BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1569933**
L & S BUILDING MATERIALS, INC. **1145 TARA COURT** **ROCKLIN, CA 95765** **Employer**	**DECISION**

Statement of the Case

L & S Building Materials, Inc. (Employer) manufactures building trusses. On December 21, 2021, an inspection was conducted by Duv Cardenas, Associate Safety Engineer for the Division of Occupational Safety and Health (the Division), in response to a report of an injury at a job site located at 7325 Reese Road in Sacramento, California.

On June 15, 2022, the Division cited Employer for four alleged violations of California Code of Regulations, title 8: failure to timely provide OSHA Form 300 Logs; failure to effectively train a supervisor and operators how to use a radial arm saw; failure to ensure that a radial arm saw barrier was adjusted to within 1/4 inch of the work piece being cut; and failure to ensure that a radial arm saw was properly guarded.

Employer filed timely appeals of the citations, contesting the existence of the violations for all citations. Additionally, Employer challenged the Serious classification, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties for Citations 2 and 3. Employer also asserted a series of affirmative defenses including, but not limited to, that the Division violated the six-month statute of limitations for issuing citations.[1]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On February 1 and March 22, 2023, ALJ Lewis conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform. Attorney Perry Poff of Donnell, Melgoza & Scates, LLP, represented Employer. Rachel Brill, Staff Counsel, represented the Division. The case was submitted on June 2, 2023.

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer timely provide its Form 300 Logs pursuant to the Division's request?

2. Did Employer fail to train its saw operators and supervisor regarding the hazards of using the radial arm saw?

3. Did Employer fail to ensure that the barrier of the radial arm saw was adjusted to within 1/4 inch of the work piece being cut?

4. Was the radial arm saw properly guarded?

5. Was Citation 3 issued in violation of the six-month statute of limitations found in Labor Code section 6317?

Findings of Fact

1. The Division requested certain documents, including Form 300 Logs, on December 21, 2021. The deadline by which Employer was required to respond was December 24, 2021. Employer provided its responsive documents on December 23, 2021.

2. Employer provided training to its saw operators regarding the use of the radial arm saw, including lowering the barrier to "just above the workpiece."

3. Employer's Plant Manager, Jordan Curtis (Curtis), provided the training to the saw operators. Curtis was familiar with the hazards associated with operating the radial arm saw.

4. The manufacturer recommendations for the radial arm saw instructed operators to lower the barrier to within 1/4 inch of the work piece.

5. Although the wing nuts which were used to lower the barrier were worn, pliers or another tool could be used to lower the barrier to within 1/4 inch of the work piece.

6. The lower half of the radial arm saw blade did not have any type of guard on it.

7. The ends of the blade's shaft were not fully guarded.

8. On December 3, 2021, Jaime Rodriguez Roman (Roman) suffered an amputation injury while he was using the radial arm saw.

9. Employer reported Roman's injury to the Division on December 3, 2021.

10. On December 21, 2021, the Division commenced its inspection of Employer's job site and of the radial arm saw involved in the accident.

11. The unguarded radial arm saw was decommissioned after Roman's accident and was removed from Employer's job site.

12. The Division issued the citations on June 15, 2022.

Analysis

1. Did Employer timely provide its Form 300 Logs pursuant to the Division's request?

The Division cited Employer for an alleged violation of California Code of Regulations, title 8, section 14300.40, subdivision (a),[2] which provides:

> (a) Basic requirement. When an authorized government representative asks for the records you keep under the provisions of this article, you must provide within four (4) business hours, access to the original recordkeeping documents requested as well as, if requested, one set of copies free of charge.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, the Employer did not timely provide copies of 2018 through 2021 OSHA 300 logs to an authorized government representative (Cal/OSHA inspector) requesting those records.

[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

The "provisions of this article" referenced in section 14300.40, subdivision (a), are found in section 14300.29, subdivision (a), which provides, in relevant part:

> Basic requirement. You must use Cal/OSHA 300, 300A, and 301 forms, or equivalent forms, for recordable injuries and illnesses. The Cal/OSHA Form 300 is called the Log of Work-Related Injuries and Illnesses, the Cal/OSHA Form 300A is called the Summary of Work-Related Injuries and Illnesses, and the Cal/OSHA Form 301 is called the Injury and Illness Incident Report. […]

The Labor Code grants the Division specific authority to investigate alleged health and safety violations. (Lab. Code §6309.) During an investigation, the Division has the authority to "obtain any statistics, information, or any physical materials in the possession of the employer that are directly related to the purpose of the investigation or inspection… ." (Lab. Code §6314, subd. (a).)

