

Overaa, Harris Construction and Beyond:
The Status of “Controlling” Employer Liability at the
California Occupational Safety & Health Appeals Board¹

A. Summary:

California’s general contractors are at risk for workplace safety citations as “controlling” employers on multi-employer work sites (MEWs) under Title 8 California Code of Regulations section 336.10(c)² arising from conditions created by their subcontractors and others. While the Division of Occupational Safety and Health³ initially enforced the regulation only after a rigorous evaluation of the general contractor’s duties and conduct⁴, over time both it and the California Occupational Safety and Health Appeals Board⁵ came to apply the regulation strictly, without scrutiny, and with very limited defenses.

The California Court of Appeals upheld Cal/OSHA’s enforcement of section 336.10(c) in *Overaa Construction v. California Occupational Safety and Health Appeals Board*, (2007) 147 Cal.App.4th 235. The court left it to OSHAB to further define “controlling employer” liability and, most importantly, to determine in later decisions whether a showing of “due diligence” constitutes a defense to a violation.

Shortly after the Court of Appeals issued the *Overaa* decision, the Appeals Board issued its decision in *Harris Construction Co., Inc.*, Cal/OSHA App. Bd. 03-3914 DAR (March 30, 2007); 2007 CA OSHA App. Bd. LEXIS 50. The Board did not reach the question of what constitutes a “due diligence” defense because it found as a threshold matter that Cal/OSHA had failed to evaluate the general contractor’s actions before issuing a citation under section 336.10(c). It also set forth specific criteria to be evaluated before issuing a citation. Those criteria do not focus on general responsibilities for safety, but focus instead upon an employer’s actual knowledge of a specific hazard, and whether the means and opportunity to abate the hazard were available to the employer.

The *Harris* decision was confirmed and further explained by the Appeals Board in *Hearn Construction Inc.* Cal/OSHA App. 02-3533/3536 (September, 2008); 2008 CA

¹This brief was prepared in February 2009. The reader should review any more recent case law and further amendments to Cal/OSHA’s proposed regulation.

²All references are to Title 8 unless otherwise indicated.

³Also known as Cal/OSHA, DOSH or the Division.

⁴See Cal/OSHA Policy & Procedures Manual section C-1C, adopted 12/8/2000 at <http://www.dir.ca.gov/CAL/OSHAPoIDOSHPOI/P&PC-1C.HTM>

⁵Also referred to as OSHAB and the Appeals Board.

OSHA App. Bd. LEXIS 127. There the Board repeated that to be considered “controlling” the employer “...must have been in a position to abate a specific violation.”

The United Association Local Union 246, AFL-CIO has filed a petition requesting a *writ of mandamus* in Sacramento County Superior Court to overturn the *Harris* case. That case is currently on hold as the Union’s standing to sue is litigated. In the meantime, Cal/OSHA has proposed a new regulation which would define the circumstances under which an employer can be determined to be a “controlling” employer subject to citation, and what employers must prove to defend against that claim.

This article discusses the provisions and enforcement of section 336.10(c), the effects of the *Overaa* and *Harris Construction* cases, and the regulatory “fix” proposed by the Division.

B. Background:

Title 8 CCR section 336.10 was enacted by the California Occupational Safety and Health Standards Board on December 1, 1997 to bring California into compliance with Fed/OSHA’s multi-employer liability policy⁶. In 2000 the California Legislature enacted Labor Code § 6400(b) as part of Assembly Bill 1127, formally codifying the regulation as Cal/OSHA’s “multi-employer workplace” regulation.

The statute and the regulation identify four categories of employers on multi-employer work sites which can be cited for violations of Title 8 safety orders.⁷ Since then, Labor Code § 6400(b) has become one of the most contentious provisions of a piece of legislation full of contentious new rules⁸.

⁶Ironically, Fed/OSHA’s policy was overturned by the federal Review Commission in *Secretary of Labor vs. Summit Contractors, Inc.* OSHRC Docket No. 03-1622; 2007 OSAHRC LEXIS 34 on April 27, 2007. That decision is under appeal.

⁷ The four categories of MEW employers are: (1) the employer whose employees were exposed to the hazard which constituted a violation of a safety order (the “exposing” employer), (2) the employer which created the hazard (the “creating” employer), (3) the employer which had the responsibility for eliminating the hazard (the “correcting” employer), and (4) the employer with responsibility, by contract or actual practice, for safety and health conditions in the workplace (the “controlling” employer).

⁸Among the issues not yet resolved, for example, is the very definition of a multi-employer work site. Cal/OSHA, for example, cited a health club as the “controlling” employer for its failure to provide safety equipment, materials and training to employees of its pool maintenance contractor. The ALJ upheld the citation. *California Family Fitness*, Cal/OSHA App. Bd. 03-0095/0096 DAR (April 4, 2005), 2005 CA OSHA App. Bd. LEXIS 36.).

