

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DISNEYLAND RESORT
1313 South Harbor Boulevard
Anaheim, CA 92803,

Employer.

DOCKETS 13-R3D1-1131
and 1132

DECISION

Statement of the Case

At all relevant times, Disneyland Resort (hereinafter Employer or Disneyland) was an employer in the state of California. Disneyland owns and operates theme parks in Southern California. Beginning October 10, 2012, the Division of Occupational Safety and Health (the Division) through associate safety engineer Thurman Randall Johns, conducted an inspection at Employer's place of business located at 1313 South Harbor Boulevard, Anaheim, California. On March 22, 2013, the Division cited Employer for two serious violations:

- Citation 1, Item 1, a Serious violation of Section 3203(a)(6)(1)¹ (Employer failed to establish and implement methods in its Injury and Illness Prevention Program (IIPP) for correcting unsafe conditions on the Space Mountain² attraction including, but not limited to failure to protect employees from injury caused by moving attraction vehicles, with a proposed penalty of \$7,650).
- Citation 2, a Serious violation of Section 3314(c)(1) (failure to create means or methods to protect employees from injury from Space Mountain vehicles traveling on the coaster rail during the "Burn-in"

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

² Space Mountain is a type of roller coaster attraction.

procedure, which required the vehicles to be moving, with a proposed penalty of \$22,500).

Employer filed a timely appeal to each citation on all grounds and alleged multiple separate affirmative defenses.

This matter came on regularly for hearing before Sandra L. Hitt, Administrative Law Judge (ALJ) of the California Occupational Safety and Health Appeals Board, at West Covina, California on April 24, 2014.³ Robert D. Peterson, Attorney, represented Employer. James Clark, Staff Counsel, represented the Division. The parties presented oral and documentary evidence on the hearing dates. The parties were given until June 5, 2014, to file a series of written closing briefs. On her own motion, the ALJ extended submission of the matter to December 1, 2014.

The parties stipulated that the citation penalties were calculated in accordance with the Division's policies and procedures, and that the injured employee was an employee of Disneyland Resort on the date of the injury. At hearing, the Division moved to reclassify the violations from serious to general, with a \$175 penalty for Citation 1 and a \$350 penalty for Citation 2, for total penalties of \$575. There being no objection, the motion was GRANTED for good cause.

Issues

1. Did Employer fail to establish and implement methods for correcting unsafe conditions in its IIPP?
2. Did Employer implement methods or means designed to protect employees from injury by moving attraction vehicles during the "Burn-in" procedure?

Findings of Fact

1. Thurman Randall Johns (Johns) was the only associate safety engineer assigned to the underlying accident inspection and he was the only witness to testify at hearing.
2. At the time of the injury accident, Disneyland was conducting a "Burn-in" procedure in the Space Mountain⁴ attraction.
3. Disneyland clearly identified "Do Not Enter" zones with large red paint markings inside the Space Mountain Building. Employees were to avoid the "Do Not Enter" zones while the attraction was running.
4. Johns found no safety order violations⁵.

³ Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

⁴ Space Mountain is a type of in-door roller coaster ride.

5. Employer's IIPP contained methods for correcting unsafe conditions.
6. It was necessary for the Space Mountain attraction to be running during the "Burn-in" procedure.
7. The "Burn-in" procedure did not involve cleaning, adjusting or servicing of any part of the Space Mountain attraction.
8. Employer implemented means designed to protect employees from the hazards of moving attraction vehicles during the "Burn-in" procedure, and trained employees.
9. The accident at issue here was an isolated event.

Analysis

Issue 1: Did Employer fail to establish and implement methods for correcting unsafe conditions?

Section 3203(a)(6) requires employers to:

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;

The alleged violation description (AVD) states:

"On or before October 3, 2012, the employer failed to implement and/or failed to ensure implementation of the required element on an Injury and Illness Prevention Program including but not limited to: (1) The employer failed to establish and implement effective methods for correcting unsafe conditions on the Space Mountain attraction including but not limited to a failure to protect employees from injury caused by moving attraction vehicles."

