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WORKPLACE INJURIES

Six Feet Over or Six Feet Under?

OSHA 'double standard' permits ironworkers to work unprotected at heights up to 30 feet while others work safe above six feet

By Mark J. LeWinter

The National Safety Council accident statistics establish that falling from a height of 11 feet creates a 50/50 likelihood of being killed. Jay Hawthorne wasn't killed. He suffers, however, what is arguably a fate worse than death.

He fell from a height of 14 feet, landing headfirst and shattering his C5 vertebrae. His C5 paralysis ascended to C2 leaving him a complete ventilator-dependent quadriplegic. His spinal cord was shredded by the bone fragments.

He cannot move his arms or legs, fingers or toes. He will never be able to breathe on his own. He has no control over his bowels or bladder. He has frequent urinary tract infections requiring hospitalizations and episodes of life threatening complications weigh heavily on his mind on a daily basis.

LeWinter, a partner at Anapol Schwartz of Philadelphia, recently obtained a settlement for an ironworker against an OSHA compliant construction manager and employer. This article reviews the theories and strategy advanced to negate the OSHA compliance defense.

He lives in constant pain. He requires skilled nursing care 24 hours a day, seven days a week, at a projected cost of over $500,000 per year. His life expectancy has been reduced by 50 percent and his quality of life is a daily nightmare from which he will never awake.

Why is it that Hawthorne was permitted to work unprotected at heights up to 30 feet while a carpenter, electrician or any other worker exposed to a fall hazard of 6 feet or more was required to use safety equipment?

He was exposed to fall hazards five times that of other workers because the Construction Management Company charged with the safety of the jobsite failed to ensure that safe fall-protection-practices were followed.

It was revealed through discovery that there was a prior accident (in 1996) and litigation involving an ironworker four years earlier where a 13-foot fall resulted in a career-ending spinal cord injury. The Occupational Safety and Health Administration had investigated the fall and determined that there were no OSHA violations because pursuant to 29 CFR Subpart R 1926.750 (b)(2)(i), ironworkers were permitted to work up to 30 feet without fall protection.

The trigger height of six feet for fall protection for all workers other than ironworkers is set forth in OSHA in 29 CFR Subpart M 1926.501, which provides that workers must be provided with personal fall protection equipment to prevent exposure to fall hazards above six feet.

OSHA Compliance Defense

In the litigation that ensued from the 1996 accident, the Construction Company's defense was OSHA compliance. However, after the 1996 accident, it was learned that the company was advised by its independent safety consultant of 20 years to exceed OSHA standards and adopt the standard fall protection trigger height for all workers of six feet. This would mean that all workers would be required to use personal fall arrest devices if they were exposed to a fall hazard above six feet.

The company agreed with its safety consultant that it had to exceed OSHA standards and require fall protection at six feet for all workers, including ironworkers. Unfortunately, the company never followed through with its commitment to prevent future injury to ironworkers and permitted ironworkers to work at unprotected heights up to 30 feet.

When Hawthorne fell from a height of 14 feet and suffered a catastrophic injury, OSHA investigated again as it had after the 1996 accident — and reached the same conclusion, issuing no OSHA violations. Hawthorne was an "OSHA compliant" quadriplegic.

The company asserted the same defense of OSHA compliance, which it had asserted in the earlier litigation, but chose not to test the strength of its defense and this case was settled two weeks prior to trial.

The OSHA "double standard" which has permitted ironworkers to work unprotected at heights up to 30 feet while others work safely above six

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feet must be thoroughly understood by the practitioner handling a fall protection case. Lawyers representing fall victims must not fall into the OSHA or industry regulation trap.

Compliance with OSHA should not create a presumption that the contractor acted with care. A jury, which is properly educated on fall protection and the history of the regulations, will likely reject an OSHA compliance defense due in large part to the inherent inconsistency and double standard.

New Standards Fall Short

Unfortunately, this double standard exists today, notwithstanding a revision last year by OSHA.

The fall protection regulations for ironworkers were recently revised in January 2002. OSHA departed from normal regulatory rulemaking by creating an advisory committee with representatives from the industry. OSHA recognized that fatality and injury levels for ironworkers were unacceptably high and clearly posed a significant risk that justified agency action.

The Negotiated Rulemaking Act passed by Congress in 1990 established a predicate for self-regulation, and talks began in 1994 when the federally appointed Steel Erection Negotiated Rulemaking Advisory Committee, SENRAC, was formed to begin to negotiate a consensus standard, to improve ironworker safety.

The SENRAC committee included ironworkers, construction trades, National Institute for Occupational Safety and Health, the Association of General Contractors, and numerous union representatives. The compromise plan was finally presented in 1997 but due to further delay, it was not implemented until five years later in January 2002.

The new steel erection standard, 29 CFR Subpart R 1926.760, is an improvement over the old regulations, however, it has been heavily criticized as an anemic standard by the Association of General Contractors and others in the industry as it still permits workers like Hawthorne to be exposed to a fall hazard of 30 feet without any fall protection required.

A jury that is properly educated on fall protection and the history of the regulations will likely reject an OSHA compliance defense.

The AGC, the largest trade association in the construction industry, favored a six-foot tie-off for all workers. Under the new rule, ironworkers engaged in installing metal decking will have an "option" to use safety equipment between 15 and 30 feet — as long as they are working within a controlled decking zone.

Hawthorne was part of a decking crew when he was injured and OSHA has long recognized that installing decking is the most hazardous of all steel erection activities, as it continually exposes workers to a fall hazard because metal decking is often slippery, can shift underfoot and is often times unsecured.

In response to the proposed revision, in a letter dated Aug. 27, 2001, the ACG chastised OSHA, stating, "[a]ll workers should be tied off or otherwise protected at six feet regardless of what type of work is being performed."

Requiring ironworkers to use fall equipment at six feet has been recognized by OSHA to be practical and feasible. Since the OSHA statistics reveal that approximately half the construction workers killed in falls are from falls under 30 feet and 26 percent are killed at heights of between 11 and 20 feet, this double standard defies logic and common sense.

The construction industry should adopt more rigorous workplace safety standards that exceed OSHA requirements. Many responsible, safety-conscious companies have heeded the call and have implemented a six-foot tie-off rule for all workers.

The workplace can and must be made safe for all workers, including ironworkers. While the emerging trend is voluntary enforcement of a six-foot trigger height, practitioners must be prepared to hold those companies that choose to rely on OSHA accountable. ■