The Hidden Role of Safety Managers in WORKPLACE INJURY LITIGATION

By Greg Gerganoff

This article is based on the author's observations and experience serving as a workplace safety expert witness. In this work, the author has discovered a hidden aspect of the company safety professional that OSH managers may not have recognized or considered.

Safety managers are typically responsible for arranging or conducting safety training, keeping safety-related records, conducting field safety audits, overseeing accident events and investigation (personal injury and equipment), and coaching employees in safety practices and conditions. Management wants safety practices and policies in place to protect employees from injury and prevent damage to equipment, and it looks to the safety manager to orchestrate all of this. The company's objective is, of course, the avoidance of harm to employees and damage to equipment while minimizing business loss costs.

As the safety manager, you are focused on employee safety and welfare and satisfying top management's goals for the same things. Your employer, however, is not the only entity interested in safety conditions. The safety manager's role can also include workplace-related injury litigation. As readers know, employee injury is covered by workers' compensation. This means injured employees typically cannot seek economic redress from their employer for injury events. But your employer is not immune to workplace injury litigation from an employee of some other entity hired by your company who is injured on your employer's jobsite. In this situation, the injured employee of another employer may sue your employer for unsafe conditions or contributing to an unsafe condition, or for some other allegedly contributory act resulting in injury to that other employer's employee. This is the situation addressed in this article. (OSHA also has an interest in your employer in safety matters, but readers are likely already aware of this.) The average safety manager (including the author while in that role) has likely never considered such an event when carrying out their duties, but it certainly happens. First, a brief explanation of the litigation process.

Generally, under the common law of a civil wrong or personal injury, certain proofs are required in order for an injured employee or plaintiff to prevail. To prove its case, the plaintiff (another employer's injured employee) must establish all of the following:

1. that the defendant (your employer) owed a duty to the plaintiff—a duty of care,
2. that the defendant breached that duty of care,
3. that the plaintiff suffered injury, and
4. that breach of the defendant's duty of care was the proximate cause of the plaintiff's injury (Legal Inquirer, 2021).

So, as applied in this article, an employee of another employer is working on your employer's work site or project, becomes injured, and now seeks to hold your employer responsible for compensation or injury damages.

How is the safety manager involved in this situation? The injured plaintiff must typically prove all the aforementioned elements to prevail against your employer. How does a plaintiff go about proving that your employer breached its safety duties? Answer: A plaintiff will look at the defendant's (your employer's) safety program, actual field safety practices and other safety-related activity. (Note: The plaintiff's safety history, training and actual practices are also examined. But, for the purpose of this article, the discussion focuses on the safety manager and their employer, the defendant.) In short, the audience reviewing your safety work extends beyond your employer and OSHA. It now extends to plaintiffs and the open court/jury.

Consider what commonly happens when an employee of another company is doing work on a site owned or controlled by your company and sustains an injury in the workplace. Your company is sued by the employee of another employer who was injured on site. This is the point where your role as safety manager of a company named as a defendant in workplace litigation comes in. The following three scenarios provide a picture of such workplace injury litigation.

Scenario 1: Injured Employee works for Property Manager at a plant site owned by Property Owner. Property Manager works for Property Owner. Property Owner controls a chemical process operation for which Property Manager is responsible for plant equipment operation and servicing. Property Manager's employee is injured at the plant site when toxic gases are released. Property Owner controls the chemical processing plant serviced and managed by the Property Manager. Property Owner is aware of prior toxic gas releases and fails to implement preventive actions. Injured Employee sues Property Owner for damages arising from the exposure to toxic chemicals while performing work as an employee of Property Manager. Injured Employee is successful. The court looked closely at Property Owner's safety program, training and safety practices and determined that they were sufficiently deficient to have caused Injured Employee's injuries.

Scenario 2: Injured Employee works for Railroad Repair Company. Railroad Repair Company is hired by Railroad Service Company. Injured Employee is injured while on a project where Railroad Repair Company (his employer) is working with Railroad Service Company employees. Railroad Service Company fails to follow or manage the site in accordance with its own safety rules while on site. Injured Employee sues Railroad Service Company, which hired his employer, Railroad Repair Company, for damages arising from his injuries. Injured Employee is successful. The case settled, but it was shown that Railroad Service Company had poor safety oversight of its own crews (and those of Railroad Repair Company) and the project as a whole, resulting in injury to Railroad Repair Company's employee.

