

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

In the Matter of the Appeal of:

**UNITED PARCEL SERVICE
1999 South 7th Street
San Jose, CA 95118**

Employer

DOCKET 14-R1D2-1779

DECISION

Statement of the Case

UNITED PARCEL SERVICE (“Employer” or “UPS”) is a shipment company which has offices in San Jose, California. Beginning on February 10, 2014, the Division of Occupational Safety and Health (“the Division”) through David Becker (Becker), Associate Safety Engineer, conducted an inspection at 1999 South 7th Street, San Jose, California. On May 5, 2014, the Division cited employer for a general violation of Title 8, California Code of Regulations¹ for failure to guard conveyors to prevent boxes from falling and injuring employees. Employer filed a timely appeal of the citation which contested whether the safety order was violated, whether the abatement requirements were reasonable, and whether the proposed penalty is reasonable.²

The matter was heard in Oakland, California before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on February 25, 2015 at 1515 Clay Street, Suite 1301, Oakland, California. The Division was represented by David Becker, Associate Safety Engineer, Division of Occupational Safety and Health, Fremont District. Employer was represented by Carla J. Gunnin, Esq. Jackson Lewis, PC.

The Division and the Employer presented witnesses and documentary evidence which were accepted into evidence. Employer submitted a post-hearing brief on March 23, 2015. The matter was submitted for decision on April 6, 2015.

Issues

- A. Did the Division establish that 1) conveyors pass over 2) areas occupied or used by employees 3) conveyors are not guarded to prevent the material being transported 4) from falling and causing injury to employees?**

¹ Citation 1 alleges a violation of Section 3999(d) with a proposed penalty of \$1,125. Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

² At the beginning of the hearing, Employer withdrew from its appeal the issue re: whether the classification of “general” was correct.

- B. Were employees exposed to the hazard of packages falling on them?**
- C. Are the abatement requirements reasonable?**
- D. Was the penalty of \$1,125 reasonable?**

Findings of Fact

1. On February 10, 2014, employees who load and unload packages for UPS worked under and next to conveyors. The conveyors pass over areas used by employees.
2. The conveyors transport materials, including packages which weigh between five and twenty pounds.
3. Conveyors were not guarded in many places in which the employees can be hit by falling packages.
4. Packages fell onto employees from conveyors or into the pathway of employees.
5. Employer provided no evidence that the suggested abatement was not feasible.
6. A penalty of \$450 is reasonable.

Analysis³

A. Employer failed to guard conveyors to prevent material from falling on employees in violation of Section of Section 3999(d).

The Division cited employer for a violation of Section 3999(d), which provides:

Conveyors passing over areas that are occupied or used by employees shall be so guarded as to prevent the material transported from falling and causing injury to employees.

Citation 1, Item 1 alleges:

Conveyors are not guarded to prevent boxes from falling and possibly causing injury in at least the following four areas:

- 1) Small sort Pink Belt to grade level.
- 2) Pink belt pickoff area to grade level.
- 3) Orange belt to grade level.
- 4) Blue belt to floor grating and also to grade level.

Section 3999(d) requires proof that 1) conveyors pass over; 2) areas occupied or used by employees; 3) conveyors are not guarded to prevent the

³ Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

material being transported; 4) from falling and causing injury to employees. The purpose of Section 3999(d) is to protect employees from the hazard of objects falling on employees when material is transported.

The Division has the burden of proving each element of its case including the applicability of the safety order cited, by a preponderance of the evidence. (*Cambrio Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsider (Dec. 31, 1986), p. 4; *Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsider (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of *probability of truth*, or of evidence that, when weighed (in terms of quality) with that opposed to it, has *more convincing force and greater probability of truth*. (*Leslie G. v. Perry & Associates* (App. 2 Dist. 1996), 50 Cal.Rptr.2d 785, 43 Cal.App.4th 472 [review denied].)

1. Conveyors pass overhead.

The evidence shows that there were conveyors passing overhead. The photographs taken during the inspection by the Division's Inspector, David Becker (Becker) show conveyor belts which carry packages at higher levels. (Exhibits 3-4, 3-5 and 3-6.) The Orange belt is ten to twelve feet from ground level; the Pink belt is seven to eight feet from ground level; the Brown belt is over six feet from the ground level in certain locations, and descends to a lower level.

