

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**ICON WEST
520 S. LA FAYETTE PARK PLACE #503
LOS ANGELES, CA 90057**

Employer

Inspection No.
1449027

DECISION

Statement of the Case

Icon West (Employer), is a contractor in the construction industry. Beginning November 6, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Jose Osvaldo Morales (Morales), commenced an inspection at Employer's work site at 26201 Golden Valley Road in Santa Clarita, California. On May 6, 2020, the Division cited Employer for failing to identify and evaluate workplace hazards; for failing to ensure that an employee received refresher training; for failing to make a thorough survey of the conditions of the work site; for not having an appropriately trained person to render first aid; for not ensuring that a load was balanced, braced, or secured as to prevent tipping; and for not keeping employees clear of an overhead suspended load.

Employer filed timely appeals of the citations. Employer appealed each citation on the ground that the safety order was not violated. Employer appealed Citations 2 and 3 on the additional grounds that the classification is incorrect and the proposed penalties are unreasonable. Employer also asserted numerous affirmative defenses, including that the citations were not issued timely. A hearing was set for February 11, 2021. On motion of Employer, the Appeals Board ordered that the hearing be limited to the issue of whether the citations were issued within the six months required by California Labor Code section 6317.

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), on February 11, 2021. ALJ Lucas conducted the hearing from Los Angeles, California, with the parties and witness appearing remotely via the Zoom video platform. Attorney David W. Donnell, of Donnell, Melgoza & Scates LLP, represented Employer. Clara Hill-Williams, Staff Attorney, represented the Division. The matter was submitted for decision on March 18, 2021.

Issues

1. Did the Division issue the citations within the six months required by California Labor Code section 6317?

Findings of Fact

1. On September 16, 2019, an accident occurred that injured an employee of Lopez Engineering, a subcontractor of Icon West.
2. The Division received a complaint of the accident on October 15, 2019.
3. All citations were issued on May 6, 2020.

Analysis

- 1. Did the Division issue the citations within the six months required by California Labor Code section 6317?**

Citation 1, Item 1

In Citation 1, Item 1, Employer was cited for a violation of California Code of Regulations, title 8, section 1509(a),¹ which provides:

- (a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

In Citation 1, Item 1, the Division references the entirety of section 3203(a), which provides:

- (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:
 - (1) Identify the person or persons with authority and responsibility for implementing the Program.
 - (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work

¹ All section references are to the California Code of Regulations, title 8, unless otherwise specified.

practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

- (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.
- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
 - (A) When the Program is first established;
[...]
 - (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
 - (C) Whenever the employer is made aware of a new or previously unrecognized hazard.
- (5) Include a procedure to investigate occupational injury or occupational illness.
- (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
 - (A) When observed or discovered; and
 - (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
- (7) Provide training and instruction:
 - (A) When the program is first established
[...]

- (B) To all new employees;
- (C) To all employees given new job assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019, the employer's Injury and Illness Prevention Program (IIPP) was not implemented in that procedures to identify and evaluate workplace hazards were not effective. Employer did not conduct hazard evaluation and hazard correction when unloading a rebar cage with a SkyTrak Rough Terrain Forklift.

Labor Code section 6317 provides, in relevant part:

If, upon inspection or investigation, the division believes that an employer has violated [...] any standard, rule, order, or regulation [...] of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part, it shall [...] issue a citation to the employer. [...] 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 [...] 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.

At hearing, the parties stipulated that an accident "happened"² on September 16, 2019, injuring an employee of Lopez Engineering, a subcontractor of Icon West. The parties also stipulated that the Division received a complaint of the accident on October 15, 2019. Morales was the only witness to testify. He testified that he was assigned to investigate this complaint on or about October 28, 2019, that he opened the investigation on November 6, 2019, and that the citations were issued on May 6, 2020.

² At hearing, the parties agreed to the wording of the following stipulation, which was specifically drafted to avoid use of the word "occurrence": "The factual circumstances, which are the basis of each citation, happened on September 16, 2019."

The description of the alleged violation above alleges a violation that occurred on September 16, 2019. The Division alleges that on that day Employer violated section 3203 by not implementing its IIPP. Specifically, the Division alleges that Employer failed to effectively “identify and evaluate workplace hazards” on the date of the accident. Morales, on cross examination, specifically noted that the Division is not alleging that a violation of this section occurred on any other date, despite the description of the alleged violation also indicating “including but not limited to” September 16, 2019.

Labor Code section 6317 requires the Division issue its citation for the alleged violation within six months of the time it discovered of the violation. The Division argues that “discovery” means the statute of limitation is tolled until the Division can confirm a complaint is valid. The Appeals Board has previously considered this position and rejected it. (*Schimmick Construction Company, Inc.*, 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).) In this instance, the Division discovered the violation when it learned of the accident on October 15, 2019, which would require the citation to issue before April 15, 2020. This citation was not issued until May 6, 2020. As such, the issuance of the citation exceeds the Division’s jurisdiction and Citation 1, Item 1, is vacated.

