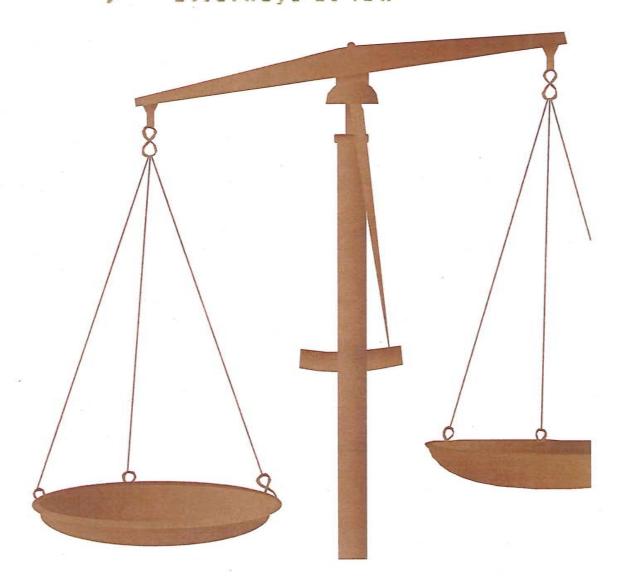


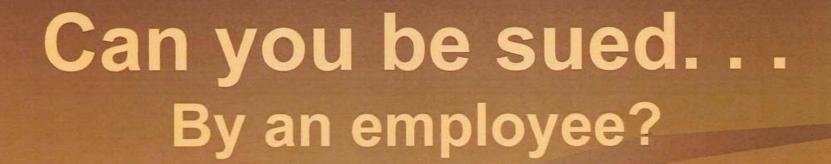
### BODYFELT/MOUNT



# LEGAL LIABILITY FOR THE SAFETY PROFESSIONAL

#### Overview

- 1 Civil Liability to an injured employee
- 2 Civil Liability to a non-employee
- 3 Personal Exposure
- 4 On the Horizon
- 5 Independent Safety Consultants and Insurance



UNLIKELY!

- Workers Compensation
  - State law requires a subject employer to provide compensation for a workers' workrelated injuries
  - If the employer complies with its duties, it will not be liable for other claims brought by workers for injuries incurred in the course of employment

Workers Compensation "exclusive" remedy
 unless

 Employer had a "deliberate intention" to produce the injury or death

- OREGON WORKER'S COMPENSATION ACT
  - ORS 656.156(2) "employer wished to injure the employee"
- WASHINGTON INDUSTRIAL INSURANCE ACT
  - RCW 51.24.020 "deliberate intention means that the employer had actual knowledge that injury was certain to occur and willfully disregarded that knowledge"

- NOT Deliberate / Intentional:
  - To withhold safety equipment to save \$\$
  - To remove a "deadman" switch
  - Failure to train on forklift or require seatbelts
  - Repeated injuries from same work condition
  - Gross negligence in failure to follow safety procedures
- IS Deliberate / Intentional:
  - To instruct employees to wash hands with methyl chloride despite MSDS



1 – Civil Liability to an injured employee

2 – Civil Liability to a non-employee

Can you be sued...

By an employee of another contractor?

ABSOLUTELY!

### Smith vs. You and Your Company

Oregon Lawsuit



 Protection and safety of persons in hazardous employment "Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger to the employees or the public shall use every device, care and precaution that is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

### Smith vs. You and Your Company

Washington Lawsuit

### RCWA 49.17.060 – two fold duty:

- (1) imposes a general duty on employers to protect only the employer's own employees from recognized hazards not covered by specific safety regulations
- imposes a specific duty to comply with WISHA regulations (for ALL employees on the job)



#### Stute v. P.B.M.C., Inc.

- Roofing subcontractor's employee, working without safety devices, fell off a wet roof.
- On March 29, 1990, the Washington Supreme Court held in Stute v. PBMC that a general contractor could be held liable for an injury to a subcontractor's employee that occurred as a result of a Washington Industrial Safety and Health Act (WISHA) violation.

#### Overview

1 – Civil Liability to an injured employee

2 – Civil Liability to a non-employee

3 – Personal Exposure to Criminal Liability / Penalties

Can you be held personally responsible?

DEPENDS!

