

August 16, 2021

## Misconduct or LOTO error? Firm fights to get OSHA fine reversed

### *Worker's hand injured on cutting/bending machine*

“This is the Rod Chomper,” said veteran machinist George Murray. He was showing an apprentice worker around the plant floor.

“You use it to cut and bend rebar,” said George. He pulled out a key and inserted a piece of rebar to show the apprentice how the machine worked.

“You have to turn the key to the ‘on’ position and use this foot pedal here to work it,” said George. “Pretty simple.”

George then bent the rebar and cut it in half, and then handed the pieces to the apprentice. He left the machine running.

“There you go,” said George. “Sometimes you’ve got to replace one of these cylinders depending on what kind of an angle you’re looking for.”

“Do you have to turn the machine off first?” asked the apprentice.

“We’re supposed to,” said George pointing to a red warning label on the side of the Rod Chomper.

### **Trained to turn machine off first**

Later that day George was busy cutting rebar. He had to replace the cylinders

*(Please see **Misconduct ...** on Page 2)*

### *Sharpen Your Judgment*

## Was injury work-related or not? Court weighs in

“Can Gene really get workers’ comp for this injury?” asked Supervisor Hannah McKey. “I mean, it doesn’t seem work-related.”

“We’re trying to figure that out,” Safety Director Chris Taylor replied. “Gene was at work when he fell, right?”

### **Tripped in the parking lot**

“Sort of,” said Hannah. “He was walking through the parking lot.”

“Gene was talking with his co-worker about the job when he tripped over one of those wheel stops,” Hannah went on. “He fell and tore his knee.”

“What’s this about a tool belt?” asked Chris.

“He had a belt with some work tools over his shoulder,” said Hannah. “He claims he was trying to protect those, which is why he couldn’t break his fall.”

“Let’s see,” Chris said. “Gene’s injury happened on our premises. And he was distracted by discussing the job. That could be seen as work-related.”

“Talking about work and working are two different things,” Hannah said. “I’m saying this comp claim is bogus.”

The company tried to have the claim thrown out. Was it successful?

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.*

# Misconduct ...

(continued from Page 1)

multiple times to cut different-sized metal pieces. George was about to wrap up when he realized he still needed a 45 degree angle rod.

But he didn't turn the Rod Chomper off first and switched out a cylinder with the machine running.

"Aaarghh! #\$\$%^&\*!"

George's hand got caught between the spinning wheel and a cylinder.

His hand was broken in multiple places.

## OSHA steps in

"You wanted to see me?" asked Safety Supervisor Bill Womack.

"We just received a citation from OSHA," said the plant manager, "for violating the concrete and masonry construction standard."

"What the heck are they saying we did wrong?" asked Bill. "George

out and tagged during equipment maintenance or repair,' to be specific."

"OSHA doesn't even understand its own standards! There was no maintenance or repair work going on. George was doing construction work, plain and simple."

"Hmm," said the plant manager. "We should contest this – help me with it, would you?"

"Gladly!" said Bill.

## Case of worker misconduct

**Result:** The Occupational Safety and Health Review Commission (OSHRC), which hears OSHA citation appeals, vacated the LOTO fine on appeal.

First an Administrative Law Judge (ALJ) sided with the injured worker.

The OSHRC ruled the judge didn't interpret the industry standard or LOTO principles correctly.

**Key:** "Because the meaning of 'maintenance' is plain, we find that the judge's reliance on the general industry LOTO standard's definition of the term ... was improper," the OSHRC ruled.

## Amputation cases are high

About 10% of all reported workplace amputations (as high as 20,000 total per year) occur among power press operators, including those who operate mechanical power presses, according to the Bureau of Labor Statistics.

Employees may need to hear statistics like these – as well as painful, real-life accidents like this one – to appreciate that "it can happen to me."

*Based on Secretary of Labor v. Roy Rock.*

## TEST YOUR KNOWLEDGE

### OSHA recordkeeping

Good Supervisors do everything they can to prevent workplace injuries and illnesses. But OSHA's rules on what to do when these incidents happen are strict.

