Aerojet General Corp.

SAFETY AND HEALTH

Timeliness of citation (RCW 49.17.120(4))

A second inspection of an employer commenced after the opening conference in the first inspection constitutes a separate inspection, not a continuation of the first, so that the time for issuing the citation and notice for the second inspection began on the date of the second inspection and not the first. RCW 49.17.120. ***….In re Aerojet General Corp.*, BIIA Dec., 10 W1285 (2012)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AEROJET GENERAL CORP.	**DOCKET NO. 10 W1285**
CITATION & NOTICE NO. 314419573	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Employer, Aerojet General Corp., by
Nixon Peabody, LLP, per
Jeffrey M. Tanenbaum

Employees of Aerojet General Corp.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Beverly Norwood Goetz, Assistant

The employer, Aerojet General Corp. (Aerojet), filed an appeal with the Department of Labor and Industries, on December 3, 2010, from a Citation and Notice of the Department dated November 17, 2010. In this citation and notice, the Department alleged 21 serious violations, with a total penalty of $31,500. The Department transmitted the appeal to the Board of Industrial Insurance Appeals on December 23, 2010. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

INTRODUCTION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review, filed by the Department, to a Proposed Decision and Order, issued on March 14, 2012, in which the industrial appeals judge vacated the November 17, 2010 Citation and Notice.

We are required to adjudicate whether the Department issued a timely citation and notice. Aerojet maintains the Department's November 17, 2010 Citation and Notice, the subject of this appeal, was merely a continuation of a prior inspection, Citation and Notice No. 314116195. This earlier citation was commenced on March 1, 2010, the date of the opening conference in the previous inspection. Aerojet maintains this citation and notice is untimely, because it was issued more than six months after the date of this conference. The Department maintains it had the right to issue a separate citation and notice with regards to the violations covered in the current appeal,

and did so in a timely fashion. Our industrial appeals judge agreed with Aerojet, and concluded the citation and notice before us in this appeal was simply an expansion of the original citation, and was therefore untimely. Aerojet had filed a Motion to Vacate the citation and notice, which was granted in the Proposed Decision and Order. The Department requests that we deny Aerojet's motion, and remand this appeal to schedule hearings on the merits of its appeal.

We conclude the Department had discretion to issue the November 17, 2010 Citation and Notice before us. Simply put, the issue in this appeal is whether the Department could commence a second inspection of Aerojet regarding Process Safety Management (PSM) issues, subject to a second statute of limitations, after it concluded its original inspection regarding different violations. We believe there is no legal basis for Aerojet's argument that this citation and notice is untimely. The Department had the legal authority to initiate a separate inspection of Aerojet regarding the alleged violations that are the subject of this appeal. Issued within six months of the May 17, 2010 opening conference, the November 17, 2010 Citation and Notice is timely. Accordingly, we grant the Department's Petition for Review to deny Aerojet's Motion to Dismiss, and remand the appeal to the hearing process.

FACTS

There is an extensive record in this appeal. However, the key facts relevant to our decision are not overly complex and are summarized as follows. In February 2010, the Department received a referral from the federal Occupational Safety and Health Administration (OSHA) regarding a complaint it received from a former Aerojet employee. Aerojet is a company whose employees design, test, fabricate, and conduct research and development of rocket thrusters and engines. The Department's file indicates Aerojet has over 250 employees. It has a jobsite in Redmond, Washington that contains 21 buildings on a multi-acre campus. As part of its manufacturing and testing process, its employees handle various chemicals. These chemicals include hydrazine, a chemical in monopropellant rocket fuel, which is not as hazardous as the following two chemicals used in bipropellant engines: monomethylhydrazine (MMH) and nitrogen tetroxide (NTO). Only the latter two chemicals are sufficiently dangerous to be covered by a PSM program. The Department requires PSM programs for these chemicals because they present special hazards to employees.

The February 2010 complaint, however, focused only on one former employee's concerns about exposure to hydrazine and pyromax paint. The employee alleged Aerojet did not provide

safe working conditions for employees working with hydrazine. He also alleged he was required to paint the interior of a vacuum chamber in a test lab without being given proper personal protection equipment. This complaint was assigned to an industrial hygienist safety and health officer, Kathryn Brown. She opened Inspection No. 314116195 at Aerojet on March 1, 2010, accompanied by her supervisor, Robert Leo, who was present only to conduct a routine evaluation of her work. Ms. Brown inspected the test lab where hydrazine was used, specifically Cell 104 in one building. The tank the employee had painted was in the same lab. Her inspection was focused almost entirely on employee exposure to hydrazine, specifically medical monitoring, training, and ventilation for technicians who handle this chemical. She also inquired about any employee's exposure to chemicals when the chamber described in the complaint was painted.

