COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4869-11

SECRETARY OF LABOR — COMPLAINANT

v

UNITED PARCEL SERVICE, INC — RESPONDENT

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS
LOCAL UNION, NO 89 — AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION AND ORDER OF THE REVIEW COMMISSION

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E. H. Chip Smith, IV, Frankfort, for the secretary, Carla J. Gunnin, Atlanta, for UPS, Brennan C. Grayson, Covington, for the union.

This case comes to us on UPS's petition for discretionary review which asks us to reverse our hearing officer who, after a trial on the merits, sustained a general duty clause[1] serious citation and a penalty of $4,250.[2] For the Cabinet to establish a

[1] KRS 338.031 (1) says: "Each employer: (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees..."

[2] UPS has not made calculation of the penalty an issue. Nevertheless, this how the compliance officer determined the proposed penalty; the CO found serious physical harm due to the weight of the dollies empty, 2,300 pounds, and loaded, 7,000 pounds. TE 34 – 35. He found greater probability of an injury because 800 employees on three shifts were exposed to the hazard; he said UPS experienced 15 runaways in 2011. Compliance Officer Williams said high serious/greater probability produced a gravity based penalty of $7,000, the statutory maximum. TE 34 – 35 and 91. He said the company got no size credit, more than 250 employees, and no good faith because of the high serious/greater probability determination. UPS got no history credit because of prior citations; this produced a penalty of $7,000. Our hearing officer reduced the penalty to $4,250 because she found lesser probability and a 25 % credit for good faith due to UPS's safety and health program. RO 9 and 10.

violation of the GDC it must show a recognized hazard, recognized that is by the employer or the employer's industry, which was likely to cause serious injury. In addition, the Cabinet must prove abatement of the hazard is feasible. Abatement must be some existing remedy that can be utilized by the employer, not an experimental or theoretical abatement. After reviewing the record before us, including the citation, transcript of the testimony, exhibits, recommended order and briefs of the parties, we conclude the Labor Cabinet failed to meet its burden of proof and so we dismiss the citation and penalty. 803 KAR 50:010, section 43 (1) (ROP 43 (1)).

KRS 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission; the Review Commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010.

When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v OSHRC and Interstate Glass*,[3] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also *Accu-Namics, Inc v OSHRC*, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."[4]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

UPS in Louisville moves cargo, containers and individual packages, around its air facility at the Louisville International Airport on mobile platforms called dollies pulled by ramp tractors or tugs.[5] These dollies are attached to the tugs and to other dollies in a train by mechanical hitches, referred to as E-hitches because of

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[3] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

[4] See federal commission rule 92 (a), 29 CFR 2200.

[5] We shall refer to the tractors used to pull the dollies as tugs because that is what the UPS employees call them. RO 2. Tug Technologies makes most of the tugs at UPS's Louisville facility.

their shape. Four dollies are the maximum which UPS will permit to be pulled in one train. Dollies from time to time become separated from the tug or from another dolly, causing dollies or a train of dollies to run into ditches or very occasionally into planes and buildings; no employees have been struck by a runaway dolly. These dollies are quite heavy, 2300 pounds for the dollies unloaded and 6,000 to 7,000 pounds loaded, and so serious injuries are distinctly probable if an employee were struck by a runaway.[6] From 2005 through 2011, UPS recorded some 52 breakaway incidents. Recommended order, page 3 (RO 3).

Labor's citation first restates the general duty clause and then lists two instances of alleged hazards:

> KRS 338.031 (1) (a): Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
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> a. On or before 09/28/11, approximately 800 employees were exposed to the hazard of being struck by runaway dollies while the employees were working on the ramp, in that the E-hitches periodically **malfunctioned** allowing the dollies to become unattached from the ramp tractor. One feasible and acceptable abatement method, among others, to correct this hazard, is to install a hitch capable of being locked/latched in the closed position on the ramp tractors.
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> b. On or before 09/28/11, approximately 800 employees were exposed to the hazard of being struck by runaway dollies while the employees were working on the ramp, in that the dolly hitches periodically **malfunctioned** allowing the dollies to become unattached from the dolly train. One feasible and acceptable abatement method, among others, to correct this hazard, is to install a hitch capable of being locked/latched in the closed position on the dollies.

[6] Runaway and breakaway are used interchangeably.

