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OSHA EXPANSION FALL HAZARD LIABILITY FOR HOST EMPLOYERS

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INTRODUCTION

It is a fact of everyday business life that many employers will, from time to time, be required to engage outside contractors to perform a variety of services at the employer's facility that the employer cannot perform with its own employees. Recently, OSHA has begun to expand the employer's liability for OSHA compliance for employees of the outside contractor under its multi-employer workplace liability. A recent decision in the case of *Secretary of Labor v. Ryder Transportation Services*, OSHRC Docket No. 10-0551 (ALJ, February 28, 2011) is of concern because it is one that most employers who own a fixed facility will face at some time if they engage an outside contractor to perform services, in this case, on the roof of the facility, either on the roof itself or on equipment, such as HVAC units, located there. This liability involves the hazard of the outside contractor employees being exposed to injury because of fall hazards, either from the leading edge of the roof or from skylights or other openings in the roof.

RYDER FACILITY

The employer in this case, Ryder Transportation Services (Ryder), owned a facility that it used to rebuild automotive equipment for its vehicles. Since 2006, no Ryder employee had been on the

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roof and the roof was classified as a restricted area and its employees were forbidden to access the roof. The roof had a number of skylights which were unguarded.

In 2009, Ryder requested an outside electrical contractor, M.C. Dean (Dean), that it had used to perform work at the facility to perform work installing exhaust fans near the ceiling inside of the building. After the fans were installed and failed to function, the Dean employees decided to access the roof to determine why the fans, which protruded through the roof, did not function. The Dean employees utilized their own aerial lift to access the roof. A Dean journeyman electrician got out of the lift and walked to one of the exhaust fans. As the employee walked across the roof back to the aerial lift using a different route, he fell through a skylight to his death.

MULTI-EMPLOYER WORKPLACE LIABILITY

OSHA cited Ryder for the exposure of the Dean employee to the unguarded skylight.[‡] Ryder could not be cited for the exposure of any of its own employees who had not accessed the roof. Using its multi-employer workplace doctrine, OSHA cited Ryder as the “controlling employer” for failing to protect the Dean employee from the hazard.

The Administrative Law Judge found that the multi-employer workplace doctrine did apply and that Ryder was the controlling employer. He vacated the citation on a finding that Ryder had “neither actual nor constructive knowledge that an employee would be exposed to unguarded skylights that were *remote* from his work area” (emphasis added). OSHA has taken an appeal of the decision, claiming that Ryder had such knowledge.

HOST EMPLOYER LIABILITY

This decision represents a further confirmation of the extent of liability for the host or “controlling” employer under the doctrine. Now, any employer who engages an outside contractor to perform work on its roof is potentially exposed to liability if it does not confirm that the outside contractor employees are protected from any fall hazards on the roof. This will require the host employer to insure that skylights are guarded, as well as the leading edge of the roof, or that the employees are utilizing some other form of fall protection while accessing the roof. This is more troublesome because many host employers have no knowledge of the applicable regulations and are relying upon the outside contractor to have such awareness, as well as appropriate fall protection for their employees. It is also a certainty that this liability will eventually extend to outside contractors coming to the employer’s worksite to perform all manner of services, including electrical, plumbing, excavation, structural repairs, etc.

RECOMMENDATIONS

In order to avoid such potential liability, the host employer should consider the following actions:

[‡] The outside contractor, M.C. Dean, was also cited by OSHA for failure to guard the skylight through which its employee fell. The citation was affirmed by the Administrative Law Judge.

- conduct a job hazard analysis of its facility, in this case the roof, to determine whether these are fall hazards, such as unguarded skylights, roof exhaust vents, other roof equipment which could pose a fall hazard
- once the job hazard analysis has been completed, consider what type of fall protection is required and feasible for employees and outside contractors who may be accessing the roof or equipment located on the roof
- after the feasible means of fall protection are identified, develop a written procedure that incorporates these measures and also sets out the process for “authorized” employees to access the roof and under what circumstances such access is permissible and what type of fall protection will be required
- conduct documented training for the “authorized” employees who access the roof, monitor their compliance and discipline the employees who are non-compliant
- when the employer is utilizing an outside contractor to perform work on the roof or equipment on the roof, conduct and document a meeting with the outside contractor and provide the outside contractor with information on the presence and location of any fall hazards on the roof or equipment
- confirm and document that the outside contractor has been informed of these hazards and that the outside contractor has the means and methods to provide the necessary fall protection for its employees and that it will supervise, monitor and enforce compliance with its fall protection program

If the host or controlling employer undertakes these actions, it will minimize its potential liability for fall hazards on the roof for its own employees and those of the outside contractor.