BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1298318**
UNITED AIRLINES **233 S. WACKER DRIVE, 11TH FLOOR HDQLD** **CHICAGO, IL 60606**	**DECISION**
Employer	

Statement of the Case

United Airlines (Employer) is a commercial airline. On February 26, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Geraldine Tolentino, commenced an accident investigation at San Francisco International Airport, located in San Francisco, California, after report of an injury at the site on February 19, 2018. On August 17, 2018, the Division issued one citation to Employer, for failure to operate an industrial truck in a safe manner.

Employer filed a timely appeal of the citation, asserting that the safety order was not violated, the classification was incorrect, and the penalty was unreasonable. Employer also asserted a series of affirmative defenses.[1]

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. ALJ Elmendorf conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform, on February 10 and 11, April 15 and 16, and May 6, 2021. Andrew Sommer and Daniel Deacon, attorneys at Conn Maciel Carey, LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The matter was submitted on August 9, 2021.

ALJ Elmendorf was unavailable to issue the Decision as of the date of submission. The parties waived a hearing de novo and stipulated that another judge could review the record of the completed hearing and issue a Decision based thereon. ALJ Kerry Lewis reviewed the hearing record and hereby issues this Decision.

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did the employee move his industrial truck without being certain that all persons were in the clear?

2. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

3. Did Employer rebut the presumption that the violation cited was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

4. Did the Division establish that the citation was properly characterized as Accident-Related?

5. Is the proposed penalty reasonable?

Findings of Fact

1. On February 19, 2018, Employer's employee, Gerardo Pascual (Pascual), struck another of Employer's employees, Scott Wong (Wong) while operating a powered industrial vehicle (tug), towing a baggage cart and two dollies with luggage containers on top of them. The tug, cart, and dollies are collectively referred to as a "train."

2. Pascual and Wong parked their trains at a conveyor belt (TX3) that was wide enough to accommodate two vehicles and it was not uncommon for ramp agents to park side-by-side in the area.

3. After Pascual finished unloading a baggage container at TX3, he walked around his train to check locks on the dollies. Pascual observed Wong standing between the two trains. The trains were parked side-by-side and had three to five feet of space between them.

4. When Pascual walked around his train prior to moving forward, he did not speak to Wong.

5. Once inside his tug, Pascual was unable to see the area alongside his train because there were no side view mirrors. Although the tug had a rear view mirror, the view in the mirror was obstructed by the baggage cart.

6. Pascual honked his horn before moving his train forward. Pascual did not look out the right side window to check the area where he had seen Wong just moments before.

7. There was no one designated at TX3 to give ramp agents hand signals to direct the movement of their vehicles.

8. When Pascual moved his train forward, Wong's lower leg was struck by the rear dolly, causing him to suffer an ankle injury that required surgery and ten days of hospitalization.

9. The penalty for Citation 1 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did the employee move his industrial truck without being certain that all persons were in the clear?

California Code of Regulations, title 8, section 3650, subdivision (t)(12),[2] governing the operation of industrial trucks, provides:

> (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following rules:
>
> (12) Operators shall look in the direction of travel and shall not move a vehicle until certain that all persons are in the clear.

In Citation 1, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on February 19, 2018, the employer failed to ensure an industrial truck was operated in a safe manner. As a result, a ramp agent suffered a serious injury when it was not made certain all persons were in the clear of the surroundings of the dolly and tug before it was moved.

Compliance with section 3650, subdivision (t)(12), requires that industrial truck operators comply with two requirements for movement of the industrial trucks. "First, operators must look in the direction of travel; and second, they shall not move a vehicle until certain that all persons

[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

are in the clear." (*Ashley Furniture Industries, Inc.*, Cal/OSHA App. 1016514, Decision After Reconsideration (Nov. 7, 2017), citing *Gayle Manufacturing Company, Inc*., Cal/OSHA App 07-3104, Denial of Petition for Reconsideration (May 6, 2010).)

There was no question that the tug operator, Pascual, was looking forward, in the direction of travel, at the time of the accident. As such, the issue to be determined is whether there was a violation of the safety order based on the argument that Pascual moved the tug before being certain that everyone was in the clear.

