

## Fall Hazard Liability for Host Employers

By Mark A. Lies II and Timothy R. Gerlach



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. Concrete cutting contractors are sometimes required to work in such areas as rooftops to perform renovation or demolition work, so it is important to know what liability is held not only by the contractor, but by the customer as well.

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) should be noted, 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, the focus was on the roof of the facility and the equipment—HVAC units—that was located there. This liability involved the hazard of 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 roof and the roof was classified as a restricted area. Employees were forbidden to access the roof. There were a number of unguarded skylights on the roof.

In 2009, Ryder requested an outside electrical contractor, M.C. Dean (Dean), to perform work at the facility to install exhaust fans near the ceiling on the inside of the building. After the fans were installed and failed to function,

## SAFETY COUNTS

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.” 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 liable if it does not confirm. Outside contractor employees must be 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. 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 or structural repairs and renovation.

### **RECOMMENDATIONS**

In order for operators of concrete sawing and drilling equipment to be fully aware of fall hazards and remain safe when working at a host employer location, the following actions should be considered by the host employer:

- The host employer should conduct a job hazard analysis of its facility—in this case the roof—to determine whether there are fall hazards such as unguarded skylights, roof exhaust vents or other roof equipment that could pose a fall hazard.
- Once the job hazard analysis has been completed, the host employer should 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, the host employer should develop a written procedure that incorporates these measures, sets out the process for authorized employees to access the roof, details under what circumstances such access is permissible and what type of fall protection will be required.

- Host employers should conduct documented training for authorized employees who access the roof, monitor their compliance and discipline employees who are non-compliant.
- When using an outside contractor to perform work on the roof or equipment on the roof, a meeting should be held to provide the outside contractor with information on the presence and location of any fall hazards on the roof or equipment.
- The host employer should 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 minimize the risk of injury for outside contractors, such as concrete sawers and drillers, who may require access to these areas.

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