Scenario 3: Injured Employee works for Company B. Company B takes orders and receives project work from Company A. Company A works for Owner. Owner tells Company A to handle several tasks at one of its well sites. Owner and Company A typically undertake specific steps prior to having others, such as Company B, send employees to the site. Company A tells Company B that the site is ready and prepped for Company B to carry out the desired task. However, the site is not properly prepped for Company B's work

GRADYREESE/E+/GETTY IMAGES

task. Company B's employee is burned at the site due to the site not being properly prepped by Company A and/or Owner. Company B's employee sues Owner and Company A. Injured Employee is successful. It was shown that industry best practices (American Petroleum Institute) required Owner and Company A to take certain steps to safeguard others and failed to do so, creating a hazardous condition for Company B's employee.

In all of these scenarios, an injury occurs, and the finger is pointed at a company other than the injured employee's employer. As readers can see, a person was injured in a workplace where the injured person's employer was on site at the behest of another (general contractor or project owner).

So, what does this mean for the safety manager? Let's briefly discuss the steps of litigation. A lawsuit is started with the plaintiff (the injured worker) filing a complaint with a court. The complaint lays out allegations of facts and alleged wrongdoing of the defendant (your employer). Next, in litigation there exists the right of both the defendant and plaintiff to ask questions and seek documents from the other side. This phase of litigation is called discovery. During discovery, the lawyers for the parties seek information from each other. Your employer's (the defendant's) safety practices, policies and recordkeeping are issues, so your employer likely will be asked by the plaintiff to produce all documents regarding your employer's safety program. Both sides also have an opportunity to take depositions of people they think will have the information they seek to support their case. (A potential deponent may include the safety manager and all their documents.) All your efforts as a safety manager will be reviewed and examined closely. Next, once discovery is completed, evidence uncovered during discovery is discussed and debated by both sides, and possibly a settlement concludes the matter. If there is no settlement, then a trial will be held.

As readers can tell from the preceding discussion, it is not the injured employee's employer whose safety program will be solely under the microscope, but rather the other employer (your company) on site. In short, the injured employee's (the plaintiff's) attorneys will focus their discovery on the nonemployer company's (your company's) safety program. As the safety manager of the defendant company, you will find the safety program and practices designed to safeguard your own company's employees being closely examined as a focus of litigation.

The extension of an employer's safety responsibility beyond their own employees is not unheard of in federal workplace safety enforcement. OSHA and MSHA both have tools that allow them to take noncomplying enforcement action beyond the endangered or injured employee's employer. Under OSHA's (1999) Multi-Employer Citation Policy (CPL 2-0.124), the agency can issue enforcement citations where employers other than the injured or endangered employee's employer create, expose, correct or control workplace hazards. Under MSHA, the mine owner is primarily responsible for workplace safety in their mines [*Speed Mining Inc. v. Federal Mine Safety and Health Review Commission*, 2008, p. 315; 30 USC 801(e)]. This duty of the mine owner is commonly exhibited by MSHA issuing citations to the mine owner for noncomplying acts of independent contractors hired by the mine owner, even when the mine owner did not directly contribute to the independent contractors' noncomplying act(s) and none of the mine owners' employees were directly exposed to the noncomplying hazardous conditions (*Secretary of Labor, Mine Safety and Health Administration v. Old Ben Coal Co*., 1979).

Suggestions to the safety manager: What can you do now to increase your employer's defensive posture for potential litigation from a nonemployee? Look to safety fundamentals. Does your safety program include a written safety manual? Has the manual been updated regularly? Do safety training programs cover appropriate topics (OSHA, 2015), such as continuous safety improvement practices or workplace hazard assessments [29 CFR 1910.132(d)], or MSHA workplace examinations (30 CFR 56/57.18002)? Under OSHA's General Duty Clause, the employer is required to provide a workplace free of recognized hazards that are causing or likely to cause death or serious physical harm. This rule has been interpreted by many U.S. federal courts to extend to not just the employer's employees, but to nonemployees as well (*Teal v. E.I. Dupont,* 1984). Consequently, your employer's safety program protections can be extended to nonemployees (even where your employer's employees are not exposed to the hazard). Other suggested safety practices include conducting regular site safety audits or inspections of the entire site, and not limited in scope to where your employer's employees work. Also suggested is conducting job safety analysis (JSA) or job hazard analysis (JHA) before starting a task a part of your safety program. It makes sense to require subcontractors on site to conduct the JSA/JHA as well, and to have a copy given to the safety manager (you) each time one is performed.

