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Hard Lessons from a Grisly Accident

By Todd R. Wulffson

Following the horrific death of an employee, Bumble Bee Foods announced its agreement to pay $6 million in a criminal settlement, the largest of its kind in California history. The situation, which resulted in the death of 62-year-old employee Jose Melena – in 2012 he was cooked alive in a steam oven along with 12,000 pounds of canned tuna fish – is a scenario more fitting to Upton Sinclair's *The Jungle* than a modern workplace.

Mr. Melena was cleaning the oven during his pre-dawn shift when a co-worker mistakenly believed he was in the restroom and proceeded to load, and then activate, the 36" by 54" oven designed to sterilize cans of tuna at 270 degrees for an hour. Bumble Bee Foods, the plant operations director and former safety manager were each charged with three felony counts of violating Occupational Safety & Health Administration (OSHA) rules, causing Mr. Melena's death. The company had previously been fined $74,000 for failing to assess the dangers to employees working in the same steamer ovens.

The criminal charges state that Bumble Bee Foods and the two managers willfully violated rules that require implementing a safety plan, rules for workers entering confined spaces, and procedures to keep machinery or equipment turned off if an employee is inside the machine. They were fined $12,000 and $19,000, respectively, and they will likely have community service, probation and criminal records.

The question arising from this case that has drawn nationwide attention can be simply put: Could this tragedy have been avoided? The unequivocal answer is "yes," and there are several valuable lessons in-house counsel and senior managers should learn from these painful facts.

In 1906, when Sinclair published his famous expose on the meatpacking industry, such an accident would also have been gruesome (albeit without the graphic publicity of the internet and TV), but at least somewhat explicable based on then-current technology. Today, however, there simply is no excuse for operating machinery that is not either automated entirely or equipped with cameras, sensors and other safety measures that would have prevented the co-worker from assuming Mr. Melena was out of the machine and then turning it on.

Given the language in the criminal charges, a clear takeaway from this case is that a modern company with ample resources is going to be held to a high standard of available technology. If an accident could have been reasonably avoided with standard technology, it should have been. Any business utilizing machines that can cause injury or death – that is, any machinery involved in a high-risk occupation – must establish strong safety controls and should routinely (at least every other year) hire a consultant to advise on whether the machinery and safety procedures are up to date and whether the machinery is working properly. Even though Bumble Bee Foods' steamer ovens were relatively old, a procedure as simple as hanging a tarp on the oven door to function as an indicator that someone was inside, or an investment in some inexpensive cameras or sensors, likely could have prevented Mr. Melena's death.

Since the accident could have been so easily avoided – and given the fact that the company was previously cited for not having adequate safety procedures on these same ovens – Bumble Bee Foods had no choice but to settle the criminal matter and the related claims that will follow. There is no acceptable explanation for the accident. If the company wants to sell tuna fish again, it needs either to change its name or at least minimize the ongoing publicity.

Another takeaway is that an employer cannot simply rely on the workers' compensation system as "insurance" against corporate liability resulting from industrial accidents. The workers' compensation system is, by definition, a no-fault system and the exclusive remedy it provides is predicated on the concept that some accidents and injuries are part of the "compensation bargain" with em-

ployees. By taking such strong criminal action, the Los Angeles district attorney has made it clear that the injuries suffered by Mr. Melena are not part of any "compensation bargain" and were not part of any employee's reasonable expectation.

The D.A.'s office also is sending an unmistakable message to employers that there is always a risk of criminal charges if you ignore safety issues. Prosecutions of workplace violations are uncommon, even in fatality cases. In 2013, California cited nearly 15,000 workplace safety violations, but of 189 fatality investigations, the state referred only 29 to prosecutors. The penalties, however, can be severe, and they are all outside the workers' compensation system.

Mr. Melena's family also will be able to pursue, at a minimum, a serious and willful misconduct claim that is similarly outside the workers' compensation system. These claims carry penalties of up to 50 percent of the underlying workers' compensation award with no cap. In a fatality case, this can result in several hundred thousand dollars in additional penalties, and since serious and willful misconduct claims are outside the "compensation bargain" of workers' compensation, they are uninsurable by the employer. Therefore, Bumble Bee Foods' $6 million criminal settlement is likely just the start of the penalties it will face, all of which will have to settle. It is highly likely that the total out-of-pocket cost the company will incur will exceed $10 million, not including the lost profits associated with the public relations stigma.

The terrible facts of this case also have highlighted other issues to which prudent employers should pay attention. Mr. Melena was a Hispanic employee who spoke limited English. In 2013, there were 817 fatal work injuries involving Hispanic workers in the United States. In the nation, Hispanics are the only racial/ethnic group experiencing an increase in these numbers, according to the U.S. Labor Department's Bureau of Labor Statistics.

Whether it is a language barrier in explaining safety rules, or a fear among undocumented workers that raising safety concerns will result in their being fired or deported, this increasing fatality rate is unacceptable. It also is likely to be featured as often as judges will allow it in any discrimination, harassment or other lawsuit based on race or national origin. The statistics are impactful on juries, and although defense counsel will argue motions in limine strenuously, cases like this one will make all employers less sympathetic and more suspect when a Hispanic employee claims he or she has been mistreated by a company.

In Southern California, where Bumble Bee Foods is headquartered, and increasingly in other states, a predominantly Spanish-speaking workforce is the reality, and employers must be proactive in addressing some of the unique challenges and concerns this workforce presents. It's not only that training, handbooks and safety notices rendered in both Spanish and English will reduce injuries. They also may be legally required, to provide the "safe and healthful workplace" mandated by OSHA.

It may be counter-intuitive, but manufacturing employers may actually be better-served to adopt an "English-only" rule on the manufacturing floor so that emergency commands and safety issues are understood by all. (To further add to the confusion, this may require the employer to provide English language training to employees). After all, there is a reason the international language for pilots is English: Parties must understand each other when safety is paramount, and shouting out commands in multiple languages can be a recipe for disaster when seconds matter.

There are many outstanding consulting firms, significantly less expensive than lawyers, who can perform an overall audit and make recommendations for improving communication and safety for employees. Having a third party perform such an audit also can help insulate the employer from liability when someone (perhaps neither an English nor Spanish speaker) objects to the English-only rule or the bi-lingual training in just English and Spanish.

The takeaways from the Bumble Bee Foods case for employers are as follows:

- Strong safety controls must be put in place to protect workers in high-risk occupations, and the more resources the employer has, the higher the technology standard will be for what is "reasonable" to protect employee safety. Bumble Bee Foods and its managers were prosecuted for "willful" violations because of the level of criminal negligence (not actual willful acts) associated with their failure to adopt proper safety measures.
- Employers must make sure that all employees are aware of the company's safety policies and procedures, and take affirmative steps to confirm this awareness. Passing out a brochure or posting a bulletin is not going to be sufficient to avoid liability. Employers must be proactive.
- Language issues are a particular point of concern, and employers – legally and morally – need to ensure that the unique concerns of a multi-racial and multi-lingual workforce are being addressed.

The circumstances of Mr. Melena's death are an absolute tragedy, but assuming it was just a freak accident that could not occur in hundreds of other modern companies would be a separate tragedy, as well as a fallacy. ■

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