Title Recent Developments Regarding AB 1127
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As discussed in my prior article, "Back to the Future for the New Millennium," Forum, Dec. 1999, AB 1127 instituted a number of fundamental changes to the construction litigation field by way of amendments to Labor Code §§ 6304.5 and 6400. The amendment to Labor Code § 6304.5 removed the existing language prohibiting OSHA standards into evidence in third party trials, and allowed evidence of OSHA standards to be utilized as a basis for negligence per se actions against "employers." This change returned the state of the law in California to that which existed prior to 1972 when OSHA regulations were allowed in evidence.

Additionally, under the amended version of Labor Code § 6400, the definition of the "employer" who was subject to these OSHA provisions on a multi-party work site was defined to include not only the direct employer of the worker, but also any employer who created the danger, or who had the authority to remedy the danger (i.e., the controlling employer.) These provisions allow an injured worker to hold any party on a multi-party construction site liable under negligence per se for violations of OSHA.1

As clear as this may seem, these amendments caused a great deal of dispute regarding their proper interpretation. This article addresses a number of the key arguments surrounding AB 1127 and also examines the best method for introducing this evidence into court.

A. Arguments Against AB 1127

A number of the common arguments made against the above interpretation involve the same premise: AB 1127 was not intended to allow OSHA rules into evidence in civil third party trials. Two of the main arguments to support this assertion are as follows:

1. Under AB 1127 OSHA rules are admissible only against an employee’s employer in a Workers’ Compensation setting, and not in third party cases.

2. The reference to Brock v. State of California in Labor Code § 6304.5 prevents any use of OSHA in a civil trial since Brock relied on Spencer v. G. A. MacDonald (1976) 63 Cal.App.3d 836, which explicitly rejected OSHA in evidence in civil trials.

If accepted, either of these arguments would prevent the use of OSHA standards

in evidence in third party cases, precluding the use of OSHA as the standard of care in the construction injury context.

B. Legislative Counsel Opinion

Weighing in on the issue of OSHA admissibility is the recent Legislative Counsel Opinion on the proper interpretation of AB 1127. "Though not binding, opinions of the Legislative Counsel are entitled to great weight." (See North Hollywood Project Area Com. v. City of Los Angeles (1998) 61 Cal.App.4th 719, 723.) Senator Martha Escutia asked the Legislative Counsel the following question:

Does Section 6304.5 of the Labor Code authorize statutory standards of the California Occupational Safety and Health Act of 1973 and regulatory standards adopted pursuant to that act to be admissible pursuant to Sections 452 and 669 of the Evidence Code in an action by an injured worker against his or her own employer, including separate employers at a multi-party worksite, or against a third party defendant, where the action is otherwise permitted by law? (Emphasis added.)

The Legislative Counsel responded that the standards were admissible in civil actions against such entities. (Legislative Counsel Opinion #6490 at p. 4.) The Legislative Counsel stated that "In applying section 669 of the Evidence Code to Section 6304.5, the violation of a statutory or regulatory standard adopted pursuant to Cal-OSHA would create a presumption that the person failed to exercise due care if all the other conditions described above are met." (See Legislative Counsel Opinion at p. 7.)

The Legislative Counsel also dismissed the argument that somehow the reference to Brock v. State of California abrogated the new statute by prohibiting such evidence in trial. The Legislative Counsel found that the inclusion of Brock was to preserve the holding that the State of California "may not be held liable for a breach of its statutory duty under Cal-OSHA to inspect places of employment." (See Legislative Counsel Opinion at p. 8.) Legislative Counsel did not believe that the inclusion of Brock "modifies the plain language of the §6304.5 that sections 452 and 669 of the Evidence Code apply to Cal-OSHA standards in the same manner as any other statute, ordinance, or rule." (See Legislative Counsel Opinion at p. 8.)

With this opinion, the interpretation of this section is clear: AB 1127 was intended to allow evidence of OSHA in third party civil cases under the broad definition of employers as found in Labor Code § 6400. Therefore, if a defendant created a hazard, had the duty to remedy a hazard, or had control over the hazard, OSHA rules and regulations may be used against them as a standard of care in construction injury litigation.

C. Procedure for Introduction of OSHA Evidence

The following is a step-by-step method under the revised Labor Code for introduction of evidence regarding OSHA standards.

Step 1: OSHA rules are admissible in evidence

1. Pursuant to the opinion of the Legislative Counsel, supra, new § 6304.5 overturns old Labor Code § 6304.5 which stated that OSHA was "not admissible in personal injury and wrongful death cases."

2. Effectively overturns Spencer v. G. A. MacDonald (1976) 63 Cal.App.3d 836.

Step 2: Definition of employer in "multi employer" work site

Under Labor Code § 6400, an employer is defined as:

(1) The employer whose employees were exposed to the hazard (the exposing employer);

(2) The employer who actually created the hazard (the creating employer);

(3) 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);

(4) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

The employers listed in subsections (2) through (4) may be cited regardless of whether their own employees were exposed to the hazard.

