



# Startlingly Large Verdict Reminds Employers of the Perils of Workplace Safety Failings

Insights

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Never having to tell a wife or child that their loved one was killed at your worksite is reason enough to maintain a safe workplace, but business people would be foolish not to also consider the legal costs of unsafe work practices.

A February 11 Houston Jury Verdict provided 54 million more reasons to go beyond words and develop and constantly improve effective safety processes. The problem is that there is a tendency to hire competent safety professionals and leave it to them to keep the workplace safe. That's a sound first step, but unless the President or CEO involves himself and ensures that a business plan is developed and adhered to, no safety professional will alone guarantee a safe culture.

I spoke at a Safety Summit held by an Investment group last week for its portfolio companies. These guys look for companies with solid safety cultures, in part because they have seen a correlation between an effective safety culture and efficient and cost effective production practices. Same mindset. There were as many executive leaders present as there were safety professionals. This executive commitment means that their safety processes will work.

Let's discuss other lessons from this case.

## **\$54 Million Verdict following Earlier OSHA Slap down**

Harris County Texas is not a plaintiff crazy area so my jaw dropped when I saw the jury verdict for \$54 million to the family of an employee killed while building Kyle Field stadium. I'll quote the facts from the [Houston Chronicle](#):

*He was using the loader's bucket to catch concrete debris being removed from the stadium. It was part of the \$450-million renovation .... The loader had a 2,700-pound carrying capacity but was bearing a 3,340-pound concrete section as another worker was using a circular saw to cut the piece from a support column, the **Occupational Safety and Health Administration** said during its inquiry into Garcia's death.*

The weight caused the overloaded Caterpillar to topple forward over the side of the stadium. Garcia was thrown from the loader, falling about four stories to the ground.

One of my Houston partners, [Joe Gagnon](#), who is savvy about Texas non subscriber law and other employee civil suits remembered the event as "ugly," but having handled 450+ worker fatality cases,

these facts didn't sound worse to me than many other cases.

So I'm curious what so offended the jury. Regardless of the "why," this tragic employee death grievously harmed the companies involved and cost \$54 million. In today's competitive highly regulated construction market, I'm not sure which factor will be more costly.

### **OSHA criticized the behavior of some of the contractors – did that affect the outcome?**

OSHA had issued two Willful citations and placed the employer into their **Severe Violator's Program (SVEP)**. Being placed into OSHA's SVEP has immediate bad national consequences, but this placement also creates potentially damning public evidence against an employer; regardless of whether they are good people who experienced an aberration or genuinely bad players.

The suit involved several site employers, including the Joint Venture/General Contractor, the deceased employee's employer and another company working on site. The general rule is that workers comp is the exclusive remedy against an employee's employer or an injured employee unless the employer engaged in near-intentional bad conduct resulting in the injury or fatality. This is a tough standard to prove. In Texas, an employer can also chose not to subscribe to workers comp and can thus be subject to civil suit. In either situation, the plaintiff "may" get the OSHA citation or facts associated with the inspection introduced as evidence and those facts can influence a jury.

### OSHA's Earlier Press Release on its Citations:

*"These experienced contractors failed to provide employees with safe demolition procedures despite concerns from workers," said Casey Perkins, OSHA's area director in Austin. "Employees had to work under the load and directly beside the skid-steer where they could be struck by the equipment or heavy, concrete debris. This disregard for worker safety is unacceptable and will not be tolerated."*

A willful citation, with a penalty of \$56,000, was issued to Lindamood for exceeding the operating capacity of the skid-steer loader where the equipment was routinely loaded with concrete until obvious signs of tipping were seen. Texas Cutting & Coring was also cited for a willful violation, with a penalty of \$63,000, for exposing workers to the hazard of being struck-by the skid-steer loader and concrete. A willful violation is one committed with intentional, knowing or voluntary disregard for the law's requirements, or with plain indifference to worker safety and health.

According to the press accounts, the **Plaintiff did not get the OSHA citations before the jury**, and yet the jury awarded \$54 million dollars . . . and this award did not include more easily appealed punitive damages. The Plaintiff's counsel reported that even without the OSHA citations,

*"The evidence was just so bad and so overwhelming and the defendants show up with no remorse and are basically just callous – refusing to accept any responsibility – and it really made the jury mad."* (Law 360: Michelle Casady)

**The GC Joint Venture, who was found 75% responsible, despite no OSHA citations.** The Joint Venture understandably argued a lack of responsibility under the usual multiemployer theory. They did not manage the employee and his employer should have been responsible for his safety. And the jury apparently viewed that explanation as “*callous*.”

The obvious lesson is that no contractor on a site can solely leave safety to the other contractors on site. If one is the General Contractor, they need to:

- Effectively prequalify their subs and ensure that the sub provides site-specific training and safety plan;
- Conduct daily documented walk arounds and take documented corrective actions;
- Bid the job with provisions for adequate safety professionals – and owners need to quit refusing to pay GCs to adequately staff the jobs with safety support;
- Train your site superintendents, project managers and engineers and foreman to recognize and respond to observed hazards because regardless of who makes the error, all employers on site can pay.

A less obvious lesson is that an employer must continuously evaluate how judges, juries and regulators may view its explanations and communications ... beginning the day of the accident ... don't wait until a suit is filed.

The suit involved a construction site but there are lessons for any employer. An errant supervisor or an unusual work situation can lead to bad events at any site. It's worthwhile to review these events so as to provide added incentive for all levels of management. Don't assume that this terrible experience could happen to you.

### ***Related People***

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