

**RIGHT OF CONTROL IN A PERSONAL
INJURY/FALL PROTECTION CASE
AGAINST A GENERAL CONTRACTOR**

Marc A. Young
Thomas J. Fischer
Cokinos, Bosien & Young
2919 Allen Parkway, 15th Floor
Houston, Texas 77019
(713) 535-5500
www.cbylaw.com

Presented at
Defense Research Institute
Construction Law Seminar
San Antonio, Texas
March 19-20, 1998

TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	E-5
II.	<u>THE GENERAL RULE C RESTATEMENT (SECOND) OF TORTS ' 409 AND ITS EXCEPTIONS ' 410-429</u>	E-5
	A. General Rule of AEmployer@ Non-Liability	E-5
	B. General Control.....	E-6
	C. Specific Control	E-6
	D. Control Exception	E-7
	E. Other Restatement Exceptions.....	E-10
	1. ADuty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor@ (' 413).....	E-10
	2. AWork Dangerous in Absence of Special Precautions@(' 416)	E-11
	3. AMaking or Repair of Instrumentalities Used in Highly Dangerous Activities@(' 423)	E-11
	4. ANegligence as to Danger Inherent in the Work@ (' 427).....	E-11
III.	<u>CONTRACT LANGUAGE</u>	E-12
	A. Generally.....	E-12
	B. Specific Right of Control Provisions Contained in the AIA General Conditions-A201	E-13
IV.	<u>OSHA</u>	E-15
	A. Pertinent Provisions	E-15
	B. OSHA Applicability	E-17
	1. Violations are negligence per seCjurisdictions	E-17
	2. Violations are not negligence per seCjurisdictions	E-18
V.	<u>INDUSTRY STANDARDS</u>	E-20
	A. The Associated General Contractors of America, Inc., <i>Manual of Accident Prevention in Construction</i>	E-20
	B. American National Standards Institute	E-22
	C. The National Safety Council.....	E-23
	D. AISC (American Institute of Steel Construction) Specifications for Designing, Fabrication, and Erection of Structural Steel for Buildings, AISC S310-1980	E-23
VI.	<u>STATUTORY VIOLATIONSCSTATES</u>	E-24

A.	Example Statutes.....	E-24
B.	States with Approved OSHA Plans	E-25
VII.	<u>SUBSEQUENT REMEDIAL MEASURES AS EVIDENCE OF CONTROL</u>	E-26
	TABLE OF AUTHORITIES	E-27
	LIST OF APPENDICES	E-33

**RIGHT OF CONTROL IN A PERSONAL
INJURY/FALL PROTECTION CASE
AGAINST A GENERAL CONTRACTOR**

I. INTRODUCTION

This paper is intended to be used as a resource tool for identifying federal regulations, industry standards, uniform contract language, and common-law principles one could face in defending a fall case from a general contractor's perspective. As the title reveals, this paper is not a detailed analysis of **all** liability theories applicable to a general contractor, but rather an analysis of one of the most frequently pled theories of liability and the evidence one representing a general contractor must be prepared to confront.

This paper will focus on the general contractor's right of control over the premises in general and more specifically, the right of control over the details of the work to be performed during a specific work activity. Although this paper will analyze the right of control, it cannot avoid a discussion of the closely related issue of general premises liability. A plaintiff's petition in a fall case will usually include allegations the defendant (general contractor) failed to provide a safe workplace, failed to furnish the plaintiff with the necessary tools and equipment with which to perform his duties, failed to warn the plaintiff, failed to inspect the x, y, or z, et cetera. These allegations encompass both premises liability theories and negligent activity theories.

**II. THE GENERAL RULE C RESTATEMENT (SECOND) OF
TORTS ' 409 AND ITS EXCEPTIONS ' 410-429**

A. General Rule of Employer's Non-Liability

Most jurisdictions in the United States have adopted the Restatement (Second) of Torts ' 409 which holds that one who retains or employs an independent contractor is not liable for the negligence of that independent contractor. The specific wording of ' 409 is as follows:

Except as stated in ' ' 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

B. General Control

Absent control, a general contractor is legally entitled to assume an independent contractor will perform his responsibilities in a safe and workmanlike manner, taking proper care and precaution to assure the safety of his employees. However, a general contractor on a construction site has the duty to use due care to provide a safe place for workmen on the premises, including the employees of other contractors. Alaska C *Morris v. Soldotna*, 553 P.2d 474 (Alaska 1976); Alabama C *Southern Minerals Co. v. Barrett*, 281 Ala. 76, 199 So.2d 87 (Ala. 1967); California C *Gonzales v. Robert Hiller Constr. Co.*, 1798 Cal. App. 2d 522, 3 Cal. Rptr. 832 (Cal. App.C2d Dist. 1960); New Mexico C *Fresquez v. Southwestern Indus. Contractors & Riggers*, 89 N.M. 525, 554 P.2d 986 (App. 1976), *cert. denied*, 90 N.M. 8, 558 P.2d 620; New York C *Zucchelli v. City Constr. Co.*, 4 N.Y.2d 52, 172 N.Y.2d 139, 149 N.E.2d 72 (1958); Pennsylvania C *Tillile v. Konkle*, 383 Pa. 420, 119 A.2d 209 (1956).

The general contractor has a duty to inspect the premises and to warn of any dangerous condition. Thus the general contractor may be liable for injuries caused by a defective or dangerous condition existing on the premises at the time the subcontractor enters the property. The subcontractor may rely, as a matter of law, on the general contractor to do his duty, i.e., inspect the premises and to warn of any dangerous condition. This right is derived from landlord/tenant law and is common to any premises owner or occupier with respect to business invitees. The general contractor, on the other hand, may rely as a matter of law, on the subcontractor to take proper care and precautions to ensure the safety of its own employees, i.e., a general contractor does not have a duty to see that an independent contractor performs its work in a safe manner. This law is derived from agency principles and ' 409 of the Restatement (Second) of Torts. *See also Shell Chemical Co. v. Lamb*, 493 S.W.2d 742, 746 (Tex. 1973).

