Bringing OSHA Regulations Back To The Courtroom

By Bill Daniels

I. Introduction

Construction work is difficult, demanding and often dangerous. Pursuing a third party claim for a construction injury can be equally trying.

Since 1972, civil jurors in third party proceedings have been prevented from learning whether a worker suffered injury because one or more defendants violated standard workplace safety regulations promulgated by Cal-OSHA.

On October 6, 1999, Governor Gray Davis signed legislation that will restore some balance in construction injury cases brought to trial after January 1, 2000. By amending the Labor Code to return the law back to its pre-1972 status, AB 1127 provides that Cal-OSHA regulations may once again be admissible in third party proceedings.

II. A Look at AB 1127

A. Background

AB 1127 was sponsored by freshman Assembly Member Darryl Steinberg of Sacramento. The legislation was a reaction to the February 1999 Tosco Oil Refinery fire in Martinez, California that killed five people.

While AB 1127 makes numerous substantive changes to the Labor Code that are intended to enhance worker safety, the amendments to sections 6304.5 and 6400 are intended to turn back the clock and restore an injured worker's ability to introduce Cal-OSHA regulations in third party cases.

B. The Amended Labor Code

For purposes of this discussion, we need only examine a portion of AB 1127 to see how it will affect introducing OSHA regulations at trial.

The legislation amends two key sections of the Labor Code, sections 6304.5 and 6400. The manner in which those amended sections interact is what makes for a change in how OSHA regulations may be introduced at trial as a standard of care at construction sites.

Labor Code section 6304.5 is amended to read in part as follows:

> 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. Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.

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The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards.

At the same time, Labor Code section 6400 is amended to read:

> (a) Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.
> (b) on multiemployer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the division:

(1) The employer whose employees were exposed to the hazard (the exposing employer).
(2) The employer who actually created the hazard (the creating employer).
(3) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer).
(4) The employer who had the responsibility for actually correcting the hazard (the correcting employer). The employers listed in paragraphs (2) to (4), inclusive, of this subdivision may be cited regardless of whether their own employees were exposed to the hazard.

The upshot of the amendments is that it is now the declared intent of the Legislature that Cal-OSHA regulations (promulgated to promote workplace safety) are now admissible in third party actions. What's more, by amending section 6400 to adopt the broad definition of employer first stated by Cal-OSHA at Title 8, section 336.10, it is clear that OSHA regulations apply to all parties that control workplace safety, not just direct employers.

III. Putting it Together for Trial

A. A Construction Site Injury Fact Pattern

Third party construction injury cases generally present three primary players.

First is the plaintiff who suffered an injury at the workplace.

Second, is a general contractor or project owner who either created the safety hazard that injured the plaintiff, was responsible for overall workplace safety, or was responsible for fixing a dangerous condition. This is the "controlling employer" under amended section 6400(b)(2-4).

Third, is the plaintiff's direct employer, generally a subcontractor.

Often, the general contractor or project owner retains overall control over construction site safety, in large part because those same parties are concerned about controlling project costs and preserving schedules.

When an accident occurs, the controlling employer invariably defends itself by attempting to place as much blame as possible on both the direct employer and the plaintiff. The idea is to convince a jury that even though the controlling employer had overall control over the workplace, the real responsibility for safety lay entirely with the subcontractor and the worker.

B. Negligence Per Se

By amending sections 6304.5 and 6400, AB 1127 makes its much more difficult for a negligent controlling employer to conceal its negligence from the jury.

Amended section 6304.5 provides that a trial court now may take judicial notice of OSHA workplace safety regulations under Evidence Code section 452. Those regulations then become the applicable standard of care under Evidence Code section 669, which provides:

(a) The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

So, assume in our hypothetical that our plaintiff was injured when he fell from a loose wooden walkway onto an unprotected piece of exposed steel reinforcing bar that impaled him in the chest area causing serious personal injuries.

Title 8, section 1712(c)(1) of the California Code of Regulations provides that employees "working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be protected against the hazard of impalement by guarding the exposed ends with protective covers, troughs or caps."

Discovery shows that as the controlling employer, the general contractor was responsible for overall site safety. Deposition testimony reveals that the general contractor's foreman noted the unprotected steel and had ordered a laborer to put caps on the projecting ends prior to the accident.

At trial, the plaintiff is entitled to a BAJI 3.45 negligence per se jury instruction identifying section 1712(c)(1) as the regulation violated by the general contractor.

C. OSHA Citations and Expert Testimony by OSHA Employees are Not Admissible

Usually, following a serious workplace accident, a Cal-OSHA inspector will conduct an investigation of the direct employer's conduct and, not infrequently, will cite the direct employer for violating some OSHA regulation. The investigation generally does not extend past the direct employer to the controlling employer, even though the controlling employer may have responsibility for the accident that far exceeds any other party's omission.

Post-1972 and pre-AB 1127, the controlling employer often relied on the Cal-OSHA enforcement mechanism to help divert attention from its own negligent acts. Even though OSHA regulations were not directly admissible

at trial, defendants would attempt to use OSHA inspectors as defense witnesses, the idea being that if a jury heard that the direct employer had been cited by Cal-OSHA it would benefit the controlling employer.

Amended section 6304.5 ends this practice. Under the amended statute:

> Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer.

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The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards.

While OSHA employees may arguably still be called as percipient witnesses, a motion in limine citing section 6304.5 should go far to limit misleading testimony at trial.

IV. A Word of Caution

While restoring some balance to a construction worker's third party civil case, AB 1127 is not a cure-all.

The legislation does not transform a bad case into a good one. If the employee and direct employer are principally or entirely responsible for the accident, AB 1127 is not likely to help. Indeed, since OSHA regulations may be introduced by any party, defense counsel are likely to introduce them themselves when the facts of the case warrant.

In the final analysis, AB 1127 will likely prove a powerful tool in communicating to juries which party is truly responsible for a construction site injury. Even so, like the blade borne by lady Justice, AB 1127 is a sword that can cut both ways.

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How We Learn To Communicate More Effectively in The Courtroom. Listen to jurors and pay attention to them at the start of the case
Due Process. Labor Code Section 203 provides a waiting time penalty that is consistent with constitutional due process.

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