

Asbestos Alert!

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Casey v. Perini Corporation

First Appellate District, Division 4 (June 13, 2012)

The Court of Appeal affirmed the trial court's grant of summary judgment in favor of Perini, a general contractor. Plaintiff alleged that he was exposed to asbestos by Perini employees at job locations where construction of new office buildings was being performed. Plaintiff's deposition testimony and discovery responses disclosed that while plaintiff had personal knowledge of having worked alongside Perini employees who were disturbing various materials, including wall surfacing materials and fireproofing, plaintiff did not know the brand names or contents of those materials, and did not know whether or not any of those materials contained asbestos (although he assumed they did).

Perini moved for summary judgment, claiming plaintiff could not establish that Perini's workers had caused him to be exposed to asbestos. Plaintiff's opposition included a declaration from industrial hygienist Kenneth Cohen opining that all surfacing materials, including fireproofing, used in the construction of office buildings before 1980 contained asbestos. Mr. Cohen's opinion was based on two OSHA regulations that presume all surfacing materials present in buildings built before 1980 contain asbestos and records from the Bay Area Air Quality Management District ("BAAQMD") regarding one of the buildings where plaintiff worked alongside Perini employees which revealed that asbestos abatement had occurred in the building from 1994 to 2004.

Perini objected to Cohen's declaration as lacking foundation for the opinion that the surfacing materials contained asbestos. The trial court sustained the objection, finding the OSHA regulations were not designed to say whether there was asbestos in any particular instance, but instead were designed to set forth efficient regulation as to warnings. Since the question on summary judgment was whether there was asbestos in the particular instances where plaintiff claimed to have been exposed by Perini employees, the OSHA regulations were irrelevant.

The Court of Appeal agreed, finding that without an adequate factual foundation via-a-vis the facts of this particular case, the opinion was speculative and not admissible. The Court of Appeal characterized Cohen's opinion as "conjecture based upon inferences flowing from the generalities embodied in the OSHA regulations."

As to the BAAQMD records, the Court of Appeal noted that they provided no evidence as to when any of the removed materials had first been installed or whether they had been in place when Casey worked in

the building. The BAAQMD records also failed to reference the specific type of fireproofing materials that had been abated or the location from which that material had been abated.

These facts distinguished plaintiff's situation from *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409. In *Lineaweaver*, there was evidence that the plaintiff had worked for 30 years at a refinery where asbestos products covered two-thirds of the piping and much of the equipment, and at least half of the asbestos insulation installed in the 1960s was identified as the defendant's product. This led to an appropriate circumstantial inference that the material to which the plaintiff had been exposed was the defendant's product.

COMMENT AND EVALUATION

This case will be very helpful to defendants in at least two regards: (1) Excluding expert opinions based on OSHA and other general regulations (a recurring issue for summary judgment motions and trial testimony), and (2) Precluding plaintiff counsel from referencing OSHA and other regulations in front of a jury, (a recurring subject of defense *in limine* motions). This case also underscores the need for defendants to fully and completely evaluate the foundations of plaintiff expert opinions. In our experience, expert foundations can often be successfully attacked, leading to the exclusion of expert opinions and the granting of summary judgment and directed verdict motions, but that such attacks involve painstaking analysis and precise argument. Our experience is also that this work is often rewarded.

Kenneth Cohen is commonly disclosed as an expert by plaintiffs in asbestos litigation. His opinions on "re-entrainment" have been found to be speculative and conclusory. See *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96 at 112-113. This case adds to the defense library of references to use in attacking Cohen's opinions and credibility.

For a complete copy of the *Casey* opinion, see

<http://www.courts.ca.gov/opinions/documents/A131881.PDF>