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**COURT OF APPEAL FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

OVERAA CONSTRUCTION,
Plaintiff/Appellant,

vs.

CALIFORNIA OCCUPATIONAL
SAFETY AND HEALTH APPEALS
BOARD,

Defendant/Respondent,

and

CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS, DIVISION
OF OCCUPATIONAL SAFETY AND
HEALTH,

Real Party in Interest

Court of Appeals Case
No. C051245

(Sacramento County
Superior Court Case No.
04 CS 00570)

**AMICUS CURIAE BRIEF OF
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA
IN SUPPORT OF APPELLANT,
OVERAA CONSTRUCTION**

Amicus Curiae Associated General Contractors of California (AGC) is pleased to present this brief for the court's consideration.

This is an appeal from the Superior Court of the State of California in the County of Sacramento of the Order and Judgment issued by the Honorable Lloyd G. Connelly dated October 19, 2005.

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I.

INTRODUCTION

In the decision at issue here,¹ the California Occupational Safety and Health Appeals Board (OSHAB, the Board, or Respondent) applied Title 8 California Code of Regulations (CCR) § 336.10 (the regulation), commonly referred to as the “multi-employer worksite” (MEW) regulation and found that Appellant, a general contractor, was a “controlling” employer under the regulation and therefore subject to citation for safety violations created by one of its subcontractors. Respondent found that a Title 8 safety regulation² was violated by the subcontractor. Respondent also found that Appellant had an aggressive safety program, employed an on-site safety coordinator, and had “buted heads” with this subcontractor on safety issues in the past. Respondent conceded that, despite all these efforts, Appellant was without actual knowledge of the violation’s existence.

Despite these findings, the Respondent upheld the citation issued by the Division of Occupational Safety and Health (DOSH,

¹ *In the Matter of the Appeal of: C. OVERAA & COMPANY*. Record, Vol. II, Tab 31. Appellant was referred as C. Overaa & Company in the Respondent’s decision, but as Overaa Construction in the caption in the lower court’s transcript. The company will be referred to herein as “Applicant” and Respondent’s decision as “the Overaa decision”.

² Title 8 California Code of Regulations (CCR) § 1541.1(a)(1) requires that employees working in excavations greater than 5 feet in depth be protected from cave-ins.

Cal/OSHA, or Real Party In Interest) to Appellant as a “controlling” employer.

Following the issuance of the *Overaa* decision, Appellant filed a Petition for Writ of Mandate with the California Superior Court. In oral argument before that court, Respondent contended that the *Overaa* decision only concluded that Real Party In Interest did not have a burden under the regulation to establish that employer knew of the violation or, in exercising reasonable diligence, could have known of the violation. Respondent sought to explain that, despite language in its decision, it left for later cases the question of whether a showing of due diligence or reasonable care could constitute an affirmative defense for “controlling” employers. Respondent argued that this defense was not properly raised at the initial hearing and therefore was not before the full Board when it considered Appellant’s petition for a Decision After Reconsideration.

The Superior Court accepted Respondent’s explanations and, in the Judgment dated October 19, 2005,³ ruled that Respondent did not determine whether Petitioner (Appellant herein) could have defended the citation as a “controlling” employer responsible for the safety order violation on the ground that Petitioner (Appellant) had not known, and in the exercise of due diligence could not have known, of the violation.

³ Clerk’s Transcript of Appeal at page 214-216.

However, the *Overaa* decision has been interpreted by Real Party In Interest's compliance officers, and Respondent and its Administrative Law Judges (ALJ's) in later cases, as establishing strict liability as the standard of care for "controlling" employers on multi-employer worksites in California.

For the reasons discussed herein, *amicus curiae* Associated General Contractors of California (AGC) believes that the *Overaa* decision and the Judgment are wrong. AGC believes that the decision should be remanded to clarify the standard of care required of a "controlling" employer on multi-employer worksites in California under the regulation, and to determine the availability to "controlling" employers of an affirmative defense based a showing of due diligence and lack of knowledge of an alleged violation.

II.

