

CONTRACTORS

BEWARE!

Revised OSHA Rules Offer No Safety For Defendants

Stephen W. Heil and Michael D. Huber
Cray Huber Horstman Heil & VanAusdal LLC
303 W. Madison, Suite 2200
Chicago, Illinois 60606
Tel: 312-332-8450
Fax: 312-332-8451
Attorneys@crayhuber.com

On January 1, 2001 (original effective date of July 18, 2001), the Occupational Safety and Health Administration (commonly known by its anagram OSHA) issued new rules governing Steel Erection (29 CFR Part 1926) to take effect on January 18, 2002. Many of these revised rules embody significant changes from longstanding OSHA safety principles, which invite application and, perhaps, domination, in a courtroom setting.

The purpose of this article is to advise the reader of the nature and scope of these new OSHA pronouncements, to discuss the ways in which they are likely to impact construction-injury litigation, and to suggest some practical approaches to contractors, insurers and defense counsel in defending against the use of these standards by savvy plaintiff attorneys.

Stated Purpose of Revisions

The current OSHA standard has been in place, with little change, for over 30 years. The revisions to the current Steel Erection standard were precipitated by OSHA's tracking of workplace injuries and fatalities through its Integrated Management Information System (IMIS), its review of compliance problems, and public comments regarding confusion and ambiguity in the current standard. Tracking of accidents and debate over the proposed revisions began in 1984 and OSHA estimates that an average of 35 fatalities and 2,279 lost-workday injuries could be avoided by compliance with the new Revised Rule. The stated objective of the final rule is to "reduce the risk of occupational exposure to a variety of hazards on steel erection construction worksites, such as those involving falls, slips, trips, being struck or crushed by objects or loads, and structural collapses."

Practical Impact

During the debate over the final version of the Revised Rule, OSHA stressed "that the general contractor or construction manager is not strictly liable for subcontractor violations, but is only responsible if it fails to take reasonable and feasible steps to discover and correct unsafe or unhealthful working conditions on the work site." Whether this holds true in practice will likely remain a subject of great debate given the language that the authors of the new rules have chosen to employ within the body of the regulations.

Prior to these "Revisions", it was common practice for defense attorneys representing general contractors to argue for a strict construction of the language of the OSHA rules as applying only to interactions between "employers" and "employees". Efforts by plaintiff attorneys to expand the scope of the application of OSHA to the general contractor/employee or subcontractor relationships could at least be met with the argument that "the rules don't mention duties on general contractors except on those projects governed by federal contracts." The new rules, however, have taken away that

argument and arguably place much broader duties on general contractors (and others on the job site) to "insure" the protection of anyone working on the site.

In perhaps the most significant modification of the existing rules, the revised regulations lump general contractors and construction managers into the broad category of "controlling contractor". This fictitious entity is collectively defined as "a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project, its planning, quality and completion." Surprisingly, in spite of decades of developed case law and official OSHA interpretations, the authors of the revised regulations chose a little used and rarely defined or interpreted phrase (i.e. "controlling contractor") to dominate the regulations. Indeed, a computer search of the national case law revealed but one reported tort decision using the phrase "controlling contractor". In that circumstance, it was used rather casually to describe a general contractor who "had the right to stop anybody who was carrying on the work in an improper and dangerous manner." (See, *Greenberg v. Branciere*, 100 Conn. 596 (1926)) **Without greater precedential guidance from the courts, there is a real threat that the breadth of this definition will be held to be unmistakable ... just about every contractor on the job site is swept up in its scope.**

Traditional Evidentiary Uses of OSHA

A strict reading of the OSHA guidelines might lead one to conclude that Congress specifically limited the use of OSHA regulations in courts when it stated:

Nothing in this Act shall be construed to supercede or in any manner affect worker's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment. 29 U.S.C. Section 653 (b)(4).

