

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

In the Matter of the Appeal of:

**KEY ENERGY SERVICES, INC.**  
5080 California Avenue  
Bakersfield, CA 93309

Employer

Docket No. 15-R4D7-0255  
and 0256

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

**JURISDICTION**

Commencing on July 17, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 23, 2014 the Division issued two citations to Employer alleging three violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> As pertinent here, only Citation 1, Item 1, which alleged a violation of recordkeeping requirements in section 14300.29, subdivision (a) is at issue.

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary - hearing.

On May 18, 2016, the ALJ issued a Decision which granted Employer's appeals of two of the three alleged violations, and sustained the alleged violation of section 14300.29, subdivision (a) [recording of injuries].

On June 16, 2016 the Board ordered reconsideration of the Decision on its own motion (Labor Code section 6614, subdivision (b)), to examine whether

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

the Decision ruled correctly on whether the statute of limitations had expired with respect to the recordkeeping violation.

Employer subsequently filed a petition for reconsideration contending the statute of limitations had expired with respect to the section 14300.29, subdivision (a) violation, among other issues.

The Division answered the Board's Order of Reconsideration and Employer's petition for reconsideration.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence. Based on our independent review of the record, we find that the Decision erred regarding the statute of limitations, and we now reverse and grant Employer's appeal of the section 14300.29 violation.

### **FINDINGS OF FACT**

Employer did not fill out "Column F" of its Cal/OSHA 300 Log in 2011, as required.

Employer included the information omitted from the 300 Log in its Form 301.

Employer pleaded the affirmative defense of the statute of limitations in its appeal of Citation 1, Item 1.

Citation 1 was issued on December 23, 2014. December 23, 2014 was more than 6 months after the date of the injury at issue, July 14, 2011, and more than 6 months after information regarding that injury was required to be recorded, July 21, 2011.<sup>2</sup>

### **ISSUE**

Was Citation 1, Item 1 issued after expiration of the statute of limitations in Labor Code section 6317?

### **DISCUSSION**

Labor Code section 6317, in relevant part, states: "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation." The uncontradicted evidence in the record showed that the alleged failure to record all information required by the 300 Log occurred in July 2011 while Citation 1 was issued in December 2014, almost three and a half years later.

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<sup>2</sup> Section 14300.29, subdivision (b)(3) provides that entries regarding recordable injuries must be entered into the 300 Log and Form 301 within seven days of the employer's learning of the injury.

The Decision rejected Employer's affirmative defense of the statute of limitations stating, "Employer failed to raise this issue at the hearing. Employer did not assert this affirmative defense and did not present any evidence." (Decision, p.6, fn. 5.) That was incorrect. The defense was raised in Employer's appeal form and in its closing brief, thus it was "assert[ed]."

Also, the issue of jurisdiction can be raised at any time. (*Airlines Reporting Corp. v. Renda* (2009) 177 Cal.App.4<sup>th</sup> 14, 20; *Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration (Nov. 18, 1998).) We have held the period of limitations in Labor Code section 6317 is jurisdictional. (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012).)

Next we must determine whether the failure to make a record is a singular event, in which case the statute of limitations has expired here, or a continuing violation, in which case the issue would be, did the Division issue the citation within six months of the time it knew or should have known of the failure to make the record.

We addressed a similar violation in another but unrelated matter involving Employer. (*Key Energy Services, LLC*, Cal/OSHA App. 13-2239, Denial of Petition for Reconsideration (Dec. 24, 2014). In that decision we found Employer to have violated section 14300.29, subdivision (a) for failure to complete Column F of the Form 300 Log. That citation had been issued timely. We noted that the record showed other occasions, in addition to the one cited, on which Employer had not completed Column F. We did not address those other instances because we did not need to and the record evidence showed they occurred more than six months before the citation being appealed had issued. (See *id.*, p. 10.) We also acknowledged that section 14300.29 was promulgated in California in order to "remain consistent" and in compliance with federal law which requires California's state program to be "at least as effective as" its federal analogue. (*Id.*, fn. 3.)

Those parallel federal statutes and regulations have been interpreted in a federal case directly on point. (*AKM LLC dba as Volks Constructors v. Secretary of Labor* (2012 D.C. Cir.) 675 F.3d 752 ("Volks").) We have adopted the reasoning of federal authority when persuasive and appropriate, although we are not bound to do so. (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) [adopted federal reasoning]; *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014) [not bound].)<sup>3</sup>

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<sup>3</sup> Note that *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014) is also distinguished on its facts; it involved an alleged *reporting* violation, as opposed to a *recording* violation. We declined to follow *Volks* in *Bellingham* because of that distinction.

*Volks, supra*, addressed the same issue we confront here: is the failure to make a record of a workplace injury a discrete event in time or a continuing violation. After considering the language of the federal statute (29 U.S.C. § 658(c)), which uses the same terms as Labor Code section 6317 in this regard, the Court of Appeals held that “the word ‘occurrence’ clearly refers to a discrete antecedent event – something that ‘happened’ or ‘came to pass’ ‘in the past.’” (*Volks*, 675 F.3d, p. 755 (citations and internal quotations omitted).) We are persuaded that the *Volks* court’s analysis is sound and applies to the present matter. Accordingly, we adopt it, and hold that the citation at issue is barred by the statute of limitations: The injury which gave rise to the recording obligation, and the failure to make the complete record as required, were events (“occurrences,” in Labor Code § 6317) which occurred more than six months before the citation was issued.

Employer also contends that it recorded the information missing from column F of the 300 Log on its contemporaneously created Form 301. While the record shows this to be true, we need not and do not decide here whether information recorded on Form 301 may be used to correct or supplement an omission of the same information required on Form 300.

**DECISION  
AFTER RECONSIDERATION**

Employer’s appeal of Citation 1, Item 1 is granted.

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH R. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: October 7, 2016