TITLE 8 CALIFORNIA CODE OF REGULATIONS SECTION 336.10: WHY IT EXISTS AND WHAT IT DOES

The United States "Occupational Safety and Health Act of 1970"⁴ (Fed/OSH Act) vests the Federal Occupational Safety and Health Administration (Fed/OSHA) with exclusive jurisdiction over occupational safety and health issues nationally. Under the Fed/OSH Act, individual states are provided the option of seeking approval from the Department of Labor to develop and administer

⁴ 29 United States Code (USC) § 651, et.seq., Public Law 91-596, 91st Congress, S. 2193, December 29, 1970.

state-specific occupational safety and health plans.⁵ California sought and obtained preliminary approval for the development of its own state plan. That plan was enacted as “The California Occupational Safety and Health Act of 1973” (the Act).⁶ Among other things, a primary condition for plan approval is the requirement that the state adopt standards “at least as effective” as federal standards.⁷

Early on in the history of the federal program, Fed/OSHA adopted an administrative policy of “multi-employer” liability. This policy was adopted to address issues arising where a number of employers are working together. Fed/OSHA’s authority for the policy is said to derive from Title 29, USC § 654(a)(2), which requires “all employers” to comply with the standards promulgated under the federal act.

On MEW’s, hazards can be created by one employer (called the “creating” employer) which expose employees of another employer (the “exposing” employer) to injury. On such sites, there often is a third employer with responsibilities for safety overall (the “controlling” employer). There may also be another employer which has taken on responsibility for abating hazardous conditions created

⁵ Title 29 CFR § 1902.1, et.seq.

⁶ Labor Code § 6300, et. seq. Unless otherwise noted, all “section” references are to the Labor Code.

⁷ Title 29 CFR § 1202.3(c)(1).

by others (the “correcting” employer). The federal multi-employer worksite policy has been upheld by the federal Occupational Safety and Health Commission (OSHRC) as imposing liability on “controlling” employers. As early as 1976, the OSHRC concluded that, based upon general contractors’s resources and supervisory roles on multi-employer worksties, they would be responsible for violations they could reasonably have been expected to prevent or abate by reason of that supervisory capacity. *Anning-Johnson Co.*, 4 BNA OSHC 1193 (No. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1275, 1976).

California’s multi-employer worksite regulation,⁸ and the later amendment of section 6400 to add subsections (b) and (c), were intended to expand the number of employers subject to citation on multi-employer worksites, and thereby provide Real Party in Interest with citation authority “as effective as” that provided by the federal MEW scheme.

Specifically, the Division was to be empowered to issue citations to employers other than those whose own employees were exposed to a hazardous condition. Section 6400(b) and (c), and Title 8 CCR § 336.10, mirror the federal policy as to the categories of employers which may be cited for violations of the safety orders. Neither addresses the standard of care to be applied to employers cited under the new rules.

⁸ Title 8 CCR § 336.10.

III.

THE CALIFORNIA LABOR CODE IMPOSES A DUTY OF REASONABLE CARE ON EMPLOYERS

- A. The Legislature Mandated “Reasonable Care” as the Standard for Employer Conduct Under the Cal/OSH Act.

Neither California Labor Code §§ 6400(b) nor Title 8 CCR § 336.10 addresses the standard of care to be applied to “controlling” employers. Absent specific direction, therefore, the MEW regulation must be applied in the context of the Cal/OSHA Act⁹ (the Act). The Act’s enabling legislation, found at Division 5, Part 1, Chapter 1 of the Labor Code, Labor Code §§ 6300, et seq., establishes the standard of care for California’s employers as reasonableness.

Section 6301 states:

The definitions set forth in this chapter shall govern the construction and interpretation of this part.

Section 6306(a) states:

"Safe," "safety," and "health" as applied to an employment or a place of employment mean such freedom from danger to the life, safety, or health of employees as the nature of the employment **reasonably** permits. [Emphasis added,]

Chapter 3 of Part 1 of Division 5 of the Labor Code, sections 6400 through 6413.5, establishes the responsibilities of California employers to their employees under the Act. As part of Division 5, these sections must be read in the context of their enabling legislation, for otherwise that legislation has no meaning. Each of

⁹ California Labor Code §§ 6300, et seq.

the sections of Chapter 3, including section 6403.5, contain within them, whether expressly stated or not, the Legislature's intention that the conduct of California employers's efforts be judged as "... the nature of the employment reasonably permits. " Labor Code § 6306.

