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CMAA CONSTRUCTION LAW UPDATE: 2022

San Diego, California

March 30, 2022
CMAA – San Diego Chapter

Presenter Introductions:

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Purpose and Learning Objectives:

Inform attendees on current legal trends in the construction industry

NEW CASE LAW

Prevailing Wage

Mendoza v. Fonseca McElroy Grinding Co., Inc.

- **Facts**:
  - Roadway construction company uses milling equipment to break up existing roadbeds. Sometimes the milling equipment is kept offsite and loaded onto trailers and brought to the job (i.e., mobilization).
  - On a public works project, contractor paid higher rate for on-site work and lower rate for mobilization work.
  - Plaintiff (unionized engineers) sued in federal court wanted prevailing wage law to extend to any work required to fulfill public works contract.
- **Holding**:
  - California Supreme Court considered under Labor Code § § 1771 & 1772
  - Legislature has defined what constitutes “public work” which did not include mobilization
  - Prevailing wage not required on mobilization work involving transporting heavy machinery to and from a public works project
  - **However**: Court did leave door open for prevailing wage for mobilization under different theory if mobilization can be shown to be “preconstruction” or “postconstruction” phases of construction

Busker v. Wabtec Corporation, et. al

- **Facts**:
  - Public transportation project, dispute over whether "field work" (e.g., building and outfitting radio towers on land adjacent to train tracks) and "onboard work" (e.g., installing electronic components on train cars and locomotives") required the payment of prevailing wage.
  - Before the CA Supreme Court, Busker argued terms "construction" and "installation" as used in Labor Code § 1720 were intended to be construed liberally and included work performed on rolling stock such as trains.
  - Busker further argued even if train systems were not "public works" then PW were still required because onboard work was "integrally related" to the towers on the trackside (i.e., required for the system to work).
- **Holding**:
  - No indication legislature intended Labor Code section 1720 to be interpreted broadly.
  - "Integrally related" argument has no limiting principle and would end up including things not part of construction, like microchips, software, and railcars.
  - "But work that is not otherwise defined as 'construction' does not become so simply because it plays some role in making the overall communications system functional."

- **Facts**:
  - Barrett contracted with Los Angeles Sanitation District to provide workers at recycling plaint to sort materials, remove nonrecyclables, clear obstructions, and place materials into containers.
  - Barrett's workers sued asserting a variety of claims, including demanding payment of prevailing wage
  - Labor Code § 1771 provides, that except on public works projects of $1,000 or less PW rates must be paid to all workers employed on "public work." Section 1720(a) defines what qualifies as "public work" and is mostly focus on work of a construction character. However, § 1720(a)(2) provides that prevailing wage includes "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type." This definition was traditionally interpreted consistent with the other definitions to encompass work of a construction character.
- **Holding**:
  - CA Supreme Court disregarded settled interpretation and said 1720(a)(2) must be interpreted in isolation and applied generically to any "work" done for a covered district. Entitlement to PW under § 1720(a)(2) does not depend on the tasks being performed, but instead "coverage turns on the governmental entity for which the work is done."
  - By disregarding historical context of "public work", there are no limiting principles to Court's interpretation

Arbitration

Remedial Construction Services, LP v. AECOM, Inc.

- Facts
  - Property Owner hired AECOM for demolition, remediation and restoration of the Gaviota oil terminal in Goleta. Prime contract between Owner and AECOM required any dispute arising out of or in connection with the contract be resolved by arbitration.
  - AECOM had payment dispute with subcontractor Remedial and moved to compel arbitration on basis that Subcontract incorporated Prime Contract and its arbitration provision
  - The Superior Court denied the motion on grounds the Remedial did not agree to arbitration and arbitration only applied to dispute between Owner and Contractor.
- Holding
  - Court of Appeal confirmed requiring preponderance of the evidence to show that Remedial agreed to submit to arbitration.
  - Remedial only assumed AECOM's obligations and responsibilities under the Prime Agreement to the extent they related to Remedial's performance of its own work on the project.
  - Order of precedence clause in Subcontract gave precedence of Subcontract over Prime Agreement
  - Subcontract incorporated certain provisions of Prime but not all.

Remedial Construction Services (cont.)

