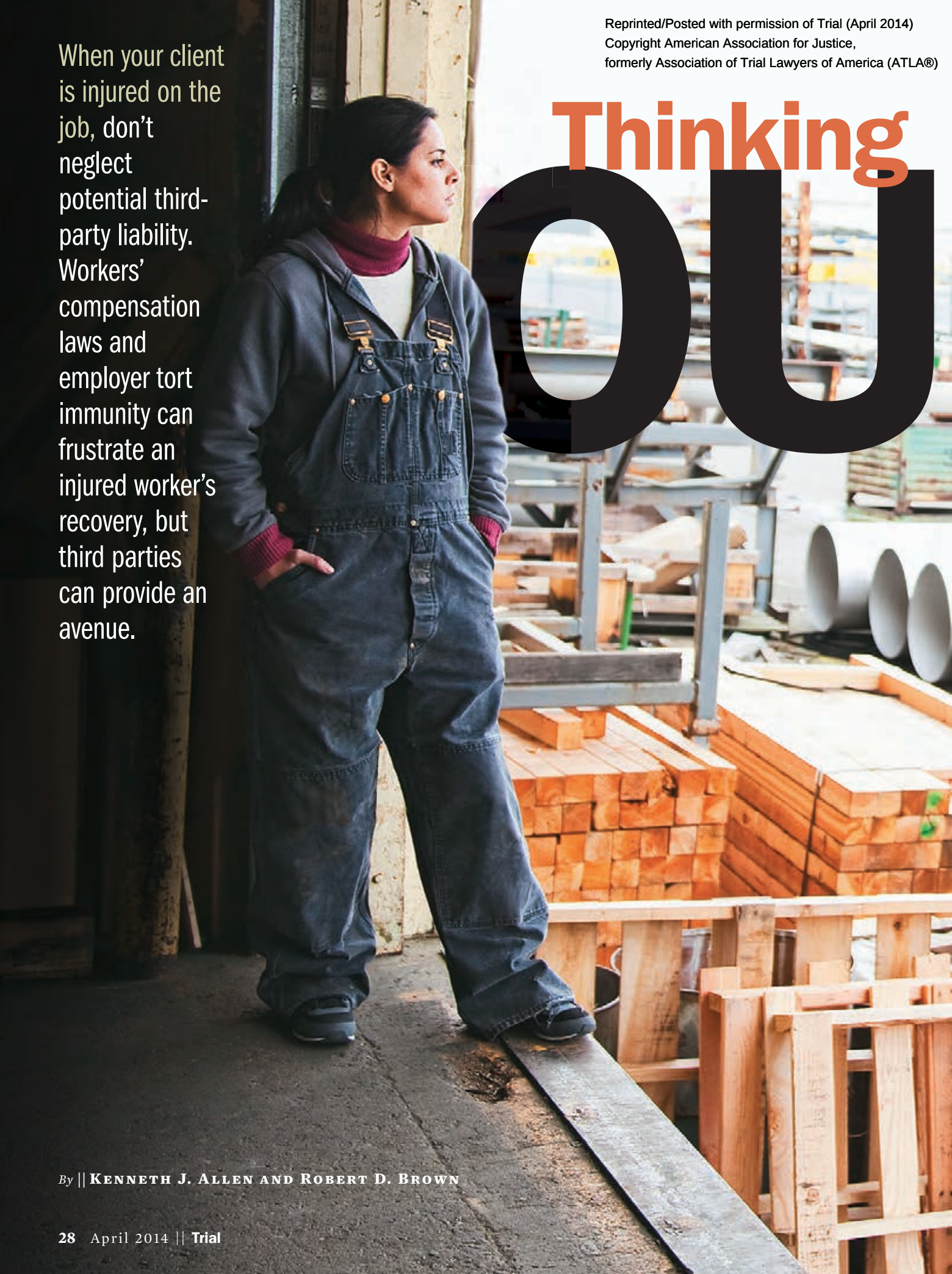
Thinking OUT

When your client is injured on the job, don't neglect potential third-party liability. Workers' compensation laws and employer tort immunity can frustrate an injured worker's recovery, but third parties can provide an avenue.