See how well you know the reporting procedures by answering *True* or *False* to these questions.

1. Injuries that don't require time away from work may still be recordable.
2. Companies with fewer than 50 employees are exempt from completing recordkeeping forms.
3. If an accident results in the death of an employee or three or more workers are hospitalized, it needs to be reported to OSHA within seven days via telephone.
4. Form 300A, Summary of Work-related Injuries and Illnesses, must be posted annually, even if there weren't injuries or illnesses.

## ANSWERS

1. **True.** OSHA requires companies report any incident involving death, loss of consciousness, days away from work, restricted activity or job transfers, or medical treatment beyond first aid.
2. **False.** Only employers with fewer than 10 employees at all times during the year are exempt. This includes full-time, part-time temporary and seasonal workers. **False.** Fatalities need to be reported orally to OSHA within eight hours. In-patient hospitalizations, amputations or loss of an eye must be reported within 24 hours. Contact your nearest OSHA office to report the workplace by Feb. 1 of each year and remain in place for three months until April 30 even if no injuries or illnesses occurred.
3. **False.** This form must be posted in the workplace by Feb. 1 of each year and remain in place for three months until April 30 even if no injuries or illnesses occurred.

### Answers to the quiz:

**About 10% of all reported workplace amputations occur among power press operators.**

knew the rules. I'm sorry he hurt his hand but he knew to turn the machine off first!"

"OSHA is hitting us with a lockout/tagout (LOTO) citation regardless," said the manager. "Failure to keep potentially hazardous energy sources locked

# 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.*

## **Owners facing likely jail sentence for fatal fire**

**What happened:** In spring 2015, two railyard maintenance workers went into a tanker car containing severely flammable fuel residue. The material ignited and sent the car up in flames. Both employees were killed and a third worker suffered serious injuries.

**What people did:** The company, Nebraska Railcar Cleaning Services in Omaha, had been cited before for not testing tanker cars for benzene fumes. The owners, Stephen and Adam Braithwaite, tried covering up a lack of safety procedures when OSHA investigated the fatal accident.

**Result:** Both men pleaded guilty to conspiracy, violating worker safety standards resulting in worker deaths and submitting false documents to OSHA. They each face prison sentences of 10 years or longer when they're sentenced in October.

## **Workers not tied off on rooftops: Firm fined \$1.2M**

**What happened:** Passersby tipped off the Washington state Department of Labor & Industries to roofers working without harnesses and lanyards.

**What people did:** The company, Allways Roofing in Snohomish, didn't ensure that employees engaged in roofing on steep pitch roofs wore fall protection,

or ladders were set up and used properly, at three worksites.

**Result:** Allways is out a whopping \$1.2 million for 11 repeat fall protection violations.

**Lesson:** The company paid more than \$300,000 for prior fall hazards but didn't clean up its act quickly enough. It's not enough to provide PPE – Supervisors need to make sure workers are using gear the way it's designed for and as people are trained to do. If not, you can count on concerned citizens or employees to take the next step.

## **COVID-19 deaths related to work must be reported**

**What happened:** California OSHA was alerted to an employee who died from COVID-19 complications. The agency didn't have a record of notification for the death and then launched a follow-up investigation.

**What people did:** The employer, Foster Poultry Farms, a poultry plant in Livingston, as well as its staffing agency, Marcos Renteria Ag Services, were cited for not reporting the fatality as required. Additional citations were issued for Injury and Illness Prevention violations stemming from failing to properly communicate, assess, correct and train workers on COVID-19 workplace hazards.

**Result:** Foster Poultry Farms was fined \$181,500 and Marcos Renteria was fined \$36,000.

**Lesson:** To learn more about COVID-19 recordkeeping and reporting obligations for employers, go to [www.osha.gov/coronavirus/standards](http://www.osha.gov/coronavirus/standards).

### SAFETY TRAINING TIPS

#### ■ Don't sabotage your good ideas! 2 examples

Here are two common communication mistakes you want to avoid at all costs:

##### 1. Selling past 'the close'

"The close" is a sales term. This describes when someone agrees, but since you had prepared to say more, you keep going on.