- Considerations
  - Subcontract dispute resolution clause should be consistent (i.e., litigation vs. arbitration) with a dispute resolution clause in prime contract.
  - Subcontracts should clearly state to what subcontractor agrees to be bound by the general contractor in the same manner that the general contractor is bound with the owner with respect to subcontractor's "work on the project"
  - "Order of precedence" should consider whether you want the entirety of a document to take precedence over another or only certain provisions within that document

Torts – Duty of Care

Gonzalez v. Mathis:

- Facts
  - Mathis hired Gonzalez, a specialist, to clean hard to reach skylights. Mathis' roof access had a very narrow path between the edge and a parapet wall and no place to affix a safety harness.
  - Gonzalez cleaned this skylight for several years before falling and suffering severe injury without workers' compensation insurance
  - In *Gonzalez*, CA Supreme Court asked to make exception to *Privette* Doctrine: project owners and higher-tiered contractors are not liable for workplace injuries sustained by employees of lower-tiered contractors (Privette v. Superior Court).
  - Current exceptions to *Privette*
    - *Hooker*: "retained control exception" whereby a "hirer," can be held liable if the hirer:
      - (1) retains control over any part of the lower-tiered party's work; and
      - (2) negligently exercises that control in a manner that affirmatively contributes to the worker's injury.

Gonzalez v. Mathis (cont.):

- Current exceptions to *Privette* (cont.)
  - *Kinsman*: "concealed hazard exception" whereby a hirer can be held liable if:
    - (1) the hirer knew, or should have known, of a concealed hazard on the property that the lower-tiered contractor did not know of and could not have reasonably discovered; and
    - (2) the hirer failed to warn the lower-tiered contractor of that hazard

- **Holding**
  - Landowner-hirers are <u>not</u> liable for injuries sustained by employees of independent contractors due to obvious/known hazards even if the independent contractor cannot remedy or protect against those hazards through reasonable safety precautions.
  - Supreme Court did not want to put the landowner in the position of evaluating safety hazards because the contractor usually has that expertise and the landowner usually doesn't have the right to interfere with contractor's decisions regarding safety or otherwise control the contractor's work

Tansavatdi v. City of Rancho Palos Verdes:

- **Facts**
  - Tansavatdi's son was killed by a semi-trailer while waiting at stoplight on bicycle. Son was going to go straight but truck was turning right. There was no bicycle lane at this particular stretch of the road although other parts did.
  - Tansavatdi sued the City for creating a dangerous condition and failed to warn of same.
  - City won Summary Judgment motion to shield from liability under Govt. Code § 830.6, the "design immunity defense" which the City also claimed shielded them from duty to warn.
  - Trial court granted MSJ but didn't address duty to warn.
  - Tansavatdi appealed.
- **Holding**
  - City was entitled to design immunity defense for liability for injuries caused by a dangerous condition on property
  - However, design immunity defense does not automatically protect a public entity from its duty to warn of a concealed dangerous condition on public property even if that dangerous conditions was covered by design immunity (citing *Cameron v. State of California*)

Sandoval v. Qualcomm:

- **Facts**
  - Contractor's employee sustained 3rd degree burns to over 1/3 of his body after he triggered an arc flash from a circuit he did not realize was "live". Contractor for whom he had been working had removed the protective cover on that live circuit while work was underway.
  - Immediately prior, Qualcomm's employees had performed a "power-down process".
  - Sandoval filed suit against Qualcomm asserting causes of action for negligence and premises liability.
  - CA Supreme Court granted review "to resolve whether a hirer of an independent contractor may be liable to a contractor's employee based only on the hirer's failure to undertake certain safety measures to protect the contractor's employees, and whether CACI No. 1009B accurately states the relevant law."
- **Holding**
  - Affirm existing rule: Hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers.
  - Didn't fail to disclose hazard under *Kinsman* ("concealed hazards exception")
  - "Power-down process" did not affirmatively contribute to injury under *Hooker* (i.e., was insufficient to prove "retained control")

Sandoval v. Qualcomm (cont.):

- **Holding (cont.)**
  - Court took issue with CACI No. 1009B ("Liability to Employees of Independent Contractors for Unsafe Conditions – Retained Control")(i.e., the *Hooker* exception)
  - CA Supreme Court said the instruction does not properly capture whether the hirer retained control over the manner of performance of some part of the work entrusted to the contractor:
    - Whether the hirer "negligently exercised [its] retained control over safety conditions" does not properly capture whether the hirer actually exercised its retained control.
    - And whether the hirer's "negligent exercise of [its] retained control over safety conditions was a substantial factor in causing [plaintiff]'s harm" does not properly capture whether the hirer's exercise of retained control affirmatively contributed to the plaintiff's injury
  - Recommended the Judicial Council and its Advisory Committee on Civil Jury Instructions update this instruction with suitable language consistent with the opinion.

