

July 14, 2021

Process change wasn't vetted: Burned staffer sues Supervisor

Can injured employee collect more than workers' comp?

"I'm still not sure why we're changing a process that's worked perfectly for years," said staff member Vernon Simms.

"Because it's more effective and it saves time," sighed Supervisor Sean Kamen. "We went over it already."

"The engineer who showed us this alternative method came up with it at his own metal-processing plant," said Sean.

"I just wish me and the other guys could've heard him talk and gotten a chance to ask questions," said Vernon.

"Mr. Jones and I asked questions," said Sean. Mr. Jones was the VP of Operations. "Don't worry, I'll walk you through the

new process until it sticks – again."

Vernon donned his PPE and climbed up into his forklift. His job was to add sodium hydroxide to a kettle of molten lead as part of the dressing process.

No one had a clue

"That's good, just squeeze it in," said Sean the Supervisor, standing behind a safety shield. "You can see all the impurities rising to the top already!"

"Boooooom!!" A loud explosion rocked the plant. Sean hit the floor then looked

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Sharpen Your Judgment

Scaffold hazards may have been overstated

"I can't believe we got a serious violation over a bucket," said Warren, the Supervisor. "It would be funny if it wasn't such a pain in the you-know-where."

"You know OSHA doesn't play games with scaffolding safety," said Safety Director Chris Taylor. "Tell me your version of events."

Would it even fit?

"The OSHA inspector climbed up our scaffold. She said the scaffold was too far away from the side of the building," Warren said.

"How far was it?" Chris asked.

"That's just it," Warren said. "She didn't

take measurements. According to mine, the gap between the scaffold and the building was only 12 inches. It can be up to 14 inches."

"And about this bucket?" Chris asked.

"The inspector said not having toe boards on the scaffolding was dangerous," Warren said. "She said a bucket on the scaffold could fall through the gap and hit a worker below."

"But there's no way that bucket was narrow enough to fall through," he went on. "Besides, my people know to wear hard hats when they're under a scaffold."

"We'll try fighting this," Chris said.

Was the fine dismissed?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

Make your decision, then please turn to Page 4 for the court's ruling.

Process ...

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up to see Vernon in the forklift jumping up and down.

Flammable hydrogen gas from the kettle had ignited and sent molten lead splashing onto Vernon.

Life turned upside down

Vernon's PPE only covered parts of his body. Molten lead scorched him in multiple spots, leaving him with second-degree burns.

The company reported the accident to OSHA, and the safety agency issued serious citations for:

- lack of hazard communication for the new lead crossing process, and
- failure to protect staff from burn hazards, under the general duty clause.

Vernon collected workers' compensation for the accident – but the story didn't end there.

Supervisor singled out in lawsuit

"Holy mackerel, Vernon's suing the company and me personally?" Sean the Supervisor asked.

"Don't worry, the company will defend you in court if it comes to that," said the company lawyer.

"Tell me what you learned about the process from the engineering consultant."

"He showed us how sodium hydroxide speeds up the crossing effect," said Sean. "But he didn't warn us about how slowly you need to add it. He didn't warn me

or Mr. Jones about it!"

"I know, you're both on the same page on that point," said the lawyer. "When it comes time for your deposition, just give them the facts like you told me."

Court rules ...

Result: The state supreme court dismissed the injured employee's lawsuit because he wasn't able to show the company and Supervisor had shown disregard for his safety or acted with gross negligence.

The employee's sole means of financial restitution was through workers' comp as per state law (other states rule the same way in similar cases).

The employee can also try suing the engineering consultant who demonstrated the new process.

Changes made with care

The VP and Supervisor weren't fully aware of the risks associated with adding sodium hydroxide to molten lead.

They rolled out the new process quickly. The accident occurred about a week after the rollout.

Key: Incorporating new processes (or new tools or materials) is a learning process, and workers are sure to have questions.

Getting it right and getting the whole team on the same page is absolutely paramount.