During her inspection, Ms. Brown noticed warning safety signs appropriate for chemicals subject to PSM rules. She asked the Aerojet representatives with whom she was meeting if it had chemicals in its jobsite that would require it to follow these special safety rules. They responded that they used sufficient quantities of MMH and NTO to subject their activities to PSM rules. Although Mr. Leo was not present when Ms. Brown learned this information, she relayed it to him that same day. As part of her job, Ms. Brown asked questions about chemical exposure, and relayed any information indicating an employer was subject to PSM rules to appropriate Department personnel.

Mr. Leo was especially interested in the presence of MMH and NTO, and in employer compliance with PSM rules, due to a new OSHA mandated National Emphasis Program (NEP). OSHA requires state programs to comply with its NEP requirements. In July 2009, OSHA issued a NEP directive requiring all states, including Washington, to conduct PSM inspections in at least three facilities with highly hazardous chemicals. The directive required inspections of three different types of workplaces, one for each for the following uses of chemicals. The first should involve the use of ammonia for refrigeration; the second, chlorine for water; and the third, ammonia and/or chlorine for other purposes, or other chemicals. The inspections had to be made with highly trained personnel who met OSHA requirements for conducting these inspections (for example, inspectors had to have "Level 1" qualifications). In March 2010, the Department was in the process of drafting a directive to comply with OSHA's NEP requirements and was also identifying potential employers to inspect as provided by this program. Terry Walley, a Department compliance operations manager who was the Department's PSM specialist and qualified as a Level 1 inspector, testified

there were 200 to 300 companies in Washington that met OSHA's criteria for its NEP inspections of PSM programs. However, only a few employers qualified under the third prong (which included using chemicals other than ammonia or chlorine). Accordingly, when Mr. Leo learned Aerojet was an employer that possibly met OSHA criteria for this third prong, Department staff sought to verify whether it would actually qualify. Even though an Aerojet employee told Ms. Brown that they were subject to PSM rules, Mr. Leo testified that other employers had erroneously believed they had sufficient chemicals on-site to require compliance with these rules when they actually did not meet the minimum thresholds for coverage. Mr. Leo indicated the Department could not be certain there were sufficient chemicals onsite to subject any employer to PSM rules until an inspection had begun. However, it was obviously prudent to verify whether Aerojet would be likely to have sufficient chemicals in its workplace to qualify under the third prong of the NEP inspections. OSHA had indicated the federal Environmental Protection Agency's (the EPA's) list of hazardous chemicals was one source for selecting employers to target in this NEP program, so Department staff contacted the EPA to check its records regarding Aerojet's use of MMH and NTO. By early March, Trent Elwing, a Department industrial hygienist employed in King County who had PSM training, had confirmed Aerojet probably had sufficient chemicals in its Redmond, Washington workplace to qualify under OSHA's third criteria for NEP inspections.

The Department issued its directive regarding Washington state's emphasis program for PSM inspections on April 15, 2010. It incorporated the requirements in OSHA's prior directive, and stated this NEP would expire within one year. This meant that all three PSM inspections had to be completed by April 15, 2011. Department personnel testified that PSM inspections are very time consuming and require specially trained staff. An inspector is only assigned one PSM inspection at a time. According to Mr. Leo, a PSM inspection frequently takes six months to complete. A PSM inspection is process oriented, meaning that it is dynamic and is based on a careful inspection of each employer's operations. There are no set criteria employers must meet. Instead, safety evaluations are made based on performance-based standards. Mr. Elwing stated that PSM rules require employers to develop and implement a written program specifying its recordkeeping, operating procedures, hazard analyses, emergency planning, and compliance audits for the chemicals that are covered by the rules. He stated that an inspection requires Department staff to first examine the employer's written PSM program to analyze whether it complies with Department rules. The staff must then determine whether the employer's program is properly implemented.

The Department had to carefully determine which employers to target based on its statewide resources and staff availability before initiating the NEP. As of May 5, 2010, the Department's statewide compliance manager had selected the three employers it would target for the PSM emphasis program. Aerojet was one of them.