2. Conveyors are in areas occupied or used by employees.

The conveyors are in areas occupied or used by employees. The photographs in Exhibit 3-1, bottom right side and Exhibit 3-2, bottom left side, show conveyors which run near the ceiling level, above the worksite. The Pink belt is seven to eight feet from ground level, and runs along the walkway frequently used by employees. In Exhibit 3-2, the photograph marked "Brown belt" is over six feet from the floor in certain locations and descends to a lower level. The walkway along the side of the Brown belt is regularly used by employees. Exhibit 3-7 depicts packages which are either thrown from the sort aisle next to the Pink belt, three feet above to the Brown belt or fall off of the Brown belt. Approximately a dozen or more packages can be seen on the ground under the conveyor in the photograph.

Lenard Ritzman (Ritzman), UPS San Jose Center Manager who worked for UPS for thirty years, testified that he accompanied Apolinar and the Division's Inspector, David Becker (Becker) on the walk around the San Jose facility on February 10, 2014. Ritzman corroborated Becker's and Apolinar's testimony concerning the accuracy of the photographs in Exhibits 3-1 through 3-10.⁴ He testified that he took photographs at the same time as Becker. He confirmed that

⁴ UPS disputes the authentication of Exhibits 3-11 through 3-14, black and white photographs which may have been taken by a person other than Becker. Becker acknowledged that he was not sure he took the photo in Exhibit 3-13 and was not in the location depicted in Exhibit 3-14. Accordingly, Exhibits 3-11 through 3-14 were not admitted into evidence.

the photographs Becker took (Exhibit 3-1 through 3-10) were the same as the photographs he took that day.

3. Conveyors are not guarded to prevent packages from falling.

The conveyors are not guarded to prevent the material being transported from falling. Ramoncita Apolinar (Apolinar), the union steward, who has worked at UPS as a Package Handler for 13 years, testified that she and the employees who worked in her area work are exposed to falling packages. The packages vary in weight and can be up to twenty pounds. On the Orange belt, packages are more likely to fall when one diverter⁵ is not functioning, which causes the packages to build up and go over the sides of the rails on the conveyor belts. Apolinar can be seen in the photograph in Exhibit 3-2, in front of the packages which are jammed up, near the slide area on the Brown belt. George Durke (Durke), UPS Manager for Industrial Engineering Department testified that even in the locations in which side pans were installed to the conveyors, the packages have gone over the side pans.

4. Packages are not prevented from falling and causing injury to employees.

The packages are not prevented from falling and causing injury to employees. Apolinar has seen boxes fall off the conveyor belts from the overhead level to grade level fifteen feet below. She testified that the packages fall onto employees frequently. Apolinar has been scratched and bruised from packages which hit her while she is performing her duties. Employees have reported to her that packages have fallen off the belts from the elevated levels. The packages also fall from conveyor belts which are at waist level to the floor level. (Exhibits 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, and 3-10.) It is also common for packages to fall from the Pink belt, which is seven to eight feet from ground level, along the walkway frequently used by employees.

The record establishes that the conveyors were not guarded in many places in which the employees can be hit by falling packages. (Ritzman; Apolinar.) Exhibit 3-2 illustrates packages which are jammed up, near the slide area, which can fall on employees. Packages fall from the Orange belt, when one diverter is not functioning, causing packages to build up and go over the sides of the rails. Packages fall on employees standing next to a waist high conveyor, when it is jammed up, as shown near the slide area in Exhibit 3-2, lower left side. Packages which are thrown from the Pink belt on the sort aisle to the Brown belt may hit an employee in the walkway adjacent to the Brown belt.

Additionally, the diverter can close and cause the packages to spill over the diverter when a wave of packages occurs. "A bulge of packages can be caused by

⁵ A "diverter" is an extension of the side pan which re-directs the packages on the conveyor to another location.

the unload rate, the flow simulation, people stopping and starting the conveyor, or a jam on a conveyor that was broke free.” (Durke, Hearing transcript, p. 265. ⁶)

Employer argues that the safety order does not apply to the facts of this case because no employees were injured due to falling material. It argues that the Standards Board intended that the Division is required to establish both falling packages and injury to employees as a result of falling packages.⁷ This analysis is rejected. Safety Orders, like statutes, are not to be interpreted in a manner "which defies common sense, or leads to mischief or absurd results." (*Troy Gold Industries, Ltd.*, Cal/OSHA App. 80-749, Decision After Reconsideration (November 18, 1983).) "If possible, the words should be interpreted to make them workable and reasonable [], in accord with common sense and justice, and to avoid an absurd result []." (*Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012) and citations therein.)