Unfortunately, in practice, nothing could be further from the truth. A nationwide survey of cases dealing with the evidentiary use of the existing OSHA regulations in trials involving tort cases, reveals that a clear majority of state courts find some way to put evidence of the existence of OSHA regulations before the jury. While only some states have sanctioned the evidentiary use of agency findings of OSHA violations (primarily due to the lack of any language in the existing regulations relating to the responsibility of a General or Prime Contractor for the safety of employees of subcontractors), most courts have ruled in favor of admissibility of specific OSHA provisions on the issue of the "Standard of Reasonable Construction Practices" recognized in the industry *or* as to the feasibility or availability of alternative safety measures.

See APPENDIX for listing of cases from various jurisdictions discussing the evidentiary use of OSHA regulations and violations.

While plaintiff attorneys have not often in the past had the benefit of arguing that a government agency found violations on the work-site, the new regulations (like the old) will likely be admissible as industry standards, allowing for *argument* that they were violated by the defendant contractor. Additionally, given the new breadth of the definition of those that are legally "in control of " the work-site, the new regulations may well allow for a more reasoned argument favoring receipt of the actual violations into evidence based upon the revised rules explicitly placing greater duties on those deemed to be controlling contractors.

With this rule of admissibility as the historical background, we now look to the specific provisions of the Revised OSHA Rules.

2002 OSHA Rules for the Construction Industry

Site layout and Construction Sequence (1926.752)

*Prior to authorizing the commencement of steel erection, the controlling contractor shall **insure** that the steel erector is provided with written notification that the concrete in the footings, piers, walls, and the mortar in the masonry piers and walls has attained, on the basis of an appropriate ASTM standard test method of field-cured samples, either 75 percent of the intended minimum compressive design strength, or sufficient strength to support the loads imposed during steel erection.*

*Under this section, the controlling contractor must also **insure** that adequate access roads into and through the site are provided so as to enable the safe delivery and movement of derricks, cranes, trucks and other necessary equipment, including all means and methods of pedestrian and traffic control throughout the site. This provision does not apply to roads outside the construction site.*

Comments: The previous section 1926.752 contained no provision that adequate access roads be maintained into and through the site. Arguments had previously been made that such a requirement was contained in the General Health and Safety provision of 1926.20, the Cranes and Derricks provision of 1926.550, and the Material Handling Equipment Standard contained in 1926.602 (a) (3) (i). The revisions to this part of the rule seek to clarify the requirements and assemble them into the section pertaining to steel erection work, leaving little doubt as to their applicability.

Hoisting and Rigging (1926.753)

Pursuant to 1926.753 (c) a pre-shift visual inspection of all cranes must be done before the cranes can be used. This inspection must be performed by a "competent person"¹ and must include the following:

¹ Defined as: one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

- All control mechanisms for maladjustments;
 - Control and drive mechanisms for excessive wear, contamination by lubricants, water or other foreign matter;
 - Safety devices, including boom angle indicators, boom stops, boom kick out devices, anti-two block devices, and load moment indicators where required;
 - Air, hydraulic and other pressurized lines for deterioration or leakage;
 - Hooks and latches for deformation, chemical damage, cracks or wear;
 - Wire rope reeving for compliance with hoisting equipment manufacturer's specifications;
 - Electrical apparatus for malfunctioning, signs of excessive deterioration, dirt or moisture accumulation;
 - Hydraulic system for proper fluid levels;
 - Tires for proper inflation and condition;
 - Ground conditions around the hoisting equipment for proper support, including ground settling under and around outriggers, ground water accumulation, or similar conditions;
 - The hoisting equipment for level position;
 - The hoisting equipment for level position after each move and set up.
- 1926.753 (c) (i) (A)-(L)

If any deficiency is identified during the inspection, a determination must be made by the competent person as to whether the deficiency constitutes a hazard. If it does constitute a hazard, the hoisting equipment must be removed from service until the deficiency is corrected. The operator is responsible for all operations under his direct control, and whenever there is any doubt as to safety, the operator shall have the authority to stop the work and refuse to handle loads until safety has been assured.

