

AB 1127: Back to the Future For the New Millennium

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On October 6, 1999, Governor Gray Davis signed legislation intended to increase OSHA fines for serious violations. Freshman Assembly Member Darryl Steinberg from Sacramento sponsored the legislation in reaction to the Tosco oil refinery fire in Martinez in February 1999 that killed five people. However, another provision of this legislation will have an effect on all construction injury cases tried after January 1, 2000. Under the new Labor Code § 6304.5, OSHA regulations will be admissible in third-party proceedings, and the duties of general contractors on construction sites with regard to safety are more clear.

A. HISTORY OF OSHA LEGISLATION AND EXISTING LAW

Understanding the effect of AB 1127 requires looking at the history of OSHA admissibility in third-party lawsuits. In many ways, the California Legislature has returned to the law that existed prior to 1972, where a number of dramatic changes reduced the incentive for contractors to monitor safety on their job sites.

1. Pre-1972 Law

Prior to 1972 the Labor Code read as follows:

"Employer" shall have the same meaning as in section 33001 and shall also include every person having direction, management, control, or custody of any employment, place of employment, or any employee. (Lab. Code § 6304, emphasis added.)

Every employer shall furnish employment and a place of employment which are safe for the employees therein. (Lab. Code § 6400.)

Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes, which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees. (Lab. Code § 6401.)

Pursuant to this language, OSHA regulations were admitted into evidence under Evidence Code § 669's negligence per se provisions. Under Evidence Code § 669, in order to obtain the negligent per se jury instruction, the plaintiff had to prove that the defendant "violated" a statute and that the plaintiff was one of the class of persons for whose protection the statute, ordinance or regulation was adopted. (Evid. Code § 669.)

There being no issue that OSHA was meant to protect workers from personal harm, the only relevant question became whether the defendant entity was a "statutory employer" subject to the Labor Code requirements for safety. (See *Atherley v. MacDonald, Young & Nelson* (1956) 142 Cal.App.2d 575, 583.) Under pre-1972 law, a "statutory employer" was an employer of an independent contractor who controlled or directed the work pursuant to § 6304, not the direct

employer of the plaintiff pursuant to Labor Code § 3300. (Id.) The Supreme Court in *Kuntz v. Del E. Webb Constr. Co.* (1961) 57 Cal.2d 100, 107, explained this control had to be more than simply "the mere right to see that work is satisfactorily completed."

Third-party defendants who retained greater control than a mere interest in the final result had a duty to provide a safe place to work to employees of subcontractors pursuant to the dictates of Labor Code §§ 6400 and 6401. (See generally *Kuntz v. Del E. Webb Constr. Co.*, supra, 57 Cal.2d 100, 106; *Atherley v. MacDonald, Young & Nelson*, supra, 142 Cal.App.2d 575; *Bickham v. Southern Calif. Edison Co.* (1953) 120 Cal.App.2d 815; *Snyder v. Southern Calif. Edison Co.* (1955) 44 Cal.2d 793; *Mula v. Meyer* (1955) 132 Cal.App.2d 279, 283.) This prevented general contractors or owners who remained in control from asserting the defense that even though they had knowledge of flagrant safety violations they had no duty to stop the unsafe conduct.

Therefore, prior to 1972 evidence of OSHA was tantamount to the standard of care in the construction industry. It created a duty of reasonable care on construction projects.

2. 1971 Legislation

In 1971, Governor Ronald Reagan signed AB 676, which was enacted in 1972. AB 676 affected construction injury litigation and formed the background to AB 1127, legislation signed in October 1999. In 1971, AB 676 addressed workers' compensation and civil evidence issues, and as part of AB 676, Labor Code § 6304.5 was enacted to read as follows:

It is the intent of the Legislature that the provisions of this division shall only be applicable to proceedings against employers brought pursuant to the provisions of Chapter 3 (commencing with Section 6500) and 4 (commencing with Section 6600) of Part 1 of this division for the exclusive purpose of maintaining and enforcing employee safety.

Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer.

The net effect of this language prevented OSHA from being used as a standard of care against third-party defendants in construction injury cases. Additionally, the 1971 legislation repealed Labor Code § 6304, which applied OSHA to any entity that directed or controlled the work, and replaced it with the following: "'Employer' shall have the same meaning as in Section 3300." As a result, OSHA could no longer be used for any purpose in third-party proceedings. (See *Spencer v. G. A. MacDonald Constr. Co.* (1976) 63 Cal.App.3d 836, 857-858.)

There was a movement in the Legislature to repeal the 1971 legislation, which failed on three attempts. (AB 1170 (1972-73 session); AB 149 (1974-75 session); AB 467 (1975-76 session).)

3. 1997 Amendments to OSHA Regulations

Prior to 1997, it was unclear in California whether Cal/OSHA could cite an employer other than the direct employer. This was at apparent odds with the federal OSHA rules existing since the early 70's which gave federal inspectors the clear authority to issue citations to parties other than the direct employer under the federal OSHA standard as contained in the Field Inspection Reference Manual, CPL 2.103. A complaint issued with the U.S. Department of Labor charging that California did not meet the minimum federal requirements of OSHA enforcement by failing to have a remedy against controlling employers prompted the change in Cal/OSHA. (See Assem. Comm. on Lab. and Empl. (1999-2000 session), Assem. Bill Analysis, April 14, 1999, p. 7.)

