In the Matter of the Appeal of: UNITED PARCEL SERVICE 1380 SHORE DRIVE WEST SACRAMENTO, CA 95691 Employer

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

United Parcel Service (Employer) engages in cargo delivery services. Beginning January 8, 2016, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Shannon Lichty (Lichty), conducted an accident inspection at a place of employment maintained by Employer at 1380 Shore Drive, West Sacramento, California (the worksite).

On June 27, 2016, the Division cited Employer for five violations of California Code of Regulations, title 8, two of which were withdrawn by the Division. Employer filed timely appeals of Citations 2, 3, and 5. Citation 2 alleges a Serious and Accident Related violation of section 3203, subdivisions (a)(4) and (a)(6) [failure to identify, evaluate, and correct workplace hazards]. Citation 3 alleges a serious and accident related violation of section 3272, subdivision (c) [failure to define walkways]. Citation 5 initially alleged a Serious and Accident Related violation of section 3650, subdivision (t)(12), and was amended to assert a violation of section 1592, subdivision (e) [failure to ensure operator knew the location of employees on foot].

This matter came on regularly for hearing before Kevin J. Reedy, Administrative Law Judge (ALJ) for the Board, at West Covina, California on December 9, 2016, April 27 and 28, 2017, and November 16, 2017. On February 12, 2018, the ALJ issued a Decision affirming the citations and proposed penalties. The Board granted Employer’s petition for reconsideration.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

1 Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
ISSUES

1. Did the Division establish a violation of section 3203, subdivisions (a)(4) and (a)(6) by a preponderance of the evidence?
2. Did the Division establish a Serious and Accident Related violation of section 3272, subdivision (c) by a preponderance of the evidence?
3. Did the Division establish alleged a Serious and Accident Related violation of section 1592, subdivision (e), referencing section 3666, subdivision (a), by a preponderance of the evidence?

FINDINGS OF FACT

1. On January 7, 2016, Kie Matsuda (Matsuda), a feeder driver for Employer, was killed when he collided with a vehicle known as a yard bird. The accident occurred at approximately 9:05 p.m.
2. Yard birds are vehicles that primarily stay on the Employer’s premises, moving trailers.
3. The yard bird was driven by Clemens Weisner (Weisner). Weisner was traveling westbound through Employer’s yard. Weisner was looking to the left, and making a slight left turn when the accident occurred.
4. At the time of the accident, Matsuda was beginning his shift. He was walking northbound through the yard, to his vehicle. As Weisner drove the yardbird west bound and Matsuda simultaneously walked northbound, a collision occurred. Matsuda came into contact with the hydraulic tank on the left side of the vehicle, in front of the rear tires. He was found in the drive train area of the yard bird.
5. Matsuda died as a result of serious injuries sustained in the accident.
6. Walkways used by feeder drivers to access their vehicles were not clearly marked as designating a pedestrian walkway.
7. Employer lacked adequate yard control procedures to ensure that drivers in the yard were aware of the presence of pedestrians.

DISCUSSION

1. Did the Division establish a violation of section 3203, subdivisions (a)(4) and (a)(6) by a preponderance of the evidence?

Citation 2 alleges a violation of section 3203, subdivision (a)(4) and (a)(6):

(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:

[…]
(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
(A) When the Program is first established;
Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
(A) When observed or discovered; and,
(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The alleged violative description alleges:
On or about, but not limited to, 1/7/16, UPS had an IIPP that was ineffective in that the employer failed to identify and evaluate and correct the workplace hazards associated with employees walking throughout the yard located at 1380 Shore Drive in West Sacramento. As a result an employee was fatally injured when he was struck by an Industrial Tow vehicle while walking in the yard located at 1380 Shore Dr. in West Sacramento.

While an employer may have a comprehensive Illness and Injury Prevention Program (IIPP), the Division may nonetheless demonstrate an IIPP violation by showing that the employer failed to properly implement that plan. (HHS Construction, Inc., Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), citing BHC Fremont Hospital, Inc., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) The Division’s citation alleges that the Employer failed to identify and correct hazards associated with employees walking through the yard.

Section 3203, subdivision (a)(4) requires that an Employer have procedures for “identifying and evaluating work place hazards[,] including scheduled periodic inspections[.]” Here, Employer has demonstrated that it has a comprehensive IIPP, and conducts regular facility audits to identify and correct hazards. (Ex.s B, 34.) Records of those facility audits were entered into the record, and Employer’s safety manager, Veronica Angin (Angin), testified that the audits
are conducted by Employer’s safety committee, which consists of both management and union representatives, on a semi-annual basis. The Division failed to establish by a preponderance of the evidence that Employer failed to have, or to implement, procedures to conduct periodic inspections to identify workplace hazards. (See, Brunton Enterprises, Inc., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

