

Fatal Falls: The Downside of the Construction Boom

American workers depend on the United States Occupational Safety and Health Administration (OSHA) to ensure that their workplaces are safe, and OSHA's worker safety protection role is especially critical in the construction sector. Construction accounts for two of the ten deadliest occupations in the nation.¹ There were 908 construction fatalities in the US in 2014, accounting for 19 percent of US occupational fatalities that year.

OSHA is tasked with enforcing its construction employer safety standards by inspecting construction sites and issuing citations and assessing penalties for any violations of standards² Yet, in Western New York, as in the rest of the nation, no matter how committed they are to worker safety, OSHA administration and staff are constrained by wholly inadequate budget appropriations and a penalty schedule that, despite a recent increase in maximums set by Congress, will still result in most fines amounting to mere slaps on the wrist. This leaves workers at risk throughout the construction industry.

The Western New York Council on Occupational Safety and Health (WNYCOSH) reviewed the results of all construction site inspections conducted in 2014 by the OSHA Buffalo Area Office. The results were disturbing. We found that significant violations are prevalent throughout the construction industry in the Buffalo area and that OSHA's inspection and enforcement activities are seriously inadequate.

Key Findings

- OSHA conducts too few inspections. In 2014, the Buffalo Area Office conducted 288 construction inspections, or only one inspection per weekday on average in a ten-county area that includes Rochester as well as Buffalo.³ The insufficiency of this number is seen when contrasted with just the 3,695 single-family home construction permits issued in this area in 2013 and 2014.
- Inspectors found a violation in 83 percent of construction inspections. 82 percent of these violations were classified as "serious," and another four percent were termed "repeat" or "willful."
- 98 percent of the 48 inspections of roofing contractors in 2014 cited at least one violation of an OSHA standard intended to prevent height-related injuries.
- The average penalty totaled only \$1,963 for inspections that found at least one violation – too little to effectively deter construction employers from taking safety shortcuts that endanger their workers.

Recommendations

- *Congress must increase maximum allowable OSHA penalties beyond the increases enacted that take effect in 2016.*
- *OSHA's budget must be increased to add enough inspectors to ensure that all workplaces are regularly monitored.*
- *Given OSHA's limitations and the number of violations that were gravity-related, other workplace protections like the Scaffold Safety Law must be maintained.*

The Western New York Council on Occupational Safety and Health (WNYCOSH) is a non-profit organization with a 37 year history of educating and advocating for safe jobs in the Buffalo region. The WNY Worker Center, a project of WNYCOSH, serves low-wage workers in all sectors of employment and includes immigrant and native-born residents of Western New York. It addresses violations on the job, which include wage theft, health and safety issues and discrimination.

Methodology

We tabulated the number of inspections, the number of violations cited and the dollar value of assessed penalties. Falls from an elevation were 49 percent of construction fatalities in New York in 2011 and 2012.⁴ Because falls account for such a large share of construction fatalities, we separately tabulated violations of OSHA's safety standards specifically intended to prevent construction worker falls and other height-related accidents.

We also focused on construction falls because the construction and insurance industries are promoting legislation that would severely weaken New York's Scaffold Safety Law (Labor Law Section 240). The Scaffold Safety Law appropriately holds building owners and contractors fully liable when their failure to provide appropriate and necessary equipment for working safely at an elevation causes a worker to be injured or killed. The proposed changes in the Scaffold Safety Law would relieve them of much of their responsibility for site safety and result in employers taking yet more safety shortcuts. More workers would be put in danger of a serious height-related injury or death.

Findings

Too few inspections

OSHA inspected between only five and seven percent of construction employers in New York State in 2010, according to the *Construction Chart Book* issued by the Center for Construction Research and Training.⁵ The *Chart Book* explains that not only was the proportion of construction establishments inspected by OSHA "low," but "the number of worksites visited can be much lower than the number of inspections since multiple employers are usually working at one construction site." Research by the New York Committee for Occupational Safety and Health found that in April 2014 there were only 71 OSHA safety and health inspectors to inspect all OSHA-covered workplaces in New York, down from 82 in 2011.

