

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

In the Matter of the Appeal of:

**UNITED PARCEL SERVICE
251 Sylvania Avenue
Santa Cruz, CA 95060**

Employer

DOCKET 13-R1D2-0040

DECISION

Statement of the Case

UNITED PARCEL SERVICE (“Employer” or “UPS”) is a shipment company, which has offices in Santa Cruz, California. Beginning on November 9, 2012, the Division of Occupational Safety and Health (“the Division”) through Kelly Tatum, Associate Safety Engineer, conducted an inspection at 251 Sylvania Avenue, Santa Cruz, California, where employer operated a warehouse and truck dispatch center. On December 14, 2012, the Division cited employer for one general violation of Title 8, California Code of Regulations, Section 3273(a)¹ for failure to ensure that floors were reasonably free of oil, grease or water.

Employer filed a timely appeal of the citation which contested whether the safety order was violated, whether the classification was correct, whether the abatement was reasonable and whether the proposed penalty was reasonable.

The matter was heard in Oakland, California before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on February 5, 2014 at 1515 Clay Street, Room 1303, Oakland, CA 94612. The Division was represented by Michael Frye, District Manager, Division of Occupational Safety and Health, Fremont District. Employer was represented by Carla J. Gunnin, Esq. Baker, Donelson, Bearman, Cladwell & Berkowitz, PC. The Division and the employer presented witnesses and documentary evidence which were accepted into evidence. The parties submitted post-hearing briefs, the last of which was filed on March 26, 2014 and the matter was submitted for decision at that time. The ALJ extended the submission date to August 8, 2014 on her own motion.

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

Issues²

- A. Were the employer's warehouse floors reasonably free of oil, grease, and water on or before November 9, 2012?
- B. Are the abatement requirements reasonable?

Findings of Fact

1. On November 9, 2013, there was oil on the warehouse floor for at least three hours from trucks which were being loaded and unloaded.
2. One or more of employer's employees were exposed to the hazardous condition (slippery floors) while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations on a chronic basis.
3. Each day around noon, the porter uses the buffing machine on the warehouse floor. Even after the porter uses the buffing machine, the oil is not as visible, but the floor is still slippery because no solvent is used to break down the oil before the buffer is used.
4. Division presented methods to clean the floor. (1) "Kitty litter", an absorbent substance, is readily available and is used by hazmat trained UPS employees to clean up liquids when packages leaked a substance. This material can be used to clean up oil and is stored in Damaged Material Processing Area at back of facility near bin #50. (2) The porter could clean the floor properly using appropriate solvents.
5. Employer provided no evidence of the cost of the suggested abatement or evidence that the suggested abatement was not feasible.

Analysis³

Employer exposed employees to warehouse floors in which oil, grease and water were not properly cleaned in violation of Section 3273(a).

The Division cited employer for a violation of Section 3273(a):

Permanent floors and platforms shall be free of dangerous projections or obstructions, maintained in

² The parties stipulated that an opening conference and closing conference was held in accordance with the regulations and the Division correctly calculated the penalties. Employer withdrew the issue regarding whether the classification of "general" was correct.

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

good repair, and reasonably free of oil, grease, or water. Where the type of operation necessitates working on slippery floors, such surfaces shall be protected against slipping by using mats, grates, cleats, or other methods which provide equivalent protection.

Citation 1, Item 1 alleges:

On or before November 9, 2012, the Employer failed to ensure that floors were reasonably free of oil, grease or water.

The Division has the burden to establish that the floors were not reasonably free of oil, grease or water and that the employees were exposed to the slipping hazard created by oil and water the warehouse floor.

The warehouse floors were not reasonably free of oil, grease or water.

When the warehouse floor has puddles of oil and water, causing the areas used by the employees to be slippery, failure to keep the floors reasonably free of oil and water, as used in Section 3273(a), is established. (*Van Camp Sea Food Company*, Cal/OSHA App. 79-0360, Decision After Reconsideration (January 9, 1980).) The Board rejected the argument in that case that the violation was *de minimis* because the areas in the alleged violation (two puddles) only cover a small percentage of the total floor space. The areas in which the slipping hazard existed were regularly used by employees, thus the condition had a direct relationship to the safety of the employees.

Employer's workplace is a warehouse facility, 243 feet by 136 feet with 72 bins or parking spaces used by UPS drivers to park and load packages into vehicles. There are two conveyer belts ("belts"), which run the length of the building, with truck bins on both sides of each belt. Trucks enter and exit through the rollup door or auto bay at the employer's warehouse facility in Santa Cruz. (Exhibit A) Each day, UPS drivers park their vehicles in the warehouse, load the packages on their vehicles between 8:30 a.m. and 9:00 a.m. When loading the packages onto the vehicles, the drivers cross through areas where the floor has spills of oil and water. The UPS vehicles leave the warehouse to deliver the packages between 9:00 a.m. and 9:30. a.m.

