

# A Watchful Eye

CONTRACTORS NEED TO CONTINUE TO PAY CLOSE ATTENTION TO CURRENT DEVELOPMENTS IN CRIMINAL LIABILITY UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT. **By Karen P. Layng**

**P**ublic outcry about willful Occupational Safety and Health Act (OSHA) violations could result in stricter enforcement by state and federal agencies and referrals for criminal prosecution to state and federal prosecutors, as well as stiffer penalties for employers.

For example, a company that builds and repairs high-voltage power lines, L.E. Myers Co., was convicted in 2005 of willfully violating five OSHA standards concerning the death of a 20-year-old power-line construction worker. He was on his second day at the job when he was electrocuted while working atop a 120-foot steel tower. A federal magistrate of the Northern District of Illinois sentenced the company to three years of probation and imposed a \$500,000 fine, the maximum allowed under the law.

Also in 2005, a construction company in Michigan was convicted of willfully violating Michigan Occupational Safety and Health Administration (MIOSHA) regulations. Lanzo Construction Co. was sentenced to two years' probation in state court for the death of a pipelayer who was buried alive in an unshored, unsloped trench. "This conviction sends a clear message to employers that worker safety is a priority in this state," said Michigan Gov. Jennifer M. Granholm, "and employers will be prosecuted to the fullest extent of the law if they put workers' health or safety at risk."

Despite modern advances in worker safety, death at the workplace remains a significant concern. From 1982 to 2003, more than 170,000 Americans were killed in the workplace. Of those deaths, 2,197 were due to violations that OSHA characterized as willful.

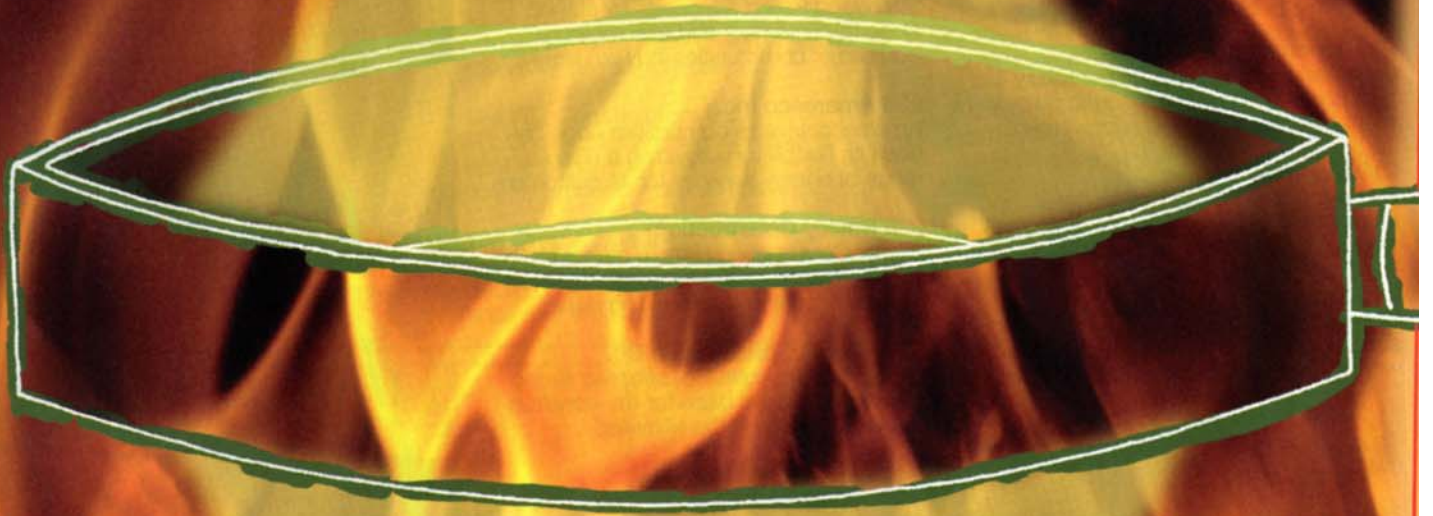
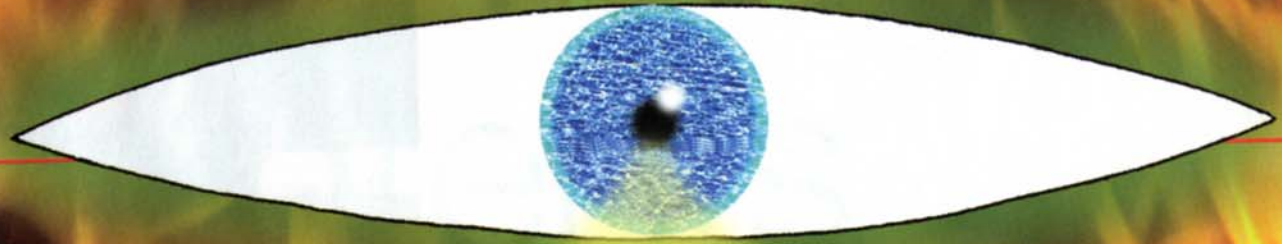
## A Persistent Problem

OSHA provides that employers whose willful violations of the law result in the death of employees will be subject to criminal liability: "Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this act, or any regulations prescribed pursuant to this act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine ... or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine ... or by imprisonment for not more than one year, or by both." (29 U.S.C. § 666(e) 1970)

Elaborating on what constitutes willful conduct under the act,



the 10th Circuit explained that an employer need not entertain a specific intent to harm an employee, nor does the employer's action need to be morally reprehensible. Instead, the court approved of the following jury instruction that defines "willful": "Failure to comply with a safety standard under [OSHA] is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally."