It is pursuant to this authority that the Division provides employers with a request for certain documents during its investigations. The Document Request Form (the Form) contains a preprinted list of numerous documents that the Division typically requests from employers, including Form 300 Logs. The Form instructs employers that they are required to provide copies of the requested documents by the "postmark date" at the top of the Form.

The Form also sets forth the applicable regulations that clarify for employers what standards govern the expectation that an employer has the documents being requested. For example, next to the preprinted line item for a Heat Illness Prevention Program, the Form references "8 CCR 3395." These references to the regulations may aid employers in determining whether particular documents in their possession satisfy the required information.

The Form makes no reference to section 14300.40. In fact, the regulation referenced with regard to Form 300 Logs is "8 CCR 14301." Section 14301 was repealed in 2002. Thus, there is nothing within the Form that informs employers of the particular regulation that requires access to, or copies of, the Form 300 Logs within four hours. Instead, the employer receiving the Form is instructed to comply with the postmark date written at the top of the Form and referenced throughout the document as the applicable deadline:

> Please provide the Cal/OSHA inspector with the required copies by the "postmark" date noted above. If the copies are not provided by that date […] possible citations and monetary penalties could result.
>
> […]

> If you require an extension of time in order to satisfy this request, please contact the Cal/OSHA inspector […] **before** the deadline. [Bold emphasis in original.]

(Ex. 6.)

The Division asserted that the alleged violation for Citation 1, Item 1, was the timing of the production, given that it was more than four hours from the time the documents were requested. The Division did not assert that there were any Form 300 Logs that had not been produced.

Duv Cardenas (Cardenas) gave Employer the Form on December 21, 2021, which provided specific instructions that the documents requested were to be produced by December 24, 2021.[3] In reliance on the instructions provided by the Division, Employer's Human Resource Manager, Edgar Avalos (Avalos), produced the documents on December 23, 2021. On March 10, 2022, Cardenas sent Avalos an email seeking clarification about the dates that Employer had been in business and requesting the Form 300 Logs instead of the Form 300A that Avalos had erroneously produced in December. With this second request, Cardenas provided no deadline by which the documents needed to be provided. On March 24, 2022, Avalos produced the requested documents via email.

The record demonstrates that, based on the Division's actions, it is unreasonable to conclude that Employer could have understood it was required to act within four hours of the request for copies. The Division provided Employer with a document request setting forth that Employer had three days to produce copies, and then went on to provide no indication as to timeliness for response when it notified Employer of the error in production two months later. As such, it is reasonable for Employer to take the Division's three-day deadline at face value and to understand that, if the requested documents, including the Form 300 Logs, were produced pursuant to that deadline, it would be in compliance with the Division's demands.

Furthermore, although the Division's citation asserts that Employer failed to comply with a timely request to provide records pursuant to section 14300.40, it is not readily apparent that the Division requested documents from Employer pursuant to that section. Instead, it appears that the Division requested documents pursuant to its authority under Labor Code sections 6309 and 6314. Based upon the specific facts at issue in this matter, the Division's request specified a time for production of all the records outside of the timing contemplated by section 14300.40 and made no separate reference to the regulation. Given the scope of Labor Code sections 6309 and 6314, which set forth no timing parameters for production of documents, the Division can clearly

[3] Cardenas did not testify at the hearing. District Manager Joseph Crocker (Crocker) was the Division's only witness.

arrange for production of documents without relying upon section 14300.40, and it appears that the Division has done so in the instant matter.

Indeed, Crocker testified that, while there may be some circumstances where he requests that an employer produce copies of its Form 300 Logs within four hours, he generally does not expect to receive them within that time frame. This testimony evidences that the Division has the ability to, and regularly does, request production of Form 300 Logs without the strict time mandates found in section 14300.40.

It is perfectly reasonable for an employer to rely upon a government agency's representations that it will be in compliance with instructions if the requested documents are produced by a specified date. It is unreasonable and inequitable for the Division to actively mislead an employer by setting a deadline of a particular date, and then penalize the employer when the employer complies with the Division's instructions.

Employer initially produced the documents in accordance with the postmark date on the Form and then, when informed that it had produced an incorrect form, subsequently provided the correct document. Accordingly, Citation 1, Item 1, is dismissed.

