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ALL ABOARD: HOW TO SUCCESSFULLY RIDE THE WORKERS' COMP AND OSHA WAVES

Bart Cannon

HUIE, FERNAMBUCQ & STEWART, LLP
Birmingham, Alabama
bcannon@huielaw.com

Donald McKay

LEAKE & ANDERSSON, L.L.P.
New Orleans, Louisiana
dmckay@leakeandersson.com

I. WORK RELATED INCIDENTS LEADING TO INJURIES AND FATALITIES OCCUR IN THE CONSTRUCTION INDUSTRY

Although recent data supports that they are decreasing in frequency across all sectors, work related incidents resulting in employee injuries and fatalities are unavoidable in the construction industry. Even though the industry, as a whole, has done, and continues to do, a much better job focusing on worker safety, the reality is due to the nature of the work and the environment in which it takes place “construction is one of the most dangerous industries in the United States.”¹ From the more common incidents that require simple medical treatment on site to the rarely occurring fatal incidents, like OSHA’s “Fatal Four²,” the type and severity of workplace injuries on construction sites has, and will for the foreseeable future, span the spectrum.

There have been many articles written and presentations given addressing the do’s and don’ts to reduce the number of construction site incidents. While that is a well deserved and noble topic (because even one serious injury or fatality is too many), it is not the purpose of this article and presentation. Employers who have a well defined plan in place for handling the investigation of work related incidents and injuries will be far better equipped to handle the negative impacts such incidents necessarily bring about than the employer who does not. Just as important, the employer who avoids the common mistakes and pitfalls regularly seen during the investigation process will fare well. The purpose of this article and presentation is to identify some, but not all, of the recommended practices, and common mistakes employers make which can be easily avoided, for handling those incidents that lead to workers’

¹ Fatal Industry Trends in the Construction Industry, Center for Construction Research and Training, February 2021 (www.cpwr.com/wp-content/uploads/DataBulletin-February-2021.pdf).

² The “Fatal 4” includes work related deaths which occur due to falling, being struck by an object, electrocution, and being caught in or between machinery, tools or other devices.

compensation claims and/or OSHA investigations.

Because many work place injuries and the necessary subsequent investigative activities will include at least some aspect of navigating workers' compensation laws (which, generally speaking, are specific to the state where the incident occurred) and/or OSHA requirements (which are more uniform, but still also involve some elements of location based application), a basic understanding of each is important. Workplace incidents and injuries are like snowflakes or finger prints - no two situations are exactly the same. While there is no "one size fits all" standard for investigating them, having standard operating procedures in place for properly documenting evidence through photographs and videos, witness statements, incident reports, and the like, will put an employer in the best position to effectively navigate these situations.

A. General Overview of OSHA and its Regulatory Power

OSHA, formally the Occupational Safety and Health Administration, is a Federal agency which falls underneath the authority of the Department of Labor.³ To address the "substantial burden upon, and...hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses and disability payments" caused by "personal injuries and illnesses arising out of work situations,"⁴ Congress created OSHA through the Occupational Safety and Health Act of 1970 (the "OSH Act")⁵. Relying on its powers under the Commerce Clause of the Constitution, in enacting the OSH Act Congress set out to "assure so far as possible every working man and woman in the Nation safe and healthful working

³ www.osha.gov/data/commonstats

⁴ 29 U.S.C. § 651(a).

⁵ 29 U.S.C. § 651, *et seq.*

conditions and to preserve our human resources”⁶ by, among other things, “providing for the development and promulgation of occupational safety and health standards.”⁷ OSHA’s stated mission today is to “ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance.”⁸ Under the General Duties clause of the OSH Act, employers must, in general, keep their workplaces “free from recognized hazards that are causing or are likely to cause death of serious physical harm” to workers and otherwise “comply with occupational safety and health standards promulgated under this Act.”⁹

While relatively small for a Federal agency, OSHA has an operating budget of nearly \$600,000,000 and operates 10 regional offices and 85 local area offices geographically disbursed throughout the country.¹⁰ According to the most recently published statistics, OSHA employs approximately 1850 inspectors who have the authority to investigate work place incidents at an estimated 7 to 8 million work sites spanning all fifty states, the District of Columbia, U.S. Territories and the Outer Continental Shelf Lands.¹¹ “OSHA inspectors, called compliance safety and health officers, are experienced, well trained industrial hygienists and safety professionals whose goal is to assure compliance with OSHA requirements and help employers and workers reduce on-the-job hazards and prevent injuries, illnesses, and deaths in

⁶ 29 U.S.C. § 651(b).