C. Specific Control

Many jurisdictions have long adhered to the proposition that the right of control must relate to the work as opposed to the control of the premises. *Mason v. Arizona Public Service Co.*, 127 Ariz. 546, 622 P.2d 493 (1980); *McKinstry v. County of Cass*, 228 Neb. 773, 434 N.W.2d 322 (1988). *Delgado v. W. C. Garcia & Associates*, 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963); *Hard v. Hollywood Turf Club*, 112 Cal. App. 2d 263, 246 P.2d 716 (1952); *Halmick v. SBC Corporate Servs., Inc.*, 832 S.W.2d 925, 929 (Mo. App. 1992).

Texas recently joined those jurisdictions in the decision reached in *Williams v. Olivo*, 952 S.W.2d 523 (Tex. 1997). The Court in explaining its decision wrote:

To recover against a general contractor for either a negligent activity or a premises defect, the injured plaintiff must establish both the general contractor's right to control the defect-producing activity and a breach of that duty according to traditional premises defect elements. (Emphasis added)

Williams v. Olivo, 952 S.W.2d at 525.

In *Williams*, the Supreme Court further refined its original holding in *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993). In *Tidwell*, a service station employee brought a negligence action against Exxon to recover damages as a result of gunshot wounds received in an armed robbery attempt. The court considered the nature of the matters to which the right of control extended to be determinative.

We think that in the case alleging negligence in maintaining a safe workplace, the court's inquiry must focus on who had specific control over the safety and security of the premises, rather than the more general right of control over operations. . . . Applying the traditional test of right of control over general operations simply does not answer the question. It requires a fact finder to surmise a general right of control from factors unrelated to safety, and then to infer from that general control a right of control over the safety conditions that are the real issue in the case.

Exxon Corp. v. Tidwell, 867 S.W.2d at 23.

D. Control Exception

There are 19 exceptions to the general rule of non-liability contained in the Restatement. The most common exception used by plaintiff lawyers is found in Restatement (Second) of Torts ' 414 which provides:

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 [i.e., the employer of the independent contractor] owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Plaintiff attorneys often end their analysis here and focus on the language A . . . retains the control of any part of the work . . .@. However, comment (c) to Section 414 provides further clarification to the rule:

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 to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general rule 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.

Virtually every jurisdiction in the country has adopted the general rule of non-liability and the control exception which together hold the employer of an independent contractor is not liable for the torts of the contractor where the employer retains only a general supervisory power necessary to ensure completion of the work and not control of the manner by which the work is to be accomplished. A partial list of cases either adopting and/or applying the Restatement (Second) of Torts ' 409 and ' 414 is provided.

Alabama C An independent contractor's negligence may be imputed to a premises owner or to a general contractor if the owner or general contractor reserved the right to control the work of the independent contractor. *Bell v. Sugar Wood Homes, Inc.*, 619 So.2d 1298 (Ala. 1993), citing *Pate v. United States Steel Corp.*, 393 So.2d 992, 994 (Ala. 1981).

Alaska C An employer of an independent contractor does not assume a duty of care to employees of the independent contractor. *Morris v. City of Soldotna*, 553 P.2d 474, 478 (Alaska 1976); *Hobbs v. Mobil Oil Corp.*, 445 P.2d 933, 934 (Alaska 1968).

Arizona C *Pruett v. Precision Plumbing, Inc.*, 27 Ariz. App. 288, 554 P.2d 655 (1976); *Chesin Constr. Co. v. Epstein*, 8 Ariz. App. 312, 446 P.2d 11 (1968).

California C Adopted and applied Restatement Second (Torts), ' 414 cmt c. *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 788-789, 285 P.2d 902, 903-904 (1955); *Castro v. State*, 114 Cal. App. 3d 503, 517-518, 170 Cal. Rptr. 734, 742-743 (1981).

Delaware C *Seeney v. Dover Country Club Apts., Inc.*, 318 A.2d 619 (Del. Super. 1974).

Florida C Owner/general contractor may be held liable for injury to employees of independent contractors if the owner or occupier interferes or meddles

with the job to the extent of assuming detailed direction of the job and thus becomes master of independent contractor=s employees. *Indian River Foods, Inc. v. Braswel*, 660 So.2d 1093 (Fla. App.C4th Dist. 1995), *rehearing denied, review denied*, 672 So. 2d 542. *Crawford v. Florida Steel Corp.*, 478 So.2d 855 (Fla. App.C1st Dist. 1985).

Georgia C Employers are not responsible under the theory of *respondeat superior* for torts of independent contractors unless the employer of the independent contractor controls the time, manner, and method of executing the work. *Fortune v. Principal Fin. Group, Inc.*, 465 S.E.2d 698, 219 Ga. App. 367 (1995), *reconsideration denied, cert. denied*. Also, in *Kimball v. BHM Constr. Co., Inc.*, 388 S.E.2d 40, 193 Ga. App. 441 (1989), the Georgia court of appeals held the contractor would not be liable to a carpenter because sufficient control was not exercised. The factors addressed by the court include (1) frequent job site visits by the general contractor=s representative to ensure the work was being performed according to specifications, (2) the carpenter was paid on a weekly basis, and (3) there was no right or actual exercise of control.

Iowa C Restatement (Second) of Torts ' 409. *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980), *citing* W. Prosser, *Handbook of the Law of Torts*, ' 71 at 468 (4th Ed. 1971).

Massachusetts C *Corsetti v. Stone Co.*, 396 Mass. 1, 11, 483 N.E.2d 793 (1985) adopted as Massachusetts law Restatement (Second) of Torts ' 414 (1965). In *Corsetti*, an employee of a subcontractor fell from scaffolding and brought suit against the general contractor. The court upheld the jury=s factual determination that pursuant to the provisions of the general contract and the subcontract, the general contractor had retained the authority and control over Aall safety precautions and programs in connection with the work.@ *Id.* at 11, 483 N.E.2d 793. The subcontract expressly reserved to the general contractor the right to initiate Aall safety measures.@ *Id.* at 6, n. 5, 483 N.E.2d 793.