The center of the facility is sloped, so that the leaked fluids, including oil and water, drain into the center. The fluids are covered by a removable grate in the center of the warehouse. It is undisputed that on November 9, 2012, one truck which parked near the customer counter leaks oil onto the warehouse floor. This was not cleaned up for hours while drivers were loading their vehicles.

Employer cleaned the floor at around noon each day, after the trucks left to deliver packages. The porter does not use a grease-cutting solvent to remove the oil, but instead used a buffer, which rubbed the oil and water into the floor. As a result of the process used to clean the floor, the oil was not visible, but the

floor was still slippery. The porter frequently goes around carts or other obstacles and misses water and oil spills on the floor. The Division established that the warehouse floors were not reasonably free of oil, grease or water.

The employees were exposed to the slipping hazard.

The Division may establish employee exposure by showing the investigator observed employees accessing the zone of danger while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

In *Continental Airlines*, Cal/OSHA App. 78-0380, Decision After Reconsideration (October 20, 1983), the Board found that employee exposure was established by the fact that the employer used a motorized scrubber to clean the water, oil and hydraulic fluids which spill on the hangar floor during maintenance operations of aircraft. Even a short duration between the employees' exposure to oil on the floor and attempts to clean it up was insufficient to be compliant with the safety order, given that there was no evidence that the employer provided mats, grates, cleats or other equivalent protection for employees.

The evidence shows oil and water on the floor of the UPS warehouse. On November 9, 2012, Kelly Tatum (Tatum), Associate Safety Engineer for the Division observed oil and water on the floor where the trucks had been parked. While waiting for employer's Safety Director Mike Robinson, Tatum observed employees walking across the warehouse floor near these oil and water spots. She took photographs during the inspection that show oil and water spots were not cleaned up during the three to four hour period that Tatum observed the puddles. (Exhibits 3-1 to 3-4.)

The customer counter and public restroom are on the west side and the office complex is on the east side. Employees who work at the customer counter and the offices, as well as drivers regularly cross the floor of the warehouse to clock in, look for packages, and use the changing room and restroom, cross the floor wearing shoes which are not slip resistant.⁴ One driver testified that he occasionally did slip, but did not fall on the warehouse floor, in spite of wearing slip resistant shoes.

⁴ Employer argues that it complied with Section 3273(a) by requiring employees to wear slip resistant soled shoes while working on slippery floors, citing *USS Posco Industries*, Cal/OSHA App. 92-0126, Decision After Reconsideration, (October 20, 1993). UPS argues that its rules requiring employees to wear slip resistant soled shoes while working on slippery floors satisfy the requirements of Section 3273(a). Employer failed to raise an affirmative defense that its' "operation necessitates working on slippery floors" and the facts do not support such a finding. *USS Posco Industries* is also distinguishable on its facts: employer installed a diamond-cut punch plate floor, which had raised bumps like a waffle iron and was designed specifically to prevent slipping. The punch plate has a drain and was washed down two or three times per work shift. In contrast, here, there were no special mats, and the floor was buffed one time each day, without using a grease-cutting cleaner.

The training form on safe work methods for each position suggests ways to avoid slips and falls, and advises employees:

“Looks before stepping – scans work area.”

“Makes adjustment based on changing conditions.”

(Exhibit B) UPS training materials state that employee slips and falls are the second leading source of employee injuries and accounts for 19% of all employee injuries. (Exhibit 4, UPS Safe Work Methods Training Facilitator Guide (December 2006) page 53.) The Division established that the employees were exposed to a slipping hazard.

The Employer had knowledge of the slipping hazard.

The employer maintains that it has no knowledge of the slipping hazard. There was conflicting evidence regarding whether this issue was raised by the Union, whether employees complained about the oil and water on the floor and whether any employee was injured slipping on the floors. One of the UPS drivers testified that he observed at least one other employee slip on the floor. He observed that when he carried boxes, he could not see directly in front of himself and had difficulty navigating around the oil spots.

“Lack of employer knowledge” of a violation is an affirmative defense to a serious violation. This defense is not available for violations classified as “general” violation, which involves proof of a violation of a safety standard.⁵ (Section 336(b).) The areas of the warehouse floor cited by the Division were not being maintained reasonably free of oil, grease and water. Division correctly classified the citation as a general violation and established a violation of Section 3273(a).