Citation 1, Item 3

In Citation 1, Item 3, Employer was cited for a violation of section 1511, subdivision (b), which provides:

- (b) Prior to the presence of its employees, the employer shall make a thorough survey of the conditions of the site to determine, so far as practicable, the predictable hazards to employees and the kind and extent of safeguards necessary to prosecute the work in a safe manner in accordance with the relevant parts of Plate A-2-a and b of the Appendix.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019 Icon West, Inc., did not make a thorough survey of the conditions of the site to determine, so far as practicable, the predictable hazards to employees and the kind and extent of safeguards necessary to prosecute the work in a safe manner, such as, but not limited to necessary safeguards to protect employees from unbalanced and suspended loads hazards when performing work while unloading a rebar cage from a flatbed truck with a forklift.

Icon West, Inc., was responsible for safety and health conditions at the site and did not protect employees of Lopez Engineering., from unbalanced and suspended loads when performing work while standing under an unbalanced, unsecured suspended load.

This citation, similar to the citation above, alleges a violation that occurred on September 16, 2019. The Division alleges that Employer did not make a thorough survey of the conditions of the construction site on that date and that date only. The Division did not offer evidence at hearing of a violation on any other date. Labor Code section 6317 requires that the Division issue its citation for the alleged violation within six months of the time it discovered the violation. In this instance, the Division discovered the violation on October 15, 2019, which would require the citation to issue before April 15, 2020. This citation was not issued until May 6, 2020. As such, the issuance of the citation exceeds the Division's jurisdiction and Citation 1, Item 3, is vacated.

Citation 1, Item 4

In Citation 1, Item 4, Employer was cited for a violation of section 1512, subdivision (b), which provides:

- (c) Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons. However, such pool shall be large enough to service the combined work forces of such employers.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019, the employer did not have an appropriately trained person available to render first aid at the job site in accordance with this section.

Like the previous two citations discussed above, the alleged violation here is limited to September 16, 2019. Namely, the Division alleges that, on that date, Employer did not have an appropriately trained person available to render first aid. The Division alleges no violations of this section later in time. Labor Code section 6317 requires that the Division issue its citation for the alleged violation within six months of the time it discovered the violation. In this instance, the Division discovered the violation on October 15, 2019, which would require the citation to

issue before April 15, 2020. This citation was not issued until May 6, 2020. As such, the issuance of the citation exceeds the Division's jurisdiction and Citation 1, Item 4, is vacated.

Citation 2, Item 1

In Citation 2, Item 1, Employer was cited for a violation of section 3650, subdivision (l), which provides:

- (l) Loads shall be so balanced, braced, or secured as to prevent tipping and falling. Only stable or safely arranged loads shall be handled.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019, employees were exposed to the hazard of unbalanced and unsecured load during the rebar cage hoisting and unloading operations. Icon West, Inc. did not ensure that the rebar cage was balanced, braced and secured to prevent it from tipping and falling on to the employees of Lopez Group during hoisting and unloading operations with the SkyTrak Rough Terrain Forklift. Icon West Inc. was responsible for the safety and health conditions at the site and failed to protect the employees of Lopez Group Corp., dba Lopez Engineering from the hazards of unbalanced and unsecured rebar cage load. (This citation is being issued in accordance with 336.10 Multi-Employer Worksites.)

The violation alleged in this instance is Employer's alleged failure to ensure that the rebar cage was balanced, braced and secured to prevent it from tipping and falling during a specific instance that occurred on September 16, 2019. The Division did not provide evidence of subsequent violations or allege that the violation was ongoing after September 16, 2019. Labor Code section 6317 requires that the Division issue its citation for the alleged violation within six months of the time it discovered the violation. In this instance, the Division discovered the violation on October 15, 2019, which would require the citation to issue before April 15, 2020. This citation was not issued until May 6, 2020. As such, the issuance of the citation exceeds the Division's jurisdiction and Citation 2, Item 1, is vacated.

Citation 3, Item 1

In Citation 3, Item 1, Employer was cited for a violation of section 3650, subdivision (u), which provides:

- (u) The use, care and maintenance of slings used in lifting suspended loads with forklifts shall comply with the requirements of Article 101 of these orders.

In Citation 3, Item 1, the Division references section 5042, subdivision (a), which provides, in relevant part:

(a) Whenever any sling is used, the following practices shall be enforced:

(6) Slings shall be set to avoid slippage.

[...]

