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OSHA Takes Center Stage In November Offerings

For many issues now, we have devoted a monthly column to the “OSHA Corner,” a short summary of news items about OSHA’s recent emphases in jobsite inspections, notable fines handed out by the agency, and specific programs to promote safety in the workplace. In a change of pace this month, we focus our lead article on a personal interview with the Columbus Area Director of the Occupational Safety and Health Administration Office, Deborah J. Zubaty. From her perspective of 29+ years with OSHA and nearly 10 years as Area Director, Zubaty has seen and heard it all. In “OSHA Area Director Shares Lessons from Almost 30 Years of Working for Workplace Safety & Health,” she reveals insights that can provide valuable guidance for anyone concerned about safety on a worksite, particularly a construction worksite. And shouldn’t we all be concerned about that?

After devoting November’s lead article to OSHA, we skip the OSHA Corner this month, in favor of a new column making its first appearance on these screens: “Hindsight About Unforeseen Site Conditions.” This follows up on last month’s lead article on the same topic, and it is written by someone who really knows whereof he speaks, our Construction Claims Analyst and Professional Engineer, Doug Shevelow. We plan to run this new column every other month, alternating with OSHA Corner (which Doug also writes).

Following our lead article, we have our seminar listing and the usual collection of columns, starting with “What the Legislators Are Considering.” This is not a busy time of year for new legislation, but we have updated the column with new summaries of House Bill 303 (the Uniform Mediation Act) and Senate Bill 150 (modifying the requirements for registration of Professional Engineers and Surveyors).

“What the Courts Are Saying” begins with a federal appellate decision interpreting the guidelines of the Americans with Disabilities Act as they apply to theaters and assembly halls. What are the requirements for accommodating patrons in wheelchairs? The Sixth Circuit recently clarified these, and our column explains what the court said. Next,

we turn to a judicial definition of “pumping” in a dewatering case out of Hamilton County. Our third summary deals with an appeals court opinion from Cuyahoga County on the thorny issue of where an Ohio subcontractor should sue an out-of-state contractor for whom it performed out-of-state work.

Another thorny issue appears in “Holman, Gillis & Shevelow on Construction Documents”—Lien Waivers. Almost every project has them, but does everyone really understand them? What are the consequences if they aren’t used properly? Read this month’s offering and find out.

After Holman, Gillis & Shevelow and the new “Hindsight About Unforeseen Sight Conditions,” we have a brief announcement about a Workers’ Compensation premium dividend (pretty good news!), and we conclude with Sam Wampler’s ADR Corner. This month it concentrates on the House Bill mentioned above, which would make the Uniform Mediation Act the law in Ohio.

We hope the issue has enough food for thought to balance the feast you will be enjoying on Thanksgiving. Happy holidays from ohioconstructionlaw.com!

In this issue

- 2 OSHA Area Director Shares Lessons from Almost 30 Years of Working for Workplace Safety & Health
- 4 Upcoming Seminars
- 5 What the Legislators Are Considering
- 9 What the Courts Are Saying
- 12 Holman, Gillis & Shevelow on Construction Documents
- 15 Hindsight About Unforeseen Site Conditions
- 16 Investment Uptick Gives Employers Break on Workers’ Comp Bills
- 16 ADR Corner
The Uniform Mediation Act

OSHA Area Director Shares Lessons from Almost 30 Years of Working for Workplace Safety & Health



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Thirty-three years ago, back in 1970, the United States Congress determined “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” To that end, it passed the Occupational Safety and Health Act of 1970, establishing an agency of the Department of Labor, the Occupational Safety and Health Administration, known ever since as “OSHA,” for short. Now it is hard to imagine a job site—construction or otherwise—that hasn’t been touched by OSHA.

