

Litigation Skills Session – Prior to the 2023 WDC Winter Conference

Co-hosted by WDC's Young Lawyers Committee and
Ad-Hoc Litigation Skills Committee
November 30, 2023

It's reporting season! Come and get 3 additional CLE credits at this in-person practical learning session. The session, which will take place the day before the 2023 WDC Winter Conference, will focus on cross-examining a plaintiff's construction expert at a personal injury trial. While this session will build on the skills from the last session in which discovery depositions were taken of the same expert, attendance at the last session is not necessary to meaningfully participate since the same materials, including expert reports and deposition transcripts, will be provided in advance of the session.

- 1:00-2:00 PM: Practical learning by Monte Weiss, *Weiss Law Offices, S.C.*
- 2:00-3:30 PM: Take turns performing mock cross-examination with intermittent coaching by attorney volunteers as appropriate.
- 3:30-4:00 PM: Feedback and questions with attorney volunteers.
- 4:00-5:00 PM: Happy hour with participants and attorney volunteers.

FACT PATTERN

This case pertains to a Plaintiff that fell through a temporary hatch access cover (made of polyisocyanurate ("poly-iso") which is a closed-cell, rigid foam board insulation) that was installed by the Defendant Roofer. The Plaintiff stepped from one adjacent roof onto another roof where the Roofer was in the process of replacing the roof material. He stepped from the adjoining roof onto the hatch cover. The cover collapsed and he fell about 20 or so feet, injuring his back, shoulder, and buttocks area.



I. LIABILITY ISSUES

The Plaintiff describes this injury as occurring on February 5, 2009, on the roof at a building in Mequon, Wisconsin. He claims that he simply “stepped down with his left leg” from the adjoining roof, about 2 ½ to 3 feet, onto the temporary cover the Roofer had screwed in place to cover a roof access hatch. The Plaintiff contends that he thought that the hatch cover doubled as a “step”. He stepped down on the hatch cover and fell through to the floor below.

By way of background, the Roofer was hired by the building owner to remove and replace an existing roof. Part of that work required the Roofer to remove a hatch (commonly referred to as a “dog house”) that covered the roof hatch. This roof access port measured about 2 ½ feet by 3 feet, the perimeter of which was surrounded by 2x6’ wood planks.

Pursuant to the contract, the building owner was to provide a cover for the roof hatch. When the Roofer attempted to install the hatch cover, it would not fit. Unfortunately, it was too late in the day for the Roofer to obtain ¾” plywood to serve as a covering which is the typical material used to cover holes at construction sites. The weather was turning for the worse and snow was expected that evening. The Roofer needed to secure the safety of his employees by removing them from the roof.

In order to provide temporary protection to the interior of the building, the Roofer installed a 1 ½” thick, 2’x3’ square piece of poly-iso over the roof access hatch. It then screwed the poly-iso into the 2x6 wood planks to prevent access to the roof from the inside of the plant by its employees. There were no markings or other signs denoting that the poly-iso piece was covering an access port. Within a few days or so after the Roofer left the roof and installed the poly-iso, the incident occurred. It should be noted that the Roofer contends that it was not finished with its work on the site.

On the day of the incident, the Plaintiff testified that a fellow employee called for his help with the grain elevator mechanicals on the subject roof. He first attempted to access the roof through the roof access port. He was unable to do as the poly-iso was screwed into 2x6 wood planks. The Plaintiff then went to a different part of plant and gained access to the roof on an adjacent building. The Plaintiff then proceeded across the roof towards the subject roof.

When the Plaintiff reached the end of the adjacent roof, he noted that there was a 2 ½ to 3 foot drop down to the subject roof. He saw the poly-iso covering and knew that it covered the very access port through which he first attempted to gain access to the roof. He thought that the Roofer installed a “step” over the hatch access port as there was the height differential between the roofs. The Plaintiff testified simply “stepped down with his left leg” about 2 ½ to 3 feet onto the temporary hatch cover. The hatch cover immediately failed.

II. EXPERT OPINIONS

The Plaintiff’s liability expert is critical of the Roofer for two reasons: (1) the failure to warn of presence of the access port on the roof being covered by the poly-iso and (2) use of an improper material to cover the roof access port: the poly-iso.

The defense liability expert contends that the poly-iso material did meet the OSHA requirements. The testing revealed that the poly-iso material would withstand 434 pounds of static weight. Additionally, the defense will contend that the incident was the result of the Plaintiff's failure to exercise reasonable care for his own safety by knowingly stepping onto a hole covering without