

October 20, 2005

by Jessica M. Walker

# Blocked out

2003 revisions in state workers' comp law curb ability to recover damages for jobsite injuries

**I**n his mid-teens, Hector Noriega moved from Mexico to Miami to find work in South Florida's booming construction industry. The immigrant followed his two brothers, who previously had found construction work here.

In August of last year, while he was pouring concrete at a residential construction site on Key Biscayne, the teenager was seriously injured when he came into contact with an electrical line. He survived the accident but suffered severe burns.

His attorney, Judson Cohen of Cohen Law Offices in Miami, said Noriega might lose his leg from the accident. No longer employable, Noriega, now 16, is living with family in Miami.

Most workers in Florida would have filed a workers' compensation claim, collected a payout, and that would have been the end of it. Noriega, however, is an undocumented alien and was not listed on the workers' comp policy of the subcontractor, C&C Concrete Pumping, or the Miami-based general contractor, Mackle Construction Co.

Ironically, Noriega's illegal status may allow him to proceed with a negligence lawsuit in Miami-Dade Circuit Court when a U.S. citizen or other legal worker generally could not. That could allow him to recover more than he could through a workers' comp claim. There are a growing number of undocumented workers

like Noriega laboring in the South Florida construction industry, and experts say the legal situation could arise more often.

As South Florida's construction boom continues, more workers are pouring into the area in search of work. For both legal and illegal workers, the ability to recover damages for on-the-job injuries has been constrained due to a sweeping 2003 revision in the state's workers' comp law that was pushed through by business and insurance groups to curb workers' comp costs, experts say.

Steven Field, a retired University of South Florida professor who formerly directed the Florida Association of Occupational and Environmental Medicine, said he's seen a rising number of construction-related injuries over the past eight years in Florida. But despite the increase, workers' comp payouts are declining.

The total amount of workers' comp claims payouts reported to the state Department of Financial Services fell in Miami-Dade County from \$5.9 million in 2002 to \$2.8 million in 2004. In Broward County, payouts declined from \$4.2 million in 2002 to \$2.3 million in 2004. In Palm



Judson Cohen, a plaintiff attorney, says fewer lawyers are interested in representing injured workers now than in 2003.

Beach County, they fell from \$4.2 million in 2002 to \$2.1 million in 2004.

Michael Haggard, a plaintiff attorney who is a partner at Haggard Parks Haggard & Lewis in Coral Gables, said, "You're seeing more accidents but not more lawsuits because of the changes in the workers' comp law."

Field said the construction industry has little oversight when it comes to safety. "You see situations where no safety precautions are taken," he said. The federal Occupational Safety and Health Administration, which is supposed to enforce job safety rules, "has no standing with construction industry."

The Builders Association of South Florida did not return calls for comment.

Associated Industries lawyer-lobbyist Mary Ann Stiles said that the changes in the law leveled the playing field for the industry, which had been seen as a cash cow by plaintiff attorneys.

"You're seeing the same suits, you just can't pull all that crap that they used to pull," she said. "I think the law is a good balance. Finally we're equal to the plaintiffs."

### **Tougher to sue**

In 1935, the Florida Legislature established the state workers' compensation system to provide workers with a prompt means of collecting benefits to compensate them for losses associated with on-the-job injuries. At the same time, however, the system insulated employers from being sued. Families cannot sue even when workers are killed on the job — unless the employer deliberately set out to hurt the workers or place them at risk.

Before the 2003 revisions in workers' comp law, construction workers injured on the job had more leeway to sue contractors and subcontractors. A worker was limited to workers' compensation in relation to his direct employer's liability but was not barred from suing other subcontractors on the site.

In 2003, Gov. Jeb Bush and legislative Republican leaders pushed through sweeping changes. Among other things, the new law extended

workers' comp protection to subcontractors working for the contractor. Co-subcontractors, however, remain vulnerable to lawsuits filed by employees of other subcontractors.

A further deterrent to workers' comp claims was tough new limits on attorney fees, which proponents acknowledged were to discourage lawyers from taking on workers' compensation cases.

Prior to 2003, there was a contingency fee schedule determining the payment for claimants' attorneys. Workers' compensation judges had discretion to determine attorney fees based on the complexity of the case. But the new law took away that discretion. The bill restricted hourly attorney fees for medical-only disputes to \$150 hourly and established a \$1,500 fee cap per accident.

The 2003 law also raised the bar for workers filing a negligence suit against their employers. Before then, a plaintiff could sue based on gross negligence or willful and wanton conduct. But the new law allows suits only if a plaintiff can show either that the employer intended to harm the employee, or that the employer knew — based on prior similar incidents or an explicit warning — of a danger that was virtually certain to cause injury or death to the employer.

Under the new law, an employee also had to be unaware of the risk because the danger either was not apparent or because the employer deliberately concealed or misrepresented the danger.

Alex "Manuel" Rebozo, a personal injury plaintiff attorney and partner at Rossman Baumberger & Rebozo in Miami, said that the new standard is "virtually impossible" to meet. "They practically have to be acting criminally," he said.

It's problematic, he argued, to provide this degree of protection from lawsuits to the construction industry because the work is so dangerous. "When you're talking construction,

the severity of the injuries tend to be catastrophic or involve death more than other industries," Rebozo said.

