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Construction Site Accidents-The Factors Involved in Determining Liability

I. Determining Construction Liability Depends on the Facts

Construction accidents are a sub-sector of premise liability cases and, therefore, involve similar rules regarding both liability and damages. Factual questions may exist as to whether the person in control of the site had notice (actual or constructive) of the hazard or if the hazard was latent. Generally, a construction site will have several different contractors and employers on the site at any given time. Because of the number of parties involved, it can be difficult to pinpoint who is liable for which injuries. Ultimately, the question becomes who had a responsibility to take measures to ensure that workers and visitors would not be harmed.

A. Location of the Accident

Location of the accident is important when evaluating a lawsuit because, if the property where the accident occurred is owned by the injured worker's employer, the worker would be barred from bringing a separate lawsuit against his or her employer under Workers Compensation laws. Construction workers injured on the jobsite are usually entitled to claim Workers Compensation benefits. Alternatively, passersby can also be exposed to potential injuries on premises under construction. In that situation, the injured person may file a premises liability claim against the owner of the property.

B. Conditions of the Accident Site

Unsafe conditions can lead directly to construction site accidents and injuries. While it is virtually impossible for any construction site to be completely free of health and safety risks because of the nature of the industry, employers, or those in control of the site, have a duty to follow safety regulations in order to reduce workplace hazards. OSHA provides guidelines to address worker safety, and employers are legally required to follow certain guidelines on the worksite. If the scene of an accident was not properly maintained, the party responsible for maintaining it could be held responsible for resulting injuries. OSHA has labeled the four most common causes of construction accidents as the "Fatal Four" (described below).

Falls: Injuries from falls can be caused by unprotected sides, wall openings, floor holes, improper scaffolding construction, unguarded exposed steel rebar, and the misuse of portable ladders. 29 C.F.R. § 1926.501 requires employers to provide fall-protection systems that ensure their workers are standing on safe ground or platforms that can hold their weight, and that will not put them in danger by moving or swaying.

Struck-by: “Struck-by” injuries are those caused by vehicles or objects that fall.

Electrocutions: This type of injury can be caused by contact with power lines, issues with ground-fault protection, or the improper use of equipment. 29 C.F.R. § 1910.305 outlines the general safety requirements that employers need to follow to prevent electrocutions from happening on their job sites.

Caught in-between: These types of injuries are caused by a failure to inspect a trench, as well as unsafe access/egress points.

C. Equipment Involved

The type of equipment involved in an accident is an important variable when evaluating accident liability because there may be some degree of human error or malfunctioning, or faulty, equipment. When looking at the equipment involved in the accident it is important to evaluate the training, maintenance, design, any safety violations, supervision, inattention, and/or reckless or negligent misuse of the equipment.

Injuries related to equipment are often caused by lack of adherence to safe work practices, accidental or inadvertent activation, failure to deactivate, or equipment failure. The type of equipment involved may also implicate questions about how the equipment was used at the time of the accident, and who had control over the equipment.

According to OSHA, some of the most hazardous equipment at a construction site includes ladders, saws, scaffolds, nail guns, power drills, and cranes. The National Institute for Occupational Safety and Health (NIOSH) published a report in which it found that up to half of all industry fatalities were partially caused by heavy equipment. Road, highway, and bridge construction sites account for almost 80% of heavy equipment deaths each year.

D. Control Over the Site and Equipment at The Time of the Accident

Depending on the size of the project, there could be numerous parties involved – sub-contractors, construction managers, and equipment and material suppliers – all of whom could play a role in contributing to a construction accident if they act in a negligent or reckless manner. The level of control exercised by the parties listed below will likely affect their level of potential liability.

1. Construction Site Owner

The person who owns or possess the land on which the construction is being performed may be held liable for injuries caused by hazards or hazardous conditions that he/she knew or should have known about. Further, the owner of the land may be liable if the owner personally maintained control of the property to a significant degree, rather than handing control over to a contractor.

