

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

*In the Matter of the Appeal of:*

**FEDEX FREIGHT, INC.  
2200 Forward Drive  
Harrison, AR 72601**

*Employer*

**DOCKET 14-R2D1-0144**

**DECISION**

FEDEX FREIGHT, INC. (Employer) is a freight shipping company. Beginning October 22, 2013, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Susan Pipes (Pipes) conducted an inspection at a place of employment maintained by Employer at 4075 Channel Drive, West Sacramento, California (the site). On January 2, 2014, the Division issued two citations of the California Code of Regulations, title 8, one of which remains at issue: failure to keep the walkway reasonably clear and in good repair, resulting in a serious accident.<sup>1</sup>

Employer filed a timely appeal contesting the existence of the violation, the correctness of the classification of “Serious-Accident Related”, and the reasonableness of the abatement requirements and the proposed penalty. Employer plead the affirmative defense of Independent Employee Action (IEAD).<sup>2</sup>

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California on April 28, 2015 and July 10, 2015. Alka Ramchandani, Esq., Jackson Lewis, P.C., represented the Employer. Denise Cardoso, Esq. Staff Counsel, represented the Division. Leave to file briefs was granted and the matter was submitted on September 10, 2015.<sup>3</sup> The

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<sup>1</sup> Unless otherwise specified, all section references are to the California Code of Regulations, title 8. Citation 2, Item 1 alleges a serious violation of section 3272, subdivision (c) with a proposed penalty of \$5,400. Employer did not appeal Citation 1, Item 1, which alleged a general violation of section 3277, subsection (f)(4).

<sup>2</sup> At the hearing, the parties stipulated that the Division calculated the proposed penalty of Citation 2, Item 1 in accordance with Division policies and procedures, assuming that the citation is determined to be correctly classified as a serious accident-related violation.

<sup>3</sup> The audio record is the official record of the hearing. (Appeals Board Rules of Practice and Procedure, Section 376.7) Employer was permitted to have a court reporter present with the proviso that the entire transcript would be provided to the Appeals Board. Nonetheless, Employer attached assorted pages from the hearing transcript to its’ closing brief, but did not provide the entire transcript. Missing from the transcript for April 28, 2015 are pages 2-11, 13-22, 24-52, 55-56, 58-60, 62-70, 74-101,103-106, 108-124, 126-130, 132-104; missing from the transcript for July 10, 2015 are pages 2-32, 33-36, 48, 49-53, 61-65, 89-103, 106-107, 110-114, 118-120, 124, 126-157, 161, 169-173, 176-189, 191, 192-197, 200, 205, 207, 211-212, 214-216.

Administrative Law Judge extended the submission date to December 31, 2015, on her own motion.

### **Issues**

- A. Did Employer violate section 3272, subdivision (c) by failing to keep the walkway reasonably clear and in good repair?
- B. Did Employer carry its burden of proof on the issue of the IEAD affirmative defense pursuant to *Mercury Service Inc.*?<sup>4</sup>
- C. Did the Division establish a rebuttable presumption that the violation was serious?
- D. Did Employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazard of failure to keep a walkway clear and in good repair, so as to rebut the presumption that the violation was properly classified as serious?
- E. Did the Division establish that the failure to keep a walkway clear and in good repair was the cause of the accident?

### **Findings of Fact**

1. On October 7, 2013, Gary Nations (Nations), the injured employee, parked his truck at dock number 138.
2. Nations walked to the fixed ladder on dock number 139 to get into his truck, because he could not fit between the trailer and the post on dock number 138. While walking to the fixed ladder to get into his truck, Nations stepped on the dock plate.<sup>5</sup>
3. The unlocked dock plate depressed four inches when Nations stepped on it. Nations lost his balance and tripped on a wheel chock.<sup>6</sup>
4. Nations fell off the dock to the concrete floor four feet below the loading dock and sustained injuries which resulted in hospitalization in excess of 24 hours.
5. Nations was not disciplined for violating any of Employer's policies at the time of the accident or any other time.