Title 8, CCR Section 3203(a)(6) does not include the requirement that an IIPP be "effective," although that may be a reasonable interpretation. Nevertheless, the Board may not read anything into or out of a safety order. *Webcor Construction LP*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sept. 2, 2010). Sometimes it is not until an accident happens that an employer realizes that a procedure needs to be corrected, and the Appeals Board has recognized that a failure to implement or maintain an IIPP cannot be based on an isolated or single violation. *GTE California*,

⁵ Johns did not write the citations at issue, nor did he sign them.

Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991; *David Fischer, DBA Fischer Transport, A Sole Proprietor*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995). John's testimony established that the injury to Monday was an isolated event. According to Johns, Employer utilized the "Burn-in" procedure for seven years and 250,000 cycles [of a ride vehicle around the track] without incident prior to the accident at issue here.

What is more, Johns⁶ testified that Employer did have an effective IIPP which included methods and procedures for protecting employees from hazards associated with attraction vehicles going through a "Burn-in" procedure:

[T]he employer did establish and implement and maintain an Injury and Illness Prevention Program. They did have methods and procedures for correcting an unsafe condition, procedures where they trained all these people. They had placed in place a demarcation zone⁷ that you were not supposed to go there.

If you go to a [theme] park and somebody is observed in an area like this, they shut--they stop the ride. It sometimes takes ten minutes to bring it back up, but they stop the ride.

So, they were well aware of the problem. And I didn't feel that it was--that they had had--you know, the AVD as written here says, Employer failed to establish and implement effective means for correcting unsafe conditions, including but not limited to failure of protecting employees from injury caused by moving vehicles.

So I didn't feel that either one of those applied in this instance.

Johns agreed that there was a hazard at the attraction should anyone get in the way of a moving attraction vehicle. However, Johns believed that Employer was aware of the hazard and had addressed it with the "Burn-in" procedure (Exhibit 5) and training. The "Burn-in" is conducted over a six-hour period during which a single vehicle is cycled repeatedly around a closed loop tract prior to returning the vehicle to service. The "Burn-in" is conducted

⁶ Johns had been a safety manager for Disneyland during the years 2004-2009, prior to returning to work for the Division (Exhibit 2).

⁷ The demarcation zone was beyond the red painted lines. The ride vehicle ran on a track and extended approximately 11 inches over the track. Persons standing outside the red lines would be outside the zone of danger. See, Exhibits 3C and 3D.

in well-lit conditions and the vehicle makes a lot of noise. To determine whether it is safe to return the vehicle to service, employees conducting the “Burn-in” procedure are supposed to move throughout the attraction, avoiding the “do not enter” zones, while observing and listening to the moving vehicle to see or hear anything that might indicate a problem.

The Division did not submit into evidence Employer’s IIPP. The *only* evidence regarding the IIPP was John’s testimony. Johns was the only witness to testify,⁸ and his testimony supported the conclusion that Employer did have procedures for correcting unsafe conditions in its IIPP. Johns testified that Employer implemented safety order compliant methods/means designed to protect employees during the “Burn-in” procedure, and that employees were trained in such means and methods. Johns testified that the injured employee, Monday, had participated in the preparation and adoption of the “Burn-in” procedure and had even trained other employees regarding the procedure.

The Division failed to establish a violation of Section 3203(a)(6) and therefore, the appeal of Citation 1 is GRANTED.

Issue 2: Did Employer implement methods or means designed to protect employees from injury by moving attraction vehicles during the “Burn-in” procedure?