The lack of an effective guard on the conveyors, which is found to exist here, is the type of hazardous condition that the safety order is designed to prevent. The Division was not required to establish that employees were injured due to the violation of Section 3999(d). The words, "injury to employees" refers to injuries caused by material falling on them while the packages are being transported. It is not an element to be established, but rather is a consequence to be avoided.

B. The employees were exposed to the hazard of being hit by packages that fall off the conveyors.

The Division may establish employee exposure by showing the investigator observed employees accessing the zone of danger while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The hazard associated with lack of a guarding on the conveyors is that of objects falling on employees in the walkway. The most likely injury in the event of an accident caused by the violation is scratches and bruises, or worse, depending on the size of the box and where it hit the employee.

⁶ References to the unofficial hearing transcript are designated ("Hearing transcript, p. ___"), followed by page number. The official record of the hearing in this appeal is the audio recording maintained by the Appeals Board.

⁷ *Chevron USA*, 2015 CA OSHA App. Bd. LEXIS 1, 67-68 was cited by the Employer. ALJ decisions are not binding on the Appeals Board and it was improper for Employer to cite such decision. (*Pacific Ready Mix*, Cal/OSHA App. 79-1550, DAR (Apr. 23, 1982) and *Western Plastering, Inc.*, Cal/OSHA 79-032, DAR (Dec. 28, 1993).) The analysis by an ALJ in another proceeding neither binds another ALJ nor has any precedent value in determining a similar issue. (Sections 350.1(a), 385(a); Labor Code Section 6608.) The ALJ's analysis in *Chevron USA* supports a finding that the plain meaning of the safety order is applicable: "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls."

Employee exposure was established through the photographs taken during the inspection by the Division's Inspector, David Becker (Becker), and the testimony of Apolinar and Ritzman. Apolinar testified that she and the employees who worked in her area work are exposed to falling packages. She reported this hazard to her supervisor and then to his supervisor.⁸

Employer argued that the packages were not falling off the Brown belt, but fell on the ground because employees were tossing them. Ritzman observed employees throw packages from the Pink belt on the sort aisle, which is waist high, down to lower level on the Brown belt. Occasionally, they miss the conveyer and the packages hit the ground in the walkway adjacent to the Brown belt. Ritzman marked the photograph with purple marker where the employees stand and place or throw the packages to the Brown belt. (Exhibit 3-2, upper left side.) The packages weigh between five to ten pounds and fall a distance of three feet from the sort aisle.⁹ Whether the packages fall off the conveyor or are thrown from another level, the employees come within the zone of danger of being hit by a package.

The Division established that the employer violated Section 3999(d).

C. Abatement requirements are feasible.

The employer has the burden of proving that the abatement requirements are not feasible, after the Division establishes a violation of a performance standard. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Decision After Reconsideration (May 30, 2014); *Campbell Soup Company*, Cal/OSHA App. 77-0701, Decision After Reconsideration (May 5, 1980).) The employer did not argue that the evidence showed a lack of feasibility of abating the violation. (Durkee, Hearing transcript, p. 261.)

If the employer believed that there was no feasible method of compliance with a safety order, or the safety order was unreasonable, it could have applied to the Occupational Safety and Health Standards Board for a variance, or to have the safety order repealed or amended. Labor Code Sections 142.3 through 142.4. (*Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsider (Feb. 19, 1985), citing *Hooker Industries, Inc.*, Cal/OSHA App. 77-525, Decision After Reconsider (Feb. 24, 1982); and see *Paradise Post*, Cal/OSHA App. 85-1769, Decision After Reconsider (Oct. 16, 1987).) No evidence that

⁸ UPS argues that no grievance was filed concerning this issue. Apolinar testified credibly that she filed a grievance regarding the hazard of falling packages which is the subject of the citation at issue here. Ritzman testified that he was aware that Apolinar filed a grievance with her supervisor regarding packages falling off the load wall and has filed many other grievances, but no grievance was filed concerning the issues raised in this appeal. It is not necessary to resolve this issue, as the Division is not required to establish that a grievance was filed.

