

Question of the month: I had two injuries today – one a fall from a 2nd story roof edge and another a cut that severed a tendon in an employees thumb. Do I have to report them to Cal/OSHA? The key is determining whether the injuries are actually “serious” under the rules. I recommend that every employer spend some time with the code sections listed below. In this case, at press time, recording is required but reporting by telephone is not. An overnight stay in a hospital may be required in the future which will require reporting.

New Legislation Regarding Reporting Workplace Injuries

Gov. Gray Davis has signed new legislation that would impose a minimum \$5,000 fine on employers who do not immediately report a workplace death or serious injury.

One of the major thrusts of the bill is addressing bilingual services to witnesses of workplace incidents and families of victims. AB 2837 states, "The Division shall make all efforts to ensure that limited-English-proficient persons can communicate effectively with the Division.

AB 2837 was prompted by allegations in Orange County last year that the Division of Occupational Safety and Health failed to investigate a number of workplace fatalities in a timely manner, or not at all.

The bill also establishes a civil penalty of not less than \$5,000 for an employer who does not immediately (as defined by the state Labor Code 6409.1 and .2) report a death or serious injury or illness. See Title 8, Sections 14000-14400 for the definitions of first aid and serious injuries. This bill essentially sets a new minimum penalty while the cap was set in 2000 with AB 1127.

National Workplace Fatalities Down in 2001, with One Big Exception.

Workplace deaths were down slightly in 2001, but the Sept. 11 terrorist attacks pushed the overall total to almost 9000, according to statistics released by the federal Bureau of Labor Statistics' (BLS) Census of Fatal Occupational Injuries (CFOI). . "The events of that day killed 2,886 workers from a wide range of backgrounds - janitors to managers, native and foreign-born workers, and the young and old."

The construction industry reported the largest number of fatalities of any industry. BLS said construction fatalities were at their highest since 1992, when CFOI began.

In California, construction fatalities were also up, from 95 in 2000 to 97 last year. Overall work-related fatalities were down about 8 percent, with declines in all major incident categories except falls, which increased sharply. In construction, falls were the leading cause of death at 44%, transportation next at 29%.

Cal/OSHA Focus on Construction Trades

Cal/OSHA continues to pursue enforcement activities under the Construction Safety and Health Inspection Project (CSHIP). Emphasis is on fall protection, employee training which now includes not just fork lifts but all motorized trucks, excavation and trenching, hazardous substance exposure – lead, asbestos, etc.

The message is clearly to ramp up training activities for all aspects of fall protection including scaffolding, ladders and fall protection gear; driver training for all who drive vehicles, including their own, during the workday; training and

certification cards for all who operate any motorized truck including front loaders, forklifts, skipjacks, material handling equipment, etc., and those that are (*or may be*) exposed to hazardous substances.

New Title 8 Regulations Update

For those using the Cal/OSHA Pocket Guide for the Construction Industry (the 3"x 6" blue pocket guide) an update sheet is available on the Cal/OSHA website under "publications" at no charge. The Guide and other materials are also available at no charge.

Cal/OSHA Appeal Decision Review

Citations:

Guards Inoperative On Circular Saws

CAL. CODE REGS, tit. 8, § 4307(c) (2002) -Two workers used a saw with the guard wedged back against orders, a general violation. The independent employee action defense was not established because there was no proof of their experience in the job.

Fall Protection – Work Above 7 ½ Feet From Perimeter Of a Structure

CAL. CODE REGS, tit. 8, §1670(a) (2002) - Employees worked at the edge of a 40-foot-high fourth story building without any fall protection. Employer's purported fall protection plan did not meet requirements and it did not comply with an alternative safety order.

Background. Following a construction accident, Employer was inspected and cited for general violation of §4307(c), saw guard wedged back, and serious violation of § 1670(a), lack of fall protection. An Administrative Law Judge denied Employer's appeal and it filed for reconsideration.

General violation - §4307(c): The Division's inspector observed two employees using a circular saw with the guard pinned back in violation of §4307(c). Employer presented evidence that the two were *recent hires* who represented themselves as experienced carpenters and framers. They were expressly instructed not to pin back the saw guards by Employer's foreman, who observed their work for about a day, and was satisfied (no Safety Violation notices issued). The Employer asserted the *independent employee action* defense. *The independent employee action defense involves a five-part test to enable an employer to avoid liability for violations caused by employees. An employer must establish each element:*

- (1) The employee was experienced in the job being performed;
- (2) Employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
- (3) Employer effectively enforces the safety program;
- (4) Employer has a policy which it enforces of sanctions against employees who violate the safety program, and;
- (5) The employee caused a safety infraction which he or she knew was against Employer's safety requirement."

The employer could not document the worker's experience record, saw guard training, did not produce safety violation notices, had no progressive discipline policy, and the employees did not testify whether or not they understood company safety rules.

Appeal Denied Job tenure aside, the defense's *first element* requires a showing that the employee has done the specific task "enough times in the past to become reasonably proficient." Here, the two carpenters had only worked for Employer for one week, and there was no evidence regarding their prior experience with a circular saw.

Serious violation - 0670(a): The Division cited because employees worked from the perimeter of a structure, with their backs to the edge, approximately 40 feet above the ground, without fall protection. The inspector testified that he could clearly see the employees, their activities, and the lack of fall protection from the ground. Employer countered that it was using a fall protection plan as permitted by §1671.1 (controlled access zone) as an alternative to the conventional fall protection required by §1670(a).

The Company Safety Coordinator testified that "there was not a secure place to anchor a safety line and that safety lines created an entanglement hazard, that fall protection was not practical and actually created a greater hazard so he used a safety monitor system under Employer's fall protection plan."

The safety monitor was not present during the Division's inspection, but later provided a copy of the fall protection plan to the inspector. They had tried individual fall protection on the second story but pipes presented hazards, and the lanyards prevented freedom of movement. There appeared to be a greater danger of falling so they implemented the fall protection plan and [he], as the safety monitor, was close enough to employees to yell a caution to them as they approached the edge.

It was determined that the assigned safety monitor was not present at the jobsite during the inspection when two employees worked at 40 feet above the ground without fall protection and "were exposed to a strong risk of falling 40 feet." - "we infer from his absence that Employer did not enforce its plan." It was also not "site or job specific" and did not document the identity of the qualified person, competent person or the identity of the employees allowed to work in the controlled access zone except to say that they will be listed in the appropriate section or identifiable by the competent person."

Appeal Denied Employer's fall protection plan *was not available* during the inspection, although a copy was provided to the Division the next day. "To comply with the requirement, Employer must have the completed plan available for inspection at the site

"Section 167 1. 1 applies to all construction operations where it can be shown that the use of conventional fall protection is impractical or creates a greater hazard. It allows the use of a fall protection plan developed specifically for the site. The plan must identify the qualified person preparing the plan, be maintained at the job site, identify the competent person, explain why conventional fall protection is not feasible, explain other measures to be used, and where other measures are not practical, establish controlled access zones and a safety monitoring system consistent with section 1671.2. The fall protection plan must also include a statement which provides the name or other method of identification of each employee who is designated to work in the controlled access zone."

