

Safety

AB 2774 - Friend or Foe?

The new law that was effective as of January 1, 2011, titled AB 2774, will change the way Cal/OSHA will be administering Title 8 in the future.

This is perhaps the most significant safety legislation since AB 1127, which you have heard me speak about numerous times. AB 2774 redefines the term “serious violation”, and it also changes the way that Cal/OSHA (DOSH) will define these violations in the future. I believe it will have a tremendous impact on the refuse industry as a whole. I also believe that this law will lead to more citations, higher penalties, more enforcement actions and serious violations, which will be much more difficult to resolve in favor of the employer.

Burden of Proof

AB 2774 establishes a “rebuttable presumption” that a serious violation exists if DOSH can show a “realistic possibility” that death or serious physical harm could result from the workplace hazard. Under the current California Labor Code definition, a serious violation exists if DOSH can show a “substantial probability” of death or harm from the violation for which the employer is cited. This has been a situation that has caused much confusion for Cal/OSHA, as the burden of proof was considered to be a 51% likelihood of death or serious injury or illness. This is a nearly impossible burden of proof to meet according to DOSH.

Under this new system before Cal/OSHA could issue a serious violation, it would have to make a reasonable attempt to “determine and consider” such factors as employee and supervisor training; how the employer discovers, controls, and corrects hazards; how exposed employees are supervised; and how safety is communicated in the workplace.

Something’s Missing

DOSH will apparently also give the employer an opportunity to explain the circumstances surrounding the alleged conditions that indicates why a citation should not be issued, why it believes a serious violation does not exist, and why its actions were reasonable. In fact, employers can rebut an allegation by demonstrating it couldn’t have known of the condition with reasonable diligence, and that it took all of the steps a reasonable employer in similar circumstances should be expected to take. The question I have is - who determines that, and should it go further from that point?

It would also remove a troublesome point for Cal/OSHA, by stating that their inspectors shall be deemed competent to testify on serious violations if they can show that their Cal/OSHA training is current. This, in my opinion, removes a very necessary element in determining any expert witness during an administrative law hearing.

Note: The labor code is being changed to include in the definition of serious physical harm “Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, which could be caused by a single, repetitive practice, means, method, operation or process”.

Criminal Investigation

In addition, it has been my experience that recently whenever a serious injury or fatality has occurred in our industry, a subsequent criminal investigation has been initiated. In several cases, I have experienced that a Department of Justice (DOJ) investigator will accompany the Cal/OSHA inspector and will initiate a criminal investigation in addition to the Cal/OSHA investigation. It is

also my experience that this criminal investigation is kept open far past any indication of criminal wrong doing, and it is my opinion that this is done to intimidate the employer into settling his case prior to the appeal hearing.

Pay Attention

I urge each and every one of the members of the refuse industry to pay attention to this new law. I sincerely believe it is not “business as usual”. Each of you has worked hard through the years in developing your companies and providing much needed service to the public. This new law will require that you insist on documented training for all aspects of any job in your company that could potentially give rise to a serious injury.

Also, whenever any new equipment or truck brand is introduced, drivers and mechanics must have documented and specific training on the differences and additions of equipment and all controls. For example, I have experienced that Cal/OSHA is insisting that all of our mechanics in the refuse industry must in fact read schematics and be knowledgeable of circuit boards and energy sources when working on truck electrical systems. If this continues to be a position supported by Cal/OSHA, in my opinion, this could have a tremendous impact on our industry.

In closing, with the advent of AB 2774, combined with Cal/OSHA’s new legal department leaders being very favorable toward labor, and likely less willing to negotiate, I am very concerned that the employer will be forced into a much more defensive posture, and in my opinion, the presumption of “guilt” is now much more likely.

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