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Fatal Falls: The No. 1 Risk in Construction

I. Current Statistics and Facts Regarding Falls from Height Resulting from Death

Understanding the frequency of height-related deaths

One of the most important and most striking things about understanding height-related deaths is realizing their frequency. First, the Occupational Health and Safety Administration (OSHA) reports that out of 4,379 worker fatalities in private industry in calendar year 2015, 21.4% were in construction. The leading cause of private sector worker deaths (excluding highway collisions) in the construction industry was falls. Falls were followed by deaths caused by objects striking a worker, electrocution, and caught-in/between deaths. Falls are by far the largest killer of these "Fatal Four" accident types, accounting for 38.8% of worker deaths in the construction industry. Additionally, the number one OSHA cited violation is "fall protection, construction" covered by 29 CFR 1926.501. The third most cited violation is "scaffolding, general requirements, construction" covered by 29 CFR 1926.451.

Construction Fall Deaths Have Outpaced Industry Growth

The U.S. construction industry is showing strong signs of recovery after being hit hard by the latest economic recession. In 2016, 10.3 million U.S. workers were employed in construction, a 16% increase after construction employment bottomed out in 2012. Although overall construction employment is still lower than the pre-recession level, the number of Hispanic construction workers reached 3 million in 2016, slightly surpassing its peak level in 2007 (2.98 million). Hispanic employment has experienced more volatility than the overall construction workforce. Hispanic employment increased 43.9% between 2003 and 2007, dropped 37.9% during the recession, and then increased 38.5% during the economic recovery. In 2016 a historic high of nearly 30% of construction workers identified themselves as Hispanic.

Coinciding with the employment trend, the number of fatalities among construction workers climbed to 985 in 2015 after dipping to 781 in 2011, a 26% increase over four years, outpacing employment growth during the same period. Falls remain the leading cause of work-related fatalities in construction, accounting for around one-third of the total number of fatalities in this industry.

During the Economic Recovery, the Frequency of Fall Deaths Grew Significantly Faster than Other Kinds of Construction Deaths.

According to Bureau of Labor Statistics data analyzed by the Center for Construction Research and Training, between 2011 and 2015, the number of fall deaths in the construction industry increased by 36.4%, from 269 to 367, while overall workplace deaths only increased 26.1%.

Height-related deaths are generally higher for Hispanic and Non-Union Workers

Fatal falls increased among all construction workers from 2011 to 2015. However, fall fatalities increased at a faster pace among Hispanic workers compared to non-Hispanic workers. The number of fall deaths among Hispanic construction workers jumped from 106 in 2014 to 136 in 2015, a 28.3% increase. In contrast, the number of fall deaths among non-Hispanic construction workers dropped to 217 in 2015, a 10% decrease from 241 in 2014. Hispanic construction workers also had consistently higher rates of fatal falls than their white, non-Hispanic counterparts. Specifically, the rate of fatal falls among Hispanic workers increased from 4.0 to 4.9 deaths per 100,000 full time equivalents (FTEs) between 2014 and 2015, a more than 20% increase within one year. However, the rate among white, non-Hispanic workers dropped from 3.4 to 3.0 deaths per 100,000 FTEs during the same time period.

New York City as an Example of What Can Happen

The New York Committee for Occupational Safety & Health (NYCOSH) conducted an in-depth analysis of all construction site inspections in New York in 2014. More than 2 in 3 (68%) site inspections found safety violations. Almost all OSHA construction fatality site inspections determined that employers had been violating health and safety laws. Safety violations were found at 87% of fatality sites inspected by OSHA in 2014, and over 90% of fatality sites inspected by OSHA in 2015. Additionally, self-employed workers, or those misclassified as self employed workers, face increasing risk. 24% (9) of the 38 construction workers who died on the job in 2012 were self-employed, an increase from 5 (9 %) of 53 deaths in 2000 and 3 (6 %) of 49 deaths in 1992.

II. What National Organizations are Doing to Address Worker Fall Deaths

The Occupational Health and Safety Administration (OSHA) Enforces National Level Policies.

As the primary enforcer of national workplace safety, OSHA is one of the agencies in the best position to help combat unsafe workplaces. Despite their best efforts, OSHA notes that their top 10 most-common violations rarely change from year to year. Fatal falls, encompassing violations of both fall protection and scaffolding regulations, often account for close to 40% of construction injuries.