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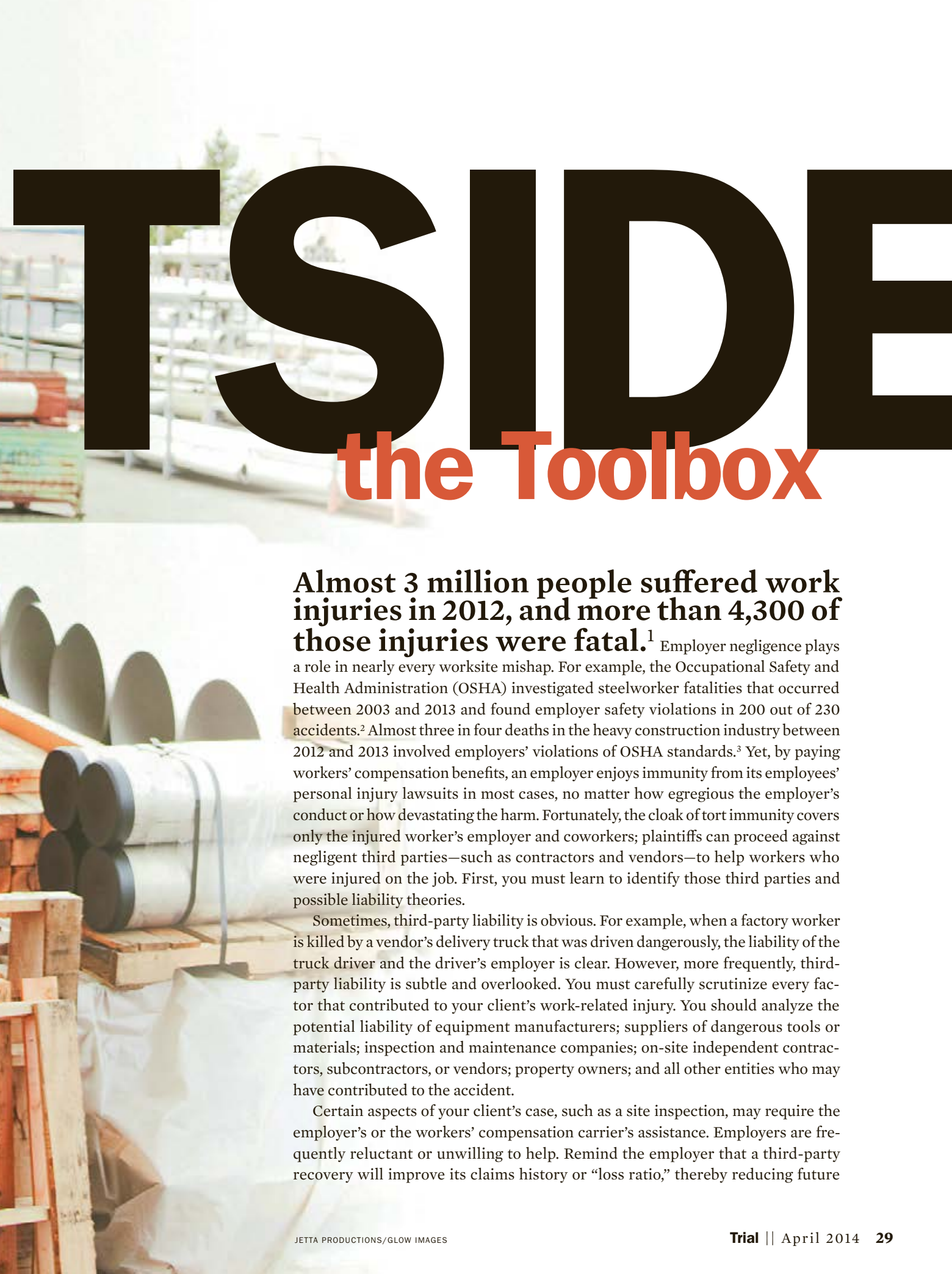

