BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1491229**
DAVIS DEVELOPMENT COMPANY, INC. **8780 PRESTIGE COURT** **RANCHO CUCAMONGA, CA 91730** **Employer**	**DECISION**

Statement of the Case

Davis Development Company, Inc. (Employer) is a framing contractor. On September 3, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Bill Moffett, commenced an accident investigation of Employer's work site located at 16350 Filbert Street in Sylmar, California (jobsite). On March 10, 2021, the Division issued one citation to Employer, alleging Employer failed to timely report a serious injury.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated and that the proposed penalty is unreasonable. Employer also asserted numerous affirmative defenses.[1]

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Lucas conducted the hearing from West Covina, California, on March 28, 2023, with the parties and witnesses appearing remotely via the Zoom video platform. Perry Poff, of the law firm Donnell, Melgoza & Scates, represented Employer. Michele Boswell, District Manager, represented the Division. This matter was submitted on July 14, 2023.

Issues

1. Did the Division issue the citation within the applicable statute of limitations?

2. Did Employer fail to timely report to the Division the serious injury of an employee?

[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).)

Findings of Fact

1. On July 27, 2020, Employer's employee, Ulysses Ayala (Ayala), was working as a framer atop roof joists when he fell to a wooden sub-floor approximately 20 feet below.

2. An ambulance arrived at the jobsite. Ayala was coherent and able to communicate clearly with the paramedics.

3. Ayala was transported to a hospital by the ambulance. The paramedics did not provide Employer with information about Ayala's diagnosis.

4. While Employer was informed that Ayala was being taken to a Scripps hospital, the paramedics did not specify the particular Scripps hospital to which Ayala was being taken.

5. Employer's inquiry into Ayala's condition included attempting to contact various hospitals and Ayala's emergency contacts.

6. After making unsuccessful attempts to determine Ayala's condition, Employer reported the injury to the Division on July 28, 2020, after learning that Ayala had likely been in the hospital overnight.

Analysis

1. Did the Division issue the citation within the applicable statute of limitations?

Labor Code section 6317 requires the Division to issue its citation for the alleged violation within six months of the time it discovered the violation. 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).)

In this instance, the Division discovered the alleged violation when Employer reported the accident to it on July 28, 2020. Under Labor Code section 6317, the Division was required to issue the citation before January 28, 2021. The Division issued the citation on March 10, 2021. However, the citation was issued during a period when the six-month deadline for issuing citations under Labor Code section 6317 was suspended due to the COVID-19 pandemic.

As the Appeals Board recently explained, Governor Gavin Newsom issued "three Executive Orders that address the Division's deadline to issue citations: Executive Order N-63-20, Paragraph 9; Executive Order N-71-20, Paragraph 39; and Executive Order N-08-21, Paragraph 24…T]he Executive Orders suspended the deadline in Labor Code 6317 until September 30, 2021." (*United Pumping Service, Inc.*, Cal/OSHA App. 1509967, Decision After Reconsideration (Mar. 23, 2022).) As the Division issued the citation within the timeframe under the Executive Orders, the citation was issued timely.

2. Did Employer fail to timely report to the Division the serious injury of an employee?

California Code of Regulations, title 8, section 342, subdivision (a),[2] states:

(a) Every employer shall report immediately to the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. The report shall be made by the telephone or through a specified online mechanism established by the Division for this purpose. Until the division has made such a mechanism available, the report may be made by telephone or email.

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

In Citation 1, Item 1, the Division alleges:

On July 27, 2020 at approximately 1:20 pm an employee of Davis Development suffered an injury which meets the definition of serious as defined in T8 330(h), received treatment due to the fall between the roof joists to the lower level about 20 feet. The employee was hospitalized over 24 hours. The employer reported the injury on July 28, 2020 at about 3:30pm.

a. Did an employee suffer a "Serious injury or illness" which required timely reporting to the Division?