2. Did Employer fail to train its saw operators and supervisor regarding the hazards of using the radial arm saw?

Section 3203, subdivision (a)(7), provides, in relevant part:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> (7) Provide training and instruction:
>
> […]
>
> (C) To all employees given new job assignments for which training has not previously been received;
>
> […]
>
> (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of investigation, including but not limited to, on December 21, 2021, the employer's Injury and Illness Prevention Program was ineffective in that, with regard to the Metra-Cut radial arm saw (Model Number SSA-17), the employer failed to:
>
> (1) Effectively train all operators; and
>
> (2) Train the Plant Manager, to familiarize him with the safety and health hazards to which employees under his immediate direction and control may be exposed.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).)

a. Training for Employees Given New Job Assignments

Although there was no allegation that using the radial arm saw was a new job assignment for any of the employees assigned as saw operators, section 3203, subdivision (a)(7)(C), pertains to assignments for which no previous training had been provided at the time that the assignment was new. Crocker asserted that the basis for Citation 1, Item 2, was twofold: First, Plant Manager Curtis allegedly told Cardenas that the barrier on the radial arm saw could not be lowered to within 1/4 inch of the work piece, meaning that employees could not be properly trained to lower the barrier if it could not physically be lowered. Second, Cardenas's inspection notes state that Roman "did not articulate any training when asked."[4] (Ex. 7, p. 6.)

Hearsay

California Evidence Code section 1200, subdivision (a), defines hearsay evidence as "evidence of a statement that was made other than by a witness while testifying at the hearing

[4] Throughout the hearing, there was confusion regarding the injured employee's last name. He is referred to with the surnames "Ramos" and "Roman" throughout the hearing and in various exhibits. The most official documents, including workers' compensation claim forms, use the name "Roman."

and that is offered to prove the truth of the matter stated." The Appeals Board's evidence rules, found in section 376.2, provide, in part:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Crocker did not have any personal knowledge of the circumstances surrounding Curtis or Roman's training and his testimony was almost exclusively a recitation of the information obtained from others during the inspection conducted by Cardenas.

The testimony that Curtis made a statement to Cardenas and Cardenas wrote it in her inspection notes is double hearsay. Employer lodged an objection to the testimony during the hearing. If Cardenas had been the witness providing the testimony about Curtis's out-of-court statements, his role as a supervisor would provide an admissions exception for the hearsay testimony. (Evid. Code §1222.) However, Crocker's testimony about a statement in notes written by Cardenas about what Curtis said does not meet any hearsay exception. While such testimony may be admissible in Appeals Board hearings, it is an insufficient basis on which to support a finding unless it supplements or explains other non-hearsay evidence. (§376.2.)

Similarly, Crocker's testimony that Cardenas wrote in her notes that Roman did not provide her with any information about his training is also multiple levels of hearsay. Roman's interview was conducted through an interpreter on the telephone and neither the interviewer nor the interviewee testified at the hearing. Roman was not a supervisor, so there is no plausible Employer admission exception as to his statements. Although the official records exception to hearsay rules may permit the admission of Cardenas's notes that she observed Roman's lack of an answer to a question about training, they may only be relied upon to the extent that it means Cardenas did not hear him say anything about training.[5] It does not mean that the note regarding a lack of information from Roman can be the basis for finding that there was actually no training. The notes do not indicate *what* Cardenas asked or whether she attempted to obtain any clarification about Roman's failure to "articulate any training" in response to the questions. The interview notes are unreliable and unpersuasive to establish whether there was, in fact, any training provided to Roman.

There was no other non-hearsay evidence that could be relied upon independently for a finding of fact in support of the Division's allegations. Indeed, testimony from both Crocker and Avalos was that the barrier *could* be lowered with a vise grip wrench. Additionally, there were

[5] See Evidence Code section 1280 and analysis of official records hearsay exception in Issue No. 5, infra.

employee training records that listed lowering the barrier as a topic. This evidence is contradictory to the notes made by Cardenas.

There was insufficient evidence that Employer failed to effectively train its operators how to safely operate the radial arm saw.

b. Training for Supervisors Regarding Hazards to Which Their Direct Reports are Exposed

As set forth above, Curtis, who was both an operator of the saw and supervisor of saw operators Roman and Ryan McCorkle (McCorkle), allegedly told Cardenas that the barrier on the saw could not be lowered to within 1/4 inch of the work piece being cut. Based on this statement, the Division asserted that Curtis was not familiar with the hazards of working with the saw, thus providing a basis for finding a violation of section 3203, subdivision (a)(7)(F). As set forth above, Crocker's testimony that Cardenas's notes say that Curtis told her the barrier could not be lowered is hearsay and, without further non-hearsay evidence that it explains or supplements, that testimony cannot be used to make a finding.