Four short years after the creation of OSHA, Deborah J. Zubaty went to work for its Chicago Regional Office. It was her first “real” job, and although she has moved around the Midwest since then, she has never left her home base in OSHA. Next year she will celebrate her 30th year with OSHA and her tenth as Columbus’s Area Director. Recently, she met with ohioconstructionlaw.com to share her thoughts on safety on the construction site, obstacles to achieving a safer workplace, and OSHA’s accomplishments and goals.

The Dangers of Construction. Last month’s OSHA Corner reported that in 2002, there were 1,171 construction workers killed on the job nationwide, just over 21% of the 5,524 work fatalities in all industries. For every 100,000 construction workers, there were 27.7 deaths. These numbers may sound shocking, but they reveal a marked improvement over past years.

Total construction-related deaths nationwide were down 9% from 2001. The total work-related deaths were the lowest in eleven years (since the survey began).

How do these national figures compare with Ohio’s and the local area’s statistics? Zubaty noted that the downward trend holds true here as well. Ohio’s 90 construction-related fatalities in the period from October 1, 2002 to September 30, 2003 are 12 fewer deaths than for the previous 12 months. In the same time periods, deaths of construction workers in the Columbus area decreased from 24 a year ago to 14 in the 12 months just completed—a drop of 41.6%.

Promoting Safety. While OSHA doesn’t claim credit for every success story, the Columbus Area Office has attacked the problem of construction safety head-on. Contractors who believe that construction sites get the lion’s share of inspections are right: Zubaty says that approximately 45% of the 600 inspections performed by the Columbus Office each year occur on construction worksites. This comes down to about 270 inspections per year, or just over one construction site inspection every workday.

These inspections are spread throughout the 28 counties that the Columbus Area covers in the southeast quadrant of Ohio. While Zubaty heads a staff of 23 persons, only 15 of them are Compliance Safety & Health Officers (usually called “CSHOs”), so they obviously stay busy.

Inspecting the Construction Site. Asked how OSHA decides which job sites to inspect, Zubaty explained that the University of Tennessee generates a random listing of sites, using data from the *Dodge Reports*. A new computer printout of the University



of Tennessee list comes out every month, and OSHA sorts it by the dollar

amount of the project or by construction type. After the list is received in the Area Office, sites will be removed if they have received a general schedule inspection within three months. Then the CSHOs begin working their way through the rest of the list, with a goal of inspecting every job site listed.

CSHOs work all hours, as some construction—such as night roadwork or bridge painting—can only be inspected at night.

Where do CSHOs come from? Zubaty explained that they often come from the particular trade they later focus on in many of their inspections. All CSHOs attend OSHA’s Training Institute, and many become professionally certified. The Area Office has not hired a new CSHO in a couple of years, and Zubaty did not think many OSHA offices are hiring right now. Her recommendation to anyone who might want to become a CSHO was to “check out USAjobs.com.”

An OSHA inspection should have the same outcome regardless of which CSHO or which Area Office performs the inspection. Zubaty considers uniformity of citations important. To that end, the State has



quarterly construction meetings at which attendees review the bases for citations and make sure all are interpreting the regulations similarly.

Do the offices have quotas for numbers of citations or amounts of fines? Not according to Zubaty. Each OSHA office has performance goals, but these are related to such things as quality of inspections and outreach to various segments of the community.

Mistakes Contractors Make. In response to a question about the biggest mistake contractors make, Zubaty gave a surprising answer: “The biggest mistake is having no safety and health program.” She explained that smaller contractors often leave a large company to go into business for themselves. They have only a handful of employees—under 20—and they need help. They get jobs, but they forget to “bid in” safety. Often they subcontract out much of the work, so they may not even know who their subcontractors are. The contractors may provide safety equipment for the subcontractors, but do they ever check to see that it is used? “They never watch people work,” she explained.

Other mistakes Zubaty noted stem from purchasing a “canned” safety and health program—and then not reading it. A program can look good on paper, but if no one knows what it says, it is worthless. Too many contractors have no training and no discipline program. They rely on hiring experienced construction workers who “know what to do.” But that isn’t enough.