Michigan C *Utle v. Taylor & Gaskin, Inc.*, 305 Mich. 561, 9 N.W.2d 842.

Montana C *Shannon v. Howard S. Wright Constr. Co.*, 593 P.2d 438 (Mont. 1979).

New Mexico C *New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634 (New Mex. 1976); *Fresquez v. Southwestern Indus. Contractors & Riggers, Inc.*, 554 P.2d 986 (N.M. App. 1976).

Oklahoma C *Grover v. Superior Welding, Inc.*, 893 P.2d 500 (Okla. 1995).

Texas *C Redinger v. Living, Inc.*, 689 S.W.2d 414 (Tex. 1985); *Williams v. Olivo*, 952 S.W.2d 523 (Tex. 1997); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993). For the general contractor to be liable for negligence, its supervisory control must relate to the condition or activity that caused the injury.

Washington C Courts in the state of Washington have come perilously close to completely eviscerating the right to control exception. In *Kelley v. Howard S. Wright Constr. Co.*, 90 Wash.2d 323, 331, 582 P.2d 500, 505 (1978), the court ruled that an affirmative duty assumed by a contract may create a liability to persons not a party to the contract, where failure to properly perform the contract results in injury to that party.

Wisconsin C It is retention of control and supervision which is required for recovery against a general contractor by an employee of a contractor in an action brought as a Afrequenter® under the state=s safe-place statute (Wis. Civ. Stat. Ann. 1967 ' 101.06, *et seq.*). The statute applies to employees of subcontractors as Afrequenters® and the duties owed to those Afrequenters® by an owner or general contractor, but only if the owner or general contractor has reserved a right of supervision and control. *Barth v. Downey Co., Inc.*, 239 N.W.2d 92 (Wis. 1976).

E. Other Restatement Exceptions

Restatement (Second) of Torts, Section 413 imposes direct liability on the employer of the independent contractor for what is known as the Apeculiar risk® exception while Sections 416, 423, and 427 impose vicarious liability on the employer for the independent contractor=s negligence. Accordingly, an owner or general contractor may be held liable for failing to take necessary safety precautions on behalf of an independent contractor=s employees without any consideration of the right of control.

1. ADuty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor® (' 413)

One who employs an independent contractor to do work which the employer should recognize is likely to create, during its progress, a peculiar, unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.®

2. AWork Dangerous in Absence of Special Precautions@(' 416)

One who employs an independent contractor to do work which the employer should recognize is likely to create, during its progress, a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

3. AMaking or Repair of Instrumentalities Used in Highly Dangerous Activities@(' 423)

One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentality used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

4. ANegligence as to Danger Inherent in the Work@(' 427)

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

III. CONTRACT LANGUAGE

A. Generally

Counsel for the general contractor is often beaten (figuratively) about the head and shoulders with contractual language contained in the agreement between the owner and the general contractor. The agreement often addresses the general contractor's control over safety, etc. Less frequently, the subcontract between the general contractor and the plaintiff's employer is brought into play. However, the subcontract usually has less favorable language for the plaintiff to use against the general contractor.

Counsel's review of the contract documents in a fall case typically focuses on indemnity, additional insured and waiver of subrogation provisions. Counsel should also scrutinize the documents for evidence of the right of control. Do not overlook favorable right of control language in the contract between the owner and general contractor. For example, the AIA General Conditions A-201 language in Construction Change Directives [AIA 201(7.3)]. This provision allows the owner or its representative to force the general contractor to do something over the general contractor's objection.

In the absence of contract language specifically delegating control over safety issues, one can still be held liable for negligent exercise of control if one gratuitously, or otherwise, actually exercises control.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care, increases the risk of harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts ' 324A (1965).

Evidence of actual control is relevant insofar as it shows a right of control not manifested by the agreement between the parties. The true test remains the right of control which may be shown by actual control exercised in derogation of a written contract. *Space City Oil Co. v. McGilvray*, 519 S.W.2d 257, 259 (Tex. Civ. App. Beaumont 1975, no writ). Thus, while contractual language may be relevant, the courts generally hold the contractual language is not dispositive of the issue of control. In *Exxon v. Perez*, 842 S.W.2d 629 (Tex. 1992), the Texas Supreme Court held that when the right of control is a controverted issue, it is a proper function of the jury to consider both what the contract provided and whether or not it was even enforced. In *Perez*, the Exxon contract had all of the phrases defendant's counsel could hope for, such as "contractor and its employees are independent contractors . . . , and Company shall have no control over contractor's methods or details of work," but the practices on location varied drastically from the contractual provisions. Thus, if the parties ignore contract language, the courts will too. Counsel should be aware that plaintiff's experts may use contract language to opine with regard to the reasonableness of a general contractor's acts or omissions and whether the contractual language should be considered dispositive.

A general contractor can successfully shift control of safety issues to a subcontractor. In *Foley v. Rust Int'l*, 901 F.2d 183, 185 (1st Cir. 1990), the subcontract provided:

Subcontractor alone is obligated to provide the safety of his employees at the job site. Subcontractor agrees to perform the work in a safe manner, to provide a safe place to work, and to abide by and enforce all federal, state, and local safety laws, rules, or regulations governing the performance of the work. Subcontractor shall furnish all apparel, materials, equipment, tools, labor, instruction, and supervision necessary for the safety of his employees in his compliance with these safety laws.

Foley, 901 F.2d at 185.

B. Specific Right of Control Provisions Contained in the AIA General Conditions-A201

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1** employees on the Work and other persons who may be affected thereby;

In *Dilaveris v. W. T. Rich Co., Inc.*, 673 N.E.2d 562 (Mass. 1996), the Massachusetts Supreme Court's reasoning relied in part upon the general contract language similar to that contained in the AIA General Conditions Section 3.3.1, *et seq.*, to find the general contractor had a right of control over the plaintiff's employer.