By then, Ms. Brown had almost completed her investigation. The Department did not want to proceed with its NEP inspection of Aerojet until Mr. Elwing and Mr. Walley were available. Ms. Brown has neither the training nor the qualifications to conduct a PSM inspection. Mr. Elwing was the senior industrial hygienist who had been trained in PSM in Region 2, which includes King County (Mr. Leo also had PSM training, but he had not done a PSM inspection and was also a supervisor, and therefore presumably unavailable to undertake this inspection because of his managerial responsibilities). Mr. Elwing, however, lacked Level 1 certification. The Department therefore also had to have Mr. Walley participate in the PSM inspection of Aerojet, because OSHA standards required the participation of a staff person with Level 1 certification. Mr. Elwing and Mr. Walley were unavailable to begin the PSM inspection until May. Mr. Elwing, for example, was engaged in a six-month long PSM inspection of a refinery, which ended then.

Mr. Elwing and Mr. Walley decided to have the opening conference in the PSM inspection of Aerojet on the same day that Ms. Brown was going to hold the closing conference in her inspection: May 17, 2010. Mr. Elwing and Mr. Walley believed they would have access to the appropriate Aerojet employees for their opening conference on May 17, 2010, because these individuals would be present for the closing conference in Ms. Brown's inspection. They believed it would be more convenient for Aerojet staff, as well as for them, to have their inspection officially begin on the same day Ms. Brown closed her inspection.

The Department issued Citation and Notice No. 314116195, based on Ms. Brown's inspection of Aerojet, on June 15, 2010. This citation alleged Aerojet had committed three serious and four general violations, for a total penalty amount of $3,900. The citations involved specific provisions of WAC Chapters 296-800, 824, and 842. The serious violations focused on employee exposure to hydrazine, due to the employer's failure to provide appropriate emergency washing facilities; adequate emergency response plan to spills, and appropriate safety training for its employees. Aerojet appealed this citation, first to a Department reassumption officer and, ultimately, to the Board. Its appeal was finally resolved by an Order on Agreement of Parties,

issued in January 2012, which regrouped the citations, and affirmed them as modified, with a total penalty of $3,000.

To return to the opening conference regarding the current citation and notice, Mr. Elwing and Mr. Walley did not know whether Aerojet had violated any PSM rules as of May 17, 2010. They first had to verify that Aerojet was subject to PSM rules. It is unclear when they determined that Aerojet had sufficient quantities of MMH and NTO in its workplace to be subject to these rules (this could have been verified that same day, but our record does not indicate when this was actually done). Department staff did not know whether Aerojet had violated any PSM rules until after the opening conference. Department staff testified they did not notice any specific violations at that time.

The Department inspection conducted by Mr. Elwing and Mr. Walley regarding PSM rules was thorough and lengthy. They were required to inspect all the buildings on the Redmond campus, so this inspection covered a much larger area than the single test lab Ms. Brown inspected in her initial inspection. Presumably, Department staff noted the violations for which Aerojet was cited on different days during their six-month long inspection, while they proceeded to inspect the different aspects and locations of Aerojet's operations. This inspection was further expanded to include a comprehensive inspection of Aerojet's operations in June 2010 (including non-PSM safety rules), because it had been on a Department list of employers due for a routine comprehensive evaluation.

The Department issued the Citation and Notice that is the subject of this appeal on November 17, 2010, six months after the May 17, 2010 opening conference. This citation alleges 21 serious violations, 20 of which involve PSM violations, and one asbestos violation, for total penalties of $31,500. These citations allege violations of specific provisions of WAC Chapters 296-62 (the single asbestos violation) and 296-67 (all the other violations).

PROCEDURAL AND EVIDENTIARY MATTERS

Aerojet filed a Motion to Dismiss the November 17, 2010 Citation and Notice, arguing it was untimely. It maintained that the inspection that resulted in this citation was merely a continuation of the earlier inspection conducted by Ms. Brown. Because this citation was not issued within 60 days of March 1, 2010, the date of the opening conference in the prior citation, it argued it is untimely and should be vacated. Aerojet's motion was based on supporting affidavits.