TSIDE the Toolbox

Almost 3 million people suffered work injuries in 2012, and more than 4,300 of those injuries were fatal.[1] Employer negligence plays a role in nearly every worksite mishap. For example, the Occupational Safety and Health Administration (OSHA) investigated steelworker fatalities that occurred between 2003 and 2013 and found employer safety violations in 200 out of 230 accidents.[2] Almost three in four deaths in the heavy construction industry between 2012 and 2013 involved employers' violations of OSHA standards.[3] Yet, by paying workers' compensation benefits, an employer enjoys immunity from its employees' personal injury lawsuits in most cases, no matter how egregious the employer's conduct or how devastating the harm. Fortunately, the cloak of tort immunity covers only the injured worker's employer and coworkers; plaintiffs can proceed against negligent third parties—such as contractors and vendors—to help workers who were injured on the job. First, you must learn to identify those third parties and possible liability theories.

Sometimes, third-party liability is obvious. For example, when a factory worker is killed by a vendor's delivery truck that was driven dangerously, the liability of the truck driver and the driver's employer is clear. However, more frequently, third-party liability is subtle and overlooked. You must carefully scrutinize every factor that contributed to your client's work-related injury. You should analyze the potential liability of equipment manufacturers; suppliers of dangerous tools or materials; inspection and maintenance companies; on-site independent contractors, subcontractors, or vendors; property owners; and all other entities who may have contributed to the accident.

Certain aspects of your client's case, such as a site inspection, may require the employer's or the workers' compensation carrier's assistance. Employers are frequently reluctant or unwilling to help. Remind the employer that a third-party recovery will improve its claims history or "loss ratio," thereby reducing future

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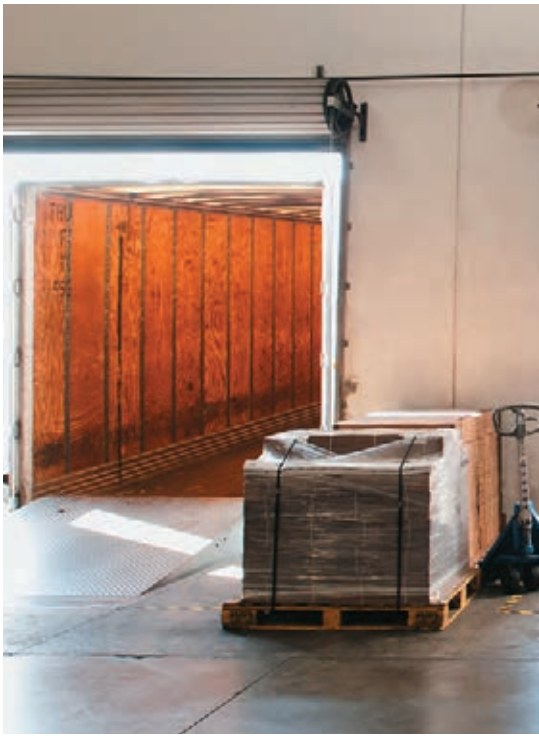
workers' comp insurance premiums. You can also contact workers' comp carriers directly—they usually understand the benefit of assisting with your third-party case given their subrogation interest in the worker's third-party recovery.

The employer and its carrier may be uncooperative or adversarial if your jurisdiction permits third-party defendants to file cross claims against an employer, or when the employer has an enforceable contract requiring it to indemnify and defend the negligent third party.[4] Some states have rules permitting an injured worker to bring an action for the sole purpose of conducting discovery to ascertain liable third parties; others, like Pennsylvania, permit presuit discovery to identify third parties.[5] Absent such a statutory remedy, the best and perhaps only prudent course of action when the employer refuses to cooperate is to commence an action against the employer seeking a temporary restraining order to preserve critical evidence and compelling production of accident investigation reports and other information identifying potential third parties.

