

## WHEN IT COMES TO WORKSITE SAFETY, YOU MAY JUST BE YOUR BROTHER'S KEEPER

By Ryan C. Caplan, Esq.  
*Procopio, Cory, Hargreaves & Savitch LLP*

**The issue:** Can a contractor on a construction project be liable for failing to warn another contractor of nonobvious hazards that it did not create but nevertheless knew about?

**The answer:** Yes, because Cal-OSHA regulations impose a duty on each employer on a multiemployer worksite to report all nonobvious hazards about which its employees learn during the course of their work. (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430.)

### Case History

*Suarez v. Pacific Northstar Mechanical, Inc.* involved injuries sustained by two employees of a general contractor (All Bay) while working on a construction project. Prior to the plaintiffs' injuries, an employee of one of the subcontractors (PNM), while working on the construction site, was slightly injured by an unguarded electrical circuit that was wired to an underground fixture on the site. The underground fixture was preexisting and neither All Bay, PNM, nor any other subcontractor was hired to do any work with the underground fixture. After PNM's employee was slightly injured, he told his foreman about the incident, who did not report it to All Bay.

Later in the same project, one of All Bay's employees, while on a ladder, grabbed the underground fixture to steady himself and received an electrical shock, causing him to fall and injure himself and another All Bay employee.



RYAN C. CAPLAN

The two All Bay employees brought a negligence action against the owner as well as PNM for failing to warn All Bay of its knowledge of a preexisting, nonobvious hazard. PNM successfully moved for summary judgment at the trial court level on grounds that it did not own or control the premises, it did not create the dangerous condition, it was not hired to work on or inspect the underground fixture, and it did not work on or use the underground fixture. The trial court held that, on these facts, PNM did not owe a duty of care to the plaintiffs and thus could not be liable in negligence for their injuries.

On appeal, the plaintiffs argued that PNM owed a duty towards them by virtue of PNM's subcontract with All Bay as well as certain Cal-OSHA regulations. The Court of Appeal rejected the argument that the subcontract language gave rise to a legal duty on PNM's part, but looked towards the Cal-OSHA regulations to determine whether a duty was owed, recognizing that the California Supreme Court had previously held

that "plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party."

Specifically, the Court of Appeal looked to California Labor Code section 6400, which provides that, "[o]n multiemployer worksites, both construction and nonconstruction, citations may be issued only to the following categories of employer 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)[.]" Assuming PNM's employee was previously injured by the underground fixture, the Court of Appeal found that PNM qualified as an "exposing employer." The Court of Appeal also looked extensively at the legislative history of the Cal-OSHA regulations, noting the intended effect "to increase significantly the sanctions available against those in control of workplace safety, with the goal of deterring unsafe practices and reducing the number and severity of future accidents."

The Court of Appeal concluded that the Cal-OSHA provisions "impose a duty on each employer, at a multiemployer worksite, to report all nonobvious hazards about which the employer learns because its employees were exposed to them during the course of their work, even if the employer in question did not create the hazard." The court went on to also hold that "a breach of that duty is actionable in tort by any worker at the site who is

subsequently injured by the hazard that was not reported.”

### **The Impact**

The failure to warn other contractors on a construction site of hazards you become aware of could potentially expose you or your company to liability for any injuries that result from those hazards. Contractors and subcontractors should immediately advise all of their employees to report any hazardous conditions of

which they become aware at a construction site during the course of their work, and all foremen or site supervisors should ensure that the other contractors on the project are also made aware of the same.

*Note: On March 10, 2010, the California Supreme Court denied review of the Court of Appeal’s ruling, effectively upholding the decision as the current status of the law.*

---

*Ryan C. Caplan is a member of the firm’s litigation team and construction practice group. His practice encompasses all aspects of business and civil litigation, including construction disputes, breach of contract, unfair business practices, employment matters, and complex litigation. Reach him at [rcc@procopio.com](mailto:rcc@procopio.com) or 619.515.3260.*