Sections 10.1.1, 10.2, *et seq.* were construed by the court in *Lawson-Avila Constr. Inc. v. Stoutamire*, 791 S.W.2d 584 (Tex. App. San Antonio 1990, writ denied) and *Hanna v. Huer, Johns, Neel, Rivers & Webb*, 662 P.2d 243 (Kan. 1983). In *Hanna*, the Kansas Supreme Court found AIA, A201 vested control for overall safety with the general contractor by virtue of paragraph 10.1.1, 10.2.1.1, 10.2.2 and 10.2.5. *Id.* At 248-249. Also, *see, Campbell v. Adventist Health Systems/Sunbelt, Inc.*, 946 S.W.2d 617 (Ft. Worth 1997). In *Lawson-Avila*, the court held the AIA, A201 language demonstrated responsibility for overall safety was the general contractor's.

The safety responsibility provisions of the AIA General Conditions have also been held not to invest sufficient control over the details of the work so as to subject the general contractor to liability. *Lewis v. N. J. Riebe Enter., Inc.*, 823 P.2d 74 (Ariz. App. 1990).

A Contract Documents is defined in various AIA forms to include drawings and specifications. Specifications is defined as consisting of written requirements for materials, equipment, systems, standards, and workmanship for the Work, and performance of related services. Careful attention and scrutiny should be directed to the specifications related to the relevant scope of work encompassing the activity associated with the injury. The specifications often contain helpful language directing the subcontractor to use proper means, methods, techniques, ventilation, manufacturer's warnings, skill and good workmanship, industry standards, etc.

Additional provisions to consider are attached at Appendix C.

IV. OSHA

A. Pertinent Provisions

1. Nowhere in the language of the Act, its legislative history, or its statutory declaration of purpose and policy is there the slightest implication that Congress intended OSHA to create a private right of action for violation of its terms. *See* 1970 U.S. Code Cong. & Admin. News pp. 5177-5241 and 29 C.F.R. 651. The only provision in the statute which addresses a private remedy clearly indicates Congress did not intend OSHA to create a new cause of action in favor of employees. Section 653(b)(4) of the Act provides:

Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

2. 29 C.F.R. 654, Duties of Employers and Employees

- (a) Each employer-
 - (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
 - (2) Shall comply with occupational safety and health standards promulgated under this chapter.
- (b) **Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.** (Emphasis added)

3. 29 C.F.R. 1926.20, *et seq.* subpart C, General Safety and Health Provisions

- (a) *Contractor Requirements.* (1) Section 107 of the Act requires that it shall be a condition of each contract which is entered into under legislation subject to Reorganizational Plan No. 14 of 1950 (64 stat. 1267), as defined in 1926.12, and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in

surrounding or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety.
(Emphasis added)

- (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.
(3) The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.
(4) The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.
- (d) (1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.
- (e) In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment.

4. **29 C.F.R. 1926.21 Safety Training and Education**

- (b) *Employer Responsibility.* (1) The employer shall avail himself of the safety and health training programs the Secretary provides.
(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.
- (6)(i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and

in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

5. **29 C.F.R. 1926.500, et seq. subpart M, Fall Protection**
6. **29 C.F.R. 1926.450, et seq. subpart L, Scaffolding**
7. **29 C.F.R. 1926.750, et seq. subpart R, Steel Erection**
8. **29 C.F.R. 1926.1050, et seq. subpart X, Stairways and Ladders**
9. **29 C.F.R. 1926.104-106 subpart E, Personal Protective Equipment**
(*Note: body belts prohibited effective 1/1/98)

Defense counsel should object to the admission of OSHA standards on the basis of relevance if the plaintiff is not the employee of the alleged tortfeasor. If attempts to exclude evidence of OSHA regulations are unsuccessful in your jurisdiction, be sure to offer 29 C.F.R. ' 654(b) which requires employees to comply with all OSHA regulations. However, counsel should be aware the improper admission of OSHA standards could be harmless error if the standards are merely cumulative of properly admitted standards such as ANSI which have broad application to industry in general. The improper admission of evidence which is merely cumulative to properly admitted evidence is harmless error. *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238, 1239 (5th Cir. 1982).

B. OSHA Applicability

1. Violations are negligence per seCjurisdictions

The Sixth and Eighth Circuits and the states of Washington, Idaho and Delaware have held the specific duty clause of OSHA [29 C.F.R. 654(a)(2)] applies to all workers, including employers and independent contractors who perform work at the site. Every employer owes a duty to protect its employees from exposure to serious hazards, regardless of whether it controls the workplace, whether it is responsible for the hazard, or whether it has the best opportunity to abate the hazard. *Teal v. E. I. DuPont De Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984).

This chapter places a duty on all employers under this chapter to furnish a hazard-free place of employment and to comply with safety regulations promulgated pursuant to this chapter; this chapter creates a government program to enforce compliance but does **not** create a

private cause of action for persons injured as a result of compliance.
(Emphasis added)

Kelley v. Howard S. Wright Constr. Co., 1978, 582 P.2d 500, 91 Wash. 323. In *Kelley*, the general contractor was held responsible for compliance with OSHA regulations for the benefit of the employees of the subcontractor as well as its own employees.

A general contractor also has a duty to protect all employees engaged at the work site. *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *Bechtel Power Corp. v. Secretary of Labor*, 548 F.2d 248 (8th Cir.).

Contractor's duty under Occupational Safety and Health Administration regulations to install guardrails on its scaffold extended to subcontractors, and was not limited to contractor's immediate employees. *Arrington v. Arrington Bros. Constr., Inc.*, 781 P.2d 224, 116 Idaho 887 (1989); compare with *Vickers v. Hanover Constr. Co.*, 125 Idaho 832, 875 P.2d 929 (Idaho 1994).

Under this chapter (' 654), an employer's duty flows from two sources: first, this chapter requires that employees shall comply with . . . standards promulgated under this chapter,⁶ and second, where no standards are applicable an employer is subject to the general duty to furnish his employees a place of employment free from recognized hazards likely to cause death or serious physical harm. *Anning-Johnson Co. v. U.S. Occupational Safety and Health Comm*, 516 F.2d 1081 (7th Cir., 1975).

2. Violations are not negligence per se jurisdictions

The following jurisdictions have held OSHA standards are admissible against one who is not the injured party's employer, but violations of the standards do not constitute negligence per se.

