

OSHAB Decisions 2017

The New and the Noteworthy

BAY AREA SAFETY SYMPOSIUM

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OSHA PREVENTION • PROTECTION • DEFENSE

OSHAB in 2017: A Summary

- ▶ Multi-Employer Worksite Liability
- ▶ Employer Defenses
 - ▶ Independent Employee Act
 - ▶ The Newberry Defense
- ▶ Processes and Privileges

Multi-Employer Worksites

- ▶ Title 8 CCR 336.10 – Determination of a Citable Employer
 - ▶ Exposing
 - ▶ Creating
 - ▶ Controlling
 - ▶ Correcting

New MEW Interpretations

- ▶ The Good News - Controlling employer defense alive
 - ▶ McCarthy Building Co (1/11/16) – defense met with:
 - ▶ Full-time safety coordinator on-site
 - ▶ Spent 70% of day in field
 - ▶ Several superintendents on site, managing safety
 - ▶ JSA each day, issues corrected in timely fashion
 - ▶ System of sanctions with history of discipline
 - ▶ Hazard was latent

New MEW Interpretations

- ▶ The Good News - Controlling employer defense alive
 - ▶ Beazer Homes (1/18/18) – defense met with:
 - ▶ Several superintendents on site, managing safety
 - ▶ Pre-job meetings and weekly tailgate meetings held
 - ▶ Correction of unsafe conditions
 - ▶ System of sanctions with history of discipline
 - ▶ Hazard was NOT latent. Does not in itself defeat defense when ER overall behavior is consistent with due diligence.

New MEW Interpretations

▶ The Bad News

- ▶ *Electrical Systems and Instrumentations, Inc.*, Cal/OSHA App. 316695469 DAR and Order of Remand (Sept. 22, 2017) – No End of Potential Liability?
- ▶ Installer no longer on property = Creating Employer
- ▶ ER installed cable tray 15 months before injury (allegedly “faulty”)
- ▶ Remanded to ALJ for further hearing on matter

New MEW Interpretations

- ▶ More Bad News
 - ▶ Property Owner = Controlling Employer
 - ▶ If no licensed contractor, homeowner or property owner will be considered GC

New MEW Interpretations

- ▶ Equipment Lessor = Controlling and Creating Employer
 - ▶ Lessor was not on site, but accident happened with equipment.
 - ▶ DOSH let this go after 2 years of litigation, but with no explanation

Employer Defenses

- ▶ The Independent Employee Act
 - ▶ Employee is experienced
 - ▶ Employer has well devised safety program
 - ▶ Employer enforces program
 - ▶ Employer has implemented policy of sanctions
 - ▶ Employee knew of infraction



*"Since you have already been convicted by the media,
I imagine we can wrap this up pretty quickly."*

Employer Defenses

- ▶ The Independent Employee Act
 - ▶ Synergy Tree Trimming (May 15, 2017)
 - ▶ DOSH argues no defense if supervisor on site
 - ▶ EE testified as to error in following rule
 - ▶ OSHAB concludes defense requires willful or intentional violation of safety rule.

Employer Defenses

- ▶ The Newberry Defense
 - ▶ Synergy Tree Trimming (May 15, 2017)
 - ▶ OSHAB: If no IEAD, try Newberry prove **NEGATIVE**
 - ▶ ER knew / should have known of potential danger
 - ▶ ER failed to exercise adequate supervision
 - ▶ ER failed to ensure EE compliance
 - ▶ Violation was foreseeable.

Processes and Privileges

- ▶ Calstrip Steel Corporation (June 30, 2017)
 - ▶ The willful allegation – when and how may DOSH allege. OSHAB will consider:
 - ▶ Bad faith of parties
 - ▶ Failure to cure before now
 - ▶ Futility of the amendment
 - ▶ Prejudice to the other party



*"In the interest of streamlining the judicial process,
we'll skip the evidence and go directly to sentencing."*

Processes and Privileges

- ▶ ExxonMobil Refining (June 30, 2017)
 - ▶ Attorney client communication?
 - ▶ Dominate purpose of communication
 - ▶ Intent of person from whom it comes
 - ▶ Attorney work product?
 - ▶ Attorney's agent

2018: Civil Penalties Highlighted

- ▶ California Supreme Court: Solus Industrial Innovations
 - ▶ Industrial incident resulting in two employee fatalities
 - ▶ Cal/OSHA Inspection
 - ▶ Citations including willful allegation
 - ▶ Referral to BOI and District Attorney

2018: Civil Penalties Highlighted

- ▶ Orange County District Attorney
 - ▶ Criminal charges: plant manager & maint supervisor
 - ▶ Civil Action including claims of:
 - ▶ Unlawful business practices (B&P Code 17200)
 - ▶ False advertising law (B&P Code 17500)
 - ▶ Penalties: \$2,500 per day per employee for 15 months

2018: Civil Penalties Highlighted

- ▶ California Supreme Court
 - ▶ Issue: Are the claims pre-empted by Fed/OSHA
 - ▶ Answer: No
 - ▶ Fed/OSHA serves as the “floor” for workplace safety
 - ▶ Fed/OSHA has approved CA state plan
 - ▶ Cal/OSHA must be as effective as
 - ▶ UCL and FAL provide remedy for other violations

Recommendations

- ▶ DOSH will still be looking for low-hanging fruit
- ▶ Document, document, document
- ▶ Lean and Mean IIPP
 - ▶ Main document should be short and sweet
 - ▶ Each program separate
 - ▶ Be careful of going “above and beyond”

Looking Forward

- ▶ Meetings
 - ▶ Injury and Illness Prevention Program
 - ▶ Indoor Heat Illness Prevention
 - ▶ Workplace Violence Prevention
 - ▶ PEL's
- ▶ Participation

Thank You!!

- ▶ **Walter & Prince, LLP**
 - ▶ www.walterprincelaw.com
 - ▶ **E-zines, articles and further links**
- ▶ **Cal/OSHA Regulations**
 - ▶ www.dir.ca.gov/samples/search/query.htm
- ▶ **Cal/OSHA Enforcement (DOSH)**
 - ▶ www.dir.ca.gov/DOSH/dosh1.html
- ▶ **Fed/OSHA Establishment Search**
 - ▶ www.osha.gov/oshstats/index.html