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336.12 Affirmative defense for controlling employers at construction worksites.

(a) Application, purpose, and pre-issuance procedures.

(1) Sole defense to allegation of controlling employer status. This section applies only to construction worksites and specifies procedures to be followed by controlling employers that, if followed, shall constitute a complete affirmative defense to any allegation that the employer is citable as a controlling employer as defined in section 336.10(c). No other defense shall be recognized at construction worksites with respect to the employer's status as a controlling employer. However, nothing in this section shall be construed to prohibit the controlling employer from defending against a citation on other grounds, e.g., the violative condition did not exist, or "independent employee action."

(2) Purpose of this section. The purpose of this section is to direct not an occupational safety and health standard, and it is not meant for any purpose other than directing the Division of Occupational Safety and Health and the Occupational Safety and Health Appeals Board to follow these provisions for determining whether employers are subject to citation as controlling employers for violations of occupational safety and health standards to which one or more employees have been exposed at construction worksites.

(3) Burden of Proof and Pre-issuance procedures.

(A) Division's burden of proof: To ~~support issuance of issue~~ a citation based on an employer's status as a controlling employer, it is the Division's burden to demonstrate with substantial evidence:

(i) the existence of the violation,

(ii) exposure of an employee to the violation, and

(iii) the employer's status at the construction worksite at which the violation has been found to exist fits within the plain meaning of a controlling employer as described in section 336(e) the employer's responsibility, by contract or actual practice, for safety and health conditions on the worksite.

(B) Except as follows, the Division has no further burden to support an allegation that the employer is a controlling employer. Before issuing any citation as described in subsection (A) above, the Division shall request that the controlling employer provide information indicating whether the employer qualifies for application of the affirmative defense described in this section. If the Division

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concludes that the elements of this defense have been met after reviewing the employer's response, or after receiving no response and reviewing the evidence gathered in the inspection, the citation shall not be issued. The Division shall document its request for information and its final conclusion.

(C) Controlling employer's burden of proof: To qualify for application of the affirmative defense provided by this section, it is the controlling employer's burden of proof to show that it meets each of the elements specified by subsection (c).

(b) Definitions.

"Designated person" One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

"Construction worksite" means: A worksite where employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts, or with excavation not covered by other safety orders for a specific industry or operation.

Note: this definition is intended to be consistent with the application of the construction safety orders as described in 8 CCR section 1502.

"Practicable" means effective and reasonably capable of being accomplished.

"Serious hazard" means a worksite condition or practice that, absent appropriate hazard-control measures, results in an unreasonable risk of causing a serious injury or illness.

"Violation" means a violation of an occupational safety and health standard enforceable by the Division of Occupational Safety and Health.

(c) Elements of the Controlling Employer Affirmative Defense. The controlling employer shall not be considered citable for a violation pursuant to section 336.10(c) if the employer can demonstrate that, as of the time of the violation, all of the following conditions were met:

(1) Reasonable steps to prevent exposure to reasonably anticipated serious hazards. The employer took reasonable steps, through one or more designated persons, to prevent employees at the worksite from being exposed to reasonably anticipated serious hazards by doing all of the following:

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(A) Before allowing a subcontractor to begin work for the first time on the project, conducting or causing to be conducted a review of the subcontractor's procedures and requiring the subcontractor to address, through those procedures, those serious hazards to which (i) the subcontractor's employees were reasonably anticipated to be exposed on the job and (ii) other employees were reasonably anticipated to be exposed on the job as a result of work to be performed by the subcontractor. ~~for preventing the occurrence of or controlling serious hazards reasonably anticipated in connection with the work to be performed by the subcontractor.~~ See subsection (d) below for a description of the types of procedures to be ~~addressed~~ reviewed.

(B) Inspecting the worksite at least once per work week and at least once during the duration of each subcontractor's work, for serious hazards during all periods when the worksite was active, ~~and~~ documenting the inspections and corrective measures taken as a result, and ensuring that each subcontractor performing high-hazard work performed all inspections as required by applicable OSH standards. Hazards to be looked for shall include, as applicable, those addressed by the procedures listed in Subsection (d)(1) below.

(C) Coordinating the work to prevent, to the extent practicable, exposure of all workers and contractors at the site to serious hazards.

(D) Requiring employers engaged in high-hazard operations to comply with requirements to utilize a competent person as defined in section 1504(a) to conduct inspections of those operations as required by regulation for that operation.

(2) Prompt action to correct hazards when discovered. If the controlling employer knew of the violative condition, the controlling employer did all of the following as soon as practicable upon discovering or being notified of it:

(A) Took all practicable steps to make sure that employees would not be exposed to the hazardous condition or practice.

(B) If the hazard was not immediately corrected, notified all employers with employees likely to be exposed to the hazard of the presence of the hazardous condition or practice.

(C) Notified the creating and correcting employers, if applicable, of the need for corrective measures.

(D) Verified and documented that effective measures were implemented to correct the identified hazards or practices.

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(3) Documentation.

The employer documented compliance with the procedures followed pursuant to subsections (c)(1) and (c)(2) above and has made the documentation available to the Division.

(d) Review of hazard-control procedures by the controlling employer.

(1) Serious, reasonably anticipated hazards. The controlling employer's review of subcontractor hazard-control procedures required by subsection (c)(1)(A) above shall be directed to the control of serious, reasonably anticipated hazards. Examples include procedures to address the following, as applicable:

- (A) Control of hazardous energy (lock-out tag-out procedures).
- (B) Fall protection.
- (C) Control of ground stability, including trench and excavation shoring.
- (D) Control of structural stability.
- (E) Control of scaffold hazards, including designation of qualified personnel to supervise and engage in the construction, use, and maintenance of scaffolds.
- (F) Training, qualification, and certification of equipment and equipment operators, e.g., in connection with cranes.
- (G) Control of electrical hazards.
- (H) Assurance of safe access to or from all areas of the jobsite, e.g., stairways and ladders.
- (I) Use of safe material handling equipment and practices.
- (J) Assurance of adequate training on the use and maintenance of personal protective equipment (PPE).
- (K) Compliance with hazard communication requirements.
- (L) Identification and control of exposure to hazardous substances to which employees at the site may be exposed.
- (M) Control of Impalement hazards.

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(N) The securing of all certifications applicable to equipment in use or operations being conducted.

(O) Control of traffic hazards.

(2) Purpose of list. Because serious hazards at construction worksites are so varied, the list of hazard-control procedures provided immediately above is meant to provide examples that convey the intent of this requirement, but is not meant to imply that all are appropriate for every site or that other procedures may not be necessary to address reasonably anticipated serious hazards. All hazards that, given the type and circumstances of work to be performed, can reasonably be anticipated to occur and result in death or serious injury if measures are not taken to prevent them, must be addressed as stated in subsection (c)(1)(B) in order for the controlling employer affirmative defense to apply.

(3) Depth of review and exercise of oversight. In reviewing subcontractors' hazard-control procedures pursuant to subsection (c)(1)(B), the controlling employer and the controlling employer's designated person are not expected to know the detailed safety orders and compliance methods for each operation being conducted by a subcontractor. The controlling employer is expected to exercise its oversight responsibility by making reasonable and diligent efforts to verify that procedures adhered to by subcontractors at the site reflect adequate consideration of and substantial compliance with current, accepted safety and health practices and with occupational safety and health standards enforced by the Division.