Licensing Law

Manela v. Stone

- Facts
  - J.D.S. Stone (Stone) was a licensed general contractor that executed a construction contract with Manela.
  - While performing licensed work on the project, Stone assigned the contract to a new company he formed, JDSS Construction Company (JDSS), of which Stone was the sole shareholder. Following a payment dispute, the Stone parties filed a mechanic's lien on the property.
  - The trial court granted Manela's motion to remove the mechanic's liens based on conclusion that Stone had assigned the contract before Stone's license had been transferred to JDSS, thereby creating a violation of Bus. & Prof. Code § 7031(a)(1) which likely required disgorgement of money by Stone (i.e., failure to maintain a license at all times during performance of contract)
- Holding
  - On appeal, Stone parties argued evidence did not support that JDSS performed work before it became licensed and the trial court improperly relied on an assignment as conclusive evidence of such unlicensed performance.
  - Court of appeal agreed and concluded § 7031 did not apply.

Construction Defect Claims

Smart Corner Owners Ass'n v. CJUF Smart Corner LLC

- **Facts**
  - The Association, a California nonprofit mutual benefit corporation, filed a construction defect action against the developers of a residential condominium tower (CJUF)
  - Trial court grants CJUF's motion for summary judgment on the grounds that the Association failed to obtain the consent of more than 50% of its condominium owner members before filing the instant action as required by the governing declaration of covenants, conditions, and restrictions
  - After the Association filed its notice of appeal, the Legislature enacted Civil Code § 5986,1 which retroactively rendered prelitigation member vote requirements null and void except if those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits.
- **Holding**
  - Court of Appeal found the case had not reached a final judicial decision (case was still on appeal) and 5986.1 applied retroactively.
  - Also found independent reason to reverse judgment because prelitigation vote requirements violated fundamental state public policy.

NEW LAWS FOR 2022

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COVID - 19

OSHA COVID Vaccine Mandate

- On November 5, 2021, OSHA issued an emergency temporary standard (ETS) to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination.
- The ETS was challenged in the courts, and on January 13, 2022, the United States Supreme Court stayed the ETS finding that the challengers were likely to succeed on the merits of their claim.
- OSHA withdrew its COVID-19 vaccination or testing emergency mandate for employers with 100 or more employees.
- OSHA said it will propose it as a rule, subject to the rulemaking process which would take up to 36 months.

Vaccine Mandate for Federal Employees

- Relying on the ruling from the Supreme Court for support, the United States District Court for the Southern District of Texas, Galveston Division, granted an injunction against President Joe Biden's Executive Order requiring federal employees be vaccinated. (See Feds for Medical Freedom v. Biden, 2022 WL 188329 (S.D. Tex. 2022).)
- The judge said he does not believe the President has the authority to require federal workers to undergo a medical procedure as a condition of employment without congressional input because the President's vaccination requirement for federal workers goes beyond the workplace.
- The Biden administration filed an appeal in the Fifth Circuit on January 26, 2022.

California AB 654

- Effective October 5, 2021, it limits COVID-19 outbreak reporting and other required notifications and updates several provisions of AB 685.
  - Provides clarity as to when to give COVID-19 exposure notifications to a bargaining representative and narrows the group that should receive this notice.
  - The outbreak reporting timeline to notify local public health agency is now one business day or 48 hours (previously 48 hours). Employer also does not need to provide notice on weekends and holidays.
  - Exempts additional employers from reporting to local public health agencies, to include adult day health centers, community clinics, community care facilities and child daycare facilities
  - Excludes telework from “worksite” definitions
  - Reporting of exposure and cleaning limited to employees at exposed worksite

References – Cal-OSHA

- Revised Emergency Temporary Standards (Effective January 14, 2022):
  - https://www.dir.ca.gov/dosh/coronavirus/ETS.html

- FAQ on ETS:
  - https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html

Contractors and Employees

Contractors

- **AB 246:** Authorizes the Contractors State License Board (CSLB) to take disciplinary action against a licensee for the improper disposal of contractor-related materials/debris if such disposal is a violation determined by a local government or agency.
- **AB 569:** Increases the maximum civil penalty amounts that can be assessed by the CSLB against a licensed contractor for violation of the Contractors State License Law and authorizes the CSLB to issue a Letter of Admonishment in lieu of a citation for multiple violations at a time.
- SB 607: Increases the amount of the license bond required of construction contractors from $15,000 to $25,000 and of the qualifier bond from $12,500 to $25,000 as of January 1, 2023.
- AB 1023: Allows the Labor Commissioner (LC) to impose a penalty on a contractor or subcontractor on a public works project if they fail to furnish payroll records to the LC, as specified. Act to amend Section 1771.4 of the Labor Code.

Employees

- **Responsible Managing Employees (AB 830):** An RME must be "a bona fide employee of the applicant" who is permanently employed by the applicant and "actively engaged" in the business—meaning working 32 hours per week, or 80% of the total hours per week that the applicant's business is in operation, whichever is less.
  - RME must exercise supervision and control of their employer's or principal's construction operations as necessary to secure full compliance with the contracting licensing rules and regulations.
  - The new law defines "supervision or control" to mean direct supervision or control or monitoring and being available to assist others to whom direct supervision and control has been delegated.