The Division’s citation also alleges a violation of section 3203, subdivision (a)(6), which requires an employer’s IIPP to also “[i]nclude methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures[.]” The Board has stated that “An IIPP may be satisfactory as written on paper, but failure to implement that plan, through failure to correct hazards, may constitute a violation of section 3203(a)(6)[.]” (Contra Costa Electric, Inc., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Employer did broadly identify and correct the hazards of working in the yard, through creation of a set of rules and procedures known as its “Facility Yard Control Master Operating Plan.” The plan addresses the dangers of working in an area where various activities are taking place around moving vehicles. Employer’s Facility Yard Control Master Operating Plan and includes identification of blind spots, pedestrian walkways, identified employee entrances and break areas, designated parking areas, and entry and exit areas, and requires employees who work in the yard become trained and certified. (Ex. 33.) Yard certified employees are required to follow a number of specified rules when engaged in tasks in the yard, such as picking up fallen packages, or cleaning spills.

While the yard control rules, which included wearing a reflective vest, applied to employees working in the yard, feeder and package drivers, such as Matsui, who spent only minimal time in the yard, going to and from their vehicles, were not required to wear reflective vests. Employer had concluded that the hazard did not require such a rule for employees whose normal job duties were not primarily based in yard work. As discussed above, Angin, the Employer’s safety manager at the time of the accident, testified to the two most recent facility audits that the Employer had conducted prior to the accident. The audits included management, hourly employees, and the unions representing bargaining unit employees. Neither audit identified any concerns related to usage of safety vests in the yard. Angin also testified that a risk assessment was conducted to measure the risks to feeder drivers in the yard; the assessment included the number of times that the feeder drivers were in the yard and how long they were in the yard. Although Angin was not involved in the assessment, she explained that the feeder drivers were exempted from wearing vests because they spent only a short period at the beginning and end of their shifts in the yard, coming to and from their vehicles.

Employer’s audits and risk assessments concluded that the hazard to feeder drivers in the yard was low enough to exempt the drivers from wearing reflective vests in the yard, and the Board finds that this conclusion was not entirely unreasonable at the time those assessments were made. Nonetheless, the Board would encourage Employer to conduct a reassessment of the hazard to feeder drivers, and to weigh the circumstances of this tragic accident in such a reassessment. Even if the Board were to conclude that a failure to implement or maintain an IIPP occurred here, the Board generally will not find a violation based on an isolated or single occurrence. (GTE California, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991; David
Citation 2 and its associated penalty is vacated.

2. Did the Division establish a Serious and Accident Related violation of section 3272, subdivision (c) by a preponderance of the evidence?

Citation 3 alleges a Serious and Accident Related violation of section 3272, subdivision (c).

Section 3272, subdivision (c) requires the following:

(c) 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.

The Division’s citation states:

On or about, but not limited to 1/7/16, United Parcel Services Inc., dba UPS, failed to clearly define the walkways that did not have proper definition by painted lines curbing or other methods of marking. As a result an employee was fatally injured when he was struck by an Industrial Tow vehicle while walking in the yard located at 1380 Shore Dr. in West Sacramento.

Employer, in its Petition for Reconsideration, argues that its due process was violated, as the safety order is unconstitutionally vague, and Employer had no notice that section 3272, subdivision (c) would be applied to its outdoor yard.

"In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case." (Teichert Construction v. California Occupational Safety & Health Appeals Bd. (2006) 140 Cal.App.4th 883, 890-891).

Here, the safety regulation requires proper definition of aisles, ladders, stairways and walkways. An aisle, ladder, stairway, or walkway may easily exist either in an indoor or outdoor setting. Notably, the word “indoor” is not found anywhere in section 3272; Employer’s characterization of the regulation as an “indoor building standard” is not supported by the plain language of the regulation. "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' (Citations.)" (Michels Corp, dba Michels

Employer attempts to bolster its argument that section 3272 is a building standard that applies only to indoor places of work by citing to the Board’s decision in United States Cold Storage of California, Cal/OSHA App. 11-1342, Denial of Petition for Reconsideration (Oct. 10, 2012). That Decision holds that section 3272 is a building standard, as it includes a reference to Title 24. Employer is not wrong when it contends that the regulation is applied to indoor places of employment. However, the fact that the standard was incorporated into Title 24 does not preclude it from also being applicable to outdoor places of employment, and the Board declines to narrow the application in a manner not supported by the plain language.

The Division has demonstrated by a preponderance of the evidence that employee Matsuda was struck by a yard bird in a hazardous walkway area that lacked clearly defined walkways. A violation of the safety regulation is established.2

3. Did the Division establish the alleged Serious and Accident Related violation of section 1592, subdivision (e), referencing section 3666, subdivision (a), by a preponderance of the evidence?

Employer also argues that due process was violated in Citation 5, which alleges a violation of a Construction Safety Order, section 1592, subdivision (e), found under Article 10. Haulage and Earth Moving. That section reads:

§1592. Warning Methods.
[...]
(e) Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations.