Not reading a contract leads to other troubles. The contract may contain specific safety obligations, and both parties had better know what these are.

Of course, contractors who don’t read their contracts are also unlikely to pre-plan their jobs, another mistake Zubaty noted.

Not all the mistakes are made by small contractors, though. Bigger contractors who work on large projects have their share of problems. Finger-pointing is easy to do. When no one is in charge, no one wants to correct a safety problem. Unless it is unmistakably clear in the contract, no one wants to do the cleanup or supply the guardrails.

As for specific safety violations, Zubaty thinks the biggest problems are roofing and scaffolding. The single most-cited violation is lack of fall protection, when workers go up on an elevated platform without a harness. Their defense is usually that the equipment was rented, and no harness came with it. This doesn’t get them very far.

Most construction citations fall into one of four major areas: (1) falls, (2) electrocutions, (3) struck-by hazards, and (4) caught-in hazards.

OSHA’s Efforts To Be Proactive. Those who see OSHA as merely a watchdog waiting to pounce on

the contractor who steps out of line would be wrong. On both a national and local level, OSHA engages in many efforts designed to prevent accidents and increase worker awareness of safety issues. This year, for instance, the new federal initiatives focus on transportation, reducing workplace violence, ergonomics, and outreach to several groups: small businesses, immigrants, and youth (defined as workers between the ages of 16 and 24). As part of the youth outreach, the Columbus Office has participated in seminars in all the vocational schools in the 28-county area. The outreach efforts to immigrant workers include encouraging residential contractors and masons to conduct safety programs in their workers’ native languages.

Within the construction industry, OSHA’s current national emphases are on silica, lead, trenching and amputations. Locally, the Columbus Office is focusing on fall hazards and the dangers of constructing towers.

OSHA works cooperatively with a number of groups of contractors in Partnerships and Alliances. Partnerships have been around since 1998 and involve voluntary relationships with groups of employers or employee representatives either to develop comprehensive safety and health programs or to address a limited concern in a particular industry. Partnerships set goals, collect data and other information, participate in OSHA inspections, and evaluate their progress. In an attempt to improve safety, Partnerships can set stricter standards than OSHA itself sets. The Partnership with the Builders’ Exchange is one of the largest in Region Five.

Do members of a Partnership get a break when it comes to OSHA inspections? Not according to Zubaty. Inspections are the same; there are no exemptions. However, when a CSHO discovers a less-than-serious violation and it is corrected on the spot, no citation will result.

A more recent attempt at relationship building, Alliances began earlier this year when the Hispanic Contractors of America, Inc. joined OSHA in an effort to reduce accidents and fatalities among the Hispanic workforce. Less structured than Partnerships, Alliances have short- and long-term goals but no enforcement component. Rather than focus on a particular plant or worksite, Alliances focus on entire industries and strive to improve outreach, education and dialogue within the industry. For instance, the most recent Alliance, signed just last month, is a statewide agreement between the Ohio Landscapers Association and OSHA. Zubaty stressed that education and training are the purpose of an Alliance.

A program can look good on paper, but if no one knows what it says, it is worthless. Too many contractors have no training and no discipline program.

What Else Does OSHA Do? Many contractors who know OSHA only through safety inspections may be surprised to learn that the agency is also the chief enforcer of the federal Whistleblower laws. The Occupational Safety and Health Act, 29 U.S.C. § 660(c), protects employees from being discriminated against because they assist with an OSHA inspection or complain to the agency about an unsafe practice in their workplace, for instance. So it is no surprise that OSHA would be the agency enforcing other Whistleblower provisions.

