The Use of OSHA Regulations in Negligence Cases

by Donald A. Loose and C. Kyle Brown

Congress enacted the Occupational Safety and Health Act (OSHA) in 1970 in an attempt to reduce work-related injuries by codifying an employer's standard of care through a series of safety and health standards.[1] Although the intent of Congress may simply have been to improve the plight of the American worker, the promulgation of OSHA standards has significantly affected litigants in work-related tort cases as plaintiffs have used, or attempted to use, evidence of OSHA regulations to establish the *duty owed* by the defendants in those cases.[2] While the courts agree that OSHA cannot confer a private right of action upon injured workers that would bypass applicable state workers' compensation laws,[3] they have differed considerably on the admissibility of OSHA standards in personal injury cases to establish the standard of care.

OSHA has been adopted in Arizona pursuant to A.R.S. § 23-410. OSHA regulations apply to all private and public employers in Arizona with one or more employees.[4]

The majority of courts have allowed evidence of OSHA violations in tort cases.[5] Some have allowed evidence of the violation as "some evidence" of negligence, while others have held that an OSHA violation constitutes "per se" negligence.[6] However, a small number of jurisdictions, including Arizona, have held that the OSHA regulations do not even qualify as evidence of the standard of care in a negligence case (*See Pruett v. Precision Plumbing, Inc.*,[7] discussed *infra*). This article examines the use of OSHA regulations in negligence cases, and suggests that the law in Arizona on this point is ready for change.

The Pruett Rule

In 1972, Richard Pruett, by and through his guardian ad litem, filed a lawsuit in the Arizona Superior Court for personal injuries that he sustained after falling four stories from the roof of an office building during its construction.[8] Pruett had worked for the plastering subcontractor on the project. The suit was brought against the owner of the property, Precision Plumbing, and the general contractor, Stewart Construction Company. In his lawsuit, Pruett alleged that the defendants had negligently maintained the premises during construction. Pruett's theories for imposing liability on Precision Plumbing and Stewart were predicated upon: 1) the common law duties of owners and occupiers of land; 2) the duty of employers of independent contractors to exercise retained control over the work; and 3) the statutory duties embodied in the regulations enacted pursuant to OSHA. The third theory advanced by Pruett is the primary focus of this article.

OSHA imposes a non-delegable duty upon a general contractor to insure that all subcontractors take adequate safety precautions.[9] Pruett argued that this OSHA provision was mandatory, or at the very least, was evidence of the

standard of care required of general contractors. The Court disagreed with Pruett's interpretation in light of 29 U.S.C. § 653(b)(4), which reads as follows:

> Nothing in this chapter shall be construed to supersede or in any manner affect any worker'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.

The Court went on to state that the OSHA regulations would not even qualify as evidence of the standard of care because Arizona "does not recognize the non-delegable duties of independent contractors," relying on the holding in the earlier case of *Welker v. Kennecott*.[10] Any evidence of an OSHA violation was thus inadmissible to prove negligence.

The court's holding in *Pruett* appears unsound for two reasons: first, the non-delegable duty exception has been eviscerated by the holdings in *Fort Lowell* and *Lewis*, discussed *infra*, and second, most state and federal courts agree that, at a minimum, evidence of an OSHA regulation can be used as evidence of the standard of care (notwithstanding 29 U.S.C. § 653(b)(4)).

Adoption of Non-Delegable Duty Exception

The holding of *Pruett* was opened to question by the Arizona Supreme Court's adoption of the non-delegable duty exception in *Ft. Lowell-NNS Ltd. Partnership v. Kelly*[11] and *Lewis v. N. J. Riebe Enter. Inc.*[12] The non-delegable duty exception refers to duties for which an employer must retain responsibility, despite proper delegation to another.[13] Such situations exist where the employer is under a higher duty to a certain class of persons because of some statutory, contractual or common law obligation.[14] Under the non-delegable duty exception, if the employer delegates performance of a special duty to an independent contractor and the latter is negligent, the employer will remain liable for any resulting injury to the protected class of persons, as if the negligence had been his own.[15] The exception is premised on the principle that certain duties of an employer are of such importance that he may not escape liability merely by delegating performance to another.[16]