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<sup>4</sup> *Mercury Service Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, October 16, 1980.

<sup>5</sup> A "dock plate" is metal ramp used to bridge the gap between a truck and a loading dock. See "<http://wikipedia.com/dock+plate>" (accessed January 7, 2016).

<sup>6</sup> "Wheel chocks" (chocks) are wedges of sturdy material placed closely against a vehicle's wheels to prevent accidental movement. See "<http://wikipedia.com/wheel+chocks>", (accessed January 7, 2016).

6. The chock was left in the walkway used by Nations by someone, other than Nations.
7. The dock plate was not placed in a locked position.
8. The proposed penalty for Citation 2, Item 1 of \$5,400 was calculated in accordance with the Division's policies and procedures.<sup>7</sup>

### **Analysis**

#### **A. Did Employer violate section 3272, subdivision (c) by failing to keep the walkway reasonably clear and in good repair?**

The Division cited Employer for a violation of section 3272, subdivision (c), which requires:

Aisles, Walkways, and Crawlways.

Permanent aisles, ladders, stairways, and walkways shall be kept reasonably clear and in good repair. Where, due to lack of proper definition, such aisles or walkways become hazardous, they shall be clearly defined by painted lines, curbing, or other method of marking.

Citation 2, Item 1 alleges as follows:

On October 7, 2013, an employee of FedEx Freight, Inc. accessed a loading dock at the facility located at 4075 Channel Dr. in West Sacramento. The walkway was not kept reasonably clear and in good repair, resulting in the employee tripping and falling from the loading dock to the ground below, sustaining a serious injury.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Under this section, the Division must establish 1) the path on Dock Number 139 used by Nations was a "permanent walkway", 2) the employer failed to keep walkways reasonably clear or in good repair and 3) an employee was exposed to the hazard.

Was the path on Dock Number 139 used by Nations a "permanent walkway"?

The Appeals Board in *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3212, Decision After Reconsideration (April. 24, 2003), page 11, note 15, defined "walkway" to include "a passage way in a place of employment . . . designed to be walked on by employees in the performance of their duties." (Exhibit I.) Where aisles or walkways are required under section 3272(b), "the objective is to provide

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<sup>7</sup> See footnote 2.

clear walkways or aisles . . . to a safe means of egress from the building”. (Starcrest, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).

At the site, a fixed ladder is installed at each dock. Employer’s drivers use the fixed ladder to access the dock so that packages can be loaded and unloaded, and to access their trucks to perform their duties. Nations testified that on October 13, 2013, his truck was parked at dock number 138. He walked to the fixed ladder on dock number 139 to get into his truck. The reason for using dock number 139 was because he could not fit between the trailer and the post on dock number 138. (Exhibit 3-5.)

Employer argues that because the Standards Board does not define a loading dock or dock plate as a walkway, Section 3272, subdivision (c) does not apply. This contention is rejected because the loading dock area and the dock plate was shown to be the place used by drivers to access their trucks. The dock plate is designed to be walked on, as shown by the grid pattern which makes the surface less slippery. (Exhibits 3-1, 3-2, 3-3, 3-4 and 3-5.) Dylan Paxton (Paxton), Nations’ supervisor, testified that employees regularly walk on the dock plate while performing their duties. In order to access their vehicles and use the fixed ladder located on each of the bays, it is necessary for employees to walk on the loading docks and dock plates, which require the employees to walk up to the ladder to use it. The ladder is on the edge of the loading dock and 24 and one half inches from the dock plate. Employer did not delineate the edge of the dock as a prohibitive location by painting a line or other markings. There was no other path designated as a walkway at the loading docks. For the foregoing reasons, the path Nations took to the fixed ladder on dock number 139, including stepping on the edge of the dock plate was a “permanent walkway”.

Was the walkway kept reasonably clear and in good repair?

