

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

FedEx Express, Inc.,

Respondent.

OSHRC Docket No. **10-1257**

Appearances:

Dane L. Steffenson, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

David G. Sarvadi, Esquire, and Robert A. Sheffield, Esquire, Keller and Heckman, LLP, Washington, D.C.
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

FedEx Express Inc. (FedEx), a subsidiary of FedEx Corporation, delivers packages and freight to destinations throughout the world. After the Occupational Safety and Health Administration (OSHA) conducted a planned inspection of a facility in Port Lucie, Florida, FedEx received an other than serious citation on June 3, 2010. The citation alleges FedEx violated the recordkeeping requirement at 29 C.F.R. § 1904.29(b)(3) by failing to record a work-related injury on its 2007 OSHA 300 Log within seven calendar days of receiving information that a recordable injury had occurred. The citation proposes a penalty of \$1,000.00. FedEx timely contested the citation.

The case was designated for Simplified Procedures under 29 C.F.R. § 2200.200. The parties have stipulated jurisdiction and coverage (Stip. #1 and #2). In lieu of a hearing, the parties, by agreement, submitted the case for decision on a stipulated record pursuant to Review Commission

Rule 61, 29 C.F.R. § 2200.61 (Stip. #21).¹ The parties' stipulation of facts, #1 through #21 with incorporated Exhibits A and B, was filed on October 12, 2010. The parties filed simultaneous briefs on November 15, 2010.

FedEx does not dispute that it failed to timely identify a recordable employee injury on its 2007 OSHA 300 Log and that the Secretary met her burden of proof regarding employee exposure and employer knowledge (Stip. #3, #8, and #12). The issues remaining for determination involve FedEx's assertion that the citation is barred under § 9(c) of the Occupational Safety and Health Act (Act), 29 U.S.C. §658(c), by the six-month statute of limitation and if a violation is found, the violation should be reclassified as *de minimis* (Stip. #18 and #19).

For the foregoing reasons, FedEx's violation of §1904.29(b)(3) is affirmed as *de minimis* and no penalty is assessed. FedEx's motion for summary judgment is DENIED.

Parties' Stipulation of Facts

The parties stipulated record is as follows:

1. Respondent is an employer engaged in the business affecting commerce within the meaning of §3(5) of the Act.
2. The Occupational Safety and Health Review Commission has jurisdiction over this matter.
3. The cited OSHA standard applies, the terms of the cited standard were not met in 2007, and the Secretary has also met her burden as to employee exposure and employer knowledge.
4. The applicable Establishment is the FedEx Express (FedEx) facility at 480 Enterprise Drive, Port Saint Lucie, FL 34986 (the "Establishment").
5. Inspection 31261546 occurred on April 20, 2010, and the sole resulting citation that is the basis of this case was issued on June 3, 2010.
6. On July 20, 2007, an employee of Respondent who was temporarily assigned and working out of the Establishment hit and cut his forehead as he was exiting a vehicle.
7. A FedEx supervisor at the Establishment was aware that Respondent was injured and told the employee to go get it treated.

¹Rule 61 provides that: "A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rules does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof."

8. The employee went to a treatment center “Absolute Testing” for medical attention, and the cut to his forehead was sutured and bandaged. Sutures for lacerations constitute medical treatment, making the injury recordable under 29 C.F.R. § 1904.7(b)(5). Additionally, the medical records indicate that the employee was prescribed medication to take after leaving the facility.
9. The employee returned to work the same day, told his supervisor the injury was “nothing” and finished his shift without any work limitations and only a bandage visible on his forehead.
10. On 7/20/2007 or shortly thereafter, the supervisor knew that there were sutures under the bandage on the employee’s forehead.
11. FedEx maintains its injury and illness records electronically. Supervisors are responsible for entering the initial data on all reported cases into the computer recordkeeping system. The FedEx supervisor, who was the highest ranking manager at the Establishment, entered information about this injury into its computer system the same day the injury occurred, July 20, 2007. The FedEx supervisor properly entered the injury as a new work-related injury into its computer system, but failed to check the box indicating that medical treatment was received. An OSHA form 301 was completed, a true and accurate copy of which is attached as Exhibit A.
12. Thus, the injury at issue was not recorded on the FedEx OSHA 300 log within 7 days of the occurrence of the event, July 20, 2007, or within 7 days of initially receiving information that the employee received medical treatment.
13. Although the injury was entered into the electronic system, in spite of the fact that the FedEx supervisor knew that sutures were received by the employee, the supervisor did not check the box that medical treatment was received or that there was any other basis for the injury to be deemed recordable. Accordingly, the computer generated reports listed the injury as not recordable and it did not appear on the OSHA 300 Log or 300A for 2007.
14. FedEx does not maintain copies of medical records at its stations or corporate office, but engages a third party administrator to process claims for payment of medical treatment for work-related injuries.