Comments: The Revised Hoisting and Rigging Rule places a great deal of control in the operator and the "qualified person". Will this have an impact on who is the "controlling contractor"? The Revised Rules broaden the scope of potential liability and will require an education process for all operators and designated "qualified persons" as to their respective duties and powers on the job site. Specific training in hazard recognition will be essential because the lack of such training will be grist for the legal mill should someone be injured during the work.

An interesting side note about the original draft of the Revised Rule was that a certification or a record of the pre-shift inspections needs to be prepared documenting the findings of the inspections. In an effort to minimize paperwork, OSHA has decided to omit the certification and recordkeeping requirement from the final Revised Rule.

Structural Steel Assembly (1926.754)

Key provisions of Revised Rule 1926.754 provide safer working and walking surfaces by seeking to eliminate tripping and slipping hazards. The Revised Rule attempts to eliminate tripping hazards by prohibiting the attachment of shear connectors, reinforcing bars, deformed anchors or threaded studs which may project vertically or horizontally

from the beam, thereby causing a tripping hazard. The Rule also seeks to prevent slipping hazards by prohibiting workers from walking along the top of any structural steel member installed after July 18, 2006, that has been coated with paint or “similar material” unless documentation or certification that the coating has achieved a minimum slip resistance of .50 when measured with an English XL trip-o-meter or “equivalent tester” on a wetted surface at a testing laboratory is provided. The Revised Rule does not require that the coated member be tested, but only that a sample of the coating be tested in accordance with ASTM standards.

Under 1926.754 (e) (2) (iii), employers must delay cutting decking holes and openings until immediately before they are permanently filled with the equipment or structure needed or intended to fulfill their specific use. OSHA’s rationale in this clarification is that by delaying the cutting of the holes in decking they hope to prevent employees and objects from falling through the holes while at the same time, eliminate tripping hazards that may be created by the presence of covers over holes that would not be used for some time.

In the event that covers are used to cover roof and floor openings, 1926.754 (e) (3) requires that those covers be capable of supporting, without failure, twice the weight of the employees, equipment and materials that may be imposed on the cover at any one time. The Revised Rule continues to require that the covers be secured when installed so as to prevent accidental displacement by the wind, equipment or employees, and that all covers be painted with “high visibility” paint or marked with the words “Hole” or “Cover”, to provide warning of the hazard.

Comments: As a practical matter, the contractors doing preparation and installation of HVAC or other equipment are rarely coordinated to be on the site at the same time or even necessarily consecutively. Consequently, the best of intentions by OSHA may well lead to scheduling nightmares by contractors and increased costs due to the necessity of multiple trips to job sites that could formerly be completed in one visit.

Obviously, testing of some kind will be necessary, prior to use on the job site, to determine the relative strength of all roof and floor opening covers. Again, given the breadth of the overall supervisory duties placed on all controlling contractors to “insure” safety, prior testing may be the only way to effectively satisfy these duties.

Falling Object Protection (1926.759)

Section (a) of this provision requires that all materials, equipment and tools not in use aloft be secured against accidental displacement. Section (b) states that the controlling contractor shall bar other construction processes below steel erection unless overhead protection for the employees below is provided.

Comments: While all good general contractors attempt to schedule the trades so that no one is working under elevated workers, this is not always feasible. Little guidance is given by the regulations as to what constitutes satisfactory overhead protection.

Consequently, this regulation is subject to broad manipulation by creative plaintiff attorneys, who, combining this with the "duty to insure" can argue that if the worker below was struck by a falling object, then there effectively was no overhead protection".

Fall Protection (1926.760)

Paragraph (a) of the Revised Rule requires that each employee engaged in a steel erection activity who is on a walkway/working surface with an unprotected side or edge more than 15 feet above a lower level be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

Comments: Prior to the enactment of this Revised Rule, the fall protection requirements for steel erection were contained in three separate provisions, depending on the structure and type of fall exposure: 1926.750 (b)(1)(ii); 1926.750 (b)(2)(i), or 1926.105(a). These provisions were the subject of considerable litigation. Section 1926.105(a) required fall protection at and above 25 feet for both fall hazards to the interior and exterior of the structure. In multi-tiered buildings, 1926.750 applied to fall hazards to the interior of the building, and fall protection was required at and above 30 feet. In multi-tiered buildings, 1926.105(a) applied to fall hazards to the exterior of the building and required fall protection at and above 25 feet.

