

**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 AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taking the petition for reconsideration filed by United Parcel Service (Employer or “UPS”) under reconsideration, renders the following decision after reconsideration.

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an inspection on February 10, 2014 at a United Parcel Service facility located at 1999 South 7th Street, San Jose, California. On May 5, 2014, the Division issued one citation to Employer, alleging a violation of a workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Employer filed a timely appeal of the citation. In its appeal, Employer contested whether the safety order was violated, the abatement requirements were reasonable, and whether the proposed penalty was reasonable. A hearing was held before an Administrative Law Judge (ALJ) of the Board on February 25, 2015, in Oakland, California. The ALJ issued a Decision upholding the sole violation on May 4, 2015, and assessing a \$450 penalty.

Employer filed a timely petition for reconsideration of the ALJ’s Decision; the petition argues that the evidence submitted by the Division does not support the ALJ’s findings of fact, and that the findings of fact do not support the ALJ’s order establishing Citation 1, Item 1 and the penalty of \$450. The Board took the Employer’s petition for reconsideration under submission on

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

July 21, 2015. Neither party filed a response to the Board's order taking the petition for reconsideration under submission.

ISSUES

- (1) Did the ALJ properly interpret section 3999 subdivision (d)?
- (2) Did the Division demonstrate a violation of section 3999 subdivision (d) by a preponderance of the evidence?

FINDINGS OF FACT

After an independent review of the evidentiary record, the Board makes the following findings of fact:

1. United Parcel Service employee Ramoncita Alpolinar (Alpolinar) has been employed with Employer for approximately 13 years. She works around the conveyors that carry packages of various sizes that are delivered by Employer.
2. Conveyors known as the "pink belt", "orange belt", "blue belt", and "brown belt" pass at different heights in the facility. The pink belt is an elevated belt, six to eight feet above the ground. The orange belt runs ten to twelve feet above ground level. The brown belt is four feet to six feet above ground level. Packages carried on the belts may weigh from five to twenty pounds.
3. The belts have side pans that are approximately one to two feet tall. The belts also have diverters, which are an extension of the side pan, and 'divert' the flow of packages.
4. Employer was not aware of any recordable injuries having resulted from falling packages in the San Jose facility.

DECISION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding, including the petition for reconsideration filed by Employer. The Board has taken no new evidence. Employer argues that the ALJ erred in finding the Division met its burden of proof in demonstrating a violation of section 3999 subdivision (d). More specifically, Employer contends that the ALJ has incorrectly interpreted the safety order.

(1) Did the ALJ properly interpret section 3999 subdivision (d)?

Employer was cited for a violation of section 3999 subdivision (d), which reads as follows:

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.

The Division's citation also includes the following alleged violative description:

Conveyors are not guarded to prevent boxes from falling and possibly causing injury in at least the following four (4) 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.

In its petition for reconsideration, Employer argues that the safety order has multiple elements that must be demonstrated by the Division for a violation to be upheld: there must not only be a showing that materials fall from conveyors, but that the falling materials have caused an injury to an employee. (Employer petition, p. 7.) Employer suggests that because the safety order is written in the conjunctive, this is the only reasonable interpretation, and an alternative reading would impermissibly change the plain language.

The Board is in disagreement with Employer's contention on this point. We interpret the safety orders in "a manner that affords maximum protection to workers." (*Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).) Safety orders are promulgated by the Standards Board to foster safe and healthful workplace environments. To that end, we agree with the ALJ that the words "injury to employees" in the safety order do not refer to an element to be established, but instead describe the possible consequence of falling material-- a consequence the standard is designed to avoid. Where a safety order is susceptible of two constructions, one leading to mischief and absurdity, and the other leading to sound sense and wise policy, the Board will adopt the latter construction, and does so here. (*Teichert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002), citing *Lockheed Missiles & Space Co., Inc.*, Cal/OSHA App. 79-492, Decision After Reconsideration (Apr. 14, 1982); *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson* (1912) 164 Cal. 221.)

(2) Did the Division demonstrate a violation of section 3999 subdivision (d) by a preponderance of the evidence?

It is the Division's burden to establish the existence of a violation by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) As part of that showing, the Division must prove employee exposure to the alleged violative condition. (*Benicia Foundry & Iron Works, Inc.*,

Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) In order to show exposure, an actual injury need not be demonstrated; the Division must only show that employees have access the zone of danger created by the alleged violative condition in the course of their work. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA app. 00-2976, Decision After Reconsideration (Apr. 24, 2003); *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (Apr. 30, 1980); see also, *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990) [It is the intended purpose of the Occupational Safety and Health Act to prevent accidents, not to wait for accidents to occur and lay blame after the fact.].) There is no dispute that Employer utilizes conveyors at its San Jose facility, some of which pass over walkways and other areas where employees work, sorting packages and completing other tasks. Employee exposure to the zone of danger is therefore established.

Testimony and evidence also establishes that the conveyors were guarded in most areas with 12 gauge steel side pans, ranging in size from one to two feet high. The side pans run the length of the conveyors on the non-operation side, according to George Durkee (Durkee), a UPS facilities designer and engineering manager, where “people are interfacing with the conveyor or where other conveyors feed another conveyor.” There are also diverters connected to the side pans, which serve to channel the flow of packages from one belt to another.

While Employer utilizes a form of guarding, testimony and evidence demonstrates that Employer’s guarding did not effectively prevent at least some of the packages transported from falling onto areas that are occupied by employees. Testimony from Alpolinar, as well as Employer’s own witnesses, establish that the diverter and side pan system has weak spots that allow packages to fall from the belts and into areas where employees are present, exposing employees to the risk of being hit by a package.² Chris Allen (Allen), Employer’s Comprehensive Health and Safety Director, noted that packages can inadvertently fall through the diverter gap when tossed by employees onto the belt. Allen testified that he had seen packages fall from belts, although he had not seen packages fall over the side pans. Durkee admitted that he had seen packages spilling through in the gap area of the diverter, contrary to its intended design. Photographic evidence from the Division’s inspection also shows packages that according to testimony, have likely fallen through a diverter gap, and packages that have become stacked up on the conveyor belt. Durkee theorized that backups on the conveyor may create package spillages,

² The Board has reviewed the record in its entirety and declines to disturb the credibility determination of the ALJ as to the Division’s witness, Ramoncita Alpolinar. “[A]n ALJ’s credibility determinations are due great weight because she is present to observe the witness’ demeanor on the stand.” (*General Truss Co., Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011), citing, *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318-19.)

and described some of the problems that would lead to conveyor belt backups. Durkee's testimony on this point is consistent with Alpolinar's, who testified that large flows of packages start to build up on the belt, and packages eventually jam up and flow over the side guards or through the diverter gaps, falling onto the floor below.

The Division established that Employer violated Section 3999 subdivision (d) by a preponderance of the evidence.

DECISION

The Decision of the ALJ is upheld. A general violation of Section 3999 subdivision (d) has been shown. The ALJ's penalty calculation is upheld, and a \$450 penalty is assessed.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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