BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
CASTON, INC.	**1568389**
Employer	**DECISION**

Statement of the Case

Caston, Inc. (Employer) is a California licensed general building contractor. From September 29, 2021, to March 22, 2022, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineers Gordon Peilte (Peilte) and David Rodriguez (Rodriguez), conducted an accident investigation at Employer's worksite located at 220 E. 6th Street in Claremont, California (the site). Employer was a subcontractor involved in the construction of a building at Pomona College.

On March 22, 2022, the Division issued two citations to Employer, one of which Employer appealed. Citation 2 alleges that Employer permitted an employee to stand on the guardrail or toeboard of an elevating work platform (in this case, a scissor lift) to gain greater working height or reach, in connection with work Employer instructed him to do. Employer filed a timely appeal of the citation, challenging the classification and asserting the Independent Employee Action Defense.

This appeal was heard by Administrative Law Judge Howard I. Chernin (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on June 24 and 26, 2025. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. Attorney Randall J. Pitre of Pitre & Teunisse, Inc., represented Employer. J. Steven Barnett, Staff Counsel, represented the Division. The matter was submitted on February 13, 2026. Employer retained a certified court reporter to transcribe the hearing, and the parties stipulated to an order designating the court reporter's transcript as the official record of the hearing pursuant to California Code of Regulations, title 8, section 376.7.[1] Said order is incorporated into this Decision.

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

Issues

1. Did the ALJ correctly deny the Division's motion to amend, which sought to add a new citation?

2. Did Employer establish all five elements of the Independent Employee Act defense?

Findings of Fact

During the hearing, the parties stipulated to the following facts, which are incorporated herein:

1. The correct name of Employer is Caston, Inc.
2. Employer gave consent to the Division for the inspection.
3. Joel Tapia (Tapia) was an employee of Caston, Inc. on September 21, 2021, and September 29, 2021.
4. Employer's jobsite on September 21, 2021, and September 29, 2021, was the Rains Center at Pomona College, 220 East 6th Street, Claremont, CA 91711.
5. Joel Tapia was performing work at the jobsite on September 21, 2021, and September 29, 2021.
6. Joel Tapia was injured in an accident by falling off a scissor lift during work at the jobsite on September 29, 2021.
7. Joel Tapia sustained serious injuries as defined by Labor Code 6432 and Title 8 of the California Code of Regulations as a result of the accident on September 29, 2021.
8. Joel Tapia was stabilized and transported from the jobsite on September 29, 2021, to a local hospital by ambulance for further examination and treatment.
9. Exhibits 23 and 24 reflect Joel Tapia standing on a scissor lift guard rail at the jobsite on or about September 21, 2021.
10. Employer's Injury and Illness Prevention Program (IIPP) excerpt contained in Exhibit 13 states Employer's written disciplinary policy.
11. Employer disciplined the employees identified in Division Exhibits 34 through 52 for safety violations reflected in Exhibits 34 through 52 only by written notices and not time off without pay and/or termination.
12. Employer maintains that Joel Tapia did not have to reach when he fell off the scissor lift, because Employer was going to install scaffolding to construct an outside wall that could

have been used to access the area Joel Tapia was trying to reach when he fell on September 29, 2021.

In addition, the following findings of fact were made by the undersigned ALJ based on the hearing record:

13. Tapia had very limited experience working from elevated platforms where his ability to reach the work area was sufficiently obstructed that he could not reach it by simply standing on floor of the elevated platform.

14. Employer did not train or document training of employees, including Tapia, on topics including fall protection, scaffold safety and safely working on aerial lifts.

Analysis

1. Did the ALJ correctly deny the Division's motion to amend, which sought to add a new citation?

Citation 2, issued on March 21, 2022, alleges a single violation of section 3646, subdivision (e), as follows:

> Prior to and during the course of the investigation, the employer did not ensure employees did not stand on guardrails of an elevating work platform or use other devices to gain greater working height or reach. As a result, on or about 9/29/2021, an employee operating a scissor lift stepped on the guardrail, or toeboard of the scissor lift to gain a greater working height or reach, and fell approximately 10 feet to the ground below, resulting in serious injuries.