(emphasis added)

Within each instance description, a for tugs and b for dollies, the Cabinet has alleged the "hitches periodically malfunctioned." This allegation of malfunctioning hitches is important for two reasons: one, the citation in occupational safety and health cases is the charging document. KRS 338.031 (1) and KRS 338.141 (1). If the Cabinet cannot prove the elements spelled out in the citation, we must dismiss the citation. Two, at the trial and in its briefs, UPS has defended by arguing there is no proof the hitches malfunctioned.

Tug Technology's
petition to intervene

After this case was tried and our hearing officer had issued her recommended order and after the parties had briefed this case to the Commission,[7] Tug Technologies,[8] a manufacturer of ramp tractors used by UPS at the Louisville airport, filed a petition to intervene in this case. Based on section 14 of our rules of procedure which says petitions to intervene shall be filed prior to the trial, our Commission denied Tug's petition. But the Commission's order denying said we would file Tug's petition and its reply and consider them to be amicus briefs. Tug's ramp tractors are equipped with E-hitches which are the subject of this dispute.

Our hearing officer's
recommended order[9]

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[7] UPS submitted its reply brief, the last brief to be filed, to the commission on September 4; Tug did not file its petition to intervene until September 26.

[8] Tug's petition said it was concerned the hearing officer's finding the E hitch had malfunctioned could be introduced as evidence in a products liability civil action.

[9] We adopt our hearing officer's findings of fact to the extent they support our decision to dismiss the citation.

Our hearing officer did a fine job of describing the functioning of an E-hitch. Because we cannot improve upon it, we shall restate it here:

> The E-hitch is made out of metal and has a vertical component with three parallel horizontal components thus making the shape of a capital E. A pin is inserted through a hole in the end of each horizontal bar. A spring coils around the upper part of the pin providing the tension that keeps the pin in place once it is inserted through a hole near the end of the tongue of the dolly and then into the hole in the bottom horizontal piece... The pin is released by pulling up on a ring or rectangle on top of the pin...Once the pin is pulled up, a flange on the pin above the top horizontal bar can rest on a welded vertical piece keeping the hitch open and ready for easy use...On some hitches the O-ring on the top of the pin swings freely up or down and when down, it rests on the top horizontal bar keeping the hitch open.
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> RO 3

These hitches are depicted in photographic exhibits 3D, 3E and 3F. Photograph 3F shows the hitch in the open position. In 3D the hitch is in the closed position, held down by the spring. Photograph 3D shows a collar which keeps the spring in the proper position on the pin; a set screw can be backed out, loosening the collar so the pin can be removed to permit installation of a new spring.

UPS says the E-hitch and dolly hitch runaways are caused by human error; regularly, a hitch failure will result in the termination of an employee. Our hearing officer in her recommended order disagreed with UPS's arguments; she said:

> <u>It is concluded that E-hitch malfunctions do occur</u> and that UPS has no reliable, consistent means of preventing them. Once a tongue has popped out of a hitch there is no good way of knowing whether the breakaway was caused by a hitch malfunction or by human error unless the hitch is visibly impaired.
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> RO 8 (emphasis added)

We are not sure what a visual inspection would disclose. From the testimony[10] we have learned the only way to test the resilience of the spring on the hitch is to pull up on the pin to feel the spring's resistance. Transcript of the evidence, pages 103 and 106 (TE 103 and 106). Tug drivers are trained to feel beneath the bottom horizontal piece on the hitch to make sure the pin is inserted through the hole in a dolly's tongue and then through the bottom horizontal piece as well. TE 104 and exhibit 3D.

Because an understanding of the word malfunction is so critical to this case, this would be a good time for a definition. In *Webster's Third New International Dictionary of the English Language*, Springfield, Mass, 1966, page 1367, malfunction is defined as:

> to function badly or imperfectly: fail to operate in the normal or usual manner...

Then the dictionary gives us the following example: the "parachute malfunctioned, opening too late..."

Our *Webster's II New Riverside University Dictionary*, The Riverside Publishing Company, 1988, page 720, defines malfunction as:

> To fail to function; to function abnormally or imperfectly...

*Webster's and Webster's II both su*ggest an abnormal function or operation.

We reject UPS's defense that it should have been cited under the powered industrial truck standard.

[10] Here we cite to Richard Jordan's testimony. Mr. Jordan, called by the Cabinet as a witness, works for UPS as a tug driver. TE 104.