The party seeking to introduce OSHA regulations against another party must show that the party was an "employer" as described above. However, you must keep in mind that the definition of "employer" is much broader than direct employer. As the final note indicates, this section includes any entity on the job site, whether or not they are the direct employer of the person exposed to the hazard.

Step 3: Separate employers in "multi employer" work site may be held negligent per se under § 6304.5

As stated by the Legislative Counsel, Amended Labor Code § 6304.5 specifically allows introduction of evidence in two ways: Evidence Code § 452 and Evidence Code § 669. The former is by way of judicial notice; the latter is negligence per se.

In order to meet the requirements of negligence per se, the following showing must be made:

[1] The person violated a statute, ordinance, or regulation; [2] the violation proximately caused death or injury to person or property; [3] the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; [4] and the person suffering the death or injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Leg. Counsel Opin. p. 7.)

The Legislative Counsel specifically found that the provisions of OSHA were regulations that applied to "separate employers at a multi-employer worksite" as defined by section 6400. This is the only logical conclusion. Since OSHA may cite separate employers at multi-employer work sites in California, those separate employers necessarily each have a separate duty of care in this regard, which extends to employees of other contractors. Therefore, if a defendant is a citable employer under the rules promulgated by OSHA, that defendant can be held negligent per se for the violation of the rules in a third party case.

Step 4: OSHA rules were specifically violated on the day of the incident and were a substantial factor in causing the incident

The party seeking to introduce evidence of OSHA also must show that OSHA rules applied to the work in question and were violated, causing injury. While the experts hired by both sides will likely contest this issue, the violation of OSHA rules cannot be addressed in any manner by the OSHA inspector at trial. While OSHA rules leave quite a bit of room for interpretation, there is no room for the opinion of the OSHA inspectors, or for their conclusions. Based on OSHA’s reluctance to have their inspectors tied-up in depositions and acting as free expert witnesses in third party cases, Labor Code § 6304.5 specifically excludes evidence of whether any citation was or was not issued by an inspector and prohibits OSHA inspectors from rendering expert opinions of any kind in third party cases.

Therefore, in order to meet its burden of proof, a party seeking to establish OSHA violations must have a competent expert who can testify as to the meaning and interpretation of OSHA rules and violations.

D. Policy and Procedure Manual Provides Additional Evidence of Whether an Entity Is a Citable Employer Under OSHA Guidelines, Subject to Negligence Per Se

The Policy and Procedure Manual for the Division of Occupational Safety and Health provides the best evidence as to the procedure that must be followed by OSHA inspectors prior to issuing a citation to any entity on a multi-employer

work site. (This manual is available for download at http://www.dir.ca.gov/doshpol/p&pc-1c.htm.) This procedure is the same as that which must be used by the court to determine if the entity fits within the definition of a "employer" for a multi-employer worksite, subject to the negligence per se provisions of Labor Code § 6304.5

Under the guidelines the following example is given:

EXAMPLE 4: The general contractor at the worksite in Examples 1 and 2 was responsible by contract to conduct daily worksite safety inspections and to order the immediate correction of hazards identified by the inspections. On several occasions the general contractor received complaints that the individual hired to perform the inspections by the general contractor was not performing them in a timely manner, but the general contractor never made an inquiry in response to the complaint. Then the inspector failed to conduct an inspection on the morning of the day that the painting contractor's employees began to work on the unguarded scaffolding. Had the inspection been conducted, the lack of guardrails could have been discovered before the employees accessed the unguarded scaffolding and the problem could have been corrected. The general contractor is potentially citable as the controlling employer, regardless of whether some other employer is also citable.

This example shows the duty that is placed on a general contractor as a matter of law to reasonably inspect the site for safety hazards and to remedy those hazards once they are found. Under this definition, if a general contractor fails to conduct proper inspection of the site, they can be held to have violated OSHA if employees of a subcontractor are exposed to the OSHA violations.

E. Conclusion

The recent opinion by the Legislative Counsel is extremely strong support for permitting introduction of OSHA standards and violations into evidence under AB 1127. In short, AB 1127 removed the old prohibition against introduction of OSHA into evidence that existed in the now repealed version of Labor Code § 6304.5 and replaced it with a provision to allow such evidence to be used as the standard of care in construction injury cases. Additionally, the defendants against which it can be used include any "employer" on a multi-employer work site.

1 Nothing in AB 1127 was intended to, or does, change the Workers' Compensation exclusive remedy against an injured person's own employer. In order words, a person is still limited to Workers' Compensation for injuries that are solely caused by the direct employer's negligence.