The word "certain" in the safety order must be given effect. (*E.L. Yeager Construction Co., Inc*., Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) The Appeals Board interpreted the word "certain" in section 3650, subdivision (t)(12), using the dictionary definition and stated that the Standards Board "used the word in the sense of 'without any doubt, assured; sure; positive.' (Webster's New World Dictionary, Third College Edition, 1991.) Complying with that standard requires more than a quick or casual glance." (*Gayle Manufacturing Company, Inc*., *supra*, Cal/OSHA App. 07-3104.)

Pascual was transporting baggage from an incoming plane to one of Employer's conveyor belts, identified as "TX3." Pascual's tug was towing one baggage cart and two dollies with containers. While Pascual was unloading bags immediately adjacent to the conveyor belt at TX3, Wong parked his own tug and baggage cart next to Pascual's, with just a few feet between the two trains. Wong began unloading some of his bags to the conveyor belt while also sorting the bags on his baggage cart as he waited for his turn next to the conveyor belt. When Pascual was ready to move his train forward, he walked around his train to confirm the containers were properly locked on the dollies. As he checked the locks, Pascual observed Wong standing between the two trains sorting bags. Pascual testified that the two men did not speak to one another. Pascual then went to his tug, honked his horn, and began moving the train slowly forward. Another employee yelled to Pascual to stop moving because Wong had been struck by the wheel of Pascual's rear dolly.

Pascual's testimony and written statements to the Division and Employer were inconsistent with regard to whether he was moving his train to move his second dolly up to the conveyor belt for unloading or if he was leaving TX3 after completing all his unloading.[3] The inconsistent statements are factually irrelevant to the matter at hand because they do not change the operative facts: Pascual walked around the train to check the locks, he did not speak to Wong, he returned to his tug and honked his horn, and then proceeded to drive forward slowly.

[3] Pascual's written statements after the accident and his testimony on direct examination indicate that he was moving his train forward to position the second dolly at the conveyor belt. On cross-examination, Pascual said that he struck Wong as Pascual was departing from TX3. The change in the narrative appears to be the result of confusion, fear about giving testimony, and perhaps a language barrier, rather than a lack of credibility or intent to mislead.

Pascual testified that there are no side view mirrors on the tug and the rear view mirror was obstructed by the baggage cart, so he could not see behind him at all. He testified that it is Employer's policy that the ramp agents honk their horn before moving their train. Other than honking his horn before moving, Pascual did not take any steps to ensure that no one was in his train's path of travel before moving forward.

Of primary importance here is that Pascual knew that there was an employee in the vicinity of his train. Pascual had just observed Wong standing alongside the rear dolly with only a small distance of three to five feet between Pascual's and Wong's trains. When Pascual was checking the locks and saw Wong, he did not tell Wong that he would soon be moving his train. Upon returning to his tug, Pascual did not check the area where he had recently seen Wong and did not take any other actions to identify Wong's location before moving forward.

Pascual was not "certain" that Wong was in the clear, despite following Employer's policy of honking his horn and moving his vehicle forward. Simply following that policy did not under these circumstances make "certain" that all persons were in the clear. Accordingly, the Division established a violation of section 3650, subdivision (t)(12).".

2. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:

[…]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

Tolentino testified that there is a realistic possibility that an employee could suffer serious physical harm or death as a result of an operator moving a vehicle before being certain that all persons are in the clear. Tolentino testified that injuries suffered as a result of the violation could be crushing injuries, amputations, fractures, and other injuries resulting in hospitalization.

Wong testified that he was hospitalized for approximately ten days, during which time he underwent surgery on his injured ankle. This establishes that there was actual serious physical harm suffered by Wong. As such, there is not only a realistic possibility that the violation in Citation 1 could result in serious physical harm, but it was an actuality in this case.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 1 was properly classified as Serious.

3. Did Employer rebut the presumption that the violation cited was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Employer contends that it provides its ramp agents with training that includes ensuring that their vehicle's path of travel is clear. However, based on the testimony during the hearing and written statements from Pascual, either the content of Employer's training is insufficient, or the training itself is not being followed. In order to ensure that his path of travel was clear, Pascual testified that he believed that merely honking the horn was sufficient to alert Wong to his movement.[4] Pascual's interviews after the accident, as well as his testimony during the hearing, indicate that it is Employer's safety practice to honk the horn before moving.