Alabama C *Knight v. Burns, Kirkley & Williams Constr. Co., Inc.*, Ala. 331 So.2d 651.

Arkansas C *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 165.

Connecticut C *Wendland v. Ridgefield Constr. Services, Inc.*, 184 Conn. 173, 439 A.2d 954 (1981).

Delaware C *Disabatino Bros., Inc. v. Baio, Del.*, 336 A.2d 508.

Florida C *Jupiter Inlet Corp.*, 546 So.2d 1 (Fla. App. 1988), review denied.

Kentucky C *Cochran v. International Harvester Co.*, 408 F. Supp. 598 (1975).

Mississippi C *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975).

Montana C *Stepanek v. Kober Constr.*, 625 P.2d 51 (Mont. 1981); *Marshall v. Isthmian Lines*, 5th Cir. 334 F.2d 131.

New Mexico C *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258 (N.M. 1987).

Texas C *Barrera v. E. I. DuPont De Nemours & Co.*, 653 F.2d 915 (5th Cir. 1981), *rehearing denied*, 661 F.2d 931. In *Barrera*, the Court found 29 C.F.R. 654, *et seq.*, did not create a duty between employers and invitees, only between employers and their employees. The decision follows the view espoused in Prosser, *Torts*, p. 202 (4th Ed. 1971) which states:

Where the statute does set up standard precautions, although only for the protection of a different class of persons, or the prevention of a distinct risk, this may be a relevant fact, having a proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider.

The word "employer" as used in this section [29 C.F.R. 654] does not envelop general contractors as joint or statutory employers of an independent subcontractor's employees; hence, the general contractor had no duty under this chapter to provide employees of an independent subcontractor with a safe working environment. *Horn v. C. L. Osborn Contracting Co.*, 591 F.2d 318 (5th Cir. 1979), *rehearing denied*, 595 F.2d 1221.

Though regulations promulgated pursuant to 29 C.F.R. 654 provide evidence of a standard of care exacted of employers, and evidence of a general standard of care due employees, they establish no standard of care due third persons. *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974). The Fifth Circuit held in *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 710-712 (5th Cir. 1981) that OSHA regulations may provide evidence of standard of care but may only be used to establish negligence per se when the plaintiff is an employee of the defendant. Under this chapter, employers who have no control, or only limited control, over operations of other employers at the work site have a duty to exert reasonable efforts to protect their own employees from the safety standard violations of others.

A jury in a negligence per se case would not be asked to decide whether the defendant acted as a reasonable person would have acted under the same or similar circumstances. Since the standard of care or breach of duty is the paramount issue in

determining liability, the application of a negligence per se theory and the submission of an instruction on negligence per se would affect the rights, duties, or liabilities of employers . . . in contravention of 29 C.F.R. 653(b)(4). *Wendland v. Ridgefield Constr. Services, Inc.*, 184 Conn. 173, 439 A.2d 954 (1981); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975). For the text of 29 C.F.R. 653(b)(4) see pg. E-15 supra.

Violations of OSHA standards would not directly give rise to a cause of action for the estate of a deceased worker since the decedent was not an employee of the alleged tort-feasor. *Koll v. Manatt's Transp. Co.*, Iowa 1977, 253 N.W.2d 265.

Employees are the exclusive class of persons protected by this chapter. *Kraus v. Alamo Nat'l Bank of San Antonio*, 586 S.W.2d 202 (Tex. Civ. App. San Antonio 1979), *aff'd* 616 S.W.2d 908. Although *Kraus* is a case which does not directly involve the injury or death of an employee of a subcontractor, it does provide instructive law regarding OSHA. In its decision, the Court reviewed other states opinions which permitted the admission into evidence of OSHA regulations even though the decedent was not a member of the exclusive class of persons protected by OSHA regulations, i.e., employees. The court held that OSHA regulations are admissible into evidence as being relevant to the standards of conduct which should have been employed by a defendant. But see *Brennan v. OSHRC & Underhill*, 513 F.2d 1032 (2nd Cir. 1975), where the regulations were only admissible if the wrongdoer was responsible for complying with the regulations.

V. INDUSTRY STANDARDS

A. **The Associated General Contractors of America, Inc., *Manual of Accident Prevention in Construction***

One need not be clairvoyant to anticipate being confronted with various industry standards relevant to the right of control which should be employed by a general contractor. Industry standards are evidentiary, but not dispositive.

In *Dilaveris v. W. T. Rich Co., Inc.*, 673 N.E.2d 562 (Mass. 1996), the Massachusetts Supreme Court ruled the general contractor had sufficient control and responsibility to subject it to liability for injuries to an employee of a subcontractor. The Court relied in part upon the Associated General Contractors of America *Guide for Basic Company Safety Program* which requires project superintendents to require conformance to safety standards from subcontractors. Currently, Section 1-13 of the *Manual of Accident Prevention in Construction* issued by the Associated General Contractors of America, December 1992 edition, states:

The prime contractor should review the safety programs and safe history of subcontractors both before bidding and during construction. The prime contractor should also include the work areas of subcontractors and site inspections and audits, and establish standard procedures requiring subcontractors to correct hazards that come to the prime contractor's attention. The prime contractor may have less involvement in monitoring safety and health efforts of a specialized subcontractor engaged in work with which the prime contractor is unfamiliar and cannot effectively monitor. The prime contractor must have reason to believe, however, that his reliance on the speciality subcontractor to work safely is reasonable.

It should be noted the *AGC Manual of Accident Prevention in Construction* has specific chapters dealing with personal protective equipment (Chapter 2), safety nets (Chapter 7), stairways and ladders (Chapter 13), scaffolding (Chapter 14), steel erection (Chapter 36), and floor and wall openings (Chapter 38). The AGC information discussing harnesses is contained in Section 2-6 and states as follows:

Safety harnesses should be worn by workers at elevated levels which are not protected by handrails or safety nets or when working from suspended scaffolds. Safety harnesses should be secured to a structural member or to a line independent of the scaffold rigging. The support member should be strong enough to support a dead weight of 5,400 pounds. Safety harnesses, with tended life lines, should also be worn by workers in confined spaces such as tanks, boilers, manholes, and vaults. This will allow the worker to be hoisted to safety in an emergency. The atmosphere within a confined space should be tested for oxygen deficiency, explosive gases, and contaminants before entry is permitted.

