

A Primer on Safety Prosecutions

SANTA MONICA - Prosecutors look for arrogance and deception when deciding whether to prosecute an employer following a workplace fatality, and seek to send a message to the employer community following the worst cases, according to participants at a workshop last week sponsored by the California District Attorneys Association (CDAA).

The workshop, the first in a planned series, was designed to educate management and labor about how and why prosecutors bring criminal charges following serious workplace incidents.

There is fear and even anger among both groups in the wake of a number of prosecutions up and down the state. Ironworker foremen in two separate incidents were criminally indicted after workers under their control died. Recently, a plant manager in Southern California was arrested and charged in the death of an employee who was pulled into a machine.

California prosecutors have had the ability to bring criminal charges in a workplace incident for decades, but the enactment of AB 1127 in 2000 gave them another way to bring charges. Under the bill, alleged violations of Labor Code §6425 may be tried as a felony.

The section provides for criminal penalties for "any employer and any employee having direction, management, control, or custody of any employment, place of employment, or of any other employee, who willfully violates any occupational safety or health standard, order, or special order," causing death or permanent or prolonged impairment.

Although only a relative handful of cases actually get prosecuted each year, observers say prosecutors are more willing to bring charges to exact settlements out of employers. And, critics add, they are more willing to bring charges against foremen and supervisors in order to get them to "flip" against their employers.

One safety consultant recently told *COR* that after an officer of a company that suffered a fatality was charged in the death, the prosecuting attorney wanted to know "what number the company would be comfortable with in terms of a settlement."

District attorneys deny these charges. They say they are too thin in resources and cases often are too hard to prove to engage in fishing expeditions. There's a misperception that prosecutors are out to get employers, Sakir said. "We're not. We're only after the worst. In Los Angeles County we have people killed every week," in addition to gruesome injuries. "We can only deal with dead bodies."

L.A. County prosecutor Jim Provenza added that the vast majority of cases don't rise to the level warranting prosecution. "Where the criminal prosecutions occur is in the worst cases," he agreed.

Larry Blazer, the Alameda deputy district attorney who successfully prosecuted the notorious K&L Plating case in the late 1990s, told the workshop that there is a "piss off" test that attorneys use when deciding whether to bring charges. "It depends on how pissed off it makes you," he explained, referring to how outrageous the employer's actions were leading to the fatality. The main criteria prosecutors use are the employer's knowledge of the danger workers faced, his or her knowledge of the law, the motive for the actions and deception on the part of the employer, Blazer said.

The K&L case, which was pre-1127, certainly qualified. A worker had been sent into a wastewater treatment unit at the plating facility to clean out sludge and was overcome by fumes. A rescuer was able to push the worker out, but he was overcome as well and died.

Blazer's investigation revealed that the sludge was a "sloppy" mixture of substances that formed hydrogen cyanide gas - the same gas formerly used in the gas chamber. The employer hired undocumented workers, forged hazardous materials certificates and provided no training or

confined space equipment. A foreman chided workers who had misgivings about entering the tanks: "Aren't you man enough to handle it?"

Company owner Robert McSkimming received a year in jail and still is dealing with the ramifications of alleged payroll and workers' compensation fraud, Blazer said.

The irony is that McSkimming at the time of the incident was taking in so much money that he easily could have provided the necessary training and equipment "and still had a tidy profit," Blazer said. "We believe in a level playing field. When someone breaks the rules like this, it puts honest businesspeople at a competitive disadvantage."

Jose Millan, deputy secretary for California's Labor and Workforce Development Agency, said he favors heavily publicizing such cases. "When you do that you send a message to the community that certain levels of misconduct won't be tolerated," he commented.

Of the 10,000 workplace investigations Cal/OSHA conducts each year, its Bureau of Investigations looks into only about 200 cases for referral to prosecuting authorities, Division of Occupational Safety and Health Chief Counsel Mike Mason told the workshop. But, he said, "The commitment of the prosecuting authorities has increased over the years."