Thus, our finding that only 288 construction employer inspections were conducted in 2014, about one a weekday on average, was unfortunately not unexpected.⁶ This very limited inspection effort can be contrasted with the enormous amount of construction, demolition and renovation work in the ten counties covered by the Buffalo Area Office. Permits for new construction were issued for 1,752 single-family homes in 2013 and for 1,973 single-family homes in 2014 for those counties.⁷ *Engineering News Record-New York* reports that construction starts were valued at \$1.6 billion in the Buffalo-Niagara Falls area in 2013 and forecast \$2.1 billion in starts in 2014. Rochester construction starts were valued at about \$1.4 billion in 2013.

Inspectors found at least one violation in 84 percent of inspections.

Construction work is inherently hazardous, yet to save time and money, many construction employers take safety shortcuts that make it even more hazardous than necessary. We found that:

- *Inspectors cited at least one violation in 239 (83 percent) of the Buffalo Area Office construction inspections conducted during 2014.*
- *82 percent of the violations were classified as "serious," and another four percent were "repeat" or "willful" violations.*⁸ As defined by OSHA, "A serious violation exists when the workplace hazard

could cause an accident or illness that would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation.”

- *138 (48 percent) of the inspections cited a Gravity 5 or Gravity 10 violation or both.*⁹ These are OSHA’s two highest gravity scores. Gravity 10 means the violation has “high severity” and “greater probability” and Gravity 5 means “medium severity” and “greater probability.” (OSHA’s severity scale skips scores between 5 and 10.)
- *In 160 (54 percent) of the inspections, OSHA cited at least one violation of an OSHA standard intended to prevent height-related accidents.*¹⁰

The most frequently violated safety standard governs ladder safety. Among other requirements, the ladder safety standard establishes the weight of the loads the ladder must be capable of supporting, the construction and position of ladder rungs, cleats and steps, and requires that ladders be used for the purpose intended and not be used on slippery surfaces. Forty-six of the 288 construction inspections by the Buffalo Area Office cited at least one ladder safety violation.

The second most frequently violated standard was the duty to have fall protection. This standard requires guardrail systems, safety net systems, or personal fall arrest systems. It also includes fall protection requirements specifically for work on low-slope and steep roofs and precast concrete erection.

A particularly noteworthy violation of the fall protection standard was by roofing contractor Kevin Burke Home Improvement. At a construction site in Lackawanna, this employer was cited for a

How temporary workers are often deprived of compensation for injuries on the job

In this hazardous industry, temporary workers are a particularly vulnerable population. Compared to permanent workers, temporary workers in the construction and manufacturing industries are twice as likely to be injured on the job, are out of work for more time after an injury, and receive less medical and sick leave benefits.*

The New York State Workers’ Compensation Law bars workers from obtaining medical costs or lost wages due to workplace injuries from employers through litigation and requires them to rely solely on Workers’ Compensation. New York has extended this bar to “special employers” (includes temporary employment agencies), making it difficult, if not impossible, for temporary workers to recover these costs through litigation from either the temporary employment agency or the host employer. At the same time, in an effort to reduce their insurance rates, agencies increasingly misclassify workers as independent contractors or as working in an occupation other than their real one, making it impossible or difficult to receive workers’ compensation benefits. This prompted OSHA to launch a Temporary Worker Initiative in 2013 focusing on the safety and health of temp workers in this particularly hazardous industry.**

*See, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, Occupational Safety and Health Administration, p. 8. Available at <https://www.dol.gov/osha/report/20150304-inequality.pdf>

**OSHA’s Policy Background on the Temporary Work Initiative, available at https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html

Gravity 5 “willful” violation of the requirement that each employee on a steep roof with unprotected sides and edges be protected by guardrail, safety net or personal fall arrest system and

a Gravity 5 “willful” violation of the requirement for each employee on a scaffold more than 10 feet (3.1 m) above a lower level to be protected from falling to that lower level.¹¹ A “willful” violation is defined by OSHA as one which “the employer either knowingly failed to comply with a legal requirement (purposeful disregard) or acted with plain indifference to employee safety.” Willful violations are cited rarely; in FY 2014, only 433 willful violations were cited nationwide.¹²

Another noteworthy example is D & M Home Improvement. In May, an inspection in Lockport led to citations for two repeat violations – one of the ladder standard and the other of the fall prevention standard. Serious violations of four other safety standards were also cited. And an inspection in Hamburg in August led to yet another repeat fall prevention violation citation and two additional serious violation citations.