Labor Code § 6400(a): Every employer shall furnish employment and a place of employment that is **safe** and **healthful** for the employees therein.

Labor Code § 6401: Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are **reasonably** adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing **reasonably** necessary to protect the life, safety, and health of employees.

Labor Code § 6402: No employer shall require, or permit any employee to go or be in any employment or place of employment which is not **safe** and **healthful**.

Labor Code § 6403: No employer shall fail or neglect to do any of the following: (a) To provide and use safety devices and safeguards **reasonably** adequate to render the employment and place of employment safe. (b) To adopt and use methods and processes **reasonably** adequate to render the employment and place of employment safe. (c) To do every other thing **reasonably** necessary to protect the life, safety, and health of employees.

Labor Code § 6404: No employer shall occupy or maintain any place of employment that is not **safe** and **healthful**.

Labor Code § 6405: No employer, owner, or lessee of any real property shall construct or cause to be constructed any

place of employment that is not **safe** and **healthful**.

Labor Code § 6406. No person shall do any of the following: (a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment. (b) Interfere in any way with the use thereof by any other person. (c) Interfere with the use of any method or process adopted for the protection of any employee, including himself, in such employment, or place of employment. (d) Fail or neglect to do every other thing **reasonably** necessary to protect the life, safety, and health of employees. [Emphasis added.]

Each of these obligations, either by explicit language or by reference to the definition of “safe” and “health” as provided by Section 6306, requires that care, as reasonably permitted, be taken for promotion of a safe and healthful workplace. This language leaves no room to conclude that employers may be held strictly liable for safety in the workplace.

B. The Courts Interpret the Act as Establishing Reasonableness as the Employer’s Standard of Care.

As early as 1899, the Supreme Court ruled that it is the duty of an employer to furnish employees with a **reasonably** safe place in which to work. *Hanley v. California Bridge & Construction Co.* (1899) 127 Cal 232, 59 P 577. In later cases, the California Courts have defined employers’s duties to include making ground conditions **reasonably** safe for those who might fall thereon while working on a structure above, taking **reasonable** steps to provide a safe and

secure workplace, and using **reasonable** care to protect employees by furnishing a suitable and safe workplace. *Powell v. Jones* (1955, 2nd District) 133 Cal. App. 2d 601, 282 P2d 856.

In the case of *Jean v. Collins Constr. Co.* (1963, 4th District) 215 Cal. App. 2d 410; 30 Cal Rptr 149, the Court of Appeal, Fourth District, specifically addressed the duty of a general contractor to provide a safe place of employment for the employees of its subcontractors. The Court acknowledged the statutory duties outlined in Labor Code §§ 6400, 6401, and 6403 and interpreted the general contractor's duty under those sections as requiring it to maintain the worksite in a **reasonably safe** condition.

In *City of Palo Alto v. Service Employees Internat. Union* (1999, 6th Dist) 77 Cal. App. 4th 327, 91 Cal. Rptr. 2d 500, the California Court of Appeal, Sixth District, addressed the duty of employer to provide a safe working environment when faced with the threat of workplace violence. The Sixth District addressed the statutory obligations imposed by Labor Code §§ 6400, 6401, 6402, 6403, and 6404 and concluded that the provisions express a public policy requiring employers to take **reasonable** steps to provide a safe and secure workplace.

Most recently, in *California Correctional Supervisors Organization, Inc. vs. Department of Corrections* (2002, 3rd District), 96 Cal. App. 4th 824; 117 Cal. Rptr. 2d 595, this reviewing court held:

Labor Code §§ 6400, et seq., which set forth the general duties of employers regarding safety, do not require an

employer to take all conceivable steps to ensure safety, nor forbid an employer from adopting practices or methods which might conceivably result in harm to an employee. No guarantee of safety is possible; room for discretion is required.

C. The Duty of Reasonable Care Imposed by the Cal/OSHA Act Is Not Altered by the Multi-Employer Worksite Statute.

The addition of subsection (b) to Labor Code § 6400 was for the purpose of enabling Real Party in Interest to issue citations to “controlling”, “creating”, “exposing”, and “correcting” employers. Subsection (b) does not address, and was not intended to alter the standard of care expected of California employers simply because they happen to be working on a multi-employer worksite.