15. In February, 2010, FedEx corporate staff obtained from its third party administrator certain copies of medical payment and treatment records related to the injury which contained the information that the employee received sutures and was written prescriptions.
16. On February 2, 2010, which was within seven days of discovering this additional information, FedEx updated the information on the injury into its computer system indicating that medical treatment was received, after which any OSHA 300 logs that were printed would have included the case as a recordable injury.
17. Exhibit B is a true and accurate copy of the computer printout showing the audit trail of entries made into the FedEx electronic injury and illness record-keeping system and the dates on which they were made.
18. Respondent asserts that this citation is invalid as it was issued more than 6 months after the time in which Respondent was required to record the injury, and more than 6 months after it was required to post its 2007 300A log.
19. If a violation is found to exist, Respondent asserts the violation should be classified as *De Minimis* rather than Other than Serious.
20. If a violation is found to exist and classified as Other than Serious, the proposed penalty is reasonable.
21. All evidence necessary to decide this case, and which would have been presented had a hearing been held, is presented in this document, including exhibits, which the parties agree are true and accurate and all admissible as evidence in this case.

DISCUSSION

Alleged Violation of §1904.29(b)(3)

_____The citation alleges “Located at the FedEx Express, Port Saint Lucie, Fl: On or about 4/20/2010, the employer did not record timely the following workplace injuries and illnesses on the OSHA 300 Log for calendar year 2007. On or about 07/20/2007, Clourier/DOT - An employee received sutures and prescription strength medication due to a laceration on the forehead.”

Section 1904.29(b)(3) provides, in part:

How quickly must each injury or illness be recorded. You must enter each recordable injury or illness on the OSHA 300 Log or 301

Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred.

There is no dispute a work-related injury occurred on July 20, 2007 at a FedEx establishment which required medical treatment and FedEx failed to record the incident on its 2007 OSHA 300 Log within seven calendar days pursuant to 29 C.F.R. §1904.29(b)(3). FedEx stipulates that its facility supervisor, despite knowing of the medical treatment, entered the injury as a new work-related injury into FedEx's computer system, but failed to check the box indicating that medical treatment was received (Stip #13). See 29 C.F.R §1904.7(a), and 1904.7(b)(5).² The work related injury was, therefore, not recorded on FedEx's 2007 OSHA 300 log within seven days of the incident, July 20, 2007 (Stip. #6, #8, #11, and #12).

Based on the parties' stipulated record, the Secretary has established a violation of §1904.29(b)(3) in that there is no dispute the standard applies, the requirements of the standard were not complied with, FedEx knew of the violative condition and employees' were exposed to the incident (Stip. #3).³

Although not disputing a violation of §1904.29(b)(3), FedEx asserts the violation is barred by the six-month statute of limitation and, if a violation is found, it should be reclassified as *de minimis* (Stip. #18 and #19).

²29 C.F.R. 1904.7(a) provides: "*Basic Requirement.* You must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. You must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness."

29 C.F.R. 1904.7(b)(5) provides: "*How do I record an injury or illness that involves medical treatment beyond first aid?* If a work-related injury or illness results in medical treatment beyond first aid, you must record it on the OSHA 300 Log. If the injury or illness did not involve death, one or more days away from work, one or more days of restricted work, or one or more days of job transfer, you enter a check mark in the box for cases where the employee received medical treatment but remained at work and was not transferred or restricted."

³In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Six-Month Statute of Limitation

Section 9(c) of the Act provides:

No citation shall be issued under this section after the expiration of six months following the occurrence of any violation.

There is no dispute FedEx's violation of § 1904.29(b)(3) happened on July 20, 2007; the date of its failure to identify a recordable injury on its OSHA 300 Log for calendar year 2007. On February 2, 2010, FedEx discovered and corrected its omission to its OSHA 300 Log. The Secretary became aware of FedEx's failure to identify the recordable injury on April 20, 2010, the date of the OSHA inspection. The OSHA citation was issued to FedEx on June 3, 2010.

