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WORKING WITH YOUR WORKER SAFETY EXPERT – FOR PLAINTIFF'S ATTORNEYS

1. Bring the expert in as soon as possible

It is not unusual for a "seasoned" attorney to think the case is "simple." They finish deposing witnesses and then send the material to the expert expecting a report. This can be a big mistake.

When this happens, we sometimes have to tell the attorney that we don't have enough facts to support the theory of liability. We sometimes have to tell the attorney there was another theory of liability not considered. Even when we get sufficient facts to write a report, there are invariably missed opportunities to get more or better information.

The best way to begin is to have a three-way telephone conversation between you, the expert and the plaintiff. A clear understanding of "what happened" and what work was done by the plaintiff and others leading up to the incident is very important. With that information, we know potential theories of liability, we can tell you who we think should be deposed and we can prepare questions for each deponent.

When the expert and the attorney have this discussion and you know exactly where we need to go and what facts are needed, we are much more likely to be successful. For us, the facts are **everything.**

Send depositions and other documents to us as soon as you get them. There is no need to wait. As we learn of the new facts that you have discovered, it may lead to new questions or new insights leading to other theories of liability or defendants. New facts could also lead to new questions which could be answered through further interrogatories or depositions.

2. Request discovery documents early, including copies of:

- Health and safety programs of defendants
- Superintendent's daily logs
- Pre-job safety conference minutes
- Safety inspection reports
- Weekly safety meeting minutes/reports
- Written job description of superintendent of GC/CM or facility management
- Contracts
- Incident investigation reports
- OSHA citations, including the entire OSHA file
- Police reports including witness statements

- Email and text correspondence related to the incident
- Photographs taken before, at the time of, and after the incident
- Police body-cam and dash cam video
- Security video of the workplace where the injury occurred

You should try to get the above documents (if they exist) before deposing witnesses. They will help us to create proposed deposition questions for your consideration.

3. Understand the standard of care for each defendant

There is a different standard of care for construction project owners, general contractors/construction managers, premises owners/host employers, contractors, subcontractors and employers regarding steps each should take to prevent worker injury.

Those roles are summarized on a separate document found here.

4. Knowledge of the exposure to the hazard by the plaintiff is usually the most important fact for our evaluation

The most important fact in most cases is related to the defendant's "knowledge" of the existence of the hazard to which the plaintiff was exposed. The key question is relative to the duration of exposure. In order for OSHA to sustain an allegation of a violation, they have to prove there was "knowledge" (actual or constructive) on the part of the contractor. Almost invariably, the defendant testifies that "if I had known the plaintiff was exposed to that hazard, I would have stopped it."

A key question to establish constructive knowledge is the **duration** of the hazard. If you can prove that the hazard on a construction site existed more than one shift, we can usually show "constructive knowledge" because the standard of care, including OSHA, requires daily safety inspections. When a hazard existed for less than one day or was inconspicuous, another approach might be required to establish knowledge on the part of a defendant.

5. Depose the Best Person

When pursuing liability against a general contractor or construction manager, usually the best person to depose is the superintendent. The superintendent runs the job. The superintendent should be implementing the project safety program and conducting regular and frequent safety inspections. He/she should be enforcing safety requirements on the site.

The person to depose when a subcontractor worker is injured is the representative of the contractor above them, preferably someone who worked on the job.

In cases involving a premises owner/host employer, you should depose the person who has the most information about the defendant's "contractor safety program." The premises owner/host employer should have its own safety program. A component of its safety program should be a contractor safety program. It will specify the safety management functions of a representative of that company relative to the oversight of contractors. Almost invariably, the defendant instead supplies a document it gives to contractors rather than the document that specifies the safety management functions the defendant personnel are required to perform. In either case, you want to ask to depose the person most familiar with the contractor safety program.

6. Ask us to propose questions for depositions of key witnesses

Perhaps the most frustrating part for an expert is to read depositions taken by an attorney who asks a line of questions relative to a theory of liability that the expert thinks is not viable because it is not based on sound principles of safety management. It is more frustrating when we have prepared proposed questions for a deponent and the attorney decides not to use them, forgets to bring them or paraphrases the question to change its meaning. Paraphrasing our questions almost invariably ruins the question.

Some attorneys think that it is not "good form" for them to be seen reading a list of questions. Our experience is that the best attorneys come with a prepared list of well-crafted questions and make sure that they get an answer before asking the next questions. Don't just make up questions "on the run."