The Revised Rule eliminates all distinctions between interior and exterior fall hazards and tiered versus untiered buildings for the fall protection trigger heights. The fall protection rules for steel erection differ from the general fall protection rules contained in Subpart M, which set 6 feet as the trigger point for fall protection. It was decided that the Revised Rule needed strengthening to account for the unique hazards faced by steel erection workers, namely, 1) the narrowness of the working surfaces, 2) its location above, rather than below, the rest of the structure and 3) a minimum distance of 15 feet to the next lower level.

There are two exceptions to the fall protection requirements: (1) connectors do not have to use their fall protection devices to avoid hazards while working at heights between 15 and 30 feet, and (2) workers engaged in decking in a controlled decking zone can work without conventional fall protection at heights between 15 and 30 feet. If an employer establishes a controlled decking zone, employees in that zone do not have to be provided with, or use, a fall protection system. Employees working at the leading edge in a CDZ above two stories, or 30 feet whichever is less, shall be protected from fall hazards. All workers in the CDZ must be engaged in leading edge work AND be trained in the hazards involved in performing leading edge work.

Training (1926.761)

Section 1926.761 supplements the general training requirements of the employer set forth in 1926.21. Section 1926.761 requires that all training be performed by a qualified person, and that all employees receive training in the areas of fall hazards, and special

training for those engaged in multiple lift rigging procedures, connector procedures, and controlled decking zone procedures.

The fall hazard training program shall include instruction in the following areas:

- (1) The recognition and identification of fall hazards in the work area;*
- (2) The use and operation of guardrail systems (including perimeter cable safety cable systems), personal fall arrest systems, positioning device systems, fall restraint systems, safety net systems, and other protection to be used;*
- (3) The correct procedures for erecting, maintaining, disassembling and inspecting the fall protection systems to be used;*
- (4) The procedures to be followed to prevent falls to lower levels and through or into holes and openings in walking/working surfaces and walls; and*
- (5) The fall protection requirements of this subpart.*

In addition to the training in fall protection, the employer shall provide special training to those employees engaged in the following activities:

- (1) Multiple lift rigging procedures (must be trained in the nature of the hazards associated with multiple lifts, and the proper procedures and equipment necessary to perform multiple lifts);*
- (2) Connector procedures (must be trained in the nature of the hazards associated with connecting, and must establish proper connecting techniques and work practices).*
- (3) Controlled decking zone procedures (must be instructed in the nature of the hazards associated with work within a controlled decking zone, and establish proper installation techniques and work practices).*

Comments: Training programs still remain in the sphere of the direct employer. However, it is reasonable to believe that the "controlling contractor's" stated duty to "insure" the safety of others on the site will ultimately be raised as a sword by future claimants.

Changes in the Landscape

A practical problem with all of these Revised Rules is that general contractors primarily hire concrete and steel erection subcontractors because general contractors lack the expertise, facilities and skilled manpower to pour footings, caissons and other concrete structures or to erect steel in a safe, efficient and proper manner. Yet, the Revised Rule

holds the general contractor, construction manager, or anyone else who may be considered to be a controlling contractor to a duty of "insuring" that many of the activities traditionally performed by the concrete and steel erection subcontractors and involving those trades' unique expertise are properly done. Under the Revised Rule, general contractors, construction managers, and others (who previously took a strictly "hands off" approach to concrete work and steel erection) will need to become more familiar with the foundation and steel erection process, and become more involved in the work being performed by these subcontractors. This micro-management will undoubtedly lead to job site conflicts and delays between the controlling contractor and the subcontractors who have developed "division of work" understandings that have served the industries well for decades. Additionally, supervisors and foremen for the general contractor when faced with deposition or courtroom testimony are likely to be challenged as to the scope of their knowledge of proper concrete and erection techniques and tolerances because they are charged with insuring the propriety of the concrete and steel erection.