### Personal Exposure - How?

- OSHA
  - "Employer" vs. "Individual"
  - Under OSHA, only "employers" can be cited
  - Under OSHA, difficult to find individuals liable
- Federal Environmental Laws
- State Criminal Law

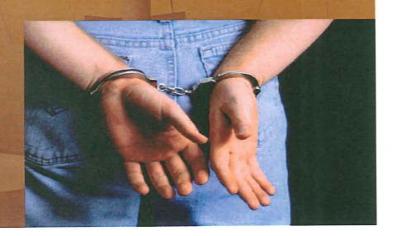
### State and Federal OSHA

· Willful violation causing death to employee

Max penalty \$10,000 or

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, max penalty \$20,000 or imprisonment for not more than one year, or by both

Washington max penalty \$100,000/\$200,000



#### State and Federal OSHA

False statements, representation or certification

Max penalty \$10,000 or Imprisonment for not more than six months, or by both

Individuals can be prosecuted



### OSHA Probability of Prosecution

- 5,700 fatalities on the job in 2005
- 5,840 fatalities on the job in 2006
- 5,488 fatalities on the job in 2007

### In 38 years and 341,000 fatals since Congress enacted OSHA:

- 68 criminal cases prosecuted (less than 2/year)
- 42 TOTAL months served in jail

### EPA Probability of Prosecution

- By comparison, in 2007 alone under the EPA:
  - 340 criminal enforcement cases
  - 64 years of jail time
  - \$63 million in penalties

Senate Comm. Health - April 29,2008

- Bush Administration's FY2009 budget request for OSHA barely topped \$500 million.
- Its request for EPA 2009 was \$7.1 BILLION
- The proposed 2009 federal budget is \$3.1 trillion. So, OSHA's work represents 0.7% of what the federal government does.

Professional Safety, March 2009

### **State Criminal Liability**

State of New York v. Minucci et al

State of New York v. Melofchik et al

 State of Arizona v. Far West Water and Sewage Company and Brent Weidman

### State of New York v.

### Minucci and Tri State Scaffold & Equipment Supplies, Inc.

Minucci enters into contract with general contractor to provide masonry work.

Both the contract and New York State building codes require a licensed engineer to design scaffold.

Minucci personally designs and constructs scaffold, despite having no license or engineering background.

5 workers die and 4 are seriously injured as a result.

### State of New York v.

Minucci and Tri State Scaffold & Equipment Supplies, Inc.

- 2<sup>nd</sup> Degree Manslaughter
- 3 to 10 years in State Prison

## State of New York v. Jeffrey Melofchik and John Galt Corp. et al

General contractor Bovis Lend Lease subcontracts with John Galt Corp., an asbestos abatement and demolition subcontractor, to remove toxic debris

John Galt Corp employees removed a crucial section of standpipe from a bank building's basement.

New York City building code requires the standpipe to be maintained

Two firemen die in bank building fire.

### State of New York v.

#### Jeffrey Melofchik and John Galt Corp. et al

- The site safety manager for Bovis (G.C.), and the director of abatement, and the foreman for John Galt (S.C.) are charged with manslaughter, criminally negligent homicide and reckless endangerment
- Each defendant is facing, if convicted of 2<sup>nd</sup> degree manslaughter, 5 to 15 years in prison
- Both the GC and the SC, combined, had more than 40 safety violations at the building earlier that year and OSHA had previously fined both contractors a combined \$464,500

#### State of Arizona

V.

### Far West Water and Sewage Company and Brent Weidman

Far West Water and Sewage Company contracted to work on an underground sewer tank in Arizona

An employee entered sewer tank and the Site foreperson turned on the sewage pump. 2<sup>nd</sup> employees enters tank to rescue 1<sup>st</sup> employee. Both employees die.

Investigation reveals air in tank was not tested, workers weren't properly trained, and required safety and rescue procedures not followed

#### State of Arizona

V.

### Far West Water and Sewage Company and Brent Weidman

- Far West Water and Sewage Company convicted of negligent homicide and aggravated assault
- Corporation cannot serve jail time, but was fined \$1.77 million, and may lose access to government contracts
- Far West's president, Brent Weidman, convicted of two counts of negligent homicide and two counts of endangerment
- Weidman sentenced to 4 years supervised probation, followed by an additional 3 years supervised probation. Also sentenced to 840 hours of community service teaching safety training classes for Arizona's OSHA, and a \$50,000 fine payable at \$250 per month

#### Overview

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4 – On the Horizon

### On the Horizon - Proposed Changes to OSHA

Protecting America's Workers Act - PAWA

Senate Bill 1244 (2007) – Obama / Kennedy

### Protecting America's Workers Act

- Strengthen Protection for whistleblowers
- Enhance public accountability
  - Mandating the Department of Labor to investigate ALL cases of death or serious incidents of injury
  - Requiring employers to inform workers of their OSHA rights
  - Gives families a right to meet with investigators
- Clarify an employer's duty to provide safety equipment

