



Court upholds criminal conviction of water and sewer utility

The Arizona Court of Appeals, District One, has upheld the criminal convictions of Far West Water & Sewer, Inc., in a 2001 incident that resulted in the deaths of a company employee and a subcontractor plus caused serious injuries to another employee during an attempted rescue.

In a multi-faceted appeal, Far West contended:

- It was “not a ‘person’ for purposes of imposing criminal liability.”
- It “cannot be prosecuted under general criminal laws for conduct involving the failure to maintain a safe workplace.”
- The indictment was insufficient.
- The evidence presented at the trial “was insufficient to support the convictions.”

However on the first portion, the Court of Appeals countered by looking at the Arizona criminal code and noting, “Not only did the legislature include corporations in the definition of person, the legislature described how corporations, as enterprises, can commit criminal offenses through the acts or omissions of their directors, high managerial agents and/or agents. We therefore conclude that Far West was a person for purposes of imposing criminal liability...”

On the second portion, the Court of Appeals observed that “Employers who knowingly violate the requirements of A.R.S § 23-403(A) [which establishes the requirements for a safe workplace] or other AOSHA [Arizona Occupational Safety and Health Act] safety standards may be subject to criminal penalties.” The Court then moved to



the criminal code and wrote in the opinion, “We first observe that ‘the minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law. In this case, the State did not charge Far West with a separate offense of failing to discharge the duty to provide a safe workplace. Rather, the State charged Far West with violating specific criminal statutes for conduct defined by those statutes.”

The decision made no distinction between public entity and private entity employers. AMRRP Members need to note that the decision, therefore, could apply to them.

On the third portion, the Court of Appeals simply stated “The indictment was sufficient to enable Far West to defend against the charged offense.”

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OSHA conducts enhanced review of ADOSH

AThe Arizona Division of Occupational Safety and Health (ADOSH) was one of 25 state-run programs to undergo a special evaluation by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) called Enhanced Federal Annual Monitoring and Evaluation (EFAME). The review covered activities during fiscal (FY) 2009 plus the first quarter of FY 2010.

The EFAME report on ADOSH concluded: "While improvements are needed in the enforcement program to meet federal effectiveness criteria, there are no major findings in the report that would indicate a need for anything other than continued close federal monitoring and increased technical assistance to improve Arizona's performance."

EFAME was initiated after a 2009 special OSHA report on Nevada's program, prompted by numerous construction-related fatalities in Las Vegas, identified serious operational deficiencies in that state. ADOSH has been undergoing Federal Annual Monitoring and Evaluation (FAME) since 1974.

ADOSH is responsible for both the enforcement and the voluntary compliance programs of the state's occupational safety and health plan under the OSHA federal grant agreements. Arizona implemented the plan in 1974, and it was certified as having completed all its developmental steps in 1981. Arizona was granted final approval and concurrent federal enforcement authority was relinquished in 1985.

ADOSH has jurisdiction over approximately 2.87 million workers in 142,902 private and public administration establishments. The program covers all occupational safety and health issues within the state except for areas precluded from enforcement, which include areas of exclusive federal jurisdiction, private contractors on Indian National lands, federal employees, copper smelters and concrete and batch plants that are physically located within mine property and under jurisdiction of the State Mine Inspector's Office. The Industrial Commission of Arizona (ICA) is responsible for the administration of ADOSH.

In commenting on EFAME, David Michaels, assistant secretary of Labor for OSHA, said, "Our goal was to identify problems in state-run programs before they result in serious injuries or fatalities," said. "While we found many positives in the state programs, we also found deficiencies including concerns about identification of hazards, proper classification of violations, proposed penalty levels, and failure to follow up on violations to ensure that workplace safety and health problems are corrected."

The EFAME report on Arizona said that a series of case file documentation issues were identified that might point to

underlying problems in complaint and fatality inspections, violation classification, and abatement. In addition, it said, Arizona's procedures for communicating with victims' families require improvement.