Exhibit 4 is the video of the accident. It shows Nations walking toward the fixed ladder on dock number 139, and tripping on a twelve inch wheel chock, which was located in the walkway, in front of the fixed ladder. Paxton testified that there was no set place to store the chocks and it was a common practice to place the chocks at the end of the loading dock near the fixed ladders. (Exhibits 3-3 and 3-5.) The Employer’s written policy, Exhibit M, the Safe Working Guidelines – Hostlers requires the chock to be placed on a bumper guard:

It is the responsibility of the operator to immediately chock or remove chocks on all trailers/pups/bob trucks that the operator parks or removes from the dock. All trailers must be chocked, regardless of length. The chock must always be placed on the driver’s side of the trailer wheels. The chock must be placed on top of the bumper guards after being removed and before pulling the trailer from the dock. This will help indicate to the dock employee whether or not the trailer is chocked.

This policy was not followed on the day of the accident.

Exhibit G, page 4 of the Service Center Safety Inspection Report for June 24, 2013 noted regarding “Dock and Dock Equipment”:

There was a trailer up to the dock that was being worked and the wheel chock was sitting up on the platform. There was also an instance of a wheel chock being left on the ground after a trailer was pulled from the dock. Action Plan: This will be addressed with a signed pre shifts by the dock and hostlers. Also the Mgr/Supps will complete an audit of this during the shift which will also be documented.

And with regard to “Housekeeping”, Exhibit G, page 5, states:

Need to improve in your housekeeping out on the dock. Found quite a lot of wood just lying around, some with nails in them. There was a load bar that was leaning up against a trailer dock door as well as some load bars just lying on the dock between some pallets. Action Plan: This will be addressed during pre-shifts again. Shift Mgrs will recap daily dock observations made and list offenders.

Employer argues that Nations should have accessed the ladder by using a difference path, namely, the concrete area next to the dock plate. This path was obstructed by a seven inch yellow post, a garbage can and shrink wrap. (Exhibits 3-3 and 3-5.) Pipes measured the area between the dock plate and the yellow post as 18 inches and the distance from the dock plate to the fixed ladder was 24 and a half inches. (Exhibit 3-3.) Nations testified that there was insufficient space for him to get to the ladder, which he described as “tight”, without walking over the shrink wrap, chock or other obstructions stored next to the concrete post. The walkway was not kept reasonably clear.

“In good repair” is not defined in the safety orders, but is defined in The Free Dictionary as “operating well; well taken care of.”<sup>8</sup>

The video of the accident shows the dock plate moving, when Nations stepped on it, which caused him to go off balance as he tripped on the chock. (Exhibit 4.) It is undisputed that the dock plate was not properly latched, and therefore, it dropped approximately four inches, when he stepped on it. (Exhibit 3-3.)

Paxton testified that he was aware that improperly latched dock plates were a hazard and correctly latching the dock plates was the responsibility of the driver who used the equipment. Failure to latch the dock plates frequently occurred. However, it did not have a procedure for routinely checking to ensure that the dock plate was properly locked when not in use. A documented

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<sup>8</sup> See <http://idioms.thefreedictionary.com/in+good+repair>, (accessed January 6, 2016).

inspection of the dock and dock equipment was done on June 24, 2013 and January 6, 2014. (Exhibits G and H.)<sup>9</sup>

There was no evidence to suggest that Nations was responsible for locking the dock plate, as he was not the driver who used it. The preponderance of the evidence established that the dock plate was not “well taken care of” by ensuring that it remained in a locked position when not in use.

Was an employee was exposed to the hazard?

Nations was exposed to the actual hazard of failure to maintain the walkway reasonably clear and in good repair, as shown in the video of the accident (Exhibit 4)

It is found that the Division established a violation of Section 3272, subdivision (c).<sup>10</sup>

**B. Did Employer carry its burden of proof on the issue of the IEAD affirmative defense pursuant to *Mercury Service Inc.*?**

Employer asserted the independent employee action defense (IEAD).<sup>11</sup> To avoid liability through that affirmative defense, employers must establish all five of the following elements: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a sanctions policy which it enforces against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

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<sup>9</sup> A second Service Center Safety Inspection Report, Exhibit F, dated January 6, 2014, has the box indicating that “dock plates” were not inspected with a check mark. This report noted at page 3, regarding “Dock and Dock Equipment”:

[Y]ou have two dock plates that do not sit into their hooks when lowered Doors 33 and 140. You also have a number of dock bump boards that are loose. See worksheet for details. Action Plan: We have placed a far [sic] for the two dock plates (33 and 140) and our FM person will address the dock bump boards. We will also have him check these bi-weekly moving forward.

