

Settlement Between The National Chimney Sweep Guild and OSHA

Article By:

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On December 1, 2023, the National Chimney Sweep Guild (NCSG), a trade association consisting almost entirely of small businesses, entered into a precedent-setting settlement with the Occupational Safety and Health Administration (OSHA) to resolve its legal challenge to the 2016 Final Rule amending OSHA's Fall Protection Standards for General Industry. The settlement describes how those standards will be applied to employees in the Chimney Service Industry (CSI) performing roof top work on the 99% plus of single family homes and similar structures that lack fall protection anchorages. The highlight of the settlement is the authorized use of alternative ground-based anchors to secure fall protection lifelines and equipment for employees working on roofs.

The Anchorage Requirement

As a general rule, fall protection is required for vertical drops of four or more feet under the General Industry standards. 29 CFR Section 1910.140(c)(13) establishes the requirements for anchorages used in personal fall protection systems and states:

Anchorage ... must be: (i) Capable of supporting at least 5,000 pounds (22.2 kN) for each employee attached; or (ii) Designed, installed, and used, under the supervision of qualified person, as part of a complete personal fall protection system that maintains a safety factor of at least two.

Permanent Anchors are Not Installed on Single Family Homes

In general, there are no permanent anchors installed on residential roofs because homebuilders understandably choose to avoid liability issues likely to arise if the anchors are not safely used or maintained by the homeowner or a contractor over the life of the home. In addition to those issues, retrofitting a home with permanent roof anchors presents even greater challenges: lack of access to the underlying structural members in the eaves and peaks of finished homes necessary to properly retrofit anchors; homeowner refusal to allow those retrofits due to the risk of water leakage through the holes cut in the waterproof roof membrane to install anchors; homeowner resistance to the costs of installing the anchors; and the time the worker is working without fall protection to install the anchors. The vast majority of homeowners will not pay for the costs of installing roof anchors and will not approve drilling/cutting holes in their roofs for that purpose. Attaching temporary roof anchors to a finished home with nails or screws, and removing them after the job is complete presents all of those problems and the problem of patching holes that, again, the homeowners will not approve.

Other Alternatives are Infeasible and/or Pose a Greater Hazard

Other fall protection alternatives are generally economically infeasible and often technically infeasible. Installing scaffolding would be prohibitively expensive and would expose the worker to greater fall hazards during the time erecting and disassembling the scaffolding than the roof top tasks that need to be performed. For most businesses, owning or leasing an aerial lift is not financially viable. Very few homeowners are willing to pay the significant pass-through costs of having a sweep rent an aerial lift for the General Industry tasks to be performed. Those costs include the lift rental fee and any additional charges and taxes, the time required to arrange for the rental, the time required to acquire and return the rental, and the cost of acquiring/renting, installing, and removing any required ground matting for the lift. An aerial lift is a large and heavy piece of equipment. Adequate and safe access to a residential roof with an aerial lift is often precluded by the presence of utility lines, adjacent structures, surrounding trees and vegetation, or the lack of a suitable surface on which to drive and ground the vehicle. Without proper matting, very few homeowners are willing to allow use of this equipment on their property because of concerns about

damage to the driveway, lawn, or landscaping.

The Need for Alternative Anchorage Options

Considering the foregoing infeasibility and greater hazard constraints, employers need to use alternative anchorage options for roof top work. In general, the only feasible alternative is ground-based anchors (e.g., trees, motor vehicles, or structures) as alternative anchorages. Trees, motor vehicles, and other structures are not rated for 5,000-pound loads, generally are not designed and installed under the supervision of a Qualified Person (e.g., they are often “installed” by Mother Nature or the operator of a powered auger), and often may not be used under the supervision of a Qualified Person. Therefore, at least for Chimney Service Industry employees working on residential roofs, literal compliance with Section 1910.140(c)(13) of the final OSHA Fall Protection Standards was infeasible.

The Settlement Agreement provides practical alternative fall protective measures (e.g., tying off to ground objects such as trees, motor vehicles, and structures; using systems that secure to the roof without roof penetration; or using an aerial lift), but recognizes those alternatives may not be feasible or may present a greater hazard to workers depending on the circumstances. For example, a suitable tree may not be available. Currently, available systems that secure to the roof without roof penetration are generally economically infeasible because they have high acquisition costs (they were designed by engineers and are subject to patents/intellectual property rights) and their use is subject to significant slope limits.

Employers in the Chimney Service Industry (CSI) compete with independent contractors not subject to OSHA requirements. If the Final Rule had not been interpreted to permit alternative anchorages, it would have put many small businesses out of business, and would have resulted in many chimneys and related elements not being cleaned or maintained, increasing the risk of home fires and mold intrusion, or possibly being cleaned and maintained by unqualified homeowners lacking the required fall protection training and equipment. The fall protection alternatives (really the alternative anchorages) identified in the NCSG Settlement Agreement reflect an implicit rejection of the approach of the ANSI fall protection standards to the extent that those standards are based on the erroneous

premise that traditional fall protection anchorages will always be available by retrofitting every residential roof with them.

Implementation of the Settlement Agreement

Appendices A and B of the Settlement Agreement identify safe harbor fall protection options with anchorages that may be used by Competent Persons. Any other alternative anchorages would have to be selected by Qualified Persons. The Settlement Agreement also addresses when personal “fall protection aids” (rather than personal “fall protection systems”) may be used to provide fall protection for access to a Covered Task or to set up or remove the fall protection system used to perform a Covered Task.

To comply with the Settlement Agreement, the CSI employers generally must establish a written fall protection program, provide employees with the required training and equipment, staff the Covered Task with the appropriate personnel, and complete and implement a written Fall Prevention Plan for each job. Some CSI employers are already in compliance with the Settlement Agreement, but many are not. Given the time required for the remaining CSI employers to come into compliance, OSHA agreed to a one-year implementation schedule with the understanding that employers that had not implemented the Settlement Agreement would remain subject to the requirements of the Final Rule, as written, but also subject to the infeasibility and greater hazard defenses.

While the terms of the Settlement Agreement are expressly limited to the Chimney Service Industry, they are likely to have applicability to other commercial sectors performing General Industry work on residential roofs.

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