On June 10, 2025, less than 20 days before the noticed hearing, the Division filed and served a document described as a Motion to Amend. The relief sought by the Division, however, was to add a new, previously unissued citation (Citation 3), alleging a separate Serious violation of section 3646, subdivision (e), and proposing a $7,200 penalty for the alleged violation. Proposed Citation 3 alleges the following:

> Prior to and during the course of the investigation, the employer did not ensure employees did not stand on guardrails of an elevating work platform or use other devices to gain greater working height or reach. As a result, on or about 9/21/2021, an employee operating a scissor lift stepped on the guardrail, or toeboard of the scissor lift to gain a greater working height or reach.

Citation 2 and proposed Citation 3 allege separate violations of the same safety order. The key differences are the dates of the alleged violations (September 29, 2021, and September 21, 2021, respectively), and whether the violations caused an accident.

Employer filed and served an opposition to the motion, and the motion was argued at the start of the hearing on June 24, 2025. After reviewing the moving and opposition papers and considering the oral arguments presented by both parties, the undersigned ALJ denied the Division's motion.

Motions to amend appeals are governed by section 371.2, which states in relevant part, that "amendment of a citation…is permitted" under certain circumstances. The term "amendment" is not defined by title 8. Ordinary rules of regulatory interpretation begin with looking to the plain meaning of the term, giving it its "ordinary and usual meaning" within its regulatory context. (*Papich Construction Company, Inc*., Cal/OSHA App. 1204848, Decision After Reconsideration (Oct. 18, 2019), quoting *People v. Toney* (2004) 32 Cal.4th 228, 232.) When interpreting regulatory language, it is also important that the language be read "in harmony with other clauses and in context of the statutory framework as a whole. (*Papich Construction Company, Inc.*, *supra*, Cal/OSHA App. 1204848, citing *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.)

Merriam-Webster defines "amend" as "to alter especially in phraseology" and in particular "to alter formally by modification, deletion or addition." (Merriam-Webster, definition of amend <https://www.merriam-webster.com/dictionary/amend > [as of March 3, 2026].) Merriam-Webster further defines amendment as "the process of altering or amending a law or document" through legal process. (Merriam-Webster, definition of amend <https://www.merriam-webster.com/dictionary/amendment > [as of December 12, 2025].) These definitions suggest that one "amends" a citation when it alters a citation that has already been created and issued, as opposed to issuing a new citation. This interpretation is further supported by Labor Code section 6317, which provides the procedure by which the Division may *issue* a citation to an employer. Issue is defined by Merriam-Webster as "to put forth or distribute usually officially." (Merriam-Webster, definition of issue <https://www.merriam-webster.com/dictionary/issue > [as of March 3, 2026].) Relying on the plain meaning of the terms "amend," "amendment" and "issue," and reading section 371.2 in harmony with Labor Code section 6317, it is clear that the act of issuing a citation is distinct from amending a citation. The Labor Code provides the exclusive procedure for the issuance of citations. Section 371.2, on the other hand, provides a procedure for amending citations that have previously been issued by the Division to an employer. Thus, section 371.2 does not create a procedure for issuing a citation, which is what the Division was essentially seeking to do by way of its motion, and the motion was correctly denied.

2. Did Employer establish all five elements of the Independent Employee Act defense?

Employer does not challenge the existence of a violation under section 3646, subdivision (e), and the parties stipulated that an employee suffered a serious, reportable injury, and Employer thereby waived its appeal with respect to the classification of Citation 2. Thus, as Employer notes in its post-hearing brief, the only issue left to decide is whether Employer's violation is nonetheless excused by application of the Independent Employee Act Defense (IEAD) to the facts of this case.

"The Appeals Board established the [IEAD] because it recognized that some employees may act against an employer's best safety efforts." (*Western Pipeline*, Cal/OSHA App. 80-1426, Decision After Reconsideration (Sept. 28, 1981).) In *Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), the Appeals Board explained that the IEAD is an affirmative defense consisting of five elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and
(5) The employee caused the safety violation which he knew was contrary to employer's safety rules.