The EFAME report continued, "The Arizona program has an allocated staff of 15 safety and 11 health inspectors that exceeds its compliance staffing benchmarks of 9 safety and 6 health [inspectors]. However, the State has had trouble hiring and retaining staff and maintaining staffing at authorized levels. (There were 7 safety and 2 health vacancies during the [evaluation] period.) The State experienced a budget deficit in FY 2009, resulting in reduction in positions, a state-wide hiring freeze, and consolidation of services. While there were no furloughs during the evaluation period, furloughs are planned for FY 2011 and 2012.



"The state was able to retain violations and penalties in informal conferences at levels above the federal [criteria]. In a significant decision, the Arizona Court of Appeals upheld a criminal conviction concerning a double fatality in a confined space accident in 2001 with penalties of \$1.8 million and 12 months probation. (See story on Page 1) The original state investigation resulted in a \$31,500 penalty."

The EFAME report took note of the state's financial problems.

"The State of Arizona was faced with a budget deficit in FY 2009, and most decisions the [ICA] made have been influenced by this continuing crisis. This includes the mandatory reduction of employee positions, a state-wide hiring freeze and services being streamlined, consolidated or reduced. It is expected the state's situation will not change in FY 2010."

Other observations made by OSHA based on the EFAME report include:

- Some files had limited documentation, especially in fatality cases, making it difficult for reviewers to determine the quality of investigations.

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Medical marijuana

The workplace could become the site of numerous battles over the use of medical marijuana, which Arizona voters have narrowly endorsed by approving Proposition 203 in November's general election, making Arizona the 15th state to do so.

Prop. 203 would allow a qualifying patient who is registered with the Arizona Department of Health Services (ADHS) to "obtain up to 2.5 ounces of marijuana in a 14-day period" and "that any person who acts in conformity with the requirements of this proposition is not subject to any governmentally imposed sanctions relating to the use of medical marijuana."

Then according to a Legislative Council analysis, Prop. 203 says, "An employer may not discriminate against a person registered pursuant to this proposition in hiring, terminating or imposing employment conditions unless failing to do so would cause the employer to lose a monetary or licensing benefit under federal law. Further, an employer may not penalize a qualifying patient registered pursuant to this proposition for a positive drug test for marijuana, unless the patient used, possessed or was impaired by marijuana on the employment premises or during hours of employment."

There is currently no standard for being under the influence of marijuana or definition for being impaired on the job. Mike Meno, communications director for the Marijuana Project, which backed the initiative, has acknowledged to the news media that workplace issues have cropped up frequently in the other 14 states where medical marijuana has been legalized.

However, much depends on who is allowed to use medical marijuana, and ADHS has released its first draft of proposed rules, which go a long way toward defining who is a qualifying patient and the patient/physician relationship. ADHS is expected to release a revised draft based on public comments by Jan. 31. Public hearings will begin in February. ADHS must finish the rule-making process by April. The agency will then review applications from people who want to use medical marijuana or operate a dispensary. The program should be fully functioning by summer.

ADHS Director Will Humble told *The Arizona Republic* the department had two goals: Make the rules strict enough to prohibit people who don't have serious medical conditions

from abusing the system without impeding patients' access to marijuana, and ensure that medical experts are deeply involved in the process of patients obtaining and using marijuana.


"I'm taking this seriously that this is the medical-marijuana act, not the recreational-marijuana act," Humble said.

The proposed rules would require that physicians have an ongoing patient/physician relationship before recommending marijuana. That means the patient would need to have seen the physician for at least one year and had at least four visits for the debilitating condition, or the physician assumes primary responsibility for managing the patient's debilitating condition and for providing routine care.

Then, the physician must certify in writing that the patient likely will benefit from using marijuana as a medicine to treat his or her debilitating disease. These conditions include cancer, HIV/AIDS, hepatitis C and multiple sclerosis. The proposed rules specify the patient must have severe and chronic pain as a result of a chronic or debilitating disease or its treatment.

Physicians will be the "gatekeepers" of Arizona's medical-marijuana program, Humble said. The department wants physicians to thoroughly assess the risks and benefits of their patient's marijuana use and make sure only patients who truly need marijuana for medical use have access to it, he added.