What about the similar provision in the Clean Water Act, 33 U.S.C. § 1367? Or the International Safe Container Act, 46 App U.S.C. § 1506? Or the environmental law known as CERCLA, 42 U.S.C. § 9610? Under any of these Acts, if an employee “blows the whistle” on her employer and suffers recriminations because of it, the place to turn is OSHA. Even last year’s Sarbanes-Oxley Act contains whistleblower protection for employees of publicly traded corporations who report violations of the Securities Exchange Act or other federal laws dealing with fraud against shareholders. Unrelated to Health and Safety, you think? Perhaps, but the civil enforcement agency is OSHA. Zubaty reports that one of her 23 staff members is devoted exclusively to enforcing 13 federal statutes that protect whistleblowers.

Zubaty’s Personal Background. Deborah Zubaty has come a long way since her entry-level job in OSHA’s Chicago Regional Office 29 years ago. Early on, she aspired to be a Compliance Safety & Health Officer, and through OSHA’s Upward Mobility Program and her own hard work, she became one of the agency’s first female CSHOs.

She was fortunate to start out in Region Five, the largest OSHA region, which covers six states: Illinois, Ohio, and Wisconsin, all with federal OSHA plans, and Indiana, Michigan, and Minnesota, all with state-operated plans monitored and approved by federal OSHA. Because Region Five is so large and contains diverse industries, it is often chosen to pilot many new initiatives. Region Five is frequently on the cutting edge of new safety programs.

Zubaty has often been on the cutting edge, too. Through a series of promotions, she became the OSHA Area Director in Lansing, Michigan. That was the position she held in 1994 when she was selected to become the Columbus Area Director. Her tenure has seen the Columbus Area Office receive numerous awards, including National Area Office of the Year in 1998 and Regional Area Office for three years (1998, 1999, and 2002).

Her personal accolades include an award for Outstanding Personal Achievement from the U.S. Department of Labor’s Federal Women’s Program, and the Department of Labor’s Distinguished Career Award, which she received earlier this year.

But perhaps her greatest achievement is her genuine enthusiasm for the work she has done for nearly 30 years. When you meet Deb Zubaty, she launches immediately into a high-speed discussion of safety statistics, challenges, and success stories all geared to show how much safer the workplace has become in the last few years—and how much further it has to go. Zubaty has laser-sharp focus, and that focus is the health and safety of the American worker. Single minded? Perhaps. But no one would ever accuse Zubaty of not caring. The sparkle in her eyes and the inflection in her voice make it hard to miss: Deb Zubaty loves her work.

Early on, she aspired to be a Compliance Safety & Health Officer, and through OSHA’s Upward Mobility Program and her own hard work, she became one of the agency’s first female CSHOs.

Upcoming Seminars

Involving Bricker & Eckler LLP Construction Attorneys

Date & Time	Seminar	Location	Attorneys	Sponsors
Dec. 3, 2003 8:00 to 4:45	Ohio Mechanics’ Liens & Hot Construction Topics	The Forum 1375 East 9 th Street Cleveland	J. Rosati	Professional Education Systems Institute, LLC
Dec. 4, 2003 8:00 to 4:45	Ohio Mechanics’ Liens & Hot Construction Topics	Concourse Hotel 4300 Int’nl Gateway Columbus	J. Rosati	Professional Education Systems Institute, LLC
Dec. 5, 2003 8:00 to 4:45	Ohio Mechanics’ Liens & Hot Construction Topics	Clarion Hotel & Stes. 5901 Pfeiffer Road Blue Ash, OH(Cincinnati)	J. Rosati	Professional Education Systems Institute, LLC
Jan. 29, 2004 1:00 to 4:00	Ohio Township Assoc. Winter Conference (Competitive Bidding)	Hyatt Regency & Convention Center Columbus, OH	G. Parks	Ohio Township Association

What the Legislators Are Considering...



This monthly column focuses on legislation pending in Ohio that is of interest to the construction industry. Our goal is to provide a concise summary, including just enough information that anyone who wants to learn more will know where to direct questions about the bills. To that end, we provide you with the opening section of each bill's Analysis compiled by the Legislative Service Commission, reprinted with permission. For the rest of the Bill Analysis, check out Bills Online, www.legislature.state.oh.us/bills_online.cfm. For the text of any particular bill, go to www.legislature.state.oh.us/search.cfm.