### **Most illegals give up**

Florida law generally allows for illegal aliens to be covered under workers' compensation. But for an employer to have coverage for an employee, there must be a provable employee-employer relationship.

Field said that when illegal construction workers come in with injuries, they are typically at the mercy of the employer. "Most of them are manual laborers and their employer will pay for medical expenses," he said. "But if the expense is more than the employer can afford, usually the employer will drop this worker. Then the employee has no standing."

In Noriega's case, while the teenager was being treated for his severe injuries at Jackson Memorial Hospital, his employer filed a compensation claim but used the name of one of his brothers, who was listed on the policy. The claim was denied as fraudulent due to the false name, said Cohen, Noriega's lawyer.

So Cohen filed a negligence suit against Mackle Construction, C&C Concrete Pumping Services, and Juno Beach-based Florida Power & Light Co. The suit is pending.

If Noriega had been listed on the policy and an appropriate claim had been filed, he likely would have been limited to a workers' compensation claim against the contractor and subcontractor. A workers' comp claim would allow for recovery of 66 percent of lost wages plus medical costs. But because of his fuzzy relationship to the employer, Noriega is able to sue and potentially recover a much larger sum of money, including pain and suffering, Cohen said.

According to Cohen, the contractor is still fighting to have the case settled as a workers' comp claim.

Field said that unlike Noriega, most injured illegal workers in the construction industry do not sue and do not get workers' comp. Instead, they simply return to their home country.

Claimants' attorney Richard Dolan, of Dolan Morales & Cernio in Hialeah, said that there have been legislative attempts to restrict workers' comp claims by undocumented workers but that the courts have blocked them.

Even so, the state of Florida has erected tough logistical barriers to undocumented workers pursuing claims. For example, Dolan said that the workers' comp division of the Florida Department of Financial Services strictly requires a Social Security number for claims.

"A lot of these people don't have a Social Security number," Dolan said. "Some use a false number and some people buy them from brokers thinking they are genuine. If someone has one of those, and it turns out to be erroneous, they come after you for fraud."

### **Egregious cases only**

Legal U.S. construction workers also face formidable problems in seeking compensation for on-the-job injuries.

There are unusual circumstances that allow injured construction workers to sue in court rather than go through the workers' comp system, said Ervin Gonzalez, a partner at Colson Hicks Eidson in Coral Gables.

For example, Haggard has a negligence suit pending against a Delray Beach contractor that allegedly knew of the danger to its workers prior to an accident. That case, filed in Martin Circuit Court, arose from the 2004 collapse of a five-story building in Stuart, which killed two people. The plaintiffs are suing Mac's Construction & Concrete and

a number of other defendants connected to the construction site.

But that case is extreme, Haggard said. "It was brutal," he said. "Just terrible construction."

As in Noriega's case, the two men who died in the Stuart building collapse were not listed on their employer's workers' compensation policy. The company was shut down by state insurance officials after its lack of workers' comp coverage came to light.

The owner of the company, Richard Meccariello Jr., was later arrested by the Department of Financial Services' Division of Insurance Fraud for his firm's alleged failure to obtain coverage.

Situations where the employer lacks coverage or otherwise cuts corners also allow injured workers to pierce the employer's shield of immunity. This past summer, Haggard said, he settled a case in Miami-Dade Circuit Court in which his client, Dwight Byrd, a scrap metal worker, received \$2 million from the employer, Trujillo & Sons.

Trujillo & Sons was demolishing a building and contracted a Hialeah man, Carlos Lopez, to handle the job. Lopez, who directly employed Byrd, did not have a contractor's license or any insurance. He also did not get the proper permitting for the demolition.

Byrd was injured when concrete from a column that had been cut fell onto his head. He suffered a fractured skull. The injury forced him to relearn basic skills, such as washing himself. The case settled before trial.

### **Defective product route**

One type of construction-related suit that is largely unaffected by workers' comp law is third-party suits. These include defective product claims and claims against a non-contractor on the site.

Stuart Silver, a partner at Kluger

Peretz Kaplan & Berlin in Miami who represents defendants in defective products cases, said these suits can be effective in recovering damages from third parties for a laborer covered by workers' comp.

"You can claim that a manufacturer supplied a defective product," Silver said. "For example, if a crane or a piece of machinery were to malfunction, you could under a strict liability theory claim that it is the cause of your injury."

Gonzalez agreed that defective product cases remain a viable way for an injured construction worker to file suit. "Normally you're trying to find out if there are products that are defective that caused the injury," Gonzalez said. "Defective products are still very much at play" in personal injury construction cases.

Nevertheless, Cohen said, because of the 2003 law fewer plaintiff attorneys are interested in representing injured workers. That's exactly what business and insurance groups had hoped for. For plaintiff lawyers to be enticed into filing suit on behalf of an injured worker, the contractor's conduct must be egregious.

"When it's just a workers' comp claim, very few times do people get represented, unless the injury is just horrific," Cohen said.

Gonzalez said he's turned down four or five cases over the past two months that he would have accepted prior to the 2003 change.

He recalled one lawsuit in which he won a \$2.5 million award for an injured construction worker that he doubts he would be able bring now. The plaintiff was walking on unsecured scaffolding at the Mystic Pointe development at Turnberry Isle when he fell and was injured.

The 2003 limits on suing subcontractors and the tougher standard for proving reckless endangerment likely would thwart the case now.

"I couldn't file that today," Gonzalez said. ♦