

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

In the Matter of the Appeal of:

**UNITED PUMPING SERVICE, INC.
14000 E Valley Blvd.
La Puente, CA 91746**

Employer

Inspection No.

1509967

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it, renders the following decision after reconsideration.

Jurisdiction

On July 17, 2019, the Division issued one citation to United Pumping Service, Inc. (Employer) alleging three General violations of California Code of Regulations, title 8¹ (hereinafter referred to as the “citations”).

Employer timely appealed the citations, and less than one month later entered into a settlement agreement with the Division, under which the penalties were reduced.

On October 14, 2021, Employer filed a timely petition for reconsideration. Employer’s petition contends the citations were untimely issued. The Division answered. The Board took Employer’s petition under submission.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

Issues

- 1) Did the Division issue the citations in a timely manner?
- 2) Has Employer stated adequate cause to overturn the settlement agreement?

¹ Unless otherwise specified all references will be to California Code of Regulations, title 8.

Findings of Fact

- 1) The Division issued the citations in a timely manner.

Analysis

1) Did the Division issue the citations in a timely manner?

Employer's petition for reconsideration contends that after settlement, new materials and evidence were discovered demonstrating that the Division did not issue the citations in a timely manner in compliance with the Division of Occupational Safety & Health Policy Procedure Manual, which requires citations be issued within six months from the last date on which the violations were observed. Employer contends the alleged violations actually occurred between October 12 and 13, 2020, and the citations were not issued until August 11, 2021, more than six months later. We reject Employer's argument for three reasons: two procedural and one substantive.

First, Employer's contention that the Division failed to follow its policy and procedure manual is without merit. Internal Division procedures and policies are guidance, not regulations enacted pursuant to the Administrative Procedure Act, and thus are not enforceable. (*Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients*, Cal/OSHA App. 1334740, Decision After Reconsideration (Feb 17, 2022) [other citations omitted].)

Second, Employer's petition is based on the contention that it discovered new evidence. The Board may consider new material evidence if a party demonstrates that it could not, with reasonable diligence, have produced that evidence at hearing. (Lab. Code, § 6617; *MCM Construction, Inc.*, Cal/OSHA App. 92-436, Decision After Reconsideration (May 23, 1995).) Employer has made no such showing, nor could it. Employer voluntarily settled this matter within approximately a month of initiating its appeal; Employer never attempted to proceed to a hearing.

Third, turning to the substance, Employer's petition may be construed as arguing that the Division failed to issue the citations in compliance with the time periods set forth in Labor Code section 6317. However, even accepting for the sake of argument that the dates set forth in Employer's petition for reconsideration were correct, the citations were issued in a timely manner. Labor Code section 6317 states, "A citation or notice shall not be issued by the Division more than six months after the occurrence of the violation." However, relevant here, that statutory deadline was suspended by Executive Order during the pertinent time periods. There are 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. Based upon the content of the aforementioned Executive Orders, even if the violations occurred on October 12 and 13, 2020, and the citations were not issued until August 11, 2021, the citations would have been timely. Relevant here, the Executive Orders suspended the deadline in Labor Code 6317 until September 30, 2021.

2) Has Employer stated adequate cause to overturn the settlement agreement?

Even assuming the citations had been untimely (which is not the case), Employer waived any statute of limitations through its voluntary settlement of this matter, and Employer has failed to provide adequate cause to overturn that agreement.

“In civil cases, the statute of limitations is not jurisdictional but merely serves a procedural function and constitutes an affirmative defense that is waived unless pleaded and proved.” (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 541 [other citations omitted].) “[T]he primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available.” (*Addison v. State of California* (1978) 21 Cal.3d 313, 317.) A statute of limitations is generally considered to be a personal privilege which is waived unless asserted at the proper time and in the proper manner. (*Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 382 [other citations omitted]; *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 36.) This general rule also applies to proceedings before an administrative tribunal. (*Ibid.*)

Previously, the Board held that the limitations period set forth in Labor Code section 6317 is jurisdictional, cannot be waived, and can be raised for the first time on reconsideration. (See, e.g., *Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration (Nov. 18, 1998); *Key Energy Services, Inc.*, Cal/OSHA App. 15-0255, Decision After Reconsideration (Oct. 7, 2016).) The Board found the general analysis applicable to civil statutes of limitations was inapposite to Labor Code section 6317. (*Sierra Wes Drywall, Inc.*, *supra*, Cal/OSHA App. 94-1071.) The Board held, “[t]he statute of limitations is such a fundamental issue it is not dependent on when or how in the appeals process it is raised for Board consideration.” (*Ibid.*) However, the circumstances of this case have caused us to revisit our analysis of the issue of whether Labor Code section 6317 is jurisdictional and our previous holding that it cannot be waived, which, as applied to this case, would make the settlement order void *ab initio*.

In construing Labor Code section 6317, and determining whether it is jurisdictional, we begin by considering the language of the statute, giving the words their usual meaning and construing the statute as a whole in light of its purpose. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 343; *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.)