⁷ 29 U.S.C. § 651(b)(9).

⁸ www.osha.gov/aboutosha

⁹ 29 U.S.C. § 654(a)(1)-(2).

¹⁰ OSHA’s regional offices are located as follows: Region 1 - Boston, MA; Region 2 - New York, NY; Region 3 – Philadelphia, PA; Region 4 – Atlanta, GA; Region 5 – Chicago, IL; Region 6 – Dallas, TX; Region 7 – Kansas City, MO; Region 8 – Denver, CO; Region 9 – San Francisco, CA; Region 10 – Seattle, WA.

¹¹ 29 U.S.C. § 653(a); www.osha.gov/data/commonstats

the workplace.¹² OSHA may conduct its investigation remotely in some circumstances, in which case the employer will be responsible for providing the pertinent information verbally or in writing within certain time parameters, or an on site inspection may be conducted. OSHA inspections, which are typically unannounced, are prioritized as follows: imminent danger situations; catastrophes/severe injuries and illnesses (including fatalities or hospitalizations); worker complaints; referrals; targeted inspections; and follow-up inspections.^{13 14}

1. The Construction Industry Constitutes a Significant Percentage of On the Job Fatalities and Injuries

In 2019, there were an estimated 11.4 million workers in construction employment.¹⁵ As one might expect given the nature of the work and the environment in which it is performed, the construction industry constitutes a significant percentage of on the job fatalities and injuries. According to the Bureau of Labor Statistics, “employers record nearly three million serious occupational injuries and illnesses annually on legally mandated logs.”¹⁶ In 2019 alone, OSHA conducted more than 75,000 federal and State plan inspections, which included 5,333 on the job fatalities.¹⁷ 1,061 of on the 5,333 on the job fatalities in 2019 - nearly 20 percent of the total - occurred in the construction industry.¹⁸ In 2020, there were a total

¹² OSHA Fact Sheet, Occupational Safety and Health (OSHA) Inspections, 08/2016 (www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf)

¹³ OSHA At a Glance, U.S. Dept. of Labor, 2014 at p. 2.

¹⁴ *Id.*

¹⁵ Fatal Industry Trends in the Construction Industry, Center for Construction Research and Training, February 2021 (www.cpwr.com/wp-content/uploads/DataBulletin-February-2021.pdf).

¹⁶ Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, June 2015 (www.osha.gov/sites/default/files/inequality_michaels_june2015.pdf)

¹⁷ www.osha.gov/data/commonstats

¹⁸ *Id.*

of 4,764 on the job fatalities.¹⁹ While there was an overall reduction of on the job fatalities of more than 10 percent, in 2020 there were 976 fatalities in the construction industry which, like 2019, constitutes approximately 20 percent of the total.²⁰

OSHA also publishes an annual list of the top 10 most frequently cited standards following inspections of work sites for all industries. In 2021, the most recently published data, five of the top ten were specific to the construction industry.^{21 22} These commonly cited standards included Fall Protection (29 CFR § 1926.501), Ladders (29 CFR § 1926.1053), Scaffolding (29 CFR § 1926.451), Fall Protection Training (29 CFR § 1926.503), and Eye and Face Protection (29 CFR § 1926.102). While worker deaths are down “from about 30 worker deaths a day in 1970 to 15 a day in 2019,” and injuries and illnesses are down “from about 10.0 incidents per 100 workers in 1972 to 2.8 per 100 in 2019,”²³ OSHA operates today on the premise that there are still “far too many preventable injuries, illnesses, and deaths in the workplace...”²⁴

B. General Overview of the Workers' Compensation System

Workers' compensation laws are created and administered at the state level. Each state has its own body responsible for administering its workers' compensation laws²⁵, and the rights and remedies

¹⁹ Economic News Release, U.S. Bureau of Labor Statistics, Table 3 (Fatal occupational injuries for selected occupations, 2016-20 (www.bls.gov/news.release/cfoi.t03.htm))

²⁰ *Id.*

²¹ 29 CFR 1926 (Safety and Health Regulations for Construction)

²² www.osha.gov/top10citedstandards

²³ www.osha.gov/data/commonstats

²⁴ www.osha.gov/top10citedstandards

²⁵ www.dol.gov/agencies/owcp/wc

afforded to employees injured in the line and scope of their employment differ widely from state to state. What is reasonable and necessary for conducting a thorough investigation related to a potential worker's compensation claim that occurs in Alabama, for example, may not have the same applicability for a claim that occurs in Louisiana or Texas (or any other place). Thus, it is critically important that employers have immediate access to individuals with adequate knowledge of the locale's laws where the particular activity is taking place.