Our hearing officer rejected UPS's defense that it should have been cited under the powered industrial truck standard; she said the standard had "no subsection that deals specifically with hitches" which is accurate. She also opined the industrial truck standard is not directed, at all, to the hitches on the dollies which have no direct connection to industrial trucks. RO 11. We agree with our hearing officer. The law on general duty clause cases says if the employer can prove there was an existing standard which could be cited, the Commission must dismiss the general duty clause citation. *Usery v Marquette Cement Manufacturing Company,* 568 F2d 902, 905, note 5 (CA2 1977), CCH OSHD 22,099, page 26,618, BNA 5 OSHC 1793, 1794. UPS in its brief argued the Cabinet should have cited it under the standard for powered industrial trucks, 1910.178. This standard is generally understood to apply to fork lift trucks.

UPS cited to three standards. Section 1910.178 (p) (1) says trucks not in a safe operating mode shall be removed from service. Section 1910.178 (q) (1) requires trucks to be maintained in a safe operating mode while section 1910.178 (l) (3) (i) (G) says operators shall be trained on the safe operation of attachments. None of these standards says anything about trailer hitches or dolly hitches.

A fork lift truck has forks protruding from the lift's front. Figure 1, found within appendix A to 1910.178, depicts such a fork lift truck viewed from above. UPS's tugs have no forks. Section 1910.178 (n) (4) says "If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing." A UPS tug driver's view forward is not obstructed, we find, because the UPS dollies are

never pushed but always pulled. Based on the obvious and basic differences between a fork lift truck and the UPS tugs, we reject UPS's standards based defense. *Marquette Cement.*

What must the Cabinet prove to establish a violation of the general duty clause?

In *National Realty and Construction Company, Inc v Occupational Safety and Health Review Commission,* 489 F2d 1257, 1265 (CADC 1973), CCH OSHD 17,018, page 21,686, BNA 1 OSHC 1422, 1426, the DC circuit set out what the federal department of labor must prove for a general duty clause case:

> Under the clause, the Secretary must prove (1) that the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious physical harm.'

For element one, the secretary must prove a hazard and an employer's exposure of his employees to that hazard. Recognition of a hazard, element two, may be the employer's recognition or that of his industry. Element three is couched in the terms found in the definition of a serious violation. KRS 338.991 (11). Element three limits the general duty clause to serious violations.

In addition to these three elements, the *National Realty* court held:

> the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.
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> 489 F2d at 1268, CCH pages 21,688 – 21,689, 1 OSHC 1428
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> (emphasis added)

[An] "accident need not occur for a violation of section 5 (a) (1)[11] properly to be found." *Titanium Metals Corp v Usery*, 579 F2d 536, 542 (CA9 1978).

According to Professor Mark Rothstein,[12] an employer may try to prove the same affirmative defenses which are available to an employer in a standards based case. UPS did not attempt at the trial to prove the four elements of the employee misconduct defense and made no such arguments in its briefs to the Commission. *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979).

Did UPS render its workplace free from hazards to which its employees were exposed?

According to *National Realty, supra,* the Cabinet must prove the employer failed to render its work place free from a hazard which the DC court of appeals defined as "the dangerous activity of riding heavy equipment." At 489 F2d 1265, CCH page 21,686,1 OSHC 1426. In its decision the *National Realty* court was very careful to distinguish the labor department's duty to prove an employer had failed to render its workplace "free" of a hazard," element one, from its duty to prove the hazard was recognized. *National Realty, supra.* So we in turn must take the same approach. UPS argues there was no employee exposure to a hazard,[13] meaning the runaway dollies weighing between 2,400 to 7,000 pounds. Certainly, there are no employee

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[11] The federal version of the general duty clause, 29 USC 654 (a) (1). In Kentucky it is KRS 338.031 (1) (a).

[12] *Occupational Safety and Health Law*, 2010 edition, sections 6:11 and 12, pages 257 – 258.

[13] "Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work..." *Amoco Chemicals Corporation*, a federal review commission decision. CCH OSHD 27,621, page 35,905, BNA 12 OSHC 1849, 1856 (1986). For our case the hazard presented to employees is being struck by runaway dollies.

injuries resulting from the 52 runaways at issue. TE 64 and 232, exhibit 1 and RO 5. What happened in these runaways, also referred to as breakaways, is a dolly or train of dollies would become detached from a tug and, one, run into a ditch or come to a stop on the ramp (the flat surface of the airport), two, strike a plane or building[14] or, three, damage a tug or another dolly.

