Closing Workers Comp Liability Loopholes

by Quenda Behler Story

Today we take workers compensation laws for granted, but the protection they afford to employers and employees alike was unheard of in the old common law rules they replaced. The biggest improvement centered around how the new laws handled responsibility for injury. It used to be that an injured worker could not collect medical costs or lost wages until he or she could prove that the injury would not have happened "but for" the employer's negligence. Workers comp laws changed all that. Today, employees are entitled to medical costs and partial lost wages any time they are injured on the job, not just when someone can be proved to have done something wrong.

Obviously, this was a great benefit to employees, but the workers comp laws also helped the employer, in two ways. First, the new laws stated that an employee who collected on a workers comp claim could not sue his employer for negligence, even if that employer's negligence had clearly caused the injury. Previously, an employer found liable for negligence faced liability for thousands — sometimes millions — of dollars more than what a workers comp claim would have cost.

Second, workers comp put into place a system through which workers could get immediate medical attention that would help them get back on the job as soon as possible. Before this system of insurance was established, an employer who wanted to help employees recover from their injuries had to spend money that raised overhead and made competing difficult.

Exception to the Rule

Until recently, however, there was one situation in particular in which the workers comp laws were still unsatisfactory. The protection from liability that the laws provided to employers also extended to employers who deliberately put their employees at risk of serious harm. In one celebrated case, for example, mine workers were not told that they were inhaling deadly mercury fumes and were not provided with safety equipment. This was not a case out of the bad old robber-baron days of the nineteenth century, either; the dateline on the case was 1982.

The people who wrote the workers comp laws did not intend to protect employers who had displayed this kind of cold-blooded disregard for workers' well-being. But the law said that an employee who was covered by workers comp could not sue his or her employer for negligence. So the courts carved out an exception to the rule.

At first glance, the extreme case of the mining company appears to have little to do with the average builder or remodeler. Unfortunately, however, once an exception is carved out, litigants keep pushing the envelope, carving out a little bit more legal territory with each lawsuit. The result is that the definition of "reprehensible and malicious" behavior has been slowly expanding. This broader definition has greater potential for the kinds of decisions small builders and remodelers are faced with every day.

As an example, suppose one of your contracts says that if you don't finish the project by a certain date, you owe your customer damages. When that date starts closing in, you might be tempted to save time by, say, instructing your roofing crew to forego fooling with hooks and safety harnesses. After all, you've been climbing around on roofs for years without any safety strap at all and you've never fallen.

> Safety is more important than finishing the job quickly

But when someone, such as OSHA, has officially determined that employees who do not use safety apparatus on a roof are in danger, an employer who does not supply and insist on the use of that safety equipment is considered to be "careless and reckless." If your employee falls, the employee's lawyer could argue that instructing employees not to use equipment you know is necessary to prevent falls goes beyond the merely careless and reckless; it is a deliberate, "reprehensible" disregard for the safety of your workers. In this case, the argument could continue, you should therefore not be able to limit what you owe that employee to just what the workers comp laws allow. If that argument is successful, you will be looking at negligence damages. (Remember what I said about millions of dollars?)

Staying Out of Trouble

Your best protection is to avoid getting into this situation in the first place. Make it clear to a court of law that you're one of the good guys who maintains a safe working site. How do you prove that? Here are some simple steps you can take:

- Meet your state and federal safety laws, even when the rules don't apply. For example, some OSHA regulations for commercial construction are ambiguous when applied to residential jobs. But the mere existence of a regulation defines what is dangerous, even if for some reason the rule doesn't apply to you.
- Inform yourself about safety practices that are standard in the industry. If everyone else does it, you'd better do it, too.
- Inform your employees when they might be exposed to something poisonous, carcinogenic, or dangerous in some other way.
- Preach job safety. Good craftsmen are hard to find, and you lose whenever one of your employees is injured. Hold safety meetings with your employees to explain safety procedures, then insist that everyone follow those procedures.
- Document the safety measures you take. This may include having employees sign an acknowledgment of attendance after every safety meeting, photographing scaffold setups, and keeping a safety manual on every site. A simple notebook with hand-written entries will do; just be sure you make entries routinely and date each one.

Safety is more important than finishing the job quickly. And it's more important than personal comfort — just ask anyone who has lost an eye because he or she didn't want to wear safety glasses. If you follow these common-sense guidelines, you'll not only be protected from financial liability, but you'll have the kind of job sites on which people are rarely injured.

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