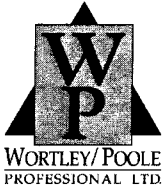


AERISK REVIEW

A BI-MONTHLY PUBLICATION FOR THE
DESIGN PROFESSIONAL COMMUNITY



Presented by
Wortley/Poole Professional Ltd.

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JOBSITE SAFETY: PART 1 — A LITIGATION MINEFIELD

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The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We would like to recognize DPIC Companies, the professional liability specialist, for contributing to this article.

Construction sites are among the most dangerous of all industrial workplaces. These sites are often treacherous for architects and engineers, as well. Roughly 10 percent of liability claims filed against design professionals are related to jobsite safety. Moreover, courts and other government entities have repeatedly sought to impose substantial (and often uninsurable) fines on architects and engineers for construction worker injuries.

Why are design firms brought into jobsite safety claims when safety on the work site is primarily a contractor's responsibility? Because, if a construction worker is injured on the job, the worker generally cannot sue the contractor and must accept as sole remedy from the employer state-mandated workers compensation benefits. But these benefits rarely cover all medical costs and lost wages and are certainly lower than awards a worker might hope for through successful litigation against a third party. This inequity can set into motion a search for "deep pockets" and an attempt to impose responsibility on a source other than the employer.

Except for certain design-build and construction-management projects, jobsite safety rightly is the primary responsibility of the general contractor. It's the contractor who has control over its employees and the jobsite, and who is the overall coordinator of the work. That's why it's important that nothing in your professional services agreement or in your actions can be

taken to imply that you will in any way assume this responsibility — and the liability that goes with it.

Here in Part 1 of this two-part report, we'll take a look at some recent court cases regarding a design professional's liability for jobsite safety. In Part 2, we'll provide information for avoiding these liabilities.

What Do the Courts Say?

It seems the courts are continually looking at the issue of jobsite safety as it applies to a designer's liability. And the rulings have been all over the board, ranging from reasonable to outrageous. A few recent cases are worth noting:

In one (*Secretary of Labor v. Simpson, Gumpertz & Heger, Inc.*), a structural engineer was telephoned by the contractor for the engineer's opinion about removing temporary shoring from under a recently poured concrete deck. A later collapse of the deck resulted in a fatality. Although the engineer's contract disclaimed responsibility for jobsite supervision, the subsequent lawsuit claimed the engineer was responsible for "means and methods" on the construction of the deck. Fortunately, the court disagreed. It held that the engineer was not liable because he had not exercised the necessary control at the jobsite to make him responsible for means, methods or safety.

In a more recent New Jersey case (*Carvalho v. Toll Brothers Construction*), a court held that a civil engineer's inspector was responsible when a contractor's employee died in the collapse of an unshored trench. The court made this ruling even though the engineer's contract disclaimed responsibility for means, methods and safety and established that the contractor alone was responsible for safety and adequacy of equipment and methods.

How could the court arrive at such a decision? Consider these facts:

- The engineer's representative was on the site daily and was contractually granted stop-work authority.
- Trench boxes were used each of the three days before the collapse, but they were not used on the day of the collapse because they interfered with two utility pipes.

- The engineer's representative was assigned to observe progress of the work and approve the contractor's construction schedule, as well as the contractor's methods for supporting and protecting all utilities that crossed the trench.
- The engineer's site representative knew the trench was unstable.

It was found that the engineer's representative was present and observed the collapse. More important, he had observed a similar collapse a week before and took no action to protect workers in imminent danger. Although the engineer insisted it was not his responsibility to ensure jobsite safety, the court found otherwise, noting that the engineer had the opportunity and capacity to alleviate the risk of harm and failed to properly exercise his duty.

The court reasoned that "there was an overlap of work-progress considerations and work-safety concerns. Matters of construction-site safety did bear indirectly on the engineer's contractual responsibility for supervising the progress of the work. Indeed, common sense tells us that an accidental injury or death on the work site because of the failure to take safety measures would directly affect the progress of the work by bringing it to a halt.... The record thus strongly indicates that if safety conditions could affect work progress, the engineer had the authority and control to take or require corrective measures to address safety concerns." The court went on to note that the project engineer "had the opportunity and was in a position to foresee and disclose the risk of harm and to exercise reasonable care to avert any harm...."