Absent specific language, section 6400(b) must be interpreted and applied consistently with the intent and definitions found in Chapter 3, and as California’s workplace safety statutes have been applied by our courts for over 100 years. This requires holding “controlling” employers to the same standard intended for other employers; namely, that of reasonable care.

The Legislature’s failure to include the word “reasonable” in section 6400 cannot reasonably be interpreted as wiping out established precedent from the pages of California law, especially when that interpretation is applied to the conduct of an employer without direct control over the conditions and conduct being evaluated.

IV.

RESPONDENT'S DECISION EXPLICITLY REJECTS A REASONABLENESS STANDARD

Respondent claimed in the lower court that its decision (Record, Vol. II, Tab 31) in this matter did not address whether an affirmative defense of reasonable action or due diligence is available to a “controlling” employer on a multi-employer worksite because the issue was not raised by Appellant. Respondent requested that the Superior Court allow it to address this issue, as well as whether a “controlling” employer has **any** defense to a citation in future cases.

A fair reading of Respondent’s *Overaa* decision (Record, Vol. II, Tab 31), however, leads to the conclusion that Appellant’s lack of actual knowledge of the cited condition and its diligence in inspecting the work of its subcontractors for safety issues was raised by Appellant only to be disregarded first by Respondent’s ALJ and then by Respondent in its review based upon Respondent’s interpretation of Title 8 CCR § 336.10. Evidence of Appellant’s argument of due diligence in defense of this citation is found in the ALJ’s summary of evidence as well as his decision.

A. The ALJ Decision (Record, Vol. II, Tab 27).

The ALJ’s Summary of Facts references the testimony of the Division’s inspecting compliance officer Clifton Cooper. Mr. Cooper is said to have testified that Appellant’s superintendent, Robert Burke, informed Mr. Cooper that he (Burke) regularly inspected the

work of subcontractors and insisted that they comply with Appellant's Injury and Illness Prevention Program and applicable safety orders. Mr. Cooper further testified as to a "Subcontractor Safety Compliance Checklist" which Appellant required be completed by all subcontractors to demonstrate compliance with safety requirements. In addition, Appellant presented evidence of "Construction Jobsite Survey Reports" documenting regular inspections between July 25, 2001, and February 26, 2001, and a "Safety Alert" subcontractor sanctioning program. (Record, Vol. II, Tab 27, p. 5-6)

Mr. Burke advised Mr. Cooper that he did not inspect the trench in question on the day of the inspection but had done so on days before the inspection and had concluded it was less than 5 feet deep. Therefore, he believed that it did not require shoring or other protection against cave-ins. (Record, Vol. II, Tab 27, p. 8)

In his Findings and Reasons for Decision, the ALJ concluded that a violation of the cited regulation existed because the trench exceeded 5 feet in depth.¹⁰ (Record, Vol. II, Tab 27, p. 16) He further concluded that Appellant was responsible for worksite conditions by the terms of the contract Appellant entered with the owner and by Appellant's actual practice. Here, the ALJ acknowledged Appellant's efforts to ensure worksite safety. He

¹⁰ In contrast to the Superior Court's conclusion that, even if Appellant had raised a due diligence defense, it should have known of the violation, the ALJ described the trench as "...a muddy and uneven trench that was within a few inches of being 5 feet deep".

concluded that because of “...Burke’s testimony concerning how Employer (Appellant herein) discharged its subcontractor safety compliance responsibilities through inspections, corrections, and sanctions, the Subcontractor Safety Compliance Checklist and the Construction Jobsite Survey Reports Employer (Appellant herein) was responsible for subcontractor safety compliance ‘through actual practice’”. (Record, Vol. II, Tab 27, p. 25-26)

The evidence presented by Appellant to establish that it undertook reasonable, and in this instance possibly extraordinary, measures to ensure compliance with safety orders on the worksite and to discover and cure potential hazards was turned on its head. Instead of exonerating Appellant, its efforts were considered as evidence of Appellant’s status as a “controlling” employer.