### Protecting America's Workers Act

- Increase Coverage
  - ♦ 8.5 million employees NOT covered under federal worker safety laws including: federal, state, and local public employees
  - PAWA would extend the Act's coverage to state and local employees, flight attendants and other workers who lack OSHA protection

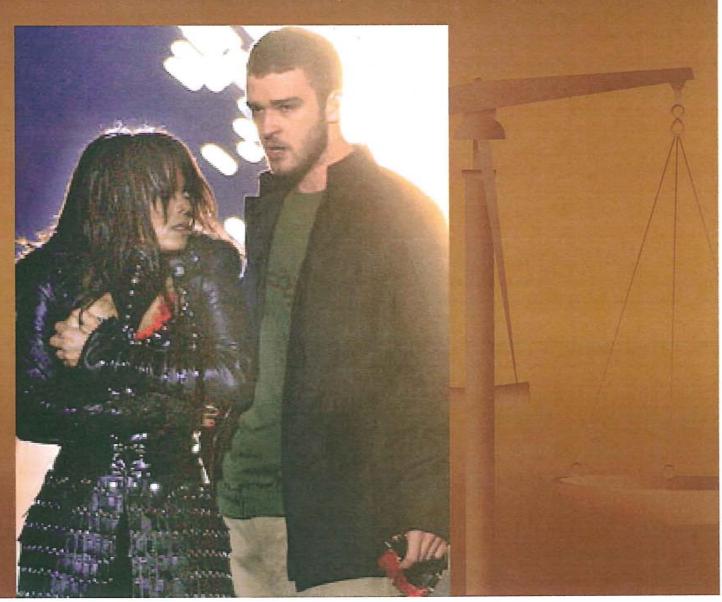
### Protecting America's Workers Act

- Felony charges for repeated or willful violations
- Civil Penalties for willful violation causing fatality:
  - Minimum penalty increased from \$5,000 to \$50,000
  - Maximum penalty increased from \$10,000 to \$250,000
  - Maximum jail term increased from 6 months to 10 yrs

#### BY COMPARISON:

- MINER Act of 2006 "serious" fatality penalty \$60,000 minimum
- Oregon avg. "serious" fatality penalty \$793 in 2007





### Worker Endangerment Initiative (WEI)

In March 2005, WEI was a joint initiative by the U.S. Department of Justice (DOJ), the Environmental Protection Agency (EPA), and the Department of Labor's Occupational Health and Safety Administration (OSHA).

#### Purpose of WEI

Target and prosecute companies that violate EPA and OSHA laws.

#### Why WEI?

- If a company is ignoring OSHA regulations, they are more than likely ignoring EPA regulations as well
- EPA investigators vastly outnumber OSHA inspectors

OSHA inspectors are "extra set of eyes and ears to the table."

### Worker Endangerment Initiative (WEI)

WEI seeks felony convictions when workers are seriously injured OR killed on the job during the course of environmental violations

 Under environmental laws, a sentence of up to 15 years for a fatal can be imposed

#### VS

 Under worker-safety laws, a sentence of six months to one year for REPEAT convictions for fatals

## WEI Cases

#### Motiva

Explosion that killed one worker, injured eight others and caused major environmental releases of sulfuric acid

Prosecuted under the Worker Endangerment Initiative

- Motiva plead guilty to endangering its workers under the Clean Water Act
- \$10 million fine
- \$12 million civil penalties for environmental violations

In contrast, in 2002 following the explosion, OSHA cited the company for

- 3 serious violations
- 2 willful violations
- \$161,000 penalty

### WEI Cases

#### BP

Explosion at oil refinery that killed 15 and injured 170

#### Prosecuted under WEI

- BP plead guilty to a felony violation of the Clean Air Act
- \$50 million in penalties
- \$100 million in criminal penalties for manipulating the propane market
- Three year probation

#### In contrast, under OSHA

- NO criminal penalties or misdemeanor charges
  - 15 workers died
  - Hundreds of civil citations for willful, egregious violations of the law

### **WEI Cases**

#### McWane

Largest producer of steel pipe in the United States

Over the course of a ten-year period (1995-2005), 11 workers were killed and thousands were injured at multiple facilities around the country

- Dozens of OSHA investigations
- Violations galore
- Penalties were reduced and citations were dropped in virtually EVERY case