The department's proposal does not require physicians to provide proof, such as MRIs and X-rays to prove chronic pain, in addition to their medical-marijuana recommendations. This means the rules "put the onus on the physician to practice ethical procedures," Laura Nelson, ADHS chief medical officer, told *The Republic*.

In addition, ADHS proposes that all medical marijuana dispensaries hire a medical director who will be on-call or on-site at the facility. Medical directors would make sure patients or their physicians document changes in their symptoms and track their marijuana usage. They also would ensure dispensaries provide educational materials, such as how to administer marijuana safely, signs of substance abuse or dependency, and possible side effects. Medical directors would not be allowed to write medical-marijuana recommendations for patients. 

On-the-job injuries, illnesses decrease

The number of reported nonfatal occupational injury and illness cases that required days away from work to recuperate decreased by 9 percent to 1,238,490 cases in 2009, according to the U.S. Bureau of Labor Statistics (BLS). The incidence rate decreased 5 percent to 117 cases per 10,000 full-time workers. However, the BLS noted that some of the overall decrease in case counts may be attributed to economic factors, including a decrease in employment and total hours worked.

Key findings included:

- Significant decreases in the number of cases reported for construction and extraction workers (26 percent) and transportation and material moving workers (13 percent) contributed to the overall decrease.
- Despite the total decrease in the incidence rate, the following occupations had increases in their rates: landscapers and groundskeepers (10 percent) and registered nurses (5 percent).
- Protective service occupations had the highest proportion of injury and illness cases in government sectors. In state government, the incidence rate was 418 cases for this occupation group, and in local government, it was 505 cases per 10,000 full-time workers.
- Contact with objects or equipment was a frequent cause resulting in an occupational injury or illness and accounted for 24 percent of all cases.
- Sprains, strains, and tears continue to dominate the type of occupational injury or illness occurring to all workers.
- The number of musculoskeletal disorder (MSD) cases declined by 9 percent to 348,740 cases and accounted for 28 percent of all cases, the same proportion as reported in the previous year.

There were seven occupations where the incidence rate per 10,000 full-time workers was greater than 300 and the number of cases with days-away-from-work was greater than 20,000. These occupations also had at least one-tenth of one percent of total employment and include police and sheriff's patrol officers; nursing aides, orderlies and attendants; light or delivery service truck drivers; laborers and freight, stock and material movers; construction laborers; tractor-trailer truck drivers; and janitors and cleaners.

Police and sheriff's patrol officers had the highest incidence rate, with 603 cases per 10,000 full-time workers for occupations with at least one-tenth of one percent of total employment.

Janitors and cleaners had an incidence rate of 316 cases and a case count of 48,180 total cases of nonfatal occupational injuries and illnesses, in which 56 percent occurred in the private sector and 36 percent occurred in local government.

For local governments, the incidence rate was 185 cases and the number of cases was 197,660 – neither figure was statistically different from 2008. The median number of days away from work was eight, one day less than the previous year.

Police and sheriff's patrol officers had the highest number of cases with 31,300, an increase of 30 percent from 2008. Their incidence rate was 676 per 10,000 full-time workers, which was over three-and-one-half times greater than the incidence rate for all local government workers. Fire fighters had 13,900 cases in 2009, which was a decrease of 17 percent from 2008. Their incidence rate was 512 cases – more than two-and-one-half times greater than the incidence rate for all local government workers. These two occupations in public safety accounted for 23 percent of all days-away-from-work cases in local government.

For state governments, the number of cases with days away from work increased by 7 percent to 75,840 cases. The incidence rate was 180 cases per 10,000 full-time workers, which was statistically unchanged from 2008. The median days-away-from-work figure was 9 days, the same as the previous year and one day more than private industry and local government workers required to recuperate.

Correctional officers and jailers had an incidence rate of 451 cases, which is about two-and-one-half times the total rate for state government. As in the previous year, this occupation reported by far the most injuries and illnesses in state government with 16 percent of the total. Police and sheriff's patrol officers in state government had an increase of 40 percent in the number of cases (4,170) from 2008. Their rate was 567 per 10,000 full-time workers.