(9) All employees shall be kept clear of loads about to be lifted and of suspended loads. (See Section 5002).

In Citation 3, Item 1, the Division also references section 5002, which provides:

Operations shall be conducted and the job controlled in a manner that will avoid exposure of employees to the hazard of overhead loads. Wherever loads must be passed directly over workers, occupied work spaces or occupied passageways, safety type hooks or equivalent means of preventing the loads from becoming disengaged shall be used.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019, employees were not kept clear of load about to be lifted and of overhead suspended load (rebar cage) during the hoisting and unloading operations. Icon West Inc, improperly used a SkyTrack Rough Terrain Forklift with an unbalanced and unsecured rebar cage while conducting unloading and hoisting operations. Icon West, Inc., did not ensure that the employees of Lopez Group Corp., dba Lopez Engineering were kept clear of the rebar cage about to be lifted and while the rebar cage was suspended, thus exposing the employees to the hazards of overhead loads. As a result, on or about September 16, [2019], an employee of Lopez Group Corp., dba Lopez Engineering sustained serious injuries when a rebar cage fell on him during the hoisting and unloading operations. Icon West Inc. was responsible for safety and health conditions at the site and failed to ensure that the employees of Lopez Group Corp., dba Lopez Engineering were kept clear of the hazards of unbalanced an unsecured rebar cage load during hoisting and unloading operations. (This citation is being issued in accordance with Section 336.10 Multi-Employer Worksites.)

This alleged accident-related violation is limited by its own description to September 16, 2019. As above, the Division did not offer evidence at hearing of a violation on any other date, despite the description of the alleged violation alleging a violation “including but not limited to”

that date. The Division alleges that, on that date, employees were not kept clear of an overhead load, and as a result, an employee suffered a serious injury. Labor Code section 6317 requires that the Division issue its citation for the alleged violation within six months of the time it discovered the violation. In this instance, the Division discovered the violation on October 15, 2019, which would require the citation to issue before April 15, 2020. This citation was not issued until May 6, 2020. As such, the issuance of the citation exceeds the Division's jurisdiction and Citation 2, Item 1, is vacated.

Citation 1, Item 2

In Citation 1, Item 2, Employer was cited for a violation of section 3668, subdivision (d), which provides:

(d) Refresher training and evaluation. Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by subsection (d)(1) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely.

(1) Refresher training in relevant topics shall be provided to the operator when:

- (A) The operator has been observed to operate the vehicle in an unsafe manner;
- (B) The operator has been involved in an accident or near-miss incident;
- (C) The operator has received an evaluation that reveals that the operator is not operating the truck safely;
- (D) The operator is assigned to drive a different type of truck; or
- (E) A condition in the workplace changes in a manner that could affect safe operation of the truck.

(2) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

The Division alleges:

Prior to and during the course of the inspection, including but not limited to, on September 16, 2019, the employer did not ensure that the operator of the SkyTrak Rough Terrain Forklift received refresher training and evaluation after the operator was involved in an accident that caused serious injuries.

In discussing section 6317, the Appeals Board has consistently held that the "six-month time limit on issuing a citation does not begin to run until...the violation ceases." (*Shimmick*

Construction Co., Cal/OSHA App. 12-0781, Denial of Petition for Reconsideration (Sep. 3, 2015).) The Division alleges here that Employer did not ensure that an employee received refresher training after the employee was involved in the above-mentioned accident on September 16, 2019. As such, the alleged violation is ongoing until such refresher training is received.

The statute of limitations set by section 6317 is an affirmative defense. (*Key Energy Services, Inc.*, Cal/OSHA App. 15-0255, Decision After Reconsideration (Oct. 7, 2016).) Thus, Employer has the burden to prove here that the violation ceased. (See *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) No testimony was offered by Employer at hearing to meet its burden, showing the date this alleged violation ceased. Therefore, the issuance of the citation was not shown to exceed the Division's jurisdiction and Citation 1, Item 2, may proceed to hearing on its merits.

Conclusion

Citation 1, Items 1, 3, and 4, Citation 2, Item 1, and Citation 3, Item 1, were not issued within six months of the time the Division discovered the violations and are vacated.

The alleged violation of Citation 1, Item 2, was not shown by Employer to have ceased, and may proceed to hearing on the merits.

Order

It is hereby ordered that Citation 1, Item 1, is vacated.

It is hereby ordered that the appeal of Citation 1, Item 2, may proceed to hearing on the merits.


It is hereby ordered that Citation 1, Item 3, is vacated.

It is hereby ordered that Citation 1, Item 4, is vacated.

It is hereby ordered that Citation 2, Item 1, is vacated.

It is hereby ordered that Citation 3, Item 1, is vacated.

Dated: 04/19/2021



SAM E. LUCAS
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.**