

## **Liability of Facility Owner for Dust Explosion**

By MARK McGRATH

Two mechanics are called into work unexpectedly on the Fourth of July. In an early morning telephone call, their crew leader had explained that a local titanium processing plant was in shutdown mode due to an electrical failure in the lathe room.

The plant has been a steady customer of Machine Fixers, Inc., for years and there was no "maybe" about taking the job. The lathes had to be fixed and quickly.

During their assessment of the problem, the workers throw a switch to energize and test the lathes. Behind them stands a large electrical panel that feeds power to the lathes. Unknown to the electricians, the panel has suffered two prior failures, one resulting in an electrical fire and the other in a large flash-over.

When they come to light months later, loss-control documents from the plant's casualty insurer reveal that, following the second failure, the damaged panel was deemed unfit for use and in need of immediate replacement.

Instead of replacing the panel, however, the plant owner made an unenthusiastic attempt to repair it with in-house maintenance personnel and rejected claims by its employees that the energized contacts inside the panel were in dire need of replacement or, at the very least, extensive cleaning and reconditioning.

On the morning of July 4, layers of metal dust, carbon and other conductive debris fill the panel cabinet. When the mechanics close the switch to test the lathe, the debris forms a bridge across energized portions of the panel, causing a powerful electrical fault.

A massive arc flash erupts from the panel, engulfing the two workers in a super-heated ball of plasma, sparks and flame. Both suffer severe electrical burns and have medical expenses and life-care plans that run well into seven figures.

Obviously, this accident would support a significant workers' compensation claim. Under these facts, however, the workers also likely have a third-party claim against the facility's owner.

### **Common-law duties**

As the party in possession and control of the panel, as well as the facility in which it was located, the plant operator would be subject to a number of common-law duties.

The operator of a factory is required to keep the facility and the surrounding area in a reasonably safe condition; use reasonable care in the operation, maintenance and use of the plant; give adequate warning of any hidden or concealed dangerous condition about which it knew or, in the exercise of ordinary care, should have known, including conditions of which it had specific knowledge, those which it could have discovered by reasonable inspection and supervision of the plant, and those which its own conduct created.

Similarly, the plant operator would be under a duty to remedy and repair all hidden or concealed dangerous conditions of which it knew or should have known.

In our example, there would appear to be a very strong basis for imposing liability against the plant operator. The plant was clearly on notice that the panel was unfit for use and posed a risk of catastrophic injury or death to persons working in its vicinity. The plant failed to warn the workers regarding the defective condition of the panel.

A strong argument could also be made that the owner is required to provide the electricians with a safe workplace pursuant to the requirements of applicable OSHA standards and regulations.

Current OSHA multi-employer citation guidelines indicate that facility owners, as well as negligent contractors employed by owners, are subject to OSHA citations for unsafe conditions and practices when the owner creates the problem resulting in injury or death.

In our example, the plant clearly created the problem by causing and then ignoring the accumulation of conductive debris inside the panel. Accordingly, the operator would be subject to the duties imposed by the OSHA standards and regulations, a breach of which could support a claim for negligence.

### **Common-law duties of others**

If we tweak the facts a little, scenarios can be created which would impose duties on other parties.

For example, assume that the plant had entered into a maintenance or service contract with an outside vendor for periodic inspection, cleaning, maintenance and repair of the panel. If the vendor failed to abide by its contractual duties, this would likewise support an action in tort.

If the panel itself is found to be defective, a product liability claim might lie against the manufacturer.

### **Negligence per se**

Industrial accidents typically implicate a complicated lacework of industrial standards and regulations.

For example, the failure of an electrical panel at a titanium processing facility would bring into play a number of the standards promulgated by the National Fire Protection Association.

If our hypothetical mishap were found to be the result of faulty wiring or a faulty electrical distribution system, the National Electric Code and National Electrical Safety Code should be consulted.

Other types of accidents would involve still other standards and regulations, perhaps most commonly the state and federal regulations promulgated under OSHA. When the violations implicate codified regulations or statutes, claims for negligence per se might be alleged.

### **Conclusion**

When workers are injured on property owned by parties other than the employer, it is incumbent upon counsel to examine the case for potential third-party liability.

Never forget that those who own and operate industrial plants, construction sites and other properties are subject to basic common-law duties. These duties can be invoked to impose liability on possessors of property when their negligent acts and omissions injure or kill people who are working on the property.

It is tremendously unlikely that this species of third-party liability will jump up and wave a flag at you. Many times, we have not identified a specific basis for liability until we have conducted a full and

lengthy examination of available documents, including OSHA reports, police reports, and after interviewing witnesses to the incident.

If you represent a worker who was seriously injured on the property of an entity other than the employer, you owe it to your client to have the case reviewed in detail by an appropriate expert or by an attorney who is well-versed in identifying and prosecuting these kinds of claims.

The effort required to get the case out for review is minimal, and the rewards, for both the client and the referring attorney, can be extraordinary.