Ft. Lowell involved the common law duty of a possessor of land to keep his premises reasonably safe for invitees.[17] In *Ft. Lowell*, the employee of an independent contractor brought a personal injury suit against the general contractor and landowner for injuries sustained on the job site and caused by the work of another independent contractor. The Arizona Supreme Court vacated the decision of the Court of Appeals, and adopted § 422 (b) of the Restatement (Second) of Torts, thereby adopting the non-delegable duty exception.[18]

In *Lewis*, the issue was whether a general contractor must provide employees of subcontractors with a reasonably safe place to work. The employee of a subcontractor fractured his wrist after falling through the roof of Mohave High School during a remodeling project. The employee sued the general contractor alleging that it was required to provide a reasonably safe workplace. The Court held that the general contractor did in fact have a non-delegable duty to provide the subcontractor's employee with a reasonably safe work site.

The linchpin of the *Pruett* decision rejecting OSHA as evidence of the standard of care was Arizona's non-recognition of the non-delegable duty exception. That linchpin was pulled by the Court's adoption of the non-delegable duty exception in *Ft. Lowell* and *Lewis*.

Majority Rule: OSHA Regulations are Admissible

The *Pruett* court held that evidence of an OSHA violation was not admissible to prove negligence per se, nor could the regulation even be offered as evidence of the standard of care. This is a minority rule. Most state and federal courts agree that, at a minimum, evidence of an OSHA violation can be used as some evidence of negligence. Of the states that have considered the issue, eight admit evidence of an OSHA violation to prove negligence per se, 25 admit the evidence as "some evidence of negligence," and only five—Arizona, California, Maryland, Michigan and Mississippi—exclude the evidence entirely.[19] Among the federal circuits, the first, fifth and the District of Columbia admit evidence of an OSHA violation to prove negligence per se;[20] the Third, Fourth, Eighth and Ninth Circuits admit evidence of an OSHA violation as "some evidence of negligence;"[21] and no circuit court has held the evidence inadmissible. A complete compendium of the various court holdings on the issue may be found in the endnotes.[22]

The debate over the admissibility of OSHA regulations in negligence cases centers around the interpretation of 29 U.S.C. § 653(b)(4), which was cited by the *Pruett* court, and which provides that OSHA standards shall not be construed to supersede or affect worker's compensation laws or the common law. The courts agree that Congress included this provision to ensure that in ordinary negligence cases the Act would not confer a private right of action upon injured workers that would bypass applicable state workers' compensation laws.[23] Some courts have held that § 653(b)(4) prohibits a finding that an OSHA violation constitutes negligence per se, because to do so would "enlarge" the employers' liabilities, while other courts have held that this Section does not prevent violation of an OSHA regulation from being considered as evidence of negligence per se.[24] An examination of some federal circuit court decisions illustrates the different approaches that have been taken in the interpretation of § 653(b)(4).

Negligence Per Se

The First Circuit Court of Appeals addressed the issue of negligence per se under § 653(b)(4) in *Pratico v. Portland Terminal Co.*[25] Looking to the legislative history of § 653(b)(4), the court found that this provision was "merely to ensure that OSHA was not read to create a private right of action for injured workers which would allow them to bypass the otherwise exclusive remedy of worker's compensation."[26] The court's interpretation was supported by a letter from the Solicitor of Labor to the Chairman of the House Subcommittee on Labor explaining the operation of § 653(b)(4). The letter stated, in part, "The provisions of S.2788, the Administration's proposed Occupational Safety and Health Act of 1969, would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions."[27] The First Circuit found that § 653(b)(4) "is satisfactorily explained as intended to protect worker's compensation acts from competition by a new private right of action and to keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself."[28] The court went on to hold "that § 653(b)(4) does not prevent violations of OSHA regulations from being considered as evidence of negligence per se."[29]

