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## Selvaggio, Teske & Associates

RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

### Jobsite Safety Part 1

### War Stories Reveal Potential Liabilities

*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.*

It is common knowledge and practice in the design and construction industry that the general contractor is primarily responsible for jobsite safety. Contractors are rightly given this responsibility because they have direct control over the site and the construction process, and have the specific training and experience needed to implement effective safety programs.

Despite this fact, construction workers, their estates and the courts have repeatedly sought to impose substantial (and often uninsurable) liabilities on architects and engineers for construction worker injuries or deaths. Why? One major reason is that if a construction worker is injured on the job, the worker generally cannot sue the contractor. He or she must accept as sole remedy the employer state-mandated workers compensation benefits. 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 contractor – namely, the architect or engineer.

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, some seemingly contradicting earlier court decisions involving very similar cases. A few recent war stories are worth noting and provide valuable lessons for design firms.

#### **Structural Engineer Avoids Getting Decked**

In *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. The engineer did not object. 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 with the claimants and ruled that the structural engineer was not liable. The court held that there was no contractual liability and the engineer had not exercised the necessary control at the jobsite to make him responsible for means, methods or safety. The liability belonged to the contractor.

## Civil Engineer Pays the Price for Inaction

In the often-cited *Carvalho v. Toll Brothers Construction* decision, a New Jersey court held that a civil engineering firm 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 stated 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 daily and to approve the contractor's construction schedule. He also approved 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.

## CH2M Hill Wins Uphill Battle

A 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. An explosion, presumably caused when one of them attempted to operate an electric pump, killed them. 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. In fact, the commission announced a new test to determine whether a firm like 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 further said, "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.

## **This Time the Engineer Wins**

*Herczeg v. Hampton Township Municipal Authority and Bankson Engineers, Inc. (2001)* presented a case very similar to the *Carvalho* case described earlier. But this time, the Superior Court of Pennsylvania reached a very different conclusion.

In *Herczeg*, as in *Carvalho*, a worker was killed on the construction site due to the collapse of an unshored trench. And, like in *Carvalho*, the engineer's contract specifically stated it was not responsible for construction means and methods, or for jobsite safety. Again, as in *Carvalho*, the engineer had a representative on site during the accident, and it was alleged that this person had knowledge of the unshored and unsafe trench and failed to take action.

The Superior Court of Pennsylvania ruled that the engineer was not liable. The court identified differing circumstances from the *Carvalho* case that led to its decision:

- Unlike *Carvalho*, Bankson Engineers did not agree to provide daily observation of the jobsite.
- Unlike *Carvalho*, Bankson Engineers did not have stop-work authority.
- And, unlike *Carvalho*, Bankson Engineers did not have knowledge of a previous trench collapse.

## **A Win in Mississippi**

Finally, in *Hobson v. Waggoner Engineering, Inc. (2003)*, a worker of a subcontractor died on the jobsite when he drowned in a lagoon being constructed at a wastewater treatment plant. The engineer who designed the lagoon was sued by the worker's estate, which alleged that the engineer violated its duty to warn the worker about the steep sides and slick surface of the liner of the lagoon. The estate also alleged defective design of the lagoon, saying it was too steep.

A Mississippi court held for the engineer. It claimed that Wagoner had no duty to warn the construction worker since it had no jobsite safety responsibility, either contractually or through its actions. The court also ruled that the estate presented no expert testimony to show that the design was defective or that the engineer did not comply with the prevailing standard of care.

## **What's a Design Firm to Do?**

These war stories demonstrate that court cases alleging job-site safety liability for design firms come in all shapes and sizes. While the design firms

managed to win most of the cases described here, not all of them end in victory. And, as the *Carvalho* and *Bankson* cases demonstrate, two incidences involving seemingly identical types of workplace accidents can end up with drastically different results in court.

So what can a design firm do to help avoid potential liability for jobsite safety? In Part 2 of this two-part report, we will discuss important steps you can take to make responsibility and liability related to jobsite safety stay where it belongs – with the contractor.

### **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.