OSHA attempts to help cut down partially through the enforcement of regulations, which may be more effective now that they have an increased power to fine. For the first time since 1990, OSHA has increased the level of its fines. Recently, fines increased for serious and other-than-serious violations from $7,000 per violation to $12,675 per violation. Failure to abate a violation is $12,675 per day beyond the abatement date. Willful or repeat violations were previously $70,000 per violation. That penalty is now set at $126,749 per violation. In addition to increased fining power now, OSHA previously was not able to increase their fines. Now, OSHA will be able to increase fines in line with inflation, which should help to keep the penalties relevant in the future.

A research report by OSHA brought to light a study by researchers associated with the McClatchy newspaper chain. In their recent study, the researchers estimated that in Texas, 37.7% of all construction workers were misclassified as independent contractors. They reported smaller but still substantial proportions of misclassified construction workers in North Carolina (35.2 %) and Florida (15.5 %). The researchers estimated that in these three states alone, more than 500,000 construction workers were misclassified as independent contractors.

The researchers found that there are several factors explaining why temporary workers are at a greater risk for injury. New workers often lack adequate safety training and are likely to be unfamiliar with the specific hazards at their new workplace. As a result, new workers are several times more likely to be injured in the first months on the job than workers employed for longer periods. Consistent with these findings, OSHA has investigated numerous incidents in recent months in which temporary workers were killed on their first days on a job.

The Centers for Disease Control and Prevention (CDC) sub agency, The National Institute for Occupational Safety and Health (NIOSH), has been effective at worker training, analyzing data, and its own innovation.

NIOSH, along with other partners, has created an event called the National Safety Stand-Down, which brings together employers, workers, and safety associations across the country to pause work on the jobsite and focus on preventing falls through talks, demonstrations, trainings and more. The Stand-Down has been a tremendous success over the last three years, reaching an estimated 5 million workers total. Stand-Downs have been reported in all 50 states and internationally. Government workers and commercial construction workers were the most-reached demographics; however, the campaign was still severely lacking in the number of residential construction workers that were participating. Considering that residential construction and non-union construction are some of the deadliest spaces going forward, it will be necessary for NIOSH and the National Safety Stand-Down to put more effort into reaching those demographics in the future.

The 2016 event report does note that one of the original goals of the Campaign to Prevent Falls in Construction when it began in 2012 was to reach small, residential contractors, a consistently difficult to reach segment of the industry. It is also worth noting that many of the stand-downs conducted by large contractors also included their subcontractors who employ 25 or fewer individuals and those may not be accounted for in the report. The only major difference in turnout for the 2016 program was that the program saw a significant increase in the percentage of residential construction jobsite stand-downs involving 10 or fewer workers, which is in line with the project's initial goal. One interesting piece of feedback to come out of the survey was that construction workers wanted more participation from insurers in helping to create a safety culture, and to help create a safer environment overall. In all, NIOSH is pursuing its goal of trying to reach more difficult and at-risk areas of the industry, while making good use of some of the easier outreach opportunities with commercial and government workers.

NIOSH has also been busy creating some of its own resources to try and increase workplace safety. NIOSH created its first mobile application, the Ladder Safety App, which was designed to improve extension and step ladder safety. The app is freely downloadable on iOS and Android phones, and has numerous features and uses. One is the Angle Measuring Tool, which uses visual, sound, and vibration signals to make it easier for users to set an extension ladder at the proper angle (approximately 75 degrees) and to check the verticality of extension and step ladders. The app also provides a procedure to select the minimum required ladder duty rating corresponding to user characteristics and task, includes a comprehensive checklist for

ladder mechanical inspection, presents a set of rules for safe ladder use in a user-friendly format, and describes a number of available extension ladder safety accessories.

NIOSH also created a guardrail system, the final design of which supported more than twice OSHA's top-rail strength requirement of 200 pounds, when anchored with nails and when screw fasteners were used, the system supported more than three times the OSHA strength requirement. In small-scale field testing the guardrail system has been accepted by both workers and owners of two participating companies. Both workers and owners felt that using the system was intuitive and was easy to install and use. All five of the guardrail system components (original design, flat, vertical, vertical offset, and slide guard) were used by the contractors during the field study, and both owners felt that the system provided a safe work environment on steep-sloped roofs, especially while working at excessive heights. Additionally, the construction workers and owners did not utilize the intervention system based solely on OSHA regulations. The contractors determined whether the risk was significant such that the intervention would actually assist them with the jobs that had to be completed.

