

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 UAL) 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.

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.

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."

**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 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 (Labor 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.

**DIVISION'S EVIDENCE REGARDING VIOLATION OF SECTION
3384(a)**

On November 12, 1999, Gerald Munkholm, the Union's⁴ 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," employees who load and unload passenger baggage,

⁴ International Association of Machinists and Aerospace Workers, Local Lodge 1781 (IAMAW or Union).

mail and airfreight at SFO. Employer had about 1,600 ramp service workers at SFO during the period of the complaint and inspection.⁵

The complaint was assigned to Division Compliance Officer Vic Doromal (Doromal) who opened his inspection on December 3, 1999. During his investigation Doromal visited United's operations at SFO twice, on December 3 and 13, 1999. He inspected primarily the aircraft ramp service area on December 3 and primarily the mail and cargo handling operations on December 13. It was his testimony that the work conditions he observed were typical of day-to-day operations. He believed that the work samples he took on December 3 and 13, 1999, were representative of the hand-cut injury exposure ramp service employees faced every day on the job during the six months preceding the issuance of the citation.

Doromal testified that on December 3, 1999 he observed approximately 20 employees working, took photographs and interviewed five or six employees. All but one of the employees Doromal observed working on the ramp were wearing gloves. Employer did not provide gloves so the employees bought them. Those wearing gloves said they wore them as protection against getting their hands cut on broken metal and plastic parts of luggage. They told Doromal that cuts could occur by contacting a metal burr on the tow bar of a luggage cart when hooking it up to another cart or a tug. Employees informed him that they commonly picked up boxes of mail by the straps and that edges of the straps or securing devices on them could cut into a hand. Doromal testified that he observed 12 pieces of luggage on 3 baggage carts that had defects such as misaligned hinges, a missing roller but with the empty metal frame which held the roller, and a broken lock or handle. He further testified that he did not have the opportunity to determine the total number of bags of which the 12 were a subset.

At the cargo facility Doromal observed metal bands used to secure loads of cargo to wooden pallets. Employees had to cut off and dispose of the straps to "break down" palletized cargo delivered by a customer for loading into an aircraft. The edges of the bands and their securing devices could cut hands. The pallets were made of wood. Some pallet boards were broken and/or had splinters on their surfaces that could cut or penetrate hands.

Doromal also observed two pallets, one with corners broken off the first three slats and missing other slats. Boxes on the second pallet obscured almost all of the slats except the first one, from which the right front quarter

⁵ 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 2001 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)

was broken off leaving large splinters projecting upward from the resulting gap in the pallet.

There was other testimony that cargo and mail are generally placed in sheet metal containers of different sizes that fit into the cargo holds of airplanes. Employees enter or reach into containers to load and unload them. 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.⁶ The rough or sharp penetrating (anvil) ends of the rivets project through the insides of the containers, presenting a hazard for employees reaching or working inside them.

Containers are towed on dollies 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.

Doromal did not interview any employees on December 13, 1999. However, he watched about 12 employees doing mail and cargo work for approximately 30 to 45 minutes that day, and he also viewed pallets, securing bands and straps, containers and the carts and other equipment used to move the containers about the airport.

From all his observations Doromal formed the opinion that ramp service work involved unusual and excessive exposure of hands to cuts. Doromal testified that he relied on his experience, the information he developed through his inspection and the dictionary to form his opinion. He defined "unusual" to mean out of the ordinary and "excessive" to mean beyond normal limits.⁷

In reaching his conclusion, Doromal considered the speed of the work and the large number of times that employees had to perform tasks as factors in determining that the work involved unusual and excessive exposure. Rapidly handling a large number of bags that could have hazardous defects anywhere presented an unusual and excessive risk of hand cuts in his opinion. Doromal conceded however, that the Division has developed no guidelines or standards to help compliance officers determine if hand-cut exposures were unusual and excessive. It was essentially a "judgment call."

⁶ It should be noted that sealant was applied to the exterior surfaces of the patches and rivets to reduce the hazard.

⁷ Employer Exhibit B consists of three pages from "Webster's Ninth New Collegiate Dictionary", the cover and the pages containing the definitions of "excessive" and "unusual." The dictionary states that "excessive" and other words said to be synonyms, i.e., "immoderate, inordinate, extravagant, exorbitant [and] extreme mean going beyond a normal limit." In explaining the implicative differences between "excessive" and the listed synonyms, the dictionary states that, "Excessive implies an amount or degree too great to be reasonable or acceptable." "Unusual" is defined as "not usual; uncommon."