For Respondent to now argue that the issue of reasonable care was not raised by Appellant is inexplicable. Apparently, Respondent does not see the irony in using Appellant’s evidence of its extensive attempts to insure a safe workplace as proof of liability “through actual practice”, and then ignoring that same evidence when arguing that Appellant did not raise a reasonable care defense at the hearing.

B. Respondent’s Decision After Reconsideration (Record, Vol. II, Tab 31)

The summary of evidence in Respondent’s *Overaa* decision focuses on that supporting the violation. Respondent accepts the

conclusions of Compliance Officer Cooper and the ALJ that Appellant was responsible, by contract and through actual practice, for safety and health conditions on the worksite and for the safety of the subcontractor's employees pursuant to the MEW regulation. (Record, Vol. II, Tab 31, p. 3-6)

The decision then addresses Appellant's responsibility for the violation under Title 8 CCR § 336.10. Here again, the testimony of the subcontractor's foreman that he constantly "butted heads" with Appellant's superintendent over safety issues and that "Burke constantly supervised Cra-Tek's employees regarding work safety" is used only to support Respondent's conclusion that Appellant was responsible for worksite safety by actual practice. (Record, Vol. II, Tab 31, p. 10)

Respondent then notes and rejects Appellant's three arguments in defense of the citation:

First, Appellant argued that liability under Title 8 CCR § 336.10 is conditioned on a showing that employer had actual knowledge of the cited condition. Respondent, without analysis, rejects this argument by stating: "By its terms, the applicability of section 336.10 is not conditioned upon a "controlling" employer's knowledge of the violative condition. (Record, Vol. II, Tab 31, p. 11)

Second, Respondent rejects Appellant's argument that "controlling" employers may only be liable under Title 8 CCR § 336.10 upon a showing that the employer failed to exercise reasonable care in discovering the violative condition. It is this

argument, that the Division does not have the burden of proving employer's lack of reasonable efforts in order to establish a violation, that Respondent now cites as the only precedent established by the *Overaa* decision. In doing so, Respondent attempts to ignore Appellant's third argument. (Record, Vol. II, Tab 31, p. 11-12; 15)

Appellant's third argument was that Title 8 CCR § 336.10 must be interpreted as including a "...reasonableness standard to ensure that strict or absolute liability is not imposed upon the controlling employer". Respondent rejected Appellant's reasonable care defense as inconsistent with a "controlling" employer's duties under the Act:

"The Board [Respondent] fails to see how Employer's use of a due diligence standard ensures a safe a workplace under the Act as the Division's interpretation. Employer's [Appellant's] interpretation would frustrate the affirmative duties of an employer under the Act. An employer could potentially escape liability by pleading it did not have knowledge of information available to it at the time the violation was discovered. Under this scenario, Employer's interpretation would bring about a defense which is deferential to the obligation mandated by the safety orders including the contractual safety responsibilities assigned to Employer." (Record, Vol. II, Tab 31, p. 14)

Respondent went further:

"Since the Act is aimed at promoting a safe working environment for all employees by holding the controlling employer liable for detecting work site violations, we decline to interpret the regulation in a way that contravenes the purposes of the Act." (Record, Vol. II, Tab 31, p. 14-15)

As we have seen, *supra*, Respondent’s view of the duties imposed on California employers by Division 5 of the Labor Code flies in the face of the plain language of the division’s provisions, and specifically section 6306’s definitions of “safe” and “health”. It ignores as well the standard of care used consistently by our courts in applying Division 5 from 1899 to the present. In short, Respondent’s understanding is wrong.

V.

RESPONDENT SHOULD NOT BE HEARD TO SAY THAT IT HAS NOT ADOPTED A STANDARD OF STRICT LIABILITY FOR “CONTROLLING” EMPLOYERS

The application of the *Overaa* decision (Record, Vol. II, Tab 31) by Respondent’s ALJ’s in later cases establishes that *they* believe that Respondent has adopted a strict liability standard for “controlling” employers, and that Respondent has rejected the notion that “controlling” employers’s evidence of their reasonable efforts to ensure safety on multi-employer worksites might constitute a defense to a citation.