As you can see, industry recommendations or standards can be as demanding as governmental regulations.

The following requirements illustrate how a general contractor can be confronted with OSHA-like requirements even if OSHA is not applicable to a third-party relationship. The safety net requirements contained in Chapter 7 of the *AGC's Manual of Accident Prevention in Construction* sets forth minimum requirements for safety net use which include:

- (1) Safety net should be provided when workplaces are more than 25 feet above the ground or water surface or other surfaces where the use of

ladders, scaffolds, catch platforms, temporary floors, life lines, and safety harnesses are impractical.

- (2) Nets should extend 8 feet beyond the edge of the work surface. [*See* 29 C.F.R. 1926.502(c)(2).]
- (3) Nets should be installed as close under the work surface as practical but never more than 25 feet below the work surface. [*See* 29 C.F.R. 1926.502(c)(1) C 30 feet.]
- (4) The mesh size of the net should not exceed 6 inches by 6 inches. [Same as 29 C.F.R. 1926.502(c)(7).]
- (5) Nets should be hung with sufficient clearance to prevent the user's contact with surfaces or structures below. Clearance should be determined by impact load testing.
- (6) When new, edge ropes should provide a minimum breaking strength of at least 5,000 pounds. [Same as 29 C.F.R. 1926.502(c)(8).]
- (7) Forged steel safety hooks or shackles should be used to fasten the net to its supports.
- (8) All new nets should meet accepted performance standards of 17,500-foot pounds (minimum) impact resistance as determined and certified by the manufacturer and should bear a label of proof test.
- (9) Connection between net panels should be at least as strong as the net.

B. American National Standards Institute

Many ANSI standards are identical in substance to OSHA standards but without OSHA's restriction of applicability to immediate employers. OSHA originally adopted many of ANSI's standards. The following citations provide ANSI standards which may apply in a fall case:

1. A10.14-1975, American National Standards Requirements for Safety Belts, Harnesses, Lanyards, Lifelines, and Drop Lines for Construction and Industrial Use
2. A12.1-1973, American National Standards Safety Requirements for Floor and Wall Openings, Railings, and Toe Boards

3. A14.4-1992, American National Standards Code for Ladders

C. The National Safety Council

The National Safety Council is a nonprofit, nongovernmental public service organization dedicated to improving and monitoring the safety, health, and environmental well-being of all people. The council was founded in 1913. In 1993, the Construction Division was established. The Construction Division is an alliance of representatives from contractors, labor, insurance, owners, consultants, and other related organizations interested in and affected by construction safety, health, and the environment. Neither the National Safety Council nor its Construction Division have authority to legislate or regulate. However, it is considered to be an influential society and repository of industry consensus.

D. AISC (American Institute of Steel Construction) Specifications for Designing, Fabrication, and Erection of Structural Steel for Buildings, AISC S310-1980

As depicted from the table below, fatalities involving structural ironworkers vastly outnumber fatalities in any other construction trade. Accordingly, it is prudent to be cognizant of the AISC specifications as well as 29 C.F.R. 1926.750, *et seq.*, subpart R, concerning Steel Erection.

Occupation	Fatalities Number	Percent	Employed (3) (in thousands)	Fatal 100,000
Construction trades	607	9.8	5,098	12
Carpenters	96	1.5	1,255	8
Electricians	117	1.9	736	16
Electrical power installers and repairers	35	.6	126	28
Painters, construction and maintenance	45	.7	509	9
Plumbers, pipefitters, and steamfitters	33	.5	502	7
Roofers	60	1.0	205	29

Occupation	Fatalities Number	Percent	Employed (3) (in thousands)	Fatal 100,000
Structural metal workers	38	.6	59	64
Construction laborers	309	5.0	780	39
Laborers, except construction	212	3.4	1,337	16

Source: U.S. Dept. of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries, 1995.

VI. STATUTORY VIOLATIONS STATES

Several states have codified Restatement (Second) of Torts ' 409 and ' 414.

A. Example Statutes

1. New York C Section 241 of the Labor Law imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection to workers and makes owners and contractors responsible for a breach of the requirements of the statute irrespective of their control or supervision of the work site.® *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 376 N.E.2d 1276. While the duty imposed by Section 241 may not be delegated, the burden may be shifted to the party actually responsible for the accident, either by way of claim of apportionment of damages under the rule of *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, or by contractual language requiring indemnification by the injured worker=s employer.

2. Washington C The Washington Industrial Safety and Health Act of 1973 (WISHA), Wash. Rev. Code ' 49.17, *et seq.* (1992) has been held to require owners, developers, and general contractors, as a matter of law, to ensure WISHA compliance by all subcontractors, not just for one=s own employees.

3. Illinois C Structural Work Act, 740 ILCS 150/1, *et seq.* (West 1992). The act provides a cause of action if the following elements are met: (1) the injured party was involved in a construction activity protected under the Act; (2) the activity took place on a structure covered by the Act; (3) a scaffold or similar device defined by the Act was being used; (4) the device was unsafe or not safely placed or located; (5) the unsafe condition proximately caused the plaintiff=s injury; (6) defendant had charge of the

work; and (7) defendant willfully violated the Act. The Structural Work Act does not impose absolute liability on all contractors, subcontractors, and other persons involved in the project on which the plaintiff was injured. The issue of whether defendant was in charge of the injured plaintiff's work is basically the common law control issue, but a violation would constitute negligence per se. However, analysis of the elements of the statute reveal the similarity of issues and evidence which would be relevant and admissible under the umbrella of duty just as it is under the elements of the statute. See also *Hausam v. Victor Gruen & Associates*, 86 Ill. App. 3d 1145, 42 Ill. Dec. 342, 408 N.E.2d 1051 (1980).