We try our best to craft proposed deposition questions that will get results no matter what the answer is. For example, relative to a superintendent of a general contractor:

- Is it your **company's policy** to take reasonable steps to plan, monitor and ensure that your contractors and subcontractors work safely and in compliance with OSHA standards? (Any answer you get will be useful as long as their answer is responsive and clear. If they don't have such a policy, they are in violation of the standard of care. If they do have such a policy, they should have implemented it.)

- If you had seen the plaintiff in the moments just before this incident occurred exposed to this hazard, **according to your safety policy**, would you have been required to do anything?

- In retrospect, is there anything that you or anyone in your company could have done before this incident occurred that would have prevented this incident?

- After this incident, did you do anything to prevent a recurrence? If so, was there anything preventing you from doing that before this incident occurred?

A better question than "Did you perform safety inspections?" is "Is it your company's policy for a representative of the company to perform safety inspections?" If the answer is yes, ask, "Who did those inspections in this case?" Questions about company policy are more indicative of a safety management failure than questions about what any one person typically does.

7. Recognize useless answers

Sometimes deponents give useless answers and the attorney does not realize it or fails to follow up. For example:

- The deponent answers: "I believe so." Sometimes the deponent really means "I think so but I don't really know."

- When a deponent answers: "I would say that …," you should ask: I'm not interested in what you "would say." Are you now saying that you can swear that …?"

- When the answer is: "It is my understanding that …," you should ask what is the basis of their understanding.

You would be surprised how frequently attorneys don't follow up after getting confusing, ambiguous, unclear or contradictory answers.

8. Depose the opposing expert

Sometimes attorneys think they may save time and money by trying to get a settlement without deposing the opposing expert. My opinion is that a case is much more likely to settle after you have shown the strengths of your case and the opposing side's weaknesses. We are pretty good at providing you with questions for the opposing expert that will show those weaknesses. Therefore, we suggest that if you are in a state that permits expert depositions, you strongly consider it.

Our experience is that we rarely go to trial when depositions are taken of both plaintiff and defense experts. A deposition is a lot easier and cheaper than a trial.

We have deposition transcripts and reports from many of the opposing experts we commonly come across. We use those when preparing rebuttal reports and in crafting suggested deposition questions for opposing experts for deposition and trial.

9. Don't turn down a case just because the…

…Employer was Grossly Negligent

It may seem counterintuitive, but the greater the negligence on the part of the employer, the greater the negligence usually is on the part of the defendant. The key question is "why" the defendant permitted the employer's egregious conduct.

It is important to understand that OSHA's multi-employer citation policy as well as the standard of care require controlling employers (general contractors, host employers and sometimes other contractors) to take reasonable steps to detect the safety violations of contractors and subcontractors and have them corrected. Contractors and subcontractors down the chain of command learn quickly what is required by the company that hired them – typically they do not act unsafely and in violation of OSHA unless permitted or expected to do so.

…Worker conduct was unsafe

Workers cannot violate OSHA standards – OSHA standards are directed at employers and the OSH Act applies to employers. Workers should, however, follow safety instructions and training given to them. Key questions to ask when a worker did something that seems unsafe are:

- Was the worker trained to identify and control the hazard?
- Was the worker exposure to the hazard an isolated incident? That is, did he/she perform this act before? Did others?
- Did the worker violate specific safety instructions?
- Were the "de facto" safety policies at the site different than what was in the written safety program? That is, was a safety program being enforced, or was "lip service" paid to safety?
- What was the safety management environment? Was safety being managed by planning, monitoring and performing safety inspections?
- Were safety inspections conducted on a regular and frequent basis? Were they conducted by a competent person?
- If the worker had done what the defendant says he/she should have done, would that have prevented the incident? For example, defendants often say the injured worker should have "used fall protection" or was given a "harness." However, even if the worker had worn a

harness, there may have been no OSHA-compliant anchorage points, the worker might have attached to something unsafe and the incident still would have occurred.

If for either of the above reasons you think you might not have a viable case against a defendant, please contact us to discuss it before turning it down. We will discuss any case with you for up to an hour without a fee being charged.

10. Review our reports carefully

We carefully review our work and try to prepare perfect bullet-proof expert reports. However, everyone makes mistakes, including us. Please read our reports carefully. We will consider all of your comments and suggestions and will make changes where appropriate. The closer we work together, the better.

Bonus Tip:

Vince Gallagher's book, *Worker Injury Third Party Cases: Recognizing and Proving Liability,* is an excellent resource for attorneys involved in worker injury cases. It explains in detail theories of liability, safety management principles, practices and the standard of care. It discusses the roles of different parties in a safety management system and includes topics such as fall protection, scaffolds, ladders, steel erection, trenches and excavations, demolition and forklifts. It provides example questions for depositions of defendants and experts and much more. Purchase it on Amazon.