If you do not bring a lawsuit immediately, at a minimum, send a spoliation letter directing the employer and its insurer to preserve the tools and equipment involved in the accident, as well as all critical documents and data. Be sure to itemize the evidence to be preserved in detail because merely asserting "all relevant documents" leaves too much latitude. A California appellate court held that a party charged with negligent spoliation has no duty to preserve evidence for a plaintiff's use against a third party absent a specific request to do so.[6] Remind the employer and its insurer that compliance with routine retention practice does not, in itself, immunize a party from potential spoliation liability.[7] "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[8] If the employer ignores your request, you may be able to assert a spoliation claim or seek sanctions when that evidence is lost, destroyed, or altered.[9]

When your client's injury results from the use of equipment, tools, or machinery, an engineering expert will be essential to ascertain whether the product was defectively designed or malfunctioned, or whether its warnings or instructions were deficient.



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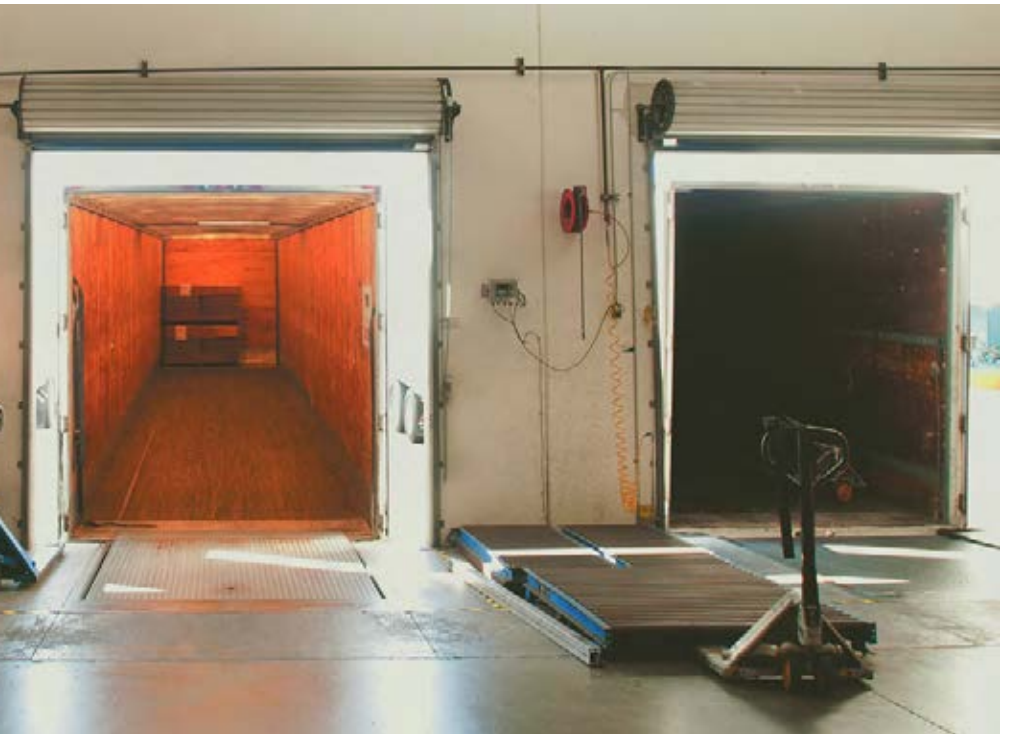
Case Investigation

Accident scenes change; tools and equipment are lost, destroyed, or altered; witnesses move away; and memories fade. So early investigation is critical. Interview your client and his or her coworkers about what led to the accident. What job procedure or industrial process was being performed at the time, why, by whom, and how? Are they aware of any previous similar accidents? What equipment, tools, or materials were being used? Who was present during and before the accident? What was your client and each witness's role in the project or task? Videotape or photograph the scene, including the equipment and process involved. Preserve items involved in the accident, such as clothing, shoes, safety equipment, and tools.

Documents. Obtain copies of every accident report and fault analysis, and the employer's internal investigation. Most collective bargaining agreements require a joint employer-union safety committee to investigate lost-time accidents (when your client is out of work due to the injury), and the information gathered can be invaluable. Contact your client's union representatives for assistance and for a copy of the investigation documents. Safety committee members will likely be aware of prior similar accidents, some of which may have led to litigation and can shed light on potential third-party liability.