Employer did not have the same training records for Curtis that it had for Roman and McCorkle, but it provided Cardenas with a written statement saying that Curtis had been trained by a predecessor company and had been using the same type of saw since 1983. Avalos testified that he provided Cardenas with this training statement because Curtis's training was verified during his interview process when Employer hired him.

Curtis was the manager who reviewed each of the training items with the saw operators. Based on the checklist of training topics provided for Roman and McCorkle, it is reasonable to infer that Curtis was familiar with the hazards to which the employees were exposed with the radial arm saw.

The Division did not present any non-hearsay evidence to support a finding that the supervisor, Curtis, was not familiar with the hazards posed by the radial arm saw. As set forth above, there was also no evidence that the saw operators were not effectively trained to use the radial arm saw. Accordingly, the Division failed to establish by a preponderance of the evidence a violation of the training requirements set forth in section 3203, subdivision (a)(7). Citation 1, Item 2, is dismissed.

3. Did Employer fail to ensure that the barrier of the radial arm saw was adjusted to within 1/4 inch of the work piece being cut?

Section 3328, subdivision (a)(2), provides:

Machinery and Equipment.

(a) All machinery and equipment:

…

(3) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineering design.

In Citation 2, the Division alleges:

Prior to and during the course of the inspection, including but not limited to on December 21, 2021, the Employer failed to ensure that the Speed Cut Inc., Metra-Cut radial arm saw (Model Number SSA-17) was operated in accordance with the engineered design in that the barrier height was not adjusted to within 1/4" of the work piece to be cut before operating the saw.

The manufacturer of the radial arm saw at issue placed a yellow sticker on the saw which instructed the operator to adjust the barrier height to within 1/4 inch of the work piece to be cut. Crocker testified that the basis for the Division's issuance of Citation 2 was the statement allegedly made by Curtis that was noted in Cardenas's inspection notes. That is, Crocker testified that Cardenas's notes reflect a statement allegedly made by Curtis which said that the barrier on the radial arm saw could not be lowered. As set forth above, this testimony from Crocker contains multiple levels of hearsay. The Appeals Board's regulations permit such hearsay to be used only to supplement or explain other non-hearsay evidence.

The Division presented no evidence that the barrier was not adjusted at the time of Roman's accident, nor was there any other evidence that the barrier was not capable of being adjusted. Indeed, Cardenas indicated in her notes that the lowering of the barrier was "[a] hazard, but no evidence that this did not occur." (Ex. 3.) Crocker testified that, based on his years of experience and training regarding guarding of saws, the barrier on the saw depicted in the inspection photographs *could* be adjusted to within 1/4 inch of the work piece. When asked about adjustment of the barrier on the saw, Crocker testified that the pictures showed that the wingnuts that were usually used to adjust the barrier were worn down or broken, making it more difficult

to adjust the barrier. However, Crocker acknowledged that the barrier could "absolutely" still be adjusted using a tool like a vise grip or wrench that could grip the worn wingnuts. (Hrg. Tr. Day 1, p. 201, ln. 3-20, and Day 2, p. 6, ln. 16-19.)

The hearsay statement by Curtis to Cardenas does not supplement or explain any other evidence. There was no evidence that the barrier on the saw could not be adjusted, and, in fact, the evidence supports a finding that it could be adjusted. As such, the Division did not meet its burden of proof with regard to Citation 2. The citation is dismissed.

4. Was the radial arm saw properly guarded?

Section 4309, subdivision (a), provides, in relevant part:

Horizontal Pull Saws (Radial Arm Saw).

(a) The saw blade shall be encased on both sides in such a way that at least the upper half of the blade and the arbor ends will be completely covered.

[…]

(2) The sides of the lower exposed portion of the blade shall be guarded to the full diameter of the blade by a device that provides a physical barrier and visual warning, such as a leaf guard or chain, that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give the maximum protection possible for the operation being performed.

In Citation 3, the Division alleges:

Prior to and during the course of the inspection, including but not limited to on December 21, 2021, the Employer failed to ensure that the Speed Cut Inc., Metra-Cut radial arm saw (model Number SSA-17) was appropriately guarded in that:

(1) The blade was not encased on both sides in such a way that the arbor ends were completely covered; and

(2) The sides of the lower exposed portion of the blade was [*sic*] guarded to the full diameter of the blade by a device that provided a physical barrier

> and visual warning that automatically adjusted to the thickness of the stock and remained in contact with the stock being cut.

