BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
UNITED PARCEL SERVICE, INC. **dba UPS** **8475 Pardee Drive** **Oakland, CA 94621** **Employer**	**1242676** **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 United Parcel Service, Inc. dba UPS's (Employer) Petition for Reconsideration under reconsideration, renders the following decision after reconsideration.

Jurisdiction

On December 5, 2017, the Division of Occupational Safety and Health (Division) issued two citations to Employer alleging three violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges a General violation of section 3203, subdivision (a)(2) [failure to establish, maintain, and implement an effective system for ensuring employee compliance with Employer's IIPP]. Citation 1, Item 2, alleges a General violation of section 3277, subdivision (j)(4) [failure to have the same rung spacing from landing platform to the first rung below the landing]. Citation 2, Item 1, alleges an Accident-Related Serious violation of section 3212, subdivision (a)(2)(A) [failure to protect ladderway floor opening].

On October 11, 2019, the ALJ issued a decision after a two-day hearing in which he upheld all violations and their proposed penalties. The Employer challenges the ALJ's Decision by arguing the facts and the law do not support the ALJ's Decision. (Employer's Petition, p. 2; Lab. Code, § 6617, subds. (c), (e).)

Issues

1. Did the ALJ correctly uphold Citation 1, Item 1, because Employer's IIPP did not include a system for ensuring employees' compliance with safe and healthy work practices?

2. Did the ALJ correctly uphold Citation 1, Item 2, because the spacing from the landing platform to the first rung of the ladder was not similar to the spacing between the rest of the ladder's rungs?

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

3. Did the ALJ correctly uphold Citation 2, Item 1, because Employer failed to protect a ship ladder opening with a swinging gate or equivalent protection? If not, was the passageway to the opening so offset that an employee could not walk directly into it?

4. Assuming the Board upholds Citation 2, did the ALJ correctly affirm the citation's Accident-Related Serious classification?

5. Assuming the Board upholds Citation 2, did the ALJ correctly find the Independent Employee Action defense (IEAD) does not excuse the violation?

Findings of Fact

1. Patrick Scott and Nida Soto were Employer's employees. Ms. Soto was a designated responder. Mr. Scott was both a package handler and a designated responder.

2. Designated responders contained the contamination in leaking packages, if necessary, and transferred the contaminated packages from the elevated platform to the ground below.

3. On June 9, 2017, Mr. Scott suffered serious physical harm as a result of the accident.[2] At the time of the accident, he was working as a designated responder.

4. The rung spacing between the landing platform and the first ladder rung was not similar to the spacing between the rest of the ladder rungs.

5. Employees, including supervisors, held the swing gate in an open position (with their hip, hand, or packages) so they could throw or guide boxes down the ladder. The act of holding the swing gate in an open position, when it should not be, rendered the opening at issue unprotected.

Analysis

1. Did the ALJ correctly uphold Citation 1, Item 1, because Employer's IIPP did not include a system for ensuring employees' compliance with safe and healthy work practices?

Citation 1, Item 1, alleges a General violation of section 3203, subdivision (a)(2). That section states,

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> …

[2] The parties stipulated to this finding of fact.

> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

The Division's alleged violative description (AVD) states,

> Prior to and during the course of the inspection, including but not limited to, on June 15, 2017, the employer's Injury and Illness Prevention Plan was ineffective in that the employer failed to ensure their employees complied with the following safe practices as stated in their Safe Work Methods Training Form:
>
> 1. Employees shall maintain three points of contact while ascending and descending ladders, and
> 2. Employees shall use the safety bar when on a platform.

Here, the Division first argues, "Employer did not have any written procedures about how to safely transfer packages from the elevated working platform, down the ship ladder, to the floor below" and that no other document included this process in writing. (Answer, p. 4.) However, the Board has previously rejected claims requiring an employer's IIPP to have a written procedure for each hazardous operation it undertakes. (See *OC Communications*, Cal/OSHA App. 14-0120, Decision After Reconsideration (March 28, 2016), fn. 9.)