III. What States are Doing to Address Worker Fall Deaths

There is a current lack of state-specific action on height-related accidents. New York is the only state that has a statutory provision to provide liability for height related accidents in the workplace.

Unlike any other state in the country, New York has explicit statutory protections for workers who fall from a height. New York's Labor Law § 240 is designed to protect workers from special hazards presented by "gravity related risks." Generally, it applies when a construction worker has fallen from a height or was struck by a falling object. Labor Law § 240 provides for strict liability, which imposes a heightened standard care. Additionally, it is important to note that with regards to § 240, the plaintiff's comparative negligence is inadmissible. Under New York Law, general contractors, owners, and agents of contractors and owners can all be liable for injuries.

Under New York Law, a party is considered a general contractor if it had the right to exercise control over the work, regardless of whether it actually exercised that right. This rule is exemplified in *Williams v. Dover Home Improvement, Inc.* In that case, because the defendant had the authority to enforce safety standards and choose subcontractors the court ruled that they were a general contractor under the Labor Law. *Williams v. Dover Home Improvement, Inc.,* 276 A.D.2d 626 (2d Dept. 2000)

An agent can be liable as well, and a party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 (2005). Continuing this line of thinking, it is not the defendant's title that is determinative, but the amount of control or supervision exercised. *Aranda v. Park E. Constr.*, 4 A.D.3d 315 (2d Dept. 2004)

Under § 240, numerous acts are covered including, but not limited to: erection, demolition, repairing, altering, painting, cleaning, and pointing. General contractors, owners, and agents of contractors and owners have a statutory obligation to ensure that scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices are constructed, placed, operated, and maintained to give proper protection to the worker.

New York's Labor Law § 240. Scaffolding and other devices for the use of employees, reads as follows:

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to the person so employed.

Texas does not provide any specific statutory remedy for height-related deaths.

While a general contractor in Texas cannot be held liable for a construction related death without a showing of some actual involvement in the work, Texas does provide a remedy against a general contractor where it can be shown that the GC is aware of the work and participated to some extent. In the Texas Supreme Court case *Lee Lewis Const., Inc. v. Harrison,* the court discussed the "right of control test" under which a general contractor can be found liable based upon the acts of other. The analysis is based upon the extent to which a general contractor retains the right to control some portion of an independent contractor's work either by contract or exercising control.

In *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001), an employee of a subcontractor on the job fell to his death while performing work on windows on the 10th floor of the project. The employee's family brought suit against the general contractor to recover for the death arguing that the general contractor exercised control over the subcontractor's use of fall protection equipment. While the general contractor claimed it did not exercise control over the use of fall protection by the subcontractor's employees, the evidence showed that the GC's superintendent routinely inspected the area of the subcontractor's work to insure the employees were making proper use of the safety equipment. There was also evidence that the superintendent was aware of and approved the subcontractor's fall protection system.

In affirming the jury's verdict finding the general contractor liable under theories of negligence and gross negligence the Supreme Court held that:

> (1) more than a "scintilla" of evidence supported the jury's finding that the general contractor retained control over safety and fall-protection systems, for purposes of establishing that general contractor had duty of care to installer; (2) the evidence of proximate cause was legally sufficient to support the jury's verdict finding that general contractor was liable; and (3) legally sufficient evidence supported finding that objectively viewed from the general contractor's standpoint, the general contractor's failure to require proper safety equipment was gross negligence." *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001)

Additionally, the court reiterated the Texas rule of what constituted gross negligence, involves two components: "(1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Id.* at 785. In the court's holding, they noted that extreme risk meant a likelihood of serious injury to the plaintiff, and not merely a remote possibility of injury or even a high probability of a small harm. The court also noted that "actual awareness" means

that the defendant was aware of the peril, but showed through its acts or omissions that it did not care about said peril.

The contractual right to control the work can give rise to liability on the part of the general contractor."If the right of control over work details has a contractual basis, the circumstance that no actual control was exercised will not absolve the general contractor of liability." *Elliott-Williams Co. v. Diaz*, 43 Tex. Sup. Ct. J. 200 (Tex. 1999). "It is the [contractual] right of control, and not the actual exercise of control, which gives rise to a duty to see that an independent contractor performs work in a safe manner." *Id.* "For a general contractor to be liable for its independent contractor's acts, it must have the right to control the means, methods, or details of the independent contractor's work. Further, the control must relate to the injury the negligence causes, and the contract must grant the contractor at least the power to direct the order in which work is to be done." *Id*. (citations omitted). Determining whether a contract gives a right of control is generally a question of law for the court rather than a question of fact for the jury. *Lee Lewis Constr., Inc. v. Harrison*.