AB 1127, which CDAA's Gale Filter called the "strongest worker safety law anywhere in the United States," gives attorneys an alternative to trying a case under the involuntary manslaughter statute. "Involuntary manslaughter is probably the hardest crime I've ever had to prove," Sakir said. "You have to show that the actor ... did something that was so reckless, so out of the ordinary, so bad and put somebody in such foreseeable harm that it ended up in death. That's tough."

Fran Schreiber, a labor attorney and former DOSH attorney, who helped develop its criminal prosecution program, said AB 1127 made improvements to the Labor Code. "I helped write those provisions and I'm proud of what I did," she told the workshop. But Schreiber added that she is "disturbed" by cases in which foremen are being prosecuted under §6425. She added, "It's really important for people to understand that the law hasn't changed" in that regard. Thirty or 40 years ago, foremen also were prosecuted. "The only difference is today the penalties have changed. Since the penalties increased, the visibility did also."

Jim Garner, business manager for Ironworkers Local 433 in Los Angeles, said he believes AB 1127 is being "abused" under §6425. For instance, a foreman is facing potential prosecution in Los Angeles after one of his workers fell through a floor opening.

Garner said he supports filing charges under the manslaughter statute, because he has experienced situations where he was asked to do "things I knew were going to kill me and I refused. But I had representation." But bringing charges under §6425 is another matter. "This is something we're going to have to watch out for," he stated. "When you prosecute someone, you're going to have to get them on the right [law]."

Schreiber contended that the Labor Code should be viewed "as part of a statutory piece," the intent of which is to provide safety and health for workers. Cal/OSHA, for instance, doesn't issue citations against workers, just employers. "To me, the criminal provisions are part of that statutory piece."

She advocates prosecuting the person "who has control over those conditions, the person who can make the difference." That person is the employer, Schreiber said, not a foreperson, a lead person, or an apprentice or journeyman.

"I think we need to bring more criminal cases against employers, not just for fatalities, but for repeat violations and recalcitrant employers," she added. "We need to bring them for health violations, not just safety violations. Just looking at fatalities is the wrong thing to do."

But Filter countered that carving out an exception for foremen and supervisors would be analogous to exempting some spouses for domestic violence.

Roy Hubert, who works for CDAA helping smaller counties prosecute worker safety cases, commented, "If somebody's good for an offense, then they're charged for it." Under his analysis of a case, he determines if the individual qualifies under §6425, if they were involved in an action that led to the fatality, and if they had formal responsibility under the Injury and Illness Prevention Program. "Does the person have real authority?"

Last, he decides whether the person "is just dumb or evil. It is incredible to me how people dummy up training records."

Sakir handled a case in which the "evil" label appeared appropriate. A contractor insisted on leaving the 100-volt circuit on while his crew worked on an electrical system at a house, repeatedly overriding his workers' effort to shut off the power.

Eventually a newly hired electrician from the Netherlands received a severe shock, causing convulsions, but the contractor refused to call for medical assistance and ordered his workers to drag the electrician out to the street to make it appear he was a bystander. "It's all right, it happens to me all the time," the contractor reportedly told his crew. Finally, he allowed them to call for medial help.

He concocted a tale about how the 23-year-old man had been injured, which he directed the workers to tell police under threat of deportation. Meanwhile, the worker died. A sharp-eyed police officer suspected the crew's story was bogus and eventually the truth was dug out.

"If the employer had not delayed in calling 911, the worker probably would have lived," Sakir said. "This is where the 'pissoff factor' comes in."

The contractor received 240 days in jail, with no time off for good behavior, was ordered to pay \$40,000 in restitution to the electrician's family and pass an OSHA course on electrical safety before he can do electrical work again.

"We go after the ones that lie and cheat and steal," Sakir said. "We go where there is greed."

DOSH BOI's Bureau of Investigation) Amy Martin said that when the bureau investigates whether a case deserves prosecution, "we are looking for the person with the responsibility for safety," but ultimately looking at the employer. BOI attempts to determine who at the scene of the incident had actual control and knowledge "of whatever factors led to the death."

She added that in appropriate cases, BOI recommends "the highest manager we can find with safety authority" for prosecution.

CDAA is planning a similar workshop in Northern California this fall.