

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

In the Matter of the Appeal of:

KELLY GLOBAL LOGISTICS, INC.
2626 East Vista Industries
Rancho Dominguez, CA 90220

Employer

Docket No. 12-R3D5-0014

**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 petition for reconsideration filed by Kelly Global Logistics, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 1, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Carson, California maintained by Employer. On December 22, 2011, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Serious Accident Related violation of section 3203(a)(7) [Failure to effectively implement Illness and Injury Prevention Program's training provisions].

Employer filed a timely appeal of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on July 26, 2013. The Decision denied

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

Employer's appeal and upheld its Serious Accident Related classification, imposing a civil penalty of \$18,000.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division did not file an answer to the petition.

ISSUE

Did Employer violate section 3203(a)(7)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Associate Safety Engineer Edwin Charles Dyer (Dyer) was notified of an accident that occurred at Employer's work site, and opened an investigation on July 1, 2011. Dyer met with John Horquest (Horquest), a supervisor of Employer, and Tom Burcet (Burdet), Employer's Vice President. Dyer was informed that Juan Gonzalez (Gonzalez), a temporary employee assigned to work at Employer's worksite by Personnel Plus, a staffing company, had begun work at Employer's warehouse on June 22, 2011, as a loader. Gonzalez's job duties included using a pallet jack to move goods from truck trailers into the warehouse.

Julio Hurtado (Hurtado) was the only employee who witnessed Gonzalez's accident. Hurtado was also a Personnel Plus employee, and had become a "regular" for Employer at the time of Gonzalez's accident, having worked with Employer for three to five months. Hurtado was acting as a "pusher" on the day of Gonzalez's accident, which meant that he was responsible for ensuring the five other employees in his crew kept on task and moved nonstop. On June 23, Gonzalez's second day at Employer's warehouse, Gonzalez was moving a loaded pallet jack when it became stuck on a dock plate. Hurtado testified that Gonzalez had stated that he had used a pallet jack in his prior job.

Hurtado noticed that Gonzalez struggled to go up a 6 inch step to go to the container, had difficulty picking up boxes at the bottom of the container, and was unable to wrap the stacked boxes in plastic. Hurtado stated that "I did practically most of the work." Hurtado also saw that Gonzalez was not raising the forks of the pallet jack all of the way off of the ground, and was getting stuck on the dock plate, and reminded him several times throughout the day to raise the forks higher. Hurtado did not have authority to remove Gonzalez from the job, and did not report Gonzalez's performance issues to

the supervisor. While taking a load into the warehouse, Gonzalez tugged at the pallet jack to clear it from the dock plate, and the boxes loaded on the pallet started to fall towards him. Gonzalez moved backwards and to the side to avoid the falling boxes, and as he did he tripped and fell, striking his head on the concrete. An ambulance was called and he was taken to the hospital. He died on June 29, 2011. (Ex. 13).

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's 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 petitioned for reconsideration on the basis of Labor Code section 6617(c) and (e).

Kelly Global Services (the secondary employer) was cited for failing to effectively implement the training and instruction section of its IIPP, by failing to provide Gonzalez with training and instruction on use of the hand operated pallet jack. Section 3203(a)(7) requires each employer to establish, implement and maintain an effective IIPP; both the primary and secondary employer must meet the requirement in the joint employer context. (*Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) The IIPP must be in writing, and the section requires at a minimum that the program:

- (7) Provide training and instruction:
 - (A) When the program is first established;

EXCEPTION: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been 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; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Employer asserts that Gonzalez came to its warehouse from Personnel Plus (the primary employer) with prior training, and did not need further instruction in operation of the pallet jack.

Dyer testified that the Employer was unable to produce any records demonstrating that Gonzalez had received training in operation of the manual pallet jack from Employer or from prior employers. Employer did not dispute that it had no records of training for Gonzalez. Hurtado testified that Gonzalez stated he had used a pallet jack before. Vice President Burcet's written statement to the Division, which indicates that Gonzalez had used a pallet jack at past jobs, where Employer's employees "had worked with Mr. Gonzalez at other companies and performed similar tasks" is not indicative of prior training, or evidence that the work, or the tools, were so similar as to exempt Gonzalez from training. (Ex. 4). (See, *A. Teichert & Son, Inc. dba Teichert Construction*, Cal/OSHA App. 05-2650 (Aug. 16, 2012) [Prior experience and training as dump man on road projects does not mean employee is exempt from training on how to conduct those operations on a sand pile. Employer failed to train.])

Employer also asserts that regardless of the training and experience Gonzalez may have had, Employer provided training to Gonzalez on the day of the accident. Hurtado, the Personnel Plus employee who was assigned to work with Gonzalez, discussed use of the manual pallet jack with Gonzalez.

