

# RECOVERY FOR INJURED WORKERS OUTSIDE FLORIDA'S WORKERS' COMPENSATION SYSTEM

by Leslie M. Kroeger, Adam J. Langino, and Diana L. Martin

## Introduction

Florida's Workers' Compensation Act sets up a self-executing system under which an employee injured in a workplace accident can receive medical care and lost wages without filing a civil lawsuit.<sup>1</sup> This system, however, does not provide all the remedies that would be necessary to make an injured worker whole. For instance, noneconomic damages, such as pain and suffering, are not available under Florida's Workers' Compensation Act. And, the injured worker is often beholden to the employer's workers' compensation carrier when seeking medical treatment, as the carrier may not agree with such treatment or find it causally related to the workplace accident. While the employee can seek relief through the administrative workers' compensation system, in some cases greater relief can be found outside the system. One such situation is when a product is a cause of the worker's injury, which provides an avenue for the employee to recover in a civil product liability lawsuit. As access to circuit court may be the only means by which the injured worker can make a full recovery of damages, it is important to be aware of opportunities that will open the courthouse doors to injured workers. For this reason, this article focuses on upcoming trends in product liability lawsuits and practice tips for making successful claims on behalf of injured workers outside the workers' compensation system.

## Trending Workplace Product Claims

### Saws

There are many different types of power saws, e.g., table, horizontal, miter, all of which are common on many construction sites. Accidents are not uncommon. For instance, researchers estimate over 30,000 table saw injuries alone occur annually.<sup>2</sup> From a product liability aspect, table saws have been alleged to be defectively designed for not incorporating

flesh-detection safety technology, such as that provided by Sawstop, which is a safety system that stops a saw within 5 milliseconds of the blade's contact with human flesh.<sup>3</sup> Horizontal band saws have been alleged to be defectively designed for not incorporating vises that require two hand-controls to operate,<sup>4</sup> and for not offering pedestal controls to allow the saws to be operated from a remote, safe position.<sup>5</sup> Alternatively, miter saws have been alleged to be defectively designed for not incorporating lock washers, cotter pins, c-clips, or other locking mechanisms to keep the saw arm in place when not in use.<sup>6</sup>

### Ladders

Among workers, approximately 20 percent of fall injuries involve ladders.<sup>7</sup> Among construction workers, an estimated 81 percent of fall injuries treated in U.S. emergency departments involve a ladder. From a product liability perspective, ladders have been found defective for several reasons. For instance, from a warning or instructions perspective, ladders have been found defective for not holding an as-advertised weight.<sup>8</sup> These types of ladders fail for larger men or women, even though their body weight does not exceed any maximum weight requirement. From a manufacturing perspective, ladders have been found defective for having out of specification rivets. The rivets are an integral part of the support structure of a ladder, and even a minimal misplacement can lead to fatigue fracture or failure.<sup>9</sup> From a design perspective, ladders have been found to be defective for not including wider, thicker legs or longer gussets, which affect stability.<sup>10</sup>

### Fall Protection

Based on published data from the Bureau of Labor Statistics, 261,930 private industry, state, and local government workers missed one or more days of work in 2014 due to fall injuries and 798 workers

died.<sup>11</sup> Many types of products can expose workers to the risk of falling on the jobsite.

Mast climbing platforms have become increasingly popular on U.S. construction sites.<sup>12</sup> Compared to scaffolding, mast climbers are typically quicker to erect and dismantle; however, they come with their own uniquely dangerous conditions.<sup>13</sup> Each time a mast platform is raised or lowered, the platform planking between the mast and the building must be manually removed and replaced, thereby creating a fall hazard.<sup>14</sup> Because mast platform workers are not required to wear fall protection, it is not uncommon for those workers to fall through the gap while replacing the planking. From a design perspective, mast climbers have been alleged to be defective for not incorporating an adjustable interlocked hinged plank and cover that can be raised or lowered without being manually removed, thereby eliminating the need for a worker to manually place any planking. In Europe, mast platforms commonly incorporate this type of protection.

Aerial lift trucks have been replacing ladders and scaffolding on many job sites due to their mobility and flexibility.<sup>15</sup> Many workers are injured or killed on aerial lifts each year.<sup>16</sup> The bucket of an aerial lift, in which the worker stands, is typically raised or lowered via a large chain. Aerial lifts have been alleged to be defectively designed for using undersized or inadequate chains, thereby causing the chain to break or fail over time. Without the chain, the bucket can tip, placing the worker at risk of falling. As such, aerial lift trucks have also been alleged to be defective for failing to incorporate failsafe protection to prevent the lift bucket from tipping during a chain failure.<sup>17</sup>

On worksites, body harnesses with safety cables are a common form of fall protection; however, they too may fail. The Occupational Safety and Health Administration (OSHA) requires the use of fall protection when construction workers are working at heights of 6 feet or greater above a lower level.<sup>18</sup> From a product design perspective, safety cables have been alleged to be too weak if they break under foreseeable use.<sup>19</sup> And, some cables have been found to not comply with national standards. From a warnings perspective, it has been alleged that cable manufacturers fail to properly instruct users how to safely anchor their cables or fail to inform workers to wear shock absorbers, which can prevent cable damage and therefore minimize the chance of cable failure.