The Division called four ramp service workers as witnesses. They offered different estimates of the percentage of workers who wore gloves and the percentage of baggage and equipment that was damaged so as to present hand cut hazards. Some of their testimony is summarized below.

For example, Gus Schoenamsgruber (Schoenamsgruber), estimated that 50 percent of the cargo containers had accidental puncture or tear holes in them. Passenger bags can have many cutting hazards such as broken wheels and rivets sticking up. Passengers sometime 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.

Another witness, 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 and that 95 percent of ramp service workers wear gloves when handling bags, mail, pallets, containers and carts. Later, he testified that in his experience one or two of the employees in any five or six person work crew did not wear gloves or that three or four would wear gloves and one would not. The ratio could vary from area to area or shift to shift. Aivaliklis wears gloves 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. He was wearing gloves when the injury occurred. To his knowledge, none of his co-workers had ever cut a hand on the job. Aivaliklis's testimony was generally consistent with Doromal's.

EMPLOYER'S EVIDENCE IN OPPOSITION

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 on a day in early 2001, he estimated that approximately 50 to 60 percent wore gloves 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.

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.⁸ 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.⁹

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.

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 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

⁸ As further described below at page 12, of these 26 injuries only two are material here, the one of the five hand injuries which was a cut and the splinter injury.

⁹ 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).

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 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. Florio expressed the view that the reported injuries did not demonstrate unusual or excessive exposure to hand cuts.

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

In pertinent part, section 3384(a) provides,

Hand protection shall be required for employees whose work involves unusual and excessive exposure¹⁰ of hands to cuts....¹¹

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 issue presented here is one of first impression. To analyze this 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).

The evidence is conflicting. The Division's witnesses testified as to the types of hand cut hazards to which they were exposed in the course of handling baggage, mail and air freight and the equipment used to transport, load and unload those things. Photographs of rough pallets, etc. and Rice's photographs of various hand-cut hazards tended to corroborate the testimony.¹² Doromal also testified that in his opinion there was exposure to hand cuts which was unusual and excessive. Employer acknowledged that damaged bags did go through the system, that containers could have sharp edged holes and tears, and sharp rivet ends projecting inward to secure

¹⁰ 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).)

¹¹ The federal OSHA standard, section 1910.138, requires hand protection for, inter alia, "severe cuts or lacerations" "severe abrasions" and "punctures."

¹² Rice's photographs were taken well after the citation was issued. But he and other Division witnesses testified without refutation that the hazards depicted are representative of hazards that existed during the six months preceding issuance of the citation.

patches, that burrs could occur on cart and dolly tongues, and that wooden pallets could have broken boards and projecting splinters. On the other hand, Employer's witnesses testified that conditions capable of causing hand cuts were less prevalent than the Division's witnesses asserted and that such exposure resulted in very few injuries.

From the evidence summarized above we conclude that Employer's employees were exposed to the hazard of hand cuts. The evidentiary conflict concerns the degree or prevalence of the hazard, not its existence. We turn our attention next to whether the Division proved the exposure was "unusual and excessive."

Evidence concerning the nature and degree of the exposure was also conflicting. For example, witnesses for the Division estimated that there were hand-cut hazards on from 10 to 35 percent of the bags. Employer estimated that the percentage was less than five percent.

Employer presented evidence that its SFO domestic flight baggage system processed approximately 20,000 bags per day during the month of July 2000.

Employer also introduced records of employee-reported injuries showing a low incidence of ramp service hand-cut injuries.

The ALJ considered but discounted that evidence, concluding that the tendency of Employer's records to prove that the hazards are less numerous and pose less of a safety threat to exposed employees than portrayed by the Division's evidence was substantially diminished by two factors. First, the records include only the hand-cut injuries that employees reported to Employer. Although Employer's written policy commands employees to report every injury however minor, ramp service worker witnesses testified that they normally did not report injuries unless they thought medical attention might be needed. Secondly, ramp service workers regularly wear gloves when handling the equipment, baggage, mail and freight that presents hand-cut hazards.

We disagree with the ALJ's conclusion that those two factors diminished the probative value of the reported hand cut records for the following reasons.

First, it was undisputed that Employer's records of employee reported injuries are maintained as part of its ordinary business records. The Division did not dispute the authenticity of the records or assert that they did not accurately reflect employee reports of injuries. Rather, the Division offered oral testimony of a union representative that disputed whether the records accurately reflect the number of injuries but offered no written documentation to support his testimony.

