MEMORANDUM OF LAW

DATE: June 1, 1989

TO: Bob Ferrier, Labor Relations Manager
FROM: City Attorney
SUBJECT: Steel Toe Work Shoe Program - Water Utilities Department

Recently you asked this office for an opinion concerning whether the City must provide steel toe work shoes for water utility workers performing duties in hazardous areas. The question was prompted by a citation issued to the City by the Division of Industrial Safety for failure to comply with the provisions of California Administrative Code, Article 10, section 3385(a) which states:

> 3385. Foot Protection (a)
> Appropriate foot protection shall be required for employees who are exposed to foot injuries from hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations.

Labor Code sections 6401 and 6403 delineate the employer's duty with regard to the safety equipment required by the Administrative Code and read in pertinent part:

> 6401. Safety devices and safeguards:
> Duty to furnish
> Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees (emphasis added).
>
> 6403. Safety devices and safeguards:
> Failure to provide
> No employer shall fail or neglect:
> (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.

Although the statutes make the provision of safety equipment and clothing a duty of the employer, a perceived ambiguity

concerning the definition of furnish has been questioned in the past. The question was answered and the definition clarified in Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, 25 Cal. 3d 465 (1979). In Bendix, workers were required to wear gloves or mittens when removing lumber from the dry kilns. The Division of Occupational Safety and Health ordered Bendix, at its own expense, to provide the requisite safety apparel. Prior to the Division's order Bendix had provided the gloves to workers on a cash or payroll deduction basis. Bendix sought a writ of mandamus seeking to block the Division's order arguing that the existing program complied with the requirements of Labor Code sections 6401 and 6403. The court disagreed with Bendix's interpretation of furnish and, quoting from an opinion of the attorney general said:

> In short, the originally ambiguous word "furnish" in section 6401 has been interpreted by the Division of Industrial Safety to mean that the employer must at his expense supply personal protective equipment, unless he and his employees-singly or collectively-agree otherwise. This construction, which has long stood unchallenged, is reasonable and within the agency's authority. Cf. Kerr's Catering Service v. Department of Industrial Relations, 57 Cal. 2d 319, 324-325, cert. denied, 371 U.S. 818 (1962) (51 Ops. Cal. Atty. Gen. 105, 109 (1968)) (emphasis in original).

From this opinion, it is clear that both the courts and attorney general agree with the Division of Industrial Safety's administrative interpretation concerning the employer's duty to furnish safety equipment. Additionally, the current Memorandum of Understanding between the City and Local 127 specifically provides, in Article 22, that the City agrees to provide all safety equipment required by applicable state law.

The unanimity concerning an employer's duty in this regard indicates unequivocally that the City must provide, at its expense, steel toe work boots for employees in hazardous positions.

JOHN W. WITT, City Attorney
By
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