Practical Litigator: Who's responsible for an injury at an unsafe workplace? Could be anyone

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Construction accidents frequently give rise to third-party tort claims. Given the number of entities involved on major construction projects, the chances of identifying a culpable party that is not protected by the exclusive remedy provisions of the workers' compensation act are rather good.

Consider an example.

An owner of urban property contracts with a general contractor to build an office building. The general contractor, in turn, then enters into contracts with subcontractors to perform specific aspects of the construction project. On a commercial building project, one would expect to see a number of subcontractors and fabricators performing specific aspects of the project such as structural steel, plumbing, electrical and concrete work. These "first-tier subcontractors" generally contract with more specialized firms who handle more detailed tasks such as painting, HVAC, concrete reinforcement and drywall work.

Other contracts come into play in a construction injury case. On a large-scale project, the owner typically contracts with a designer or architect to draw the plans for the project. On some projects, the architect also supervises the work performed by the various trades and certifies payment for work that has been completed according to contract specifications.

On other projects the owner may hire a construction manager. Construction managers are typically retained to supervise and oversee the construction project to ensure timely completion and coordination among the various trades working on the project. Construction managers are also involved with inspecting finished work and approving it for payment.

When a worker is injured on the job due to a dangerous condition or unsafe work practice, who might be legally responsible for the injury? The short and unsatisfying answer is, it could be anyone.

Let's assume that the employee of a bottom-rung subcontractor falls through an unguarded opening in a concrete floor and is severely injured. Generally speaking, the worker will not be able to sue his employer due to the exclusive remedy provisions of the act.

There is an important exception to this rule, however. Lower-tier subcontractors have been known to work without purchasing workers' compensation insurance and contractors sometimes fail to ensure that their subs have such coverage. In this scenario, the contractor who hired the sub (or his insurance carrier), not the uninsured employer, is tagged with responsibility for paying the injured employee's workers' compensation benefits.

If the general contractor pays those benefits he, and not the employer-subcontractor, is immune from suit by the employee. In other words, the employee is free to sue his employer in court. Of course, an employer who fails to purchase workers' compensation coverage is not likely to possess liability coverage, which in most cases will make filing suit against the employer a futile gesture.

Let's assume for purposes of our example that the subcontractor-employer did have the requisite insurance coverage. Who might be liable for leaving an unguarded opening in a concrete floor?

To answer the question, one needs to review the contracts very carefully. While reviewing the contracts lawyers need to keep two questions in mind: (1) who created the hazard by affirmative act or omission (failure to guard floor openings); and (2) who was responsible for inspecting and supervising that aspect of the work site to identify and correct hazards and dangerous conditions?

Starting at the top of the chain, let's begin with the owner. The owner of a commercial project will rarely be legally responsible for an injury to a subcontractor's employee. The owner will generally have delegated to the general contractor all responsibility for construction of the building. Unless the owner retains control over the project or assumes a supervisory role, he will not be legally responsible for injuries suffered by a subcontractor's employee. For a thorough and exemplary analysis of this principle refer to *McCorkle v. North Point Chrysler Jeep, Inc*., (N.C. Court of Appeals, COA10-378, Dec. 21, 2010)(unpublished).

What about the general contractor? In most cases, the contract between the owner and the general contractor requires the general contractor to assume control and oversight of the entire project. These contracts frequently impose a responsibility on the general contractor to ensure that the firms and workers on the site comply with applicable safety statutes, regulations and standards. If the general contractor in our example were subject to such a duty and failed to inspect the area where the floor opening was located, he would be responsible for the worker's injuries.

Of course, if the contractual scheme places this responsibility on another entity, such as a construction manager, this would create a basis for establishing the liability of that party. In a typical place, two parties will potentially liable for a construction site injury. First, of course, liability will attach to the party who creates a worksite hazard, either by affirmative act (dropping a sledgehammer through a floor opening) or omission (failing to guard a floor opening). Remember, however, that liability may also attach to the party responsible for inspecting work in progress. Typically, this party will be contractually responsible for identifying hazards and ensuring that appropriate corrective measures are taken to eliminate them.

The contracts may place this responsibility on a general contractor, an architect/designer or a construction manager. Again, the contract documents will make this quite clear. In some cases, the contracts might overlap, imposing this responsibility on more than one party. For example, general contractors, architects and construction managers would typically be responsible for inspecting the entire project.