# In 2003, the *New York Times* exposed McWane's pattern of abuse and violations

- United States v. Union Foundry Company (N.D. Ala. filed July 28, 2005)
  - \$3.5 million fine and three years probation for willfully violating an OSHA regulation that caused the death of an employee and for illegally treating bag house waste dust generated from its foundry operations
  - United States v. McWane, Inc. (N.D. Ala. filed May 25, 2004)
    - McWane guilty of conspiracy, false statement and Clean Water
       Act charges
    - Three company managers found guilty of various charges
    - \$5 million criminal fine
    - Five years probation

# In 2003, the *New York Times* exposed McWane's pattern of abuse and violations

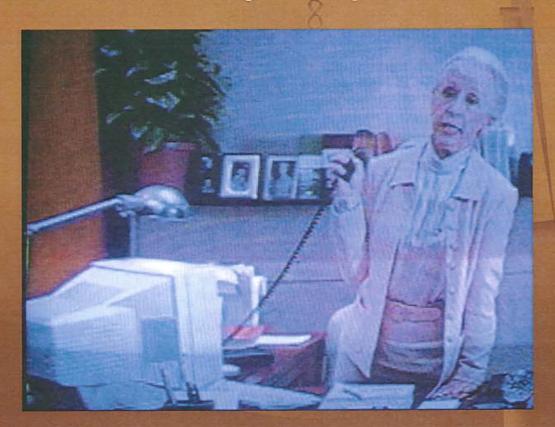
- United States v. Tyler Pipe Company (E.D. Tex. filed March 22, 2005)
  - \$4.5 million criminal fine
  - Five year probation
  - Knowing violations of the Clean Air Act preconstruction requirements and for concealment of material facts from EPA
- United States v. McWane Inc. (D. Utah filed Nov. 3, 2005)
  - \$3 million fine-largest criminal environment fine ever imposed in Utah
  - Three years probation
  - Knowingly submitting false emission test results to the State of Utah as required by the Clean Air Act.
  - The Vice President and the General Manager plead guilty to knowingly rendering inaccurate a testing method required by the Clean Air Act.

## Tyson Foods

- Evidence that WEI has survived the Obama transition
  - Tyson Foods Inc. pleads guilty and agrees to pay maximum fine for willfully violating worker safety regulations that led to a workers death in its River Valley Animal Food (RVAF) plant
  - Tyson Foods Inc. pleaded guilty to a "willful violation of an OSHA standard resulting in the death of an employee," the most serious offense available to OSHA
  - Tyson Foods Inc. has agreed to pay \$500,000 fine (maximum criminal fine) & serve one year probation

# HOW DO YOU AND YOUR EMPLOYER AVOID THE CIVIL AND CRIMINAL PENALTIES???

It's so very simple.....



## Overview

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## Independent Safety Consultant

#### Advantages

- able to provide site specific programs that allow companies to maintain compliance and remain competitive while enhancing the overall workforce
- able to provide employees with skills necessary to meet site specific and proficiency requirements
- able to assist companies in understanding and remaining current on all OSHA-required issues and regulations

## **Consulting Contract**

#### What should you make sure to clearly outline in the contract?

- ♦ Each party's obligations under the contract, including compensation
- Confidentiality and Ownership of materials
- ◆ Employment Relationship: Independent Contractor v. Employee
- Warranties and Limitations of Liability
- Terms of Termination of Contract
- Risk Allocation and Insurance Coverage
- Governing law and arbitration clause

#### Safety and Health Consulting Agreement

This Safety and Healt	h Consulting Agreement (this "Agreement") is entered	into as of
200 between	, a	corporation with
offices at	(the "Client"), and	
a	corporation with offices at	(the
"Consultant").		

Client requires the services of Consultant for the purpose of assisting with the development of Client's Safety plan and to act as a consultant for various safety and health issues, as further described below. In consideration of the agreements and covenants hereinafter set forth, the parties agree as follows:

http://www.c emins.com/a sse.html

## Professional Liability Insurance

- Errors and Omissions "E&O"
- In-house and independent safety professionals
- Must include bodily injury
- "Tail Coverage" for statute of limitations period
- General Liability Insurance
  - Professional Services Exclusion
     "injury due to the rendering of or failure to render any professional service... including supervisory or inspection"
- Workers' Compensation Insurance
  - All states you do business in
- Auto Commercial and Personal
  - Non-owned auto exclusion on commercial
  - Work use exclusion on personal



# BODYFELT/MOUNT

