NEWS AND VIEWS

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JAIL TIME FOR YOU?

There are a few acts of omission or commission by the management that can get them to jail, i.e., the act is considered criminal in nature. Consider the case where a hoist in the shop is "jumping" (mal-functioning). The technician walks into the office of the Service Manager and informs that the hoist is not working and needs *immediate* repair. The Service Manager is busy in his every day chores and burdened with mounting expenses for the month, delays the repair of the hoist to the next month. Two weeks later, a car falls off the mal-functioning hoist and the operator employee is killed.

Under existing laws, the local prosecutor may seek criminal penalties against management on grounds as follows:

Lockout/Tagout: The Service Manager should have investigated the mal-functioning hoist immediately and then locked the hoist operating levers so no individual could have operated the hoist. Also, a tag near the operating lever indicating that the hoist should not be operated by any employee should have been posted on the hoist (Accident Prevention Tags LC6004). This Lockout/Tagout is a requirement under and Fed-OSHA and Cal-OSHA regulations. Thus a violation of a safety code that results in a fatality will certainly result in a criminal prosecution. Failure to have a written lockout/tagout procedure is citation as well.

Prior Knowledge of Hazard: The Service Manager had prior knowledge of hazard and this is interpreted as willful misconduct. In essence, the employer has a duty to inspect and provide a safe workplace. When the Manager fails to undertake repairs in a *reasonable* period of time, a safety violation has occurred. In the event of a criminal prosecution, the word *reasonable* will be charged to a jury. Also, the hoist repair, service and maintenance are the responsibility of management, i.e., employees are not responsible for either repairing the hoist or calling the company to repair the hoist.

Communication with Employees: Management should have immediately held a meeting with employees on the hazard at the workplace (the hoist) and communicated with employees so as not to use the mal-functioning hoist. OSHA regulations mandate that communication with employees on Health and Safety issues especially serious hazards at the workplace must be conducted promptly.

Summary: To prevent such criminal prosecution, management should take action such as follows:

- Follow health and safety regulations such as those on Lockout/Tagout.
- Inspect workplace for hazards on a periodic basis and correct them promptly.
- Communicate on health and safety issues with employees on an ongoing basis.
- Whenever the management has knowledge of a serious hazard, immediate action must be taken.

Safety regulations and manufacturers specify that the hoists be inspected on a *periodic* basis. ALI Preventive Maintenance Log (App. F) and Inspection Certificate (App. B) should be kept in files. Criminal penalties not withstanding, the civil penalties are $25,000 for each serious violation. Legal bills in defending such claims can also run in hundreds of thousands of dollars. *(Ref.: AB1127 (1999), PC387, SB198, LC6423, LC6425 & LC6004).*

CRACK THE WHIP

An employee is *seriously* injured on the job and the employer calls OSHA as part of notification requirements. OSHA investigates and slaps a $12,000 fine against the employer. This just happened to an automobile dealer in Los Angeles. The employee had partially amputated a finger while diagnosing the engine on an automobile. In their defense, the employer pled that the act of the employee that had caused the injury was an *independent act* of the employee and the employer should not be held liable.

In order to prevail on this affirmative defense, which must be pled on the appeal following the citation, a California employer must prove all five elements as follows:

1. **The Employee was Experienced and Trained on the Job Being Performed**: In the case at hand, the employee was a diagnostic specialist on automobiles and the employer presented 79 training certifications from the automobile manufacturer out of which 30 were on engine diagnostic and performance checks. Training certification from a nationally recognized body was also presented. OSHA accepted the employers' claim on this issue.
2. **Employer Has A Well Devised Safety Program**: Employer must prove that a well-devised safety program, which includes employee training for their particular job assignment, is in effect. The employee presents its IIPP Program and training from the service manual from the automobile manufacturer relevant to the service operations being done when the injury occurred. OSHA accepted this element of the defense as well.
3. **Policy of Sanctions Against Employees Violating Safety Program**: The employer must have a policy of sanctions against employees not following safety rules and policies. The employer stated that one had never been required as the injuries were virtually non-existent and one was never deemed necessary. The employer lost on this element as no earlier enforcement/disciplinary action had been documented.
4. **Employer Effectively Enforces the Safety Program**: The written disciplinary policy should be implemented. OSHA held that the enforcement element of the safety program had "no teeth" and that the safety program had not been enforced.
5. **Employee Caused the Safety Infraction Which He or She Knew was Contra to Employer's Safety Requirement**. The employer must prove that the employee had knowledge of this safety requirement, violation of which caused the injury. The employees pled that the safety rules, acknowledged and signed by the employee were available. Also, the shop manual (to service automobiles), which technicians reference repeatedly had outlined the safety procedures including relevant safety issues.

