

Multiemployer Sites in the U.S. Project Control & Duty of Safety Care

By Vladimir Ivensky

In the absence of a clearly defined duty of safety care to subcontractors or other multi-employer project parties in OSHA regulations and in many state laws and regulations, recognizing safety-related duties, liabilities and mitigative strategies poses a challenge for any company hiring subcontractors or acting at multiemployer project sites. The duty of care can be regulatory (statutory), retained via a contract or retained via controlling (managing) actions in the field. Knowing the mechanism of retaining or avoiding the duty of care (and associated liabilities) is an important consideration when designing safety risk mitigative strategies at multi-employer projects.

This article reviews the mechanism of retaining the duty of care via control and provides an overview of risk mitigative strategies. It discusses two categories of negative scenarios related to the duty of care (both based on actual case studies):

- Scenario 1: A company had a duty of care to a subcontractor, but failed to mitigate the risk and to achieve the standard of care. A serious incident involving a subcontractor resulted in a lost gross negligence case.

- Scenario 2: A company does not have a statutory or contractual duty of care to a subcontractor, but unintentionally retains the duty of care through unnecessary safety management actions. Lengthy post-incident litigation resulted in no damages for the defendant.

It is recommended to consult with legal and safety representatives before setting up or participating in multiemployer field projects to develop

effective third-party safety risk mitigative strategies. Those strategies should be based on either avoiding third-party-related duty of care or, when the duty of care is unavoidable, on implementing effective safety management programs that would ensure that sufficient levels of safety care and mitigation of liabilities are achieved.

Safety Duty of Care

For a company hiring a subcontractor, a duty of safety care to a subcontractor can be statutory (regulatory), retained by a contract, retained by action (control) or some combination (Figure 1, p. 46). Similarly, to any company engaged at a multi-employer project site (no matter with subcontractors or not), the duty of safety care to any contractor present at the site or a project-wide duty of safety care can be retained by a law, by a contract or by action (control).

In the absence of a clearly defined statutory safety duty to the subcontractors or project-wide in the federal OSHA and in many state laws and regulations, review of control-retained duties and liabilities are of interest for any company hiring subcontractors or acting at multiemployer project sites.

When the statutory safety duty is nondelegable, the hiring contractor cannot avoid liability when the duty is breached.

The safety duty of care to subcontractors can be presented as follows:

- When statutory duty exists and it is delegable, it can be properly delegated.
- When statutory duty exists and is not delegable, it should be fulfilled.
- When no statutory or contractual duty exists but sufficient control is applied, the duty of care is generated and retained by a hiring company.
- When no statutory or contractual duty exists and no control is applied, there is no duty of safety care to a subcontractor by a hiring company.

Regarding contractual safety obligations subcontractors, the duty of safety care to a subcontractor or project-wide can be retained:

- in the contract with a higher tier (client);
- in the contract with a lower tier (subcontractor).

IN BRIEF

- OSHA risks related to subcontractors are significant business risks encountered by contractors that employ other contractors.
- Mitigating these risks is an important task of a hiring contractor's management team, which should recognize statutory, contractual and control-generated duty of care to subcontractors.
- This article discusses the duty of safety care created by control over a subcontractor or over other project parties and the ways to mitigate the related liabilities.

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Retained Control & Duty of Safety Care in the U.S. Common Law

In the U.S. common law, the starting point for determining whether a duty of care exists on a contractor hiring other contractors is found in §414 of the Restatement (Second) of Torts (ALI, 1965):

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. (ALI, 1965)

The “retained control” element is further explained in comment (c) to §414:

In order for the rule stated in this section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which

need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way. (ALI, 1965)

Under this U.S. common law, the hirer of an independent contractor (a principal employer) does not have a default initial duty of care to the independent contractor. The duty arises with the retained control, when the “contractor is not entirely free to do the work in his own way.”

OSHA’s (1999) multiemployer citation doctrine and policy is consistent with the U.S. common law with respect to a “controlling employer.” Both the Restatement (Second) of Torts (ALI, 1965) and OSHA (1999) agree that control generates the duty of care. Neither OSHA (1999) nor U.S. common law establish a default statutory duty of care on a company hiring a subcontractor. The duty may be generated and retained depending on a fact of a control. The physical absence of control would indicate the absence of control-generated duty of care (other types of duty of care—statutory or contractual—may still exist and may be applicable).