Please recognize that this summary omits some bills that may be of interest to our readers. Also, due to the nature of the legislative process, the status of any bill may change on a daily basis. The very brief summaries here cannot explain all facets of any currently pending legislation. Readers with additional questions about pending or desired legislation should contact one of the attorneys in Bricker & Eckler's Government Relations Practice Group. For more information on the attorneys in this group, check out www.bricker.com/legalservices/practice/govern.

Summaries of Pending Legislation

*** HOUSE BILLS***

State Contractors: Fair Employment In Northern Ireland, H.B. 15

Reps. Miller, Ujvagi, Domenick, Allen, Sferra, Skindell

Bill Summary:

- Requires firms that contract with the state to supply goods, render services, or construct public improvements to implement the MacBride Principles of Fair Employment with respect to their business activities in Northern Ireland.

Assigned to the House Commerce & Labor Committee.

Vehicles To Display Lights in Road Construction Zones, H.B. 18

Reps. Miller, Carano, Ujvagi, Domenick, Allen, Sferra, Skindell

Bill Summary:

- Permits the Director of Transportation, a board of county commissioners, or a board of township trustees to require that vehicles display lighted lights during hours of actual work within a construction zone.

- Assesses one point against an offender's driver's license for a violation of the requirement to display lighted lights, in addition to a criminal penalty.
- Provides that the requirement to display lights applies only when signs giving notice are erected in accordance with the Director's specifications and when a violation occurs during hours of actual work within the construction zone.

Assigned to the House Transportation & Public Safety Committee.

Including Drainage Protection in County Building Codes, H.B. 25

Reps. Gibbs, Grendell, Peterson, Seitz, Otterman, McGregor, Core, Gilb, Hollister, Niehaus, Setzer, Wagner, DeBose, Domenick, Skindell, Carmichael, Aslanides, Buehrer, Cates, Chandler, Cirelli, Clancy, Collier, Flowers, Hoops, Hughes, Kearns, Koziura, S. Patton, Reidelbach, Taylor, Wolpert

Bill Summary:

- Authorizes a board of county commissioners to adopt and include regulations in its building code to protect existing

surface and subsurface drainage for property that is not subject to the Subdivision Law.

- Requires regulations not to be inconsistent with, more stringent than, or broader in scope than standards adopted by the Natural Resource Conservation Service in the United States Department of Agriculture concerning drainage or rules adopted by the Environmental Protection Agency for reducing, controlling, or mitigating storm water runoff from construction sites, where applicable.
- Eliminates the Residential Construction Advisory Committee.

Signed into law by Governor Taft on 7/30/03; effective 10/29/03.

Making Unlicensed Practice of Certain Professions a Deceptive Trade Practice, H.B. 38

Reps. Willamowski, Hagan, McGregor, Seitz, Setzer, Schaffer, Buehrer

Bill Summary:

- Provides that a person engages in a deceptive trade practice when, in the course

of the person's business, vocation, or occupation, the person performs for or with the expectation of compensation, whether directly or indirectly received, a service for which a license, certificate, permit, or registration is required, including licenses, certificates, permits, or registrations required under specified laws, while not holding a current and valid license, certificate, permit, or registration.

Assigned to the House Civil & Commercial Law Committee.

Prevailing Wage on School Construction + Ohio Contractors on Public Improvements, H.B. 45

Reps. Boccieri, Ujvagi, Brown, Beatty, Harwood, Koziura, Otterman, Allen, Strahorn, Miller

Bill Summary:

- Subjects school facilities construction to the Prevailing Wage Law.
- Prohibits schools from awarding a contract for a public improvement supported in whole or in part by the state to a contractor who does not have a principal place of business in Ohio.

Assigned to the House Commerce & Labor Committee.

