

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

UNITED PARCEL SERVICE, INC. DBA UPS
111 Bingham Dr.
San Marcos, CA 92069

Employer

DOCKETS 13-R3D2-2664
and 2665

**AMENDMENT TO
DECISION**

A Decision of the Occupational Safety and Health Appeals Board was issued on this matter on December 9, 2015. The Decision is amended as follows:

Enclosed please find an Amended Decision. (Note: Amendment has been made on Page 5, last paragraph in bold and italicized: "Therefore, the Division met its burden to establish that the proposed penalty of \$425 was reasonable".)

The Amendment relates back to the date of issuance of the Decision and is effective as of that date (December 9, 2015).

DATED: January 5, 2016

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

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**[AMENDED]
DECISION**

Statement of the Case

United Parcel Service, Inc. dba UPS (Employer) is a package delivery service. Beginning February 25, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Melissa Brittan conducted a complaint inspection at a place of employment maintained by Employer at 111 Bingham Drive, San Marcos, California (the site). On August 15, 2013, the Division issued Citation 1, Item 3 to Employer for failure to have training records, a regulatory violation of section 3203¹, subdivision (b)(2), with a proposed penalty of \$425².

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and

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

² At the hearing, the parties resolved Citation 1, Items 1 and 2, and Citation 2. The Division increased good faith for Citation 1, Items 1 and 2, reducing the penalty for each to \$350. The Division amended Citation 2 to allege a general violation with a penalty of \$1,400 on the grounds that the evidence was insufficient to sustain the serious classification. Employer withdrew its appeals to Citation 1, Items 1 and 2, and Citation 2, as amended. Employer stipulated that if Citation 1, Item 2 were affirmed, the proper classification of the violation was regulatory.

Health Appeals Board, at San Diego, California on July 22, 2015. Carla J. Gunnin, Attorney, represented Employer. Kathy Derham, District Manager, represented the Division. The parties presented oral and documentary evidence. The submission date was extended to August 6, 2015 to permit the parties to file simultaneous briefs. The ALJ extended the submission date to November 30, 2015 on her own motion.

Issues

1. Did Employer document all Injury and Illness Prevention Program (IIPP) training of all its employees?
2. Was the penalty proposed for Citation 1, Item 3, reasonable?

Findings of Fact

1. Employer had a written IIPP, Hazard Communication Program, Hazardous Materials, and Emergency Response Plan.
2. Employer's name for its IIPP is "Comprehensive Health and Safety Process³" (CHSP.) Employer's IIPP contained the seven required elements set forth in section 3203, subdivisions (a)(1) through (a)(7). Employer's IIPP required employees to be informed of the IIPP provisions upon hire⁴, and required supervisors to implement and maintain the IIPP⁵.
3. Employer's IIPP required Employer to document health and safety training for each employee⁶. Employer did not have records documenting that all employees received IIPP training.
4. The proposed penalty was calculated in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations.

Analysis

1. Did Employer document employee training regarding its IIPP?

The Division cited Employer for a violation of section 3203, subdivision (b)(2), which reads as follows:

Records of the steps taken to implement and maintain the employer's Injury and Illness Prevention Program shall include documentation of safety and health training required by subsection (a)(7) for each

³ Exhibit 3

⁴ Exhibit 3, pp. 5, 6

⁵ Exhibit 3, p. 10

⁶ Exhibit 3, p. 11

employee, including employee name, training dates, type of training, and training providers.

Section 3203, subdivision (a)(7) provides as follows:

- (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: ...
 - (7) Provide training and instruction:
 - (A) ...
 - (B) To all new employees;
 - (C) To all employees given new job assignments for which training has not been previously received;
 - (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
 - (E) Whenever the employer is made aware of a new or previously unrecognized hazard; ...

The alleged violation description reads as follows:

At the time of the inspection training records for employees were requested. Steps were not taken to implement and maintain the employer's IIPP as safety training records were not documented for employee training of the IIPP, Hazard Communication Program, Hazardous Materials and Emergency Response Training.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

Associate Safety Engineer Melissa Brittan (Brittan) interviewed three of Employer's employees: Maria Kuresa (Kuresa), an unloader; Isaac Dailey (Dailey), a designated hazmat respondent and driver; and Leo Correa (Correa), a porter or janitor. She learned that all three employees had received IIPP or CSHP training.

Brittan requested all training records for the three employees⁷. In response, she received the training records marked as Exhibits 4, 6, and 8. These training records related to safe work methods and hazards specific to

⁷ Exhibit 2

each employee's job. There were no records showing that employees had received IIPP training from Employer. There were no records showing that employees had been trained regarding the persons with authority and responsibility for administering the IIPP (3203(a)(1)), the system for ensuring that employees complied with safe and healthy work practices (3203(a)(2)), the system of communicating on health and safety matters without fear of reprisal (3203(a)(3), procedures for identifying and evaluating workplace hazards (3203(a)(4)), procedures for investigating injuries and illnesses (3203(a)(5), procedures for correcting unsafe conditions (3203(a)(6), or required training and instruction (3203(a)(7)), although Brittan determined that the three employees had actually received training on all these topics.

