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CONSTRUCTION LAW

Construction Accidents and Handling the OSHA Investigation

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Special to the Legal

Often, when someone is seriously injured or killed on a construction site, an OSHA investigation will take place. The Occupational Safety and Health Administration (OSHA) administers the Occupational Safety and Health Act, created in 1971 to ensure employees are provided a safe workplace. OSHA is the administrative arm of the Department of Labor and may investigate certain workplace accidents. While there are many provisions of the act that address many specific topics, there is the default "General Duty Clause," which indicates that "each employer shall furnish to each employee employment and a place of employment which are free from recognized hazards which are causing or are likely to cause death or serious physical harm to his employees." It is important for plaintiffs and defense lawyers to understand the purpose and consequences of an OSHA investigation and what it means during a potential third-party lawsuit. First, OSHA's involvement typically starts with a phone call—it could be from the injured individual's employer, a general contractor, a foreman or supervisor on the jobsite, the police, or even an anonymous tip from someone unaffiliated with the construction project. As soon as an OSHA representative receives the phone call, the investigation has begun. OSHA will visit the site quickly and begin to speak to witnesses and individuals involved while the memories of the incident are fresh. It is helpful for the lawyers to be involved from the get-go and facilitate whatever information and interviews OSHA needs. For example, our firm has often arranged and participated in OSHA meetings with the injured employee, as well as provided photographs, medical records, and documents that are not always easily or readily available to the OSHA investigator. Not only does this ensure the investigator has the relevant and correct information about the incident and all potentially culpable entities, but developing a rapport with OSHA from the beginning is meaningful as the investigation may take months or even years to complete and you will likely need this relationship.

All too often when OSHA is investigating an accident, if a party is cited, it is typically the injured party's direct employer, irrespective of "fault" for the incident. This is naturally something that carries its own implications in a future third-party lawsuit, as the employer will likely have immunity under the Worker's


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Compensation Act, and thus is not a viable target (however, there may still be benefits to naming the employer in the third-party lawsuit, a discussion for another time). On a construction site, however, OSHA will not only speak with the injured party's employer (assuming it is a subcontractor), but will likely interview the general contractor as well and those who were designated as being responsible for the safety of the jobsite, such as a separately retained risk manager. Again, it is helpful to have a relationship with the investigator and to make sure he or she has the relevant contracts and agreements that lay out the expectations of the various entities involved in the construction project. For example, a document could indicate that the general contractor was responsible for providing any necessary or required fall protection, which may alleviate the employer's third-party duty in that regard and help properly focus the investigation, but still will not eliminate a citation to the employer.

Once OSHA has spoken to witnesses, taken statements, collected necessary documents and visited the jobsite, a "safety narrative" will be prepared, summarizing the information and findings. Typically, a Freedom of Information Act (FOIA) request to the appropriate OSHA regional office will produce this report, along with other documents. However, expect them to be heavily redacted—it is not uncommon to receive hundreds of blank pages in an OSHA file received directly from the agency. If you are experiencing delays in receiving the OSHA file (do not fret, this is normal), an "establishment search" on the OSHA website can help you determine if any of the contractors on the job are being investigated, or have been in the past, which can lead to helpful supplemental discovery requests.

The OSHA investigation is by no means conclusive for purposes of third-party litigation. The standards are different, the inquiry is less involved, and many issues are not considered (for example, if a machine is manufactured and sold to an employer without a necessary guard and an employee is seriously injured due to the lack of guard, OSHA may cite the employer for the incident, despite it not having expertise in machine guarding, but would never cite the manufacturer for selling a defective product). Thus, for purposes of litigation, it is important to be familiar with all of OSHA's provisions, including, for example, the multiemployer citation policy—not an OSHA standard in and of itself, but a directive (CPL 02-00-124), in which four types of "employers" are described that exist on a jobsite—correcting, creating, controlling, exposing. Regardless of who the injured employee's direct employer is, any number of contractors can be considered an employer for purposes of OSHA's multiemployer citation policy depending on the condition in issue. The correcting employer is considered responsible for correcting a hazard, such as when a contractor has the responsibility of installing and/or maintaining particular safety equipment or devices. The creating employer is the contractor that caused the hazardous condition that violates an OSHA standard. The controlling employer must exercise reasonable care to prevent and detect violations on the jobsite, but is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the OSHA standards as the contractor it has hired. More frequently than not, the direct employer of the injured party is considered the exposing employer. Consistent with the directive, "more than one employer may be citable for a hazardous condition that violates an OSHA standard," and "a creating, correcting or controlling employer will often also be an exposing employer," and "exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard."

Thus, even in situations where only the direct employer was cited by OSHA, utilization of the multiemployer citation policy

with your expert and cross-examination of the adverse expert witnesses can prove very beneficial. While the exposing employer may be the direct employer of the injured party, the hazard it "exposed" to the employee was one "created" by another contractor, "corrected" by another contractor, and "controlled" by others as well. Further, to the extent there are "control" issues raised by the general contractor in a Motion for Summary Judgment (often relying upon the Pennsylvania Supreme Court case of *Leonard v. Commonwealth*), pointing to the OSHA investigation and the multiemployer citation policy (that would be addressed by your experts), is added fodder in the opposition.

As mentioned above, if a third-party lawsuit is brought, OSHA's findings as to the plaintiff's direct employer can carry significant implications in how you try your case. The defense and their experts may focus on the direct employer and blame the incident on its negligence, relying on the federal investigation of OSHA as proof of such. This often introduces the so-called "empty chair" defense, in which the party-defendant general contractor, safety manager, project manager, subcontractor, etc. will try to exculpate themselves by blaming the plaintiff's direct employer, a non-party to the lawsuit. However, this non-party cannot be placed on the verdict sheet, will often not be present or represented at trial, and careful attention should be taken with regard to motions in Limine as argument that a non-party was responsible for the plaintiff's injuries could be incurably confusing to the jury.

Oftentimes when dealing with a construction accident at the trial phase, there is a misconception and misleading argument that OSHA violations can constitute negligence per se on behalf of the cited contractor. However, the Pennsylvania suggested standard civil jury instructions has a specific jury charge that keeps OSHA violations in mind: 13.110 Violation of Standard or Governmental Regulation. The Pennsylvania Superior Court in *Wood v. Smith* supported the use of failure to comply with OSHA standards as "some evidence of negligence," but it did not rise to the level of negligence per se. Thus, while it may be evidence the jury can consider, it is important to frame the argument carefully and not allow the suggestion that the violations show the absolute negligence of an employer. Your expert can explain that the direct employer was merely cited as the exposing employer because its employee was exposed to a hazard created by another contractor (one of the party-defendants).

Naturally, some of the above is not unique to a construction accident case and can be utilized across the board with many workplace incidents. However, the unique issues that are present in construction cases, such as multiple contractors, may fall squarely in line with the OSHA investigation and help build the framework for the litigation of your case. ●