

Massingham Messenger

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SPECIAL REPORT: New case underscores need for “no payroll” worker’s compensation policy for condominium associations

By Tim Cline, CIRMS; President of Timothy Cline Insurance Agency, Inc.
Condominium Associations

Contributor’s Note: This is the second notable case involving an injured worker of an “independent contractor.”

Luis Gonzalez was a member of a painting crew when, in September 2005, he was injured working on a three-story condominium association called “**3515-17-19 Sacramento Street Homeowners Association**” in San Francisco, California. The HOA contracted with Bruce Parsley to paint the exterior of the building. The Covenants, Conditions and Restrictions (CC&Rs) of the HOA mandated that the HOA “shall acquire and maintain... [w]orker’s compensation insurance to the extent necessary to comply with any applicable law.” However, when the HOA negotiated the painting contract with Parsley, he lied and said that he maintained both general liability insurance and workers’ compensation insurance. He also provided bogus documentation of non-existent insurance. The HOA relied on these false representations and “assumed” that since Parsley was insured he must also be licensed.

Luis Gonzales was suspended in a bosun’s chair and working near the top of the building’s interior light well when the chair’s rigging snapped and dropped him approximately 20 feet to the bottom of the shaft. He suffered serious injuries to both shoulders and numerous fractured bones. Parsley, the employer, was cited by Cal-OSHA for workplace safety violations.

Luis Gonzalez applied to the Workers’ Compensation Appeals Board since Parsley had no insurance. As determined by the Heiman case, the hiring of an unlicensed contractor who is injured, or whose employee is injured, performing the work for an HOA creates an environment in which different employment relationships may arise with respect to “employer” liability for workers’ compensation or tort damages. (Heiman v. Workers’ Comp. Appeals Bd. (2007) 149 Cal. App.4th 724, 734 (Heiman).)

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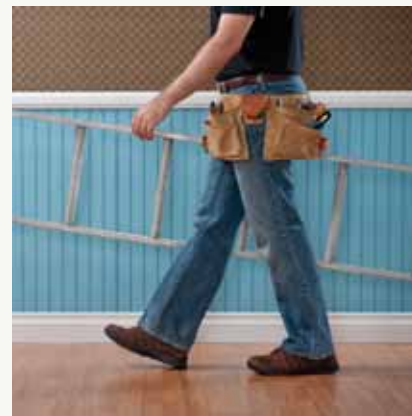
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(SPECIAL REPORT: New case underscores need for “no payroll” worker’s compensation policy for condominium associations) In the seminal opinion, *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd.* (1985) 40 Cal.3d 5 (State Fund), the Supreme Court concluded that a homeowner who hired an unlicensed contractor, who was injured when he fell from a scaffold, was required to assume the status of “employer” for workers’ compensation liability because section 2750.5 requires an independent contractor be licensed as a matter of law.

“Any person performing any function or activity for which a [contractor’s] license is required... shall hold a valid contractor’s license as a condition of having independent contractor status.” (*Fernandez v. Lawson* (2003) 31 Cal.4th 31, 40 (conc. opn. of Brown, J.)) It is well established that the language of the statute “creates a rebuttable presumption affecting the burden of proof that a worker performing services for which a contractor’s license is required, or who is performing such services for a person who is required to obtain such a license, is an employee rather than an independent contractor.”

The moral of this story: Even if an independent contractor lies to you about the existence of a contractor’s license or workers’ compensation coverage, it doesn’t rule out the possibility that the common interest development could be found to be in an employee/employer relationship at the time of loss.

A minimum audit payroll “no payroll” workers’ compensation policy, in the name of the common interest development, acts as an effective safety net against these sorts of claims. Workers’ compensation “no payroll” policies are readily available in California for minimum premiums as low as \$528 to \$606 per year*.



About the Author: Tim Cline, CIRMS, is President of Timothy Cline Insurance Agency, Inc. in Santa Monica. Tim is also past President of the Channel Islands and Greater Los Angeles Chapters of CAI (Community Associations Institute) as well as the Independent Insurance Brokers and Agents Association (IBA West). Formally, Tim chaired the CAI National Insurance and Risk Manager Professionals Networking Committee. For the last 14 years Tim has been a member of the teaching faculty of the California Association of Community Managers (CACM).

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*Workers’ compensation policies are subject to annual audit and premiums may exceed the quoted minimum premiums if uninsured or unlicensed contractors are reported at the conclusion of the policy period.