Next, the Division alleges it established the violation at issue here by applying the listed options in subdivision (a)(2) to the two specific circumstances it also alleged in its AVD. However, the regulation uses general language and does not require employers to establish compliance as to specific work rules or policies like the three-points of contact rule and the failure to keep the swing gate in a closed position. (See, e.g., *Shimmick-Obayashi,* Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013); *Marine Terminals Corp. dba Evergreen Terminals,* Cal/OSHA App. 08-1920, Decision After Reconsideration (March 5, 2013).) As evident by its terms, subdivision (a)(2) is concerned with whether Employer's IIPP as a whole substantially complies with the regulation by "includ[ing] a system for ensuring that employees comply with safe and healthy work practices." The terms of subdivision (a)(2) do not require an IIPP to account for specific circumstances like the two the Division alleged in its citation.[3]

When analyzing section 3203, subdivision (a)(2), the Board has previously explained, "The listed methods are written with the disjunctive 'or,' and the final method allows for, 'any other such means that ensures compliance,' indicating that any one (or more) of the previous three methods are sufficient to ensure compliance…Therefore, the Division must show that Employer did not comply with any of the four listed options under section 3203(a)(2)." (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (March 5,

[3] Of course, the Board does not suggest an IIPP may ignore or fail to account for specific circumstances. Here, the Board merely notes such specific circumstances may be better addressed by other subdivisions within section 3203, rather than subdivision (a)(2).

2013).) Thus, the Division must demonstrate an employer's failure to substantially comply with subdivision (a)(2) by proving the employer did not have any of the four listed options, i.e., the Division must prove IIPP's deficiency in all four factors. On the other hand, employers may rebut the Division's case by demonstrating their IIPP as a whole includes a system for ensuring workers comply with safe work practices by establishing substantial compliance through any one of the four options. This is not to say that employers can meet the substantial compliance burden by a cursory showing or passing mention of any of the four listed options, since that would elevate minimal compliance to substantial compliance—an interpretation which the Board rejects.

As mentioned, the Division failed to meet its burden of proving Employer's IIPP did not substantially comply with the regulation at issue by proving it did not comply with all four of the options listed in the regulation. Consequently, the Board vacates the violation.

2. Did the ALJ correctly uphold Citation 1, Item 2, because the spacing from the landing platform to the first rung of the ladder was not similar to the spacing between the rest of the ladder's rungs?

Citation 1, Item 2, alleges a General violation of section 3277, subdivision (j)(4), which states:

> (j) Landing Platforms.
>
> (4) One rung of any section of ladder shall be located at the level of the landing laterally served by the ladder. Where access to the landing is through the ladder, the same rung spacing as used on the ladder shall be used from the landing platform to the first rung below the landing (Figure 10).

The Division's AVD states:

> Prior to and during the course of the inspection, including but not limited to, on June 15, 2017, the employer permitted employees to ascend and descend a permanently fixed ladder installed at 5000 W Cordelia Rd, Fairfield, CA, where the distance between the top surface of the landing and the top surface of the first rung below the landing was not the same as the rung spacing used on the fixed ladder.

In its Petition, Employer does not dispute the rung spacing between the landing platform and the first ladder rung was not similar to the spacing between the rest of the ladder rungs. Instead, it argues it was completely unaware of this violation despite its best efforts to inspect and monitor the facility through routine inspections. (Petition, p. 8.) Employer further claims the violation regarding the rung spacing was not readily apparent and right after the Division pointed out the issue, it corrected the hazard.

While the Board applauds Employer's effort in abating the violation upon notice, the Board finds Employer's arguments in its Petition do not explain away the clear violation here. The Division introduced pictures of measurements demonstrating the spacing from the landing platform to the first rung of the ladder was not similar to the spacing between the rest of the ladder's rungs.