The Fifth Circuit has also determined that § 653(b)(4) does not prohibit the application of the negligence per se doctrine in personal injury cases.[30] However, in one case the Fifth Circuit held that evidence of an OSHA violation could only be used to establish negligence per se when the plaintiff was an employee of the defendant (relying on the proposition that OSHA regulations provide evidence of the standard of care exacted of employers).[31]

The Sixth Circuit Court of Appeals in *Teal v. E.I. DuPont De Nemours and Co.*,[32] applying Tennessee law, ruled that the district court erred in refusing to give a negligence per se instruction in a case where the evidence indicated that the employer had violated a federal regulation promulgated pursuant to OSHA. The court found that OSHA imposed a duty on employers to protect the safety of every employee who works in the employer's facility, including the employees of an independent contractor.

"Some Evidence" of Negligence

Even the federal circuit courts that have rejected the negligence per se approach have allowed evidence of OSHA violations as "some evidence of negligence." For example, in *Ries v. National R.R. Passenger Corp.*,[33] the Third Circuit emphasized that a per se finding would bar the defendant from asserting a contributory negligence defense which could certainly "affect" liability.[34] The court stated that "it would be almost axiomatic that the effect would be to 'enlarge or diminish or affect' the statutory duty or liability of the employer."[35] The court reasoned, however, that a "some evidence of negligence" approach would not "enlarge or diminish or affect" the liability of the employer in contravention of § 653(b)(4), because the jurors would be free to draw their own conclusions from the evidence of the OSHA violation. The court justified this approach by stating "[e]vidence of an OSHA violation, in and of itself, does not 'affect' liability; it is the inferences that the trier of fact draws from the evidence that 'affect' liability."[36]

The *Ries* court also downplayed the significance of the legislative history that the *Pratico* court had relied on, specifically the letter from the presiding Solicitor of Labor to the Chairman of the House Subcommittee on Labor, discussed *supra*.[37] Instead, the *Ries* court emphasized the plain language of the statute and avoided giving too much weight to "the contemporaneous remarks" of a non-legislator such as the Solicitor of Labor.[38]

The Fourth Circuit, in *Albrecht v. Baltimore & Ohio Railroad Co.*,[39] also adopted the view that OSHA stan-

dards may be admitted as "some evidence" of the applicable standard of care.[40] The district court read OSHA regulations to the jury and instructed the jury that the regulations could be considered by it as "one more piece of evidence on the issue of negligence."[41] The trial court also instructed the jury that the regulations "were not conclusive or binding and that the application of the regulations to the facts of the case were solely for the jury to determine, as was the weight to be given to the regulations in determining the issue of negligence."[42] The Fourth Circuit found no reversible error in these instructions or the introduction of the regulations.[43]

Conclusion

The Arizona Court of Appeals' holding in *Pruett* has not been reversed, but for the reasons discussed in this article, the decision is not based on sound rationale. *Pruett* was based on the principle that Arizona does not recognize non-delegable duties of independent contractors. However, since the *Pruett* decision 23 years ago, the Arizona Supreme Court has adopted the non-delegable duty exception in *Ft. Lowell* and *Lewis.* It appears, too, that the *Pruett* court misinterpreted § 653(b)(4). Indeed, the vast majority of courts that have considered the issue have not found a statutory bar to the use of OSHA regulations in negligence cases, to either establish negligence per se or as evidence of the standard of care. It is likely that *Pruett* would be decided differently 23 years later.