When advising attorneys, the author typically suggests seeking several types of documents during discovery:

1. Safety training. Is safety training provided to employees for equipment and tasks they are asked to operate or carry out? Is the safety training documented? Does the documentation include employee signatures? Is the safety training dated? Is safety training carried out frequently or infrequently? (Daily or weekly is better, in the author's opinion.) Is the safety training thorough or just a few seconds in duration? Some safety training is mandatory, such as forklift training if forklifts are involved (29 CFR 1910.178). If chemicals are present in the workplace, hazard communication training is required (29 CFR 1910.1200). This training applies to both the general industry (29 CFR 1910.1200) and construction (29 CFR 1926.59).

OSHA's (2015) booklet, "Training Requirements in OSHA Standards" is an excellent guide on what safety training is required. It lists all of the mandatory safety training required under OSHA. There are 63 mandatory topics of safety training for general industry and construction industry classifications. If the work your employer asks employees to do is listed in this booklet, make sure adequate training is conducted and documented. It is also wise to check if recurring training is required to comply with OSHA mandatory safety training.

How long training documents must be retained by the employer depends on the topic being trained. Bloodborne pathogens training documents must be retained for 3 years [29 CFR 1910.1030(h)(2); Note: Some records must be kept longer]. Asbestos training documents must be retained for 1 year beyond the employee's last date of employment (29 CFR 1910.1001; 29 CFR 1910.1101). For training and document retention, read the applicable OSHA and MSHA safety training regulations.

Other safety program elements that a workplace safety expert witness might look for include training in a language

commonly spoken by the trained employees. Use of a translator should be noted on the training documentation and should include the name of the translator. Both OSHA and MSHA require training in a language understood by the trainees.

2. Inspection records. Is equipment (e.g., forklifts) inspected before use [29 CFR 1910.178(q)(7)]? MSHA requires pre-use equipment inspection for all equipment (30 CFR 56.14100), so the author asks for pre-use inspection records. If defects were found, the author asks for work orders or other notations indicating the equipment was repaired before being returned to service. Is there a consistent policy or practice that equipment found to have defects is promptly removed from service and sent for repair?

3. Safety audits. The author asks for safety audits of the workplace to see if they were done and if identified hazards were remedied. Are hazards identified repeatedly and not fixed? Was the inspection thorough? MSHA requires workplace examinations to be conducted and documented, and that documentation of these inspections be kept for at least one year [30 CFR 56.18002(a)(b)(d)]. While OSHA does not have an inspection requirement similar to MSHA, the employer is required to provide a workplace free of recognized hazards under the General Duty Clause. This clause seems to strongly support workplace examinations for OSHA-related industries. After all, how else are hazards identified without an inspection?

4. For cases involving mining, the author asks for workplace examinations. The mine operator is required to retain documented workplace examinations for a period of 1 year [30 CFR 56.18002(d)]. If there is an injury, accident or certain type of incident (depending on severity and type of event [30 CFR 50.2(h); 30 CFR 50.11(b)] the mine operator is required to conduct an investigation (30 CFR 50.11). The investigation must result in a written report. [Note: OSHA does not have a similar requirement that incidents be investigated, but it strongly encourages conducting post incident investigation (OSHA, n.d.)]. It is a generally accepted safety practice in the safety profession to investigate incidents and generate reports for safety program improvement. Training records and certificates must be retained by the mine operator for 60 days after the employment termination of the miner [30 CFR 46.0(h)]. [Note: Mine operators must have a copy of all required mine training, even that of its subcontractors (Federal Mine Safety & Health Act of 1977, Public Law 91-173, as amended by Public Law 109-280, 2006).] Mine operators are primarily responsible for the safety of its mine, including its independent contractors' compliance with the Mine Act (*Speed Mining Inc. v. Federal Mine Safety and Health Review Commission*, 2008).

5. Other documents the author asks for in the mining world are the safety training plans. To be compliant, this document must be written and must satisfy a list of criteria (30 CFR 46.3). The author looks at the last date of update and compares it to related documents (safety training as documented on MSHA Form 5000-23). Does the Form 5000-23 match topics listed in the mine safety training plan? The author also asks for task training documentation.

6. Other documents the author commonly seeks for OSHA-related industries concern JHA/JSAs. The author sees if JHA/JSAs are regularly conducted and list topics germane to the tasks being performed. Are subcontractors required to fill these out and turn them in to the general contractor (your employer)?