2. General Contractor

General contractors are responsible for an entire project. They have a duty to create a work environment that is reasonably safe, and ensure that the work over which they have control is being performed in a safe manner. This responsibility includes the hiring of competent workers and following all safety regulations.

3. Prime Contractor

A prime contractor may be contracted for special work. These contractors are responsible for the work identified in their contract, which would include responsibility for site conditions and the

safety of employees involved in the work. Prime contractors are also responsible for any work delegated to a sub-contractor. If an accident occurs during the work overseen by a prime contractor, he or she could be held liable.

4. Architects/engineers

An architect or engineer may be liable for injuries that result from a failure to meet required safety standards during the design or construction phase of a project. Importantly, architects and engineers are obligated to uphold professional standards, and will be held liable if an accident or injury was caused by neglect of those standards.

5. Manufacturers of Construction Equipment or Machinery

A manufacturer may be held liable if a defective part or dangerous design in the machine/equipment causes an accident or injury. Manufacturers have a legal obligation to design and manufacture equipment that meets all applicable safety standards. Additionally, construction equipment suppliers have a duty to inspect and only purchase equipment that meets safety standards and also a duty to then maintain it properly.

6. Multiple Parties

In most cases, all or some of the above parties could be held liable for the same accident. The case depends on the cause (or causes) of an accident, the parties involved and their roles, and a determination of who was responsible for ensuring the safety of those involved.

E. Employer of Injured Person

An important consideration is the identity of the person or entity for whom the injured party works. That will determine if the employer, or some other party, is responsible for the injuries. If the injured party's employer is responsible, the employee may not have a viable personal injury claim. However, if another person or entity was responsible, there a third-party personal injury claim could potentially exist.

II. Each State Has Its Own Liability Laws and Standards

A. General Elements of Negligence

Negligence is the failure to take reasonable care to avoid foreseeable injury or loss to another party. In other words, what would a "reasonable / ordinary" person do in a given situation? The required elements to prove negligence are: 1. Duty – a legal duty of care owed by the defendant to the plaintiff; 2. Breach – the defendant's breach of that legal duty by acting or failing to act; 3. Damages – the existence and amount of the plaintiff's injury; 4. Causation – the fact that defendant's actions (or inaction) caused the plaintiff's injury.

B. Florida:

Negligence and independent contractors: While an owner who hires an independent contractor is not generally liable for injuries sustained by that contractor's employees, an exception to this general rule exists when the owner "has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed" or has engaged in "acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee." *Johnson v. Boca Raton Cmty. Hosp., Inc.*, 985 So. 2d 593, 595-96 (Fla. 4th DCA 2008), review denied, 1 So. 3d 172 (Fla. 2009).

Attractive nuisance doctrine: In *Martinello*, the court held that construction contracts under Florida law cannot preclude a representative of a minor injured by falling from the roof of an uncompleted house from suing under an attractive nuisance theory by admitting negligence and claiming that the suit is therefore limited to ordinary negligence. *Martinello v. B & P USA, Inc.*, 566 So. 2d 761, 763 (Fla. 1990).

Workers Comp Benefits: Florida statute § 440.10 provides that if a contractor subcontracts for any part of his contract work to a subcontractor, all of the employees of the contractor and the subcontractor shall be deemed to be employed in one and the same business, with the exception of employees of a subcontractor who have secured such payment. F.S.A. § 440.10.

C. Texas

Negligence: A premises owner / general contractor generally does not owe any duty to ensure that an independent contractor performs his work in a safe manner. *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). Limited duty arises if a general contractor/premises owner retains control over a subcontractor's methods of work or operative details to the point that the subcontractor is not entirely free to do the work his own way. *Id.*

Workers Comp Benefits: The general rule in Texas is that independent contractors can sue a general contractor in a third-party action. However, Texas law authorizes a contractor to provide workers' compensation coverage for subcontractors and a subcontractors' employees. V.T.C.A. Labor Code § 406.123(a)(2004).