⁹ Employees have been disciplined in the past for failure to follow company procedures regarding throwing packages which land in the walkway. Chris Allen (Allen), UPS Comprehensive Health and Safety Process Manager testified that the packages are supposed to be set down on the Brown belt, rather than tossed or thrown.

employer sought a variance was provided. For all the foregoing reasons, and because Employer did not present any evidence to demonstrate that the abatement was not feasible, the abatement requirements are found to be reasonable.

D. The Proposed Penalty is Reasonable.

The Division must calculate proposed penalties in accordance with its regulations and present proof sufficient to support its calculations on likelihood, etc. (*M1 Construction, Inc.* Cal/OSHA App. 12-0222, Decision After Reconsider (July 31, 2014); *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317/318, Decision After Reconsider (Sept. 27, 1990).) When the Division presents no evidence to prove a disputed penalty, employer is entitled to maximum credits and adjustments under DOSH’s penalty setting regulations. (*Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsider (Dec. 4, 2003), citing *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsider (Oct. 21, 2003).)

David Becker presented Exhibit 2, Division’s Proposed Penalty Worksheet, which shows how the proposed penalty was calculated for Citation 1, Item 1, which was classified as “general”.

Severity was rated as “high”. The definition of “high” severity is: “Loss of more than one day from regular work or normal activity including time for medical attention; or considerable temporary discomfort.” (Section 335(a)(1).) Severity was rated as “high” based on evidence that considerable temporary discomfort would result, if a package fell on an employee. Employer did not rebut the evidence presented by the Division regarding the severity rating. The initial base penalty for a general violation with a “high” rating is \$2,000. (Section 336(b).)

Extent was rated “medium”.¹⁰ This rating is established by evidence which shows that the employees were in the zone of danger and exposed to the hazard of falling packages due to the failure to comply with the safety standard. No adjustment to the penalty was made.

Likelihood was rated “high”. “Likelihood” is defined in §335(a)(3) as:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on

- (i) the number of employees exposed to the hazard created by the violation, and
- (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the

¹⁰ When the safety order violations do not pertain to employee illness or disease, “medium” extent exists when occasional violation of the standard occurs or 15-50% of the units are in violation. (Subsection 335(a)(2)(ii).)

employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: LOW, MODERATE OR HIGH.

If there was evidence in the record of the number of employees exposed to the hazard and the extent to which the violation resulting in injury, the “high” rating for likelihood would result in an increase of 25% of the base penalty.

(Section 336(b).) However, at the hearing the inspector did not explain how likelihood was calculated and no evidence was presented which supported a “high” rating. Employer must be given maximum credit or a “low” likelihood rating, which requires the the initial base penalty to be reduced by 25% from \$2,000 to \$1,500. (Section 336(b).)

The Proposed Penalty Worksheet shows that the following penalty adjustment factors were applied: 0% for good faith¹¹; no credit was given for size because there were more than 100 employees (0%); history was rated “good” (10%) because Employer did not have any history of serious, willful or repeat violations within the prior three years. (§ 336(d)(3).)

“Good faith” is defined in subsection 336(a)(ii)(c) as:

The Good Faith of the Employer-is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer’s awareness of CAL/OSHA, and any indications of the employer’s desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good faith is rated as GOOD-Effective safety program. FAIR-Average safety program. POOR-No effective safety program.

However, the evidence did not support the good faith rating of 0%, in light of the fact that the employer was not cited for deficiencies in their safety program. Further, there was no testimony about the reason for the 0% good faith rating. The Employer must be given maximum credit, resulting in a 30% reduction of the gravity-based penalty. Based on the Proposed Penalty Worksheet, the maximum 10% credit for good history was given. The correct adjustment based on 30% for

¹¹ “Good faith” is defined in §336(a)(ii)(c) as: “The Good Faith of the Employer-is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer’s awareness of CAL/OSHA, and any indications of the employer’s desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good faith is rated as GOOD-Effective safety program. FAIR-Average safety program. POOR-No effective safety program.”

good faith and 10% for history is 40%. A 40% credit results in a \$600 reduction of the penalty to \$900, calculated as: $40\%/\$1,500 = \600 ; $\$1,500 - \$600 = \$900$.