Crocker testified that the "arbor" is the shaft located in the center of the circular shaped saw. Photographs of the saw show that the shaft was not fully encased, with the lower half of the shaft, or arbor, exposed. (Ex. 30-Mod1.)

Additionally, there was no guard, such as a chain or leaf guard, on the exposed lower half of the saw blade. Crocker testified that leaf or chain guards drape down on either side of the radial saw to prevent contact with the rotating saw. These two types of guards allow the saw to move forward and back to perform a cut on the work piece, but do not interfere with the cut because they are flexible and can drape over the piece as the saw moves. Furthermore, they are sturdy enough to prevent an employee from accidentally moving his hand against the rotating blade from the side.

Photographic evidence demonstrates that the saw's arbor ends and the lower portion of the blade were not fully guarded. Employer did not dispute the accuracy of the photographs. Indeed, Avalos conceded that there was a lack of guarding. (Ex. 30-Mod2.)

The Division established there was a violation of section 4309, subdivision (a), as set forth in Citation 3.

5. Was Citation 3 issued in violation of the six-month statute of limitations found in Labor Code section 6317?

Employer argues that Citation 3 was untimely because it was issued more than six months after the occurrence of a violation.[6] Employer asserted that the Division did not establish that any employees were exposed to the alleged violation within six months prior to the date the citation was issued.

Labor Code section 6317, subdivision (e)(1), provides, in relevant part:

> A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation or notice for a violation of subdivision (b) or (c) of Section 6410, including any implementing related regulations, an "occurrence" continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement

[6] As set forth above, Citation 1, Item 2, and Citation 2 have been dismissed. As such, although the issue was raised as to those citations as well, their timeliness and validity is not being addressed in this statute of limitations analysis.

ceases to exist. Nothing in this paragraph is intended to alter the meaning of the term "occurrence" for violations of health and safety standards other than the recordkeeping requirements set forth in subdivision (b) or (c) of Section 6410, including any implementing related regulations.

Where, as here, statutory language is clear, its meaning must be construed from the words of the statute itself, so as to effectuate the purpose the Legislature intended. (See *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 173-174; *Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d. 222.) The Appeals Board has held that the time to issue a citation begins to run when the violation occurs. (*Shimmick Construction Company*, Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012).) The Appeals Board has held that "the Division has six months from the time it learns of an accident to investigate and issue citations." (*Bimbo Bakeries USA*, Cal/OSHA App. 03-5216, Decision After Reconsideration (Jun. 9, 2010).) The six-month statute of limitations is not necessarily triggered by the date the Division opens its inspection. (*The Environmental Group*, Cal/OSHA App. 94-1838, Decision After Reconsideration (Aug. 25, 1998).)

a. Employee Exposure

In order to establish a violation of a safety order, the Division has the burden to prove that there was employee exposure to the hazard addressed by the safety order. (*Ja-Con Construction Systems, Inc., dba Ja-Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).) The alleged violation for which Employer was cited in Citation 3 involves the hazards surrounding the use of the unguarded radial arm saw.

The Division provided testimony, and Employer did not dispute, that there were three employees who were assigned to use the radial arm saw at issue. There was also no dispute that the injured employee, Roman, was using the radial arm saw at the time of his accident. Thus, the Division established that there was actual exposure to the hazard of the radial arm saw for these three employees. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

b. Within Six Months of the Alleged Violation

Except where an employer's conduct or omission impedes the Division's discovery of a violative condition, the date the violation occurs is the factor triggering the Division's duty to issue citations before six months elapses. (*Kaiser Foundation Hospitals, Hayward Medical Center*, Cal/OSHA App. 83-508, Decision After Reconsideration (Nov. 19, 1985).)

Additionally, while not a true exception to the six-month statute of limitations set forth in Labor Code section 6317, the Appeals Board has recognized that the limit may be extended when the violation alleged by the Division continues to exist. The Appeals Board has previously held that, regardless of when a violation is initiated, its "occurrence" continues until it is corrected. (See *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).)

Therefore, except where there is either a continuing violation or an employer's conduct or omission impedes the Division's discovery of a violative condition, a citation must be issued within six months of the occurrence of the violation. (*The Environmental Group, supra,* Cal/OSHA App. 94-1838; *Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration (Nov. 18, 1998).)