Scaffolding is very common on construction sites. An estimated 2.3 million construction workers, or 65 percent of the construction industry, work on scaffolds.<sup>20</sup> The U.S. Department of Labor estimates that protecting workers from scaffold-related accidents may prevent some of the 4,500 injuries and over 60 deaths each year.<sup>21</sup> Many scaffolding systems use T-shaped bracket support systems, which are welded together. From a manufacturing perspective, T-brackets can fail due to inappropriate welding. A T-bracket failure can cause any scaffolding to collapse. From a design perspective, defects have been alleged if a T-bracket system fails to incorporate redundancies, such as additional welding or bolting to prevent scaffolding collapse in the event of a failure.<sup>22</sup>

### ***Vehicles and Heavy Machinery***

Large trucks are found on almost every construction site. The National Highway Traffic Safety Administration (NHTSA) estimates that about 21,000 heavy truck drivers are injured and 800 are killed each year.<sup>23</sup>

From a design defect perspective, particularly in roll-over (or tip-over) events, the integrity of the heavy truck's cab should be examined. If the cab was not designed to withstand the weight of a foreseeable load, then any roof crush may be the result of a defective or improperly tested cabin. In addition, the cabin could be defectively designed for failing to include side-impact airbags or incorporating airbags that failed to deploy.

In 2016 alone, NHTSA attributes tire malfunction to contributing to 733 motor vehicle traffic fatalities.<sup>24</sup> Tire defects have been reported as the second leading defect (brake problems being first) found in truck accident investigations.<sup>25</sup> Tires can fail for many reasons, including improper maintenance, defective design, and defective manufacturing processes. Improper maintenance practices generally will be attributed to the employer, so it's important to look beyond this obvious angle. If a tire fails, especially if by tread separation, it should be evaluated by a forensic expert to determine if evidence of failure can be found that would link to the tire manufacturing company.

Press brake machines are commonly used by workers to bend sheet metal. Data from the Bureau of Census for 1980 show that there are about 151,000 mechanical press operators in the United States.<sup>26</sup> Data from the Bureau of Labor Statistics indicate that about 10 percent (2,000 per year) of all reported amputations (20,000 per year) occur among power press operators, including those who operate mechanical power presses.<sup>27</sup> From a design defect perspective, newer press brakes may be defectively designed for not incorporating light curtain safety devices. These devices sense photoelectric presences and protect against hands or fingers being crushed. Older press brake machines have been alleged to be defectively designed for not incorporating two handed control activation or appropriate guarding on its foot treadle. *Gushanas v. Pitsston Mach. Works, Inc.*, No. 20148790 (Pa. Ct. Com. Pl. Luzerne Cnty. June 2017).

### **Tips for Success**

As is the key in any product liability claim, early intervention and preservation is critical. Unlike a severe auto accident, in a workplace accident there is not always an investigating officer that will perform an initial investigation, take accident photographs, take witness statements, and preserve the product involved. In many workplace accidents, because liability is not-contested under Florida's Workers' Compensation Act, many employers do not recognize the need to preserve the equipment that injured their employee. This is particularly true if the employer relies upon the equipment regularly in his or her business practice. Therefore, for workplace accidents it is imperative to send a preservation letter and request a site inspection as soon as possible.

Some severe workplace accidents, such as those resulting in a fatality or the hospitalization of three or more employees, require an investigation by the U.S. Department of Labor via OSHA.<sup>28</sup> While OSHA requires evidence to be left untouched, it is still best to send a preservation letter as many employers may not be familiar with OSHA rules and regulations.<sup>29</sup> As soon as practicable, send a Freedom of Information Act request for a copy of OSHA's final investigative report. OSHA will typically look to see what practice and procedures of the employer or employees were a cause for an injury as opposed to a defect with the product itself. Understanding these comparative factors will help you fine tune

the allegations of product liability negligence prior to your lawsuit.

In addition to securing the physical evidence, it would be wise to speak to the company's owners or managers as to which outside companies, if any, maintained, repaired or serviced the equipment at issue. Often, heavy machinery repair or service shops do not have sophisticated electronic record keeping, like those of auto-dealers or other companies. Therefore, these records are at risk of destruction, disposal, or misplacement. After these third parties are identified, preservation letters should be sent to them, too.

