

Construction Law Newsfeed



Mitigating Prime Contractors' Liability for Injuries to Subcontractors' Employees

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The recent Supreme Court's decision in *Lee Lewis Construction, Inc. v. Harrison*, affirmed a \$12.0m award against a prime contractor for injuries of a subcontractor's employee. This case has justifiably raised concerns among prime contractors regarding their liability for these injuries when the subcontractors control their employee's work. The Supreme Court's decision, however, did not change the prior law with regard to a prime contractor's responsibilities for safety. What the Supreme Court decision did do is to emphasize a prime contractor's liability if he ignores safety issues in the construction process.

The purpose of this letter is to provide guidelines for a prime contractor to mitigate liability for catastrophic events. Under Texas law, a prime contractor is liable for the safety of a subcontractor's employees if the prime contractor assumes this responsibility, either by contract or by his actions in controlling the safety procedures of the subcontractor. A prime contractor will also be held liable, however, if the safety of the subcontractor's employees is ignored. To balance these opposing concerns, my recommendations are as follows:

1. Use a subcontract that does not assume safety responsibilities. The standard subcontract drafted by a prime contractor should clearly provide that the subcontractor is responsible for the safety of its own employees. It is imperative that a prime contractor does not assume by contract, responsibility for the safety of its subcontractor's employees.

2. Insist that subcontractors designate in writing a safety coordinator who is on site at all times. This safety coordinator may be the subcontractor's superintendent or foreman, and he may have multiple responsibilities. All prime contractor communications relating to safety should be addressed to the subcontractor's safety coordinator (and not to a foreman or supervisor, even if that title is his other hat). The purpose of this procedure is to place control of safety issues with the subcontractor, not with the prime contractor.

3. Have all communications from AGC's safety directors, or other third-party safety consultants, made directly to the subcontractor's safety coordinator. Since the responsibility for the safety of a subcontractor's employee must be managed and controlled by the subcontractor, all reviews, recommendations, and communications relating to safety should be addressed directly to its safety coordinator. A prime contractor's safety director should be copied.

4. Insist on safe job site practices and procedures. Although the subcontractor must be responsible for the safety of its own employees, a prime contractor cannot allow unsafe practices on the job site. Since the subcontract agreement will require the subcontractor to be responsible for safety, including compliance with OSHA regulations, a prime contractor should utilize its subcontract remedies for breach, to insist on safe practices at the job site.

5. Insist on strong indemnification provisions. If Lee Lewis Construction had a strong indemnification provision in its subcontract, its subcontractor would be defending and covering the loss. A prime contractor's subcontract should provide that the subcontractor's Commercial General Liability ("CGL") policy be either a broad form or that it have a contractual liability endorsement. With this endorsement, a subcontractor's CGL insurance will cover a subcontractor's indemnification obligations to the prime contractor.

6. Make sure that the subcontractor's CGL policy names the prime contractor is an additionally insured. The first line of defense for a prime contractor from liability arising out of a subcontractor's work, is the subcontractor's insurance. A prime contractor's insurance is its second line of defense. The subcontract agreement should also provide that the subcontractor's CGL coverage is primary and non-contributory. If Lee Lewis was additionally insured under his subcontractor's policy, and the subcontract required the policy to be primary and non-contributory, neither Lee Lewis nor its insurer would have suffered an adverse consequence until and unless the policy limits of the subcontractor's CGL insurance, as well as its umbrella insurance, were exhausted.

The law in Texas, as emphasized by the Lee Lewis case, is that a prime contractor must attempt to satisfy two conflicting goals: (1) to clearly provide by contract that the subcontractor is responsible for controlling the safety of its own employees, and not to assume actual control by subsequent actions; and (2) to insist on safe job site practices and procedures for all construction workers, including the subcontractor's employees. This difficult balancing act is best attempted by following these recommendations. Of course, the best way to avoid liability is to avoid accidents.