Second, since the dispositive issue before us is whether employees faced "unusual and excessive exposure," undisputed written evidence of hand cut

injuries was probative. To discount the value of that evidence, especially when no other documentary evidence is provided in contradiction was error. Weaker and less satisfactory evidence was offered when it was within the power of the Division to produce stronger and more satisfactory evidence. We therefore view the evidence presented by the Division with a degree of "distrust." (Evidence Code § 412) 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).¹³

INTERPRETATION OF SECTION 3384(a) LANGUAGE

The words "unusual" and "excessive" are not defined in the Act or in the safety orders and they have not previously been interpreted by the Board. The words' generality creates ambiguity and raises an issue of construction or interpretation of section 3384(a).

"In construing regulations the Appeals Board must give words 'their usual, ordinary, and common-sense meaning based on the language the [drafters] used and the evident purpose for which the [regulation or safety order] was adopted.'" *Sierra Production Service, Inc.*, Cal/OSHA App. 84-1227, Decision After Reconsideration (Aug. 13, 1987) at p. 2. (The Board is quoting from p. 155 of *In re Rojas* (1979) 23 Cal. 3d 152). Where the safety orders do not supply a definition for a term used in a section, the Appeals Board applies the common usage or common law meaning. (*D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals*, Cal/OSHA App. 96-3553, Decision After Reconsideration (Mar. 15, 2001).

It is well established that rules of statutory construction apply to the construction of regulations. (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal. 2d 285)

Webster's Ninth New Collegiate Dictionary (*Webster's*) is a generally recognized source of information concerning the "usual, ordinary, and common-sense meaning" of words. It defines "excessive" as, "going beyond a normal limit" or "an amount or degree too great to be reasonable or acceptable." It defines "unusual" as "not usual; uncommon." *Webster's*

¹³ 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*).)

definitions of "unusual" and "excessive" are accepted as an aide to ascertaining the Standards Board's intended meaning of those words in section 3384(a).¹⁴

The denotation of "unusual" is of a *qualitative* difference when one parameter or attribute of a person, object or circumstance is compared to another. Similarly, "excessive" denotes a *quantitative* difference between the items or characteristics being compared. We also note that the Standards Board used the two terms in the conjunctive, thus indicating that the exposure in question must be both of a kind *and* a degree that is exceptional to require hand protection.¹⁵

We find that for an employee's exposure to a safety hazard to be "unusual" or "uncommon" it must occur under circumstances that differ from those under which others are usually exposed to the same or like hazards and tend to increase the risk of accidental contact. Likewise exposure to a hazard is "excessive" if it occurs in "an amount or degree too great to be reasonable or acceptable" (*Webster's*, above) under the protective principles of the Act.

One prior Board decision, while not totally on point, provides guidance in interpreting the word "excessive": *Nassco National Steel & Shipbuilding Co.*, Cal/OSHA App. 00-2743, Decision after Reconsideration, (Oct. 17, 2002). The *Nassco* case involved determining what is an excessive weight or length of the load of T-beams to be transported by a Toyota forklift. The *Nassco* Board held, "We find that it is necessary to the establishment of a violation of section 3650(m), to produce evidence of some *standard* or *norm* to which a comparison may be made to show that the subject material [load] is of **excessive** width, *length* or *height*. In addition, it is necessary to demonstrate the basis of why such comparison amounts to an "**excessive**" determination." [Emphasis added] We concur with that analysis, noting particularly that as here the Board found "excessive" requires comparing the parameter at issue to some reference.

Examining the facts of this case, we find that there is no proof of a parameter or standard to use to measure the "exposure" of employees performing the same type work. No evidence was presented by the Division of any standard, norm or comparison to show that the exposure was unusual and excessive.

In applying section 3384(a) to this employer, the Division admitted that it had no definition of "unusual" and "excessive," and that citing Employer was essentially a "judgment call" on the Division's part. The Division did not

¹⁴ *Webster's Third New International Dictionary Unabridged* (1981 ed.) similarly defines "excessive" as "characterized by or present in excess, exceeding the usual, proper or normal, very large, great, or numerous, greater than usual." It defines "unusual" as "being out of the ordinary, exceptional, remarkable, deviating from the norm."

¹⁵ 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.

further explain or justify that the "judgment call" was appropriate under the facts of this case.

