



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: October 22, 2012

TO: John Shilts, Administrator
Management Labor Advisory Committee

FROM: Carol A. Parks, Senior Assistant Attorney General
Business Activities Section *cap*

SUBJECT: *Cortez v. NACCO Materials Handling Group, Inc.*
DO File No: 440420-GB0462-12

You requested that the Department of Justice provide an analysis of *Cortez v. NACCO Materials Handling Group, Inc.*,¹ including a summary of the case and the related implications. In most circumstances, workers' compensation is the exclusive remedy for workers who are insured on the job, and the exclusive liability of the workers' employers. In the *Cortez* decision, however, the Oregon Court of Appeals (court) ruled that an employee of a limited liability corporation (LLC) may sue the members of the LLC for their negligent acts which caused those injuries. Under *Cortez*, the members of the LLC are not protected from liability resulting from an employee's injury under the exclusive remedy provision provided by ORS 656.018.

Summary of the Case

This case involved an action for damages for personal injuries sustained by Antonio Cortez (Plaintiff), a laborer employed by Sun Studs, LLC, (Sun Studs) at its Roseburg Mill. Sun Studs is a member-managed LLC as defined in ORS 63.001(22).² Swanson Group, Inc. (Defendant) is the sole member and owner of Sun Studs. Defendant provides a safety manual to each of its subsidiary LLCs, and one of Defendant's executive officers is responsible for ensuring that Defendant's subsidiary LLCs, which includes Sun Studs, implements the policies and procedures set forth in the safety manual.³

Plaintiff's injury occurred when he was run over by a co-worker who was driving a forklift, in reverse, owned by Sun Studs. The forklift had been purchased by Defendant as an

¹ 248 Or App 435 (2012).

² A member-managed limited liability company is a limited liability company that is not a manager-managed limited liability company. A manager-managed limited liability company is a limited liability company that is so designated in the articles of organization or whose articles of organization otherwise expressly provides that the limited liability company will be managed by a manager or managers.

³ *Id.* at 437.

asset when it acquired Suns Studs, Inc., a predecessor owner of Sun Studs.⁴ As a result of the injury, Plaintiff filed a workers' compensation claim for benefits, the claim was accepted and benefits were paid by Sun Stud's insurer.

Plaintiff filed a lawsuit against Defendant, and in Plaintiff's amended complaint, he alleged the following three claims of relief against Defendant: 1) violation of the Oregon Employer Liability Law (ELL); 2) noncompliance with providing workers' compensation coverage pursuant to ORS 656.017; and 3) negligence. The first two claims for relief failed; this memo is focused on the negligence claim and whether the exclusive remedy provision in ORS 656.018(3) applies to "members"⁵ of LLCs.⁶

The court found that the determining factor of the case was the interpretation of the exclusive remedy provision. It relied on the principle of statutory interpretation that in determining legislative intent, it must first consider the statutory text, context and any relevant legislative history.⁷ ORS 656.018 provides, in relevant part:

(1)(a) The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom[.]

(3) The exemption from liability given an employer under this section is also extended to the employer's insurer, the self-insured employer's claims administrator, the Department of Consumer and Business Services, and the contracted agents, employees, officers and directors of the employer, the employer's insurer, the self-insured employer's claims administrator and the department[.]

In its opinion, the court held that subsection (1) shielded employers from liability, and subsection (3) protected other entities and persons, which included the employers' directors. Nevertheless, neither subsection expressly listed an LLC member or owner of an LLC.⁸

The Defendant argued that the definition of "employer" in ORS 656.005(13)(a) demonstrates the legislature's intent to include the owners of the LLCs in the definition of "employer." ORS 656.005(13)(a) states: "[e]mployer" means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations,

⁴ *Id.*

⁵ Defendant conceded it was not Plaintiff's employer for the purposes of the exclusive remedy provision.

⁶ *Id.*

⁷ *Id.* at 440, citing *State v. Gaines*, 346 Or 160 (2009).

⁸ *Id.*

school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person.” This definition includes as an employer, a “person.” “Person” is defined to include partnerships, joint ventures, associations, limited liability companies and corporations. Although, an LLC is defined as a “person,” the definition does not include the members of the LLC.⁹

The court rejected Defendant’s argument that the legislature intended to include the LLC’s members in the definition of employer for the following two reasons. First, LLC’s are legal entities distinct from its members.¹⁰ Therefore, the court concluded that when the exclusive remedy provision applies to an LLC it does not necessarily apply to the LLC’s members. Second, the court opined that the legislature knows how to expressly include LLC members because when it enacted the LLC statutes, it extended the coverage of certain statutes to “members” and “managers” of LLCs. The LLC statutes were enacted in 1995, and the court noted that the legislature amended ORS chapter 656 the same year. Thus, the court concluded that if the legislature had intended to exempt LLC members from liability, it could have easily done so by expressly including members in ORS 656.018(3) at that time. Since the legislature did not do so, the court concluded that the exclusive remedy provision does not apply to members of an LLC employer.¹¹

Implications of Cortez v. NACCO

The *Cortez* decision has exposed a loophole in ORS 656.018, the workers’ compensation “exclusive remedy” statute. The “exclusive remedy” statute prevents the injured worker from filing a lawsuit against the worker’s employer, which includes the LLC, and the employer’s agents, employees, officer and directors. Nevertheless, it does not expressly state that LLC members are exempt from liability. As a result of this case,¹² LLC members are not included in the “exclusive remedy” exemption provided by ORS 656.018.

This decision is counterintuitive to the purpose of LLCs, which is to protect its members from personal liability. Therefore, it is likely that there are individual members who formed LLCs for the purpose of avoiding personal liability, and under this case, those members will now not be shielded from liability resulting for employee injuries.

Note: The Department of Justice only provides advice to state agencies. Nothing in this letter is intended or should be construed as providing legal advice to any non-state person or entity.

⁹ *Id.* at 440-441.

¹⁰ This is similar to partnerships being separate entities from the partners and corporations are separate legal entities from the shareholders.

¹¹ *Id.* at 441-442.

¹² This case has been appealed to the Oregon Supreme Court.