In summary, the employer lost for not having a policy enforcing sanctions against employees violating the safety program. Written policy without implementation is not sufficient either. A written IIPP where the facility is inspected on a periodic basis and hazards corrected is *not enough*. A "Write-Up Policy" is needed. Further, such policies should be enforced consistently without discrimination. A safety disciplinary form is available in the Black Box and one is enclosed. Disciplining employees is also a labor law issue as well and the advice of qualified counsel should be solicited. (*Ref.: Mercury Service, Inc. Docket No, 77-R4D1-1133*)

SAFETY COMPLAINTS ARE UP

Lately, many employers have received letters from Cal-OSHA or had an inspection following complaints purportedly from employees or ex-employees. Under California law, Cal-OSHA must investigate complaints made by an "employee representative", which has been expanded now to include an attorney, Health & Safety professionals, union representative, a representative of a government agency or an employer of an employee directly involved in the unsafe place. Cal-OSHA has 3 days to investigate serious violations and 14 days for non-serious charges; serious violation notification from state or local prosecutor must be investigated within 24 hours. (AB1127).

HOW HIGH IS HIGH?

Believe it or not there is a code on tire storage. Codes followed by local Fire Departments for tire storage are as follows:

- Clearance from the top of the storage to sprinkler deflector shall not be less than 3 feet.

- Storage clearances in all directions from roof structures should not be less than 18 inches.
- Clearance from light fixtures to prevent possible ignition.
- On floor, on side storage up to 12 feet.
- On floor, on tread storage up to 5 feet.
- Stored tires shall be segregated from other combustible storage by distances at least 8 feet.

Remember these are fire safety issues. Issues related to physical safety are also relevant and must be taken into consideration to ensure employee safety. (*Ref.: NFPA Chapter 3, 231D-6, 1998 Edition*)

UNIVERSAL WASTE – HERE WE GO AGAIN

State of California has enacted new regulations regarding the disposal of CRT/LCD/Computer screen/laptop screen etc. starting February 8, 2004. The regulations also cover the LCD panel in an automobile such as the GPS/Entertainment Screens and all consumer devices with a circuit board.

Old Law: Federal regulations require that all generators of universal waste must recycle these wastes. In our 2000 Newsletter, we noted that California and federal law had exempted Conditionally Exempt Small Quantity Generator (CESQG) from recycling so long as the facility did not generate more than 100 kg/mo. of RCRA waste. California has adopted regulations that are more stringent then the ones enacted earlier.

New Law: Not only have new items been added to the Universal Waste criteria, the Conditionally Exempt Small Quantity Generator (CESQG) exemption has been redefined. Now, for the CESQG exemption to apply, the facility must:

- generate less than 30 lamps/month
- generate less than 20 lb/mo. of batteries such as those from flash lamps & remotes
- generate no universal waste thermostats

These exemptions are only available if the total RCRA and universal waste amount is less than 100kg/mo. and the waste is shipped to a municipal facility capable of handling such wastes. Circuit boards in consumer electrical equipment can be disposed as normal waste provided the 100kg/mo. limit as stated earlier is not exceeded.

Contractor Issue: What happens if a contractor is hired to replace the lamps. State contends that the contractor is a co-generator of the Universal Wastes and hence must manage the wastes as Universal Wastes. We assume that the contractor collectively generates more than 30 lamps/month. The dealership should obtain a 'Bill of Lading' from the contractor and retain them on files. No special hauler registration is required.