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

"Serious injury or illness" is defined in section 330, subdivision (h):

> (h) "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing, or in which an employee suffers an amputation, the loss of an eye, or any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by an accident on a public street or highway, unless the accident occurred in a construction zone.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "'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 with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

On July 27, 2020, Ayala was working as a framer atop roof joists when he fell to a wooden sub-floor approximately 20 feet below. When the ambulance arrived at the accident scene, Ayala was given 50 mcg of fentanyl by the emergency personnel and transported via ambulance to Scripps Mercy Hospital in San Diego. The records and testimony show that Ayala arrived at the hospital's emergency department at 2:10 p.m. on July 27, 2020, presenting with "left knee pain" and "facial pain at the bridge of his nose." The hospital records show that Ayala did not lose consciousness and that he was diagnosed with a "facial laceration" and "closed fracture of the nasal bone." He was admitted as an inpatient at 2:55 p.m. and discharged the next day at 4:47 p.m.

The Division's contention here is not that Ayala suffered "a loss of any member of the body" or suffered "any serious degree of permanent disfigurement," but rather that Ayala's hospital admission was for "other than medical observation." Employer argues that there is insufficient evidence to establish Ayala received treatment during his hospital stay. Much testimony was provided at hearing on the question of whether the medical records submitted as Exhibits 8A and 9A show that Ayala received "treatment" while he was in the hospital.

The Appeals Board has previously held that "while the occurrence of treatment is undoubtedly relevant, it is not the dispositive regulatory inquiry. The regulatory inquiry is whether there was "inpatient hospitalization…for other than medical observation..." (*Target Corporation*, Cal/OSHA App. 1251879, Decision After Reconsideration (Jul 22, 2021).) The Appeals Board further expands:

> To determine whether inpatient hospitalization occurred for other than medical observation, the meaning of the term "medical observation" must be first ascertained. Since that term is not specifically defined, we apply common or ordinary definition to the words, which may be derived from dictionaries. [citations] The word "observe" is defined to mean, relevant here, "to watch carefully especially with attention to details or behavior for the purpose of arriving at a judgment" or "to make a scientific observation on or of." An "observation" is defined to mean, relevant here, "an act of recognizing and noting a fact or occurrence often involving measurement with instruments" or "a judgment on or inference...from what one has observed." For something to constitute "other than medical observation," it must not fit within the foregoing definitions; it must be other than.

(*Id*.)

"The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).) Here, where Ayala was admitted to the hospital after having been diagnosed with a fractured nose, it is reasonable to infer that he was not simply being observed during his admittance period. Fractures require attention by medical professionals. Whether that is labeled "treatment" is immaterial. What is material is that such attention is for other than mere observation. It is not reasonable to conclude that the hospital was merely observing Ayala's fractured nose during his 26-hour stay in the hospital. Ayala's injury, therefore, was a serious injury as contemplated and defined by section 330, subdivision (h), and was therefore required to be reported to the Division pursuant to section 342, subdivision (a).

b. Did Employer conduct a diligent inquiry to determine if Ayala suffered a "serious injury"?

Section 342, subdivision (a), requires an employer to report "any serious injury or illness, death, of an employee occurring ... in connection with any employment" to the Division "immediately," meaning, "as soon as practically possible but no longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness."

In *Burbank Recycling, Inc.*, Cal/OSHA App. 10-0562, Decision After Reconsideration (June 30, 2014), the Appeals Board held that "… a citation for failure to report a serious injury may be upheld where the Board finds that the Employer … should have known of the serious

injury had it engaged in a diligent inquiry." The Board also cited *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003), to offer the following discussion regarding measuring whether the employer had "constructive knowledge" of an employee's serious injury:

> We find that in addressing the constructive knowledge requirement in section 342(a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h).