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AssociaLiving is a fun and insightful online magazine created specifically for our Associa communities and homeowners.

A resource of useful and inspiring information for residents and community associations across North America, AssociaLiving includes relevant stories about Entertaining, Home, Practical Living and Community, each geared toward enriching our homes and building stronger community associations.

Sign up for AssociaLiving (www.associaliving.com) to get great recipes for fall or to discover activities for the whole neighborhood. Keep reading to be inspired with holiday decorating ideas or to learn the ins-and-outs of weatherproofing your home. AssociaLiving has something for everyone in your family and community.

For those everyday clever ideas, visit AssociaLiving’s NeighborlyNotes blog. NeighborlyNotes provides quick and savvy ideas to help make your home a happier, healthier

and more efficient place to live. Blogger Carol, like many of our homeowners, juggles a life comprised of many roles: spouse, parent, child and working professional, to name just a few. She has hectic days like everyone else, but no matter where they are spent, she ends them all at the same place: home. The editors of AssociaLiving hope the helpful tips and tricks about everything from organizing things around the home to entertaining with a twist will help make your days run a little smoother.

Celebrate the best of community living.

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The Seasons Are Changing: Emergency awareness for your community

By Melissa Hajostek, Branch Manager, Massingham Concord

The seasons are changing, your pool may be closing, the kids are back in school, your HOA budget is due followed by the holidays... life seems to move so fast, yet sometimes in the HOA world, it can seem to take forever to get sometimes even the smallest tasks completed. You are required to wait until the next open board meeting to take action, occasionally not all of the board members agree on an issue, there is a lack of participation among the membership concerning matters, contracts need to be negotiated, etc. Board members can feel like they are in limbo and wonder what they can do in the meantime. The answer is plan ahead.

As most Associations have a December 31st year end... you likely find yourself smack dab in the middle of budget season. This is a great place to be as you have so many opportunities in front of you. This is the time where you can dream about what you see for the future of your community as well as setting goals in order to make true progress. Vision and goal setting is important during the budget season as Associations are required to publish their budget 30 days in advance of the fiscal year end. You will need to make sure you budget appropriately in order to put your visions and goals in action.

An important aspect of proactive planning for your community is setting policy and procedure as well as determining protocol to address emergency situations. One of the most important aspects of planning for an emergency is to obtain sufficient insurance coverage for your Association. Boards are encouraged to work with your insurance agent to determine the correct type and amount of coverage needed for your Community. Insurance agents often recommend that the Association's insurance

limits cover full replacement costs. They will use a number of methods to arrive at these values. One way to ensure that all of the Association's components are recognized and appropriately valued is to provide the Association's Reserve Study to your insurance agent. Another option is to obtain an appraisal. It is important that your appraiser is licensed, carries appropriate insurance including Errors and Omissions (E&O) coverage, and has experience with HOAs or multi-family dwellings.

In the event of an emergency like a fire or water loss, a great deal of damage can be done in a very short amount of time. Emergency services can be very costly. It is important for boards to work with Management to determine procedures to address emergency situations and to build relationships with your vendors in advance of any peril. This will help to contain costs and ensure that the Association has the ability to respond when needed. In the event of a disaster and loss, the Association may be faced with additional reconstruction costs to bring the damaged area to current applicable building codes. If the damage is significant enough, you may be forced to bring the whole structure to current code, which can be expensive. Your Association's insurance agent can help your Association avoid paying these costs out of pocket by adding building ordinance coverage to your insurance policy.

A number of Associations have organized Emergency Response Committees, developed evacuation plans, communication systems, meeting areas, official notice boards (your Association website is a great location for this in addition to a physical onsite posting place), arranged for emergency generators and water pumps,

as well as a stocked pantry of emergency supplies. Committee members are volunteer residents who may or may not be members of your Association who know the locations of the utility shut-offs. They may be CPR or First Aid Certified and or members of a Community Emergency Response Team (CERT). More information about CERT can be found by visiting www.citizencorps.gov/cert. As potential first responders to an emergency, it is the Committee member's responsibility to remain calm, call for professional help from the Police and or Fire Department, and secure the area. Any first responder is encouraged to do what they can without jeopardizing their safety or the safety of others as well as take appropriate action to prevent further damage or loss. Insurance companies have been known to not cover post-disaster damage that could have been reasonably prevented. It is worth the time and effort to walk your property and mark a map of any and all utility shut off locations. A few minutes could save you thousands of dollars in damage.