Another problem is that the foremen for the subcontractors who staff the construction sites tend to be in better positions to educate, train, supervise and insure that the work is being performed properly and in accordance with OSHA. With the burden for training now having been transferred (at least on a shared basis) to the controlling contractor, this could arguably lead to a relaxing by subcontractors in their efforts to train, educate and insure that their workers are adequately instructed in the intricacies of construction safety dynamics.

How slippery is the slope?

These rule revisions obviously give rise to the concern that once the potential liability of the general or controlling contractor is expanded within the area of steel erection, what is to prevent OSHA from expanding the role of general contractors in the areas of scaffolding, stairways, ladders, fall protection, excavation or any other area in which a general contractor would typically subcontract with someone having greater expertise in that particular trade? The short answer is nothing. Expansion of duties in one area tends to lead to expansion in other areas as well. However, until OSHA decides to specifically revise the regulations applicable to these construction fields, defendants still have in their arsenals decades of limiting case law. The real problems will arise when OSHA, having now completed the Steel Erection guidelines, takes up the next mantle. That is only a matter of time and budgetary constraints.

Practical Considerations

What follows are some suggestions as to how to help ward off and later address some of the issues raised by the adoption of these Revised OSHA regulations:

- When contracting, consider inserting or bargaining for a clause in each subcontract requiring the subcontractor to continue to train, educate and supervise its workers throughout the construction process. Although this will

not absolve the controlling contractor from liability, it will prevent the subcontractor from attempting to later abdicate these responsibilities.

- Specific language should be included in every subcontract setting forth that various OSHA provisions notwithstanding, the subcontractor shall be responsible for all aspects of control, safety, construction means and methods, training and oversight of its contracted services and employees.
- Traditional contract language which broadly adopts all OSHA regulations needs to be revisited to determine whether it inherently contradicts other "division of responsibility" provisions in the contract.
- Revised OSHA regulations training meetings/programs should be considered for all job sites to make all contractors aware of changes in the rules and how those changes impact their on-site responsibilities for overall safety. As an adjunct, general contractors need to insist on wide job site dissemination of any applicable Revised Rules by subcontractors. Controlling contractors need to be careful not to forget about the training of their own employees on the job site as well.
- General and other potentially "controlling" contractors need to insist on subcontractor compliance with the formalized Training Program guidelines and identify the "qualified person" and his or her safety training prior to the start of the subcontractor's work.
- Because these Revised Rules could dramatically increase the potential costs and the risks of liability for the general or controlling contractor, consideration should be given to shoring up indemnity provisions in all construction contracts. Most states, which have not disallowed (by statute or case law) the enforceability of indemnity clauses in construction contracts, require very specific language in the contract manifesting a specific intent to have the subcontractor indemnify the general contractor for the negligent acts or omissions of the general contractor.
- Further, "promises to procure insurance" agreements contained in construction contracts are subject to waiver if all conditions for the agreement have not been insisted upon by the general contractor. Consequently, great care must be taken by the general contractor to insist that insurance coverage, which names the general contractor as an insured venter or additional insured on the policy (and for the appropriate and agreed upon policy limits), has actually been issued. The general contractor needs to routinely insist on the production of executed certificates of insurance prior to the subcontractor's commencement of the work.
- Defense attorneys who defend against the use of OSHA regulations need to be thoroughly familiar with the Revised regulations **as well as** the comments and

discussions that occurred during adoption hearings, because the only thing standing between a Court's strict application of the terms "insure" and "controlling contractor" (as used in the regulations) may be counsel's skills and the admonition by the discussants that general contractors are not to be strictly liable for the acts of their subcontractors. Until sufficient case law develops to help define any changes in the exposure to potential controlling contractors, care should be taken by counsel to factor the potential for broader exposure into the overall defense plan.