William Herson (Herson), Job Foreman, was present on the jobsite on the day of the accident and testified at hearing. According to Herson, after the accident, he observed Ayala on the ground, conscious, with a cut and blood on his face. According to Herson, Ayala "was not moaning or in any kind of pain that I remember." Herson testified that Ayala was moving his extremities, seemed to be coherent in answering questions, and was otherwise "responding very well" to the paramedics. The paramedics did not inform Herson of any sort of diagnosis or indicate whether Ayala had suffered any particular injury. Herson asked the ambulance to which hospital they were taking Ayala, but only learned that the ambulance was taking him to "Scripps." According to Herson's testimony, there are many Scripps hospitals in the area.

In sum, at the time Ayala was taken by ambulance from the jobsite, Employer was in possession of the following facts regarding the accident: Ayala fell from a height of about 20 feet, he did not lose consciousness, he did not seem confused or disoriented, and the paramedics did not provide Employer with a diagnosis as to any injuries.

On cross examination, Herson testified that he had "a safety assistant on the job and we made phone calls" to "[a]ny number or contact numbers we [had]." Herson explained that they "were limited with the phone numbers, so we tried the numbers that…were made available to us." Herson reported the accident to Vanessa Herrera and followed up with her office to get updates on Ayala that evening and the next day. By the following morning Herson was aware Ayala did not

show up for work. Herson was notified at some time that morning that Ayala was in the hospital and that Ayala had broken his nose.[3]

Alfredo Sanchez (Sanchez), Safety Manager testified that following Ayala's accident, he worked with Herrera to follow up on Ayala's condition. Sanchez testified that he and Herrera made numerous attempts to contact the hospital to determine Ayala's status, but the attempts were unsuccessful because hospitals refused to release patient information due to HIPAA regulations. Sanchez tried to visit the hospital, but there "were more than one at that time" and was not able to find the correct location. Sanchez became aware that Ayala was kept overnight in the hospital at about noon the following day. The decision was made to report the accident to the Division "as a precaution."

Considering the facts in their totality, it is found that, after being informed of the accident and facilitating medical attention, Employer made a diligent attempt to inquire into the nature of Ayala's injuries. While falling from that height is itself cause for every attention and care to be taken, section 342 does not require a report of a fall from a specific height.[4] The regulation requires the report of a serious injury, so that is where the inquiry lays. Ayala never lost consciousness and seemed to be responding coherently to questions put to him. Although Ayala had blood on his face, his nose break was not apparent to Employer at that time. Even if there had been some indication that Ayala had broken his nose, it was not apparent or obvious that he would be admitted to the hospital. At no time did the paramedics make any diagnosis known to Employer. Thus, the circumstances surrounding the injury itself did not lead to a reasonable conclusion that there was a reportable injury. The inquiries made by Employer after Ayala was transported to the hospital were extensive and diligent, albeit unsuccessful through no fault of the individuals making the inquiries. Upon ultimately learning that Ayala had been admitted to the hospital, Employer promptly reported the injury to the Division.

For the reasons set forth above, the Division has failed to meet its burden to show that Employer did not timely report a serious injury. The citation is vacated.

Conclusion

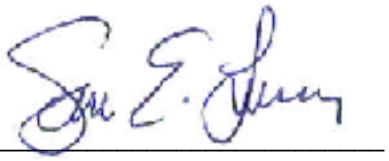
The evidence supports a finding that the Division timely issued the citation, and that Employer conducted a diligent inquiry into the accident and timely reported the serious injury to the Division. Therefore, the Division did not prove that Employer violated section 342, subdivision (a).

[3] Herson's testimony is unclear as to exactly who told him of Ayala's hospitalization, but believes it was from "coworkers."

[4] The Division's witness Dr. Paul Papanek conceded in his testimony that blunt head trauma and facial trauma resulting from a second story fall are not enough to meet the requirements for serious injury that needs to be reported.

Order

It is hereby ordered that Citation 1, Item 1, is dismissed and the penalty vacated.



Dated: 08/08/2023

Sam E. Lucas
Presiding 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.**