Section 3314(c) is entitled Cleaning, Servicing and Adjusting Operations. Section 3314(c)(1) provides:

If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g. extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

The alleged violation description states:

On or before 10/3/2002, the employer failed to create effective means or methods to protect employees from injury from vehicles traveling on the rail at the Space Mountain attraction, whose movement was necessary during the “Burn-in” servicing

⁸ The Division proposed to call Sr. Safety Engineer, Joel Foss, to testify, but Employer properly moved to exclude his testimony as he had not been identified previously as a witness.

procedure. As a result on 10/23/12, an employee was seriously injured when he was struck by a moving attraction vehicle.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).) The Division presented no evidence that Employer's "Burn-in" procedure involved cleaning, servicing or adjusting. "Servicing" is not defined in Section 3314(c), nor in Section 3207, which includes numerous definitions. The *Concise Oxford Dictionary* (eighth edition) defines "servicing as (a) the provision of what is necessary for the installation and maintenance of a machine, etc. or operation. (b) a periodic routine maintenance of a motor vehicle etc. Nothing was "provided" during the "Burn-in" procedure. Nor was any maintenance, routine or otherwise, performed on the ride vehicle. The "Burn-in" procedure was a rather passive endeavor which involved observing the vehicle run to determine if there was any reason the vehicle *should be repaired or serviced* prior to placing it back in use. If nothing of concern were observed, the ride vehicle would be returned to regular operation. The ride vehicle was not being cleaned, serviced or adjusted during the "Burn-in" procedure.

Where the Division's case presents a factual situation not within the contemplation of the cited safety order, the alleged violation must be set aside. (See *Carver Construction Co.*, OSHAB 77-378, DAR (March 27, 1980), citing *Johnson Aluminum Foundry*, OSHAB 78-593, DAR (Aug. 28, 1979). Based upon the above facts, the ALJ finds that Section 3314(c) does not apply to the circumstances under consideration here. Even if Section 3314(c) did apply, Johns testified that Employer implemented safety order compliant methods/means designed to protect employees during the "Burn-in" procedure, and that employees were trained in such means and methods. The "Burn-in" procedure requires the ride vehicle to be in motion during the procedure, and "other methods" (i.e. "Do Not Enter Zones" clearly marked in red paint) were in use to protect employees from injury caused by moving ride vehicles.

The Division did not establish a violation of Section 3314(c)(1). For all of the foregoing, the appeal of Citation 2 is GRANTED.

Conclusion

Citations 1 and 2 are DISMISSED.

Order

Total penalties of \$0 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: December 30, 2014

SANDRA L. HITT
Administrative Law Judge

SLH:ml

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

Dates of Hearing: April 2-4, 2014

Division Exhibits – Admitted

Exhibit Number

- 1 Jurisdictional Package**
- 2 CV of Thurman R. Johns**
- 3A Photo of Stairway with track**
- 3B Photo of platform with track**
- 3C Photo of injury site with man in safety vest**
- 3D Photo of injury site with man in blue shirt**
- 4 Video of ride**
- 5 Burn-in” procedure**

Employers’ Exhibits--Admitted

Letter

NONE

WITNESSES APPEARING AT HEARING

Thurman Randall Johns, associate safety engineer

CERTIFICATION OF RECORDING

I, Sandra L. Hitt, 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.

SANDRA L. HITT

December 30, 2014

**SUMMARY TABLE
DECISION**

In the Matter of the Appeal of:

**DISNEYLAND RESORT
Dockets 13-R3D1-1131 and 1132**

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

IMIS No. 315531277

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	APPEAL	VERIFIED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-1131	1	3203(a)(6)	S	[ER failed to establish and implement methods in its IIPP for correcting unsafe conditions at the Space Mountain attraction] DOSH lowered extent and likelihood and reduced class to General at hearing, due to after acquired information relevant to ER knowledge. ALJ dismissed citation.		X	\$7,650	\$175	\$0
13-R3D1-1132	2	3314(c)	S	[ER failed to protect employees from injury by vehicles moving on the rail during the "Burn-in" procedure] DOSH lowered extent and likelihood and reduced class to General at hearing, due to after acquired information relevant to ER knowledge. ALJ dismissed citation.		X	22,500	350	0
Sub-Total							\$30,150	\$525	\$0
Total Amount Due*									\$0

NOTE: *Please do not send payments to the Appeals Board.*
All penalty payments must be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

Total Amount Due*
(INCLUDES APPEALED CITATIONS ONLY)

*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 or (415) 703-4308 (payment plans) if you have any questions.

ALJ: SLH/ml
POS: 12/30/2014