Of the injuries incurred from contact with objects or equipment, 29 percent were cuts, lacerations or punctures; 17 percent were bruises or contusions; and 12 percent were sprains, strains, and tears. Twenty-seven percent of contact with objects or equipment injuries involved an injury to a finger or fingernail.

Overexertion accounted for 22 percent of all occupational injuries and illnesses; sprain, strain, and tear injuries accounted for 40 percent; and soreness and pain (including the back) accounted for 11 percent of total cases.

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On-the-job fatalities lowest since 1992

The U.S. Bureau of Labor Statistics' Census of Fatal Occupational Injuries (CFOI) program has reported a preliminary total of 4,340 fatal work injuries in 2009, the smallest annual preliminary total since the census was first conducted in 1992. The preliminary total was also down from a final count of 5,214 fatal work injuries in 2008.

In Arizona, the number of fatal work injuries fell from 100 in 2008 to a preliminary count of 50 in 2009. Transportation incidents accounted for 23 fatalities. None were reported in fires or explosions.

Based on the preliminary count, the rate of fatal work injuries for U.S. workers in 2009 was 3.3 per 100,000 full-time equivalent (FTE) workers, down from a final rate of 3.7 in 2008, according to the Bureau of Labor Statistics (BLS). Counts and rates are likely to increase with the release of final 2009 CFOI results in April 2011. During the past two years, increases in the published counts based on information received after the publication of preliminary results have averaged 156 fatalities per year or about 3 percent of the revised totals.

Economic factors played a major role in the fatal work injury decrease in 2009, says the BLS. Total hours worked fell by 6 percent in 2009 following a 1 percent decline in 2008, and some industries that have historically accounted for a significant share of fatal work injuries, such as construction, experienced even larger declines in employment or hours worked. In addition, some source documents used by CFOI state partners to identify and verify fatal work injuries were delayed, due at least in part to fiscal constraints at some of the governmental agencies who regularly provide source documentation for the program.

Key preliminary findings of the 2009 CFOI included:

- Workplace homicides declined 1 percent in 2009, in contrast to an overall decline of 17 percent for all fatal work injuries. The homicide total for 2009 includes the 13 victims of the November shooting at Fort Hood. Workplace suicides were down 10 percent in 2009 from a series high of 263 in 2008.
- Though wage and salary workers and self-employed workers experienced similar declines in total hours worked in 2009, fatal work injuries among wage and salary workers in 2009 declined by 20 percent while fatal injuries among self-employed workers were down 3 percent.
- The wholesale trade industry was one of the few major private industry sectors reporting higher numbers of fatal work injuries in 2009.
- Fatal work injuries in the private construction sector declined by 16 percent in 2009 following a decline of 19 percent in 2008.

- The number of fatal workplace injuries in building and grounds cleaning and maintenance occupations rose 6 percent, one of the few major occupation groups to record an increase in fatal work injuries in 2009.
- Transportation incidents, which accounted for nearly two-fifths of all the fatal work injuries in 2009, fell 21 percent from the 2,130 fatal work injuries reported in 2008.

Most types of transportation fatalities decreased in 2009 relative to 2008, including highway incidents (down 27 percent); workers struck by vehicle or mobile equipment (down 19 percent); aircraft incidents (down 18 percent); and non-highway incidents such as tractor overturns (down 8 percent). Fatal occupational injuries due to water vehicle incidents were higher (82 fatalities in 2009, up from 76 in 2008). These and other transportation counts presented in this release will likely rise when updated 2009 data are released in April 2011, says BLS. Key source documentation detailing specific incidents related to transportation has not yet been received and could identify 100 or more cases if recent trends hold true.

Fatal falls declined 12 percent in 2009 (from 700 in 2008 to 617 in 2009). Overall, fatal falls are down 27 percent from the series high of 847 fatal falls reported in 2007. About half of all fatal falls occur in construction, so the decline in overall construction activity and employment since 2007 may account for the lower number of fatal falls over the past 2 years. Fatalities involving contact with objects or equipment were down 22 percent in 2009 after increasing in 2008, and fatal work injuries involving exposure to harmful substances or environments (such as electrocutions) were down 11 percent.