The default statutory duty for a principal employer (those hiring an independent contractor)

Figure 1

Statutory & Retained Safety Duty at a Multiemployer Project

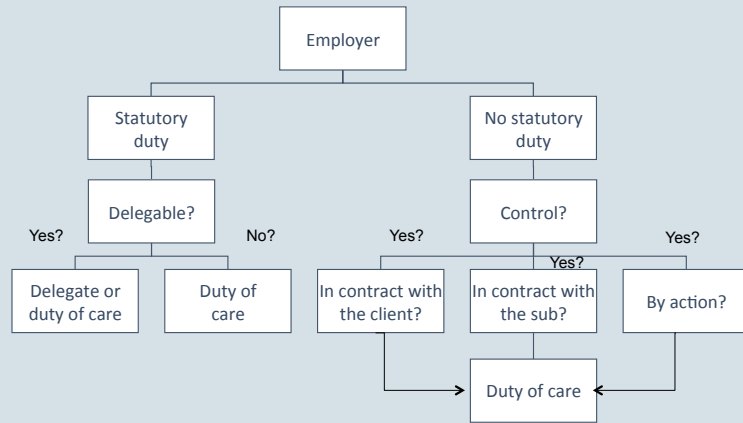
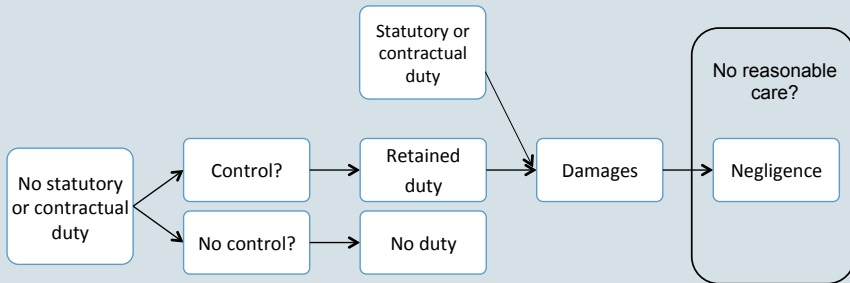


Figure 2

Safety Duty to an Independent Contractor Created by Control



does not exist in the U.S. federal safety regulations or in the U.S. common law. However, it exists in some state safety regulations or court interpretations (for example, in the state of Washington).

The clearly defined statutory duty of care toward a subcontractor is present in Canadian federal and provincial OSH laws and in the U.K. safety and health regulations.

Controlling Employer Duty of Care in the U.S.

Figure 2 illustrates the duty to an independent contractor, statutory or retained by control or a contract, and potential outcome in a case where “reasonable care” was not provided.

In the U.S. common law (*Lee Lewis Construction Inc. v. Harrison, 1999*):

(R)etention of control over an independent contractor’s work a necessary, but not a sufficient, condition of liability. Another prerequisite for liability under the rule is that the person harmed be among those “others for whose safety the employer owes a duty of reasonable care.”

When it comes to a controlling employer duty of care doctrine, the strategy can be twofold: 1) agreeing that control is present and proving that reasonable care is in place (standard of care is achieved); or 2) proving no statutory duty and no control (either contractual or actual) and, therefore, no retained duty of safety care.

One exclusion of the above strategy is the absolute liability situations. Under the absolute liability laws, the proof of reasonable care is irrelevant as there is no need to prove negligence. That scenario is rare in occupational safety laws and regulations. One example is the New York scaffold law (Scaffolding and Other Devices). This exclusion emphasizes the need for management teams to ensure the knowledge of local jurisdictions in advance of any business decisions.

Under OSHA’s multiemployer site citation policy, a controlling employer is one:

... who has general supervisory authority over the work site, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. (OSHA, 1999)

Absence of the subcontractors is not determinative of controlling employer status (Swanson, 2001).

The OSHA inspector is able to cite a controlling employer for a subcontractor’s or other project party’s safety violation. No incident, injury or any kind of damage to a subcontractor or other project party is a prerequisite for such a citation.

In the absence of statutory or contractual duty of safety care to a hiring company, when control over subcontractors or other

project parties is applied above the levels generating a safety duty of care, but the standard of care is not yet achieved, the hiring company’s liabilities are uncontrolled (Figure 3). The ratio between the level of control applied (effort) and safety care achieved (result) can vary, depending on the quality of a subcontractor managed.

High-quality subcontractors (Sub 1) will require little control from the hiring company to achieve the required standard of care; poor-quality subcontractors (Sub 2) will require significant levels of control from the hiring company with a risk that the standard of care may not be achieved.