To the extent the workplace accident was witnessed, an investigator should take statements to capture the best possible memory of the incident. Because an employer is not a potential defendant to a product liability claim, there is no rule that prevents an investigator from attempting to capture this type of information. To the extent that a video may exist, a specific preservation request for that video or any pictures should be sent as well.

**Conclusion**

Because Florida's Workers' Compensation Act limits the damages available to injured workers, it is important to look for other avenues that may enable an injured worker to recover sufficient damages in order to become whole. Because the Act does not preclude an employee, or his or her family, from seeking restitution from a third party, counsel should determine whether the employee's injuries were caused by a product and whether a civil product liability action might enable the employee to make a greater recovery than a claim merely under Florida's Workers' Compensation Act. ■



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<sup>1</sup>Fla. Stat. § 440.11

<sup>2</sup>Chung, Kevin C., and Melissa J. Shauer, "Table Saw Injuries." *Plastic and Reconstructive Surgery*, vol. 132, no. 5, 2013, doi:10.1097/prs.0b013e-3182a3bfb1.

<sup>3</sup>*Mai v. Ryobi Techs.*, No. 140303388 (Pa. Ct. Com. Pl. Phila. Cnty. May 2017).

<sup>4</sup>*Brubaker v. MidAtlantic Mach., Inc.*, No. 2015-CV-2394 (Pa. Ct. Com. Pl. Dauphin Cnty. Dec. 2017).

<sup>5</sup>*Id.*

<sup>6</sup>*Corcoran v. Omga, Inc.*, No. 6:14-CV-06451 (W.D.N.Y. June 2016).

<sup>7</sup>Christina M. Socias, DrPH, Cammie K. Chamount Menendez, PhD, James W. Collins, PhD, et. al., "Occupational Ladder Fall Injuries – United States, 2011" *MMWR*, vol. 63, no. 16, 2014.

<sup>8</sup>*Klingenberg v. Vulcan Ladder USA L.L.C.*, No. 5:15CV04012 (N.D. Iowa Jan. 2018).

<sup>9</sup>*Ore v. Tricam Indus., Inc.*, No. 0:14-CV-60269 (S.D. Fla. June 2017).

<sup>10</sup>*Baugh v. Cuprum S.A. de C.V.*, 2017 WL 104464 (7th Cir. Jan.2017).

<sup>11</sup>"The National Institute for Occupational Safety and Health (NIOSH)." *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention, 2 Apr. 2018, www.cdc.gov/niosh/topics/falls/.

<sup>12</sup>Pam Susi, MSPH, et. al., "Reaching Higher – Recommendations for the Safe Use of Mast Climbing Work Platforms." *CPWR Work Group on Mast Climbing Work Platforms*, December 2010.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 11.

<sup>15</sup>OSHA Fact Sheet "Aerial Lifts." Apr. 2011.

<sup>16</sup>*Id.*

<sup>17</sup>*Amezcuva v. Davey Tree Expert Co.*, No. RG13694477 (Cal. Super. Ct. Alameda Cnty. June 2017).

<sup>18</sup>29 CFR 1926.501

<sup>19</sup>*Arrants v. Honey well Intl., Inc.*, No. 2:15-CV-07103 (W.D. Wash. May 2017).

<sup>20</sup>"UNITED STATES DEPARTMENT OF LABOR." *Occupational Safety and Health Administration*, www.osha.gov/SLTC/scaffolding/construction.html.

<sup>21</sup>*Id.*

<sup>22</sup>*Sayegh v. Raymond Corp.*, NO. 7:15-CV-00688 (W.D. Ca. Dec. 2016).

<sup>23</sup>NHTSA "Heavy Truck Crashworthiness: Injury Mechanisms and Countermeasures to Improve Occupant Safety" May 2015.

<sup>24</sup>"Tires." *NHTSA*, 28 Feb. 2018, www.nhtsa.gov/equipment/tires#35291.

<sup>25</sup>Z. Bareket, D.F. Blower, C. MacAdam. "Blowout Resistant Tire Study for Commercial Highway Vehicles." *Final Technical Report for Task Order No. 4*, UMTRI-2000-28 (August 31, 2000).

<sup>26</sup>"Injuries and Amputations Resulting from Work with Mechanical Power Presses." *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention, 6 June 2014, www.cdc.gov/niosh/docs/87-107/default.html.

<sup>27</sup>*Id.*

<sup>28</sup>29 CFR 1960.29(b)

<sup>29</sup>*Id.*