All of these documents and training records must be current, dated and related to the nature of work that the company commonly handles. For example, if the employer can only produce a few safety training documents, questions arise about how serious the employer is about safety. It is a well-accepted position of both OSHA and MSHA that untrained employees are a hazard to themselves and to those with whom they work. If documents produced are not dated or only sporadically dated it is arguable that the safety program is weak and allowed the unsafe condition to exist, resulting in or contributing to the cause of injury. The bottom line is if it is not in writing, it did not happen. Federal safety agencies, courts and juries like to see things in writing.

A point of interest: A recognized and generally accepted safety practice is continuous safety improvement: Safety is not a one and done task, but rather a long-term, ever-evolving process. The fundamental elements of this safety practice are to identify and correct hazardous conditions and practices, the result being to remove hazardous conditions and practices from the workplace. But, critical to this enterprise is the prompt determination of an appropriate remedy, followed by prompt corrective implementation. This means documentation of the hazard and the remedy, and the means and date of correction. This is critical. The danger to the employer exists when the employer identifies a hazard but does nothing to correct it. Now, the employer is aware of a hazard but has taken no steps to eliminate the hazard to employees. Finding a hazard and promptly correcting the same shows the company's commitment to employee safety. So, prompt correction and documentation are key.

The workplace safety expert witness armed with solid safety workplace documentation can point to the defendant's determination to actively seek hazards and correct them in a timely fashion, or to provide pertinent, solid safety training and, therefore, demonstrate its commitment to the safety of all on its work site. Repeated findings of hazards with inadequate corrective steps place a defendant employer in a negative light.

The safety manager should also consider other sources of safety practices besides OSHA or MSHA. ANSI, National Fire Protection Association (NFPA) and National Electrical Code are a few examples of such sources. Some of these standards have been incorporated by reference by OSHA (29 CFR 1910.6), which means OSHA can base a noncompliance citation upon these non-OSHA standards. But do not overlook consensus standards that are not necessarily incorporated by reference by OSHA and, therefore, are typically unenforceable by OSHA. If an employer defending one of these legal actions can show it not only complied with OSHA or MSHA but with other industry consensus safety standards (ANSI, NFPA) as well, that adds yet another defense tool. Another aspect of consensus safety standards is that OSHA has looked to ANSI and NFPA standards, for example, for use in General Duty Clause citations (Hamel, n.d.; see Wahoff, 2019, for a more thorough discussion on the use of consensus standards in safety).

Any safety practice by the employer that supports its safety posture goes a long way in a legal setting. Demonstrating via documentation safety training, enforcement of company safety rules when noncomplying conditions or behaviors are observed, conducting field safety audits, and taking corrective actions are important in defense.

The bottom line: Having good, clean documentation records, field safety audits and inspections, training, and sound

field safety practices can play a significant role in mitigating the impact of the type of litigation this article addresses. As a safety manager, your role in helping your employer in such third-party litigation is key. **PSJ**

References

Federal Mine Safety & Health Act of 1977, Pub. L. No. 91-173, as amended by Pub. L. No. 109-280, enacted Aug. 17, 2006.

Hamel, K.D. (n.d.). 10 consensus standards you might be violating. New Pig.https://bit.ly/3MGVIL6

Legal Inquirer. (2021, Aug. 16). What is negligence in common law? https://bit.ly/3TLIzCy

MSHA. (1999). Training and retraining of miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate or surface limestone mines (30 CFR 46).

MSHA. (2004). Investigation (30 CFR 50.11).

MSHA. (2012). Safety defects; Examination, correction and records (30 CFR 56.14100).

MSHA. (2015). Training plans (30 CFR 46.3).

MSHA. (2019). Examination of working places (30 CFR 56/57.18002).

OSHA. (n.d.) Incident investigation, workers' rights. www.osha.gov/incident-investigation

OSHA. (1992). Occupational exposure to asbestos. (29 CFR 1910.1101).

OSHA. (1996). Hazard communication (29 CFR 1926.59).

OSHA. (1999). Multi-employer citation policy (CPL 2-0.124).

OSHA. (2006). Definitions (30 CFR 50.2).

OSHA. (2012). Training records [29 CFR 1910.1030(h)(2)].

OSHA. (2013a). Incorporation by reference (29 CFR 1910.6).

OSHA. (2013b). Toxic and hazardous substances (29 CFR 1910.1200).