FedEx argues that despite Commission precedent, the unambiguous language of § 9(c) of the Act requires the six-month limitation to run, not on the date which OSHA discovers a violation, but on the date that a violation occurs. The failure to log a recordable illness is not a continuing violation. FedEx claims § 9(c) does not support a discovery rule for OSHA enforcement actions. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) (the discovery rule is applicable only in "an area of law that cries out for application of a discovery rule," such as latent injuries in a tort context). FedEx asserts the violation in this case occurred on July 28, 2007 when FedEx failed to record the injury within seven days of the incident and the six-month limitation ended January 28, 2008, well before the issuance of the OSHA citation on June 3, 2010. The failure to record a recordable injury within seven days pursuant to § 1904.29(b)(3) is "a single instantaneous act to be performed at a given time." *Toussie v. United States*, 397 U.S. 112, 115 (1970).

FedEx's argument regarding the application of § 9(c) is rejected. In *Central of Georgia Railroad Company*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977), the Commission discussed the meaning of "occurrence"

For section 9(c) purposes, a violation of section 5(a)(2) of the Act "occurs" whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation, occurred within six months of the citation's issuance.

In record-keeping cases such as at issue, the Commission stated the failure to:

comply with a standard issued under the Act violates the Act until it is abated. We conclude that the obligation to correct any error or omission in an employer's OSHA-required injury records runs until the error or omission is either corrected by the employer, or discovered or reasonably should have been discovered by the Secretary.

General Dynamics Corp., Electric Boat Div., 15 BNA OSHC 2122, 2128 (No. 87-1195, 1993) (a violative condition that remains unabated within six months of citation issuance not barred by § 9(c) regardless of when the condition first occurred). Also, see *Johnson Controls Inc.*, 15 BNA OSHC 2132, 2135 (No. 89-2614, 1993) (inaccurate entry on OSHA Form 200 violates Act until it is corrected) and *Manganas Painting Co.*, 21 BNA OSHC 2043, 2048 (Nos. 95-0193, 95-0104, 2007) (a violation barred under § 9(c) because violative condition was corrected prior to six months of issuance of the citation).

This court is bound to follow the applicable precedent of the Commission. The arguments raised by FedEx are currently before the Commission in *AKM LLC d/b/a Volks Constructors*, (No. 06-1990, oral argument 11/2/10). Vol. 40, No. 45 BNA Occupational Safety & Health News, 951 (11/18/10).

Despite FedEx's failure to identify the recordable injury by July 28, 2007, the six-month statute of limitation ceased to run on February 2, 2010 when FedEx corrected its OSHA 300 Log. The statute stopped running prior to OSHA's inspection on April 20, 2010. The citation issued by OSHA on June 3, 2010, however, is not barred by § 9(c) because it was issued within the six months of February 2, 2010.

FedEx's claim that the citation is barred by § 9(c) of the Act, is rejected.

Reclassification to *De Minimis*

OSHA classified FedEx's violation of § 1904.29(b)(3) as other than serious with a proposed penalty of \$ 1,000.00. A violation is considered other than serious when "there is a direct and immediate relationship between the violative condition and occupational safety and health, but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf and Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973). The Commission recognizes

the importance of OSHA's recordkeeping requirements in playing "a crucial role in providing information necessary to make workplaces safer and healthier." *General Motors Corp., Electro-Motion Div.*, 14 BNA OSHC 2064, 2070 (Nos. 82-630, 84-731, 84-816, 1991).

A *de minimis* classification involves a technical non-compliance with a standard but the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Keco Industries, Inc.*, 11 BNA OSHC 1832, 1834 (No. 81-1976, 1984).

FedEx voluntarily self corrected its failure to record the recordable injury 2 months prior to the OSHA inspection. There was a single instance of a failure to record. No abatement is required and no penalty is shown appropriate. If not corrected by FedEx, OSHA may not have discovered the omission.

Based on the stipulated record, OSHA, exercising discretion, should not have issued a citation in this case. Employers, like FedEx, should be encouraged to perform regular self-analysis of its safety programs including the record-keeping requirements and make the necessary corrections without concern that such corrections may result in an OSHA citation. By the time of OSHA's inspection, the failure to record was corrected and the violation abated.

There is no showing employees were put at a greater risk of injury because of the supervisor's inadvertence in not properly recording the medical treatment. FedEx was not deprived of the information to make it aware of the kind of injuries occurring in the workplace. The information was in its computer system and visible to safety and health managers. But for the supervisor's inadvertence in failing to check a box indicating that the employee received medical treatment, the injury would have been recorded on FedEx's 300 Log in July 2007. No purpose is now served through an order for abatement since FedEx abated its own omission. FedEx's voluntary self-correction remedied any potential long-term data gaps for the company's record-keeping. Also, the single omission did not significantly affect the ability of employees to learn about and understand the hazards of their job.

FedEx's violation of §1904.29(b)(3) is reclassified as *de minimis*.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, alleged other than serious violation of §1904.29(b)(3) is reclassified as *de minimis* and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: December 3, 2010