The Department responded to the Motion to Dismiss by submitting a brief, also based on supporting affidavits, in which it argued Aerojet's motion should be denied. However, in its original

brief in response to Aerojet's motion, the Department also maintained there were material facts in dispute about whether the two separate inspections should be considered a single inspection. At the November 3, 2011 hearing on the motion, the employer maintained no material facts were in dispute, and therefore its motion could be granted. The assistant attorney general again stated there were material disputed facts. The industrial appeals judge determined there was a need for a jurisdictional hearing, where witnesses would testify regarding the facts relevant to a determination of whether the November 17, 2010 citation was timely. He converted the first week of hearing time the parties had already reserved for a hearing on the merits of the appeal to a hearing regarding Aerojet's motion to dismiss. The balance of the time originally scheduled for a hearing on the merits of the appeal in January and February 2012 was cancelled. The parties proceeded to present witnesses at this jurisdictional hearing on January 9, 2012, and January 10, 2012. Following the hearing, both parties submitted post-hearing briefs.

We believe the employer's motion could have been decided without an evidentiary hearing because there were no disputed material facts at the time of the November 3, 2011 hearing on the motion. Even after a full evidentiary hearing, we do not believe any of the facts material to our decision are disputed. However, because the parties agreed to proceed with the evidentiary hearing, we considered all the evidence submitted by the parties regarding this motion, including all affidavits, exhibits, and oral testimony. Our record, however, does not contain the affidavits and exhibits originally submitted by the Department in support of its Reply Brief. We have the exhibits and affidavits submitted by the Department in support of its Post-Hearing Brief. From the discussion in the parties' briefs and in our record, these affidavits and exhibits appear identical. However, on remand, we direct our industrial appeals judge to obtain copies of the missing affidavits and exhibits cited as support for the Department's October 6, 2011 Reply Brief so that our record is complete.

As a matter of law, Aerojet has the burden of proving the citation and notice before us is untimely. Aerojet has raised an affirmative defense, which required it to prove the citation and notice was untimely by a preponderance of the evidence. Aerojet had the burden of producing sufficient evidence to establish the citation was untimely, based on governing law.

Although our judge erred in some of his evidentiary rulings, none of his errors were prejudicial. We note one error committed by this judge should not be repeated on remand. Our judge had a propensity to interrupt the parties' attorneys to ask questions of witnesses before they

had completed their initial examinations. On remand for the hearing on the merits, the judge should generally not interrupt the attorneys to ask witnesses his or her own questions during their initial direct or cross-examination of witnesses, except as necessary to clarify our record and to resolve evidentiary and procedural disputes.

DECISION

The statute of limitations for the issuance of citations is found in RCW 49.17.120(4), which states that "[n]o citation may be issued . . . after the expiration of six months following a compliance inspection, investigation, or survey revealing any such violation." The relevant Washington appellate and Board decisions have all dealt with the timeliness of citations involving a single Department inspection of an employer. They have addressed whether a particular citation was issued within the six-month statute of limitations. These decisions have clearly held that a citation and notice issued within six months of the opening conference is timely. No Washington appellate or Board precedent has addressed the issue before us, namely, whether a second inspection of an employer, begun after the opening conference in the first inspection, must be considered a continuation of the original inspection, making it subject to the original statute of limitations. The citation before us was issued exactly six months after the opening conference in the second inspection. We must determine it timely unless we find it is a continuation of the original inspection.

Without binding Washington precedent addressing whether the Department could initiate a second inspection of Aerojet, subject to a second statute of limitations, we look to federal law to resolve this issue. The statute of limitations found in RCW 49.17.120(4) has the same purpose as the six-month statute of limitations contained in OSHA, so it is appropriate to look to federal decisions to determine the appropriate construction of the statute. *Lee Cook Trucking and Logging v. Department of Labor & Indus.*, 109 Wn. App. 471 at 478 (2001); *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996).

Both Aerojet and the Department discussed several federal cases in their briefs. Aerojet relied on two federal cases in support of its motion in its original brief. Neither case concerned the factual situation before us in this appeal: determining whether a second inspection of an employer is entitled to a new statute of limitations. These cases both concerned the timeliness of single violations issued to employers. In *Kaspar Electroplating Corp.*, 16 OSHC (BNA) 1517 (1993), the Occupational Safety and Health Review Commission found a citation timely even though it was issued more than six months after the opening conference was scheduled to begin. In that case,

an OSHA inspector attempted to open an inspection on March 19, 1990 or March 20, 1990, but was not allowed on the employer's premises until March 21, 1990 to March 23, 1990, because of undisclosed legal issues. The citation was issued on September 20, 1990. Even though it was issued more than six months after the inspector attempted to proceed with the opening conference, it was found timely. It was issued within six months of the inspector's first entry onto the workplace, when the actual opening conference was held. This was within six months of when the violation in question (a machine guarding violation) was initially observed. We did not find this case to be relevant to this appeal.