The Federal Emergency Management Agency (FEMA) offers a wealth of information regarding emergency preparedness and response. There are free online courses as well as family and community emergency planning tools. Please visit www.fema.gov for more information.

Emergency situations are unpredictable. Few Associations are fully prepared to react in such an event. You are encouraged to take the time to plan ahead and budget accordingly so that if and when your Association is faced with a fire, flood, power outage, etc., you have the procedures and relationships in place to protect your families, homes and neighbors.



EXECUTIVE SESSIONS

By Adrian Adams, Esq.

PURPOSE. Executive sessions of the board of directors are provided by statute so boards can address issues involving privileged information and matters of a private nature. Civil Code §1363.05(b). As a result, homeowners do not have a right to attend executive sessions. Boards may go into executive session for the following matters:

1 *Legal Issues.* This preserves attorney-client privilege, litigation strategy and settlement strategies for current and potential litigation matters. The association's attorney does not need to be present either in person or by phone for the board to meet in executive session to discuss legal issues.

2 *Formation of Contracts.* Boards may consider matters relating to the formation of contracts with third parties.

3 *Disciplinary Hearings.* Boards should meet in executive session for all disciplinary hearings. The accused member is entitled to attend the executive session for that portion of the meeting dealing with member's hearing.

4 *Personnel Issues.* Personnel matters which include, but are not limited to, hiring, firing, raises, disciplinary matters and performance reviews.

5 *Payment of Assessments.* Board may meet with members in executive session to discuss requests by delinquent members for payment plans.

WHO MAY ATTEND. Directors, managers, recording secretaries, association attorneys, members subject to disciplinary action as well as witnesses called by either side (but only for that portion of meeting involving that person), and others invited by the board (such as vendors bidding on a project) may attend executive sessions.

NOTICE TO MEMBERS. Starting January 1, 2012, boards must give members notice of their executive session meetings.

1 *With an Open Meeting.* If executive session is held with a scheduled open meeting of the board, it must be included in the open meeting's four-day notice and generally noted in the open meeting agenda.

2 *Between Open Meetings.* If a meeting is to be held solely in executive session, members must be given notice of the time and place of the meeting at least two days prior to the meeting. Notice must be posted in a prominent place or places in the common areas and by mail to any owner who had requested notice by mail (at the address requested by the owner). In addition, notice may be given by mail, by delivery of the notice to each unit in the development, by newsletter or similar means of communication, or, with the consent of the member, by electronic means. The notice must contain the agenda for the meeting. Civil Code 1363.05(f).

AGENDA. Because executive sessions are confidential which members cannot attend (Civil Code §1363.05(b)) and because the topics are only generally noted in open meeting minutes (Civil Code §1363.05(c)), executive session topics should not be described in detail in the meeting agenda.

MINUTES. In addition to keeping minutes of executive session meetings, any matter discussed in executive session must be generally noted in the minutes of the next open meeting of the board.



Massingham & Associates 2011 New Associations

ASSOCIATION	DATE	UNIT	BRANCH
Senterville Terrace Homeowners Association	01/01/11	Condominium	Campbell
Fox Hills Vista Homeowners Association	01/01/11	Condominium	Orange
Branham Homeowners Association	02/01/11	Condominium	Campbell
Northwood Condominiums Owners' Association	03/01/11	Condominium	Concord
Crossman Place Maintenance Association	03/01/11	Condominium	Campbell
Montclair II of Fremont Homeowners Association	03/01/11	Single Family Home	Hayward
Lotus Homeowners Association	04/01/11	PUD	Concord
Quail Valley Estates Owners' Association	04/01/11	Single Family Home	Concord
Autumn Terrace @ College Owners Association	05/01/11	Single Family Home	Campbell
San Pablo Heights Homeowners Association	06/01/11	Condominium	Concord
Windsor Gardens Unit No. 1	07/01/11	PUD	Hayward
Lundy Plaza II	04/01/11	Business Condo	Campbell
Villages of the Galleria	09/01/11	Condominium	Citrus Heights
Hidden Hills	09/01/11	Single Family Home	Concord
Somerfield	09/01/11	Condominium	Citrus Heights
Kingswood Homeowners Association	10/01/11	Townhome	Concord