Drug-Free Public Works Projects, HB. 136

Rep. G. Smith

Bill Summary:

- Requires public improvement contractors to have written safety programs that include drug and alcohol testing.
- Requires public works contractors for projects financed with money appropriated by the General Assembly to establish drug-free workplace programs.
- Requires the Department of Administrative Services to adopt, by rule, specified standards and requirements for drug-free workplace programs.

Assigned to the House State Government Committee.

Establishing Statewide Uniform Residential Building Code, H.B. 175

Reps. Buehrer, Widener, Olman, D. Evans

Bill Summary:

- Requires the Board of Building Standards to adopt a statewide uniform *residential* building code, separate from the nonresi-

dential building code, for one-, two-, and three-family dwelling houses and accessory structures incidental to those dwelling houses.

- Requires the Residential Construction Advisory Committee to recommend a residential building code to the Board of Building Standards.
- Permits a certified building department established by a county, township, or municipal corporation to administer and enforce the residential building code, the nonresidential building code, or both.
- Specifies that an owner of a residential building in an area without a local building department certified to enforce the residential building code is not required to receive approval of the plans and specifications for the residential building.
- Permits specified local governments to adopt additional regulations governing residential buildings and property maintenance regulations if the regulations are not in conflict with the statewide residential building code and address subject matter that is not addressed in that code.
- Provides procedures for the Board of Building Standards to determine whether a conflict exists with a local regulation, and requires the incorporation of a local regulation into the statewide residential building code if the regulation conflicts with that code but is necessary for health, safety, or welfare.
- Requires a political subdivision with a certified building department to collect, on behalf of the Board of Building Standards, a fee of 1% of any local fees collected in connection with residential buildings.
- Removes detailed requirements that the Board of Building Standards adopt energy conservation and thermal efficiency standards for residential structures while retaining this requirement in a general manner.
- Adds penalty provisions for violations of the Building Standards Law.
- Removes the authority of a county or municipal corporation to require licensing of residential contractors.
- Requires residential contractors to be licensed statewide by the Ohio Construction Industry Examining Board.
- Increases the Ohio Construction Industry Examining Board from 17 to 22

members by adding a five-member residential construction section to the Board.

- Modifies the composition of the Residential Construction Advisory Committee.
- Provides procedures for a homeowner and residential contractor to follow prior to a homeowner filing a claim against the contractor or seeking arbitration.

Assigned to the House Homeland Security, Engineering & Architectural Design Committee.

Prohibiting Pay Retainage, H.B. 208

Reps. Young, Brinkman, Buehrer, McGregor, Flowers, Aslanides, Peterson, D. Evans, Gibbs, Reidelbach, Callender

Bill Summary:

- Eliminates statutory authority allowing or requiring the practice of holding a retainage from payments to contractors in the case of public improvement projects.
- Limits the use of holding a retainage to a percentage-based system in the private sector.
- Requires contractors who contract to perform public improvements to have a written safety program.

Assigned to the House Commerce & Labor Committee.

School Facilities—Renovate Rather Than New, H.B. 217

Reps. Williams, Hagan, McGregor, Miller, Widowfield, Aslanides, Martin, Allen, Brinkman

Bill Summary:

- Prohibits the Ohio School Facilities Commission from prohibiting a school district undertaking a state-assisted classroom facilities project from renovating an existing facility rather than acquiring a comparable facility by new construction as long as certain conditions are satisfied.

Assigned to the House Education Committee.

Construction & Demolition Debris Fees, H.B. 259

Reps. Harwood, Kearns, Seitz, Oelslager, Carano, Cirelli, Strahorn

- Eliminates the current annual license fee for construction and demolition debris facilities, and instead establishes a 22¢ per cubic yard or 66¢ per ton fee on the disposal of construction and demolition debris.