Hurtado asked Gonzalez if he was familiar with using the manual pallet jack, and gave Gonzalez several pointers. Hurtado recalled that the first time he himself had used the pallet jack it had gotten stuck and tipped over; Hurtado was aware that some instruction was needed. While Employer describes these conversations as training, Hurtado held the position of pusher and was not “held responsible” for the number of duties assigned to supervisors in Employer’s IIPP. Hurtado did not provide Gonzalez with the new employee training and instruction required under Employer’s IIPP.

Employer’s IIPP mandates “[t]raining in such areas as safety standards, statutory requirements, hazard identification, safety analysis, and similar techniques [which] shall be incorporated into safety training programs.” (Ex. 3). Employer’s IIPP also states “[s]upervisors are held responsible for providing a safe workplace for all employees” and have responsibility for a laundry list of duties, including: communication, disciplinary action, management’s responsibility for safety, new employee checklist, new employee orientation, observation of affected employees in their work environment, recognition of unsafe conditions, and more. (Ex. 3). Hurtado did not have authority to remove employees from the job and did not consider himself to be “the main supervisor.”

While there are a number of ways employees may be provided training, Employer’s own IIPP holds supervisors explicitly responsible for the safety and orientation of new hire employees. Furthermore, the Board has noted that an employee who is assigned to train coworkers must himself have been provided instruction to make him eligible to teach others. The record here does not establish that Hurtado had been provided any training in Employer’s IIPP, use of the pallet jack, or how to effectively instruct others. (*Hypower, Inc. dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013).)

As the Board found in *CA - Prison Industry Authority State of California*, Cal/OSHA App. 09-2459, Denial of Petition for Reconsideration (Oct. 26, 2011), lack of documentary evidence showing that an employee was trained or instructed, lack of specific provisions related to training for a particular piece of machinery or equipment in the IIPP, and testimony in the record, may support an ALJ’s conclusion that the employer failed to train on the hazards associated with a particular machine. In this case, the lack of documentation, lack of discussion of training related to the equipment, and the testimony establish that Employer failed to train on hazards related to the pallet jack. That another Personnel Plus employee stepped in and offered to assist Gonzalez throughout the day, and gave cursory instructions on how to use the pallet jack, does not relieve Employer of its responsibility to effectively implement its own IIPP. (*Sturgeon & Son, Inc.*, Cal/OSHA App.

91-1024, Decision After Reconsideration (Jul. 19, 1994) [General instructions are not a substitute for specific instructions on hazards unique to the job assignment, such as loading/securing of pipes.]

Employer's IIPP includes the directive that "[e]mployees shall be instructed as to the hazards of their respective jobs, the methods necessary to perform them safely, and those rules and regulations, which concern their safety and the safety of others." (Ex. 3). The IIPP also states that "[a]ll work assignments of our employees shall be compatible with their physical condition." (Ex. 3). Hurtado noticed that Gonzalez had a physical disability or injury of some kind which made it difficult for him to step and bend, and Hurtado assisted Gonzalez with much of his work throughout the day. However, Hurtado had no authority to remove Gonzalez from the job, and did not report Gonzalez's problems with lifting, stepping, and moving the pallet jack to a supervisor. While Hurtado was able to advise Gonzalez that he needed to lift the forks of the pallet jack, he did not provide training on the hazards of failing to do so, or have authority to modify Gonzalez's job or remove him from the assignment altogether.

Employer failed to implement the training provisions of its IIPP, by failing to train Gonzalez in the necessary methods to perform his work safely, and the hazards of his specific job. By failing to train its employee or cause its employee to be trained as per its IIPP, Employer failed to meet the requirements of section 3203. (*Hypower, Inc. dba Hypower Electric Services, supra*).

PENALTY

The Division established that there is a realistic possibility that serious injury could result from the actual hazard created by the violation. While not defined in the safety orders, the Board interprets the phrase "realistic possibility" using the ordinary meaning of the words. In prior decisions after reconsideration, the Board has interpreted "realistic possibility" to be a possibility which is within the bounds of reason, and which is not one of pure speculation. (*Janco Corporation, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001)*.) Dyer explained that there is a high likelihood of an employee sustaining serious physical harm, and described the actual hazard as tripping or falling, heavy materials falling on the employee from the pallet jack, or the pallet jack running over the operator's foot. The actual hazard was created by Employer's failure to train the employee in proper operation of the pallet jack.

Dyer testified to extensive education and experience in the health and safety field, and the Board finds his testimony regarding the possibility of serious physical harm from failure to train the employee in use of the manual pallet jack to be credible.

To show that a violation is accident-related, the Division must establish by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, supra, citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) The Division established that Employer's failure to train was a cause of Gonzalez's fatal accident. This designation, as found by the ALJ, does not allow for application of penalty reduction factors, leaving the penalty at \$18,000, which the Board affirms.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: September 4, 2014