidence is compounded by the later testimony of Mr. Rice who admittedly "staged" photographs he took when deliberately seeking out defective baggage to prove a point. Clearly, Mr. Rice's photographs prove little more than the existence of some damaged bags, a point we do not question.

²⁰ Ms. Claire Florio, a United employee who was with Mr. Doromal during his inspections, testified that she recalled seeing one bag with a "loose wheel" and no sharp objects or other damaged bags in the course of Doromal's December 3, 1999, inspection.

²¹ Evidence Code section 412 states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

We further find that Mr. Doromal demonstrated a tendency to overstate in his testimony. One example is seen in his initial statement that "many" employees had told him they had been cut by plastic strapping. When asked "how many is many," he said that many was "two or three," and he did not take statements from any of those persons, though he took statements from several other employees and the Division and Union arranged for written statements from over 100 others. Another example is seen in his statement, quoted above, "[T]here is really no way that a piece of luggage can be picked up to prevent being cut[.]" The evidence does not support this broad assertion. Yet another example was his inability to support a statement that "most" of the employees he interviewed actually reported cuts to their hands from defective baggage.²² In short, his testimony in this proceeding was not persuasive or credible.

In contrast, we find the testimony and investigative work of Employer's witness, Mr. Max Malone, more credible and more probative. For example, he spent about 10 hours (roughly 8:30 a.m. to 6:30 p.m.) on one day observing SFO ramp operations during the peak work times of the morning and the afternoon shifts. Thus, his observations were made over a period at least four or five times longer than Doromal's. From the transcript of his testimony we also judge his attitude and demeanor to have been more credible. Unlike Mr. Doromal, Mr. Malone's testimony regarding glove usage was consistent and credible. Mr. Malone estimated that 50 to 60 percent of ramp service workers wore gloves at various times while performing their duties, but not all the time, and acknowledged that wearing of gloves varied according to task and personal preference.

In addition to Mr. Doromal, we had difficulty crediting several other of the Division's witnesses. For example, Mr. Fedoroff testified that "[E]very bag can be a hazard, you know. Can be. I won't say every bag is, but can be a hazard to the pickup." (sic) Another example from Mr. Fedoroff's testimony is, "[O]ut of, say, 200 bags, there might be a number of bags that have the wheels off of them[.]" This and other of his statements were general or hypothetical, and suggest a degree of exaggeration that diminishes their value. We cannot credit a statement that every bag can be a hazard. In similar vein, Mr. Aivaliklis's testimony was often vague or inconsistent. He testified to a hand injury he had witnessed but did not say when it had occurred. He estimated that 35 percent of baggage is damaged, the highest estimate in the testimony, which was not corroborated by any other testimony or evidence.

²² Not only was Doromal unable to provide supporting detail, it was shown in other testimony that there were no reported hand cuts due to defective baggage in 1999, the year for which United supplied records to the Division. Florio sent Doromal a letter on January 15, 2000, stating that Employer's reported injury records indicated that one ramp service cargo worker had reported a splinter injury and five plane-side, bag and mail room employees had reported "Cuts/Lacerations/Puncture" type injuries. She noted that three of the five injuries in the latter category were caused by employees getting hands or fingers caught in pinch points. Another occurred when an employee's hand was struck by a loading bar, and the last happened when an employee's hand was lacerated by a metal burr on a baggage cart handle. The parties did not make an issue of the time period covered by the reports.

Mr. Grogans testified that he had reported safety issues and concerns to his superiors, but had never done so with respect to hazards to his or fellow workers' hands. We infer that he did not consider the exposure to his hands to be worth mentioning.

We acknowledge that some witnesses testified to getting scraped or scratched with some (vaguely articulated) regularity. We find that such testimony is demonstrative of exposure, but we see no evidence in the record which allows us to conclude that such testimony proves the work in question involves exposure to hand cuts that is unusual and excessive, that is which is "too great in amount or degree to be reasonable under the circumstances."

Similarly, the Division's witnesses testified that most injuries they suffer, while admittedly minor (i.e. requiring at most a Band Aid or other simple attention), go unreported because they don't have time to report them and the process takes too long. (It was undisputed that Employer's policy and work rules requires all injuries, regardless of degree or seriousness, to be reported.) In contrast, Mr. Malone testified, again without challenge or contradiction, that it takes only a minute or two for an employee to report an injury to his or her supervisor, and that it is the supervisor who is required to take the time to make the written report. Thus, we, again, cannot credit the witnesses' testimony.