None of the documents Employer offered at the hearing contained IIPP training records.

Employer defended its records on the grounds that it had many previous inspections by Cal/OSHA, but Employer had not been cited for lack of training records. Previous safety inspections do not constitute permanent approvals of conditions. Employer may not use previous inspections as a defense to subsequent citations for violations existent then or afterwards. (*Alpha Beta Company*, Cal/OSHA App. 79-1572, Decision After Reconsideration (Apr. 23, 1981).)

Therefore, the Division established a violation of section 3203, subdivision (b)(2)⁸. Employer stipulated that if a violation were found, the proper classification was regulatory.

2. Was the proposed penalty reasonable?

Penalties calculated in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations (sections 333-336) are presumptively reasonable and will not be reduced absent evidence by Employer 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

⁸ Section 3203(b)(2) requires documentation to be kept for one year. The issue of whether the training in question was done more than a year before the inspection was never raised, and was therefore waived. An issue not properly raised on appeal is deemed waived. See Section 361.3, "Issues on Appeal;" *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999); *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (Dec. 31, 1998); and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (333-336) In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

Here, the proposed penalty worksheet was admitted into evidence and Brittan testified that the \$425 penalty was calculated correctly. The penalty began with a base of \$500, as required for all regulatory violations. (336(a)(1).) With regulatory violations, reductions are not allowed for likelihood, extent, or abatement. Employer had over 100 employees, so no reduction was allowable for size (336(d)(1).) Employer had a previous serious violation within the past three years, so no reduction was allowable for history. (336(d)(3).)

Brittan rated Good Faith at 15% or medium. Under § 336((3)(c), “good faith” is defined as follows:

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

Brittan rated good faith as medium because Employer was cooperative, was aware of Cal/OSHA and expressed a desire to comply with the California Occupational Safety and Health Act of 1973. Employer did not rebut her testimony. Accordingly, the rating of 15% is found appropriate.

Therefore, the Division met its burden to establish that the proposed penalty of **\$425** was reasonable. A penalty of \$425 is found reasonable and is assessed.

Conclusion

Employer did not document employee training on its IIPP. The Division established a violation of section 3203, subdivision (b)(2). The violation was properly classified as regulatory. The proposed penalty of \$425 is reasonable.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

DALE A. RAYMOND
Administrative Law Judge

Dated: January 5, 2016
DAR:ml

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**UNITED PARCEL SERVICE, INC. dba UPS
Dockets 13-R3D2-2664 and 2665**

Date of Hearing: July 22, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Document Request
3	IIPP-Comprehensive Health and Safety Program Southern California District
4	Safe Work Methods—Unloader—Training Form for Marie Kuresa
5	Field Documentation Worksheet—Notes of interview with Barbara Perry
6	Periodic Training Evaluation Report for Isaac Dailey
7	Field Documentation Worksheet—Notes of interview with Isaac Dailey
8	Safe Work Methods – Plant Engineering – Training Form: Annual Training for Leo Correa
9	Documentation Worksheet and Violation Classification
10	Proposed Penalty Worksheet

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A-1	Document Request (same as Exhibit 2)	Yes

A-2	IIPP-Comprehensive Health and Safety Program Southern California District (same as Exhibit 3)	Yes
A-3	Safe Work Methods—Unloader—Training Form for Marie Kuresa (same as Exhibit 4)	Yes
A-4	Conveyor Securing Test—Marie Kuresa	No
A-5	Hazardous Materials/Emergency Response Quiz for All Inside Employees—Marie Kuresa, Isaac Dailey, Leo Correa	No
A-6	Confined Spaces Program	No
A-7	Authorized Employee Program Completion Certificate—Leo Correa	No
A-8	Periodic Training Evaluation Report for Isaac Dailey (same as Exhibit 6)	Yes
A-9	Egress Training—Marie Kuresa, Isaac Dailey, Leo Correa	No
A-10	Yard Control Safety Rules—Marie Kuresa, Isaac Dailey, Leo Correa	No
A-11	Respirator Use Information—Leo Correa	No
A-12	Completion of Hazard Communication certificate— Leo Correa	No
A-13	Power Point Slides on safety topics, January 18, 2013	No
A-14	Power Point Slides on safety topics, November 22, 2013	No
A-15	Power Point Slides on safety topics, January 2, 2013	No
A-16	CHSP Co-chair JBA—Job Bulletin Announcement, CHSP Committee Member Handbook	No
A-17	Employee Policies and Procedures Manual	No

Witnesses Testifying at Hearing

1. Melissa Brittan
2. Mark Bergman

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

December 9, 2015

DALE A. RAYMOND

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On January 5, 2016, I served the attached **AMENDMENT TO DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at West Covina, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Carla Gunnin, Esq.
JACKSON LEWIS PC
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309

District Manager
DOSH – San Diego
7575 Metropolitan Drive, #207
San Diego, CA 92108

DOSH - Legal Unit
1515 Clay Street, 19th Floor
Oakland, CA 94612

Los Angeles Legal Unit
320 West Fourth Street, Suite 400
4th Floor
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 2016, at West Covina, California.

Declarant