

DYING FOR A PAYCHECK: BODY COUNT RISES AS WORKERS FALL ALARMING INCREASE IN HISPANIC WORKER DEATHS

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A casual drive past a residential construction site in New Jersey on any given day will reveal that the framers and roofers are working at elevations where they are exposed to significant risk of catastrophic injury or death. The problem however is not limited to New Jersey; it is industry wide. The National Association of Homebuilders "NAHB" recently completed the most comprehensive analysis of fatalities in the residential homebuilding industry. Falls from elevation continue to be the leading cause of fatalities and the highest proportion of those killed worked for small contractors with less than 10 employees.

While injury on residential work-sites certainly occurs across all demographics, recent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths. The NAHB concluded that 28% of all fall fatalities were Hispanic workers and 29% were foreign born. Between 2003-2006 34% of all Hispanic worker deaths occurred in residential construction which was an increase of 370% over prior periods. These statistics do not include the number of workers that suffer career ending or catastrophic spinal or brain injuries as a result of falls.

It is this tragic reality that engenders the competing interests of the safety guidelines promulgated by the Occupational Health and Safety Administration ("OSHA") and the interests of the employers at the residential homebuilding site and their dictates of time and money considerations. The focus of this article is to highlight the staggering imbalance of injury to Hispanic and foreign-born workers so that future guidelines and enforcement mechanisms can be implemented to promote safety for all workers and across all ethnic groups.

UNDOCUMENTED IMMIGRANT WORKERS

The scenario leading to tragedy is all too common. Laborers from countries like Costa Rica and Mexico are recruited to work on roofing jobs for various roofing subcontractors. Many have immigrated to the United States and will work in even hazardous conditions in the hopes of making money to send home to their families. Many of the workers are undocumented and the construction industry will often not question their immigration status and pay them in cash with no benefits. These workers often have little or no training or experience for the hazardous work before climbing onto a roof. In kind, possible language barriers and the unfamiliarity with the norms and customs of the United States add to the lack of understanding of the worker's right to be free from working in hazardous conditions that can ultimately lead to severe injury or death.

When an injury occurs to one of these undocumented workers they often are afraid to make a claim for workers' compensation benefits or file a third party claim given their immigration status. To complicate this issue, the workers are given incentives to work as quickly as possible as they are not paid by the hour, but rather paid based on the speed of production. Even still, the workers themselves will resist utilizing fall protection as it is perceived as an impediment to speedy job completion, and therefore less pay. Hence, even employers have an incentive to ignore the oversight and forego job safety.

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A CASE STUDY OF WORKER EXPLOITATION

As an example of exploitation in the home construction industry, I recently represented Pablo, an undocumented worker who was a Costa Rican National. Pablo suffered a catastrophic injury breaking both legs and suffering spinal injury resulting in permanent loss of bowel, bladder and sexual function as a result of a 30 foot fall from a rooftop while working on a single-family home in Delaware.

Pablo had been “recruited” and he and a number of other undocumented workers were transported by van every day to worksites in Delaware. As was customary, he was paid cash, “under the table” and no questions were asked. The builder hired a company that subcontracted the labor for the roofing job to Pablo’s employer. Notwithstanding contractual obligations requiring compliance with OSHA regulations, these regulations were ignored. There was no attempt whatsoever to make certain that roofers were trained as to the types of fall protection devices available and required for their protection. Unaware and untrained Pablo had been using a “slide guard” of his own device and did not utilize safety harnesses with lifelines as they were not required by the Builder or the labor subcontractor. The faster Pablo completed work, the faster he would be paid.

While working on the roof Pablo slipped while carrying a bundle of roofing shingles. The shingles broke the “slide guard” and created a hole in the roof through which Pablo, without any fall protection, fell 30 feet to the ground. A Delaware jury awarded \$14,000,000.00, the largest verdict to date in Delaware for a workplace injury. That verdict reflected the jury’s outrage at Pablo’s exploitation and his horrific injuries.

OSHA STANDARD: INADEQUATE PROTECTION AND ENFORCEMENT

Why does the homebuilding industry face these unacceptable fatality rates? Due to homebuilders ignoring OSHA regulations relative to fall protection, 29 CFR 1926.501(b)(13), the standard for safety in residential roofing, was promulgated. This standard mandated a guardrail system, safety net or personal fall arrest protection for residential construction activity above 6 feet. The standard however was modified after the residential construction industry, specifically the NAHB, voiced objections maintaining that work-site compliance with the regulation was not feasible. As a result, STD 3-0.1A, Plain Language Revision-Interim Fall Protection Compliance Guideline For Residential Construction “Compliance Guidelines” was issued in 1999 and provided alternatives to the use of guardrails, nets or safety harnesses.

STD 3-0.1A breaks down residential construction into 4 Groups. Group 1 - installation of floor joists, sheathing, setting and bracing of roof trusses and rafters; Group 2 - work on concrete and block walls and formwork; Group 3 - electrical and HVAC, plumbing and carpentry when performed in attics and roofs; and Group 4 - roofing work.

Most residential fatalities occur during Group 1 and Group 4 activities and the type of work dictates the level of fall protection required by OSHA. Unfortunately, under the modified guidelines only Group 1 workers are required to use conventional personal fall arrest protection during sheathing (placement of plywood over the framing). STD 3-0.1A has drawn criticism from career safety professionals like Vince Gallagher, Principal of Safety Research Inc., Audubon, New Jersey, inasmuch as OSHA modified the requirement for personal fall arrest protection (safety harness with lifeline) for Group 4 activities like roofing where the greatest number of fatalities occur. When STD 3-0.1A was drafted, OSHA specified alternative methods of compliance, none of which provide the same level of protection for workers. STD 3-0.1A provides that for Group 4 activities slide guards are acceptable: “A slide guard is a two by four (framers) or two by six (roofers) board which slides into brackets which are nailed

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through sheathing into the trusses. The board is intended to prevent a worker or material from sliding off the roof." While a slide guard can prevent a worker from sliding off the roof, as Mr. Gallagher points out, "it will offer no protection to a worker on the edge of the roof or a worker who tumbles over it. Slide guards are not nearly as effective as a personal fall arrest system which could be used for roofing work but is not required". The practitioner should be aware that OSHA standards are minimum standards for the industry and even if followed unacceptable risk of catastrophic injury or death is still present.

Under STD 3-0.1A, no laborer is permitted on a roof unless he or she is trained in fall hazards and all alternative forms of fall protection. However, after investigating many residential fall injury cases, it is clear that in virtually all cases workers were not adequately trained to perform the work, evidencing that the current regulatory scheme lacks teeth in its enforcement mechanisms and is in dire need of regulatory overhaul.

THE NEED FOR CHANGE

Due to the lack of personnel and resources within OSHA, enforcement in the homebuilding industry is often lacking. Even under the less stringent modified regulations homebuilders and roofing contractors still fail to require fall protection and workers are exposed to unnecessary risk.

Since the NAHB has revealed that small homebuilding industry contractors employing less than 10 workers account for 75% of fatalities, while 47% of all fatalities involve workers employed for less than one year, additional regulatory oversight and additional enforcement mechanisms of this segment of the industry is necessary. Builders and subcontractors must require use of feasible fall protection, trained workers and OSHA compliance in residential homebuilding to stem the growing trend of fatalities. In the end, change is needed on every level from the individual worker, up to and including, federal oversight and regulatory enforcement. Only then can we expect to see a reduction in the body count with regard to these tragic unnecessary injuries and fatalities.

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