As to the penalty calculations, the Employer perfunctorily asserts, "UPS respectfully requests…for the penalty to be reduced to $0." (Petition, p. 9.) Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Division did so here and 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*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Here, the burden is on the Employer to establish a basis for the Division's proposed penalty to be reduced to zero. Labor Code section 6616 requires the petitioning party "to set forth specifically and in full detail the grounds upon which the petitioner considers the final order or decision … to be unjust or unlawful, and every issue to be considered by the Appeals Board." But, the Employer fails to support its one sentence contention and the Board, like the courts, treats such an unsupported claim as waived. (*Bragg Companies dba Bragg Crane Service,* Cal/OSHA App. 1157198, Decision After Reconsideration (Nov. 2, 2018).)[4]

Thus, the Board upholds Citation 1, Item 2 and its proposed penalty.

3. Did the ALJ correctly uphold Citation 2, Item 1, because Employer failed to protect a ship ladder opening with a swinging gate or equivalent protection? If not, was the passageway to the opening so offset that an employee could not walk directly into it?

Citation 2, Item 1, alleges an Accident-Related Serious violation of section 3212, subdivision (a)(2)(A), which provides:

> Every ladder-way floor opening or platform with access provided by ladder-way, including ship stairs (ship ladders), shall be protected by guardrails with toeboards meeting the requirements of General Industry Safely Orders, Section 3209, on all exposed sides except at entrance to the opening. The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening.

The Division's AVD states,

> Prior to and during the course of investigation, including but not limited to, on June 15, 2017 the employer failed to ensure the ladder-way access to the "on-load" elevated platform had its swinging gate or equivalent protection in place to prevent employees from walking directly into the accessway.

[4] The Board similarly treats the one sentence contention in Employer's conclusion paragraph, merely stating, in part, "for the same reasons…the proposed penalty was unreasonable." (Petition, p. 21.)

> As a result, on 6/9/17, an employee was seriously injured when he bypassed the fall protection by holding open the swinging gate to the ladderway access opening to transfer a package to the lower level and stepped through and fell approximately 52.75 inches to the concrete working surface below.

Under section 3212, subdivision (a)(2)(A), the Division may prove a violation by either proving (1) lack of guardrails with toeboards on all exposed sides of the "ladder-way floor opening or platform with access provided by ladder-way, including ship ladders," except at entrance to the opening or (2) by establishing the opening through the railing did not have a swinging gate or equivalent protection and in case of an unprotected opening, the passageway to the opening was not so offset that a person could walk directly into it. The plain terms of the regulation make clear the Standards Board's intent to protect employees from fall hazards either while they are on the ladder-way floor opening or platform with appropriate guardrails and toeboards or while they are exposed to the hazard of "a person" falling into the opening.

As to the first method[5] of establishing the violation, while the parties stipulated the ladder-way here was a ship ladder, the Division did not seek to prove the violation through this method. Therefore, the Board will not further discuss it.

The Board will now address whether the ALJ correctly concluded the Division established the violation through the second method, concerned with protecting the opening. In his Decision, the ALJ found,

> Scott and Soto testified that they, together or alone, would regularly open the safety gate and move packages through the ship ladder opening that was "protected" by the swing gate. According to Scott and Soto, their supervisors viewed and were aware of this activity. No one ever informed them that this was an unacceptable practice or make any effort to prevent the opening of the closed swing gates. Further, no one trained the employees to move the packages using an alternate, safer procedure. In fact, Scott testified that he learned the procedure from supervisors.
>
> Employer presented no evidence showing it took any steps to ensure that the safety swing gates that accessed the elevated platform were closed when not in proper use. Nor did Employer show it otherwise took any steps to prevent the safety swing gates from being opened by unauthorized persons or used improperly.
>
> (Decision, pp. 7-8.)

Employer challenges the ALJ's findings on two bases. First, Employer argues the ALJ's finding that employees regularly opened the swing gate while moving packages down is not supported by the evidence. Relying on testimony in the record, Employer claims it did not train its employees

[5] As mentioned, the first method requires proof of lack of guardrails with toeboards on all exposed sides of the "ladder-way floor opening or platform with access provided by ladder-way, including ship ladders," except at entrance to the opening.

to transfer leaking packages down to the ground below by holding the swing gate open. Second, Employer claims even if one were to assume the swing gate was not even installed at the entrance to the opening, the platform was "so offset that a person cannot walk directly into the opening." (§ 3212, subd. (a)(2)(A).) In essence, Employer argues the passageway to the opening, i.e., the platform at issue, was not a work area and the opening is so offset that employees could not walk directly into it.