- *Roofing and framing contractor violations are especially hazardous for workers.*
 - 47 (98 percent) of the 48 inspections of roofing contractors cited at least one violation. All of these were of an OSHA standard intended to prevent height-related injuries, principally of the fall prevention standard.
 - 17 (94 percent) of the 18 inspections of framing contractors cited at least one violation.
- *Even large construction companies were cited for violations in a majority of their inspections.* Twenty-five (52 percent) of the 48 inspections of Commercial and Institutional Building Construction employers¹³ cited at least one violation. These typically are construction companies with substantial numbers of employees that construct larger commercial, industrial or institutional structures. Unlike smaller contractors, they typically employ site safety managers and have the resources to implement many other necessary safety measures. Yet they, too, sometimes cut safety corners.

Penalties assessed for violations cited in 2014 were so small they were meaningless as a safety violations deterrent:

- *The 239 construction inspections that cited at least one violation were accompanied by a total of \$932,468 in monetary penalties.* Once employers contested their citations and fines, this total was reduced 49%, to \$469,186,¹⁴ an average of only \$1,963 per inspection with at least one violation – hardly sufficient to deter even small employers from violating OSHA safety standards. The average penalty was only \$955 per violation.

Congress recently enacted an increase in maximum allowable penalties, to take effect in August 2016. Penalties will increase by about 80 percent to make up for the inflation that has occurred since they last were raised a quarter century ago.¹⁵ Yet, even with this long-delayed increase, penalties will remain far below the levels needed to effectively incentivize employers to maintain safe worksites.

- *Penalties were very small even for “repeat” and “willful” violations.* The maximum allowable penalty for a repeat or willful violation is \$70,000.¹⁶ Yet the highest penalty actually levied among the 18 repeat violations cited in 2014 was only \$16,320 and the next highest was 8,000.¹⁷ Regarding the two willful violations cited that year, the penalty for each was reduced from \$22,000 to \$4,400 by an Administrative Law Judge.

- *The penalty was reduced through an “informal settlement” in 165 inspections.* Informal settlements have been criticized by the AFL-CIO, which is concerned that OSHA apparently resorts to them because it lacks enough staff to carry out enforcement litigation.¹⁸ In testimony before a Congressional hearing in 2010, the AFL-CIO’s Director of Safety and Health explained:

“The initial citations and penalties in OSHA enforcement cases, weak to begin with, are reduced even further in the resolution of cases. Due to limited staff and resources, OSHA area directors and Department of Labor solicitors are under tremendous pressure to settle cases and avoid time consuming and costly litigation. In both informal settlements by the agency, and formal settlements after employer challenges to OSHA citations, penalties are routinely cut by another 30 – 50 percent.”¹⁹

- *Many of the penalties will never be paid.* OSHA reported that penalties in 35 inspections are in “debt collection.” According to the Center for Public Integrity, in recent years only about 12 percent of OSHA penalties referred to debt collection are ever paid.²⁰

Concluding observations

If employers always complied with OSHA construction safety standards, especially those intended to prevent falls, construction work would become substantially safer. Unfortunately, we found that because the number of inspections OSHA has been able to conduct have been too few and because the permissible penalties for safety violations have been so small as to be almost meaningless, OSHA has been prevented from ensuring that construction work in Western New York is as safe as possible.

This is not because OSHA administrators are not committed to construction safety. In 2012, OSHA launched a national construction fall prevention campaign, and for several days in June 2014 sponsored a national “Safety Stand-Down” to raise awareness among employers and workers about the hazards of falls in construction. A Safety Stand-Down is a voluntary event that OSHA encourages employees to undertake, to talk directly to employees about safety. This one focused on fall hazards and fall prevention.²¹

But if OSHA is to become truly effective in advancing construction safety much more will need to be done:

- *Allowable penalties need to be increased further.* While WNYCOSH supports the long overdue raise in OSHA fines, the increase is too small; while it catches up with inflation, the penalty levels were too low in 1990 when they were last increased. According to the AFL-CIO, in 2014 a death on the job resulted in a median OSHA fine of just \$5,050.²¹ Even a doubling this amount would have little impact on employer safety practices.
- *OSHA’s budget must be increased to add enough inspectors to ensure that all workplaces are regularly monitored.*
- *Given OSHA’s limitations and the number of violations that were gravity-related, other workplace protections like the Scaffold Safety Law must be maintained.*

¹ Source: US Bureau of Labor Statistics. The two construction occupations are roofer and construction laborer.