Overaa has been followed by Respondent’s ALJ’s in several decisions to date. Each of these decisions cites the *Overaa* decision as precedent for one or both of the following principles:

1. Violations of Title 8 CCR 336.10 are not conditioned upon an “controlling” employer’s knowledge of the alleged violative condition, and;
2. A “controlling” employer’s evidence of reasonable efforts

to ensure safety does not constitute an affirmative defense to the citation.

The language of the ALJ decisions is not always clear regarding whether the ALJ specifically considered and rejected the availability of a due diligence defense to the “controlling” employers. It is clear however that in each case:

1. The “controlling” employer presented evidence of due diligence in defense of the citation(s);
2. Evidence of the employer’s active safety program was used to characterize the employer as “controlling by actual practice”;
3. The ALJ’s provided very little analysis, if any, to justify rejecting each employer’s evidence of reasonable care as supporting the employer’s appeal; and
4. The citations issued to “controlling” employers under the MEW regulation were upheld in EVERY CASE which cited *Overaa*.

In *The Matter of the Appeal of Hearn Construction, Inc.*, Cal/OSHAB 02-3533 (9/16/04); 2004 CA OSHA App. Bd. Lexis 58, it was alleged that employees of the employer’s roofing subcontractor were working on a construction project without appropriate fall protection equipment. Hearn Construction was cited as both the “controlling” and “correcting” employer on a MEW for its subcontractor’s violation of a fall protection regulation.

In upholding the citation, the ALJ addressed the issue of Hearn Construction's status as a "controlling" employer as follows:

"... it is found that by Employer's actual practice of conducting job-wide safety inspections, holding safety meetings with subcontractors, enforcing its safe rules by citing subcontractors found in violation of these rules or applicable Cal/OSHA regulations, and by taking direct action to abate hazardous conditions and/or arranging for corrective actions to be performed by the responsible contractor, Employer was responsible for safety conditions at the worksite as a controlling employer and correcting employer as those terms are defined by § 336.10.

The judge's rejection of the employer's "due diligence" defense was based solely upon the facts that the roofers could be seen from the ground, that the employer's job trailer was 75 to 100 feet away from the building and that because the employer's project superintendent was at the site on the day of the inspection, he could have discovered the alleged violation.¹¹

The Matter of the Appeal of Skidmore Contracting Corporation, Cal/OSHAB 02-2175 (8/20/04) 2004 CA OSHA App. Bd. Lexis 37, also involved a "controlling employer" citation for violation of a fall protection regulation by a subcontractor's employees. The employer's defense of reasonable diligence was rejected because the employer was aware of the architectural design of the building,

¹¹ The Division had alleged, in part, that the sub-contractor's anchorages were improperly secured in that they were nailed, as opposed to screwed, to the roof.

that the subcontractor's employees would require fall protection equipment, and that the employer's job trailer was approximately 200 yards away from the violative condition.

In *The Matter of the Appeal of California Family Fitness*, Cal/OSHAB 03-0095, April 4, 2005; 2005 CA OSHA App. Bd. LEXIS 36, the Division cited the employer, a fitness club, as a "controlling" employer for violations of various regulations related to the club's pool service's poor maintenance of the club's pool. The employer was credited as having an "extensive safety and health training program". The club's argument that its employees had no involvement with the pool chemicals and that it had relied on the expertise of the contracted service to ensure compliance with applicable regulations, however, was rejected as being "without merit" in light of Respondent's *Overaa* decision.¹²

Citations issued to the club as both a "controlling" and "correcting"¹³ employer were upheld by the ALJ.

In *The Matter of the Appeal of Harris Construction Company, Inc.*, Cal/OSHAB 03-3914 ALJ (10/12/05); 2005 CA OSHA App. Bd. LEXIS 91, the ALJ cited *Overaa* as precluding consideration of the

¹² Here, the ALJ justified her findings by stating that in *Overaa* the Respondent "...declined to interpret § 336.10 to require a showing that a controlling employer can only be liable if it failed to exercise due diligence in discovering the violative condition."

¹³ The finding that the employer also was a "correcting" employer was based upon its efforts to abate the hazardous conditions at its facility following discovery.

employer's evidence of due diligence in evaluating its liability under Title 8 CCR § 336.10.