We did find some value in the testimony of one Division witness. The testimony of Mr. Schoenamsgruber on direct and cross examination was less characterized by hyperbole, although even he often spoke in terms of possibilities and generalities. He had worked for United in ramp service in 1986. He testified to one cut from a plastic strap, such as those used to secure mail, in 1989 and none since. He had suffered only one injury from luggage in his career when he was poked by a safety pin. Thereafter he learned to look for bags with safety pins in order to avoid being poked again, with complete success according to his testimony. Mr. Schoenamsgruber testified he has been able to avoid injury from pins and other problems with luggage, and apparently other risks as well. We infer that other ramp service workers are equally capable of looking for and avoiding problem luggage in the course of their work, and do so. And, while he wears gloves most of the time, he testified that when he did not wear gloves he received "just . . . little scrapes" from the luggage. His testimony was that he handled about 5,000 bags a week, or about 1,000 a shift.

The Division's witnesses stated that the volume of baggage, mail and cargo that the employees had to handle and the time pressure under which they operate makes the exposure unusual and excessive. Yet Mr. Schoenamsgruber's testimony indicated that he handled more than two times the number of bags per shift that Mr. Aivaliklis estimated ramp service workers handled per shift (1,000 vs. 300 to 400), and Mr. Schoenamsgruber was able to

look for and avoid problems when handling bags. If Mr. Schoenamsgruber could successfully avoid safety pins by looking for them, others can avoid more patent hazards of missing or broken wheels and damaged luggage. Although we find merit in much of Mr. Schoenamsgruber's testimony, his input regarding the prevalence of cut hazards was too general for it to serve as a basis for a finding that the exposure was more than reasonable under the circumstances. Moreover, Mr. Malone's testimony was that ramp service workers have the authority to control the speed of the loading conveyors and that their work is structured and designed by Employer to involve about 5 hours of loading and unloading work in each 8-hour shift, thus leaving the remaining 3 hours for breaks, other duties such as paperwork, and so on. That testimony dispelled the impression of never-ending rush that the Division's witnesses sought to evoke. Mr. Malone also testified that United had about 200 flights per day into and out of SFO during the period involved here. It follows by simple arithmetic that each flight would have between 50 and 100 pieces of luggage on average, given the estimates of 10,000 and 20,000 bags per day that were given.

The nature of most of the Division's witnesses' testimonies, which we have highlighted herein, leads us to assign little weight or probative value to it. We conclude the alleged hand cut exposure to have been overstated.

In addition, because much of the Division's evidence was rebutted by evidence from Employer, we cannot find that the Division established the violation's existence by a preponderance of the evidence. For example, the testimony regarding the amount of damaged luggage was so varied that it was inconclusive at best. The Division's witnesses offered estimates varying from 10 to 35 percent, and Employer's witnesses estimated less than 5 percent; but the photographic evidence and testimony based on actual observations rather than estimates points to the actual rate being less than 1 percent.

Likewise, the estimates of the number or proportion of ramp service workers who wore gloves at least most of the time varied greatly among witnesses and the Division's individual witnesses lowered and/or qualified their initial estimates during cross examination. Employer's witnesses' testimony on the question was more consistent and nuanced. They estimated glove usage to be in the 50 percent range based on longer periods of direct observation as well as equivalent personal experience. They also acknowledged that glove usage varied depending on conditions such as weather as well as personal preference and the type of work being done.²³ Glove usage is significant because the ALJ found that the evidence regarding the incidence of actual cuts was artificially reduced due to the high percentage of ramp service workers practicing self-protection by wearing gloves. We find the evidence

²³ The ALJ seemed to view the evidence regarding glove usage as significant because he believed it reduced the frequency of hand cuts. Since we do not consider the occurrence or lack of occurrence of cuts to be indicative of exposure in this case, we mention the conflicting evidence regarding glove usage only as another example of the variability of the evidence.

regarding the degree to which ramp service workers wore gloves to be too inconsistent to support this finding, and therefore reject it. We do not believe any conclusion about the alleged violation can be reached regarding the effect of ramp service workers use of gloves.

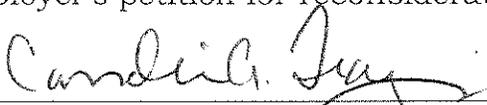
The Division's evidence does not persuade us that it is more likely than not that the exposure of United's ramp service workers to hand cuts was unusual and excessive, or "too great in amount or degree to be reasonable under the circumstances."

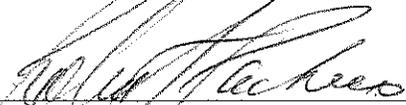
In sum, we find the totality of the evidence in this case does not prove, by a preponderance, that Employer violated the safety order as alleged. In other words we find that the evidence did not prove that the exposure was "too great in amount or degree to be reasonable." We further find that the Division did not prove by a preponderance of the evidence that the exposure in question was "unusual," which we take to mean "uncommon."

DECISION AFTER RECONSIDERATION

Based on the facts of this case we find that the evidence presented was insufficient to establish "unusual and excessive" exposure to hand cuts.

For the reasons stated above, we reverse the ALJ's decision finding a violation of section 3384(a), set aside the \$655 civil penalty, and sustain Employer's petition for reconsideration.


CANDICE A. TRAEGER, Chairwoman


ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: APR 30 2009
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