Fatal injuries among government workers were down 17 percent. While fatalities incurred by state and local government workers decreased in 2009, fatalities among federal government workers were higher (up 7 percent to 116 fatal work injuries in 2009), largely due to an increase in the national security subsector (resident military).

Fatal work injuries involving workers in transportation and material moving occupations accounted for more than one-fifth of all occupational fatalities in 2009, though fatalities in this occupational group declined by 28 percent. Driver/sales workers and truck drivers, the subgroup with the highest number of fatal work injuries within the transportation and material moving group, led the decline with 32 percent fewer fatal work injuries in 2009 than in 2008.

Fatal work injuries in construction and extraction occupations decreased by 16 percent in 2009 after declining 17 percent the previous year. Construction trade worker fatalities were

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OSHA conducts continued from page 2

- There were deficiencies in documenting communication with the family members of fatality victims and union participation in inspections.
- Complaint inspections were timely, but documentation was not always complete. Lack of documentation also raised issues of appropriate violation classification.
- There were instances of hazards not identified or cited, violations not classified properly and inappropriate proposed penalties were found.
- Arizona has a high in-compliance rate (46 percent) and a low rate of serious violations (22.5 percent).
- The Industrial Commission of Arizona (ICA) reviews all proposed penalties over \$1,000, resulting in a citation issuance lapse time greater than the national average, yet initial proposed penalties for serious violations (\$1,429) remain above the national average (\$1,329).
- Certified Safety and Health Official (CSHO) training is primarily through University of California –San Diego Ed Center courses and OSHA webinars as a result of the state's out-of-state travel ban. These courses are not intended for CSHO training.
- A governor's rulemaking moratorium has hindered Arizona's ability to adopt standards in a timely manner. ADOSH has been unsuccessful in obtaining an exception to this policy based on its federal responsibilities.


EFAME found that ADOSH's enforcement program for state and local governments was identical to the program for the private sector. During FY 2009, ADOSH conducted 184 inspections in the public sector, more than 11.5 percent of its total 1,594 inspections and nearly three times as many as

conducted in previous years. According to EFAME data, 74 public sector inspections were conducted in FY 2006; 74 again in FY 2007; and 69 in FY 2008. The EFAME report says, This was the result of an oversight, and measures have been taken to ensure it does not happen again."

ADOSH has not made a formal response to EFAME, but made the following preliminary response:

"Since the time of the approval of its state occupational safety and health plan in 1974, the Arizona Division of Occupational Safety and Health (ADOSH) has been regularly monitored by Federal OSHA (OSHA) to ensure that its program is 'at least as effective' as the federal program. Over the years, ADOSH has consistently demonstrated the effectiveness of its program and its commitment to the improvement of safety and health conditions within Arizona workplaces. While facing challenges as a result of limited resources, that commitment has never been stronger than it is today. This commitment is demonstrated on a daily basis through the excellent work of our employees who work tirelessly to ensure that Arizona employees are provided safe and healthful working conditions.

"We disagree with some of the findings and recommendations noted in OSHA's FY 2009 EFAME report, including those that imply that the errors noted in a small percentage of the audited files are systemic throughout the ADOSH organization. We will be filing a more formal response to address OSHA's findings and recommendations.


"We share OSHA's commitment to employee safety and health and we will take the steps necessary to ensure the continued effectiveness of our program." 

On-the-job fatalities continued from page 5

down 16 percent (from 726 in 2008 to 607 in 2009), though fatal work injuries were higher in 2009 for electricians, plumbers, and carpenters, among others. Fatal work injuries involving construction laborers, the worker subgroup accounting for the highest number of fatalities in this occupational group, declined by 7 percent in 2009 to 224 fatal work injuries.

Fatal work injuries among protective service occupations fell by 21 percent in 2009 and are down 30 percent from the high for the series reported in 2007. Fewer fatalities among law enforcement workers, fire fighting and prevention workers, and security guards led the decline in this occupational group in 2009.