Based on the presence of tug drivers, sitting in their vehicles and dismounted to check on the E-hitch connections, employees loading and unloading cargo from aircraft, aircraft mechanics, aircraft fuelers and de-icers and air crew arriving and departing from their planes, all working where tugs and dollies come and go with regularity, we find the Cabinet has proved employee exposure to the hazard of being struck by a runaway dolly or dolly train. A hazard may be found even though no injuries had occurred.[15] *Yellow Freight Systems, Inc v Occupational Safety and Health Review Commission*, 530 F2d 1095 (CADC 1976), BNA 4 OSHC 1023, affirming a decision of the occupational safety and health review commission, CCH OSHD 19,439, page 23,207, BNA 2 OSHC 1090, 1091 (1975). In *Gilles and Cotting, Inc*, CCH OSHD 20,448, page 24,425, BNA 3 OSHC 2002, 2003 (1976), the federal commission said:

> On balance we conclude that a rule of access based on reasonable predictability is more likely to further the purposes of the Act that is a rule requiring proof of actual exposure.

[14] A runaway dolly struck a "smoke shack." TE 65. We infer UPS employees take smoke breaks in these shacks.

[15] In fact, the occupational safety and health act is designed to prevent the first injury. KRS 338.011.

Because of the weight of an individual dolly, ranging from 2,300 pounds to 7,000 pounds, we find an injury resulting from being struck by a runaway dolly would cause serious injury or death. Labor's compliance officer concurs. TE 35.

Was the hazard of malfunctioning E-hitches recognized by either UPS or its industry?

We are required to ask whether the hazard of malfunctioning hitches was recognized because the Cabinet in its citation explicitly attributed the hazard of being struck by a runaway dolly to malfunctioning hitches. This issue is composed of two parts: one, is there proof in the record of malfunctioning E-hitches? Two, assuming for the sake of argument the hitches malfunctioned, is there proof either UPS or its industry recognized the hazard? Our hearing officer found the hitches malfunctioned but she cited to no testimony or documentary evidence in support. RO 8.

Labor, in its brief to the commission, does not mention hitch malfunction as a hazard except for a reference to the hearing officer who in her recommended order found hitches malfunctioned. But the Cabinet injected the malfunction issue into this case with its citation and the Cabinet has the burden of proof.[16] Labor has charged UPS with malfunctioning hitches and so that is what it must prove in so far as it wants to establish employer knowledge of the hazard – the hazard of malfunctioning hitches.

Industry knowledge

[16] ROP 43 (1).

Mark Di Maria, of all of the witnesses at the trial, was in the best position to know about industry knowledge of malfunctioning hitches. Mr. Di Maria testified he has worked for Tug Technologies for 13 years. Tug manufacturers the tractors but buys the hitches from another manufacturer; at the time of the UPS trial Di Maria was the director for technical services at Tug. TE 164. He had worked for Saudi Arabian Airlines[17] for ten years as a ground support technician conducting training classes. TE 163. With his working knowledge of the airline and air cargo businesses, Mr. Di Maria had reason to know what industry knowledge about malfunctioning E-hitches existed within the industry, if any. Here is the extent of his testimony on the malfunctioning hitch issue:

> Q. ...You said earlier on your direct testimony that – let me make sure I have it right...You said the spring keeps it in the closed position; is that right?
> A. That's correct. You have – the pin keeps it in a closed position.
> Q. Okay. What types of problems have you seen with the spring affecting the closed – its ability to stay in the closed position?
> A. As I haven't seen it where – the only thing I have seen is where the spring has possibly been broken.
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> TE 181

Mr. Di Maria was never directly asked about industry knowledge of hitch malfunction. Labor's question to Mr. Di Maria about problems he has seen with the hitch is as close as anyone ventured toward the central issue in this case. Mr. Di Maria said the only problems with the hitches he had observed was broken springs which, we find, is not an indication of a hitch malfunction. In its supplemental brief the Labor Cabinet concedes there is no direct evidence in the record that the E-hitch

[17] Saudi Arabian Airlines uses E-hitches. TE 166.

was "defective in design" which we find meant no direct evidence of a hitch malfunction. But Labor in its supplemental brief then suggests we could infer the hitch was defective. Our *Black's Law Dictionary* defines inference as "A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts."[18] But there is no testimony about hitch malfunction. Mr. Di Maria, when asked about problems with the hitch, could only point to spring weakness. But these springs can be replaced by new ones and so this is not a hitch defect but is instead a maintenance issue caused perhaps by age of the equipment or its repetitive use. UPS witnesses said hitch separation was due to improper closing of the hitch by its employees; even though they had the opportunity, no Cabinet witnesses contradicted this testimony on rebuttal.