In response to the complaint, Cal/OSHA adopted the federal standard by way of Title 8, Section 336.10 "Determination of Citable Employer" in 1997. Under this regulation the following entities could be cited for workplace safety violations:

On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:

- (a) The employer whose employees were exposed to the hazard (the exposing employer);
- (b) The employer who actually created the hazard (the creating employer);
- (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
- (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

NOTE: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard. (Emphasis added.)

As stated, the above language derived directly from the federal version, which was interpreted by the federal OSHA as follows:

Depending on the circumstances, including contractual responsibility or the assumption of a safety-monitoring role, a construction manager may also be a "controlling employer" A controlling employer is one having the responsibility or authority to have violative conditions corrected. General or prime contractors are controlling employers for many types of violations that occur on construction sites, but they may choose to carry out their safety role in whole or in part through a construction manager. (See Letter from Roy F. Gurnham, P.E., Esq., Director Office of Construction and Maritime, to John P. Majewski, Esq. entitled, Duties of Construction Manager (Apr. 5, 1993).)

Therefore, as of 1997, Cal/OSHA could cite a general contractor, or owner who remained in control of the work, for violations of safety regulations, even if employees of the subcontractors committed the violations. Essentially, a legal duty was created; under OSHA, general contractors, construction managers and owners had a duty to assure all contractors followed safe practices on multi-party job sites. However, attorneys representing injured parties could not mention the duty because OSHA was inadmissible for all purposes under § 6304.5.

B. CHANGES INSTITUTED BY AB 1127

AB 1127 amends Labor Code § 6304.5 to allow introduction of evidence of OSHA violations in civil actions against general contractors, owners, construction managers, and other subcontractors. The new section reads as follows:

It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety.

Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer.

Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in *Brock v. State of California* (1978) 81 Cal.App.3d 752.

Unchanged by AB 1127 is the inadmissibility of OSHA citation issuance, or lack thereof. Plaintiffs are prohibited from telling the jury that a general contractor was cited for violating OSHA. Likewise, defendants are prohibited from telling the jury that they were not cited. On the other hand, evidence of whether the conduct of a defendant violated OSHA is now admissible.

AB 1127 allows introduction of evidence of OSHA regulations against "statutory employers" pursuant to the requirements of Evidence Code § 669 regarding negligence per se. The change would be a distinction without difference unless the definition of an employer was also changed. As noted above, the post 1972 version of Labor Code § 6304, provided that OSHA applied only to direct employers. In other words, if "statutory employer" only meant the "direct employer" under § 3300, and given that workers' compensation is an exclusive remedy against a direct employer (see Lab. Code § 3602), there would be no context in which to introduce evidence of OSHA violations.

As such, AB 1127 amended Labor Code § 6400, and codifies in total Title 8 section 336.10, as referenced above for the multi-employer work sites. The codification of section 336.10 changes the definition of "citable employer" on a multi-employer work site to "the employer who was

responsible, by contract or through actual practice, for safety and health conditions on the work site; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected." This is the statutory employer.

1. Legislative History of AB 1127

The legislative history supports the above interpretations. First, the Legislature clearly intended the legislation to allow evidence of OSHA in third-party liability actions. The legislative history provides as follows:

Under current law, government regulatory standards are generally admissible into evidence in negligence and wrongful death actions. They are typically used in such cases to establish a standard of care. In 1971, the Legislature barred the admission into evidence of occupational health and safety standards, and thereby created an exception to the general rule. This bill repeals that exception. (Assem. Comm. on Lab. and Empl. (1999-2000 session) Assem. Bill Analysis, April 14, 1999, Comments § 2, emphasis added.)

The legislative intent is clear. Changing § 6400 was pursued to establish in the civil law context the duty of care already existing on general contractors and owners who remain in control as defined by federal OSHA standards and existing California regulations. The August 17, 1999 Senate Committee on Public Safety analysis also recognized the civil liability aspect of this bill, but rejected arguments that the bill imposed vicarious liability:

Opposition has expressed concern that the definition of "employer" in this bill would create vicarious liability for the action of a subcontractor.... In the current version of the bill, the author has adopted the exact language from the definition of multi-employer which already exists in OSHA regulations.... The definition in its wording does not create vicarious liability, it instead requires that if you are responsible for a hazard or the safety of the workplace you are responsible regardless of who the employee is. (Sen. Comm. on Pub. Safety (1999-2000 session) Bill Analysis AB 1127, Aug. 17, 1999.)

2. Brock v. State of California

The inclusion Brock v. State of California (1978) 81 Cal.App.3d 754, in the final sentence of § 6304.5 may cause some confusion. This sentence was added into the bill in one of the final amendments in the Senate on September 3, 1999. (The bill was approved on September 7, 1999.) The provision was added at the specific request of the Cal/OSHA over concerns that Cal/OSHA would incur third-party liability for failure to inspect a job site where an injury incident occurs.