To find information about other similar incidents (OSI) on the same worksite, first look to OSHA. It maintains the integrated management information system (IMIS), a database easily searchable by keyword, text in the summary, event date, or industry. It helps find OSIs, summarizes OSHA's fatality and catastrophic injury investigations, and is accessible via OSHA's website.[10] Another way to discover OSIs is by



searching local newspaper archives for accidents at a particular plant or project. This can produce a treasure trove of information, such as the identities of potential witnesses.

When vendors or outside contractors are directly involved, demand copies of their contracts with your client's employer. In a general industry case, the plant operator/employer may have a "master agreement" under which the third party/vendor periodically sends invoices to the plant operator. Often only the invoices are produced in discovery as the "contract," so make sure you request and obtain all master or general agreements.

In a typical construction accident case, the employer may be a subcontractor hired by the construction manager, the general contractor, or the landowner. The contract documents will reveal the identities and relationships of these entities and all others on the site, their insurance carriers, and any indemnification agreements. These contracts usually impose safety duties on the parties, the breach of which will support a third-party claim.

Send a Freedom of Information Act request to OSHA regarding its investigation of the accident. Its file may include photographs, witness statements, diagrams, and the identities of everyone on site at the time. The employer must file a "First Report of Accident" with the state workers' compensation board, and you should request a copy. These documents are generated almost immediately after the accident and contain invaluable information relevant to your third-party liability investigation and analysis.

Codes, standards, and regulations. Codes, standards, and accepted custom and practice exist in practically every industry governing work processes, products, tools, and equipment. Identify which ones apply to your case. For example, if a vendor supplying services to a steel mill agreed to ensure OSHA compliance but created a dangerous trip hazard by piling debris in the aisle near its work area, this could serve as a basis for holding the contractor liable for a mill worker's trip and fall injury.[11] Many states enacted construction and general industrial safety laws in the early 1900s, which imposed non-delegable safety duties at work sites, thereby governing employers and third parties alike. But since the advent of tort "reform," most have been repealed, with a few notable exceptions.[12]

Always consider OSHA's multi-employer jobsite rules, which allow more than one employer to be cited for a hazardous condition that violates OSHA standards, particularly when the injured worker's direct employer (the steel mill in the previous example) has similarly violated OSHA rules.[13] This will enable you to mitigate the direct employer's fault by establishing that the third party, as a creating, exposing, or controlling "employer," owed the injured worker the same duty as the direct employer.[14]

Look for potential violations of other industry codes and standards, including those promulgated by the American Society for Testing and Materials International (ASTM), American National Standards Institute (ANSI), International Organization for Standardization (ISO), and Building Officials and Code Administrators International, Inc. (BOCA). Various trade association guidelines can also be useful, such as the American Concrete Institute and American Iron and Steel Institute. Standards exist for nearly every product or procedure—find them or direct your consultants to do so.

Experts. Hire a qualified safety expert from the outset. When your client's injury results from the use of equipment, tools, or machinery, an engineering expert will be essential to ascertain whether the product was defectively designed or malfunctioned, or whether its warnings or instructions were deficient. It is also helpful to retain experts on the manufacturing process or the industry involved. They can provide valuable insight into standard practice,

applicable industry regulations, and the responsibilities of the parties involved.

Defective Products

When a worker is injured while using a product—which broadly encompasses the tools, equipment, machines, and vehicles involved in the accident—there may be a basis for pursuing a products liability claim against the manufacturer or supplier. Although products liability laws vary by jurisdiction, they generally provide a basis for recovery against a manufacturer and supplier of a defective and unreasonably dangerous product.[15] A product may be dangerously defective because of a manufacturing defect, a defective design, or failure to provide adequate warnings.[16] For example, a power saw may be defectively manufactured, causing its blade to shatter simply from centrifugal force, or the tool may be designed with inadequate guards, exposing the worker to unreasonable danger during use. Adequate warnings and instructions for any apparatus must be supplied, particularly when foreseeable use may expose the worker to latent dangers.[17] Thorough analysis of all the instrumentalities involved in the accident is absolutely critical as products liability claims often provide the only route to third-party recovery.