D. California

Negligence: The Right to Repair Act sets forth statewide standards that the components of a dwelling must satisfy, and establishes a pre-litigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure. *McMillin Albany LLC v. Superior Court*, 408 P.3d 797 (CA 2018).

Workers Comp Benefits: "In construction settings, any company that hires a contractor for a job requiring a license is the statutory employer of any unlicensed contractor. *Cedillo v. W.C.A.B.*, 130 Cal. Rptr.2d 581 (Cal. App. 2003). This statute can make a valid contractor's license prerequisite for independent contractor status and can create a dual employment relationship whereby the worker may be the employee of both the general contractor and the subcontractor. *Hernandez v. Chavez Roofing, Inc.*, 286 Cal. Rptr. 919 (Cal. App. 1991). In construction settings, any company who hires a contractor for a job requiring a license is the statutory employer of any unlicensed contractor. Section 2750.5 provides in part as follows: There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor....." (<https://www.mwl-law.com/wp-content/uploads/2013/03/workers-comp-subrogation-in-construction-settings-for-all-50-states.pdf>)

III. Liability Insurance Considerations

The coverage that each party's insurance policy provides can determine legal responsibility in a construction injury. Therefore, the insurance coverage of any potentially liable party is an important element to consider in a construction accident case.

Coverage under policies depends on the type of policy and the facts of the accident. A determination of coverage under a liability insurance policy depends on answers to the following questions: (1) Who is an “insured” under the policy? (2) What is the coverage period? and (3) Is the loss a covered loss under the policy? Regarding damages, there are two main categories: 1) “Special” damages, which includes medical bills and lost wages; and 2) “General” damages, which includes pain and suffering, loss of consortium, and emotional distress. Compensation for any insured under a policy depends both on coverage and damage evaluations.

A. Risk Transfer

Risk transfer addresses which policy and which party will be responsible for a person’s injuries, and often involves a risk management and control strategy of contractual shifting of a pure risk from one party to another. This can be done through contractual indemnification clauses or additional insured clauses in another policy. The mechanism for effecting a transfer of risk is through a tender of defense to another party and/or its liability insurer. If a tender is accepted, the accepting party will send a Reservation of Rights letter to the tendering party. If a tender is rejected, the tendering party can still provide reasons why the tender should be accepted. Sometimes, the tender recipient will send a tender acknowledgement to the tendering party while continuing to investigate the coverage.

B. Duty to Defend

The duty to defend is different than the duty to indemnify, and the duty to defend is greater than the duty to indemnify. The duty to defend arises at the earliest stages of litigation and generally exists regardless of whether the insured is ultimately found liable.

C. Mechanism of Injury and Causation

Investigation of workplace injury claims typically address the cause of the accident and the claimed injuries. In order to understand which party is liable when a workplace accident occurs, we first must understand what happened, including which elements of the worksite and job were causative factors. This often entails using human factors and biomechanics to evaluate the kinetics and kinematics of the incident to examine the interactions of the individual, the job task, and the overall working environment.

Each incident must be evaluated based upon the specific facts of the case, including taking into account the claimant’s behavior. Workplace accidents usually involve a number of different factors related to engineering, biomechanics, human factors (i.e. individual characteristics) and the environment (e.g. building codes, weather, lighting). A comprehensive human factors and biomechanical engineering analysis can analyze the injury claimed, determine the mechanism of the injury, and help evaluate the cause of the injury (including determining whether there is a causal link between the claimed injury and the task being performed). Alternatively, it may be determined that the injury was degenerative, or linked to recreational activities. If there are objective findings to support the claimed injuries, the analysis must then determine the proximate cause of the claimed injuries. Evaluation of the injury mechanism leads to the identification of a kinematic pattern. Understanding the kinematic pattern helps determine the actions and/or equipment that was involved in the incident. This information can then be used by risk managers and claims managers to help determine liability.