

The following is from the Appeals Board's booklet on how to handle appeals. To obtain a copy of the booklet, fax a request with your company name and address and a contact name to: (916) 274-5785 or call the Board at telephone number: (916) 274-5751

The following defenses may apply to the facts of an appeal under certain limited circumstances. The employer must raise them or they are considered waived.

### **I. Independent employee action defense**

This affirmative defense applies when an employee acts against the best safety efforts of the employer in causing a violation. The employer must prove each of the following elements by a preponderance of the evidence:

1. The employee was experienced in the job being performed;
2. The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
3. The employer effectively enforces the safety program;
4. The employer has a policy of sanctions against employees who violate the safety program; and
5. The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements. (Mercury Service, Inc., 77-1133, Dec. After Recon. at p. 3 (10/16/80).)

### **II. "Logical time" defense**

An employer does not have to comply with a safety order until the logical time for compliance has arrived. Worker safety is the focus of the defense, not what is most convenient for the employer from an engineering or cost point of view. For example, an employer need not place guardrails around the perimeter of a building until the flooring is in place, because it would be dangerous for the worker installing the guardrails. (See Nicholson-Brown, Inc., 77-024, Dec. After Recon. (12/20/79).) The employer has the burden of proof to establish the defense.

### **III. The statute of limitations**

"No citation or notice shall be issued by the Division for a given violation or violations after six months have elapsed since the occurrence of the violation." (Labor Code § 6317.) This affirmative defense must be pleaded by the employer. The six months normally will begin to run at the time of the inspection of the worksite by the division.

### **IV. Absence of employer knowledge of serious violation**

To establish a serious violation, the division must show that there is a substantial probability that death or serious physical harm could result from the violation. A serious violation will not be found if the employer can prove that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (Labor Code Section 6432.). The employer, therefore, has the burden of proving that it did not know and could not have known of the presence of the violation.