Recycling Ideas: CRT's, though a disappearing species, should be returned to the vendor, if possible, as an exchange. Leasing them and later returning them to the lessor is a good option too. Dismantling electronic equipment, in a safe manner, to recycle the circuit board alone is an option as well. A list of recyclers is available at the following web sites:

- nema.org/lamprecyle/recylers.html
- h2eonline.org/tools/hg-recy.htm
- dtsc.ca.gov/database/crt_recyclers/county_list.cfm

Lastly, $6-8-10 fee will be implemented as of July 1, 2004 on all LCD/laptops purchases depending upon the screen size. Screen sales for automobiles (GPS/entertainment) are exempt from fee requirements. Disposal requirements apply as above nevertheless. *(Ref.: Electronic Waste Recycling Act of 2003 (SB20) & T22CCR Div.4.5 Chap10 Art.2)*

SHOW ME THE MONEY

With great fanfare, Governor Arnold S. signed and *delivered* on April 19, 2004, the law reforming Workers Compensation in California. The bill and other cost cutting should reduce the spending on Workers Comp in California by $13.5 billion in 2006. Some changes we expect to see are as follows:

Disability: New law increases the disability benefit by 15% (for those with 70-99.75% disability) if the employer cannot accommodate an employee after an injury. Modified work duty looks more attractive than ever before. American Medical Association guidelines on disability must be followed.

Networks: The W/C doctors are likely to 'mirror' the ones in the health insurance plans that the employer offers. The W/C administrator in Sacramento will hold hearings to *define* the networks. This change will increase an employer's control of medical treatment. If the employer does not provide a network for employee injuries, the employee then may seek his/her own physician after 30 days at the physician chosen by the employer.

Pre-designated physicians may end up as workers primary doctor under the network where they will be responsible for keeping the medical records on the employee.

Evidence: Evidence based guidelines must be used to determine what is reasonable and necessary care. Hopefully, expensive preposterous treatments will be eliminated.

Apportionment: Any prior permanent disability awards to an employee are conclusively presumed to exist at the time of subsequent injury. Now payments are for percentage of the injury occurring at the present job. Under the earlier law, workers compensation paid for the complete injury if the employee had rehabilitated. The new law requires the physician preparing the Permanent Disability report to include apportionment where factors that may have caused the injury are considered such as prior industrial injuries.

Medical Evaluation Process: Creates a new evaluation process for unrepresented employees when there is a dispute if the injury is work related. New medical legal evaluation process has also been created for represented employees as well. This should reduce the legal bills for both sides. The only party complaining of this new law is the attorney lobby!

In general, it is a good law for the employers and should hopefully keep a tab on the W/C expenses in years to come. (*Ref: SB 899*)

$2.00 SPRING AND HIV

Both, a $2 spring and exposure to HIV can subject the employer to serious penalties from OSHA. A spring was missing on the hoist control lever at a dealership in Norco, California. Following an inspection by Cal-OSHA, the employer was fined $2500 for this serious violation as the mal-functioning hoist could have caused serious injury to an employee.

Similarly, exposing an employee to HIV is also considered a serious hazard and punishable by a penalty. In recent weeks, there has been furor over spreading of HIV virus through the workers in the porn industry. Apparently a male worker had contracted the HIV virus from work in Brazil and then spread to porn workers here in San Fernando. The world capital of the porn film industry, San Fernando Valley, CA shut down shooting for a few weeks while the employer and workers determined the 'safe practices' to avoid exposing the workers to HIV virus. OSHA spokesman stated that subjecting employees to unsafe work practices, such as exposure to HIV, could result in penalties up to $25,000!

Legalese: California law defines serious violation exists if there is a substantial probability that a death or serious harm could result from a serious exposure exceeding the established permissible exposure limit, or a condition which exists, or from one or practices, means, methods, operations, or processes which have been adopted or are in use unless the employer can demonstrate that it did not and could not with the exercise of reasonable diligence, know of the presence of the violation.

TAKE 5 ON PROPOSITION 65

A few years ago, almost every auto dealership in California got a letter from an attorney stating that the dealership was in violation of Proposition 65 requirements. Dealers formed a coalition and retained counsel to ensure ongoing compliance with Prop. 65 requirements. The dealers should refer to the manual prepared by the counsel to achieve ongoing compliance. Amongst others, the dealership should ensure ongoing compliance with five issues as follows:

- Signs be placed at all the entrances of the dealership, cashiers windows, customers lounge etc.. Signs are available from CMCDA and other sources.
- Signs for Parts & Service areas indicating that the servicing operations generate and expose individuals to chemicals.
- Signs on windows of automobiles for sale (Signs are available from CMCDA).
- Employee training so that employee can understand Proposition 65 exposures.
- Indemnity from contractors visiting the dealership.

The ***News and Views*** is a periodic publication of Celly Services Inc. It should not be considered as legal advice or legal opinion on any specific facts or circumstances. The contents are for general information purposes only. For further information regarding issues addressed in this publication, please contact the editor, Sam Celly.

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