

Ogletree
Deakins

Conducting a proper investigation after a crane accident: skillfully navigating safety and legal implications



Texas Crane Owners Association
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Presented by:

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Presenter



- OSHA matters in 40 states; 100 percent of practice is OSHA
- 100s of OSHA matters, depositions, trials
- CCO written core, lattice boom, and telescopic boom crane operator examinations.
- CSP, ASP, CHST, OSHA-30s
- Ogletree – 60 offices, 1100 attorneys
 - Band 1 in Occupational Safety and Health by *Chambers USA*

Agenda

- A. Assembling your team
- B. Discovering and preserving evidence
- C. Responding to any regulatory requests
- D. Ensuring confidentiality and privilege
- E. Controlling the process
- F. Understanding critical crane legal issues

Incident Investigations

- “The best way to respond to an emergency is to prepare to respond before it happens”
- “Few people can think clearly and logically in a crisis, so it is important to do so in advance, when you have time to be thorough”

How to Prepare

- Assemble your investigation team
- Train your team
- Understand the procedure

Privileged Accident Investigation

- Get attorney involved
 - Document the involvement
 - Direct retention of expert for purpose of assisting with legal advice and analysis
- Protect privilege (no disclosure to third parties)
 - E.g., power point for GC with root cause analysis
- Limit updates to management team
- Dangers of texts, emails, WhatsApp – phone calls

Accident Investigation Practices

- Never put anything in writing you don't want shown to you on cross-examination
- “Just” the facts (get a lot of them) – includes taking many photographs
- Exercise your rights / control the flow of information – you can't exercise your rights if you don't know them
- Get your team involved right away

Two Purposes of Accident Investigations

- Understand what occurred and prevent future accidents
 - Enhance safety and health plan
- Mitigate if not eliminate legal exposure
- Steps and considerations
 - Document what occurred
 - Preserve evidence
 - Investigate/assess any factual, legal, and even any potential criminal issues

Sources of Information

- Injured worker
- Co-workers
- Owner, contractors, subcontractors
- Government inspectors
- First responders
- Witnesses
- The media
- Social media

Statements

- Scope of inquiry
 - What happened?
 - What was injured worker doing?
 - Involvement of other trades/workers?
- In the area?
- Scope of work?
 - PPE
 - Weather conditions
 - Equipment

Statements

- Example:
 - 55-year-old worker falls 8 feet and injures shoulder;
 - No complaints of neck or back pain at the scene;
 - Initially receives conservative treatment
 - Released to “light duty,” returns to work, but then gets laid off
 - Goes to spinal surgeon; MRI reveals herniations
 - Undergoes bi-lateral cervical fusion one month later
 - Needs future lumbar surgery and can never work again

Statements

- **Option A:** “Accident description: Worker fell 8 feet from ladder onto his shoulder”
- **Option B:** “Accident description: Worker fell 8 feet from his ladder. Admitted to foreman on-site approximately 10 minutes after alleged accident when questioned how the accident could have occurred that he did not use the ladder spikes on the bottom of the ladder contrary to his training and also did not use an available ladder stabilizer (at the top of the ladder) contrary to his training. His sole complaint at the time is soreness in his right shoulder with a pain level of approximately 3-4 out of 10. He denied any complaints of pain or any discomfort anywhere else, including any pain along his neck or back. Denied any LOC”

Additional Information

- Source of the information
 - “I observed...”
 - “Tom Smith, Project Manager of the GC, told me ... [that he observed]...”
 - “I overheard Tom Smith tell the OSHA inspector”
 - “According to ...”
- Detailed

Equipment

- Name, manufacturer, serial number
- Who owned, set up, maintained, inspected, repaired?
- How being used?
- When last used – any inspection checklists?
- User guides/specifications from manufacturer?
- Preserve involved equipment
- Take many photographs
- Also, equipment not being used but available on site

Accident Reports / Photos

- Accident reports
 - “According to ...”
 - Only relevant facts (who, what, where, when)
 - Consider protecting as privileged
- Photos
 - Equipment
 - Identifying landmarks
 - Site conditions
 - Stay out of photo
 - Use judgment (- no gory photos!)

Documents, Documents, Documents

- Relevant documents
 - Corporate safety records/plan/programs
 - Site-specific safety records
 - Training records/certifications of employees
 - Worksite inspection records
 - Daily/weeks/monthly, etc. JSAs, JHAs, pre-task plans, toolbox talks
 - Crane inspection records – daily, monthly, annual
 - Operators' manual, lift plan, load chart, etc.
 - Job ticket, contract documents
 - Disciplinary records – both a written plan and records of discipline
 - Job logs
 - Photos
 - Accident report

OSHA: “Compliance Directive for Cranes and Derricks in Construction Standard”

- Current Directive Number: **CPL 02-01-063** (231 pages)
- Information Date: 02/11/2022
- Page 5 - Abbreviated Inspection Checklist
- https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-063.pdf