Abatement requirements are feasible

The employer has the burden of proving that the abatement requirements are not feasible, after the Division establishes a violation of a performance standard. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Decision After Reconsideration (May 30, 2014); *Campbell Soup Company*, Cal/OSHA App. 77-0701, Decision After Reconsideration (May 5, 1980).) No evidence of lack of feasibility was presented by the employer.

Section 3273(a) is a performance standard which requires the employer to keep work spaces clean and orderly. The Division has only required compliance with the minimum requirements of the safety order. The employer can choose the least burdensome means of abatement. (*Starcrest Products of California, Inc.*,

⁵ The “lack of knowledge” defense was not raised in the appeal. Assuming this violation had been classified as “serious, the Employer would be required to demonstrate that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (*C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).)

Cal/OSHA App. 02-1385, Decision After Reconsideration, (November 17, 2004); *The Daily Californian/Calgraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) The Division suggested technologically feasible means of abating the hazard alleged, e.g. keeping the warehouse floor clean enough so that it would be safe to walk on. Employer could clean up the spills which take place during the loading period by using the “kitty litter”, which is stored in Damaged Material Processing Area at back of facility near bin #50 to soak up the oil and water until the floor can be properly cleaned. Kitty litter is readily available and is used by hazmat trained UPS employees to clean up liquids when packages leak a substance. The porter could be trained to use a grease-cutting cleaner to clean the floor, instead of buffing the oil and water into the floor.

Employer presented no evidence regarding the cost or feasibility of abatement. Based on the evidence in the record, the cost of additional cleaning supplies and “kitty litter” are *de minimis*. The feasibility of scheduling the porter to be available, so that the spills can be dealt with quickly, during the period that warehouse is full of employees loading their vehicles was not disputed. Likewise, the employer failed to present evidence that training the porter on how to clean the floors properly is an unreasonable cost of abating this safety hazard.

If the employer believed that there was no feasible method of compliance with a safety order, or the safety order was unreasonable, it could have applied to the Occupational Safety and Health Standards Board for a variance, or to have the safety order repealed or amended. Labor Code Sections 142.3 through 142.4. (*Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, DAR (Feb. 19, 1985), citing *Hooker Industries, Inc.*, Cal/OSHA App. 77-525, DAR (Feb. 24, 1982); and see *Paradise Post*, Cal/OSHA App. 85-1769, DAR (Oct. 16, 1987).)

For all the foregoing reasons, and because Employer did not present any evidence to demonstrate that the abatement was not feasible, the abatement requirements are found to be reasonable.

Penalty

The parties stipulated that the proposed penalty was correctly calculated in accordance with the regulations. The penalty of \$600 is reasonable and assessed, as set forth in the summary table. (See §336(d)(1) – (5)).

Conclusion

Employer’s appeal is denied. A violation of Section 3273(a) is affirmed and a penalty of \$600 is assessed, as set forth in the attached Summary Table.

DATED: August 27, 2014

MARY DRYOVAGE
Administrative Law Judge

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
UNITED PARCEL SERVICE
Docket 13-R1D2-0040
Date of Hearing: February 5, 2014**

Division's Exhibits

<i>Exh. No.</i>	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Field Document Worksheet (3 pages)	Yes
3-1	Photo - Oil on warehouse floor taken @ 11:17, 11/9/12	Yes
3-2	Photo - Warehouse floor - UPS truck in Bin #104 @ 11:17, 11/9/12	Yes
3-3	Photo - Warehouse floor - Bins #213 to 223 @ 11:18, 11/9/12	Yes
3-4	Warehouse floor - Bins #201 to 203 @ 11:19, 11/9/12	Yes
3-5	Photo - Kitty litter used for clean up of oil, stored in Damaged Material Processing Area at back of facility near bin #50 @ 11:51, 11/9/12	
4	UPS Safe Work Methods for Trainers (p. 1-97)	Yes

Employer's Exhibits

<i>Exhibit Letter</i>	Exhibit Description	Admitted
A	Santa Cruz Center, Warehouse floor schematic, 1/31/12	Yes
B	Safe Work Methods Training Form for 7 positions (Blank)	Yes
C	Plant Engineering, Work Routines and Area Definitions, Rev. 10-27-2009 (23 pages)	Yes

Witnesses Testifying at Hearing

1. Kelly Tatum
2. Rene Villanueva
3. Loren O'Donley
4. Marcus Smolanowich

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.

Signature

08/27/2014

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
UNITED PARCEL SERVICE
DOCKET 13-R1D2-0040

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

IMIS No. 316734201

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION 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
13-R1D2-0040	1	1	3273(a)	G	[Failure to ensure that floors were reasonably free of oil, grease or water.] ALJ sustained citation.	X		\$600	\$600	\$600
Sub-Total								\$600	\$600	\$600
Total Amount Due*										\$600

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should 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: 08 /27 /14**