The Division’s citation also includes the following alleged violative description and reference:

On or about 1/7/16, United Parcel Service Inc. dba UPS, failed to ensure the tow tractor was being operated in a safe manner by looking in the direction of travel and not moving the vehicle until certain all persons were in the clear in the yard located at 1380 Shore Dr in West Sacramento. As a result an employee was fatally injured when he was struck by an Industrial Tow vehicle while walking in the yard located at 1380 Shore Dr in West Sacramento.

2 Employer’s Petition for Reconsideration does not raise the issue of classification of the citations. Issues not raised in the Petition are deemed waived. (Lab. Code § 6618.)
Reference:

1) T8 CCR §3666(a) Haulage Vehicles and Earthmoving Equipment
   (a) After June 7, 1972 haulage vehicles and earthmoving equipment such as scrapers, crawler tractors, bulldozers, frontend loaders, motor graders, and similar equipment shall comply with Article 10, Haulage and Earthmoving, of the Construction Safety Orders.³

Employer argues that it was not on notice that a Construction Safety Order would be applied to UPS’ operations. In Columbia Helicopters, Inc., Cal/OSHA App. 01-623, Decision After Reconsideration (Jan. 8, 2004), the Board rejected an employer’s due process argument, stating:

The Appeals Board has consistently held that a safety order will not be held void for uncertainty if any reasonable and practical construction can be given its language. A safety order is not rendered vague or unenforceable simply because it requires the exercise of judgment by the regulated entity or person as long as it is reasonably susceptible to interpretation. The prohibition against vagueness in statutes also applies to administrative regulations.

The citation includes a reference to section 3666, subdivision (a), which is a General Industry Safety Order (GISO); the GISOs are unquestionably applicable to Employer’s operations. The referenced GISO clearly states that haulage vehicles must comply with Article 10 of the Construction Safety Orders. In other words, the CSO applies to Employer through application of section 3666, subdivision (a). While the CSOs may not generally be applicable to Employer, they are incorporated by reference to apply to haulage vehicles used in non-construction settings via section 3666, subdivision (a).

While the citation may have been more clearly stated by alleging a violation of section 3666, subdivision (a), referencing section 1592, rather than vice versa, ultimately, the outcome is the same. "It is well settled that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws." (Novo-Rados Constructors, Cal/OSHA App. 78-135, Decision After Reconsideration (Apr. 28, 1983); Guy F. Atkinson Co., Cal/OSHA App. 75-929, Decision After Reconsideration (Jan. 27, 1976).) No due process violation is found.

The regulation at issue references “haulage vehicles”, but no definition of what constitutes a haulage vehicle exists in the GISOs. Employer contends that the vehicle that ran into Matsuda with fatal results is not a haulage vehicle. The term haul is defined in Merriam Webster as “to cause (something) to move by pulling or drawing: to exert traction on.” (Decision, p. 8.) As the ALJ wrote in his Decision, “Tow tractors and yard birds haul trailers at the worksite. The meaning of the word ‘haulage,’ and the language of the regulation are clear, and no further analysis is necessary.” (Decision, p. 8.) The Board has held that a safety regulation will not be held void for

³ Title 8 Section 3666, subdivision (a) is a General Industry Safety Order, found in Group 4. General Mobile Equipment and Auxiliaries Article 25. Industrial Trucks, Tractors, Haulage Vehicles, and Earthmoving Equipment.
uncertainty if any reasonable and practical construction can be given its language. (Duke Timber Construction Co., Cal/OSHA App. No. 81-347, Decision After Reconsideration (August 19, 1985); Novo-Rados Enterprises, Cal/OSHA App.75-1170, Decision After Reconsideration (May 29, 1981).) The regulation is sufficiently clear and is applicable to the yard bird involved in the incident.

To demonstrate a violation of the regulation, the Division must show that Employer failed to implement control procedures to ensure that drivers were aware of the location of employees on foot within the vicinity of their vehicles. Because the standard is a "performance standard," it establishes a goal or requirement, while granting the employer latitude in designing appropriate means of compliance under various working conditions. (Davey Tree Service, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012), citing, Estenson Logistics, LLC, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011).) As discussed by the ALJ in his Decision, the Employer could have implemented a range of control procedures or utilized various warning systems or devices to ensure that drivers are aware of the location of pedestrians in the yard. (Decision, p. 9-10.) While Employer has a number of yard control procedures as discussed above, Employer failed to establish any procedures related to warning drivers of the presence of feeder and package drivers like Matsuda who were exempted from wearing vests pursuant to the yard control program. Because of this lack of control or warning procedures, the driver of the yard bird was unaware of the pedestrian walking nearby. The Division has met its burden of demonstrating a violation of section 1592, subdivision (e).

DECISION

The Decision of the ALJ is reversed in part and affirmed in part. Citation 2 and associated penalties are vacated. Citation 3 and the associated $18,000 penalty is affirmed. Citation 5 and the associated $18,000 penalty is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member

FILED ON: 05/28/2019