Pascual acknowledged that, although he knew that Wong was working toward the rear next to his train, he could not see Wong from inside the tug. Pascual testified that the reason he was unable to see alongside the vehicle while he was inside the tug was because there were no side view mirrors. Jose Dominguez (Dominguez), Employer's Area Ramp Manager, testified that mirrors are not necessary on tugs because the tugs are small and "if you put your head out, you're going to see what you have on your left…" Dominguez did not say anything about the need for a ramp agent to see behind him along the right side of the vehicle.

Pascual, Wong, and another ramp agent, David Tahi (Tahi), testified that it was not unusual for a ramp agent to pull his train alongside another train at TX3 because it was the widest of the belt areas and could accommodate two trains side by side. Tahi testified that he did not know if anyone from management knew of this behavior, but he indicated that it was "common practice" and he was unaware of there being any rule preventing ramp agents from parking next to another train at TX3. Wong testified that he saw ramp agents parking next to other trains in TX3 "very often, specifically during busy hours." (Hearing Record, Day 2, p. 228, ln. 6.)

Additionally, Employer's Ramp Service Manual states that "United requires the use of the 'stop and move' hand signals" to facilitate movement of a chain of carts or dollies to the belt loader. (Ex. 13, pg. 6 of original document.) The witnesses testified that, despite the fact that the area was frequently congested, there was no one designated to provide hand signals to the ramp agents that were unloading at TX3 at the time of the accident.

There was sufficient testimony that Employer knew, or should have known, about the hazard of employees working on the ground in the area of baggage trains at TX3 based on testimony that two trains parking adjacent to one another at TX3 was a common practice. The witnesses provided testimony that TX3 was congested and that there was no one giving hand signals to guide the vehicles at the conveyor belt. Pascual testified that Employer's training required only that the ramp agent honk his horn to alert other employees that the vehicle was going to move.

[4] "When I blow my horn for safety protocol, if you hear the horn, you have to … go to the safe place." (Hearing Record, Day 1, p. 129, lns. 11-13; see also Day 1, p. 41-42.)

Employer's policy is especially deficient to the extent that it only requires the ramp service agent to honk the horn before moving the industrial truck when that operator knows other employees are on foot in the area. Such a policy charges the employees on foot with ensuring their own safety and is contra to the purpose of the safety order. (See *JAFEC USA, Inc*., Cal/OSHA App. 1290383, Decision After Reconsideration (Jun. 2, 2021) [Employer's policy of instructing on-foot workers to watch out for the equipment, and to communicate with operators through eye contact and hand signals, was insufficient to inform the excavator operator of Taylor's location].)

These facts support a finding that Employer failed to take "all the steps a reasonable and responsible employer in like circumstances should be expected to take" to prevent the violation from occurring. As such, Employer did not rebut the presumption that Citation 1 was properly classified as Serious.

4. Did the Division establish that the citation was properly characterized as Accident-Related?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

In 2018, at the time of the accident and issuance of the citation, Labor Code section 6302, subdivision (h), provided that a "serious injury" included, among other things, any injury or illness occurring in a place of employment or in connection with any employment which required inpatient hospitalization for a period in excess of 24 hours for other than medical observation.[5] Wong's injuries met the definition of "serious injury" based on the fact that he was hospitalized for more than 24 hours for treatment.

The violation established in Citation 1 was a powered industrial truck operator's movement of his vehicle before making certain that all persons were in the clear. Because Pascual was not certain that Wong was clear of his train before moving forward, Wong was struck by the wheel of the rear dolly. The injury was the result of the accident. As such, there is a direct nexus between the violation and the injury. Accordingly, Citation 1 was properly characterized as Accident-Related.

[5] In January 2020, Labor Code section 6302 was amended to remove the "in excess of 24 hours" qualification with regard to hospitalization, among other amendments.

5. Is the proposed penalty reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Tolentino testified about the basis for the Division's penalty and the Division's Proposed Penalty Worksheet was admitted into evidence. Employer did not present any evidence that the penalty was miscalculated or that there were any other circumstances that warrant a reduction in the penalty.

Accordingly, the penalty of $18,000 is found to be reasonable.

Conclusion

For Citation 1, the Division established that an operator of a powered industrial vehicle moved the vehicle without making certain that all persons were in the clear. The citation was properly classified as Serious, with an Accident-Related characterization. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1 is affirmed, and the penalty of $18,000 is assessed, as set forth in the attached Summary Table incorporated herein.

Dated: 09/03/2021

Kerry Lewis
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**