BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1437252**
JT2 INC. **dba TODD COMPANIES** **P.O. BOX 6820** **VISALIA, CA 93290** **Employer**	**DECISION**

Statement of the Case

JT2, Inc., doing business as Todd Companies (Employer), is a general construction contractor. On October 9, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun, commenced an inspection of Employer's job site located at 2350 East Alluvial Avenue in Clovis, California (job site). On April 9, 2020, the Division cited Employer for one alleged violation of California Code of Regulations, title 8, for failure to ensure that a hand tool was used only in the manner for which it was intended.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated and the proposed penalty was unreasonable. Employer also raised the jurisdictional issue that the Division did not issue the citation within the six-month statute of limitations. Based on its statute of limitations argument, Employer filed a Motion to Dismiss the Citation (Motion) the day before the hearing started. Employer renewed its Motion several times during the hearing. The Motion was repeatedly denied, and the parties were both able to present evidence and argument that supported or refuted Employer's assertion that the citation should be dismissed based on the statute of limitations issue.

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on July 23 and December 8, 2021, and January 26, 2022. Matthew Quall, attorney with Quall Cardot LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The matter was submitted for Decision on January 26, 2022.

Issues

1. Did the Division issue Citation 1 within the six-month statute of limitations established by Labor Code section 6317?

Findings of Fact

1. A laborers' coalition was picketing Employer's job site on October 1, 7, and 8, 2019, to protest that Employer was not paying prevailing wage for the area.

2. While picketing the job site, members of the laborers' coalition took pictures of conditions at the job site that it suspected were safety violations.

3. Francisco Nunez, the Director of Field Operations for the laborers' coalition, prepared three email complaints with the photographs taken by his organizers and sent them to the Division's Fresno District Office. The complaint referencing October 1 was sent on October 2, and the complaints referencing October 7 and 8 were sent on October 8, 2019.

4. The October 8, 2019, emails were sent after 5:00 p.m., which was after the Division's office had closed. The emails were processed as complaints on October 9, 2019.

5. The photographs submitted to the Division show that a metal wrench was being used as part of the rigging for a crane that was lowering large pipes into trenches.

6. The Division's inspector, Ronald Chun (Chun), visited the job site on October 9, 2019.

7. The alleged violation, using a hand tool in a manner that was not its intended use, was not present on October 9, 2019, nor was it observed on any other date after the Division commenced its inspection.

8. On April 9, 2020, the Division issued one citation for the alleged violation observed by the laborers' coalition involving the metal wrench.

Analysis

1. Did the Division issue Citation 1 within the six-month statute of limitations established by Labor Code section 6317?

Employer argues that the citation was untimely because it was issued more than six months after the occurrence of the alleged violation.

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 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 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).)

Although the statutory language of Labor Code section 6317 is clear, the Appeals Board has carved out an exception to the six-month requirement, but only where necessary to achieve the legislative intent.

> The exception is limited to situations where an employer neglects to perform a statutory duty to timely report a serious injury to the Division, hampering the Division's ability to timely discover, investigate, and cite a violative condition. The rationale for "tolling" the six-month period in these cases is that the Legislature did not intend for an employer to create a defense (time bar) through unlawful acts or omissions (failure to report), and thus benefit by its own wrong.

(*Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration (Nov. 18, 1998).)

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. (*The Environmental Group, supra,* Cal/OSHA App. 94-1838; See also *Kaiser Foundation Hospitals, Hayward Medical Center*, Cal/OSHA App. 83-508, Decision After Reconsideration (Nov. 19, 1985) and *Bayles Ranch*, Cal/OSHA App. 86-1270, Decision After Reconsideration (Feb. 4, 1988).)

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., supra,* Cal/OSHA App. 94-1071.)

On October 2 and 8, 2019, the laborers' coalition sent three emails to the Fresno District Office's general email address, with accompanying photographs, asserting that there was a safety violation at the job site. The laborers' coalition had been picketing Employer's job site to protest Employer's pay practices and the picketers took photographs of anything they believed to be a safety violation. The photographs and emails showed that a metal wrench was being used as part of a crane's rigging, suspending pipes above workers in trenches. The complaints asserted that the use of the wrench as part of the rigging was inappropriate and a safety violation.

The October 8, 2019, emails were sent at 5:21 p.m. and 5:32 p.m., which was after the Fresno District Office had closed operations for the day. In accordance with the Division's regular practice, Ronald Harris (Harris), the Associate Safety Engineer assigned as "Duty Officer" the following day, was responsible for processing email complaints received the prior evening. Harris completed the appropriate form, noting the date of the complaint as October 9, 2019, but indicating that there was objective evidence of a violation on October 8, 2019.