C. Cal/OSHA's Enforcement and the Board's Administrative Law Judges' Response:

When the MEW regulation was enacted, Cal/OSHA developed a three-part test for its inspectors to follow when analyzing an employer's status. The purpose of these procedures, according to then-Cal/OSHA Chief John Howard, was to protect alleged "controlling" employers from unwarranted citations. However, partly due to the sheer complexity of the required analysis, the Division's inspectors quickly adopted the viewpoint that any up-stream employer with any retained oversight is a "controlling" employer. Further, it is Cal/OSHA's view that there may be more than one "controlling" employer on a job site.

It did not take long for the Board's Administrative Law Judges (ALJs) to join Cal/OSHA in reducing its analysis to shorthand. So long as the general contractor had some level of control over the work on the site and the power to order a subcontractor to abate a hazard it could have found, the odds were that it would be held to be controlling.

D. The Appeals Board's Response

1. The Old Board

The Appeals Board is composed of three seats, each of which is occupied by a member representing a separate segment of the population. The Board seats are, respectively, the "Labor" seat, the "Management" seat, and the "General Public" seat. When Labor Code § 6400(b) was enacted, the three-member Appeals Board had only two members: The Labor seat was filled by a former SEIU business manager, and the General Public seat was filled by a retired lobbyist for the Teamsters' Union. The Management seat remained empty during the administration of former Governor Gray Davis.

The first Decision After Reconsideration issued by this Board on the question of "controlling" employer liability was *Overaa, supra*. There, the general contractor's safety consultant aggressively walked the job to look for, and order correction of, safety hazards. A Cal/OSHA inspector, however, found that an unshored trench was six inches too deep at one end and issued citations classified as Serious to the subcontractor as both the "creating" and the "exposing" employer, and to Overaa as the "controlling" employer. The Board's decision upholding the citation against Overaa strongly implied that a "controlling" employer's liability for the errors of a creating or exposing employer is strict.

The Board also held that the employer's argument that proof of "due diligence" in the pursuit of safety constituted an affirmative defense was not properly raised at the

initial hearing and that, even if it had been, this defense would operate merely as a partial defense affecting only the classification of the citation.

Board decisions following *Overaa* confirmed employers' fears that section 336.10(c) would be applied strictly against "controlling" employers, and removed any hope that a general contractor's good faith efforts toward safety would be rewarded by either dismissal of the citation or reduction of its classification.

In one such case, for example, the Board dismissed a general contractor's attempt to show that it acted with due diligence in the performance of a CalTrans contract by hiring only expert subcontractors for specialty work, making the breathtaking assertion that if the general was not qualified to supervise all of the work called for in the contract it should not have bid the job. *DeSilva Gates Construction Cal/OSHA App. Bd. 01-2742 DAR* (Dec. 10, 2004), 2004 CA OSHA App. Bd. LEXIS 62.

Overaa was appealed by writ to the Superior Court and from there to the Court of Appeals. The appellate court upheld the Appeals Board decision, saying in *dicta* that while there might be an affirmative defense to "controlling" employer liability, the existence and elements of that defense was an issue for the Appeals Board to determine in later decisions.

2. The New Board

By the time the Court of Appeals ruled on *Overaa* the composition of the Appeals Board had changed. The Management chair had been filled by the Schwarzenegger administration with a corporate safety director from UPS and a retired Republican assemblyman was appointed to fill the General Public position. The Labor seat had become (and remains) vacant. Within weeks of the *Overaa* decision, the new Board issued its Decision After Reconsideration in *Harris Construction*.

Harris Construction was the general contractor on a public works project. During the job an unsupervised apprentice pipe-fitter was seriously injured when he attempted to work on a pressurized line. Harris was cited for two reasons: First, because the Cal/OSHA inspector found language in its contract with the public agency generally stating that it would be responsible for safety, and second, because the accident happened near Harris's job trailer, creating an inference in Cal/OSHA's view that its managers could have easily seen what was going on.

The new Board overturned the ALJ's decision upholding the citation. The Board held that while contractual language is a factor in determining whether an employer can be held to be "controlling", it is not, by itself, determinative. Furthermore, the Board found that Labor Code § 6400(b) vests Cal/OSHA with discretion regarding whether to issue a citation, even if an employer is deemed "controlling". Among the factors the

Board held Cal/OSHA must weigh before deciding whether an employer on a MEW is “controlling” are the degree of responsibility the alleged “controlling” employer had for the hazardous condition, its awareness of the hazard, the foreseeability of the hazard, and whether reasonable steps were taken to protect employees.

The Board further held that the employer must be shown to have been in a position to abate, or order abated, the specific hazard in question. As for the job trailer, the Board stated in a footnote that the employer’s “mere presence” on the site does not render it liable for everything that transpires on the premises.

The new Board also appears to have answered the old Board’s view on the scope of a general contractor’s responsibilities stated in the *DeSilva Gates* decision, without specifically mentioning that case: “Consistent with our view that different employers in a multi-employer worksite have differing roles and responsibilities, we find that general contractors are not charged with staying abreast of their subcontractors’ every activity. We do not believe general contractors are required to consult with their subcontractors about each step they plan to undertake in their work as well as the manner in which they plan to undertake it. A general contractor is not charged with that level of oversight.”