Florida also does not provide any specific statutory remedy for height-related deaths.

Similarly to Texas the only remedy for a wrongful death when the employer subscribes to worker's compensation is a claim of gross negligence, or ordinary negligence if the defendant was either not the decedent's employer or was an employer which did not subscribe to workers' compensation.

In Florida, a general contractor may be liable for workers compensation benefits to an injured employee where the employer/subcontractor fails to obtain workers compensation insurance. In *VMS, Inc. v. Alfonso*, a Florida District Court noted that that "where a subcontractor performing part of the work of a [general] contractor fails to secure payment of compensation, the [general] contractor is liable for same. If both subcontractor and contractor fail to secure coverage, then the contractor has a liability to the subcontractor's injured employee for purposes of an action for statutory benefits or damages at law." *VMS, Inc. v. Alfonso*, 147 So. 3d 1071, 1074 (Fla. 3d Dist. App. 2014). As such, because a contractor is the "statutory employer" of everyone under them on a construction site, it is prudent for them to prepare for or insure against its contingent liability even if the subcontractor has agreed to secure coverage for its employees.

A different Florida district court recently shed additional light on this subject in *Ciceron v. Sunbelt Rentals, Inc.* In that case, a construction site worker who suffered injury resulting in amputation of his leg while trying to help load a rental company's scissor lift onto a truck brought a negligence claim against the rental company. The rental company claimed it was immune from suit because the injured employee had received workers' compensation benefit from his employer. The District Court of Appeal held that the rental company was not a subcontractor entitled to horizontal immunity under the workers' compensation laws. *Ciceron v. Sunbelt Rentals, Inc.*, 163 So. 3d 609 (Fla. 4th Dist. App. 2015), review denied, 192 So. 3d 42 (Fla. 2015) In *Ciceron*, the court held that "the core concept for extending workers' compensation immunity from tort liability to subcontractors revolves around the notion of a contractor 'subletting' part of its contractual obligation to a subcontractor." The intent of the statutory protections was to ensure that "employees engaged in the same contract work are covered under worker's compensation, regardless of whether they are employees of the general contractor or any of its subcontractors." As such, because the rental company was only retained to deliver, pick up, and repair the scissor lifts, which on occasion would involve a repair at the

construction site, it did not fall into the category of a subcontractor, and there was no horizontal immunity. Situations like these are the rare exception to Florida's broad immunity statutes.

California does not provide any specific statutory remedy for height-related deaths but like Texas will hold a general contractor liable for failing to properly exercise control of the jobsite.

In California under the *Privette* doctrine, which arose from a 1993 California Supreme Court case, a general contractor that hires a subcontractor is generally not liable for a workplace injury to the subcontractor's employee, the court noted. However, a series of state Supreme Court cases decided after *Privette* refined the general rule: The general contractor may be liable for injuries to a subcontractor's employee where the general contractor retained control of the worksite and exercised that control in a negligent manner. In that situation, the state Supreme Court explained, the general contractor would be liable for its own independent negligence, to the extent that negligence caused the worker's injury.

In the recent case of *Alvarez v. Seaside Transportation Services LLC,* the court noted that in the landmark case of *Privette*, the Supreme Court held that "an independent contractor's employee should not be allowed to recover damages from the contractor's hirer, who 'is indirectly paying for the cost of [workers' compensation] coverage, which the [hired] contractor presumably has calculated into the contract price. *Alvarez v. Seaside Transportation Services LLC*, 2017 WL 3083926 (Cal. App. 2d Dist. July 20, 2017). The exception, again, is when the contractor retains control over the work site.

In *Alvarez*, the court held that active control required an affirmative contribution from the general contractor. An affirmative contribution occurs when a general contractor is actively involved in, or asserts control over, the manner of performance of the contracted work. Such an assertion of control occurs, for example, when the [general contractor] directs how the work is done or otherwise interferes with the means and methods by which the work is to be accomplished. When the general contractor does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the general contractor may be held liable to the injured employee if its participation affirmatively contributed to the employee's injury.