Donald A. Loose *and* ***C. Kyle Brown*** *are shareholders of Loose Brown & Associates, P.C., a Phoenix law firm that prosecutes personal injury cases.*

ENDNOTES:

1. *See* 29 U.S.C. §§ 651-78 (1970).
2. Mark A. Rothstein, *Occupational Safety and Health Law*, 500-502 (3d. 1990).
3. *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 265 (1st Cir. 1985).
4. A.R.S. § 23-401(7).
5. *See* Rothstein, *supra* note 2, at 500-02.
6. *Id.*
7. 27 Ariz.App. 288, 544 P.2d 655 (1976).
8. The nature and extent of Pruett's injuries are not discussed in the decision, but the uncontroverted facts were that he sustained multiple serious injuries.
9. 29 C.F.R. § 1518, *et. seq.*
10. 1 Ariz.App. 395, 403 P.2d 330 (1965). In *Welker*, the employee of a general contractor was killed during the construction of a mining plant for Kennecott Copper Company near Ray, Arizona. The employee died when the bank of the "footer" in which he was working collapsed. The personal representative of Welker's estate sued Kennecott, the owner of the property, alleging that it was negligent for, among other things, failing to ensure that its independent contractor exercised adequate safety precautions on its property.
11. 166 Ariz. 96, 800 P.2d 962 (1990).
12. 170 Ariz. 384, 825 P.2d 5 (1992).
13. *Ft. Lowell*, 166 Ariz. at 101.
14. *Id.*
15. *Id.*
16. *Id.*
17. *See* Restatement (Second) of Torts § 422.
18. *Ft. Lowell*, 166 Ariz. at 105. The Ninth Circuit cited *Ft. Lowell* in holding that "Arizona state law recognizes that a landowner has a non-delegable duty to his invitees for injuries that occur while he is in possession and result from his independent contractor's negligence in performing the duties of the possessor or of the contractor." *Brossard v. U.S.*, 2000 U.S. App. LEXIS 504 (9th Cir. 2000).
19. *See* Rothstein, *supra* note 2, at 504-06.
20. *See, e.g., Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985); *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231 (5th Cir. 1982); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Ceco Corp. v. Coleman*, 441 A.2d 940 (D.C.App. 1982).
21. *See, e.g., Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992); *Albrecht v. Baltimore & Ohio R.R.*, 808 F.2d 329 (4th Cir. 1987); *Donovan v. General Motors*, 762 F.2d 701 (8th Cir. 1985); *Robertson v. Burlington N. R.R. Co.*, 32 F.3d 408 (9th Cir. 1994).
22. *Admissible/Negligence Per Se:* First Circuit, Fifth Circuit, District of Columbia, Colorado, Delaware, Idaho, Indiana, Iowa, Tennessee, Washington, Wisconsin; *Inadmissible:* Arizona, California, Maryland, Michigan, Mississippi; *Admissible/Some Evidence of Negligence:* Third Circuit, Fourth Circuit, Eighth Circuit, Ninth Circuit, Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Wyoming. *See Rothstein*, supra note 2, at 504-06.
23. *See Pratico*, 783 F.2d at 266.
24. *See Id*. at 264-266.
25. 783 F.2d 255 (1st Cir. 1985).
26. *Id.* at 266.
27. *Id.*, quoting from Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 before the Select Subcommittee on Education and Labor, 91st Congress, 1st Sess., Part 2 at 1592-93 (letter of L.H. Silberman, Solicitor of Labor).
28. *Id.*
29. *Id.* at 266-267.
30. *See Dixon v. International Harvester Co.*, 754 F.2d 573, 581 (5th Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 (5th Cir. 1982); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir. 1981).
31. *Melerine*, 659 F.2d at 710-712.
32. 728 F.2d 799 (6th Cir. 1984).
33. 960 F.2d 1156 (3d Cir. 1992).
34. *Id*. at 1162 (stating that "we are hard pressed to say that it would not 'affect' liability…. In short, it defies reason to construe section 653(b)(4) as only precluding private actions which would bypass workers' compensation. Had Congress intended such a result, it would not have drafted section 653(b)(4) in such sweeping terms.").
35. *Id*.
36. *Id.*
37. *Id.*
38. *Id.* at 1161-62 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).
39. *Albrecht v. Baltimore & Ohio R.R.*, 808 F.2d 329 (4th Cir. 1987).
40. *Id.* The conclusion of *Albrecht* is probably dicta, since the case was remanded for a new trial on other grounds.
41. *Id.* at 332.
42. *Id.*
43. *Id.*