OSHA: “Compliance Directive for Cranes and Derricks in Construction Standard”

1. Determine the adequacy of ground conditions beneath the equipment set-up area such as the support/foundation, matting, cribbing, blocking, etc.
2. Check for visible indications of repairs of the equipment.
3. When overhead power lines are on the construction site, ask if the utility owner/operator was contacted and if the lines are energized. Obtain the voltage of the power lines (if known). Verify whether a work zone around the crane was demarcated and what encroachment prevention steps are being used.
4. When a signal person is used on the worksite, verify the individual’s qualifications/documentation. Acceptable documents include both physical and electronic records.
5. Verify that the communication system being used by the crane operator and the signal person is the one specified on the signal person’s qualification documentation.
6. If lift plans are being used, verify that they are being followed.
7. When equipment is used to hoist personnel, identify who determined that it is infeasible to use another way to reach the work area and that it is necessary to use the crane for this task. This does not apply to steel erection activities under Subpart R.

OSHA: “Compliance Directive for Cranes and Derricks in Construction Standard”

8. Verify whether employers are holding required meetings, such as planning meetings necessary for working near overhead power lines, conducting Assembly/Disassembly (A/D), or hoisting.

9. Inspect all rigging equipment that is available for workers to use (slings, chokers, shackles, etc.) for damage, wear, safe working load tags, capacity, and safety factor.

10. Verify that load chart and operations’ manuals are available, written in a language that the operator understands (specified on the operator’s certification), and that the information is applicable to the particular crane. Ask the operator or employer where the documents are kept. For example, see if the serial number on the load chart matches that of the crane. Typically, the serial number is found on the nameplate in the cab and on the front cover of the manual.

11. Verify operator qualifications and training. Observe crane operations and interview both the employer and the operator to determine whether the operator is competent to operate the equipment safely.

12. Verify that the equipment and wire rope inspection requirements have been met and that the documentation is available for all inspections of the equipment. Identify who did the inspection and verify that inspector’s qualifications.

Knock, Knock... OSHA's Here!

Learn Your Rights Before OSHA Shows Up

- You will get no warning – there is no *Miranda* warning
- OSHA is not a law enforcement agency
- It does not have to tell employers their rights.
- **Once inspection begins, litigation has also begun** – OSHA wants to prove its case – already (in its mind) has probable cause
- OSHA won't tell you all of your rights, including important ones
 - Fourth Amendment – OSHA needs a warrant or your consent
 - Right to limit the scope of an inspection/restrict access

Important Rights – The Right to Say “No”

- The right to:
 - Refuse to sign anything
 - Refuse to be recorded
 - Refuse to speak to the inspector (if no subpoena) – everything is **voluntary**
 - Object to the inspector taking photos or video due a concern that trade secrets may be disclosed
 - Refuse any “unreasonable” request (OSH Act of 1970)
 - Refuse to perform a “demonstration” of any work process or activity

Stage One – Opening Conference

- OSHA will arrive with no notice given
- Ask to see badge/credentials
- Inspector should tell you (and you have the right to know):
 - Why OSHA is there (e.g., accident, employee complaint, reported injury, programmed inspection, etc.)
 - What and where are the potential hazards
 - What the inspector plans to do

Stage Two – Document Demands

- Inspector will ask you to produce documents
- 300, 300A, 301 Logs – must be given w/in 4 business hours of request
- No set time limit for other documents
- Requests must be limited to scope of inspection/probable cause (e.g., training records, inspections, etc.)
- Requests must be related to incident/relevant issues
- Request that CSHO put requests in writing.

Stage Three – Walkaround

- CSHO has the right to collect evidence (photos, videos, samples, speak with employees)
- Employer has the right to have a representative accompany CSHO
- Any violations the CSHO views is plain sight can expand the scope of the inspection
- Strategies
 - Plan the route
 - Side-by-side photos
 - Ask questions
 - Detailed notes
 - No admissions – correct, but do not admit, apparent violations

Stage Four - Interviews

- Critical distinction exists between interviews of:
 - management/supervisors (entitled to company representation); and
 - non-supervisory employees (private interviews)
- All interviews are voluntary, unless OSHA issues a subpoena
 - If no subpoena, employee can decline or end interview
- Prepare all witnesses for interviews
 - Goal – accuracy
 - Understand relevant/controlling legal issues
 - Example: General Duty Clause Case – “recognized hazard”

Perform Accident Investigation with Understanding of Burden of Proof

- **Four Elements OSHA Needs to Prove**
 - Standard applies
 - Standard was violated (not complied with)
 - One or more employees had access to the hazard
 - Employer knew or (in the alternative) should have known of the alleged violation or hazardous condition
- **Is Your Crane Operator a Supervisor?**
 - If only employee on site?
 - If A/D director?
- **Employee Misconduct**
 - Civil versus OSHA matter

Perform Accident Investigation with Understanding of ASME B30.5

■ 5-3.1.3 Responsibilities

(a) Crane Owner. The crane owner has custodial control of a crane by virtue of lease or ownership.

