

State Supreme Court Upholds Use of Cal/OSHA Regs in Third-Party Cases

In a ruling that reverses more than 30 years of precedent, the California Supreme Court has ruled that Cal/OSHA standards may be used in third-party actions, restoring common law.

The unanimous ruling upheld a key provision of AB 1127, the controversial 2000 law that made a number of changes to the state Labor Code and was aimed at increasing penalties against employers for serious safety violations.

In *Elsner v. Uveges*, roofer Rowdy Elsner was injured when a scaffold collapsed beneath him. The defendant, Carl Uveges, general contractor for the project, was found 100 percent negligent by a jury, which awarded Elsner \$500,000. But on appeal the verdict was reversed. A Court of Appeal concluded that when the state Legislature amended Labor Code §6304.5, it did not intend to change the existing rule against admitting Cal/OSHA provisions in third-party actions to establish negligence.

The Supreme Court upheld the appellate court on the application of the new Labor Code language to the case, saying that the AB 1127 changes could not be applied retroactively, but upheld the changes themselves.

The ban on the use of Ca/OSHA regs in third-party actions had been in place since 1971 with the creation of the OSHA Act, in which the Legislature enacted §6304, creating an exception to the common law. Until 1971, the Supreme Court pointed out, California worker safety provisions were "routinely" admitted in workplace negligence actions to prove a "standard of care," and violations of safety regulations were treated as negligence.

AB 1127 revised the §6304.5 language, which now states, "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." The court said the new language and deletion of old language "indicate that henceforth, Cal/OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard of duty of care in all negligence and wrongful death actions, including third party actions." In essence, the court said the Legislature was well within its rights to restore the common law rule and reverse the language in place, according to Fred Walter, a Healdsburg attorney who represents clients in Cal/OSHA cases. "There are no boundaries to it. The decision is pretty clear that the regulations are admissible to establish a standard of care. Without a doubt, general contractors are going to be responsible for injuries to employees of subcontractors."

Walter quipped, "You should be very concerned if you loan a tool to a neighbor like a skill saw with a broken guard. I don't see any holdback in the Supreme Court's decision. This puts the OSHA regs on the same par as the use of the Vehicle Code for accidents in civil cases. The Standards Board will be making regulations that affect all of us."

Injury and Illness Posting Starts Soon

In just a couple of weeks begins the three-month posting period for employers' summaries of work-related injuries and illnesses for 2004. Starting Feb.1 and ending April 30, employers must post the Cal/OSHA Form 300A in a conspicuous place or places where notices to employees customarily are posted.

The requirement is applicable to employers with 11 or more employees, excluding some low-hazard establishments in the retail, services, finance and real estate sectors. Employers with no injuries or illnesses for 2004 should post the 300A with zeros through the total lines.

Employers must mail or otherwise provide an annual summary to employees who do not report at least weekly to a location where the summary is posted.

The summary includes information on types of injuries and illnesses that occurred during the previous year and their extent and outcome. The 300A is intended to alert workers of possible hazards and also includes the annual average number of employees and hours worked, to facilitate calculating injury and illness rates.