The inclusion of Brock was intended to immunize Cal/OSHA from the broad reach of AB 1127. The position for which Brock was included is as follows:

the fact that the State has a mandatory duty to inspect and enforce Cal/OSHA provisions is irrelevant to the issue of whether those provisions can be relied upon in a personal injury action against the State when the State is not an employer. (Brock at 757.)

The confusion may arise from the fact that Brock dealt with the repealed version of § 6304.5, which prevented application of OSHA in any personal injury or wrongful death action for any purpose. Therefore, some might argue that the inclusion of Brock is somehow intended to prevent use of OSHA standards in any personal injury action.

However, to claim Brock reenacts the dictates of the repealed Labor Code § 6304.5, implies that the Legislature has passed a law that has no purpose. Courts are bound to "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (People v. Jenkins (1995) 10 Cal.4th at 246.) It cannot be the Legislature's intent to modify a statute only to cite a case relying on the old statute in order to effectively resurrect the original statute and abrogate the new statute. Rather, the only reasonable interpretation is that Brock prevents application of the new section to the State when the State is not an employer as defined in new § 6400.

3. Effect of New Legislation

With the codification of existing CCR 8:336.10 and the addition of Labor Code § 6304.5, the effect of AB 1127 is as follows:

1. Under Evidence Code § 669 a defendant can only be found responsible under negligence per se if he "violated a statute, ordinance, or regulation." For AB 1127 to apply under negligence per se, a plaintiff must show that the OSHA regulations were applicable to that defendant.
2. Under the amended § 6400 (and existing Title 8, § 336.10), "the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)" is a citable entity.
3. If the plaintiff can produce evidence that the defendant had the authority to correct the hazardous condition, the defendant "violated" OSHA and can be held negligent per se if they knew or should have known of the hazard.
4. Additionally, new Labor Code § 6400 states that "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." This provision applies to create a duty of reasonable care even when no specific violation of OSHA is found. It applies against any defendant that had the authority to remedy the unsafe conduct.

In referring to older case law on the subject, the determination of whether an employer is a "statutory employer" subject to the Labor Code provisions is considered an issue for the jury to decide, and not the judge. In *Stilson v. Moulton-Niguel Water Dist.* (1971) 21 Cal.App.3d 928, fn.5, the court held that the issue of whether the defendant was a statutory employer was "a factual determination for the trier of fact." (Citing *Van Arsdale v. Hollinger*, supra, 68 Cal.2d 245, 257.) In other words, the determination of whether the defendant had the authority to require remedy of safety violations by subcontractors is an issue for the jury. Therefore, summary judgment would be inappropriate in most situations.

C. EFFECT ON EXISTING CASES

AB 1127 will go into effect in January 2000. The general rule is that a statute that changes a substantive right will not be given retroactive effect unless it is the clear intent of the Legislature. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 174.) However, there are two exceptions to this rule. First, "[g]enerally, the rules of evidence in effect at the time of trial govern the admissibility and exclusion of evidence at that trial." (Evid. Code § 12; see also *Garfield v. Russell* (1967) 251 Cal.App.2d 275, 278.) "It is not uncommon that admissibility of evidence be judged by a standard which was not in effect when the evidence came into being." (*People v. Burroughs* (1987) 188 Cal.App.3d 1162, 1167.) Since AB 1127 declares that Evidence Code § 669 is applicable to OSHA standards, the new legislation would apply to any case tried after January 2000.

Second, if the legislation merely codifies existing law, the new legislation is applied retroactively. AB 1127 codifies existing law in that it adopts the definition of citable employer from CCR 8:336.10. Therefore, this evidence of this pre-existing duty is admissible in third-party proceedings after January 2000. (See *Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484: when a statute operates to clarify existing law, rather than to change it, it will be given retroactive application.)

D. BACK TO THE FUTURE

Essentially, AB 1127 reinstates the law that existed prior to 1972. Specifically, a general contractor or owner who has the "authority" to correct hazards, has a statutory duty to correct those hazards. The general contractor or owner can be held negligent per se for the direct employer's failure to correct violations of OSHA, where the general contractor knew or should have known such violations were occurring. Additionally, under § 6400, the "controlling employer" has a statutory duty to provide a safe place for employees on the job. This duty extends beyond direct OSHA violations, including other safety issues not addressed by OSHA.

However, the new legislation is perhaps stronger than the old law in that it codifies the right to use the safety orders under negligence per se, and it specifically defines the level of "control" over the work site which is necessary for liability. Both of these factors were unclear under pre-1972 law, and have now been clarified. There is little doubt that the foregoing legislation will have a profound effect in making construction sites safer for California workers.

¹ Labor Code § 3300: "As used in this division, "employer" means: (a) The State and every state agency. (b) Each county, city, district, and all public and quasi-public corporations and public agencies therein. (c) Every person including any public service corporation, which has any natural person in service. (d) The legal representative of any deceased employer. (Enacted by Stats. 1937, Ch. 90.)