As the Board explained above, the purpose behind the regulation is to assure employees are protected from falling through an opening at issue either because of a swing gate or something providing equivalent protection, or because the passageway to the opening is "so offset" that an employee cannot walk into the opening. Here, injured employee Scott testified he would hold the swing gate open when a package was heavy and/or could not fit in the gap between the platform and the swing gate. Mr. Scott further testified sometimes when a package was too heavy, a supervisor would come to help with one of them holding the swing gate open and pushing the package forward and the other standing on the ladder to slowly release the package to the ground below. He explained he learned this method of keeping the gate open while transferring packages to the ground below from observing supervisors or other employees.

Inspector Stevenson's testimony provides further support for Mr. Scott's testimony. He also testified, during his investigation, Mr. Scott told him he would sometimes hold the gate open to throw boxes down. This conversation prompted the inspector to call Ms. Soto one more time to ask her whether she also held the gate open while throwing packages down—a question to which Ms. Soto responded in the affirmative.

As evident, the opening at issue here had a swing gate; however, the record preponderates to a finding that the employees, including supervisors, unsafely held the swing gate in an open position (with their hip, hand, or packages) so they could throw boxes down—a practice that essentially renders the swing gate ineffective. This is because employees are not protected from the fall hazard contemplated in this safety order when they hold the swing gate in an open position when they should not. This is not to say the Board prohibits opening the swing gate at all times for that will render the ship ladder and the swing gate useless. There are circumstances where the swing gate must be opened, including times when employees need to safely go down the ship ladder. Here, however, the Board is taking issue with employees', including some supervisors', act of holding the swing gate in an open position to throw or guide boxes down the ladder. The parties do not dispute such acts are unsafe and hazardous, which is also in line with common logic: when the swing gate is held in an open position when it should be closed, the opening is unprotected and employees who are throwing or guiding boxes down are exposed to the fall hazard from which the drafter intends to protect workers.

Such a finding, however, does not end the Board's inquiry here. Even if an opening is not protected by a swing gate or something that provides equivalent protection, an employer complies with the safety order so long as "the passageway to the opening shall be so offset that a person cannot walk directly into the opening." (§ 3212, subd. (a)(2)(A), underscores added.) As evident, the drafter has employed the term "so" before "offset." The Board looks to the dictionary definition of the word to ascertain its ordinary and usual meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.) And, the Board advances an interpretation that promotes worker

safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.) The Board should give significance to every word, phrase, sentence, and part of an act and must avoid a construction which makes some words surplusage. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465 [holding general rules of construction prevent an interpretation that renders any part of a regulation superfluous]; *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 695 [holding in interpreting regulations, every word must be given meaning and a construction that would render a word surplusage must be avoided].)

Dictionaries define the term "so" as "to an indicated or suggested extent or degree"[6] and "to such a degree,"[7] on one hand, and "very, extremely, or to such a degree"[8] or "to a great extent or degree : VERY, EXTREMELY"[9] on the other hand. Thus, the regulation may be interpreted in two ways: (1) requiring the passageway to the opening be offset to such a degree that a person cannot walk directly into the opening and (2) the passageway to the opening be extremely offset or offset to a great extent that a person cannot walk directly into the opening. While the Board interprets regulations liberally to promote worker safety, in light of the parties not having litigated the proper definition of the term "so" in the regulation and the record here preponderating to a finding the passageway to the opening was not "so offset" within either of the definitions, the Board need not decide the ambiguity in this case.