OSHA. (2015). Training requirements in OSHA standards (OSHA Publication No. 2254-09R 2015).

OSHA. (2016a). Personal protective equipment [29 CFR 1910.132 (d)].

OSHA. (2016b). Materials handling and storage (29 CFR 1910.178).

OSHA. (2016c). Maintenance of industrial trucks [29 CFR 1910.178(q)(7)].

OSHA. (2019). Asbestos (29 CFR 1910.1001).

Secretary of Labor, Mine Safety and Health Administration v. Old Ben Coal Co., FMSHRC 1480 (FMSHRC), 1979 OSHD (CCH) P 23969, 1979 WL 32265.

Speed Mining Inc. v. Federal Mine Safety and Health Review Commission, 528 F.3d 310 (4th Cir. 2008).

Teal v. E.I. Dupont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984).

Wahoff, W.J. (2019). Industry standards: How does OSHA use them to prove its case under the general duty clause. *ABA Journal of Labor and Employment Law, 34*(1), 1-16.

Cite this article

Gerganoff, G. (2022, Nov.). The hidden role of safety managers in workplace injury litigation. *Professional Safety, 67*(11), 20-23.

Disclaimer

Nothing in this article should be considered legal advice. Your company's attorney and/or insurer's legal defense team is best suited for providing definitive legal guidance.

Greg Gerganoff, Esq., CSP, has been a safety professional for more than 20 years and is a licensed attorney (Colorado). He has worked as a safety manager for mining, oil and gas, and construction, and as a safety consultant with insurance companies. He has operated his own safety consulting firm since 2014 and took on expert witness work in 2016. His expert witness work is 50-50 plaintiff/defense and covers all U.S. states. Gerganoff is a professional member of ASSP's Colorado Chapter and a member of the Society's Oil, Gas and Mining Resources Practice Specialty.

Statement of Ownership, Management and Circulation *(PS Form 3526, July 2014)*

1) Publication title: *PSJ*. 2) Publication number: 0099-0027. 3) Filing date: 9/30/2022. 4) Issue frequency: Monthly. 5) Number of issues published annually: 12. 6) Annual subscription price: $60. 7) Complete mailing address of known office of publication: 520 N. Northwest Highway, Park Ridge, Cook County, IL 60068-2538; Contact person: Sarah Astra, (847) 768-3414. 8) Complete mailing address of headquarters or general business office of publisher: Same as 7. 9) Full names and complete mailing addresses of publisher, editor and managing editor: Publisher, American Society of Safety Professionals, same as 7; Editor, Tina Angley, same as 7; Managing Editor, Tina Angley, same as 7. 10) Owner: American Society of Safety Professionals, same as 7. 11) Known bondholders, mortgagees and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages or other securities: None. 12) Tax status: The purpose, function and nonprofit status of this organization and the exempt status for federal income tax purposes has not changed during preceding 12 months. 13) Name of publication: Same as 1. 14) Issue date for circulation data below: September 2022.

15) Extent and nature of circulation	Average no. copies each issue during preceding 12 months	No. copies of single issue published nearest to filing date
a) Total number of copies	25,753	26,215
b) Paid circulation		
(1) mailed outside-county paid subscriptions stated on PS Form 3541	24,176	24,520
(2) mailed in-county paid subscriptions stated on PS Form 3541	0	0
(3) outside the mails including sales through dealers and carriers, street vendors, counter sales and other paid distribution outside USPS	0	0
(4) by other classes of mail through the USPS	0	0
c) Total paid distribution	24,176	24,520
d) Free or nominal rate distribution		
(1) outside-county copies included on PS Form 3541	0	0
(2) in-county copies included on PS Form 3541	0	0
(3) copies mailed at other classes through the USPS	0	0
(4) outside the mail	0	0
e) Total free or nominal rate distribution	0	0
f) Total distribution	24,176	24,520
g) Copies not distributed	1,577	1,695
h) Total	25,753	26,215
i) Percent paid	100.00	100.00
16) Electronic copy circulation		
a) Paid electronic copies	7,248	6,932
b) Total paid print copies + paid electronic copies	31,424	31,452
c) Total print distribution + paid electronic copies	31,424	31,452
d) Percent paid (both print and electronic copies)	100.00	100.00

17) Statement of Ownership will be printed in the November 2022 issue of this publication. 18) Signature and title of editor, publisher, business manager or owner: (signed) Tina Angley, 9/30/2022. I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).