The contracts may also require contractors who employ subcontractors to inspect and approve the work performed by their subs. Careful attention to the language of these documents is absolutely critical to one's success in a construction injury case.

On larger projects the layers of responsibility multiply and the analysis gets a bit trickier. On an office building project, for example, there may be general contractor, a subcontractor that pours the concrete, a subcontractor that installs the plywood formwork that dictates the shape and contours of the pour, and a structural steel subcontractor who pre-installs rebar into the areas where concrete will be poured. In this situation, one would expect that the formwork subcontractor would have responsibility for guarding all floor openings.

Where do OSHA violations come into play? Typically, NCDOL issues citations only to employer of the injured subcontractor. Because injured workers cannot sue their employers, these citations usually offer no help to anyone other than the third-party tortfeasor who can use the citation as a basis for bringing the employer into the suit as a third party defendant.

But North Carolina courts now recognize the multi-employer worksite doctrine. *Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005). This doctrine provides that a contractor on a multi-employer site who controls or creates a worksite safety hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer. Accordingly, if a general contractor exerts control over a work area where a violative condition exists or affirmatively creates the condition, NCDOL is authorized to issue a citation against the general contractor, even though it does not employ the workers who were exposed to the hazard.

Our courts have long held that violation of an OSHA standard, while not negligence per se, is evidence of the standard of care or as evidence of industry custom. Accordingly, an expert testifying for a plaintiff can invoke

violations of an OSHA regulation as a basis for her opinions.

Can an expert combine this principle with the multi-employer worksite doctrine and testify that a general contractor who violates an OSHA regulation is liable to the employee of a subcontractor? One would certainly think so, but remember that we live in a state whose court of appeals tends to regard precedent as yesterday's news.

In *Pike v. D.A. Fiore Constr. Servs.*, 689 S.E.2d 535 (2009), the court held that, while the multiemployer worksite doctrine imposes a duty on general contractors to inspect worksites for OSHA violations, that duty does not create a duty in tort. Why, you may ask? Because, the court held, the multiemployer worksite doctrine had not been recognized to stand for the proposition that a general contractor's violation of OSHA regulations necessarily gives rise to tort liability and is not instructive in the present case.

Not instructive! It is directly on-point! And what about the notion that the doctrine had "not been recognized" to stand for this principle, as if there were a vast body of intervening interpretive case law leveled against the plaintiff's theory? Curiously, the *Pike* court fails to tell us is that *Weekley* had never been applied or interpreted in any fashion by the courts. No court had recognized it as standing for anything because no court had yet applied or interpreted it whatsoever.

The plaintiff in *Pike* was not asking for a novel interpretation of *Weekely*; he was merely asking the court to take an inescapably logical next step, and a baby step at that. And it fell flat on its face.

Fortunately, sidestepping the wreckage of *Pike* is rather easy. If a general contractor has been cited under the multiemployer doctrine, violation of the OSHA standard is relevant evidence of custom in the construction industry and is admissible in proving the requisite standard of care. Such evidence, standing alone, will be sufficient to survive a motion for summary judgment. That body of case law stands inviolate and has the weight of years behind it. Often and consistently *recognized*, you might say.

Similarly, an expert can testify by way of opinion that a general contractor that was not cited under the multiemployer doctrine should have been. In this way the expert can rely on the doctrine to establish that a general contractor failed to act in accordance with the prevailing customs in the construction industry and failed to comply with the relevant standard of care for general contractors.

One final issue: during depositions and discovery, determine if a party not contractually bound to inspect work did in fact do so during the course of the project. In this situation attorneys can invoke the principle that one who assumes an undertaking is required to execute it in a reasonable fashion. For example, if an owner habitually roves the worksite, identifying OSHA violations and other hazards, liability might be imposed against him as well.

Construction injuries are frequently catastrophic. When a client is injured on a construction project, attorneys need to explore in detail whether there is a basis for imposing liability against other parties involved in the construction project. When we have been asked to review such claims by workers' compensation attorneys, more often than not we have been able to identify a culpable third party, and provided the client with a source of recovery over and above his workers' compensation benefits.

And these folks tend to be the most appreciative clients in the world.

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