Often the products and equipment used on work sites, such as overhead cranes, are manufactured or sold far outside the statute of repose for products liability actions. But that does not necessarily time-bar your client's third-party liability claim. Conduct discovery to determine whether the product was reconditioned, substantially altered, or modified; if so, argue that these changes were so significant that a "new" or different product resulted, restarting the statute of repose period.[18]

When a third party supplies the employer with a used product for which

Carefully analyze the conduct of all third-party entities with a direct connection to the accident to determine whether they owed a duty of care to the injured worker. A breach of that duty would support a negligence claim.

the repose period has expired, the manufacturer may have a valid statute of repose defense. But the supplier might face liability for providing a product knowing that it was or would likely be dangerous.[19] If the statute of repose irrefutably bars a products liability claim, but the product was not maintained or repaired in-house by the employer, explore the possibility that a third-party maintenance, inspection, or repair company should be held liable for not correcting or warning about the dangerous condition.

Apart from strict products liability, simple negligence may provide a basis for tort recovery against a third-party supplier that provided the tools or equipment but failed to make them safe or discover the danger and warn the employer.[20] For example, if your client fell from a ladder or platform that is unsafe for the purpose for which it was supplied—such as a ladder without a cage—the third-party seller may be held liable, even if the ladder or platform is affixed to the employer's premises.[21]

Dangerous Premises

The factory or premises where the injured worker was hurt might not be owned or maintained by the employer, exposing a third-party entity to potential tort liability when employees are injured by a condition of the premises or by others' dangerous behavior. The property owner must maintain its premises in a reasonably safe condition, but it generally has no duty to provide a factory employee with a safe place to work.[22]

The scope of this duty is embodied in *The Restatement (Second) of Torts*, which provides that a landowner is subject to liability if it knows or should know of a danger and should realize it involves an unreasonable risk; should expect that invitees will not realize the danger or will not protect themselves against it; and fails to exercise reasonable care to protect the invitees from danger.[23] The landowner's duty to maintain the premises in a reasonably safe condition protects employer and employees alike, as well as invitees lawfully on the premises.[24] The restatement recognizes that more than one entity can be a "possessor" of land, exerting the requisite control to support tort liability for known dangerous conditions for which it did not warn or correct.[25]

A landowner must exercise

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reasonable care to discover defects or dangerous conditions on the premises and will be held liable for injuries that result from any dangerous condition that could have been discovered; this duty is ongoing[26] and extends to protecting invitees from the foreseeable, dangerous behavior of others on the premises.[27] Other third parties may be liable as well. If a contractor or vendor created the dangerous condition or was charged with inspection or maintenance duties, third-party liability may follow.

For example, a vendor in a processing plant who contracts with the plant operator/employer to provide cleaning services incurs third-party liability to a plant employee injured while falling on waste material the vendor negligently failed to remove. A construction manager hired to perform daily site inspections can be held liable for harm to employees of a specialty contractor injured by uncorrected hazards the construction manager should have seen and remediated. In both examples, the third parties could be deemed possessors of a portion of the premises, and each may incur landowner liability, as well as potential liability for breach of their contractual obligations.

Third-Party Duties

Carefully analyze the conduct of all third-party entities with a direct connection to the accident to determine whether they owed a duty of care to the injured worker. A breach of that duty would support a negligence claim.

Contractual duty of care. A duty of care may arise contractually.[28] Where the contract affirmatively evinces the parties' intent to charge one party with a duty of care, actionable negligence may be predicated on the failure to carefully perform that contractual duty.[29] Courts generally hold that a duty of care may arise out of a contractual obligation in three circumstances: where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; the worker has suffered injury as a result of reasonable reliance on the third-party defendant's continuing performance of a contractual obligation; or the contracting party has displaced the employer's duty to maintain the instrumentality or premises safely.[30]

For example, the cleaning contractor who leaves a floor wet and slippery increases the risk of harm to workers traversing the floor and may incur liability for fall injuries. Or that contractor may incur third-party liability if it is contractually required to clean up after each shift yet fails to remove debris, which causes a worker to fall during the shift change.