It is important to note that in both *California Family Fitness* and *Harris Construction* the *Overaa* decision was held to require rejection of the employer's offer of evidence of due diligence. The ALJ's citations to *Overaa* were not limited to establishing Real Party in Interest's burden of proof. If Respondent truly believes that the *Overaa* decision left open the question of whether a "controlling" employer's reasonable efforts to ensure safety may constitute an affirmative defense to a MEW citation, it has done a poor job of educating its judges.

VI.

"CONTROLLING" EMPLOYERS ARE NOT SIMILARLY SITUATED TO EXPOSING EMPLOYERS AND OUGHT NOT TO BE HELD TO SAME STANDARD

The Act requires that employers take reasonable steps to provide a safe and healthful work environment for employees. Section 6300 et seq. Until the adoption of Title 8 CCR § 336.10, Respondent's enforcement of that duty had been limited to employers who exposed their own employees to workplace hazards.¹⁴ As we have seen, Title 8 CCR § 336.10 creates the potential for liability in four classes of employers for a single hazard.

¹⁴ *Red's Express*, OSHAB 81-1256, Decision After Reconsideration (March 7, 1985), 1985 CA OSHA App. Bd. LEXIS 63.

As we also have seen, and as was the case with Appellant, the “controlling” employer is usually not the “exposing” employer; that is, the employer designated by Respondent as “controlling” may not be, and usually is not, the employer of the employee exposed to the hazard. The control which can be exercised by the “controlling” employer over the conduct of the other classes of employers on a multi-employer worksite, therefore, is indirect. The degree of control which can be effectively exercised by a “controlling” employer must be evaluated in the context of its role on the worksite and with consideration to the amount of control it actually has over a given area or work activity.

To hold “controlling” employers, which enjoy only indirect control over other’s employees, to the strict standard established in the *Overaa* decision while the “exposing” employer, which has clear and direct control over its employees, is afforded the benefit of the affirmative defense provided in subsection (c) of section 6400, is unfair, unsupported by Division 5, and unnecessary.

The federal MEW scheme is a working model of how “reasonableness” standards can be applied to “controlling” employers on multi-employer worksites. The federal scheme recognizes that effective enforcement of the Fed/OSH Act requires that a “controlling” employer’s liability depends upon an analysis which balances the employer’s ability to control the hazard in question against the steps taken by that employer to either prevent or correct the hazard.

This concept is not foreign to California jurisprudence. In *Jean v. Collins Constr. Co. (supra)*, the Court applied the statutory obligations of the Act to conclude that a general contractor was to be held to a reasonable standard of care to provide a safe working environment for the employees of its subcontractors. The Court concluded that the general contractor in that case was required to provide reasonably safe ground covering under work being performed by its roofing subcontractor's employees. It was undisputed that the general contractor's duty did not require it to provide the same level of safety on the roof itself since that area, due to the nature of the work, was within the control of the subcontractor.

To Respondent, however, section 6400(b) and Title 8 CCR § 336.10 mandate that ANY activity undertaken by an employer to promote employee safety on a multi-employer worksite, whether it be routine inspections, safety meetings, or a policy of sanctioning subcontractors for safety violations, is evidence that the employer is a "controlling" employer. Once so labeled, Respondent suggests that it is powerless to do other than hold that employer strictly responsible for any and all safety violations which may occur.

Respondent's application of the MEW regulation has consistently disregarded the Act's provisions that California's employers are only obligated to provide *reasonably* safe and healthy workplaces. Those provisions should apply *a fortiori* to an employer which lacks direct control over an employee's safety and health.

VII.

RESPONDENT'S DECISION IS CAUSING IRREPARABLE HARM TO CALIFORNIA EMPLOYERS

Respondent has interpreted and applied section 6400(b) and Title 8 CCR § 336.10 without regard to either their genesis in federal law or their context within Division 5, Part 1 of the Labor Code. Respondent's insistence that Title 8 CCR § 336.10 creates a strict liability standard for employers deemed "controlling" is inconsistent with both the Act's enabling legislation and the Appellate Court rulings which have interpreted it. Worse, it is bad public policy.