Compliance Officer Williams said he found no reports of hitch malfunction on the internet. TE 83 and 85.

We find there is no proof of industry knowledge of malfunctioning hitches.

Employer
knowledge

Labor in its brief focuses on breakaways which, we have found, provides no basis for this commission to infer a malfunctioning hitch where the testimony attributes hitch separation to weak springs, improper closing techniques, driving over a bump in the tarmac or a tug stalling and jerking. Labor alleges Mr. Warren Mounts said "hitches malfunctioned" but that is not what he said. Mr. Mounts had heard of

[18] Revised fourth edition, 1968, page 917.

reports of malfunctioning but his testing showed there was no "design malfunction." TE 195.

Chris Williams, the compliance officer, knew nothing about malfunctioning hitches at UPS; here is the question and his answer:

> Q. And did you note that UPS had ever discovered that there had been a malfunctioning hitch that caused a breakaway?
> A. Not that I recall.
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> TE 64

We are reminded the compliance officer had found no reports of hitch malfunction on the internet either.

Warren Mounts testified for UPS. He has worked for the company for 30 years; for five years he was a former manager of maintenance for UPS at the Louisville airport. At the time of his testimony, he worked for UPS as the purchasing manager. TE 190. He said he has never found any indication of a hitch malfunctioning, despite Labor's assertion to the contrary in its brief:

> Q. Have you...ever heard of one of those malfunctioning in some manner?
> A. I've heard of them being said that they malfunctioned, but every testing that – or investigation that I have done have not found a design malfunction of it. [I] Have found where components were worn out and needed to be replaced and, uh – <u>but never the design of it</u>.
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> TE 195 (emphasis added)

Michael Werner testified for UPS. He has worked for the company for 27 years. TE 215. He started out as a union package handler and was then promoted into full time management in 1994. Since 1999, he has worked in human resources which

includes the "comprehensive health and safety process" and his responsibilities as "the health and safety manager for day operations." TE 216. Mr. Werner said he was not aware of any injuries related to breakaways, confirming what others have said. TE 225. Then Mr. Werner was asked about potential problems with the hitch:

> Q. Prior to the inspection beginning, were you aware of any problems with a hitch being – something wrong with the hitch itself as the cause of a breakaway?
> A. No.
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> TE 225

Mr. Werner said his discussions with employees, about hitch breakaways, led him to conclude "they have a realization that they didn't follow all the prescribed methods and procedures..." TE 243. Mr. Werner confirmed the "pin and the spring" were the most vulnerable parts of the hitch. TE 252. Again, Mr. Werner said the spring was the most vulnerable part of a hitch. TE 266.

The Labor Cabinet has placed its faith in the 52, Labor says 53, incidents of hitch runaways. Exhibit 1. But these runaways are not in themselves proof of hitch malfunction, only that they occur with some regularity.

Our hearing officer's finding of malfunctioning E-hitches is not linked to any specific testimony about malfunctioning:

> It is concluded that E-hitch malfunctions do occur and that UPS has no reliable, consistent means of preventing them. Once a tongue has popped out of a hitch there is no good way of knowing whether the breakaway was caused by a hitch **malfunction** or by human error unless the hitch is visibly impaired.
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> RO 8 (emphasis added)

We reverse our hearing officer on this point; we find there is no proof of hitch malfunction. One, there is no testimony or documentary evidence about hitch malfunction. Two, there is no proof of UPS knowledge about hitch malfunction. Three, there is no proof of industry knowledge of hitch malfunction.

