

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

UPS (UNITED PARCEL SERVICE)
3121 East Jurupa Avenue
Ontario, CA 91764

Employer

Docket No. 07-R3D3-3322

**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 UPS (United Parcel Service) (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

On April 10, 2007, the Division of Occupational Safety and Health (Division) issued one citation to Employer after investigating an accident which occurred on December 6, 2006, at a place of employment maintained in California by Employer. Employer filed a timely appeal contesting the violation and alleging the independent employee action defense (IEAD). Subsequently, the parties agreed at the hearing that the violation occurred, and that four of the five elements of the IEAD had been established. In lieu of testimony, the hearing consisted of the parties' representatives stipulating to the admission of documents, which comprise the entire record here. The matter was submitted to allow the ALJ to decide whether the fifth element of the IEAD had been established by the admitted documents.

The Decision affirmed the violation, and concluded the disputed element of the IEAD was not established by the record. The violation of California Code of Regulations, Title 8, section 3650(t)(9) ¹ [failure to maintain active control of vehicle] was affirmed, and the penalty of \$750.00 was imposed. The Employer filed a petition for reconsideration, and the Division filed an answer. After reconsideration, we issue this decision affirming the ALJ's conclusion that the Employer failed to establish the fifth element of the IEAD.

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

Evidence

Employer transports packages, and operates airplane loading facilities to accomplish this work. The parties stipulated that a violation of section 3650(t)(9) occurred when Employer's employee Kevin Rega operated a tow tractor (also called a "push back") in a manner that resulted in the large vehicle striking another heavy vehicle, moving it so that it struck and injured another employee. The Division investigator concluded that Rega turned off the ignition prior to attaining a complete stop.²

Employer submitted a brake inspection report that concluded the brakes of the push-back operated properly. The employer's theory was that the reason the vehicle did not stop as Rega intended was because Rega turned off the ignition prior to bringing the vehicle to a complete stop, which effectively disabled the brake system.

Training records of Rega were submitted which showed Rega had been through several training events, some of which concerned operating vehicles in general. Employer submitted affidavits of two of its supervisors who stated: "All employees who are trained to operate a tow tractor are instructed to always come to a complete stop before turning the ignition off." Employer did not submit any document containing such a rule. The training records do not show such a rule was specifically acknowledged by Rega. Rega did not testify. Rega did not tell the Division inspector that he knew of any rule prohibiting him from disengaging the engine prior to bringing the push-back to a complete stop. The records do show Rega underwent "towtractor/towbar" training on April 1, 2005, which Supervisor Gordon's declaration asserts was the training wherein the rule prohibiting the ignition from being turned off prior to stopping a tow tractor was to have been covered.

Employer provided a written test question as part of its safety training documentation. That question tests takers' knowledge of a rule prohibiting heavy vehicle operators from leaving a vehicle prior to disengaging the engine.

ISSUE

Did employer establish the fifth element of the IEAD, that the employee knowingly violated a safety rule of which he was aware?

² Employer's post-accident investigation concluded the brakes on the pushback were operational, and that the vehicle would have travelled the distance it did after the brakes were applied only if the operator turned off the ignition prior to the vehicle stopping. In his post-accident statement to his employer, Rega stated he shifted the pushback in to neutral and then applied the brakes, and that he was surprised that the brakes did not stop the vehicle as anticipated. Even if Rega did turn off the ignition while braking, and before the vehicle came to a complete stop, this does not affect the analysis of whether Employer proved element five of the IEAD.

DECISION

The parties stipulated to all of the facts in the record, which renders such facts conclusive. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007) [parties are bound by their stipulations absent fraud or misrepresentation leading to the agreement.]) The Board considers all of the evidence so submitted, and draws reasonable inferences from such evidence. (*Hollander Home Fashion*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012); *SMUD*, Cal/OSHA App. 08/4887, Denial of Petition for Reconsideration (Oct. 28, 2010).)

The IEAD is an affirmative defense established by the Board. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); *Davey Tree Surgery Company v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232). To prevail under the IEAD, an employer must prove 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 which 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 policy of sanctions against employees who violate the safety program.
5. The employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements.

Failure to prove by a preponderance of the evidence any one or more of the foregoing elements results in the defense not being satisfied. (*Mercury Service, Inc.*, *supra*). When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009).) The fifth element has been satisfied with admissions by the employees that they knew of the safety rule prior to violating it. (*Chicken of the Sea International*, Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 23, 2003).) Evidence an employee received the safe practices manual, and was present for general safety discussions at tailgate meetings, is by itself insufficient to show a specific employee was actually aware of a specific safety rule in order to satisfy element five of the IEAD. (*Pacific Coast Roofing, Corp.*, Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).)

Here, the specific rule allegedly violated does not appear in any of the documentation provided by employer. It does not appear on any of the safe

driving and ramp worker training checklists. It is not tested for in the safety tests administered to drivers.³ The Employer did not submit documentation of the rules covered by its trainers in the “towtractor/towbar” training. Instead, it offers affidavits of its trainers that every towtractor operator (assumed to be a “push back” operator) would be so instructed on this rule. This is the same evidence offered by the employer in *Pacific Coast Roofing Corp, supra*, which the Board determined fell short of establishing a particular employee was aware of a specific rule. Such general assertions that a class of employees would have been informed of an unwritten rule falls short of establishing Rega violated a safety rule which was actually known to him, as required to establish the fifth element of the IEAD. Moreover, in *Pacific Coast Roofing Corp*, the rule was written in the code of safe practices provided to the employee, although there was no proof she read the document. Here, Employer does not even meet that level of proof. This rule does not appear in any document either supplied directly to employees, or used by management during training.

The Division completed an internal report evaluating the IEAD, and this report was submitted in to the record. Regarding the fifth element, that report states only that “Mr. Rega has declined to be interviewed by Mr. Shiblak (Division investigator) in regards to the accident.” Such does not establish, by a preponderance of the evidence, that Mr. Rega knew of a rule (which we conclude was unwritten) prohibiting him from turning off the push back prior to it attaining a complete stop. The ALJ reached a similar conclusion based on the evidence. In the absence of compelling evidence to the contrary, we decline to reverse the ALJs decision. (*Watson Roofing, Inc.*, Cal/OSHA App. 07-0491, Denial of Petition for Reconsideration (Jul. 11, 2008).)

ART R. CARTER, Chairman
ED LOWRY, Member

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³ Employer asserts its test question addresses the rule requiring the engine remain on until the push back comes to a complete stop. However, the proffered question asks: “Before exiting the cab: A. Shift the transmission to neutral; B. Engage the parking brake; C. Turn off ignition; D. All of the above.” The correct answer is asserted to be D. However, this does not test the proper order of these events. Rather, they must just be completed before exiting the cab. Thus, the question does not test knowledge of any rule regarding when the engine must remain on.