



## Case Study

# Employer's Liability Law

(OR 654.305 et seq.)

— by Jeffrey D. Eberhard

In *Moe v. Eugene Zurbrugg Const. Co.*, 202 Or App 577, \_\_\_ P3d\_\_\_ (2005), the court of appeals explained the heightened duty of care required under Oregon's Employer Liability Law (ELL).

Park Lanes contracted with Zurbrugg Construction Company (general contractor) to build a bowling alley. Zurbrugg was responsible for directing all work and supervising all safety precautions during construction. Park Lanes remained responsible for installing and leveling the lanes themselves – a task that required large trenches to remain open between lanes during construction. While the trenches were open, a subcontractor, Cascade Acoustics, began installing ceiling tiles. Donald Moe, a Cascade employee, was seriously injured when the wheel of his scaffold fell into a trench, causing him to fall and suffer serious injuries.

Moe filed suit against Zurbrugg and Park Lanes, alleging negligence and violation of Oregon's Employer's Liability Law (ELL) for permitting installation of the ceiling tiles while the trenches were uncovered and failing to properly instruct the workers to recognize and avoid unsafe and hazardous conditions. A jury found both Zurbrugg and Park Lanes liable.

On appeal, the court explained that the ELL imposes “a heightened statutory standard of care on a person or entity who either is in charge of, or responsible for, any work involving risk or danger.” For liability to be imposed, a defendant must: (1) be engaged with the plaintiff's direct employer in a common enterprise; (2) retain the right to control the manner or method in which the risk-producing activity was performed; or (3) actually control the manner or method in which the risk-producing activity is performed.

In *Moe*, the court found the uncovered trenches satisfied the requirement that plaintiff was involved in a “risk producing activity” or was subject to dangerous workplace conditions. Both Park Lanes and Zurbrugg were potentially liable for plaintiff's injuries under ELL.

Park Lanes was potentially liable under a “common enterprise” theory. To trigger liability, a plaintiff must show a causal link between a defendant's involvement in joint work and plaintiff's injury. According to the court, this causal link was satisfied because the trenches were left open specifically to allow Park Lanes employees to perform work on the lanes.

The court also found sufficient evidence to allow a jury to find Zurbrugg liable. The construction contract stated that Zurbrugg was responsible both for safety on the project and was solely responsible for control over the means and methods of construction. Additionally, Zurbrugg's owner was present at the work-site every day and aware of the risk posed by the trenches. Nevertheless, Zurbrugg chose to schedule the installation of the ceiling tiles before the lanes were fully installed, knowing of the danger the trenches presented. On these facts, Zurbrugg likely retained both the right to control the manner and method of work and exercised actual control over the work. ❖

---

**Claims Pointer: Oregon's Employer Liability Law (ELL) imposes a heightened duty of care on any party in charge of or responsible for any work where employees are involved in a 'risk-producing' activity or are subject to dangerous workplace conditions.**

---

— If you want to be notified of new cases, please send an email to [caseupdate@smithfreed.com](mailto:caseupdate@smithfreed.com).

— For additional information, please visit our website at [www.smithfreed.com](http://www.smithfreed.com).

*This article is intended to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.*