² The safety standards are in the Code of Federal Regulations Sec. 1926, Safety and Health Regulations for Construction.

³ These were inspections of employers counted in North American Industry Classification System code 23 (construction). Inspection details were obtained from the on-line OSHA Integrated Management Information System. A number of employers were inspected two or three times in 2014.

⁴ See, *The Price of Life, 2015 Report on Construction Fatalities in New York*, New York Committee for Occupational Safety and Health.

⁵ Center for Construction Research and Training, *The Construction Chart Book*, 5th Edition, April; 2013, p 50. Available at <http://www.cpwrr.com/sites/default/files/publications/CB%20page%2051.pdf>

⁶ OSHA has refocused its construction inspections nationwide, conducting fewer inspections overall but conducting more partial inspections of sites where greater hazards may exist. We found that the number of partial construction inspections by Buffalo Area Office increased from 186 in 2003 and 2004 combined to 324 in 2013 and 2014 combined. However, the number of comprehensive inspections fell from 669 to 343 during the same periods.

⁷ Source: US Census Building Permits Survey.

⁸ Besides the serious, repeat and willful violations, the remaining violations were “other than serious” violations, which OSHA defines as, “A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm.”

⁹ 111 inspections cited a G-5 violation and 28 inspections cited a G-10 violation.

¹⁰ These are: scaffold standards in CFR 1926.451, 452 and 453; fall protection standards in CFR 1926.501, 502 and 503; ladder and stairway standards in CFR 1926.1051, 1052 and 1053 and CFR 1926.1425

¹¹ The total penalties for these two violations were reduced from \$44,000 to \$8,800 through an Administrative Law Judge determination. In addition, there were six “serious” violations including three violations of standards for scaffolds and two of fall protection standards. The total penalty for all eight violations reduced from \$56,400 to \$10,000.

¹² As reported in the 2015 edition of the AFL-CIO report, *Death on the Job: The Toll of Neglect*, available at <http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnbug.pdf>

¹³ North American Industry Classification System code 2366220.

¹⁴ One employer was contesting their initial violations and penalties of \$3,000 as of November 2015.

¹⁵ The maximum fine for a “serious” violation will increase to \$12,500, up from the current \$7,000.

¹⁶ The increases that take effect in August 2016 will bring maximum allowable penalties for the most egregious “willful” and “repeat” violations to \$125,000, an increase from the current \$70,000 maximum.

¹⁷ An employer may be cited for a repeat violation if they were cited for a substantially similar violation within five years. Repeat violations against Western New York construction employers were cited infrequently in 2014, largely because most employers are not inspected twice within a five-year period.

¹⁸ See, for instance, AFL-CIO’s testimony at a Congressional hearing in 2010: “The initial citations and penalties in OSHA enforcement cases, weak to begin with, are reduced even further in the resolution of cases. Due to limited staff and resources, OSHA area directors and Department of Labor solicitors are under tremendous pressure to settle cases and avoid time consuming and costly litigation. In both informal settlements by the agency, and formal settlements after employer challenges to OSHA citations, penalties are routinely cut by another 30 – 50 percent.” <http://www.aflcio.org/Legislation-and-Politics/Testimonies/Submitted-Statement-of-Peg-Seminario>.

¹⁹ Submitted Statement of Peg Seminario, Director Safety and Health, AFL-CIO To the House Committee on Education and Labor Subcommittee on Workforce Protections Hearing on "Protecting America's Workers Act: Modernizing OSHA Penalties," March 15, 2010.

²⁰ Center for Public Integrity, *Even after workplace deaths, companies avoid OSHA penalties*, December 21, 2012.

²¹ During the stand-down, employers and workers were asked to pause their workday to talk about fall prevention in construction, and discuss topics like ladder safety, scaffolding safety and roofing work safety.

²¹ National Council on Occupational Safety and Health statement on increased fines and comment from AFL-CIO <http://www.coshnetwork.org/OSHA-Fines-Rise> .