INTEGRITY OF WALKING AND WORKING SURFACES

Many employers in the construction industry believe that all they have to do is ensure their employees are provided with and are using any of a number of permitted types and methods of fall protection whenever they are working on a surface with an unprotected edge which is more than six feet above the surface below. But, providing fall protection (which includes guardrails and warning lines) may not be enough.

By: Gary Auman

The OSHA Fall Protection Standards for Construction and General Industry contain a requirement for determining the integrity of all walking and working surfaces. This requirement is clearly stated in 29 CFR 1926.s01(a)(2) and 1910.22(b). While the language in these sections is not exactly the same, they each provide OSHA with the tools it needs require you to determine the integrity of all walking/working surfaces before any of your employees steps onto them to do work.

The interesting point in construction is that the OSHA Standard requires the employer to determine the integrity of any walking and/or working surface on which its employees will work to support them safely. But the second sentence (one which many employers miss) states: "Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity." This second sentence comes very close to the requirement set by Washington OSHA (WISHA) that requires the employer guarantee the integrity of any walking or working surface before an employee may work on it. In the state of Washington, the use of fall protection does not satisfy the requirement that the employer guarantee the integrity of the surface. I have a real concern that OSHA compliance officers could interpret 29CFR 1910.22(b) in the same way. However OSHA tries to enforce the second sentence of 1926,591(a)(2), it is clear that at the very least the employer must determine the integrity of the walking and working surface before an employee steps onto that surface. In a recent case OSHA required the employer to inspect both the top and bottom of the surface when determining integrity.

While any employee is inspecting a walking/working surface for its integrity, that employee must use a personal fall arrest system. The fact that you are employing a guardrail or a warning line/safety monitor system as your means of fall protection for employees working on a walking/working surface will not abrogate the requirement that you determine the integrity of the surface before any of your employees begins to work on it. BE SURE YOU DOCUMENT THE ACTIONS YOU TAKE TO DETERMINE THE INTEGRITY OF THE WALKING/WORKING SURFACE EVERY TIME! I suggest that you keep all of these records for the duration of the project plus six months. This procedure should also be part of your training program. These inspections should occur at the start of the job and they should be repeated every time any work is done on the surface that might affect its integrity. Remember OSHA's enforcement techniques; if you have an accident in which an employee falls through a walking/working surface OSHA will very likely not accept your argument that it had not been inspected because you did not feel that the work being done did not affect its integrity. OSHA will most likely cite you under this standard and take the position that since the surface failed, something must have been done to it to affect its integrity after your initial inspection. Finally, I recommend that you use a "qualified" individual to perform this audit whenever it is necessary.

Subcontractors and the Multi-Employer Worksite Policy

Whether you usually work as a general contractor or a subcontractor you may find yourself in a situation in which you will contract out part of your work to another contractor, who will then become your subcontractor. The OSHA Multi-Employer worksite policy may create responsibility for the employers on the site for the safety of employees other than their own. This policy has resulted in much litigation at the Occupational Safety and Health Review Commission and the Federal Appellate Courts. Basically, the position I have seen OSHA take is that if you have a management employee on a construction site who observes the employees of one of your subcontractors working unsafely and in violation of an OSHA standard you may well be cited, in addition to the employee's employer, for failure to take corrective action to protect the employee. The only area in which I believe there

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is an exception to this is for alleged violations of the General Duty Clause.

I have recently seen OSHA cite an employer for not taking immediate action to correct a safety violation by individual employees of its subcontractor. The point here is that you need to be sure your contract with your subcontractor clearly states the subcontractor's responsibility for the safety compliance and safety of its employees. In this instance the employer did not have specific language in its contract with the subcontractor that spelled out how the general was to ensure that the subcontractor's employees were working safely. My message here is that rather than just reciting in your contract that the subcontractor shall comply with all federal, state, and local laws and rules governing safety on the jobsite you need to be specific.