While we agree UPS has no reliable ability to prevent hitch separation, runaways, at its Louisville facility, that is not the issue in this case. Labor in its citation charged the company with permitting its employees to be exposed to the hazard of malfunctioning hitches. Labor, however, has failed to prove UPS's hitches malfunctioned. As the enforcer of the act, the Cabinet has the duty to write citations it is prepared to support. When he was asked if he had learned UPS was aware of malfunctioning hitches, the compliance officer said he had not. TE 64. He testified he had performed a search on the internet but could find no reports of E-hitch malfunctions. TE 83 and 85. This was the extent of the Cabinet's proof.

Although there is ample evidence of hitch separation and runaways, exhibit 1, that is not evidence of a malfunctioning hitch as Labor had alleged in its citation.

Did the employer render its workplace free from a hazard causing or likely to cause death or serious physical harm?

If the hazard in this case had been the likelihood of being struck by a runaway dolly or dollies, exhibit 1, then UPS had not rendered its workplace free from the hazard. But if the issue, as expressed in the citation, is whether UPS had rendered its workplace free from the hazard of being struck by runaways because of hitch

malfunctions, then the answer is yes because there is no evidence of hitch malfunction. We find the Cabinet has failed to prove this element. *National Realty, supra.*

At the risk of repeating ourselves, UPS has exposed its employees to the hazard of runaway dollies but it was not so charged. See serious citation 1.

Did the Cabinet prove UPS could have taken particular steps to avoid a citation and then prove the feasibility and likely utility of those measures?[19]

According to *National Realty, supra,* "the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." At 489 F2d at 1268, CCH OSHD 17,018, pages 21,688 – 21,689, 1 OSHC 1428. Feasibility must be economically and technologically possible. *Baroid Division of NL Industries, Inc v OSHRC and Marshall,* 660 F2d 439, 447 (CA10 1981), CCH OSHD 25,671, page 32,011, BNA 10 OSHC 1001, 1005.

UPS directed our attention to *Pepperidge Farm, Inc,* CCH OSHD 31,301, page 44,045 – 44,046, BNA 17 OSHC 1993, 2033 (1997), where the federal review commission held "the means of abatement put forth by the Secretary were unproven and would have required trial and error to determine whether they would materially reduce the hazard..." The Commission then dismissed the GDC citation because the secretary had failed to prove feasible abatement. In *Empire-Detroit Steel Division, Detroit Steel Corp v Occupational Safety and Health Review*

[19] *National Realty, supra,* 489 F2d at 1265, CCH pages 21,688 – 21,689, 1 OSHC 1428.

Commission and F. Ray Marshall, Secretary of Labor, 579 F2d 378, 384 (CA6 1978), CCH OSHD 22,813, page 27,576, BNA 6 OSHC 1693, 1697, the court said "The duty imposed by the general duty clause of the Act must also be capable of achievement."

For each case tried before this Commission, the Labor Cabinet bears the burden of proof. ROP 43 (1). In its citation, the Cabinet averred UPS could use locking hitches to abate the breakaway dolly hazard. Through its compliance officer, the Cabinet introduced two photographs of what Compliance Officer Chris Williams referred to as a "prototype hitch." These are photographic exhibits 3G and 3H. TE 28. As Mr. Williams explained, a notch, a cut, in the collar around the pin can be aligned with a piece of metal welded onto the hitch. When the pin's notch is aligned with this flat metal piece (CO Williams called it a locking bar) and the pin is driven through the dolly tongue and then through the lowest point on the hitch, the pin is capable of being turned so the collar notch no longer aligns with the locking bar. At this point, the pin is down and locked in place and cannot be pulled back up or pop up until the driver rotates the pin so the collar notch is again aligned with the locking bar welded to the hitch. TE 28. CO Williams said he gave UPS the names of several makers of a locking hitch. TE 29 and 30. He also said he told UPS they could use wires or chains to lock the pin in the closed position; he suggested a cotter pin to lock the hitch pin in place. TE 30 and 31.

While CO Williams had, during his time at UPS, suggested a locking hitch as feasible abatement of the runaway dolly hazard, UPS counted with unrebutted proof it was in the process of evaluating possible abatement measures but had not

as yet found a workable abatement method. Our review of the law persuades us to hold the Labor Cabinet must at the trial prove an abatement method exists which is capable of being implemented and is not still being evaluated. *National Realty, Pepperidge Farm and Empire Detroit Steel, supra.*

Several employees at UPS had taken matters into their own hands, attaching bungee cords to the hitch to keep the pins in place. Richard Jordan, a UPS tug driver testified for the Cabinet. Mr. Jordan said he had had a runaway and used a bungee cord to prevent the hitch pin from riding up and out of the trailer tongue. TE 103. UPS, however, rejected the idea of its employees using bungee cords to tie down the E-hitches. Michael Werner said he understood employees used bungee cords "for peace of mind." TE 269. Mr. Werner was concerned the cords could fall to the pavement and then get sucked into an aircraft jet engine or hit an employee in the eye. TE 270.

