

## **An Ounce of Preservation: Three Steps to a Stronger Worksite Accident Defense** *By Kelly A. McGee | Tuesday, July 24, 2018*

One of the most important things a contractor can do to position the company for a strong defense to a personal injury lawsuit is to begin preserving evidence from the accident right away. The information derived from the first hour following an accident is critical to defense lawyers. It arms them with information that will be used to prevent the plaintiff from telling the “story of the case” during early discovery.

This must be avoided at all costs. Keep in mind, the first and most informed witness to the worksite accident is the plaintiff. A company may not find out about the accident until hours later. Early intervention and documentation of the scene is critical. Otherwise, it allows the plaintiff to frame the story of the case early, placing the company at a disadvantage. Once the plaintiff tells a story of being an all-star employee who was a victim of a terrible work environment, the company is at the bottom of an uphill battle, trying to prove otherwise.

There are three ways to arm the attorney with the key information needed to neutralize the plaintiff's story, steering it closer to the truth and maintaining an even playing field.

### **1) AN EARLY AND PRESERVED INVESTIGATION**

Ideally, counsel would be present immediately after the accident, assisting in the investigation. However, under most circumstances, counsel does not see the case until years later. In New York, for example, the statute of limitations for bodily injury cases is three years. Over those years, witnesses' memories fade or the witnesses themselves become impossible to locate. Photographs that were once saved in someone's phone or laptop become lost in internet clouds or just lost! As it is customary for some to upgrade their phones annually, many investigation photographs are discarded with old phones, having never been downloaded, emailed or printed. Key documents that were once kept neatly organized during the project are tossed into a crate and sent to storage. Lawyers understand that once one project is done, contractors quickly move onto the next. They also appreciate that contractors are so busy that preserving evidence for a future lawsuit that may never even happen isn't on the top of their to-do list. However, it will benefit the company greatly if management takes the time to gather and save information in the event litigation does occur.

What a legal team looks for in an accident investigation is a fully documented scene that was inspected immediately after the accident and preserved for future use. Once a contractor receives notice of an accident, he should immediately secure the site and inspect, then photograph or take videographic evidence of everything in the area, including:

- **The Equipment.** Show any tools or equipment that the worker was using, taken from all angles. For example, if the worker fell from a ladder, show everything from the top cap to the feet. The photographs should show all parts of the equipment including any tags, brand names or warning labels.
- **The Ground.** Photograph the platform, ground, concrete or flooring upon which the equipment was set up. For example, show the ground beneath the ladder and the area surrounding it.
- **The Surroundings.** Show a view of the worker's surroundings, including other trades. Show the worker's environment, including lighting fixtures, windows and his distance from other trades and materials.
- **The Plaintiff.** This may seem awkward since no one likes their picture taken when they aren't feeling their best but capturing the plaintiff after an accident is invaluable. Show his/her injured body part, his/her personal protective equipment, shoes, hardhat and clothing. Not only will these photographs lead the attorney closer to the truth about the plaintiff's post-accident condition, facial identification of the plaintiff works wonders on immediate surveillance and social media searches.

## 2) A TIME CAPSULE OF THE DAY

Once the entire site is photographed, gather the following documents and save them, should future litigation occur. Computer drop-boxes are great, but a simple folder or a box will do to save these documents in a single space and prevent a search through old forgotten records later. When these early steps aren't taken immediately, years later when the lawsuit is filed, the lawyer will spend much of his or her time trying to obtain these items. Documents to save include:

- instruction or training manuals for the equipment;
- notes on the condition of the equipment;
- notes on where and how the equipment was stored;
- witness statements and recordings, including nearby witnesses who claim they saw and heard nothing. Hearing and seeing nothing is sometimes valuable evidence;
- the Site Safety Plan specific to that date and location; and
- all subcontracts related to the project.

## 3) INFORMATION ON THE WORKER — "THE DIRT ON THE PLAINTIFF"

The plaintiff may be the best worker or worst nightmare. The lawyer will never know if unless this information is captured and shared. Some of this information may not find its way into motion papers or trial briefs, but it is indispensable during settlement talks and at mediation. Descriptive information about the plaintiff includes:

- worker's training/experience with using the equipment;
- worker's prior complaints about the worksite or equipment; and
- worker's issues with co-workers, drugs/alcohol/frequent absences or lateness, insubordinate behaviors, work practices, etc.

When a lawyer isn't armed with this information, it potentially allows the plaintiff to control the case. Collecting and preserving this critical information will prevent that from happening. Early, thorough and preserved investigation and materials leads to quicker resolution and better results.