As the IEAD is an affirmative defense, an employer bears the burden to prove all five of the forgoing elements by a preponderance of the evidence. (*Id.*)

a. *Was Tapia experienced in the job being performed?*

This element is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).) The employer must demonstrate that the employee had performed the specific task in question enough times to become reasonably proficient. (See, e.g., *Sacramento Bag Mfg. Co.*, Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992); *Solar Turbines Incorporated*, Cal/OSHA App. 90-1336, Decision After Reconsideration (July 13, 1992).) The amount of time that it takes to become reasonably proficient for a specific task is situational, correlating to the complexity of the task. (*Land O' Lakes Purina Feed, LLC*, Cal/OSHA App. 08-1843, Decision After Reconsideration (Jan. 31, 2014).)

Employer was a subcontractor at the site, and the scope of the work that it was performing involved installation of metal stud framing and drywall in connection with the remodeling of the Rains Center, an athletic and recreation center on the Pomona College campus. At the time of the accident, Tapia was attempting to install an I-beam to serve as the "top track" portion of a metal stud frame wall being built. Tapia had been employed by Employer for approximately one year at the time of the accident; and had worked in construction since 1989. He testified that he had "many years" experience working with scissor lifts and "metal components."

The specific task that Tapia was assigned to perform – installing a "top track," required him to work from an elevated scissor lift in an area (depicted in Exhibit 24) obstructed by an air duct that prevented Tapia from fully extending the scissor lift to its full height. Although Tapia testified that he was experienced in working on scissor lifts, no evidence was produced showing that he was specifically experienced with installing "top tracks" in locations with obstructions that prevented fully extending the scissor lift to a safe working height.

Tapia's testimony, coupled with the lack of evidence in the record demonstrating Tapia had significant experience working on scissor lifts in vertically obstructed areas, suggest that Tapia was not experienced in installing "top tracks" in areas with such obstructions. Although Employer introduced some evidence that Tapia had received training and experience from his union and prior employment, nothing in the record established that Tapia's 34 years of experience included sufficient experience working from an elevated scissor lift in an area with vertical obstructions such that he had become "reasonably proficient" in the performance of his assigned task on the date of the accident. In other words, one cannot reasonably say based on the evidence at hearing that Tapia was "reasonably proficient" in performing work from elevated platforms where his ability to reach the work area was sufficiently obstructed that he could not reach it simply standing on the floor of the elevated platform. Based on the above-summarized evidence, therefore, the undersigned finds that Tapia was not experienced in the job he was performing at the time of the accident.

Accordingly, Employer did not establish the first element of the IEAD by a preponderance of the evidence.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (See *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) "This element should be analyzed by taking a realistic view of

the written program and policies, as well as the actual practices at the workplace." (*Bragg Investment Company, Inc.*, Cal/OSHA Inspection No. 1466722, Decision After Reconsideration (Oct. 9, 2025), quoting *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

Employer introduced its written Injury and Illness Prevention Program (Exh. M) as evidence during the hearing, and other evidence was offered to establish Employer's policies and procedures relevant to the circumstances of the accident. In response to the Division's Notice of Intent to Classify as Serious (1BY), Employer provided a letter with attachments addressing the five elements of the IEAD. (Exh. 13.) The documents included self-described "excerpts from Caston Inc.'s IIPP showing written rules for Elevated Work Platforms including that 'employees must stand on the floor of the basket.'" (*Id*.) Tapia signed forms on September 9, 2020, acknowledging certain "Employee Responsibilities" that included following all of Employer's "safety and health requirements and safe work practices" (Exh. 13, p. 4), and received information about Employer's safety policies (Exh. 13, p. 5). Employer's IIPP includes a requirement that "workers must stand only on the floor of the basket." (Exh. 13, p. 6) and that workers must be "instructed in proper (safe) use of the platform." (Exh. 13, p. 7). Employer also provided sample "Tailgate/Toolbox Safety Training" forms dated "Aug/Sept. 2008" containing safety rules for use of scissor lifts and industrial lifts (Exh. 13, pp. 16-17), but the record did not show that these forms were actually used or discussed during regularly held tailgate meetings. James Wathen (Wathen), who at the time of the accident was the general contractor's Safety Director, testified that subcontractors were required to hold weekly tailgate meetings, but he did not testify specifically to any particular tailgate meeting where Employer discussed safe use of elevating work platforms. Wathen's testimony is viewed as weak, given the lack of corroborating documents establishing what precisely was covered during the safety meetings, and who attended those meetings. It was within Employer's power to produce stronger and more satisfactory evidence. Wathen's testimony, therefore, is afforded little weight. (Evid. Code §412.)

