MEMO TO FILE

Workplace Injuries

My plumber's guy got injured using my ladder – am I on the hook?

It's practically a law of physics (like gravity). It's bound to happen: workers will grab whatever step-stool or ladder is in arm's reach to help them do their job, no matter who or which business the step-stool or ladder belongs to. If it's on site and available, then it's fair game. Likewise, it's almost inevitable that the various trades on site (including the GC) become less vigilant with each passing day and eventually just leave their equipment out and about the site.

How worried should general contractors be about subcontractors' employees getting injured when they use the GC's equipment? After all, depending on the nature of the task being performed and the site conditions in that direct area, an accident with a simple step-stool could be catastrophic.

The GC should worry if they have equipment that: (a) is broken, faulty or damaged; (b) is not labeled as belonging to the GC ("property of" … "do not use"); (c) they leave around the site unattended and unsecured; and/or (d) is not specifically prohibited from being used in the GC's contracts with their subcontractors (because GC's and subcontractors always have formal, written contracts with each other, right?). The GC's level of worry is amplified if the subcontractor did not maintain workers compensation insurance (here, we assume the GC had already secured evidence of their subcontractor's workers comp coverage).

What exactly should the GC be worried about if one or more of the above are at play? Two possible consequences: (1) OSHA penalties and (2) a third-party action (outside of workers compensation).

1. OSHA Penalties.

   OSHA's multi-employer citation policy casts a wide net with its four categories of employers potentially at fault in a workplace accident scenario: creating employer, exposing employer, correcting employer and controlling employer. GC's are advised to review the policy.

   If a plumber using a GC's ladder suffers the kind of injury that summons OSHA to the jobsite, there will undoubtedly be an examination of the ladder. If the ladder is broken, faulty or damaged, it is likely that OSHA will penalize the GC as the creating employer (the GC created the hazard by leaving the dangerous ladder around the site, reasonably knowing that someone else might try to use it) and the controlling employer (the GC was in charge of the site and its

subcontractors). The plumbing contractor will likely be the exposing employer for not providing its worker with a safe ladder in the first place, and/or not instructing the worker to refrain from using other's equipment.

What if there is evidence shows that one of the GC's workers had used the ladder the day before, safely and without incident – and a manufacturer defect caused the malfunction that resulted in the injury to the plumber's worker? Manufacturer liability may be at play, but that is not the care or concern of OSHA. The GC, still, is probably the creating (and controlling) employer, because an argument can be made that if the GC leaves equipment out and about, and they know that other trades will be on the jobsite, then it's reasonable to expect the GC to perform routine safety checks or somehow ensure their equipment is safe and being used safely. Otherwise, lock the ladders up and put signs on them that they are property of the GC and not to be used. Also, include a provision in the GC/subcontractor contract that prohibits the sub's use of GC equipment and requires the sub to provide its own equipment. Likewise, the OSHA multi-employer citation policy applies to the different employers in the same way no matter what kinds of safety provisions they may have agreed to in their contracts.

2. Third-Party Action (Litigation).

This means that the subcontractor's worker sues the GC directly. Isn't workers compensation supposed to be the "sole remedy" for workplace accidents? Yes, it is, and there are exceptions to the "sole remedy" rule. One exception is when the accident is caused by the negligence of a third-party, i.e. someone other than the worker's employer, like a property owner or another tradesperson. Here, the subcontractor did not provide its worker with the necessary equipment. That issue will be at play in favor of the GC, but it will not absolve the GC entirely.

All the "be worried, if" factors listed above might add up to the kind of culpability that makes the GC vulnerable to a third-party action, but factor (a) (broken, faulty or damaged equipment) would likely be the most damning form of negligence, mitigated somewhat only if the GC/sub contract includes a provision specifically (i) requiring the sub to provide its own equipment and (ii) prohibiting the sub from using equipment not its own.

An indemnity clause in the GC/Subcontractor contract may help limit the GC's exposure, but Massachusetts law limits just how far those clauses can go (see M.G.L. c. 149, § 29C). Maybe the indemnity clause will help the GC in the third-party action scenario, but probably not in the OSHA scenario. The worker still got hurt and parties will be penalized. In the scenario here, a contractual provision that makes the plumber (or any subcontractor) financially responsible for the GC's OSHA penalty for a regulatory obligation may be of limited enforceability, especially if the plumber was not the "cause" of the accident. But that's the rub with the OSHA multi-employer citation policy. It leans towards finding that many were the cause of the accident, that all contributed somehow.

What if the ladder was not defective and the accident occurred because of the worker's misuse? Then, the negligence burden shifts back to the plumber. In terms of the OSHA multi-employer citation policy, there is less evidence, then, that the GC created a hazard leading to an accident and/or could have or should have discovered the hazard before it could cause an accident.