- Requires monthly remittance of disposal fees from owners or operators of construction and demolition debris facilities to local boards of health or the Director of Environmental Protection, and allows quarterly remittance of the fees.
- Authorizes municipal corporations and townships to appropriate a portion of the disposal fees for specified purposes.

Assigned to the House Energy & Environment Committee.

Revising Building and Fire Codes, H.B. 266

Reps. Flowers, Widener

Bill Summary:

- Renames the Board of Building Standards as the Board of Building and Fire Standards and adds five members to the renamed Board.
- Transfers authority to adopt the State Fire Code from the State Fire Marshal to the Board of Building and Fire Standards.
- Creates a five-member Ohio Building Code Advisory Committee and a five-member Ohio Fire Code Advisory Committee to assist the Board of Building and Fire Standards in Ohio Building Code and State Fire Code development.
- Transfers the State Fire Marshal's office

from the Department of Commerce to the Department of Public Safety, where it will become the Division of the State Fire Marshal.

- Adds two members to the State Board of Building Appeals.
- Transfers the regulation of underground storage tanks from the State Fire Marshal to the Superintendent of Industrial Compliance.
- Requires the Superintendent of Industrial Compliance to propose rules to the Board of Building and Fire Standards for the adoption of an Aboveground Petroleum Storage Tank Program and gives the Superintendent primary responsibility, with specified exceptions, for administering that program.
- Creates a 16-member Aboveground Petroleum Storage Tank Study Committee for the purpose of submitting a recommendation whether unregulated aboveground petroleum storage tanks should be registered or otherwise regulated.
- Makes appropriations.

Assigned to the House State Government Committee.

Adopting Uniform Mediation Act, H.B. 303

Rep. Oelslager

Bill Summary:

- Creates the Uniform Mediation Act.
- Specifies when the Uniform Mediation Act applies to a mediation proceeding.
- Sets forth specific exclusions from the Uniform Mediation Act and provides parties with an opportunity to opt out from the coverage of the Act.
- Provides that mediation communications are privileged and are not subject to discovery or admissible in evidence except when the privilege is waived by all parties or in specified exceptions.
- Prohibits communications by a mediator in specified circumstances.
- Requires mediators to make a reasonable inquiry before accepting a mediation to determine whether any conflict of interest arises and to disclose any conflicts to the mediation parties as soon as is practicable.
- Provides that mediation communications are confidential to the extent agreed by the parties.
- Provides that an attorney or other individual designated by a party may accompany the party to and participate in a mediation.

Assigned to the House Judiciary Committee.

***** SENATE BILLS*****

Compensatory Time in Lieu of Overtime, S.B. 26

Sens. Coughlin, Spada, Stivers, Schuler

Bill Summary:

- Permits private employers to award compensatory time off in lieu of monetary overtime compensation to their employees, subject to the consent of the employee and other specified conditions.
- Permits public and private employers to establish biweekly work schedule programs to allow their employees to work 80 hours in any two consecutive work weeks.
- Prohibits private employers from requiring their employees to accept compensatory time off in lieu of monetary payment for overtime and prohibits public and private employers from

requiring their employees to work a biweekly work schedule program.

- Establishes civil and criminal penalties for violations of the bill's provisions.

Assigned to the Senate Insurance, Commerce & Labor Committee.

Rural Accelerated School Building Assistance Program, S.B. 54

Sens. Carey, Mumper

Bill Summary:

- Creates the Rural Accelerated School Building Assistance Program to provide early state assistance for classroom facilities acquisition for school districts with territories greater than 350 square miles.

Assigned to the Senate Finance & Financial Institutions Committee.

Modifications Pertaining to Public Libraries, Sub. S.B. 55

Sens. R. Gardner, Stivers, Miller, Mumper, Schuler, Prentiss, Mallory, Austria, Carey, Dann, Herington, Fedor, Coughlin, Hagan, Harris, Spada

Bill Summary:

- Increases from \$15,000 to \$25,000 the competitive bidding threshold for improvements to free public libraries.
- Removes the monetary limit specified for life insurance coverage offered by free public libraries to their employees, but limits life insurance procurements to group term life insurance.
- Allows a board of library trustees to authorize its employees to use a credit card held by the library to pay for library expenses.