Having decided the appeal on the threshold issue of proper issuance, the Board did not rule on the employer’s effort to raise a “due diligence” defense, nor did it rule on whether Harris was justified in relying on the expertise of its pipe-fitting subcontractor. It did confirm the existence of an affirmative “due diligence” defense, but did not opine on its elements.

The Appeals Board confirmed the *Harris Construction* decision in *Hearn Construction, Inc.* Cal/OSHA App. Bd. 02-3533/3536 DAR (September 19, 2008); 2008 Ca. OSHA App. Bd. LEXIS 127. Here, the underlying violation was a subcontractor’s failure to ensure that planking on a scaffold was not less than twenty inches wide, a violation of section 1647(e)(2). The Appeals Board found that while Hearn played a very active role in safety on this job, Cal/OSHA failed to establish that the hazard was foreseeable or capable of being anticipated, or that it was readily apparent by normal observation. It also found that there was nothing inherent in this situation which required the general contractor’s involvement. Again, the Appeals Board did not reach the question of what constitutes a defense based upon “due diligence.”

E. Cal/OSHA’s Proposal

1. Cal/OSHA’s Objections to *Harris Construction*.

Cal/OSHA does not like the *Harris* and *Hearn* decisions. First, it believes that the Appeals Board has introduced elements into the analysis of who is and who is not a

“controlling” employer which are not to be found in Labor Code section 6400(b)(3).

Labor Code section 6400(b)(3) reads:

On multi-employer work sites, both construction and nonconstruction [sic], citations may be issued only to the following categories of employers when the division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the division: *** The employer who was responsible, by contract or through actual practice, for safety and health conditions on the work site, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer).”

Cal/OSHA’s position is that the language of this section limits the Appeals Board to determining the status of a “controlling” employer on the broad basis of whether an employer has acquired the role of overall supervisor of safety on a job, either by contract or by its actions. In Cal/OSHA’s view, the Appeals Board does not have the latitude to determine an employer’s status and liability by assessing the employer’s actual knowledge of a specific hazard, or its precise ability to take action to abate it.

Second, Cal/OSHA believes that *Harris* places an impossible burden upon its inspectors to decide whether an employer is “controlling” or not. Cal/OSHA claims that after an incident it can become impossible to gain sufficient information from employers to make the findings required by the *Harris* and *Hearn* decisions. For example, if a foreman is advised by counsel not to answer questions whether he or she knew of a certain condition, how can the Division determine if the employer was aware of it and had opportunity to abate it?

Third, Cal/OSHA claims that the *Overaa* decision and the *Harris* response, coming as they do from two Boards with very different political orientations, demonstrate that both employers and Cal/OSHA are at the mercy of political appointees. Why not, then, retake control of our joint fortunes by agreeing to a regulation which will define who is a “controlling” employer and preserve ourselves from the unpredictability of future Appeals Board decisions?

2. The Proposed Regulation

The Division proposes to address its concerns by adding section 336.12 to its part of the Title 8 regulations. [Click here to see the February 9, 2009 draft \(http://www.walterlaw.com/336.12-draft.pdf\)](http://www.walterlaw.com/336.12-draft.pdf) of the proposed regulation, which is also posted on our Resources page. Section 336.12 is intended to do three things. First, it would limit evaluations of “controlling” employer status to a strict reading of Labor Code section 6400(b)(3). Second, it states that no defense to status other than that provided for in the regulation shall be recognized. These two steps are intended to restrict the

Appeals Board's power of review and to erase the *Harris* and *Hearn* decisions.

Third, it would create an affirmative defense for "controlling" employers and prohibit Cal/OSHA from issuing a citation before determining whether the "controlling" employer qualifies for the affirmative defense by having undertaken the specific steps set forth in the regulation. This would be the only defense to "controlling" employer status. The employer would then have two options: 1) Offer proof of its qualification for the defense during the inspection to avoid a citation from being issued, or 2) Choose to wait and produce that information during its appeal in the event citations are issued.

The proposed regulation has been available for review for some time, and two stakeholder group meetings have been held to explain its purposes and to gain input. On the Management side, the regulation is supported by the Associated General Contractors of California and trade groups of wood frame construction contractors and specialty contractors, whose representatives were instrumental in writing the proposal.

Opposition from Labor has generally been that the elements of the defense are not strict enough. Labor successfully sought an amendment that the "controlling" employer shall employ a "designated person" to oversee the subcontractors's work. "Designated person" is defined as a person "capable of identifying existing and predictable hazards ...and who has authorization to take prompt corrective measures...." Additionally, labor groups believe the "boundary statement" in section (d)(3) is too lax. That section now provides that the "controlling" employer shall make all reasonable and diligent efforts to verify substantial compliance with both Title 8 safety orders and "...current, accepted safety and health practices."

The final version of the proposed regulation is expected to be submitted for approved within the next few months.