There is no question that workplace safety is a paramount concern in California, and rightly so. Yet it is difficult to explain to even a responsible safety-conscious employer who has read the *Overaa* decision, and Respondent's decisions following it, of the value of additional pro-active safety efforts. When evidence of a "controlling" employer's efforts to insure the safety of workers is considered irrelevant except to prove liability even more firmly, what incentive does an employer have to do more?

It is now routine for California's workers' compensation carriers to base their underwriting decisions on, in part, the applicant's safety record.¹⁵ In addition, landowners and developers doing their own due diligence to "pre-qualify" contractors uniformly base their decisions in part on the prospect's OSHA record.

¹⁵ Go to <http://www.osha.gov/pls/imis/establishment.html> to find the citation history of any employer in the United States.

The Associated General Contractors of California has a real concern that the “law of unintended consequences” will soon affect its members’ ability to do business in California. Since general contractors are most vulnerable to being cited as the “controlling” employer, sooner or later these citations will inflate their workers’ compensation insurance premiums, or render them unable to find insurance at all. These citations eventually will justify a decision to disqualify general contractors from bidding future jobs based on events which, as Respondent conceded in its *Overaa* decision, may be wholly beyond their knowledge or actual control.

These citations also create liability where none otherwise would exist. Real Party In Interest is already issuing more punitive “repeat” citations to employers where the second violation arises solely as a consequence of their status as a “controlling” employer. *In the Matter of Krama, Inc.*, OSHAB Docket Number 04-R1D1-2035 through 2043, inspection number 300895083, is an appeal of, among other citations, a repeat general citation based upon an alleged second violation caused by a subcontractor at a time when the appellant had no employees or supervisors on the worksite, and had no knowledge or reason to expect that the alleged violation would occur.

Following this path will render the historical OSHA citation records unreliable for the valuable purposes they now provide in

weeding out the better contractors from the worse, in providing a true measure of an employer's commitment to safety, and as a research and statistics resource.

VIII.

CONCLUSION

The application of a strict liability standard on "controlling" employers creates a purely punitive practice when that employer, regardless of its diligence, had no knowledge of a hazardous condition.

Respondent's broad brush strokes paint all "controlling" employers on multi-employer worksites with the color of strict liability and put responsible, pro-active employers on the same plane as those who are indifferent to safety. In a very real sense, Respondent has given those indifferent employers a competitive advantage over companies as diligent as Appellant. This misinterpretation of the law devalues effective, pro-active efforts at workplace safety by California's employers and thereby tragically undermines the fundamental purpose of the Act.

If Respondent will not take action on its own to revisit its analysis in this case, this honorable Court should order it to do so.

For these reasons, Amicus Curiae urges the Court to direct Respondent to revise its decision in this matter accordingly.

Dated: February 14, 2006, Respectfully submitted,
THE WALTER LAW FIRM

Fred Walter
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Attorneys for Amicus Curiae
Associated General Contractors of
California

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rules of Court, Rule 14(c), the attached Amicus Curiae Brief is proportionately spaced, has a typeface of 13 points or more, and contains 6,635 words.

Fred Walter

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sonoma, State of California. I am over the age of 18 and not a party to the within above-mentioned action. I am employed in the County of Sonoma, State of California; my business address is 489 Powell Avenue, Healdsburg, California 95448-3419.

On February 14, 2006, I served the **AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA IN SUPPORT OF APPELLANT, OVERAA CONSTRUCTION** and the **APPLICATION OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT, OVERAA CONSTRUCTION** on the interested parties in this action by causing said documents to be enclosed in sealed envelopes, with the proper postage thereon prepaid, and depositing them in the United States mail at Healdsburg, California. addressed as follows:

Douglas G. Nareau, Esq.
Chief Counsel
Cal OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833-4229

Superior Court of California
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Stanton, Kay & Watson
7801 Folsom Boulevard, Suite 350
Sacramento, CA 95826

On February 14, 2006, I served five copies the **AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF**

CALIFORNIA IN SUPPORT OF APPELLANT, OVERAA CONSTRUCTION and the **APPLICATION OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT, OVERAA CONSTRUCTION** on the Supreme Court of California by causing said documents to be enclosed in a sealed envelope, with the proper postage thereon prepaid, and depositing it in the United States mail at Healdsburg, California. addressed as follows:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 14, 2006, at Healdsburg, California.

Lynn C. Cavallo

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