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Third-party safety consultants may be liable to workers under new ruling

By Benjamin Kim and Maritza Martin

On July 30, 2018, a California Court of Appeal ruled that a third-party safety consultant can be held liable to an injured worker through a "negligent undertaking" claim.

In *Peredia v. HR Mobile Services, Inc.*, the California appellate court reversed a trial court decision to grant summary judgment in favor of a safety consultant sued by the parents of a 19-year old worker who died after being hit and run over by a tractor. The lawsuit sought wrongful death and related claims against the safety consultant based on the allegation that the safety consultant failed to create, institute and implement an effective safety program at the company that employed the deceased worker. Before the fatal accident, the company had hired the safety consultant through a "handshake agreement" to render safety consulting services, including proving safety policy documents, quarterly safety meetings and quarterly safety inspections at the employer's worksite.

The California appellate court concluded that the common-law theory of "negligent undertaking" could apply to a safety consultant if:

- The safety consultant agreed to render services to the company;
- The safety consultant should have recognized the type of service as necessary for the protection of the company's employees;
- The safety consultant failed to exercise reasonable care in the performance of the services;
- The failure to exercise reasonable care resulted in physical harm to a company employee; and
- Either: (1) the safety consultant's carelessness increased the risk of injury, (2) his/her task was to perform a duty that the employer owed to the employees or (3) the harm was suffered because of the reliance by the employer or its employees on the safety consultant's undertaking.

The California appellate court concluded that the safety consultant in *Peredia* "undertook to assist [the company] in carrying out its workplace safety obligations and accepted a role (the extent of which is disputed) in conducting safety inspections and safety training." The court also rejected the argument that a safety consultant needs to fully assume the company's safety obligations in

order for the negligent undertaking theory to apply. Because courts are likely to focus on the factors above, employers and safety consultants should take various steps:

- Enter into a written contract (avoid verbal or "handshake" agreements) that specifically delineates the duties delegated by the employer to the safety consultant and those retained by the employer.
- Exercise reasonable care when carrying out those duties and document those efforts as much as reasonably possible.

In addition, safety consultants, independent consultants and even insurance brokers with safety consultants should do the following:

- Become familiar with an employer's business and the potential hazards for employees to understand the nature and extent of those duties and tailor the services to each business, its facilities and equipment, as well as the specific potential hazards (avoid "boilerplate" materials).
- Discuss and resolve any issues with employers who may give instructions that may call into question whether the consultant acted with reasonable care. Outside consultants are liable for their own tortious acts whether or not the employer is also liable and irrespective of whether they acted in accordance with the employer's directions.

Although the above are general guidelines, both safety consultants and employers should consult with counsel regarding the effect of *Peredia* on their own businesses.

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