The Division's primary witness, Doromal, was not qualified as an expert. Doromal testified that he relied on his experience, the information he developed through his inspection and the dictionary to determine that ramp service work brought about unusual and excessive hand cut exposure. He admitted he had no prior experience, guidelines or standards to support him when he made a "judgment call" in issuing the citation.

We are guided by Evidence Code section 550 in deciding whether the Division met its burden of producing evidence. "The burden of producing evidence as to a particular fact is on the party against whom the finding on that fact would be required in the absence of further evidence." (Evid. Code § 550) Board precedents also hold the Division has the burden of proof. For example: The Division must produce evidence at a hearing to establish by a preponderance of the evidence each element of a violation. *Howard J White, Inc.*, supra; see, also, *Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982), and *Travenol Laboratories*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct 16, 1980).

Although the Division's evidence showed that there was a hazard, it failed to show the hazard was unusual and excessive. In light of the definition of *excessive* as, "going beyond a normal limit" or "an amount or degree too great to be reasonable or acceptable," we must be able to find in the evidence what is a "normal limit" or what is "too great to be reasonable or acceptable" in order to determine whether Employer violated the regulation. The Division did not provide that evidence.

The Division responded to Employer's evidence (the written injury reports) describing the one hand cut and one puncture in 1999 by speculating that employees did not report all injuries or that they wore gloves to reduce the number of hand cut injuries and therefore that was the reason so few injuries occurred¹⁶. We draw another inference, however, from the testimony that hand cuts were not reported unless thought to be serious by the affected employees, namely that the cuts were not so serious as to concern adults having a healthy concern for their wellbeing to seek assistance or report the event to Employer.

17

The union representative testified he wanted employer to provide gloves to prevent cuts, but then also testified he opposed the wearing of gloves to be mandatory for employees. That testimony undermines the probative value of

¹⁶ The Division acknowledged that employees were required to report all injuries.

¹⁷ This is not to say that any injury is acceptable; zero is the preferred number of such events. The evidence, however, does not support a finding that the exposure here was unusual and excessive. Further, the testimony was that about half the affected employees wore gloves some of the time, and the other half did not.

other testimony that employees were exposed to unusual and excessive amounts of hand cuts because one can logically assume that if the exposure were as great or frequent as portrayed, there would not be opposition to a mandatory wearing of gloves to prevent injury.

Although the evidence presented by the Division covered several different types of injuries, as noted above there was actual direct testimony of only one reported hand cut and one reported puncture injury. Both the number and frequency of such injuries can only be seen as small given the size of the workforce involved and the volume of bags and other cargo items handled. The numerous statements from the Division's witnesses of the possibilities that, "...an employee could cut a hand" or "could cut hands", must be viewed as speculation without specific facts to support such occurrences or even supporting such hypotheses. There must be reliable proof that employees are endangered. *Rudolph & Sletten Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981).

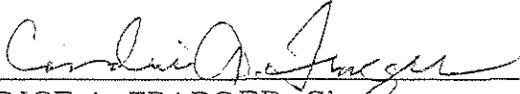
DECISION AFTER RECONSIDERATION

We normally give great deference to the factual findings of the ALJ. However, in this case we cannot agree with the conclusion that the exposure to ramp service employees has been established by a preponderance of the evidence to be "unusual and excessive" so as to constitute a violation of section 3384(a).

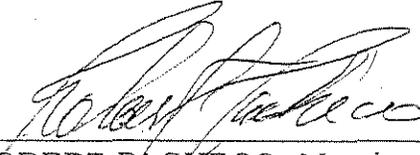
We are mindful of the purpose of the California Occupational Safety and Health Act to assure safe and healthful working conditions for all California working men and women to minimize workplace injuries, but we do not apply that purpose in a vacuum. Rather, in enforcing the Act, we acknowledge that the Standards Board is delegated the authority to adopt effective occupational safety and health standards and orders effectuating the purpose of the Act. (Labor Code § 142.3). However, without some point of reference from the Standards Board we do not presume to create a definition of standards or criteria applicable to interpretation of the words "unusual and excessive" found in section 3384(b) where neither the Standards Board nor the Division have provided effective regulatory interpretation or guidance to assist enforcement.

Based on the facts of this case we find that the supporting evidence presented in attempting to establish "unusual and excessive" exposure to hand injuries, is not of such probative force that we can find a violation. That is especially true in the face of countervailing written evidence produced by Employer that was not contradicted by evidence of equal or greater probative value.

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: FEB 15 2007

A.M.