<sup>10</sup> A violation of Section 3272, subdivision (c) can be sustained if a walkway is not kept reasonably clear, even if it is in good repair. (*BART*, Cal/OSHA App. 09-1221, Decision After Reconsideration (Sept. 6, 2012).)

<sup>11</sup> Employer failed to file a timely motion to amend the appeal to add the IEAD. The IEAD is an affirmative defense which must be raised in the appeal. (Section 371.) At the hearing, the IEAD was raised for the first time. In the closing brief, Employer argued that the failure to raise the IEAD in writing should be excused because of statements employer made in response to the I-B-Y letter regarding Gary Nations’ training and actions and because Employer’s counsel mentioned it to Division’s attorney in a conversation approximately a week before the hearing. (Employer’s Closing Argument, p. 13, note 4 and Exhibit 14.) Assuming the IEAD was raised in a timely manner, Employer failed to satisfy the requirements of *Mercury Service*, as discussed herein.

The ultimate burden of proof is upon Employer to establish each of the five elements. The defense is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee's actions serve to circumvent or frustrate the employer's best efforts. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires that the employee be experienced in the job performed. This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient". (*Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).)

Nations was employed as a city driver for Employer for over 15 years and completed sixty-three FedEx safety courses, including Accident Prevention Education (APE 2012), Safe Working Guidelines – General (1350R), Forklift (1351R) and Hostlers (1352R) during that time. (Exhibit D.) This first element was established.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, *supra*.) The well devised safety program must contain specific procedures. (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).) Paxton testified that Employer has an "avid safety program that includes videos, computer-based education, a hand-on mentor, a dock mentor, a driver mentor, and a six-week driver development course."

Paxton, who supervised Nations for the prior fifteen years, testified that Nations was not required to check the dock plate prior to walking on it.<sup>12</sup> Employer failed to establish that it has a well-devised safety program which covered the job assignments of the drivers regarding use of the dock plates and wheel chocks by preponderant evidence.

The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After

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<sup>12</sup> Employer did not have any written policies prohibiting employees from walking on dock plates to the fixed ladders on the loading docks, prohibiting drivers from accessing a fixed ladder from an adjacent loading dock, governing the correct locking position of the dock plates, making sure that dock plates are in the locked position when not in use, or requiring the edge of the dock where employees are prohibited from walking to be marked.

Reconsideration (September. 15, 1999).) In *Tri-Valley Growers*, the Board stated that "[s]ystematic inspections for hazardous conditions and practices and a sufficient measure of competent supervision must also be demonstrated to meet the third element" citing *Atchison, Topeka and Santa Fe Railway Company*, Cal/OSHA App. 86-1700, Decision After Reconsideration (Mar. 17, 1988). The Board has also stated that "[a]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 5, 1988) at p.5.)

Paxton testified he issued corrective actions to employees for failing to adhere to company procedure in the past but failed to provide any specific examples or documentation. It is undisputed that Nations was not disciplined for violating any of Employer's policies. Walking on the dock plate was a job assignment which was frequently done by employees during the course of their duties. There was no written rule governing it and no employee had been disciplined for walking on the dock plate. Employer had no procedures for ensuring that the dock plate was locked when not in use. Employer claimed that if Nations stepped around the wheel chock, he would not have tripped. Employer also argued that if he did not walk on the edge of the dock plate he would not have tripped. If Nations had used three point contact,<sup>13</sup> he would not have been at the edge of the dock plate and would not have tripped. The video, Exhibit 4 and photos of dock number 137, Exhibits 3 and C, show that the wheel chock was difficult to see, given the glare of the sun and the other obstacles in the vicinity. Employer's policy regarding placement of the wheel chock was violated by someone, other than Nations. At the time he tripped on the wheel chock, Nations was not yet in the position to climb down the fixed ladder, where the three point contact rule would be relevant. Employer failed to prove that it had a progressive disciplinary system, or present evidence of discipline which had been imposed in other cases. Employer failed its burden of proving that it effectively enforced its safety program as required by the third element of the IEAD.