4. Wisconsin C The Wisconsin safe-place statute, Wis. Civ. Stat. Ann. ' 101.06, *et seq.* provides that an owner or general contractor can owe a duty to the employees of a subcontractor as frequenters if the owner or general contractor has reserved a right of supervision and control. *Barth v. Downey Co., Inc.*, 239 N.W.2d 92 (Wis. 1976).

B. States with Approved OSHA Plans

The Occupational Safety and Health Act of 1970 encourages states to develop and operate their own job safety and health plans. States with plans approved pursuant to Section 18(b) of the Act must adopt standards and enforce requirements that are at least as effective as federal requirements. There are currently 25 states and territories with OSHA-approved plans, 23 covering private and public (state and local government) sectors; and two, Connecticut and New York, covering only the public sector.

Plan states must adopt standards comparable to the federal standards within six months of a federal standard's promulgation. The following is a list of state-approved plans: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Be sure to check the general and specific duty clauses of any state-approved plans for your jurisdiction.

VII. SUBSEQUENT REMEDIAL MEASURES AS EVIDENCE OF CONTROL

Evidence of subsequent remedial measures will be admissible to demonstrate control in most jurisdictions. Fed. R. Civ. Evid. 407.

Federal Rules of Civil Evidence 407 states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, **control**, or feasibility of precautionary measures, if controverted, or impeachment. (Emphasis added)

Texas Rules of Civil Evidence 407(a) states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, **control**, or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability. (Emphasis added)

TABLE OF AUTHORITIES

CASES

Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 376 N.E.2d 1276.....E-24

Anning-Johnson Co. v. U.S. Occupational Safety and Health Comm, 516 F.2d 1081 (7th Cir., 1975).....E-18

Arrington v. Arrington Bros. Constr., Inc.,781 P.2d 224, 116 Idaho 887 (1989)
E-18

Barrera v. E. I. DuPont De Nemours & Co., 653 F.2d 915 (5th Cir. 1981), *rehearing denied*, 661 F.2d 931.....E-19

Barth v. Downey Co., Inc., 239 N.W.2d 92 (Wis. 1976)E-10

Bechtel Power Corp. v. Secretary of Labor, 548 F.2d 248 (8th Cir.).....E-18

Bell v. Sugar Wood Homes, Inc., 619 So.2d 1298 (Ala. 1993)E-8

Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).....E-19

Campbell v. Adventist Health Systems/Sunbelt, Inc.,946 S.W.2d 617 (Tex. App. C Ft. Worth 1997).....E-14

Castro v. State, 114 Cal. App. 3d 503,170 Cal. Rptr. 734 (1981)
E-8

Chesin Constr. Co. v. Epstein, 8 Ariz. App. 312, 446 P.2d 11 (1968).....E-8

<i>Cochran v. International Harvester Co.</i> , 408 F. Supp. 598 (1975).....	E-19
<i>Corsetti v. Stone Co.</i> , 396 Mass. 1, 483 N.E.2d 793 (1985).....	E-9
<i>Crawford v. Florida Steel Corp.</i> , 478 So.2d 855 (Fla. App.C1st Dist. 1985) E-9	
<i>Delgado v. W. C. Garcia & Associates</i> , 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963) E-6	
<i>Dilaveris v. W. T. Rich Co., Inc.</i> , 673 N.E.2d 562 (Mass. 1996).....	E-14
<i>Disabatino Bros., Inc. v. Baio, Del.</i> , 336 A.2d 508	E-19
<i>Dole v. Dow Chem. Co.</i> , 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 E-24	
<i>Dunn v. Brimer</i> , 259 Ark. 855, 537 S.W.2d 165	E-18
<i>Exxon Corp. v. Tidwell</i> , 867 S.W.2d 19 (Tex. 1993).....	E-10
<i>Exxon v. Perez</i> , 842 S.W.2d 629 (Tex. 1992).....	E-13
<i>Foley v. Rust Int'l</i> , 901 F.2d 183 (1st Cir. 1990)	E-13
<i>Fortune v. Principal Fin. Group, Inc.</i> , 465 S.E.2d 698, 219 Ga. App. 367 (1995), <i>reconsideration denied, cert. denied</i>	E-9
<i>Fresquez v. Southwestern Indus. Contractors & Riggers, Inc.</i> ,554 P.2d 986 (N.M. App. 1976)	E-9

<i>Gonzales v. Robert Hiller Constr. Co.</i> , 1798 Cal. App. 2d 522, 3 Cal. Rptr. 832 (Cal. App. C2d Dist. 1960).....	E-6
<i>Grover v. Superior Welding, Inc.</i> , 893 P.2d 500 (Okla. 1995).....	E-10
<i>Halmick v. SBC Corporate Servs., Inc.</i> , 832 S.W.2d 925 (Mo. App. 1992).....	E-6
<i>Hard v. Hollywood Turf Club</i> , 112 Cal. App. 2d 263,246 P.2d 716 (1952) E-6	
<i>Hausam v. Victor Gruen & Associates</i> , 86 Ill. App. 3d 1145, 42 Ill. Dec. 342, 408 N.E.2d 1051 (1980).....	E-25
<i>Hobbs v. Mobil Oil Corp.</i> , 445 P.2d 933 (Alaska 1968)	E-8
<i>Horn v. C. L. Osborn Contracting Co.</i> , 591 F.2d 318 (5th Cir. 1979), <i>rehearing denied</i> , 595 F.2d 1221.....	E-19
<i>Indian River Foods, Inc. v. Braswel</i> , 660 So.2d 1093 (Fla. App. C4th Dist. 1995), <i>rehearing denied, review denied</i> , 672 So. 2d 542	E-9
<i>Jeter v. St. Regis Paper Co.</i> , 507 F.2d 973 (5th Cir. 1975) E-20	
<i>Jupiter Inlet Corp.</i> , 546 So.2d 1 (Fla. App. 1988), <i>review denied</i> E-19	
<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wash.2d 323, 582 P.2d 500 (1978) E-10	
<i>Kimball v. BHM Constr. Co., Inc.</i> , 388 S.E.2d 40,193 Ga. App. 441 (1989) E-9	