In practice, the “control creating duty” vertical line and the “standard of care” horizontal line may be blurry and open to legal interpretation.

No Control & No Duty of Care Safety Strategy

The no-control-and-no-duty defense for a hiring contractor is only possible where no statutory or contractual duty of care toward a subcontractor

or other project employer exists. The no-control defense has been a prevalent defense strategy for construction incident litigation cases in Texas, predominantly for property owners, where in 8 of 10 cases litigated at the Texas Supreme Court level, the no-control argument was used as a defense.

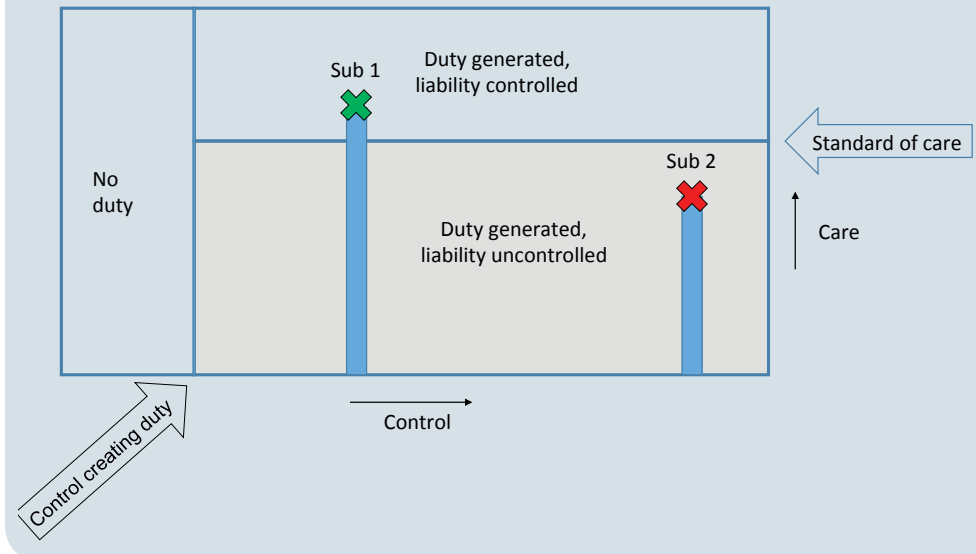
Johnson and Timmons (2010) provide a list of inadequate controls for liability based on the analysis of several construction cases reviewed by the Texas Supreme Court. Inadequate control in this context is actually good news for the defendants, as adequate control would be evidence of the existence of the duty of safety care, which would then require proof that the standard of care was achieved (which would be problematic in all of the cases reviewed) (Johnson & Timmons, 2010).

According to the Texas Supreme Court, those project control actions did not create the duty of safety care:

- 1) Retention of or exercise of the right to stop or start work.
- 2) Retention of or exercise of the right to inspect or receive reports about the work of an independent contractor.
- 3) Retention of or exercise of the right to make suggestions or recommendations, which need not necessarily be followed, or to prescribe alterations and deviations.
- 4) Placing a safety employee on the work site to observe the work of the independent contractors.
- 5) Placing a safety representative on the work site that could have stopped the plaintiff from working had the representative known of the safety hazard on its premises.
- 6) Creating a safe work permit system, giving the owner the general right to preclude independent contractor's work from beginning in the first place.
- 7) Exercising general control over safety matters on the work site, where the safety regulations or procedures do not actually cause or contribute to the plaintiff's injury.
- 8) Exercising the general right to order the work stopped or resumed, inspect the premises or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.
- 9) Maintaining the right to forbid work unless the contractor complies with safety regulations.
- 10) Providing training materials to an independent contractor who fails to use them. (Johnson & Timmons, 2010)

Figure 3

Duty of Care Generated by Control & the Standard of Care (No Statutory & Contractual Duty of Care)



While some of these actions may appear logical or useful, they were based on mistaken understanding of project safety roles and responsibilities and resulted in lawsuits.

A similar no-control strategy may apply in cases argued to contest controlling employer citations under OSHA's (1999) multiemployer citation policy. In OSHA's citation context, the definition of control versus no control may differ from and is less stringent than the negligence tort cases listed previously. Any item from the cited list of controls would constitute sufficient evidence for an OSHA inspector to cite a controlling employer in a case of a subcontractor's OSHA violation.