It might sound like this: "Great. Glad you agree. Here's why I think it's important ..."

Don't bother. Instead say, "Great. Thank you."

##### 2. Hedging

You present a perfectly good idea. But before people can respond, you offer alternatives and thereby weaken your idea.

It might sound like this: "If that doesn't sound like a good idea, we could always try ..."

Instead make your case and stand your ground. Say, "I've considered the alternatives and this is why I want us to go this way."

#### ■ Who is all this safety training really for?

Workers often see safety as a part of their jobs, but not as primarily for their benefit.

Following rules because you "have to" leads to breaking them when you can. Remind them safety is for:

- **themselves.** Workers should follow safety rules because it benefits them. It keeps them healthy and alive, and an accident could ruin their future plans.
- **their loved ones.** If nothing else, workers should be safe for the family, friends, spouses ... even their pets. So many people depend on them coming home alive and safe.
- **their co-workers.** Taking risks doesn't only affect one person. Everyone who is around them is also put in danger when safety steps aren't followed.

# Contractor ignores safety protocol, pays with his life: Is host facility liable for his accident?

*Co-owner tried helping driver who was in a hurry*

“Is Jerry in?” asked Jon Bleistein, a truck driver who was delivering a shed to Zaborowski Rentals.

“I’m sorry but he’s out now,” said Lynn Zaborowski. “I’m his wife Lynn. Can I help you with something?”

“I’ve got a shipment he ordered from us, and could use a hand,” said Jon.

“I can help,” said Lynn, “unless you’d rather wait for him?”

“I would wait, but time is tight,” said Jon. “I’d appreciate your help.” They headed out to the parking lot.

## Famous last words

“Believe it or not, the box isn’t that heavy,” said Jon. “I can nudge it onto your loading dock.”

Lynn cleared some items away from the front of the dock. “Don’t you use a belt and winch?” she asked.

“Sometimes but in this case, I don’t need them,” said Jon. “Would you mind leaning into it from the back?”

Jon dumped down to steer the shed

onto the dock while Lynn pushed from behind. “More to the left,” said Jon.

Jon misjudged the weight of the shipment and couldn’t hold it. The heavy load fell off the truck bed and pinned him.

He died before paramedics could attend to him.

**Result:** The driver’s wife sued the company for negligence. She lost the initial trial but appealed and won when a court ruled the co-owner owed the driver a duty of care.

The company’s share of liability began when it agreed to help move the heavy load without using tools and safety gear.

**Key:** The co-owner should have refused to assist the truck driver, or at the very least, insisted he follow normal safety precautions.

The driver was on a tight schedule and didn’t want to wait for the co-owner’s husband to help with unloading the delivery. This case is a good reminder that rushing can lead to tragedy.

*Based on Landrum v. Three Aces Towing.*

## What you need to know:

Host facilities can easily become liable for an injury or fatality suffered by a contractor, vendor or supplier.

You can be deemed “in control” of a contractor’s work and successfully sued for negligence by:

- loaning tools, materials or equipment, such as ladders, lanyards and PPE, or
- giving specific instructions on how to do a job or task (caveat: that doesn’t apply to warning about site hazards).

## Sharpen Your Judgment – The Decision

*(continued from Page 1)*

Yes. A judge said that the worker’s injury didn’t arise out of his employment.

Therefore he couldn’t be awarded workers’ comp for it.

The worker argued he was on his way into work when he tripped and fell.

He was distracted by discussing that day’s job and had tried to protect work equipment, which made his injury worse.

But the court ruled this injury didn’t pass the “everyday risk” test.

Tripping over a wheel stop in a parking lot could happen to anyone at any time.

Thus it wasn’t the employee’s work which

caused the accident – and he couldn’t get comp for it.

### Analysis: Preach safety at all times

Life’s not without risk. People get injured doing all kinds of everyday tasks.

But when those tasks happen on the job, it can be difficult to determine who – if anyone – is at fault.

Stress to workers they need to be constantly aware of their surroundings. Paying a little more attention and exercising caution are two easy ways to cut down on injuries.

*Based on Snyder v. City of Richmond P.D.*

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