Rodriguez testified that Employer's safety program was deficient in multiple respects, including that it did not document relevant employee training appropriately. Significantly, Rodriguez testified that Employer lacked training records for Tapia, the injured employee, showing that he had been trained for working on an elevated work platform. (Exh. 20.) Although Tapia testified that he had received training on lifts, including not to stand on the guardrail to gain additional height, his training was not documented by Employer. (See Exhs. 20 and 21.)

Greg Malachowski (Malachowski), Employer's Vice President, testified that employees receive training from multiple sources, including unions, the general contractor at the site, equipment manufacturers, rental companies, outside safety consultants, and Employer. Malachowski further testified that employees are trained in the operation of scissor lifts in "a multitude of ways," most prevalently through the union via "multiple courses over many weeks

of schooling and apprenticeship that go over all kinds of safety aspects [including] working on scaffolding [and] scissor lift operation." Malachowski also testified that employees are trained on "the do's and do not's of scissor lift operation" on the first day of employment and on the first day at a job site with their foreman. Additionally, he testified that Employer does stand-down meetings that cover scissor lifts, and that rental companies provide periodic training on the equipment.

Malachowski's testimony regarding employee training, however, was internally inconsistent, and was generally inconsistent with the documents in evidence. Critically, when asked about missing certifications for employees including Tapia (see Exhs. 20 and 21), Malachowski could not satisfactorily explain what the missing certifications indicated, and admitted that it could mean that the employees had not received the trainings indicated on the exhibits, including scaffold, fall protection and aerial lift training. Although Malachowski testified that Employer independently verified employee training and certification directly with the unions, he also displayed unfamiliarity with the content of the training that employees may have received from the unions. For instance, when asked whether aerial lift training would include training to avoid standing on guardrails of scissor lifts, Malachowski answered "I would imagine so, yes."

Here, the evidence strongly supports a finding that Employer did not have a well-devised safety program that included training employees in matters of safety respective to their particular job assignments. Employer's documentation indicated that many of its employees, including Tapia, were not trained in topics such as fall protection and working on elevated platforms. This type of training would have been critical for Tapia to have before he attempted to perform the tasks he was performing at the time of his accident. Despite testimony that Tapia received relevant training from a multitude of sources, the record does not include what specifically Tapia received training on, or from whom, relevant to the task he was performing at the time of his accident. From the evidence described above, the undersigned finds that Employer did not ensure that its employees, including Tapia, were provided with training on safely working at heights from elevated work platforms. This finding supports the conclusion that Employer, therefore, did not have a well-devised safety program.

The failure to establish even one element of the IEAD is sufficient to defeat the defense. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932). Here, as demonstrated above, Employer failed to establish the first two elements of the IEAD. Employer neither established that Tapia was experienced in the task that he was performing when the accident occurred, nor that it had a well-devised safety program including training on relevant topics including safely working on elevated work platforms. Accordingly, Employer did not establish its affirmative defense.

Conclusions

The Division's Motion to Amend Citation 2 was properly denied.

Employer did not establish all five elements of its pleaded Independent Employee Act Defense.

Order

Citation 2 is affirmed and its associated penalty is assessed.

/s/ Howard I. Chernin
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Howard I. Chernin
Administrative Law Judge

Dated: 03/11/2026

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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.