Two Categories of Negative Scenarios for Project Safety Management

Two categories of negative scenarios related to statutory/contractual duty and retained project control duty are possible:

- 1) Scenario 1: A company has a statutory or contractual duty of safety care (Figure 4, p. 48) but fails to realize it and/or fails to achieve the reasonable care (perform to a standard of care).
- 2) Scenario 2: A company does not have a statutory or contractual duty of safety care but delivers enough project control to generate and retain that duty (often without realizing it) (Figure 5, p. 49).

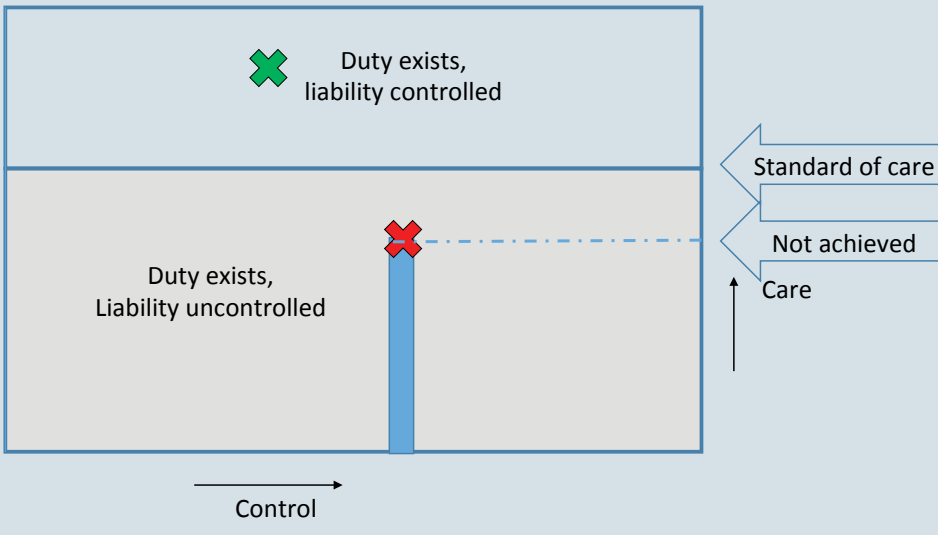
Following is further discussion of those two potential scenarios.

Scenario 1

A company has a duty of care to a subcontractor, but it failed to mitigate the risk and to achieve the standard of care. A serious incident involving

Figure 4

Company Had a Duty of Safety Care to a Subcontractor, But Failed to Exercise It; Standard of Care Is Not Achieved



a subcontractor resulted in a lost gross negligence case (Figure 4).

Case name: *Lee Lewis Construction Inc. v. Harrison* (1999)

Cause: Subcontractor's fatality

Brief case description:

Methodist Hospital in Lubbock engaged Lee Lewis Construction Inc. (LLC) to be the general contractor on a construction project that included remodeling the eighth floor of one of the hospital's buildings and adding ninth and 10th floors. The contract between the hospital and LLC required LLC to be "solely responsible" for every aspect of the work, including "initiating, maintaining and supervising all safety precautions and programs," and to take "all reasonable precautions for the safety of . . . all employees" at the site, including assigning one of its employees at the site the duty of preventing incidents. The contract contemplated that LLC would use subcontractors to do the work and required that they each undertake to LLC the same responsibilities for their own work that LLC owed Methodist for the project as a whole.

One of the subcontractors, KK Glass Co., was to do the glass glazing and window installation. The work required KK Glass employees to install aluminum window frames from inside the building but then lean out over the side of the building to do caulking, thermal insulation and other work. Setting the glass in place had to be done from a swinging stage outside the building. The subcontract authorized LLC to remove from the project any KK Glass employee who failed to comply with safety requirements.

KK Glass allowed its employees to work outside the building sitting on a "bosun's chair," a

wooden board suspended from the roof by a rope. The bosun's chair could not be used safely unless the worker was attached to the building by an independent lifeline separate from the rope that held the "chair"; otherwise, there would be nothing to prevent the worker from falling to the ground if the rope became detached or if the worker slipped while getting onto or off of the "chair," or while sitting on it.

LLC's superintendent had . . . watched without objection as KK Glass employees attached the bosun's chair to the roof and used it without a lifeline. Indeed, anyone could clearly see from the ground that KK Glass employees were working outside the building eight floors up suspended by nothing more than a board attached to a nylon rope hung from the roof.

Jimmy Harrison, a KK Glass employee, was working on a window on the 10th floor of the building when he fell to his death. No one witnessed his actual fall, and some of his coworkers believed that Harrison had been working inside the building while others thought he had been outside in the bosun's chair. Harrison's body was found with a lanyard hooked to his safety belt. KK Glass employees immediately disconnected the bosun's chair from the roof and removed it. It was never found.