Employer argues employees worked near the conveyor belts and they did not use the passageway to the opening unless they were designated responders. The argument goes, "The fact that designated responders might place leaking packages down on the platform as a staging area and then go down the ladder and come around to grab the packages off the platform does not turn the area into a workspace." (Petition, p. 15.) And, Employer asserts, "The passageway to the opening of the ladder was offset from the main work area so someone could not just walk directly into the opening but would have to make a turn to go up or down the ladder." (*Ibid.*) At one point in its petition, the Employer even argues, "ALJ Elmendorf erred by completely failing to consider that a swing gate was not necessary in this case where the passageway was so offset that a person could not walk directly into the opening." (*Ibid.*)[10]

Here, testimony in the record established the passageway to the opening was not "so offset." To the contrary, designated responders and supervisors worked on the passageway located right next to the opening. For instance, both the injured employee and Ms. Soto kept the gate in open position (with either their hip or packages) and threw packages down at least two times a month; inspector Stevenson testified Ms. Soto told him she did so one or two times per week. Employee Scott testified when he was working on the platform, the swing gate was right next to him. Inspector Stevenson testified to the same. Further, Mr. Scott testified, in certain circumstances when a

[6] Merriam-Webster (Merriam Webster since 1828 < https://www.merriam-webster.com/dictionary/so> (as of May 5, 2021).
[7] Cambridge Dictionary (Cambridge University Press 2021 <https://dictionary.cambridge.org/us/dictionary/english/so> (as of May 5, 2021).
[8] Cambridge dictionary, *supra.*
[9] Merriam-Webster*, supra*.
[10] As will be described, the Board finds Employer's focus on designated responders alone is too narrow as ample evidence in the record supports the conclusion that supervisors also worked on the passageway to the opening.

leaking package on the platform needed scanning, supervisors would also come on the platform to assist with the scanning process. And, of course, by the nature of holding swing gates open when it should have remained closed, supervisors had to access the platform to assist Mr. Scott with transferring larger leaking packages down the ladder to the ground below. Similarly, the Division's inspector testified, "management told me that they placed boxes on those platforms, came down the stairs, and then grabbed them." Therefore, the mentioned testimony and the photographic evidence preponderate to a finding that the designated responders and supervisors worked on this passageway to the opening and the area was not "so offset" when it came to their work location. And, in light of the terms of the regulation, the Board will not exclude these employees from its analysis when determining whether the passageway to the opening was "so offset" that "a person" could not walk into it. Therefore, the Board rejects the argument that this area did not need a swing gate or equivalent protection.

The Board upholds the violation.

4. Assuming the Board upholds Citation 2, did the ALJ correctly affirm the citation's Accident-Related Serious classification?

Citation 2's Serious classification

Labor Code section 6432, subdivision (a), provides, "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." As used therein, the term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC,* Cal/OSHA App. 13- 0231, Decision After Reconsideration (April 24, 2015).)

Here, inspector Stevenson testified he was up-to-date with his Division mandated training; therefore, he is deemed competent to testify as to the Serious violation classification. (Lab. Code, § 6432, subd. (g).) He further testified there was a realistic possibility of serious physical harm should an employee fall from the opening. In fact, Mr. Scott suffered such injuries and the parties stipulated he suffered serious physical harm as the term is used in Labor Code section 6302. Thus, the Division established the Serious violation presumption.

Next, the Board needs to decide whether Employer rebutted this presumption per the Labor Code. Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:
> (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. Options relevant to this determination include, but are not limited to, those listed in subdivision (b).
(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, employee Scott testified he learned from other employees to keep the gate open and throw packages down. And, his supervisors would sometimes come help him transfer packages in the method explained to the DMP area. While Employer provided ample testimony from Mr. Kings, Employer's business manager, and Ms. Orta, Employer's health and safety supervisor, to prove they did not train any employee, or see any employee, engage in this practice, their testimony does not rebut employee Scott's testimony regarding other supervisors that actually helped him in this process. Because of this testimony regarding supervisor involvement in some of these practices, Employer cannot demonstrate it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (Lab. Code, § 6432, subd. (c).) The Board upholds the ALJ's reliance on this evidence to impute the knowledge of the supervisors on the Employer. (Decision, p. 12 [citations omitted].)

