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July 26, 2000

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New York Law Journal

NEW YORK, WEDNESDAY, JULY 26, 2000

Inspector Owed Duty To Client's Workers

Agreed to Make Con Ed Plant OSHA Compliant

BY MICHAEL A. RICCARDI

A PRIVATE COMPANY that conducts safety inspections for employers has a duty to its clients' employees to make sure that no unsafe conditions cause injury, a unanimous panel of the Appellate Division, Second Department, has ruled in a case of first impression.

In *Forde v. Columbus McKinnon Corp.*, 1999-10921, the panel denied summary judgment to defendant Markey Industrial Supply Inc., which had contracted with Consolidated Edison to make sure that its workplace was in compliance with federal Occupational Safety and Health Administration regulations.

The panel, which included Justices Daniel W. Joy, Howard Miller, Daniel F. Luciano and Nancy E. Smith, noted that Markey Industrial agreed to perform for Con Ed testing "as per OSHA regulations" for chain hoist equipment.

The plaintiff, Kevin Forde, a Con Ed worker, was attempting on Jan. 10, 1995, to lower machinery onto a loading platform using a hoist on the site. The hoist, consisting of a ceiling-mounted hook and chain, began to malfunction, and the hook disengaged. The machinery fell onto Mr. Forde, leaving him a paraplegic.

According to the unsigned opinion, the accident was the result of a defective hook and the absence of a safety latch.

"[T]he clear and unambiguous language of the contract establishes that Markey's duties included performing inspections of the hoists in accordance with regulations of [OSHA]," the court said. "Accordingly, Markey can be held liable to the plaintiff for its negligent performance of those duties."

The Second Department followed a decision of the New York Court of Appeals, *Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579 (1994), in which a company that provided service to an employer under a maintenance contract was held liable for the injury of an employee.

In the *Palka* case, however, the contractor did not promise to bring or keep the workplace in compliance with OSHA regulations.

The decision in *Forde*, therefore, is the first to find a duty to workers flowing from a contractual obligation to an employer to ensure that a workplace remains in compliance with federal safety regulations.

The appellate court upheld Queens Supreme Court Justice Simeon Golar, who had denied summary judgment to Markey Industrial, rejecting defense arguments that the inspector had no duty to the employee.

Service 'As Required'

Markey Industrial in its brief to the court also said that it contracted to service hoisting equipment only as "specifically designated" by Con Ed, its client.

The defense said that Markey never knew of the existence of the hoist and never serviced it.

But the court ruled that the terms of the contract obligated Markey to inspect and maintain hoists at Con Ed's Astoria, Queens plant "as per OSHA regulation" and perform maintenance "as required."

That language, the panel concluded, amounted to a promise to keep all of the hoists at the Con Ed site in safe condition as defined in OSHA regulations.

According to the plaintiff's brief, the ceiling-mounted equipment that failed in the 1995 accident had bent to a point where it could no longer reliably hold a hook bearing the weight of heavy machinery.

Jozef K. Goscilo of Murphy & Higgins represented Markey Industrial.

Michael Weinberger and Sanford F. Young represented Mr. Forde.