Close scrutiny of all contracts between the property owner and any vendor, contractor, or other third party is important. The essential contract terms often are contained on the back of a purchase order or invoice, so be sure to demand production of the original documents. The goal is to find a contractual provision imposing a duty of care, the breach of which is a causal factor in the accident. This could include an agreement to comply with OSHA, to ensure safety, to supply safe and adequate equipment, or to inspect and

MORE ON WORKPLACE INJURY

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Workers' Compensation and Workplace Injury

www.justice.org/sections

AAJ LITIGATION GROUP

Workers' Injury Law & Advocacy Group

www.justice.org/litgroups

AAJ EDUCATION PROGRAM

2013 Annual Convention: Social Security/ Workers' Compensation Section Program

www.PlaybackAAJ.com

warn about unsafe conditions.

Assumption of duty. A duty of care supporting tort liability may arise where the third party assumes such a duty, either gratuitously or contractually.[31] For example, an entity voluntarily conducting safety inspections, holding safety meetings, or correcting safety violations may have assumed a duty of safety, creating third-party liability. Some courts have found that an insurance company assumes a duty regarding safety when it gratuitously undertakes to conduct safety inspections and render safety engineering services.[32] Never constrain your search for third parties by looking only at the obvious actors.

When workers are seriously injured on the job, workers' compensation benefits may leave employees without a sufficient remedy. But if the facts and circumstances are carefully analyzed, third-party liability can provide a solution. Although it is typically a long and arduous battle, with proper investigation, creativity, and hard work, trial lawyers can impart some measure of justice to an otherwise unjust system via third-party recovery in tort.