<i>Knight v. Burns, Kirkley & Williams Constr. Co., Inc.</i> , Ala. 331 So.2d 651 E-18	
<i>Koll v. Manatt's Transp. Co.</i> , Iowa 1977, 253 N.W.2d 265	E-20
<i>Kraus v. Alamo Nat'l Bank of San Antonio</i> , 586 S.W.2d 202 (Tex. Civ. App. CSan Antonio 1979), <i>aff'd</i> 616 S.W.2d 908	E-20
<i>Lawson-Avila Constr. Inc. v. Stoutamire</i> , 791 S.W.2d 584 (Tex. App. CSan Antonio 1990, writ denied)	E-14
<i>Lewis v. N. J. Riebe Enter., Inc.</i> , 823 P.2d 74 (Ariz. App. 1990)	E-14
<i>Lunde v. Winnebago Indus., Inc.</i> , 299 N.W.2d 473 (Iowa 1980)	E-9
<i>Marshall v. Isthmian Lines</i> , 5th Cir. 334 F.2d 131	E-19
<i>Marshall v. Knutson Constr. Co.</i> , 566 F.2d 596 (8th Cir. 1977)	E-18
<i>Mason v. Arizona Public Service Co.</i> , 127 Ariz. 546, 622 P.2d 493 (1980) E-6	
<i>McDonald v. Shell Oil Co.</i> , 44 Cal. 2d 785, 285 P.2d 902 (1955) E-8	
<i>McKinstry v. County of Cass</i> , 228 Neb. 773, 434 N.W.2d 322 (1988)	E-6
<i>Melerine v. Avondale Shipyards, Inc.</i> , 659 F.2d 706 (5th Cir. 1981)	E-19

<i>Morris v. City of Soldotna</i> , 553 P.2d 474 (Alaska 1976).....	E-8
<i>New Mexico Electric Service Co. v. Montanez</i> , 89 N.M. 278, 551 P.2d 634 (New Mex. 1976).....	E-9
<i>Pate v. United States Steel Corp.</i> , 393 So.2d 992 (Ala. 1981)	E-8
<i>Pruett v. Precision Plumbing, Inc.</i> , 27 Ariz. App. 288, 554 P.2d 655 (1976) E-8	
<i>Rabon v. Automatic Fasteners, Inc.</i> , 672 F.2d 1231 (5th Cir. 1982).....	E-17
<i>Redinger v. Living, Inc.</i> , 689 S.W.2d 414 (Tex. 1985).....	E-10
<i>Seeney v. Dover Country Club Apts., Inc.</i> , 318 A.2d 619 (Del. Super. 1974).....	E-8
<i>Shannon v. Howard S. Wright Constr. Co.</i> , 593 P.2d 438 (Mont. 1979)	E-9
<i>Shell Chemical Co. v. Lamb</i> , 493 S.W.2d 742 (Tex. 1973).....	E-6
<i>Southern Minerals Co. v. Barrett</i> , 281 Ala. 76, 199 So.2d 87 (Ala. 1967)	E-6
<i>Space City Oil Co. v. McGilvray</i> , 519 S.W.2d 257 (Tex. Civ. App.CBeaumont 1975, no writ).....	E-13
<i>Stepanek v. Kober Constr.</i> , 625 P.2d 51 (Mont. 1981).....	E-19
<i>Teal v. E. I. DuPont De Nemours & Co.</i> , 728 F.2d 799 (6th Cir. 1984)	E-17
<i>Tillile v. Konkle</i> , 383 Pa. 420, 119 A.2d 209 (1956)	E-6

Utley v. Taylor & Gaskin, Inc., 305 Mich. 561, 9 N.W.2d 842.....E-9

Valdez v. Cillessen & Son, Inc., 734 P.2d 1258 (N.M. 1987)
E-19

Vickers v. Hanover Constr. Co., 125 Idaho 832, 875 P.2d 929 (Idaho 1994)
E-18

Wendland v. Ridgefield Constr. Services, Inc., 184 Conn. 173, 439 A.2d 954 (1981)
E-20

Williams v. Olivo, 952 S.W.2d 523 (Tex. 1997).....E-6

Zucchelli v. City Constr. Co., 4 N.Y.2d 52, 172 N.Y.2d 139, 149 N.E.2d 72 (1958)
E-6

MISCELLANEOUS

1970 U.S. Code Cong. & Admin. NewsE-15

29 C.F.R. 1926.104-106.....E-17

29 C.F.R. 1926.1050E-17

29 C.F.R. 1926.20E-15

29 C.F.R. 1926.21E-16

29 C.F.R. 1926.450E-17

29 C.F.R. 1926.500E-17

29 C.F.R. 1926.502E-22

29 C.F.R. 1926.750E-17

29 C.F.R. 651E-15

29 C.F.R. 653E-15

29 C.F.R. 654E-15

Associated General Contractors of America, *Manual of Accident Prevention in Construction*, Dec. 1992E-21

Fed. R. Civ. Evid. 407.....	E-26
Restatement (Second) of Torts	E-5
Structural Work Act, 740 ILCS 150/1 (West 1992)	E-25
Tex. R. Civ. Evid. 407	E-26
U.S. Dept. of Labor, Bureau of Labor Statistics,Census of Fatal Occupational Injuries, 1995	E-24
W. Prosser, <i>Handbook of the Law of Torts</i> , ' 71 (4th Ed. 1971).....	E-9
Wash. Rev. Code ' 49.17 (1992).....	E-24
Wis. Civ. Stat. Ann. 1967 ' 101.06	E-10

LIST OF APPENDICES

- A. National Safety Council Accident Fact (Injury Statistics for 1996 by Occupation). Example: Approximately 6 times more people die in their homes than on the work site every week
- B. U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries, 1995. Table 2 Fatal Occupational Injuries by Selected Occupation, with Employment, Rate, and Relative Standard Error, 1995
- C. AIA A-207-1997 General Conditions
- D. Interrogatories and Requests for Production
- E. AGC List of Publications/Videos