Aerojet also relied on *Sun Ship, Inc.*, 12 OSHC (BNA) 1185 (1985). This is the only case cited by either party that determined a citation and notice was untimely. However, this appeal is distinguishable because it concerns when the statute of limitations began to run during a single inspection. On August 17, 1979, in response to a complaint, an OSHA inspector asked Sun Ship to provide it with complete OSHA injury/occupational disease logs, listing the affected employees by name. The employer refused to do so. The Department did not issue its citation until May 20, 1980, more than six months later. The Occupational Health and Safety Review Commission found the citation untimely because it was issued more than six months after the initial conference, when the violation was found to have occurred. This decision is also irrelevant to the situation before us, because it does not address the appropriate statute of limitations to be applied during a second inspection of an employer. Its holding, that the statute of limitations begins when a violation was actually discovered (or reasonably should have been discovered), has not been violated here. No PSM or asbestos violations were or could have reasonably been discovered prior to the date of the opening conference for the citation and notice involved in this appeal. Ms. Brown, who conducted the initial inspection, had neither the qualifications nor the training to discover any PSM violation during the course of her inspection. She also was responding to a specific complaint regarding employee exposure to different chemicals in one lab, instead of an overall inspection of the employer's PSM and overall operations throughout its entire campus. In short, there is no evidence that Ms. Brown discovered any PSM violations, or that she reasonably should have discovered them, during her initial inspection.

The Department has correctly identified and summarized several cases that support its contention that the citation and notice involved in this appeal is timely. We found one case to be directly on point and dispositive. *Sec'y. of Labor v. Dayton Tire,* OSHRC No. 94-1374, 1994

WL 913343 (July 26, 1994). In this appeal, three inspections of an employer occurred within a short time period. OSHA staff initially inspected the employer on May 6, 1993, in response to an employee complaint regarding alleged ergonomic hazards. During May through September, inspectors investigating this complaint also observed violations of lock-out/tag-out rules. Their plan to focus on these violations took a back seat when a subsequent inspection began in October 1993, following a fatal accident. After issuing citations dealing with the fatality in November 1993, OSHA staff finally issued citations dealing with the lock-out/tag-out violations in April 1994. Because the lock-out/tag-out violations continued to exist during the six months preceding the issuance of the citation and notice, the OSHRC held it was timely, even though these violations were initially observed eleven months earlier. The Commission held the statute of limitations was not tolled as of the date the inspectors initially noticed these violations during the first inspection. It noted that OSHA staff has the prosecutorial discretion to determine when to cite an employer. The fact that its staff could have issued an earlier citation addressing the lock-out/tag-out violations does not preclude them from alleging equivalent violations based on their findings during a subsequent inspection. *Dayton Tire,* at 3, citing *Safeway Store No. 914*, OSHRC No. 91-373 at 5, 1993 WL 522458 (December 16, 1993). Because the lock-out/tag-out violations were definitely apparent during OSHA staff's initial inspection, this situation amply covers the situation involved in this appeal. The Department staff did not know that Aerojet violated any PSM or asbestos rules during Ms. Brown's initial inspection. Based on *Dayton Tire* and *Safeway Store No. 914*, this citation and notice is timely.

Aerojet has not cited any federal precedent to support a conclusion that a second inspection of an employer, begun immediately after an initial inspection, is subject to the statute of limitations governing the first inspection. We found no precedent in federal or state law that would support granting Aerojet's Motion to Dismiss. In addition to relying on several federal cases, the Department maintains there are several legal and policy rationales for determining this citation and notice is timely. We will only address some of these arguments here.

Washington law clearly allows the Department prosecutorial discretion to determine whether it should expand the scope of an inspection, amend a prior citation, or initiate a new inspection in circumstances such as this one. RCW 49.17.050(6) allows the Department latitude to adopt rules governing the method and manner of its inspections as it sees fit. WAC 296-900-12005 allows the Department to expand the scope of an inspection to include an entire workplace, at its discretion.

In this respect, Washington is consistent with federal law. As Mark Rothstein, the author of the *Occupational Safety and Health Law* treatise has noted, the OSHRC has rejected the argument that the six-month statute of limitations period begins to run when the "violative condition first came into existence." Rothstein, Mark, *Occupational Safety and Health Law*, Sect. 11-6, at 434 (2012 edition).