The fourth element requires Employer to establish that it has a sanctions policy which it enforces against employees who violate the safety program. As discussed above, no employee had been disciplined for walking on dock plates and Employer did not discipline Nations for his actions. Accordingly, it failed to prove the fourth element of the IEAD.

The fifth element requires Employer to prove that Nations caused a safety infraction which he knew was against Employer's safety requirement. No evidence was presented regarding who placed the chock on loading dock number 139 or who left the dock plate in the unlocked position. Nations testified credibly that he was not violating any FedEx policies when he tripped on the chock and unlocked

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<sup>13</sup> Three point contact rule "requires three of four points of contact to be maintained with the vehicle at all times – two hands and one foot, or both feet and one hand. This system allows maximum stability and support, reducing the likelihood of slipping and falling." (See <http://safetytoolboxtopics.com/Slips-Trips-and-Falls/three-point-rule-avoid-falls.html>, accessed Jan. 7, 2016.)

dock plate. He was not responsible for leaving the walkway in the hazardous condition. Element five was not established.

Employer failed to prove the second, third, fourth and fifth elements of the IEAD. Division established a violation of section 3272, subdivision (c).

**C. Did the Division establish a rebuttable presumption that the violation was serious?**

To sustain a serious violation, Labor Code Section 6432, subdivision (a) states:

(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<sup>14</sup> 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.

Division classified the violation as “serious”. It must present evidence to show 1) a realistic possibility that death or serious physical harm, 2) could result from the actual hazard created by the violation and 3) in a place of employment, in order to create a rebuttable presumption that the citation was correctly classified as serious. The employer has the statutory right to contradict or rebut the evidence that a serious violation was established.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

Here, it is undisputed that on October 7, 2013, Nations sustained a serious injury when he fell on concrete four feet below the loading dock, as shown in the

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<sup>14</sup> Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

video of the accident. (Exhibit 4) He sustained four broken ribs, a broken sternum, head trauma and a sixteen day hospitalization. The “realistic possibility that death or serious physical harm could result” prong was established. Similarly, prong two and three, that there was an exposure to an actual hazard created by the violation and that the violation occurred in a place of employment were not disputed. Susan Pipes’ opinion<sup>15</sup> was that not only was there a realistic possibility of a serious injury, a serious injury actually occurred.

Associate Safety Engineer Pipes testified that she inspected the worksite on October 22, 2013 and October 31, 2013. At the time of the inspection, she determined the distance of the fall on dock number 139 was 48 inches by measuring from the loading dock to the truck bay. She examined the concrete onto which Nations fell, the dock plate, the fixed ladder, the chock blocks and the obstacles and equipment in the surrounding area. The types of injuries which result if an employee falls onto concrete from a height of four feet includes multiple fractures, broken bones, head trauma or death. Pipes’ un rebutted opinion that serious injury or death from a trip hazard caused by failure to keep a walkway clear and in good repair is a realistic possibility, is found credible and is accepted.

The realistic possibility of serious physical harm combined with existence of the actual hazard caused by failure to keep a walkway clear and in good repair is well within the definition of “serious” set forth in section 6432. The Division established a rebuttable presumption that the violation was properly classified as a serious.