AB 830 (cont.)

- Defines “direct supervision or control” to mean:
  - supervising construction,
  - managing construction activities by making technical and administrative decisions,
  - checking jobs for proper workmanship, or
  - supervision on construction job sites.
- The RME’s employer must, starting in 2022, prepare and submit to CSLB an employment duty statement detailing the qualifying individual’s duties and responsibilities for supervision and control of the applicant’s construction operations.
- Contractor who fails to submit this statement is subject to disciplinary action and misdemeanor punishment.

Employees

- **Employment, SB 727:** Expands existing direct contractor liability to include liquidated damages and penalties in circumstances where the direct contractor fails to meet payroll monitoring and corrective action requirements, as specified. For contracts entered into on or after January 1, 2022, the liability of a direct contractor for unpaid wages, fringe or other benefit payments or contributions (including interest) owed by a subcontractor is expanded to also include penalties and liquidated damages. *Act to amend Section 218.7 of, and to add Section 218.8 to, the Labor Code.*

- **Worker classification, AB 1561**: Eliminates the 3-part test, commonly known as the "ABC" test, to determine if workers are employees or independent contractors. Establishes a new 7-part test that considers whether a subcontractor can demonstrate whether all of the following criteria are satisfied:
  - (1) the subcontract is in writing;
  - (2) the subcontractor is licensed by the CSLB and the work is within the scope of that license;
  - (3) the subcontractor has the required business license or business tax registration if the subcontractor's domicile requires them;
  - (4) the subcontractor maintains a business location that is separate from the business or work location of the contractor;
  - (5) the subcontractor has the authority to hire and to fire other persons assisting the subcontractor in providing the service;
  - (6) the subcontractor assumes financial responsibility for errors or omissions, and
  - (7) the subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

  Act to amend *Sections 2778, 2781, 2782, and 2783 of the Labor Code*

General

Penalties

- **Expansion of Cal/OSHA Power to Enforce and Penalize, SB 606**: was enacted to mirror federal OSHA regulations that allow for heightened penalties for "egregious" safety violations at the state level.
  - Creates a rebuttable presumption that a Cal/OSHA violation committed by an employer that has multiple worksites is enterprise-wide if the employer has a written policy or procedure that violates Cal/OSHA rules and regulations, in most circumstances, or Cal/OSHA has evidence of a pattern or practice of the same violation committed by that employer involving multiple worksites.
  - The bill also authorizes Cal/OSHA to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut this presumption, and increases the penalties for enterprise-wide violations to the same level as willful or repeated violations

SB 606 (cont.)

- SB 606 also defines certain categories of “egregious” violations where Cal/OSHA will be required to issue a citation, rather than just a non-compliance notice. A violation is defined as egregious if any of the following are true:
  - The employer intentionally, through conscious and voluntary action or inaction, made no reasonable effort to eliminate a known violation.
  - The violations resulted in worker fatalities, a worksite “catastrophe” resulting in hospitalization of three or more employees, or a large number of illnesses or injuries.
  - The violations resulted in persistently high rates of worker injuries or illnesses.
  - The employer has an extensive history of prior violations of this part.
  - The employer has intentionally disregarded their health and safety responsibilities.
  - The employer’s conduct as a whole shows bad faith in their duties to maintain a safe workplace.
  - The employer has committed a large number of violations, which undermines significantly the effectiveness of any safety and health program that may be in place.

SB 606 (cont.)

- SB 606 requires Cal/OSHA to treat each instance of an employee exposure to an egregious violation to be considered a separate violation, allowing Cal/OSHA to stack cumulative penalties for widespread or ongoing safety violations.
- SB 606 also expands Cal/OSHA's investigatory powers, authorizing Cal/OSHA to issue an investigative subpoena if an employer fails to promptly provide requested information, and to enforce the subpoena if the employer fails to comply within a reasonable period.

Penalties

- **Subsurface installations, SB 297:** Increases penalties for operators or excavators who cause damage to a gas or hazardous liquid pipeline subsurface installation that results in the escape of any flammable, toxic, or corrosive gas or liquid, as specified. *Increases fines and penalties (up to $100,000) against contractors who violate regulations concerning excavations and subsurface construction work and damage underground utilities*.
- **Excavations, AB 930:** Provides reasonable attorney's costs and fees to a prevailing excavator who is found to, generally, not be at fault for damaging a subsurface installation due to errors on the part of the operator who owns, and is legally responsible for labeling the location of, the subsurface equipment. *Act to amend Section 4216.7 of the Government Code.*

Conclusion, Any Questions?

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