The two cases above reached radically different conclusions. Yet upon examination, the two decisions are not inconsistent. They spell out two important messages about responsibilities when providing field services:

1. It is important to have contractual protections from responsibility for jobsite safety.
2. You cannot avoid your duty as a licensed professional — or as a fellow human being — to step forward and warn people in the face of immediate threats to their life or safety.

The Case of CH2M Hill

A more recent federal appeals court decision struck down an OSHA penalty imposed on the renowned engineering firm, CH2M Hill, ending a decade-long legal battle.

In 1987, during a construction project on the Milwaukee sewer system, methane gas was discovered. The sewer district directed the lead engineering firm, CH2M Hill, to investigate. CH2M Hill indeed found methane and drafted a contract modification that addressed, among other things, the kinds of electrical equipment that could be used in the tunnel. The district reviewed and approved the modification.

In late 1988, methane was again detected in a tunnel and the contractor evacuated its employees, but did not turn off the electrical power. Contrary to its evacuation plan, three contractor supervisors re-entered the tunnel after only 17 minutes. They were killed by an explosion, presumably caused when one of them attempted to operate an electric grout pump.

OSHA issued citations to the contractor and CH2M Hill, for "willful violation of the construction standards that apply to employers engaged in construction work." Thus, the case turned on the legal question of whether OSHA's construction standards apply to professional firms with responsibilities similar to those exercised by CH2M Hill. The Occupational Safety and Health Review Commission concluded the standards did indeed apply. The commission announced a new test to determine whether CH2M Hill was substantially engaged in construction — and thus responsible for safety. The test stated that an architectural or engineering firm was engaged in construction work if it:

1. Possessed broad responsibilities in relation to construction activities, including both contractual and de facto authority over the work of the trade contractors; and,
2. Was directly and substantially engaged in activities that were integrally connected with safety issues, notwithstanding contract language expressly disclaiming safety responsibility.

CH2M Hill appealed. In September 1999, the U.S. Court of Appeals for the Seventh Circuit struck down the decision, saying that, because CH2M Hill's responsibilities "did not rise to a level that constituted being

engaged in construction work, the (OSHA) regulations do not apply to it." The court said that "even if this 'new' test were appropriate, OSHA still fails to establish that CH2M Hill contractually or on a de facto basis exercised direct authority and control over or substantially engaged in activities integrally connected with the safety measures." In its opinion, the court said that "Contracts represent an agreed upon bargain in which the parties allocate responsibilities based on a variety of factors. . . . To ignore the manner in which the parties distributed the burdens and benefits is contrary to our notion of contract law."

The court also pointed out that the commission had previously concluded that a "professional" employer is engaged in construction work only if the employer, either contractually or in actuality, had substantial control over the safety program, had the authority to stop work, or had substantial supervision over actual construction. CH2M Hill did not have any of these powers. The commission, the court said, appeared to have not only departed from the substantial supervision test but also from its own precedents.

The court could have gone further, but chose not to. In fact, it stressed that while the regulations were not applicable to CH2M Hill in this instance, they may apply to some professionals — construction managers, for example — working on construction.

In addition to the OSHA action, a civil case was brought against CH2M Hill by the estates of the three supervisors killed in the blast. CH2M Hill was able to tender the defense of that case to the contractor's general liability insurer and was defended at no cost to CH2M Hill.

Certainly, the CH2M Hill decision is good news for design firms. However, it does not set a far-reaching precedent that eliminates liability concerns regarding jobsite safety. Architects and engineers must still be absolutely sure that their professional services agreement and the contractor's general conditions place responsibility for the means, methods, techniques, sequences and procedures of work, as well as jobsite safety, solely and squarely on the contractor.

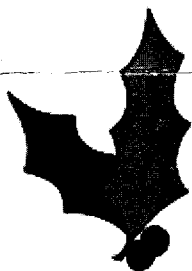
That's why an architect's and engineer's contractual scope of services and conduct during the construction phase are both so important. Field personnel must do nothing to undermine the contract language. Engineers

and architects who step beyond the duties set forth in a professional services agreement and exercise de facto supervision, are likely to be held responsible.

In Part 2 of this two-part report, we will discuss important steps design firms should take to avoid responsibility and liability related to jobsite safety.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.



Oh the weather outside is frightful...but clients like you are delightful. It's the perfect time to let you know....

Thank you so!

Thank you so!

Thank you so!

Happy Holidays to all from Wortley/Poole Professional!



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