Companies can take steps to eliminate willful violations of OSHA standards on construction sites.



But until several years ago, criminal liability for willful OSHA violations resulting in the death of an employee was remote. From 1982 to 2002, OSHA investigated 1,242 cases where the agency determined that the employer willfully violated the act, resulting in the death of at least one employee. Twenty-one state OSHAs and one U.S. territory made the same determination in 556 cases. Of those 1,798 total cases, only 196 were even referred to prosecutors, 104 were actually prosecuted, 81 resulted in convictions and 16 of the convictions carried jail sentences. Collectively, these jail sentences added up to 30 years over this span, with 20 of those years accounted for by a single case.

#### **Public Reaction**

In the past five years, organizations concerned with workplace safety have begun to comment on OSHA's reluctance to pursue criminal penalties for employers found responsible for employees' deaths. Working with the support of victims' family members, these groups include the National Council for Occupational Safety and Health (through the Campaign to Stop Corporate Killing), the New York Committee for Occupational Safety and Health, Confined Space, the Philadelphia Project on Occupational Safety and Health, Occupational Hazards and the Western New York Council on Occupational Safety and Health. They have



launched campaigns to attempt to inform the public about what they claim is a “grave and persistent injustice” to America’s work force.

In this light, *The New York Times* published a three-part series in December 2003 that offered a comprehensive account of the issue. It began with a detailed story of a 22-year-old plumber’s apprentice who was buried alive in a trench. The circumstances of his death were almost identical to those of an employee of the same company who died in 1989. Although OSHA found that the company had willfully violated OSHA standards in both instances, no referral for criminal prosecution was made for either death.

The final article noted that willful violation of OSHA standards is a misdemeanor under federal law. But in California, the same offense is a felony, and convictions carry sentences of up to three years in prison and fines of up to \$1.5 million. Cal OSHA is required by law to refer every workplace death to prosecutors “if there is credible evidence of a deliberate safety violation.”

According to the *Times*, of the 2,197 deaths resulting from willful OSHA violations, 248 occurred in the construction of water, sewer and utility lines; 111 in structural steel erection; 89 in construction trades; 59 in nonresidential construction; and 59 in roofing, siding and sheet-metal work.

An examination of the causes of death further suggests that many deadly accidents are happening at construction sites: 330 victims fell from a significant height, 282 were struck by machinery or other objects, 239 people were caught in machinery or other equipment, 201 inhaled smoke or gases, 151 were struck by dirt or stones and 132 were electrocuted.

#### A Change in the Offing?

Although all of the attention has not yet led to increased prosecution of willful OSHA violators, there are indications that the culture at OSHA and other government agencies charged with the protection of American workers is undergoing a change.

*The New York Times* published another article in May 2005 under the headline, “With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws.” It described the forming of a partnership between OSHA, the Environmental Protection Agency and the Department of Justice “to identify and single out for prosecution the nation’s most flagrant workplace safety violators.”

The initiative reportedly was already making an impact, with OSHA officers attending training sessions led by DOJ prosecutors and EPA investigators, OSHA managers compiling lists of bad workplaces and sharing them with EPA prosecutors who would then select the most promising cases for investigation, and several criminal inquiries and prosecutions already in progress.

“There is a concerted effort between the Department of Labor and Department of Justice to aggressively prosecute safety violations in the workplace,” U.S. Attorney Eric Sussman told the *Chicago Tribune* after the L.E. Myers conviction.

A new focus on aggressively prosecuting willful violators is also evident in the comparison of official OSHA releases before and after *The New York Times’* reportage. For example, in 2002, Assistant Secretary of Labor John L. Henshaw had this to say after a guilty plea by Tyler Pipe Co. for the death of a maintenance mechanic in an iron foundry: “[W]e sincerely hope that [the guilty plea] will prompt Tyler Pipe and others like them to take seriously its responsibilities to protect the lives and safety of its workers. OSHA will not waver in its commitment to ensure that Tyler Pipe does just that and lives up to its obligations under the law.”

Then, after the L.E. Myers conviction, U.S. Secretary of Labor Elaine L. Chao struck a far more uncompromising tone: “We are pleased that the judge in this case imposed the maximum penalty, and it should send a loud and clear message that this department will continue to aggressively enforce the law to protect its workers.”

#### Preventable Tragedy

Even if contractors did all that was humanly possible to prevent them, workplace deaths would still take place in an industry where the potential for danger is pervasive. However, willful violations should be eliminated. Companies interested in preventing workplace fatalities – and accidents in general – should consider taking the following steps:

1. Review current OSHA standards to implement or update your company’s program.
2. Consult OSHA’s official website at [www.osha.gov](http://www.osha.gov) for compliance advice.
3. Implement and/or expand training of project foremen and other on-site supervisors on a periodic basis to ensure that on-site safety is being consistently enforced.
4. Emphasize safety to all your employees on a consistent basis. Punish by suspension or termination – depending on the severity of the violation – workers who fail to comply with safety procedures. ■

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