BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **UPS GROUND FREIGHT INC DBA UPS FREIGHT** **2650 SOUTH WILLOW AVENUE** **BLOOMINGTON, CA 92316** **Employer**	Inspection No. **1111325** **DENIAL OF PETITION FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above-entitled matter by Employer.

JURISDICTION

Commencing on December 9, 2015, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On June 8, 2016, the Division issued one citation to Employer alleging a serious violation of occupational safety and health standards codified in California Code of Regulations, title 8.[1]

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board. The parties jointly requested permission to submit the matter on stipulated facts and briefs in lieu of an evidentiary hearing, which the ALJ granted.

On September 14, 2017, the ALJ issued a Decision (Decision) which upheld the existence of the violation but changed the classification from serious to general and amended the penalty proposed in the citation accordingly.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

ISSUES

Employer states three issues in its petition: (1) Is Employer required to pay for the appropriate footwear worn by employees at its facility? (2) Does *Bendix Forest Products Corp v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, (hereafter *Bendix*) provide Employer with fair notice of the requirement that it must pay for appropriate foot protection? (3) Has the Board properly interpreted *Bendix* in holding that it requires Employer to pay for appropriate footwear?

REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Employer's petition does not assert any of the above grounds but may reasonably be construed to contend that the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The citation alleged that Employer violated section 3385, subdivision (a), which requires, in pertinent part, "Appropriate foot protection shall be required for employees who are exposed to foot injuries[.]" It was not disputed that the employees in question were required to and did wear appropriate foot protection. Rather the dispute turns on whether Employer must pay for the footwear.

Employer contends that *Bendix* does not require it pay for employees' appropriate footwear, or put it on notice of that requirement, and that the Board has misapplied *Bendix* in holding Employer must pay for the footwear. We disagree.

The California Supreme Court in *Bendix* ruled that Bendix Forest Products had to pay for gloves needed for employee hand protection. (*Bendix*, *supra,* 25 Cal.3d at p. 473.) Employer argues that since the issue in *Bendix* was whether the employer had to pay for employees' hand protection equipment, it is distinguished from the instant foot protection issue.

We do not agree that *Bendix* is so distinguished because the decision rested on statutory provisions relating to safety equipment in general and not just hand protection. As pointed out in *Bendix*, Labor Code section 6401 states that "Every employer shall furnish and use safety devices and safeguards . . . which are reasonably adequate to render such employment and places of employment safe and healthful. . . ." (*Bendix*, *supra,* 25 Cal.3d at p. 471.) There is no limitation or reference solely to hand protection. And there is no ambiguity in the quoted language and the ordinary meaning of *furnish* is applied. (*Barnard Impreglio Healy JV*, Cal/OSHA App. 317134021, Denial of Petition for Reconsideration (Mar. 10, 2017).)

Furnish means "to supply, provide or equip with whatever is necessary or useful." (Webster's New World Dictionary (3d college ed. 1991) p. 547.) The courts and the Board do not interpret "clear language in favor of an ambiguity that does not exist." (*Barnard Impreglio Healy JV*, Cal/OSHA App. 317134021, Denial of Petition for Reconsideration (Mar. 10, 2017)), citing *Pulaski v. California Occupational Safety and Health Standards Board*, (3rd Dist. 1999) 75 Cal.App.4th 1315, 1338-1339) [internal quotes and citations omitted].)

Bendix also cited Labor Code section 6403, which requires, in pertinent part, employers "To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe." The Court held that those provisions supported the view that employers are required to pay for safety equipment, stating, "Nor do we find error in the Division's interpretation of [Labor Code] section 6403 []" as well as section 6401. (*Bendix*, at p. 471.)

Because *Bendix* rested on Labor Code provisions requiring employers to "furnish" and "provide" safety equipment not limited to hand protection equipment, we do not agree that it is distinguishable on that basis. (Labor Code §§ 6401, 6403, respectively.) We therefore hold that Labor Code sections 6401 and 6403 require Employer to pay for foot protection satisfying the requirements of section 3385, subdivision (a).

Bendix also gave Employer fair notice of its obligation to pay for footwear, and even if it did not, Labor Code sections 6401 and 6403 do. We note that Labor Code sections 6401 and 6403 have not been substantively amended since enactment in 1973. Had the Legislature disagreed with the *Bendix* decision, it presumably would have taken action reflecting such disagreement. (*Ladd v. Board of Trustees* (1972) 23 Cal.App.3d 984, 990; *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 779.) Moreover, *Bendix* specifically found "no error" in the interpretation that Labor Code sections 6401 and 6403 require employers to pay for necessary safety equipment. It follows that the Board historically and the ALJ in her Decision correctly interpreted *Bendix* and applied it to the instant matter.

As to Employer's claim of lack of notice, we also point out that in 2011 the Board held that employers are obligated to pay for employees' foot protection required by section 3385, subdivision (a). (*Newman Flange & Fitting Company*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011).) There we specifically reversed an ALJ's decision which held that because section 3385, subdivision (a) used the word "required" instead of "furnish" or "provide" the employer did not have to pay for foot protection. (*Ibid*., pp. 13, 14.) We held in *Newman Flange* that Labor Code sections 6401 and 6403 require employers to pay for necessary safety equipment. (*Ibid*., p. 12.)

Employer argues in footnote 2, page 4 of its petition that its collective bargaining agreement may relieve it of the duty to pay for appropriate footwear. That argument is unsupported for the following reasons.

Board precedent stating that an employer may not contract away safety responsibilities is well established. (*Moran Contractors, Inc*., Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975); see *Torrez v. Consol. Freightways Corp*. (1997) 58 Cal.App.4th 1247, 1258.)

Moreover, the *Bendix* court "express[ed] no opinion whether, as implied in the opinion of the Attorney General, the payment of required safety equipment and clothing can be a proper subject of collective bargaining." (*Bendix*, at p. 472, fn. 7.)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member