What you need to know:

Facilities aren't just required to follow OSHA standards like lockout/tagout or machine guarding – they're expected to provide a workplace free from known hazards.

Failure to do so can result in fines under the general duty clause, which often leads to:

- workers' comp claims or lawsuits using OSHA citations to back them up, and
- repeat OSHA inspections.

TEST YOUR KNOWLEDGE

Keeping your team safe working on scaffolds

Scaffolds are one of the best ways to get work done at heights for the simple reason that unlike ladders, they let workers move about and use their hands freely.

Test staffers' knowledge on scaffold safety by having them answer *True* or *False* to the following:

1. Only qualified professionals should set up or inspect scaffolds.
2. Scaffolds should be able to support their maximum intended load exactly.
3. You should never move or repair a scaffold while someone is on it.
4. Scaffolds must always be anchored to a permanent structure.
5. Each scaffold taller than 10 feet must be equipped with either guard rails or mesh nets for fall protection.

ANSWERS

1. *True.* Scaffolds must be erected by a "competent person." This is defined as someone capable of identifying existing and predictable hazards, and has the ability to take action to prevent them quickly.
2. *False.* Scaffolds should actually be able to support at least four times their maximum intended load.
3. *True.* Scaffolds must not be moved horizontally or altered while they're occupied.
4. *False.* Scaffolds should be supported by being anchored using anchor bolts, reveal bolts or equivalent means.
5. *False.* Mesh nets do not take the place of guard rails. Workers at these heights need to be protected with multiple guard rails and toe boards on all exposed sides of the scaffold.

Answers to the quiz:

Based on Means v. Glover. The case has been dramatized for effect.

Fines, accidents and damage supervisors could've prevented

News you can use to head off safety mishaps

In this regular section we highlight situations that led to fatalities, injuries, near-misses, damaged equipment or fines that frontline supervisors could've prevented.

Using wet vac to suck up gasoline triggers a fire

What happened: An employee at Lupton Petroleum Products used a plug-in wet/dry vacuum to remove excess gasoline from a refinery distillation tower when hydrocarbons ignited. The fire caused minor injuries to an employee and significant damage to facility equipment.

What people did: An EPA investigation found the Lupton, AZ, company failed to:

- conduct a hazard review
- identify hazards associated with the discharge of pressure relief valves, and
- identify and train employees about various electrical hazards.

Result: The agency issued a \$279,472 fine.

Engulfment death of Supervisor: \$676K

What happened: A Cambria, WI, grain facility called 911 when a manager didn't show up for a meeting or answer his phone. After a nine-hour search, emergency services found the body of the manager, who had been engulfed in a corn silo.

What people did: OSHA said Didion Milling failed to:

- ensure mechanical equipment was de-energized during employee entry
- ensure observers were stationed

outside silos during entry operations

- prevent employees from entering silos with engulfment hazards
- issue permits to employees entering silos for cleaning and inspection activities
- provide employees working in silos with body harnesses and lifelines, and
- provide equipment for rescue operations.

Result: The 14 violations add up to \$676,808 in fines.

2 workers killed by steam line blast: Lack of LO/TO

What happened: After making repairs to a steam pipe at a U.S. Department of Veterans Affairs' healthcare facility in Bridgeport, CT, a Veterans Affairs worker and a worker from Mulvaney Mechanical of Danbury, CT, were fatally injured when a fixture on a steam line blew off.

What people did: Mulvaney Mechanical failed to:

- develop procedures for control of potentially hazardous energy
- train employees on lockout/tagout, and
- inform Veterans Affairs of company lockout/tagout procedures.

Result: The contractor will pay \$38,228. OSHA can't levy fines against another federal agency. But according to a press release, a private sector employer would've been fined \$621,218 under these circumstances.

Note: Read up on lockout/tagout standards at bit.ly/LOTO514

SAFETY TRAINING TIPS

■ Getting change – not excuses – from workers

When employees are confronted about mistakes, they often point the finger at a co-worker or try to make excuses.

Some even ignore the message, believing they didn't do anything wrong.