**D. Did Employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazards of failure to keep a walkway clear and in good repair, so as to rebut the presumption that the violation was properly classified as serious?**

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to the employer to rebut the presumption. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (June, 2015).) Labor Code section 6432, subdivision (c) provides that Employer may rebut the presumption:

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<sup>15</sup> Pipes’ opinion was based upon a reasonable evidentiary foundation consisting of her education, experience and training. At the time of the hearing, she was an Associate Safety Engineer for three years and was current in her Division-mandated training. (Exhibit 5.) She completed approximately 250 inspections, including 30 involving falls. Of the investigations involving falls, 29 involved falls from 15 feet, one involved a fall from 80 feet, and two involved falls of five feet or less, both involved a serious injury. Prior to working for the Division, Pipes earned a certification in the U.C. Davis Health and Safety Program. Thus, Pipes is competent to give her opinion per Labor Code section 6432, subdivision (g). (See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) Her opinion was corroborated by the testimony of District Manager Jon Weiss, who served as Associate Safety Engineer for eleven years and investigated 69 accidents involving falls.

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. Factors 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.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*Robert Onweller dba Pacific Hauling & Demolition*, Cal/OSHA App. 14-1087, Decision After Reconsideration (June 15, 2015); *A. A. Portonova & Sons, Inc.* Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

The factors set forth in Labor Code section 6432, subdivision (b)(1) may be used to evaluate whether Employer established that it did not know and could not, with the exercise of reasonable diligence, have known of the severity of the harm and likelihood of harm involved in failing to keep a walkway clear and in good repair. (*A. Teichert & Son*, Cal/OSHA App. 11-1895, Decision After Reconsideration (August 21, 2015).)<sup>16</sup>

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<sup>16</sup> Labor Code section 6432, subdivision (b)(1), mentioned in subdivision (c)(1) above, directs the Division to consider several factors when issuing citations for alleged serious violations, which include:

- (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.

Employer argued that Employer did not violate the safety order and failed to provide evidence of the steps it took to evaluate the hazard. For example, Employer failed to clearly define by painted lines, curbing, or other method of marking, aisles or walkways which have become hazardous. It failed to have a procedure for ensuring that the dock plate was locked or the chocks were properly stored. No evidence was offered regarding steps taken to correct the violation, after the accident.

It is found that Employer failed to take all of the steps a reasonable and responsible employer in like circumstances should be expected to take, before the accident occurred or that it took corrective action to eliminate the exposure to the hazard. The serious classification stands.

**E. Did the Division establish that the failure to keep a walkway clear and in good repair was the cause of the accident?**

To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The Division establishes that a violation is accident-related by showing that the violation more likely than not was the cause of the injury. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Pipes testified, based on her interviews with the supervisor and injured employee and her investigation of the site, that Employer's failure to keep the walkway clear and in good repair was the cause of the accident. Based on Pipes' credible testimony, the photographs and accident video documenting the site of the accident, it is found that Nations tripped on the chock block and recessed plate. The accident-related characterization is sustained.

**Conclusion**

Employer's appeal is denied. The Division established a violation of section 3272, subdivision (c). Employer stipulated that the \$5,400 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

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(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative event were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

Accordingly, the serious classification of Citation 2 is affirmed and a penalty of \$5,400 is assessed.

**Order**

Citation 2, Item 1 and the proposed \$5,400 penalty are affirmed.

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

DATED: January \_\_\_\_, 2016  
MD:sp

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MARY DRYOVAGE  
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 Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