Roman's accident occurred on December 3, 2021, and Employer reported the accident to the Division that day. Cardenas commenced her inspection on December 21, 2021. The citations were issued on June 15, 2022.

Because Employer reported the injury to the Division immediately, there can be no argument that the statute of limitations was tolled based on a failure by Employer to report the injury or otherwise impeded the discovery of the violative condition. However, there was a period of more than six months between the accident and the issuance of the citations, so it is necessary to look to whether there was a continuing violation with regard to the unguarded radial arm saw.

Cardenas's notes from the investigation were reviewed by Crocker, who testified about what he read in the notes, but he had no personal knowledge of the conditions at Employer's job site. As discussed previously, the testimony about the contents of Cardenas's notes is hearsay, but portions of the documents themselves may arguably be admissible under the "official records" hearsay exception found in Evidence Code section 1280.

A limitation on the admissibility of records under the official records exception is that the record must report the public official's firsthand knowledge or contain statements of another public official with a duty to record the act, condition, or event within the scope of her duty. (*McNary v. Dept. of Motor Vehicles* (1996) 45 Cal.App.4th 688, 693-695; *Gananian v. Zolin* (1995) 33 Cal.App.4th 634.) Reports containing conclusions based primarily upon statements by others are not admissible official records. (*Behr v. Santa Cruz* (1959) 172 Cal.App.2d 697, 705.)

Notes taken by Cardenas during her initial inspection of Employer's job site indicate that the radial arm saw was not being operated at the time of the inspection on December 21, 2021. (Ex. 4.) This appears to be a personal observation by Cardenas and would thus qualify as a hearsay exception under the official records exception.

There was testimony about Cardenas's notes of her interview with Curtis where she wrote that Curtis allegedly told her, "Radial arm saw is still there. Nothing is wrong with it. It was inspected. Is in use." (Ex. 7, p. 2.) This statement allegedly made to Cardenas by Curtis is not "the public official's firsthand knowledge," so that aspect of Cardenas's notes would not qualify for the official records exception.[7]

Even if testimony about Cardenas's notes, and the notes themselves, are hearsay, the Appeals Board's rules of evidence provide that hearsay evidence may be used to support a finding of fact if it supplements or explains other non-hearsay evidence. (§376.2.) The Division did not produce any non-hearsay evidence regarding whether the saw was in use after December 3, 2021. Crocker testified that he had no personal knowledge about whether the radial arm saw was in use at any time after Roman's accident. To the contrary, Avalos, who had personal knowledge of the circumstances, testified that the saw was decommissioned shortly after Roman's accident and "it's not even at the plant anymore." (Hrg. Tr. Day 2, pg. 58, ln. 17-23.)

There was no evidence presented to establish that the radial arm saw was used at any time after December 3, 2021. Thus, there was no evidence of employee exposure to the unguarded saw after December 3, 2021. If there is no employee exposure to a hazard, there is no citable violation. Labor Code section 6317 requires that the Division issue a citation no more than six months after the date of the violation. Thus, because there was a violation of the safety order on December 3, 2021, when Roman was using an unguarded radial arm saw, and there was no evidence of a continuing violation beyond that date, Citation 3 needed to be issued no later than June 3, 2022. It was not issued until June 15, 2022.

Citation 3 was issued in violation of the six-month statute of limitations period mandated by Labor Code section 6317. Accordingly, the citation is dismissed.

[7] As discussed above, Curtis was a supervisor. Thus, if Cardenas had testified that Curtis had told her certain things, those out of court statements would have met the authorized admissions hearsay exception. The finding that those statements are hearsay herein is based on the fact that Crocker is the witness testifying about what the notes say that Curtis allegedly told Cardenas.

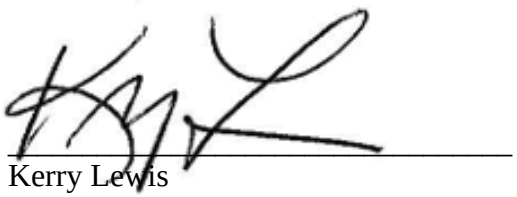
Conclusion

The Division did not establish by a preponderance of the evidence that Employer violated section 14300.40, subdivision (a), section 3203, subdivision (a)(7), or section 3328, subdivision (a)(2).

Although the Division established a violation of section 4309, subdivision (a), Citation 3 was not issued within six months of the violation.

Order

It is hereby ordered that Citation 1, Items 1 and 2, and Citations 2 and 3, are dismissed and the penalties vacated.



Dated: 06/28/2023

Kerry Lewis
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**