Mr. Rothstein also notes that OSHA can amend an already issued citation more than six months after a violation occurred without violating the statute of limitations, provided the violation existed within six months of the date the original citation was issued. *Occupational Safety and Health,* at 435. This is consistent with Washington law. The Board has allowed citations to be amended both before and after a hearing, so long as an employer is not prejudiced by the amendment. *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990). The amended citations in such cases were obviously issued more than six months following the original inspections, but were nonetheless timely.

If the Department can amend its pleadings more than six months after a violation occurred, it would be inconsistent to hold that it cannot choose instead to issue a second citation. The Department had the prosecutorial discretion to determine whether to initiate a second inspection of Aerojet, or to expand the scope of its initial inspection. The key issue is whether the alleged violations existed during the six months before the citation is issued. This issue, obviously, can only be resolved during a hearing on the merits of the appeal.

We also note that WISHA is a remedial statute. As such, its provisions are liberally construed to protect the health and safety of all Washington workers. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454 (1990). Vacating the citation would undercut the purpose of the Act. The Department's initial inspection of Aerojet was of limited scope: involving a single lab building and focused on employee exposure to hydrazine and pyromax paint. If we were to hold that the Department was required to proceed with its PSM and comprehensive inspection of Aerojet within six months of Ms. Brown's opening conference, we would hinder the Department's ability to successfully investigate this and future violations. The Department staff convinced us it did not have qualified inspectors available to proceed with a PSM inspection of Aerojet until mid-May 2011. The Department should not have had to proceed earlier. That would have been disadvantageous not just to the Department, but also to Aerojet and its employees, who deserve to have inspections done by personnel with appropriate expertise.

Mr. Leo also stated that during the five years prior to his testimony, the Department had initiated opening conferences in second inspections of employers on the same day it held closing conferences regarding their initial inspections approximately 120 times a year. A decision dismissing this appeal could therefore have significant repercussions. Without precedent for deciding the statute of limitations in the first inspection governs the second inspection in such cases, we decline to make a decision that would clearly require a significant change in the Department's investigative procedures.

Based on our decision that the Department was legally entitled to open a second inspection of Aerojet immediately after the closing conference in Ms. Brown's initial inspection, we find the citation and notice involved in this appeal timely. Both parties ask us to reexamine prior Washington cases finding that citations issued within six months of opening conferences are timely. We see no reason to reexamine this issue in this appeal. Neither the appellate courts nor our prior decisions have issued a general interpretation of the statutory mandate prohibiting the issuance of a citation "after the expiration of six months following a compliance investigation . . . revealing any such violation." RCW 49.17.120(4). As we have acknowledged, based on this language, the six-month limitation could begin to run from (a) the opening conference, (b) the date each violation is discovered, or (c) the date of the closing conference. We have declined to rule which date is most appropriate in prior appeals, because they involved cases where the Department's citations had been issued within six months of the date of the opening conference. This is the earliest possible tolling date for the statute of limitations. Accordingly, a citation issued within six months of the opening conference would be timely under any of these interpretations. *In re Erection Company*, Dckt. No. 02 W0078 (May 3, 2004). This is in accord with the only appellate decision interpreting this statute, which held a citation issued within six months of the opening conference was timely. *Inland Foundry v. Department of Labor & Indus.*, 106 Wn. App. 333, 338 (2001). It is also in accord with our other decisions on point. *See, for example, In re Martinez, Melgoza, and Assoc., Inc.*, Dckt. No. 99 W0438 (August 23, 2002).

In conclusion, the November 17, 2010 Citation and Notice is timely. We deny Aerojet's Motion to Dismiss, vacate the Proposed Decision and Order, and remand this appeal to an industrial appeals judge, as provided by WAC 263-12-145(4), to schedule further proceedings on the merits of its appeal. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of the further proceedings,

unless the matter is dismissed or resolved by an Order on Agreement of Parties, the industrial appeals judge shall enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based on the entire record, and consistent with this order. To be more specific, any agreed order or proposed decision should contain findings and conclusions regarding the timeliness issue that are consistent with this decision. Any party aggrieved by a further Proposed Decision and Order may petition the Board for its review, as provided by RCW 51.52.104, but we will not revisit this order finding this citation and notice timely unless a subsequent Washington appellate or federal decision mandates a different result.

Dated: June 26, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JACK S. ENG Member