I suggest that you take a look at the contracts you use with your subcontractors to be sure that your responsibility as to the safety compliance of their employees is clearly spelled out. Also, your contract should specify meaningful penalties against your subcontractor whenever your site supervisor or your safety manager observes the subcontractor's employees violating an OSHA standard, their employer's safety rules or, if you require compliance with your safety rules, your own safety rules. You then need to be sure that your site supervisor is aware of his/her responsibility to take action under the contract for any safety violations of the employees of the subcontractor he/she observes. You should discuss with your OSHA counsel how far your responsibility for the safety of the subcontractor's employees should go so your contract can be drafted appropriately. Everyone's goal is to see that all employees work safely, but you need to ask yourself how much of that goal you wish to take on as a contractual responsibility and a potential OSHA liability. At the end of the day and in light of this new interest being shown by OSHA holding the general contractor (or any level contractor who retains the services of a subcontractor) responsible to OSHA for the safety compliance of the subcontractor's employees, you should have the attorney who you use for OSHA matters take a look at the contracts you are using now and edit them to protect you as much as possible from exposure for the safety violations of your subcontractors. You may be saying to yourself that the more simple approach would be to require your subcontractors indemnify and hold you harmless from any OSHA fines assessed against your company for the safety violations of the subcontractors employees, but I believe that such language would not be enforceable as against public policy. So, get your contracts reviewed and edited to clearly set out the subcontractor's responsibilities and your responsibilities for the actions for the employees of the sub as well as the method by which you will enforce those responsibilities.

PFAS anchor points

How do you anchor your personal fall arrest systems? Many employers/employees take short cuts when anchoring their personal fall arrest systems. Rather than finding an anchor point that complies with the requirements of 1926.502(d)(15) and is capable of supporting a

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load of at least 5,000 pounds per employee or is designed in compliance with the requirements of 1926.502(d)(15)(i) and (ii), they tie off to anything at hand. These alternatives state that the anchorage must be part of a complete fall arrest system which maintains a safety factor of at least 2 and which is under the supervision of a qualified person. I raise this issue because recently I have become aware of citations being issued for violations of 1926.502(d)(15) because the employer was not using and could not demonstrate that their anchorage point met the 5,000 pounds per employee requirement.

In one case, the employer had its employees loop their safety line through the sheet metal base of an HVAC unit using an aluminum carabiner that had no weight rating. To make matters worse, the "set-up" had not been approved or installed by a qualified person. No effort had been made to determine the load bearing limits of the sheet metal base or the load limits on the carabiner, so OSHA concluded that the employer was in violation of 1926.592(d)(15). The employer failed to consider any possible alternative and never got to the question of whether its anchorage point was in compliance with 1926.502(d)(15)(i) and (ii). I raise this issue because I find that frequently, employees in the field will use expedient measures to accomplish a task without following the rules. In a situation such as the one I have outlined, employees are likely to tie off to anything that appears to be solid without ever taking any steps to confirm their belief. I believe the subparts I have discussed above can give the employer an alternative to installing a 5,000 pound per employee rated anchorage point, but they will only come into play if a qualified person (under the definition in 1926(32)(m) has made a determination of the safety factor of the proposed anchor point. I must recommend complying with the requirement for an anchorage point with a 5,000 pound load factor per employee. If you choose to rely on the provisions of (i) and (ii), be sure you have involved a qualified person in establishing your anchor point.

State Plan States

I have discussed the requirements of state plan state programs in the past. But some of the differences have become more apparent since COVID-19. If you are going to perform work in a state plan state, remember the rules that govern the work you are going to perform, even though you are based in a state where safety is governed by federal OSHA or you are based in a different state plan state. For example, Virginia has adopted a very detailed Emergency Temporary Standard for employee exposures to COVID-19. Other state plan states have either adopted emergency guidance or are in the process of adopting emergency temporary standards. Be aware that guidance in a state plan state, if more strict than the guidance relied on by federal OSHA to protect employees in

light of the COVID-19 pandemic, will govern all employers working in that state no matter what the guidance or rules are in the state in which that employer is based. Also, if you are going to be working in a state plan state, familiarize yourself with that state's safety standards that will govern the work you will be doing as well as the procedures established in that state for challenging any citations you may receive in that state.

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