Citation 2's Accident-Related classification

As to the Accident-Related classification, the Board finds Employer's failure to raise the Accident-Related classification issue in its Petition waives this issues. (Lab. Code, § 6618.) Even if Employer had raised the issue, the Board finds the record supports the classification. To establish an Accident-Related classification, the Division need only prove the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4270, Decision After Reconsideration (Mar. 4, 2011).) The Division need not show that the violation was the only cause of the injury. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) Here, employee Scott testified when he fell from the opening, he was holding the gate in an open position and had the gate been in a closed position, he would not have fallen. Inspector Stevenson testified to the same. The Board agrees and upholds the Accident-Related classification.

5. Assuming the Board upholds Citation 2, did the ALJ correctly find the Independent Employee Action defense (IEAD) does not excuse the violation?

IEAD is a Board-created affirmative defense that was created to relieve employers from a willful violation by employees. (*Macco Constructors, Inc.,* Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 02, 1987).) To establish this affirmative defense, an employer must prove: (1) the employee was experienced in the job being performed, (2) the employer has a well-devised safety program that includes training in safety matters respective to employees' particular job assignment, (3) the employer effectively enforces the safety program, (4) the employer enforces a policy of sanctioning employees who violate the safety program, and (5) the employee caused a safety infraction that he or she knew was contrary to the employee's safety requirement. (See *C.E. Buggy, Inc. v. Occupational Safety and Health Appeals Board* (1989) 213 Cal.App.3d 1150, 1155.) An employer's failure to prove any one of the elements defeats the application of the defense. (*Jerlane, Inc. dba Commercial Box and Pallet,* Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007).)

In his Decision, the ALJ held IEAD cannot apply to the regulation at issue in Citation 2 because it concerns a positive guarding requirement and employers cannot delegate this responsibility to employees. The ALJ cited to Board precedent, which applied this positive guarding exception when dealing with elevated work platforms. (Decision, p. 8, citing *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002); *In Heritage Railway Service, Inc*., Cal/OSHA App. 98-1088, Decision After Reconsideration (Apr. 10, 2002).)

The ALJ's conclusion is supported by Board precedent. In one case, the Board explained the policy behind unavailability of IEAD in failure to guard cases is because "such [an] administrative policy cannot substitute for mechanical protection [required by the safety order]." (*City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-985, Decision After Reconsideration (Dec. 31, 1986).) The Board has explained guarding requirements are designed to protect employees who have a lapse of common sense, engage in horseplay, or otherwise may not know or may forget the apparent danger. (*Sierra Pacific Industries,* Cal/OSHA App. 77-891, Decision After Reconsideration (Aug. 30, 1984).) Thus, in cases where employee protection against a particular hazard is through positive guarding, an employer's instructions, admonitions, or warnings are not a substitute for adequate guarding. (*Pierce Enterprises, supra*, Cal/OSHA App. 00-1951; *In Heritage Railway Service, Inc., supra*, Cal/OSHA App. 98-1088.) Here, there was a swing gate, but Employer failed to ensure it remained secured to protect employees like Mr. Scott from falling. The Legislature has put the onus of promoting a safe working environment on employers. (Lab. Code, §§ 6402 and 6402.)

Moreover, the Board created this defense in cases "where the employer has done its best to comply with OSHA, [and] the purposes of the act would not be furthered by punishing it for the violation." (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1242.) Here, Employer did not adequately train its designated responders on how to safely transfer packages from the platform to the ground below. Even if the Board were to assume Employer did train its designated responders on their duty of transferring packages from the platform to the DMP area, Ms. Soto did not retain the training and needed retraining on the material. While responder Soto was able to verbally explain to inspector Stevenson how she needed to transfer a leaking package down to the DMP area, she was not able to put that knowledge into action and clearly failed to show a safe method to do so. Additionally, injured employee Scott testified he learned the method of dropping packages down the ground below while holding the swing gate open from other employees, and supervisors helped him do so. The Board finds the Division established by a preponderance of evidence designated responders (and at times, supervisors) transferred packages from the platform to the ground below by dropping them or guiding them down the ladder while keeping the swing gate open. In light of this evidence, the Board cannot conclude this is a case where the employer has done its best to comply with OSHA and the purposes of the act would not be furthered by punishing it for the violation. Thus, applying IEAD to this case is incongruent with the policy behind the Board's creation of the defense.