A 50% abatement credit must be applied.¹² A review of the proposed penalty indicates that the penalty of \$450 is appropriate here. (Sections 335 and 336(d)(1) – (5)). The penalty of \$450 is reasonable and assessed, as set forth in the summary table.

Conclusion

Employer's appeal is denied. Citation 1, Item 1 is affirmed.

Order

It is hereby ordered that Citation 1, Item 1 is established, as indicated above and as set forth in the attached Summary Table. It is further ordered that the penalty of \$450 is assessed, as set forth in the attached Summary Table.

DATED: May 4, 2015
MD:sp

MARY DRYOVAGE
Administrative Law Judge

¹² Application of the 50% abatement credit is not discretionary; it must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).)

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
UNITED PARCEL SERVICE
Docket 14-R1D2-1779
Date of Hearing: February 25, 2015**

<i>Exh. No.</i>	Exhibit Description
1	Jurisdictional Documents
2	Proposed Penalty Worksheet (1 page)
3-1	Three photos: upper left - wall chart re: Dart Plan; lower left - packages jammed on conveyer; and lower right - shop floor with overhead slide, belts and metal roller.
3-2	Four photos: upper left - packages on floor next to conveyor; upper right - bags on the ground and packages jammed on conveyer; lower left - packages jammed on Brown Belt conveyor; lower right - view of metal roller from above.
3-3	Four photos: upper left - view of metal roller from above; upper right - view of metal roller jammed with packages; lower left - packages jammed on conveyer; lower right - view from above showing jammed packages.
3-4	Photo of workplace with boxes on shelves under overhead conveyer (Enlargement of Exhibit 3-3, upper left).
3-5	Photo of workplace with boxes on shelves under overhead conveyer (Enlargement of Exhibit 3-3, lower right).
3-6	Photo of workplace with boxes on shelves under overhead conveyer (duplicate of Exhibit 3-4).
3-7	Photo of package wedged between conveyor and poll, which has not yet fallen to the floor and packages on floor, which have fallen off conveyor belt.
3-8	Photo of packages jammed on metal roller of conveyer - Enlargement of Exhibit 3-3, lower left.
3-9	Photo of packages jammed on metal roller of conveyer - Enlargement of Exhibit 3-3, upper right.

3-10 Photo of packages jammed on metal roller of conveyer –
Enlargement of Exhibit 3-1, lower left.

Employer's Exhibits

***Exhibit
Letter***

Exhibit Description

- | | |
|-----|---|
| A | Photo showing three conveyer belts including Sort aisle belt, Orange belt and Brown belt. |
| B | Photo of unload tunnel in front of Brown belt. |
| C | Photo of slide from Brown belt conveyer into bin next to label maker. |
| D-1 | Chart – 2014 Health & Safety Committee listing concerns raised in Injury Prevention Reports, SWM Observations, Safety Committee Minutes, and Employee Concerns and Actions Taken. (3 pages) |
| D-2 | Safety Committee Meeting Minutes 2014 for UPS District 0386 – San Jose (27 pages) |
| E | OSHA Form 301 – Jonathan Legasbi, Jan. 27, 2014 |

Witnesses Testifying at Hearing

1. Ramoncita Apolinar, UPS Package Handler
2. David Becker, Associate Safety Engineer, Division
3. Chris Allen, UPS Comprehensive Health and Safety Process Manager
4. Lenard Ritzman, UPS San Jose Center Manager
5. George Durke, UPS Manager for Industrial Engineering Department

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

05/04/2015
Date

Site: 1999 South 7th Street, San Jose, CA 95118

Date of Inspection: 02/10/14 - 04/29/14

Date of Citation: 05/05/14

IMIS No. 317351922

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R1D2-1779	1	1	3999(d)	G	[Failure to guard conveyors to prevent boxes from falling and injuring employees.] ALJ affirmed, but reduced penalty based on evidence.	X		\$1,125	\$1,125	\$450
Sub-Total								\$1,125	\$1,125	\$450
Total Amount Due*										\$450

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board.
All penalty payments must be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142
 (415) 703-4291, (415) 703-4308 (payment plans)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ: MD
POS: 05/04/15