

The Case of the "Rented" Worker Fatality

The long march of Cal/OSHA justice is set to take another step when California's Third District Court of Appeal hears oral arguments in a Multi-Responsibility case that reaches back into the 1990s.

The incident involved a worker for a paving contractor who was "loaned" to another paving company because company had no work for him at the time. The 22-year-old employee was operating a heavy roller on a steep grade on his first day at the new job site when another roller lost control and slammed into his machine.

The roller was not equipped with a seat belt and the worker was thrown under it and crushed to death. Division of Occupational Safety and Health cited his company (*not the company he was operating the roller for*) for a serious violation of Construction Safety Orders § 1509 for failing to provide an *effective* Injury and Illness Prevention Program (IIPP) for workers sent to another site. (*had the Program been effective his employer would have ensured that a seat belt was on the machine, or the operator would have refused to operate an unsafe machine*)

An administrative law judge (AU) decided that the state legislature, under Labor Code §6401.7(h) intended that the secondary employer was assigned "the sole and exclusive responsibility for providing site and job-specific IIPP protection to [him] while he was "rented" (on loan in this case) from employer and controlled, directed and directly supervised" by the second contractor.

The Cal/OSH Appeals Board reversed the AU, stating that the Labor Code section applies to the obligations of a secondary employer regarding contract employees. "Nothing is said about the primary employer," the Decision After Reconsideration stated. Case law, particularly the *Pemco II* DAR of 1985, "clearly spelled out the primary employer's obligation to recognize and avoid the hazards peculiar to the work performed by its employees at the secondary site," the board said.

It added that the overriding policy behind LC §6401.7(h) is that employees receive "thorough and exhaustive" training in the hazards they might encounter, such as the requirement for certain equipment to have seat belts. The primary employer was required to instruct the worker that he was to "refuse to perform any assignment involving a dangerous condition until that condition was abated," the board added.

The primary employer challenged the decision, alleging that the board engaged in "quasi-legislative" action. The company's writ of mandate was denied in Sacramento Superior Court in October 2004, and the firm appealed to the Third District Court of Appeals.

Briefings have begun in appellate court on another multiemployer case. Last June, a Sacramento judge upheld an Appeals Board decision holding that DOSH does not need to prove a controlling employer's (usually the GC) lack of due diligence to issue a citation under the multiemployer regulation.

The judge found that the board has the authority to determine whether due diligence is DOSH's burden to disprove, or whether it is an affirmative defense that the employer must prove.

DOSH has said it intends to use "the lack of due diligence" decision as precedent in citing controlling employers.

This interpretation by DOSH will definitely result in more GC citations for subcontractor's accidents. Worse, cited controlling employers may not know when or how invoke the due diligence defense.

A key element of the due diligence defense will be the GC's ability to prove that the Title 8 rules were enforced or caused to be enforced. In the case of the employee killed in the roller accident above, documentation should show that:

- (1) the employee was trained in and aware of the jobsite Code of Safe Practices which, among other things, would have included the usual "do not perform unsafe acts" " and "do not use unsafe equipment" employee safety rules;
- (2) equipment was inspected at the beginning of each shift. (which would have revealed the lack of a seat belt causing the machine to be removed from service;
- (3) previous inspections showing that equipment had been removed from service for safety defects;
- (4) contractual language and requests in writing for the subcontractor to provide employee training and inspection documentation per Title 8, sections 3203 and 1509.

The message – document, document, document. *Oh, yes, find out just what exactly is supposed to be documented.*