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Employment Law Commentary

Cal/OSHA Enforcement Penalties: The New Definition of Serious is Serious

By Lloyd W. Aubry, Jr.

Effective January 1, 2011, new Labor Code §6432 (AB 2774) revises the definition of a "serious" violation for the purposes of a Cal/OSHA citation and makes it much easier for the California Division of Occupational Safety and Health (DOSH) to prove a serious violation with its significantly higher fines than citations classified as either general or regulatory. The amendment was negotiated among the various Cal/OSHA stakeholders but was instigated because labor, health, and safety advocates, DOSH itself, and the federal government, which oversees the Cal/OSHA program, believe that the number of serious citations sustained by the Cal/OSHA Appeals Board is lower than in other states because of the narrow interpretations of the Board—interpretations which the federal government does not believe are consistent with federal guidelines. Indeed, as recently appointed Cal/OSHA Division Chief Ellen Widess was recently quoted saying, AB 2774 "gives us the tools to cite more serious violations."[1]

With citations issued for serious violations potentially exceeding $100,000 (see www.dir.ca.gov/DOSH/citation.html), Cal/OSHA citations will need to be taken more seriously than perhaps they have been in the past. Indeed, in the past serious citations were appealed as a matter of course and often either reduced on appeal based on evidentiary issues, or negotiated based on a belief that the serious citation would be reduced to a general or regulatory citation or vacated by the Board. Such results will no longer be as likely under the new definition of serious. For these reasons employers would be wise to review their safety plans to make sure they are up to date and address all the various hazards that exist in the particular workplace.

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Background

A recent case issued by one of the Cal/OSHA Appeals Board's Administrative Law Judges, but based on the old definition of "serious," reveals the concerns that lead to the amendment. In that case, a supervisor in the employer's warehouse placed a 2,500 lb. pump on the lift gate of a truck that was generally used for equipment weighing around 750 lbs. The pump did not have locking wheels nor were the wheels blocked and, as it was being lowered, it fell off the lift gate onto the employee, resulting in an amputation.

DOSH issued a serious citation assessing a $13,500 penalty for violation of the safety order that requires "all loads shall be secured against dangerous displacement either by proper piling or other securing means." The Division classified the violation as serious because, under old Labor Code § 6432(a), a serious violation exists if there is a "substantial probability" that death or serious physical harm could result from a violation. While the ALJ conceded that an amputation is serious physical harm, he reclassified the citation to a general violation and reduced the penalty to $450 because "the Division presented no evidence regarding the likelihood (substantial probability) of a serious injury occurring in the event of an accident caused by the violation—failure to secure a load." Thus the Division had not proved all the elements of a serious violation and the ALJ never had to consider whether the employer disproved any of the elements of a violation.

To avoid similar results in the future, Labor Code §6432 was significantly amended and, as shall become clear, had the above violation been cited under the new law, it is unlikely that the serious citation would have been reduced to a general violation.

New Labor Code §6432

AB 2774 redefines what a serious violation is and actually creates a rebuttable presumption that a serious violation exists if there is a "realistic possibility" (as opposed to the old "substantial probability") that death or serious physical harm could result from the actual hazard created by the violation. This essentially changes the burden of proof in sustaining a citation. Moreover, "realistic possibility" is not defined in the new statute, leaving it to interpretation by the Board. Assuming the other requirements of the statute are met, the burden shifts to the employer to prove that there is not a "realistic possibility" that death or serious physical harm could result from the actual hazard.

The new statute does require that DOSH, before issuing a citation, make a reasonable attempt to determine and consider among other things all of the following:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
>
> (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
>
> (C) Supervision of employees exposed or potentially exposed to the hazard.
>
> (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
>
> (E) Information that the employer wishes to provide, at any time before citations are issued, including any of the following:
>
> > (i) The employer's explanation of the circumstances surrounding the alleged violative events.
> >
> > (ii) Why the employer believes a serious violation does not exist.
> >
> > (iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

If, after considering this evidence, the Division issues the citation and establishes the presumption pursuant to the "realistic possibility" standard then the employer may rebut the presumption and establish that a violation is not serious by "demonstrating that the employer did not know and could not, with an exercise of reasonable diligence, have known of the presence of the violation." This latter provision is a carryover from old §6432.

AB 2774 also provides that if the employer does not present the information requested by the Division in the indented material above, the employer would not be barred from presenting that information at a hearing and "no negative inference shall be drawn." However, if it offers different information at the hearing than what was provided to the Division, the employer may explain the inconsistency but the trier of fact may still make a negative inference from the prior inconsistent factual information.

Another provision has been added allowing a Division Safety Engineer or Industrial Hygienist, who can demonstrate at the time of the hearing that his/her training is current, to offer testimony to establish the elements of a violation, including the custom and practice within a particular industry. In several cases, the Cal/OSHA Appeals Board has rejected testimony by Division compliance personnel because they had no expertise in particular industries or workplace practices and, as a result, citations were reduced or vacated. This provision is an attempt to allow Division compliance personnel to essentially testify as experts on safety issues as federal health and safety personnel are allowed to do. Moreover, by allowing compliance personnel to testify as to the "realistic possibility" as experts, the Division will be able to meet its burden much more easily and shift the burden to the employer to disprove the serious nature of the violation.

Finally, "serious physical harm" as required in new 6432(a) to cite a serious violation has also been expanded from its old definition requiring an amputation or a hospital stay of at least 24 hours. Under the new definition, "serious physical harm" is now defined as:

> (e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

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(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Moreover, serious physical harm may now be caused by a single repetitive practice, means, method, operation, or process.

Conclusion

There is little doubt that the purpose of AB 2774 is to increase not only the number of citations that are issued as serious violations but also the number of serious violations that are sustained by the Cal/OSHA Appeals Board on appeal. There is also little doubt that, had the case described above occurred after January 1, 2011, the serious citation would have been sustained. Clearly, putting a 2,500 lb. pump on a lifting gate and not securing it as it is being lowered presents a "realistic possibility" that serious physical harm could occur. Under the presumption in the new law, the burden would then shift to the employer, unlike the old statute where the burden remained with Cal/OSHA and, if the Division did not offer any evidence, the citation would be vacated.

In this new environment, employers need to be diligent about updating their injury and illness prevention plans, insuring that supervisors take safety issues seriously, and requiring that safety be observed and practiced by all employees in the workplace.

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1. *Cal-OSHA Reporter*, June 17, 2011 at p. 00-10066

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