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Notes

1. Press Release, U.S. Dept. of Lab., Bureau of Lab. Statistics, Workplace Injury and Illness Summary (Nov. 7, 2013), www.bls.gov/news.release/osh.nr0.htm; Press Release, U.S. Dept. of Labor, Bureau of Lab. Statistics, Census of Fatal Occupational Injuries Summary, 2012 (Aug. 22, 2013), www.bls.gov/news.release/cfoi.nr0.htm.
2. U.S. Dept. of Labor, Occupational Safety & Health Admin., Fatality and Catastrophe Investigation Summaries (Feb. 2, 2003 through Feb. 2, 2013), http://tinyurl.com/lchgnpq.
3. U.S. Dept. of Labor, Occupational Safety & Health Admin., Fatality and Catastrophe Investigation Summaries (Jan. 1, 2012 through Dec. 31, 2012), http://tinyurl.com/oqeu4ax.
4. For examples of jurisdictions permitting cross claims against employers, *see e.g.* Cal. Lab. Code Ann. §3864 (2014); 77 Pa. Stat. Ann. §481(b) (2014); *Union Carbide Corp. v. SWECO, Inc.*, 610 S.W.2d 932 (Ky. App. 1980).
5. *See e.g.* Ill. Sup. Ct. R. 224 (2014); Tex. R. Civ. P. 202.1 (2014); Pa. R. Civ. P. 4003.8 (2013).
6. *Dunham v. Condor Ins. Co.*, 66 Cal. Rptr. 2d 747 (Cal. App. 1st Dist. 1997).
7. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988).
8. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Most federal courts are in accord. *See e.g. Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011); *Williams v. N.Y.C. Transit Auth.*, 2011 WL 5024280 (E.D.N.Y. Oct. 19, 2011).
9. In jurisdictions that do not recognize the viability of spoliation as an independent tort, spoliation of evidence in a party's control generally supports the inference that had the evidence been preserved and produced, it would have been detrimental to that party and, if intentional, may support an award of sanctions under Fed. R. Civ. P. 37. *See e.g. Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 502–3 (S.D.N.Y. 2013); *Patton v. Wal-Mart Stores, Inc.*, 2013 WL 6158467 (D. Nev. Nov. 20, 2013).
10. www.osha.gov/pls/imis/accidentsearch.html.
11. The vendor's liability flows from its violation of the OSHA housekeeping standard, 29 C.F.R. §1910.22 (2014), as well as its violation of OSHA's Multi-Employer Citation Policy, CPL 02-00-124 (1999).
12. New York and Montana are two of the exceptions. *See* N.Y. Labor Law §241(6) (2013); *see also* Montana Safety Act, Mont. Code Ann. §50-71-201 (2013).
13. *See* OSHA's Multi-Employer Citation Policy, CPL 02-00-124, *supra* n. 11.
14. *See e.g. Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803-04 (6th Cir. 1984); *Arrington v. Arrington Bros. Constr., Inc.*, 781 P.2d 224, 228 (Idaho 1989).
15. *Restatement (Second) of Torts* §402A (1965).
16. *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992); *West v. Searle & Co.*, 806 S.W.2d 608, 610 (Ark. 1991).
17. *See East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1118, 1120 (D.C. 1990); *Light v. Weldarc Co.*, 569 So. 2d 1302, 1303–1304 (Fla. 5th Dist. App. 1990); *Fisher v Multiquip, Inc.*, 96 A.D.3d 1190, 1192 (N.Y. App. Div. 3d Dept. 2012).
18. *Malen v. MTD Prods., Inc.*, 628 F. 3d 296, 306–07 (7th Cir. 2010); *Richardson v. Gallo Equip. Co.*, 990 F.2d 330, 331 (7th Cir. 1993); *Denu v. W. Gear Corp.*, 581 F. Supp. 7, 8 (S.D. Ind. 1983).
19. *Restatement (Second) of Torts* §§399, 388.
20. *Id.* at §392.
21. *Id.* at §388 illus. 4.
22. *Chance v. Dallas Co., Ala.*, 456 So.2d 295, 301 (Ala. 1984); *Goodman v. Kendall Gate-Investco, Inc.*, 395 So. 2d 240, 241 (Fla. 3d Dist. App. 1981); *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264–65 (Ind. App. 5th Dist. 2002).
23. *Restatement (Second) of Torts* §343.
24. *Case v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 597, 601–02 (S.D. Miss. 1998).
25. *See Restatement (Second) of Torts* § 328E; *see also e.g. Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 685 (Ind. App. 1st Dist. 2006).
26. *Lutheran Hosp. of Ind., Inc. v. Blaser*, 634 N.E.2d 864, 868 (Ind. App. 4th Dist. 1994); *Olmanson v. LeSueur Co.*, 693 N.W.2d 876, 881–82 (Minn. 2005).
27. *Novak v. Capital Mgt. & Dev. Corp.*, 452 F.3d 902, 908 (D.C. Cir. 2006); *Hopper v. Colonial Motel Props., Inc.*, 762 N.E.2d 181, 188 (Ind. App. 1st Dist. 2002).
28. *Pope v. McCrory*, 575 So. 2d 1097, 1099 (Ala. 1991).
29. *Perryman v. Huber, Hunt & Nichols, Inc.*, 628 N.E.2d 1240, 1244 (Ind. App. 1 Dist. 1994).
30. *Espinal v. Melville Snow Contractors, Inc.*, 773 N.E.2d 485, 488 (N.Y. 2002).
31. *See Davis v. Venture One Constr., Inc.*, 568 F.3d 570, 575 (6th Cir. 2009). The restatement imposes such a duty where the party that assumed the duty should recognize its performance as necessary for the protection of a third person, and where the failure to exercise reasonable care increased the risk of harm, or the harm is suffered because of the third person's reliance on the undertaking, or he has undertaken to perform a duty owed by the other to the third person. *See Restatement (Second) of Torts* §324A.
32. *See Hill v. U.S. Fid. & Guar. Co.*, 428 F.2d 112, 115–20 (5th Cir. 1970) (the plaintiff can bring an action against an insurer for negligent inspection under Florida law); *Deines v. Vermeer Mfg. Co.*, 752 F. Supp. 989, 996–97 (D. Kan. 1990) (insurer's safety inspection on manufacturer's behalf subjected insurer to possible tort liability); *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769, 778 (Ill. 1964).