Here, nothing in the plain language of the statute indicates an intent to depart from the general rule that the statute of limitations may be waived. If the Legislature had intended to make the limitations period jurisdictional, it would have clearly said so. (*Amaro v. Anaheim Arena Management, LLC*, *supra*, 69 Cal.App.5th at p. 541.) Nothing in text or purpose of the California Occupational Safety and Health Act of 1973 (the Act) convinces us that the statute of limitations cannot be waived.

The primary purpose of the Act is to enforce standards designed to assure safe and healthful working conditions for employees. (*Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625, 632.) A citation is an enforcement action between the Division and the employer. The penalties and abatement requirements are intended to remediate present violations and deter future ones. (*Maria de los Angeles Colunga dba*

Merced Farm Labor, Cal/OSHA App. 08-3093, Decision After Reconsideration (Feb 26, 2015); See also, e.g., *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 542.) Finding that Labor Code section 6317 is a statute of limitations that may be waived does not interfere with these statutory goals.

We also observe that the Federal Occupational Safety and Health Act contains a six month statute of limitations. (29 U.S.C. § 658—[“No citation may be issued under this section after the expiration of six months following the occurrence of any violation.”].) For decades, the Occupational Safety and Health Review Commission (OSHRC), which is the Board’s federal counterpart, has not found that statute jurisdictional, but considered it a statute of limitations that may be waived. (See, e.g., *Cmh Co.*, 9 OSHC (BNA) 1048, 1980 OSHD (CCH) P24,967 (O.S.H.R.C. November 24, 1980); *Kaspar Electroplating Corp.*, 16 OSHC (BNA) 1517, 1994 OSHD (CCH) P30,303 (O.S.H.R.C. December 16, 1993); *General Dynamics Corp.*, 15 OSHC (BNA) 2122, 1993 OSHD (CCH) P29,952 (O.S.H.R.C. February 3, 1993).) While we are not required to follow federal precedent, given the fundamentally similar policy goals, timeframes, and statutory text, we can discern no reason to interpret our own statute differently.

Although the six month limitations period in Labor Code section 6317 does use the word “shall,” indicating the time limitation is mandatory, it does not necessarily follow that the time limit is jurisdictional. (*Kabran v. Sharp Memorial Hospital*, *supra*, 2 Cal.5th at pp. 339, 343.) For example, the California's Agricultural Labor Relations Act (ALRA) provides that: “[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board...” (Lab. Code, § 1160.2.) Though the statute uses the word “shall,” it has not been interpreted as an absolute limit on the administering labor board's jurisdiction to issue complaints. (*Ruline Nursery v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 265.) As the Court noted in *Kabran v. Sharp Memorial Hospital*, *supra*, 2 Cal.5th at p. 341-342,

[A] statute of limitations may be “mandatory in the sense that the court may not excuse a late complaint on grounds of mistake, neglect, or the like,” but “it is not ‘jurisdictional.’” (*Santa Clara*, *supra*, 4 Cal.3d at p. 551, fn. 2.) A properly raised objection to an untimely complaint may require that the court dismiss it, and the court's failure to dismiss is reversible on appeal. But a party cannot raise the untimeliness for the first time on appeal or in a collateral attack. If an untimely complaint results in a judgment, the judgment will not be disturbed on timeliness grounds if the defendant did not properly preserve a statute of limitations defense. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8 [91 Cal. Rptr. 2d 273, 989 P.2d 701]; cf. *Gonzalez v. Thaler* (2012) 565 U.S. 134, 146 [181 L. Ed. 2d 619, 132 S. Ct. 641, 651] [“calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored”].)

In sum, jurisdictional rules are mandatory, but mandatory rules are not necessarily jurisdictional. Noncompliance with a mandatory rule can result in invalidation of the action so long as the noncompliance is properly raised; a party can forfeit its challenge to the noncompliance by failing to object.

For the reasons stated herein, we conclude that the six month time period in Labor Code section 6317 is a non-jurisdictional statute of limitations, and overturn any prior decisions holding to the contrary. The defense based on the statute of limitations may be waived in some circumstances, e.g., when an employer fails to plead or present it in some timely fashion. (See, e.g., *Petersen v. W. T. Grant Co.* (1974) 41 Cal.App.3d 217, 223 [other citations omitted].)

Employer, here, waived the statute of limitations by voluntarily settling this matter, and cannot now revive it via a petition for reconsideration. The Board will not interfere with, or overturn, a settlement agreement absent evidence of fraud, misrepresentation, or other satisfactory grounds. (*K H S & S of Concord Inc.*, Cal/OSHA App. 11-0374, Decision After Reconsideration (Sept. 4, 2014).) No satisfactory grounds to overturn the settlement agreement have been alleged.

Decision

For the reasons stated herein, the Board declines to disturb the settlement agreement.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 03/23/2022