Default/initial duty of care: Duty of care existed through contract with the owner and subcontractors, and because field safety management activities.

Reasonable care provided? No

Outcome: Gross negligence by a hiring contractor (general contractor).

Damages to the defendant: \$12 million.

Court comments:

- The general contractor agreed with the owner to be responsible for the safety of its own employees, its independent subcontractors' employees and everyone else on the construction site.

- The general contractor required the subcontractors to agree to adhere to a voluminous, detailed safety manual under penalty of being removed from the project.

- Although subcontractors agreed to be responsible for the safety of their own employees, the general contractor had the right to monitor their efforts and did so.

- Contractually and actually, the general contractor had thorough control of safety on the site, which is typical for major construction projects.

- Such control over independent contractors serves the important public interest of minimizing work-related injuries. That interest would be impaired if a general contractor's retention of con-

trol over job safety triggered a liability to which it would not be exposed if it gave independent contractors free rein to take whatever risks they chose in order to get the work done.

- [This] would be a perverse rule indeed if it punished the general contractor who tried to protect workers by controlling job safety and exonerated the general contractor who stood aside and let them fend for themselves.

- In this case, there is more than retained control. The general contractor also actually knew that the independent subcontractor was using an extremely dangerous device in its work and did nothing to stop it. The evidence supports the jury's findings that the subcontractor and the general contractor were both grossly negligent, the one in using the device, and the other in failing to prevent its use.

The Texas Supreme Court made the above decision based on the U.S. common law. No OSHA regulations or multiemployer citation policy were part of that ruling. Therefore, the ongoing debate on OSHA's multiemployer policy applicability to controlling employer, while it can be of consequence to the fate of OSHA citations to controlling employers, would not impact courts' decisions regarding controlling employer tort negligence based on the common law.

When a statutory, contractual or control-retained duty of care to a subcontractor exists, reasonable care must be provided. Understanding the existence of a duty of safety care and the standard of care is required for the management of a company hiring the subcontractors or operating at multiemployer project sites. When duty of care exists and some care is provided, it may not be sufficient to satisfy the standard of care and, in a case of a safety incident, the defendant may be found negligent.

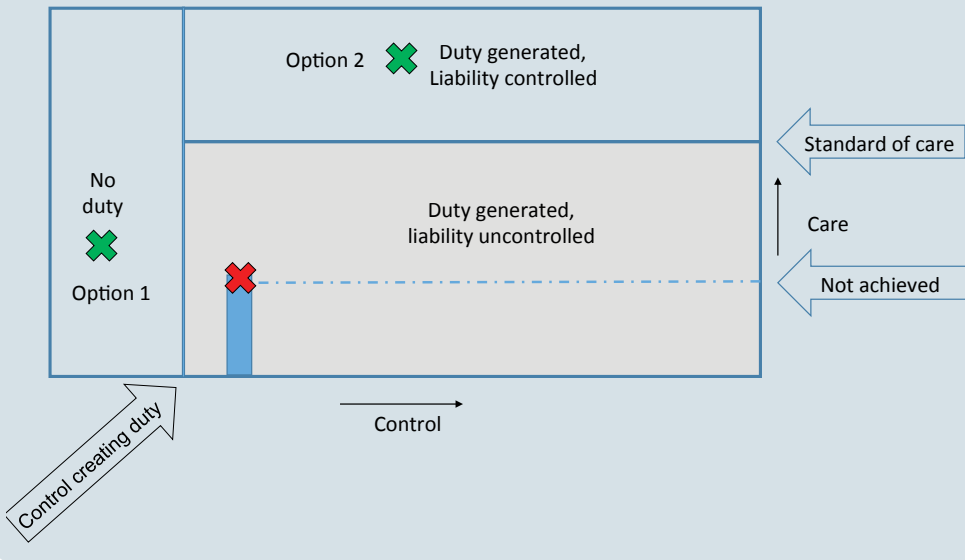
When the hiring company has a duty of safety care, the only option is to achieve the standard of care. All other options will leave the liability uncontrolled.

Scenario 2

In the second scenario, a company upon hiring a subcontractor initially had no duty of safety care. The company, however, has provided a safety officer whose actions in the field could have been perceived as a control. Those actions were not sufficient to prevent a subcontractor's incident and did not constitute a reasonable care. As a result, a hiring company had argued that it had no control and no duty was generated and retained.

