

NEW MEXICO INJURY ATTORNEY BLOG

PUBLISHED BY
COLLINS & COLLINS, P.C.
ATTORNEYS AT LAW

June 2, 2010

Employer Responsibility for Worker Safety? No, But Thanks for Playing.

The seminal New Mexico case addressing worker's compensation exclusivity is the 2001 New Mexico Supreme Court case of *Delgado v. Phelps Dodge*. The case, despite the leap in the protection of workers over prior law, clearly illustrates the marginal protection employees are afforded from the negligent acts of their employers.

The *Delgado* case involved a fatal incident at a smelting plant where a worker suffering a horrifying death. The term incident is used because it was no accident that Delgado was burned to death. Instead, the facts showed that the employer clearly expected that Delgado would be killed while performing a task that he was grossly unqualified to perform.

The *Delgado* case illustrates the disdain with which workers are treated under the Worker's Compensation Act. The good and the bad news is that as a result of *Delgado*, workers enjoy slightly greater protection than in the past. In the past, New Mexico followed the "actual intent test." *Delgado* set forth the purportedly higher standard of willful and intentional.

The "actual intent test" is most clearly illustrated by the district court's granting of the defendant's motion to dismiss for failure to state a claim. The complaint alleged that the defendants "acted intentionally, with the knowledge that Delgado would be seriously injured and killed as a result of their actions." The district court, following the actual intent requirement, ruled that even if it was true that defendants "did engage in a series of deliberate or intentional acts which they knew or should have known would almost certainly result in serious injury or death to Reynaldo Delgado...the complaint falls short of alleging that [they] actually intended to harm Reynaldo Delgado." In short, the only way an employer could be sued beyond the Worker's Compensation Act was basically if they murdered the worker. How else may this language be read?

The Court in *Delgado* took the enlightened view that this standard was unacceptable. However, the Court went only slightly further in protecting workers injured as a result of the acts of employers. The Court held instead employers would lose the protection of the Workers Compensation Act only where the "employer willfully or intentionally injures a worker." The Court defined willfulness as follows: "(1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2)

Main Office:
400 Gold Ave. SW
Suite 500
Albuquerque, NM 87102
(505) 242-5958

<http://www.newmexicoinjuryattorneyblog.com/>

the worker or employer expects the injury to occur, or has utterly disregarded the consequences of the intentional act or omission; and (3) the intentional act or omission proximately causes the worker's injury."

The new standard is only slightly better than the old. In fact, employers continue to enjoy protection for gross negligence, and arguably for recklessness. Delgado still requires that the act reasonably be expected to lead to the injury of the worker. It further requires that the employer either totally disregarded the possible consequences or fully expected the injuries to occur. This is little better than the "actual intent test" and arguably mere word play. The result is the same, the employer must send a worker into a situation with a reasonable expectation that the worker will be injured or killed. Anything short of that and the employer is protected by the Worker's Compensation Act and the worker (or his survivors) is left to bear the burden of the employer's negligent behavior.

To be expected, the business community reacted with much the same repulsion to the Delgado ruling as did the defendant who warned the Court "that any deviation from the actual intent test will visit an undo hardship upon employers in this State and wreak havoc with New Mexico's workers' compensation system." It truly is tragic that employers can no longer send their employees to certain death. Honestly, what has New Mexico come to when we visit such injustice on our State's businesses?

**Main Office:
400 Gold Ave. SW
Suite 500
Albuquerque, NM 87102
(505) 242-5958**

<http://www.newmexicoinjuryattorneyblog.com/>