Warren Mounts said the locking hitches UPS has been evaluating, exhibits 3G and 3H, are difficult for the tug drivers to use. He said drivers "got to line it up in a very tight window and then, um – then they just, uh – twisting of the arm and twisting of the wrist to get it locked." He said the employees using the locking hitches as part of an evaluation program do not like the locking hitches depicted in exhibits 3-G and 3-H. TE 194 – 195 and 208.

Mr. Mounts said the existing E-hitches were locked in place by their springs. TE 197. He took the position UPS's E-hitches if properly attached could not come loose, barring a mechanical failure. TE 202. Mr. Mounts said if there is a gap at the top of

the spring in the closed position, the spring not touching the top of the hitch, the spring needed to be replaced. TE 211.

Michael Werner said he was evaluating two hitches, the one depicted in photographs 3G and 3H and a Holland hitch. TE 234. He also said his employees did not like either the Holland or the 3G – 3H hitches. TE 236. Mr. Werner said UPS drivers had a hard time aligning the pin notch with the locking plate for the 3G – 3H hitches, even with red highlight paint. TE 237. Mr. Werner has noticed tug drivers are experiencing shoulder and knee strains from using the Holland hitches. TE 238. Mr. Werner said it was difficult to eliminate the human factor when hitching dollies to tugs or to other dollies. TE 243. Mr. Werner said the Holland hitch pin had a greater diameter which made its alignment with the hitch parts and the dolly tongue difficult. TE 237.

Mr. Werner testified the runaways are caused by drivers who do not follow the procedures for checking to see the hitching was completed properly. TE 265.

Mr. Di Maria, the Tug manager, said some of his customers want locking hitches and some do not. He said he did not know why some of these customers use the locking hitches. TE 183. He had no opinion about dolly hitches. TE 187.

Labor offered no rebuttal testimony to overcome UPS's proof it was still evaluating locking hitches but had not found an acceptable solution to the abatement problem, not from the compliance officer and not from the UPS employees who testified for the Cabinet.

Abatement must be feasible and not be under consideration or experimentation with alternative choices. UPS was in the process of evaluating several locking hitch but had not found one which would work or could be used by its trained employees.

We find the Cabinet has failed to prove a feasible method for abating the hazard of runaway dollies. We express no opinion about malfunctioning hitches because we have held there was no proof of malfunctioning hitches.

For the reasons given, we reverse our hearing officer and dismiss citation 1.

It is so ordered.

April 7, 2014.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Dissenting Opinion by Commissioner Joe F. Childers:

I respectfully dissent from the majority's decision reversing the hearing officer. The majority has reversed the hearing officer by finding that the 52 "runaways" of dollies for which UPS was cited were not caused by the E-hitches on the tugs used to pull dollies, and the hitches on the dollies used to transport packages to and from UPS airplanes "malfunctioning." Further, the majority has reversed the hearing officer's finding that the Labor Cabinet demonstrated that

feasible alternatives existed to prevent these hitches from malfunctioning. I would find that the Cabinet has met its burden and would affirm the hearing officer.

UPS offered no proof that the 52 separate incidents of runaways were caused by human error, nor did the company make any attempt to do so. The E-hitches used on the tugs depend on a spring to hold a pin in place in order to secure the dollies being towed. There is no locking mechanism on the hitch which will prevent the pin from popping up and releasing the dollies from the hitch. A UPS driver, Carla Tuttle, testified that she had been operating tugs for UPS for 17 years. She testified that the actual springs used on the E-hitches at UPS are easy to depress using just her thumb and forefinger, unlike the spring used as a demonstrative exhibit at the hearing. TE 140-141. She testified that all of the springs used on the tugs at UPS were weaker than the one offered as an exhibit. TE 144-145. She also described a runaway event while she was operating a tug with dollies attached which caused her to be disqualified from operating dollies on the ramp. TE 135-136.