Conclusion

As a practical matter, all persons involved in risk management, from the contractors to the underwriters to the claims personnel to defense counsel need to be acutely aware of the potential for increased claims exposure to general and "controlling contractors" from these revised regulations. They will find their way into the courtroom and once there will only increase the already significant burden placed upon general contractors to explain to jurors and judges the realities of the world of construction and the well-respected distinctions in job responsibilities and duty stratification.

It is imperative, in response to this dynamic, for all members of the risk management team to begin at the moment of contracting with a well-planned strategy for placing the greatest burden for safety and control on the subcontractor who has been hired for the specific job purpose that is likely to give rise to a claim.

APPENDIX

VIOLATION ADMISSIBLE

Industrial Tile Inc. v. Stewart, 388 So.2d 171 (Ala. 1980).

Kinney v. CSB, 2001 Ca.App. Lexis 57.

DuPree v. Keller, 404 S.E.2d 291 (Ga. 1991).

Ganci v. PATHC, 258 A.D. 2d 386 (NY 1999).

ADMISSIBLE AS NEGLIGENCE PER SE

Practico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985).

NOT NEGLIGENCE PER SE - ADMISSIBLE AS TO STANDARD OF CARE

Davis v. Hebden, Schilbe and Smith, Inc., 1995 U.S.App. Lexis 9018 (4th Cir. 1995) [applying Virginia Law].

Robertson v. BNRC, 32 F.3d 408 (9th Cir. 1994) [applying Washington FELA law].

Ries v. NRPC, 960 F.2d 1156 (3rd Cir. 1992)

Minichello v. U.S. Industries, Inc., 756 F.2d 26 (6th Cir. 1985).

Garay v. MPRC, 38 F.Supp.2d 892 (USDC Dist. Kansas 1999) [not negligence per se, no ruling on admissibility], but see Cott v. Peppermint Twist, 253 P.2d 906 (1993) [admitted as evidence of foreseeability].

Miller v. CNWTC, 925 F.Supp. 583 (USDC N.D.Ill. 1996).

Ball v. Melsur, 633 A.2d 705 (Vt. 1993).

Duncan v. PCHA, 283 N.W.2d 546 (S.D. 1979).

White v. W.G.M. Safety, 707 F.Supp. 544 (USDC S.D. of Ga. 1988)

Jupiter v. Brocard, 546 S.2d 1 (Fla. 1988).

Valdez v. Gillessen, 734 P.2d 1258 (N.M. 1987).

Cowan v. Laughridge, 219 S.E.2d 287 (N.C. 1982).

Wood v. Smith, 495 A.2d 601 (Penn. 1985).

Mingachos v. CBS, 491 A2d 368 (Conn. 1985).

LIMITED ADMISSIBILITY OF OSHA

Trowell v. Brunswick, 522 F.Supp. 782 (USDC, S.C. 1981) [not admissible as to non-employee].

Scott v. CIC, 1 P.3d 185 (Colo. 1999) [not admissible if not employer/employee relationship].

Wells v. DEC, 2000 Del. Super. Lexis 224 [admissible against a plaintiff with knowledge on contributory negligence issue].

Gerace v. 3-D, 522 N.W.2d 312 (Iowa 1994) [not an abuse of discretion to bar them].

Cleary v. The Turning Point, 512 N.W.2d 9 (Mich. 1993) [not an abuse of discretion to bar them].

Sumrall v. MPC, 693 So.2d 359 (Miss. 1997) [not admissible because not given compulsory force by the legislature].

Hickey v. JC Penney, 1996 Tex. App. Lexis 3772 [not admissible if independent contractor situation].

Durel v. American Peco, 1992 U.S. Dist. Lexis 4557 [not admissible without proper relevancy foundation shown].

Tomas v. Hohlfelder, 1996 Ohio App. Lexis 2585 [admissible as to notice of dangerous condition].