Chun commenced his inspection of the job site on October 9, 2019. The alleged wrench-related safety violation was not present on October 9, 2019, and Chun did not observe a wrench being used as part of the crane rigging at any time during the inspection. Nonetheless, having received the photographs clearly evidencing the wrench's inappropriate use, the Division proceeded with its investigation into the previously-documented violation.

On April 9, 2020, the Division issued a single General citation for the alleged misuse of the wrench as part of the crane's rigging. The violation was not continuing, as there was no evidence presented by the Division that a violation occurred at any time after October 8, 2019. Additionally, there is no assertion that there were actions by Employer, such as failure to report an accident, which resulted in the Division's inability to learn of the violation.

The Division argues that the language of Labor Code section 6317, subdivision (e)(1), defines "occurrence of the violation" to mean when the Division "discovers the violation." The Division asserts that it did not "discover" the violation until October 9, 2019, when it accessed the emails sent the prior evening by the laborers' coalition. However, reading the subdivision in its entirety reveals that this is a misinterpretation. As set forth above, Labor Code section 6317, subdivision (e)(1), provides:

> 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 ceases to exist. *Nothing in this subdivision 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.*

(Emphasis added.)

The portion of the subdivision on which the Division relies for its definition of "occurrence" does not relate to all safety violations. The second and third sentences of the subdivision set out a definition of "occurrence" related only to Labor Code section 6410.[1] Indeed, the third sentence limits the subdivision's application explicitly by saying that the subdivision does not alter the meaning of "occurrence" for any violations other than Labor Code section 6410, subdivisions (b) and (c).

The Division's argument that it did not discover the violation until it accessed emails the morning of October 9, 2019, is unpersuasive and immaterial. The alleged violation occurred on October 8, 2019, more than six months prior to the issuance of the citation. As set forth in Employer's closing argument, the Division's office procedures do not alter the statutory mandate that citations shall be issued within six months of the occurrence of the violation.

[1] Labor Code section 6410 pertains to reporting and recordkeeping requirements, and is not at issue in the instant matter.

In sum, even though the inspection did not start until October 9, 2019, the evidence showed that the violation ceased as of October 8, 2019. As such, in order to ensure that the citation was issued within the six month statute of limitations, it was required to be issued no later than April 8, 2020.

a. Independent Employee Action Defense

After the conclusion of testimony at the hearing, Employer made a motion to amend its appeal to assert the Independent Employee Action Defense (IEAD). Over objection from the Division, the motion to amend was granted. Employer had the burden of proof with regard to the affirmative defense. Based on evidence presented during the hearing, the Division made sufficient legal argument, during both its objection to the amendment and its closing argument, to defeat evidence of the defense. As such, no additional time or further presentation of evidence was required by the Division.

Because the citation was void due to the statute of limitations, the IEAD will not be analyzed in detail. However, even if the citation had been timely issued and a violation had been established within the applicable six-month period, the evidence adduced during the hearing was insufficient to meet Employer's burden of proving the affirmative defense. In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The Appeals Board has long held that where the employee causing the safety infraction is a foreman or supervisor, the defense is inapplicable. (*Davey Tree v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1241 (*Davey Tree*).) As the court in *Davey Tree* explained, supervisors and foremen are management's representatives at worksites, and

when they violate a safety standard their behavior is attributed to management. (*PDM Steel Service Centers, Inc*., Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) The evidence at the hearing in this matter established that Junior Serna, indisputably Employer's foreman representative at the job site, was aware of the wrench being used in the rigging and evidently did not perceive it to be a problem.

Additionally, there was no evidence presented about enforcement of Employer's safety program, sanctions for violations of the safety program, and, perhaps most glaringly missing, there was no testimony that the employee or employees that caused the safety violation knew that it was against Employer's safety program.

As such, because even a single missing element defeats the IEAD (*Home Depot USA, Inc*., Cal/OSHA App. 10-3284 Decision After Reconsideration (Dec. 24, 2012), Employer's assertion of the IEAD would have been insufficient to relieve it of liability for the violation if the citation had been issued timely.

Conclusion

The Division did not issue Citation 1 within six months of the occurrence of the violation. Accordingly, Citation 1 is dismissed.

Order

It is hereby ordered that Citation 1 is vacated.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 01/28/2022

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.**