Interestingly, the majority's decision rests on the definition of "malfunction" and its belief that the runaway dollies were not caused by the hitches malfunctioning. The majority decision includes two definitions for "malfunction:"

1) "To function badly or imperfectly; fail to operate in the normal or usual manner. . . ;"[20] and
2) "To fail to function; to function abnormally or imperfectly . . .."[21]

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[20] Webster's Third New International Dictionary of the English Language, Springfield, Mass, 1966, p. 1367.

[21] Webster's II New Riverside University Dictionary, The Riverside Publishing Company, 1988, p. 720.

Common sense tells me that the E-hitches on the tugs and the hitches on the dollies functioned "badly . . . imperfectly . . . [or] abnormally" when they allowed the dollies to become disengaged from each other or the tug and therefore "runaway" from where they had been attached. If they had not acted "badly . . . imperfectly . . . [or] abnormally," then there would have been no runaway incidents. In other words, the hitches malfunctioned, as the citation suggests.

The majority has placed a larger burden on the Labor Cabinet than is necessary to show that the hitches malfunctioned. The majority mistakes a *design* malfunction for a run-of-the-mill malfunction. Here, the hitches malfunctioned by permitting the dollies to become disengaged. The testimony indicates that the reason is most likely that the springs used on the UPS hitches are weaker than they should be. They were in fact weaker than the one offered at the hearing as a demonstrative exhibit. If the spring is too weak, the hitch does not perform properly, thereby *malfunctioning*. I would affirm the hearing officer's finding that the hitches used on the UPS tugs and dollies malfunctioned, thereby contributing to the unsafe working environment for which the company was cited.

The majority also finds that the Labor Cabinet did not demonstrate a feasible, economical alternative to the malfunctioning hitches. Here, again I believe the Cabinet met its burden. The testimony of several witnesses indicated that a hitch that would cause the pin to lock in place would correct the defect which has led to 52 runaway dolly incidents. Mark DiMaria is employed by Tug Technologies, the company which manufactures the tugs used by UPS. The tugs have the E-

hitches attached to them to which the dollies are then attached. Mr. DiMaria testified that in fact his company sells hitches that lock and that several companies use them instead of the ones used by UPS. He described how the lock operates, with a notch that when the pin is turned locks onto a plate, keeping the pin in place and securing the dollies to the hitch. TE 167-168, 174. By contrast, Mr. DiMaria testified that over time a spring will lose its "springiness" when it is compressed over and over. TE 176. Unlike the locking hitches, the hitch used by UPS cannot be locked. TE 182. Finally, the manufacturer makes no recommendation as to how often the springs used in the hitches should be replaced. TE 188.

Clearly, a locking hitch is available on the market and in fact is used by other customers of Tug Technologies. It is therefore apparent that the Cabinet met its burden of demonstrating that a feasible, economical alternative exists to the faulty hitches employed by UPS.

I would affirm the hearing officer and the citation issued by the Labor Cabinet.

Joe F. Childers
Commissioner

Certificate of Service

I certify a copy of this decision was served on the following in the manner indicated on this April 7, 2014.

By messenger service:

E. H. Chip Smith, IV
Kentucky Labor Cabinet
Office of General Counsel

1047 US Highway 127 South, Suite 4
Frankfort, Kentucky 40601

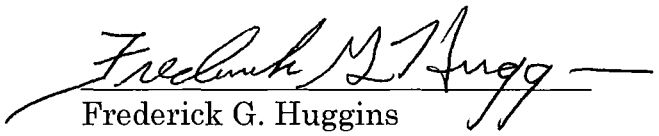
Susan S. Durant
Hearing Officer
Administrative Hearings Branch
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601 – 8204

By US mail:

Carla J. Gunnin
Baker Donelson
3414 Peachtree Road, NE
Suite 1600
Atlanta, Georgia 30326

Robert E. Reynolds
UPS Group Legal
1400 N. Hurstbourne Parkway
Louisville, Kentucky 40223

Brennan C. Grayson
Kircher Suetholz Grayson
525 West Fifth Street, Suite 230
Covington, Kentucky 41011



Frederick G. Huggins
Kentucky Occupational Safety and
Health Review Commission
4 Mill Creek Park
Frankfort, Kentucky 40601
(502) 573-6892

Counsel for the commission

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