(b) Crane User. The crane user arranges the crane's presence on a worksite and controls its use there.

(c) Site Supervisor. The site supervisor exercises supervisory control over the worksite on which a crane is being used and over the work that is being performed on that site.

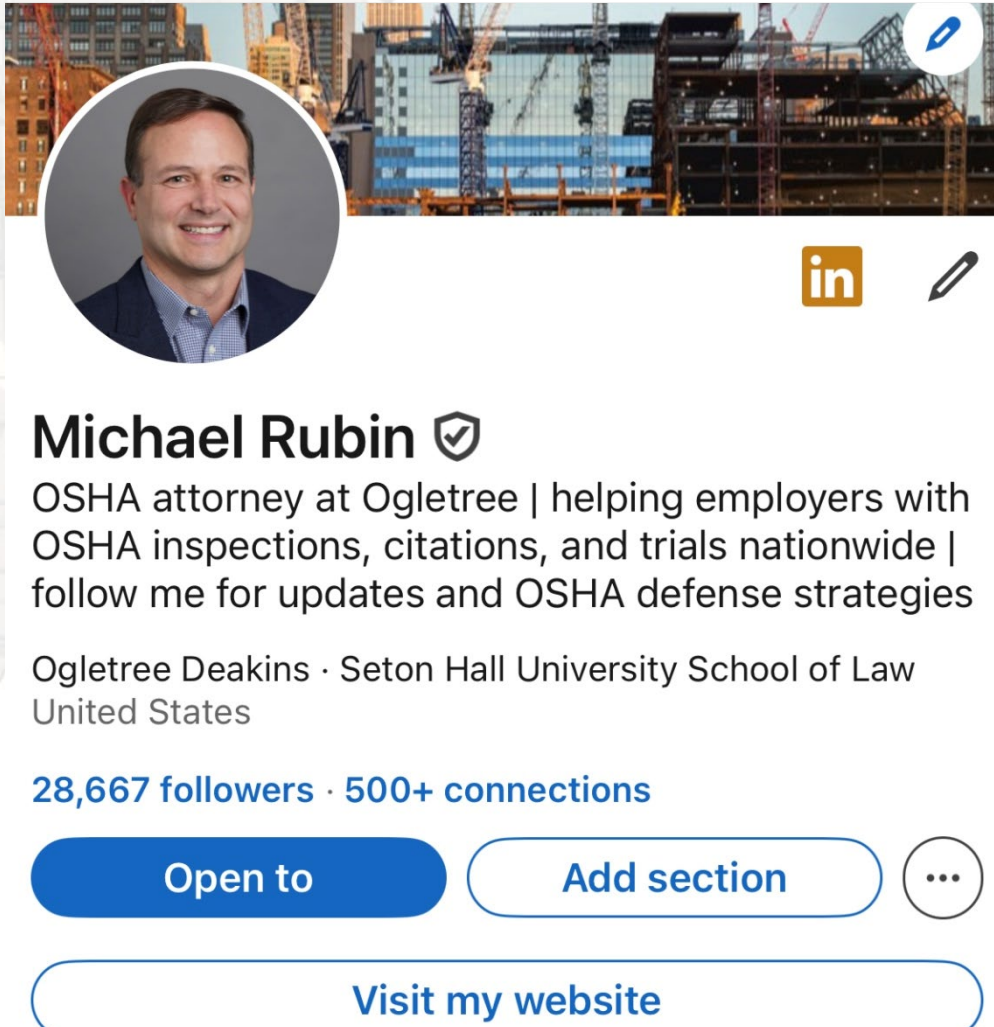
(d) Lift Director. The lift director directly oversees the work being performed by a crane and the associated personnel.

(e) Crane Operator. The crane operator directly controls the crane's functions.

(f) Rigger. The rigger selects, configures, and assembles the rigging equipment for attachment, support, control, and detachment of the load during lifting activities.

(g) Signalperson. The signalperson delivers hand, voice, or special signals (see Section 5-3.3) to direct movement of the crane or load or both when necessary(see para. 5-3.1.3.3.1(v))

Follow me on LinkedIn!



A screenshot of a LinkedIn profile for Michael Rubin. The profile includes a circular profile picture of a man in a suit, a background image of a construction site, and a blue pencil icon in the top right corner. Below the picture is the LinkedIn logo and another pencil icon. The name "Michael Rubin" is followed by a verified badge. The bio reads: "OSHA attorney at Ogletree | helping employers with OSHA inspections, citations, and trials nationwide | follow me for updates and OSHA defense strategies". The location is "Ogletree Deakins · Seton Hall University School of Law United States". It shows "28,667 followers · 500+ connections". At the bottom are buttons for "Open to", "Add section", and a three-dot menu. A "Visit my website" button is also present.

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Thank you

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