But none of these reactions get what you're really driving at – a change in unsafe behavior.

4 tactics to get results

When you're talking with an employee about a mistake, remember to:

- **Use the right words.** A question that starts with "Why" or "Who" usually gets defensive responses. Instead pose questions like "What could we have done differently?" or "How could this have been done more safely?" That opens the door to finding solutions.
- **Be specific.** Use documented examples of what went wrong. Instead of telling an employee, "Sometimes you forget a crucial step," say "this morning, I saw you didn't put on the proper PPE before starting work."
- **Know personalities.** If a worker is the no-nonsense type, make your message direct. Tell him or her what went wrong and work to find a solution to keep it from happening again. If you're correcting employees who are more sensitive to criticism, ease into the conversation. Tell them the behavior needs to change, but emphasize what they're doing well too.
- **Confirm they understand.** Make sure to close your conversation by having the worker repeat what needs to be done differently back to you. And always document that you had the talk. It provides a record that can help protect you in court.

Worker injured in fall gets workers' comp, but can he sue employer for more money?

Citing safety regs, worker says he's entitled to additional award

Construction worker Chris Callender stepped out of the lift. His assignment was to connect steel beams on what would be the third floor of a new building.

As he started to harness up, he turned to his co-worker, Ronnie Nagy. "There aren't any tie-off chokers up here?" Chris asked.

"We have chokers, just not the tie-off kind," Ronnie said, pointing them out. "The bridge clamps up here are kind of sketchy, so I wouldn't bother with them."

Chris took Ronnie's advice and left the clamps alone. But because his beamer wasn't fully anchored to the beam he was working on, it slipped all the way down to the unattached end of the beam.

"Help!" he screamed as he fell.

Was equipment adequate?

As a result of his injuries, Chris wasn't going to be able to work for a long time and he was awarded workers' compensation benefits.

Chris read up on his state's safety regulations and learned he could apply for additional compensation for Violation of a

Specific Safety Requirement (VSSR).

In his VSSR complaint to the state industrial safety board, Chris said he was unable to properly secure his harness to a structure while working at a hazardous height, and was injured because his employer failed to provide fall PPE that's required by law.

The board rejected the application and Chris took it to court.

Result: When a judge ruled in Chris's favor, the safety board appealed. The appellate judge reversed the decision and said Chris wasn't entitled to a VSSR award because the employer met its responsibility to provide fall protection equipment, and that there were several ways he could've secured himself to the structure.

Key: Because of the dangers of working at heights, employees should be encouraged to express any concerns about the condition of fall protection equipment to a Supervisor, instead of working without crucial safety components.

Based on DeMarco v. Industrial Commission of Ohio.

What you need to know:

OSHA standards for personal fall arrest systems say they're required to:

- be inspected prior to each use for wear and damage
- be removed from service if there are defective components
- include an anchor and a connector, such as lanyards, deceleration devices and/or lifelines, and
- be rigged so an employee can't free fall more than 6 feet or contact any lower level.

Sharpen Your Judgment – The Decision

(continued from Page 1)

No. The company was able to get the fine downgraded to other-than-serious when the case went before the Occupational Safety and Health Review Commission (OSHRC). But it wasn't dismissed outright.

The company claimed the bucket the OSHA inspector pointed out was too wide to fall between the building and the scaffolding.

OSHRC acknowledged that the bucket couldn't fall. But that didn't mean other objects couldn't fall and hit workers below.

The company should've protected workers by marking off the area below the scaffolding and installing toe boards to prevent materials from falling, OSHRC said.

The company was still at fault, but the fine was downgraded from serious.

Analysis: Difficult to overturn citations

Companies may be able to show OSHA made mistakes in investigations. But having a fine dismissed is a tough task.

Getting fines downgraded can save money. But by the time OSHA has issued a violation, it's likely you'll be forking over some cash.

The only guaranteed way to come out unscathed is to follow OSHA's regs to the letter in the first place.

Based on Secretary of Labor v. PCI.

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