Additionally, even if the Board were to apply the defense to this case, the ALJ correctly found the Employer failed to satisfy all of its elements. As to the second element, the ALJ found "Employer's safety program was not well devised with respect to safe practices for transferring packages from

the unload area to the DMP area." (Decision, p. 10.) The ALJ took issue with Employer's failure to have procedures on properly transferring packages from the elevated work platform to the ground below. The ALJ took note of business manager King's testimony, which confirmed Employer's lack of written policy on this task; health and safety manger Orta's testimony, which testified there was no specific training on the task of transferring packages down; and employee Scott's testimony on not having received training on the task. Based on the evidence and testimony, the ALJ correctly concluded Employer did not have a well-devised safety program.

As to the fifth element, Employer must prove it had a safety rule in place regarding the specific conduct in question and the employee's violation of that rule was "willful or intentional." (*Macco Constructors, Inc.*, *supra,* Cal/OSHA App. 83-147; *United Parcel Service*, Cal/OSHA App. 07-3322, Decision After Reconsideration (Mar. 27, 2012); *Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) The ALJ concluded Employer also failed to meet this element by relying on employee Scott's testimony that "he was never admonished for propping the swing gate open while moving a package to the lower level. As there was no known rule that prohibited propping the swing gate open, Scott could not have intentionally violated Employer's safety rule." (Decision, p. 10.)

For the reasons explained above, any of which are sufficient to reject application of IEAD to this matter, the Board affirms the ALJ's analysis of this issue and concludes IEAD does not excuse the violation at issue in Citation 2, Item 1.

Decision

The Board vacates Citation 1, Item 1 and upholds Citation 1, Item 2 as well as Citation 2, Item 1.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair

Judith S. Freyman, Board Member

Marvin Kropke, Board Member

FILED ON: 06/08/2021

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: **1242676**
In the Matter of the Appeal of: **UNITED PARCEL SERVICE, INC. dba UPS**
Site address**: 5000 W. Cordelia Road in Fairfield, California**
Citation Issuance Date: **12/05/2017**

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	3203 (a) (2)	G	Decision After Reconsideration issued. Citation vacated.	V	G	$525.00	**$0.00**
1	2	3277 (j) (4)	G	Decision After Reconsideration issued. Citaiton affirmed.	A	G	$390.00	**$390.00**
2	1	3212 (a) (2)(A)	S	Decision After Reconsideration issued. Citaiton affirmed.	A	S	$18,000.00	**$18,000.00**
						Sub-Total	$18,915.00	**$18,390.00**
						Total Amount Due**		**$18,390.00**

*See Abbreviation Key
**You may owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: **1242676**
In the Matter of the Appeal of: **UNITED PARCEL SERVICE, INC. dba UPS**
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PENALTY PAYMENT INFORMATION

Please make your cashier's check, money order, or company check payable to **Department of Industrial Relations**
Write the **Inspection Number** on your payment.

If sending via US Mail:
CAL-OSHA Penalties
PO Box 516547
Los Angeles, CA 90051-0595

If sending via Overnight Delivery:
US Bank Wholesale Lockbox
c/o 516547 CAL-OSHA Penalties
16420 Valley View Ave.
La Mirada, CA 90638-5821

Credit card payments can also be made on-line at www.dir.ca.gov/dosh/calosha_paymentoption.html

DO NOT send payments to the California Occupational Safety and Health Appeals Board.

*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	**RR**	Repeat Regulatory	**WR**	Willful Regulatory
G	General	**RS**	Repeat Serious	**WRG**	Willful Repeat General
IM	Information Memorandum	**S**	Serious	**WRR**	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	**SA**	Special Action	**WRS**	Willful Repeat Serious
R	Regulatory	**SO**	Special Order	**WS**	Willful Serious
RG	Repeat General	**WG**	Willful General		