**For further information, call: (916) 274-5751.**

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**FEDEX FREIGHT, INC.**

**Docket 14-R2D1-0144**

**Dates of Hearing: April 28, 2015 and July 10, 2015**

**Division's Exhibits—Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>	
1	Jurisdictional Documents	<b>X</b>
2	Proposed Penalty Worksheet	<b>X</b>
3-1	Photo - Loading Dock #139 (00247) taken Oct. 22, 2013 12:10	<b>X</b>
3-2	Photo - Loading Dock #139 (00246) taken Oct. 22, 2013 12:09	<b>X</b>
3-2-2	Photo – duplicate of Ex. 3-2 taken Oct. 22, 2013 12:09	<b>X</b>
3-3	Photo - Loading Dock #139 (00253) taken Oct. 31, 2013 9:17	<b>X</b>
3-4	Photo - Loading Dock #139 (00254) taken Oct. 31, 2013 9:19	<b>X</b>
3-5	Photo - Loading Dock #139 taken Oct. 22, 2013 12:15	<b>X</b>
4	Video provided by FedEx	<b>X</b>
5	Letter re: Susan Pipes is current on Division-mandated training, April 27, 2015 (1 page)	<b>X</b>
7	Document request to Employer, Oct. 22, 2013 (1 page)	<b>X</b>
8	Second Document request to Employer, Nov. 6, 2013 (1 page)	<b>X</b>
9	Employer's website re: Safety Topics – Slips & Falls (3 pages)	<b>X</b>
10	Employer's Driver Manual "Safety" (19 pages)	<b>X</b>
11	Handwritten Notes, Oct. 23, 2013 (1 page)	<b>X</b>
12	Employer's Policy - Service Center Inspection Guidelines (13 pages)	<b>X</b>
13	I-B-Y, dated Dec. 5, 2013 (3 pages)	<b>X</b>
14	Employer's Response to 1-B-Y, dated Dec. 16, 2013 (5 pages)	<b>X</b>

15 Facility checklist X

**Employer's Exhibits—Admitted**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	
A	Title 8, Section 3207	X
B	Title 8, Section 3337	X
C	Photo - Loading Dock #139 (00252) taken Oct. 22,2013 12:22	X
D	Transcript for Gary Nations – training (2 pages)	X
E	Employer's website re: Safe Working Guidelines – General (5 pages)	X
F	Service Center Safety Inspection, Jan. 6, 2014 (5 pages)	X
G	Service Center Safety Inspection, June 24, 2014 (5 pages)	X
I	Definition of “walkway” in <i>Tutor-Saliba-Perini</i> , Cal/OSHA App. 97-3212, Decision After Reconsideration (April. 24, 2003), page 11, note 15	X
J	Employee/ Witness Interview of Gary Nations, Nov. 5, 2013 (2 pages)	X
K	Safe working guidelines – Hostlers (4 pages)	X
M	Safe working guidelines – Hostlers (1 page)	X
N	Photo –Dock – West Sacramento (00248) taken Oct. 22, 2013 12:12	X
O	Driver Manual – Dock Operation (1 page)	X
P	IIPP (2011) (1 page)	X

**Witnesses Testifying at Hearing**

1. Gary Nations
2. Susan Pipes
3. John Weiss

4. Dylan Paxton

5. Jon Barrett

**CERTIFICATION OF RECORDING**

*I, Mary Dryovage, 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.*

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**MARY DRYOVAGE**

Signature

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Date

# SUMMARY TABLE DECISION

*In the Matter of the Appeal of:*  
**FEDEX FREIGHT, INC.**  
**DOCKET 14-R2D1-0144**

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

Site: 4075 Channel Dr, West Sacramento, CA 95691

IMIS No. 317247211

Date of Inspection: 10/22/13 – 12/30/13

Date of Citation: 01/02/14

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R2D1-0144	2	1	3272(c)	S	ALJ affirmed violation.	X		\$5,400	\$5,400	<b>\$5,400</b>
<b>Sub-Total</b>								\$5,400	\$5,400	<b>\$5,400</b>
<b>Total Amount Due*</b>										<b>\$5,400</b>

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*  
**ALL penalty payments must be made to:**  
Accounting Office (OSH)  
Department of Industrial Relations  
PO Box 420603  
San Francisco, CA 94142  
(415) 703-4291, (415) 703-4308 (payment plans)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ:MD**  
**POS: 1/\_\_\_/16**

**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, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

On January \_\_\_\_, 2016, I served the attached 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 Sacramento, 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:

Alka Ramchandani, Esq.  
Jackson Lewis, P.C.  
50 California Street, 9<sup>th</sup> Floor  
San Francisco, CA 94111-4615

DOSH DISTRICT OFFICE  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

ATTN: Denise M. Cardoso, Staff Counsel  
DOSH - LEGAL UNIT  
1515 Clay Street, 19<sup>th</sup> Floor  
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on January \_\_\_\_, 2016, at Sacramento, California.

\_\_\_\_\_  
Declarant