The building and grounds cleaning and maintenance occupational group was among the few occupation groups with a higher number of fatal injuries in 2009 (up 6 percent), led by an increase in fatal work injuries among grounds maintenance personnel (up 12 percent to 147 fatalities).

The CFOI, part of the BLS Occupational Safety and Health Statistics (OSHS) program, compiles a count of all fatal work injuries occurring in the U.S. during the calendar year. The CFOI program uses diverse state, federal, and independent data sources to identify, verify, and describe fatal work injuries. This assures counts are as complete and accurate as possible. For the 2009 data, over 17,000 unique source documents were reviewed as part of the data collection process. 


Cost of work-related disabling injury averages \$48,000

The National Safety Council (NSC) estimates the average cost for a work-related disabling injury is \$48,000 and a work-related death is \$1.3 million.

The estimates are based on 2008 data, which NSC says is the latest available, and NSC advises that the estimates do not include property damage or non-disabling injury costs.

The NSC makes estimates of the average costs of fatal and non-fatal unintentional injuries to illustrate their impact on the na-

tion's economy. The costs are a measure of the dollars spent and income not received due to accidents, injuries and fatalities.

For example, NSC has made estimates on the average costs for motor vehicle accidents. Costs include wage and productivity losses, medical expenses, administrative expenses and vehicle damage. An accident with a death can cost an average of \$1.3 million; with a disabling injury, \$63,000; and with property damage and a non-disabling injury, \$8,300. 

Court upholds continued from page 1


On the fourth portion, the Court of Appeals cited a 1996 decision: "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conclusion." The Court then added: "In our review of the evidence, we construe the evidence in the light most favorable to sustaining the verdict."

The incident occurred on Oct. 24, 2001 at a sewage collection and treatment facility owned and operated by Far West. James Gamble, a Far West employee, and Gary Lanser, an employee of the subcontractor Santec Corp., were overcome by hydrogen sulfide gas in an underground tank. Nathan Garrett, a Far West employee, sustained injuries while attempting to rescue Gamble.

Far West was indicted for two counts of manslaughter for the deaths of Gamble and Lanser; one count of aggravated assault for Garrett; four counts of endangerment to Gamble, Garrett and two Santec employees, Shawn Hackbarth and Eric Andre; and one count of violating a safety standard in the death of Gamble. Brent Weidman, Far West president; Connie Charles, a Far West supervisor; and Santec were indicted on similar charges.


Santec pled guilty to one count of violating a safety standard that caused the death of Lanser. Santec was placed on probation for two years and fined \$30,000. Charles pled guilty to two counts of endangerment and was placed on concurrent one-year terms of probation.

The trial court – Yuma County Superior Court – severed the trials of Far West and Weidman. The jury acquitted Far West of both counts of manslaughter, but found it guilty of negligent homicide in the death of Gamble, one count of aggravated assault for Garrett, two counts of endangerment for Gamble and Garrett and one count of violating a safety standard that caused the death of Gamble.

The trial court ordered the sentences suspended, but placed Far West on four years of probation for negligent homicide, five years of probation for aggravated assault, three years of probation for each count of endangerment and violating a safety standard. Some of the terms of probation were to run concurrently; others were to run consecutively. The trial court also imposed fines and penalties totaling \$1,770,000. 

On-the-job injuries continued from page 4

Forty-two percent of sprains, strains, and tears were the result of overexertion. Bodily reaction – such as bending, reaching, twisting or slipping without falling – accounted for another 22 percent and 11 percent were the results of falls. In 37 percent of the sprain, strain and tear cases, the back was injured. In another 27 percent of the cases, a lower extremity – typically the knee or ankle—was injured.

Sprain, strain, and tear cases where the shoulder was injured required a median of 22 days to recover, more than twice as many median days than for all sprain, strain, and tear cases. Workers who sustained fractures required a median of 30 days to recuperate. Carpal tunnel syndrome required a median of 21 days to recuperate and electrical burns required a median of 27 days. 



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COMP TIMES

is published quarterly by
Arizona Municipal Risk
Retention Pool (AMRRP)

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