Figure 5

Company Had No Duty of Care Initially, But Provided Enough Control to Retain Duty & Liability; Standard of Care Is Not Achieved



Scenario 2: A company does not have a statutory or contractual duty of care to a subcontractor, but unintentionally allegedly retains the duty of care through unnecessary safety management actions. Lengthy post-incident litigation resulted in no damages for the defendant (Figure 5).

Case name: *Koch Refining Co. v. Chapa (1999)*

Brief description:

Koch Refining Co. hired H&S Constructors Inc. (H&S) as an independent contractor to perform pipe-fitting operations at its plant. H&S hired Juan Chapa from an employee-leasing company. Chapa sustained an injury when a coworker who was helping Chapa to move a pipe, unexpectedly lost his footing. Chapa testified that, before the accident, he questioned his H&S supervisor about the safety of the manner in which the pipe was to be lifted. Chapa further testified that he hoped that the Koch safety employee, who was standing nearby, would overhear the conversation and instruct Chapa to move the pipe in a different manner.

Cause: A personal injury to a subcontractor's employee.

Default/initial duty of care: No initial/default duty of care. Owner's (defendant's) safety officer's simple presence on site almost created the duty of care.

Reasonable care provided? No, it was not regulatory or contractually required.

Outcome: The Texas Supreme Court agreed that "Koch's act of having a safety man on the premises did not impose a duty of care on itself to ensure that Chapa did nothing unsafe" (*Koch Refining Co. v. Chapa, 1999*).

Lack of understanding of safety responsibilities at a multiemployer project site may lead to actions sufficient to generate the safety duty and liability, but not sufficient to satisfy the standard of care. It is critical to recognize a company's responsibilities in ensuring that the standard of safety care is met.

Damages: No damages to a defendant (Koch Refining Co).

Court comments:

•Generally, a premises owner does not have a duty to ensure that an independent contractor safely performs his work. . . . But when the premises owner retains some control over the independent contractor's work, it must exercise that control with reasonable care.

•Under certain circumstances, a premises owner may incur this duty to its independent contractor's employees when it reserves the right to forbid the independent contractor from performing its work in a dangerous manner.

•Exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to subject a premises owner to liability. In order for the rule to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.

•[In order to demonstrate the control], there must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

There was no need to employ a safety officer by the owner, or the safety officer should have been instructed to conduct safety oversight only (no management), concentrate on premises defects, and only respond to potential immediately dangerous to life and health situations—no control of means and methods, and no directions to the subcontractors.

The presence of Koch's safety employee on site was not beneficial to the company. If Koch Refining Co. provided no safety employee at all, the case would not likely reach the court. This is an example of a situation in which a hands-off safety approach would be beneficial to the owner. Alternatively, the owner could have adopted a proactive safety strategy with an effective safety management system, in which the safety employee would have been able to intervene and prevent the incident.

A hiring company in this case had two options:

•Option 1: Do not generate the duty of care. Avoid any project management steps that may be interpreted as control and do not manage safety directly. Limit safety efforts to prequalification of subcontractors and oversight. The owner/its representatives still must intervene in situations that may be immediately dangerous to life and health.

•Option 2: Provide level of care above the standard of care; actively manage safety.

There is no third option. When some safety care or some level of control is provided to a subcontractor or any other project party, it generates a legal duty of care and a liability but is not sufficient to mitigate the liability.

A hands-off strategy (option 1) can be appropriate to some property owners, hiring qualified and competent general contractors, and to consulting companies.

Conclusion

When no statutory or contractual safety obligations exist to a subcontractor or other project employers, a company may still retain a safety duty via control of other project parties, including subcontractors. That may occur either intentionally as a conscious business decision or unintentionally, without a complete understanding of related liability implications and without a strategy to minimize the risk. The extent of a sufficient level of control to generate the duty of care and liability is open to interpretation in the U.S. The U.S. common law determiner of control is "a retention of a right of supervision that the contractor is not entirely free to do the work in his own way" (ALI, 1965). Lack of understanding on safety role and responsibilities at a multiemployer project site may lead to actions that would be sufficient to generate the safety duty and liability, but not sufficient to satisfy the standard of care.

In situations in which the safety duty exists, it is critical to recognize a company's role and responsibilities in ensuring that the standard of safety care to subcontractors and other project parties is met.

A company should consult with legal and safety departments before setting up any multiemployer projects or participating in such projects in potentially controlling capacities to achieve an understanding on statutory and contractual safety obligations, to come up with the effective field safety strategy. **PS**

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