C. Best Practices to Employ and Common Pitfalls to Avoid When Investigating Workplace Incidents

a. Have a Plan Before the Incident Occurs

Perhaps the most simple and important, yet often overlooked, practice to effectively handle investigating incidents that have the potential to involve OSHA investigations or implicate workers' compensation laws is to have a written plan in place before the incident occurs. It is critical that the investigation begin as soon as the appropriate medical care has been rendered and the scene has been safely secured. Time is of the essence in these situations.

The age old adage "prior planning prevents poor performance" remains true, even in the context of investigating workplace incidents. The only way to effectively operate in this manner is to have a plan in place beforehand that every member of the team understands and has practiced. That way, when the incident occurs everyone understands his or her role, why it is important, and the plan can be executed. This will pay dividends later down the line once the lawyers, OSHA investigators, or any other third-parties become involved with the incident. There are many "best practice" articles discussing the mechanics of exactly what should be done, but it starts with having a plan.

b. Failing to Adequately Preserve and Document the Evidence

One of the very first tasks employers do, and rightfully so, to investigate an incident is to gather and generate pertinent materials related to the incident as close in time to the incident as possible. The importance of generating good, quality photographs and video of the scene and involved equipment as quickly as possible to capture the evidence cannot be overstated. For those incidents that eventually end up as legal claims and work their way through the court or arbitral process, it most likely will be years before the evidence is ever put before a jury or other fact finder so that a final decision can be rendered. In many instances, by the time the case makes its way to the discovery phase where documents are exchanged for the first time and depositions of the witnesses are ready to be taken, the witnesses who possess the first hand knowledge of the incident are no longer employed, have left the area, or for one reason or another cannot be located so that their testimony can be secured for trial. The more evidence that is available help adjudicate the dispute the better, generally speaking.

This is particularly true in situations where the injury was caused by or involved a piece of equipment. There are times, often at no fault of anyone, where the equipment, which is a critical piece of evidence, for whatever reason, becomes unavailable at some point after the incident. This can be problematic in situations where the the injured employee's attorneys and/or experts did not have an opportunity to inspect the equipment, and often times this will result in a claim for spoliation of evidence. Even if, in the best case scenario, the judge or arbitrator eventually rejects the spoliation claim, having to engage in that fight will unnecessarily increase the cost of defense. Having good, quality photographs and video of the equipment can help alleviate these concerns.

Another consideration on preserving and documenting evidence, which has become increasingly applicable in recent years, is to ensure that all photographs and videos taken by all witnesses are collected as early as possible. Nearly every person on a construction site has a smart phone within arms reach at all

times. In instances where an employee is involved in an incident with a resulting injury, it would be highly unusual for there not to be photographs and perhaps even videos taken of them by the first hand witnesses.

c. Failing to Engage Legal Counsel During the Investigation to Assist in Generating Materials and Establishing Privilege

While preservation and early collection of evidence is important, a common mistake employers make during investigations of workplace incidents is rushing to obtain incident reports or written or recorded witness statements. There have been many times when good intending employers quickly assign the task of preparing incident reports or witness statements to someone who does not understand the importance of those tasks or, more critically, the proper way they should be accomplished. Often times, the rush to obtain this information results in unfavorable materials which later become the very evidence at trial or arbitration that the fact finder determines proves liability of the employer. In these situations, well skilled lawyers will use the employer's good intentions and efforts to quickly obtain the information against the employer every time. This a very common difficulty in defending workplace incidents.

While it does not make sense to do so in every instance, for incidents involving serious injuries or fatalities, employers would be well served to consider engaging outside counsel prior to obtaining incident reports and witness statements. The reason for this is two-fold. First, while it is not always the case, in general lawyers are better at interviewing and obtaining statements from witnesses than non-lawyers in incidents which are likely to be litigated because they view the materials in the context of how the information obtained may be perceived by a jury or fact finder. At a minimum, engaging outside counsel early in the process, before these materials are generated, would be a positive step because a lawyer brings a different perspective to the team.

Second, and one may argue more importantly, engaging counsel to assist in the preparation of these materials potentially protects them from disclosure based on privilege. That is not to say that any materials generated with the assistance of a lawyer, or if the incident eventually turns into a legal claim, are privileged. That is not the case. For example, in Alabama “the mere fact that litigation does eventually ensue does not, by itself, cloak materials with the protection of the work-product privilege.”²⁶ However, engaging counsel early in the process to assist in preparing these initial materials at least sets up the argument, which may become important later, that the materials are not discoverable under the particular Rules of Civil Procedure which apply to the dispute. Again, in Alabama, which is similar to many other jurisdictions, “the test should be whether, in light of the nature of the document and factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”²⁷ Thus, for incidents which more likely than not will end up as a legal claim or lawsuit, which almost always includes serious injuries and fatalities, there is no downside to engaging counsel as early in the process as possible.

d. Failing to Think Like an Investigator.

One of the first things aspiring lawyers learn in law school is to “think like a lawyer.” Along those same lines, employers investigating workplace incidents which end up being investigated by OSHA would be well served to learn to “think like an OSHA investigator.” Specifically, employers should be prepared to provide OSHA’s investigators with a thorough root cause analysis and show compliance with OSHA’s “four-step systems” approach to investigations.

²⁶ *Ewing v. Biggs*, 135 So. 3d 247, 251 (Ala. 2013) (quoting *Ex parte State Farm Mut. Auto Ins. Co.*, 761 So. 2d 1000, 1002 (Ala. 2000)).

²⁷ *Id.*

There are hundreds of articles addressing what OSHA considers to be a “proper” investigation for a workplace incident (many are published by OSHA and on can be accessed for free *via* its website). When an incident occurs, it can be easy for the employer investigating the incident to focus primarily on what specifically happened in the instance to cause the incident. While the “what” of a particular incident is certainly important - and for those instances that progress into civil legal claims it is the ultimate question someone will have to explain and the finder of fact will have to answer - OSHA typically does not take such a narrow view of investigations. OSHA has been clear in its own published literature that its investigators will expect employers to “look behind *what* happened to discover *why* it happened.”²⁸ While employers have a natural tendency to take a more micro view to investigating an incident to, hopefully, get in the best possible position to limit liability down the line, OSHA takes a more macro view – or what it calls a “systems approach.” In its own words, “one of the biggest challenges facing OSHA investigators is to determine what is relevant to what happened, how it happened, and especially *why* it happened.”²⁹

In OSHA’s view, “investigating a worksite incident...provides employers and workers the opportunity to identify hazards in their operations and shortcomings in their safety and health programs. Most importantly, it enables employers and workers to identify and implement the corrective actions necessary to prevent future accidents.”³⁰ OSHA takes the position that “a successful incident investigation must always focus on discovering the root causes,” which are the “underlying reasons why unsafe

²⁸ Incident [Accident] Investigations: A Guide for Employers, December 2015, at p. 1 (emphasis in original) (www.osha.gov/sites/default/files/IncInvGuide4Empl_Dec2015.pdf)

²⁹ *Id.* at p. 6.

³⁰ *Id.* at p. 2.

conditions exist or of a procedure or safety rule was not followed in a workplace. Root causes generally reflect management, design, planning, organizational or operational failings.”³¹

To accomplish this objective, OSHA recommends employers adopt a “four-step systems approach” to incident investigations. This includes: (1) preserving/documenting the scene; (2) collecting information; (3) determining the root causes; and (4) implementing corrective actions.³² There are many articles addressing the recommended “best practices” for implementing these four systems, as well as forms promulgated by OSHA and available on its website for employers to utilize. Suffice it to say that the employer who conducts an investigation with these principles in mind, the one who is able to “think like an OSHA investigator,” will be well prepared to efficiently and effectively maneuver through OSHA’s investigative process and put itself in the best position to limit liability thereunder.

³¹ *Id.*

³² *Id.* at p. 6.