- Allows a county budget commission to waive certain tax budget requirements in a county in which a single library receives all of the county library and local government support fund distribution that is distributed to libraries.
- Makes changes to the law authorizing political subdivisions to self-insure for health care benefits.

Signed into law by Governor Taft on 10/09/03; effective on 01/08/04.

Tort Reform, Sub. S.B. 80

Sens. Stivers, Hottinger, Goodman, Wachtmann, Amstutz, Randy Gardner, Austria, Nein, Schuring, Armbruster, Coughlin, Carey, Harris, Mumper, Schuler

Bill Summary: Statutes of repose

- Provides that the ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos, that the cause of action based on asbestos that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to asbestos, whichever date occurs first, and that the civil action for wrongful death must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues.
- Provides that the ten-year statute of repose does not bar an action based on a product liability claim against a manufacturer or supplier of a product for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.
- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose but less than two years prior to the expiration of that period.
- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.
- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any defendant who engages in fraud with regards to an improvement to real property.

Passed the Senate on 6/11/03; assigned to the House Judiciary Committee.

Deadline for Providing Copies Of Public Records, SB. 87

Sens. Dann, Miller, Coughlin, Brady

Bill Summary:

- Requires a public office or person responsible for public records to provide copies of public records within ten days or, if requested to be provided by United States mail, within 15 days after receipt of the request.

Assigned to the Senate State & Local Government & Veterans' Affairs Committee.

Modifying Qualifications of County Engineers, S.B. 90

Sen. Schuring

Bill Summary:

- Eliminates the requirement for a county engineer to be a registered surveyor.
- Requires the office of the county engineer to have a registered surveyor on its staff if the county engineer is not a registered surveyor.
- Requires a county engineer to have an engineering degree with a major area of study in civil engineering.

Assigned to the Senate State & Local Government & Veterans' Affairs Committee.

Requiring an Indoor Air Quality (Mold) Program for School Buildings, S.B. 121

Sen. Dann

Bill Summary:

- Amends several statutes for the purpose of adopting new section numbers and enacting sections to establish sanitation requirements and standards for indoor air pollutants for schools and to require boards of health or a board's designated representative to conduct inspections of schools and school buildings.

Assigned to the Senate Health, Human Services & Aging Committee.

Modifying Requirements for Registration Of Professional Engineers & Surveyors, S.B. 150

Sen. Coughlin

Bill Summary:

- Increases from \$16 to \$20 the annual renewal of registration fee for professional engineers and professional surveyors.
- For registration renewals of professional engineers and professional surveyors beginning with calendar year 2008, implements continuing professional development requirements.
- Authorizes the State Board of Examiners of Architects to adopt rules pertaining to continuing education requirements for architects who hold a certificate of qualification under state law.

Assigned to the Senate Insurance, Commerce & Labor Committee.

What the Courts Are Saying...



Each month, ohioconstructionlaw.com summarizes recent decisions of Ohio and federal courts that may affect construction projects and those involved with them in Ohio. From time to time, we may even include a case from another state, if it seems particularly relevant. We highlight what the courts have said in these cases to keep you informed about decisions that may affect your business and your interests, but the summaries themselves are neither legal advice nor legal opinion. If we overlook a case that you think is significant, E-mail us with your suggestions. We can always use feedback, and we would enjoy hearing from you!

Some Updates. Before we begin our summaries of new opinions, we need to update you on three cases we discussed recently.

- Our September 2003 column related an opinion of the Sixth Circuit on September 18th that prohibited a non-union contractor from barring access to the construction site to union representatives when an organized subcontractor has a union access clause in its contract. When we reported on the case, it was an unreported opinion available on LEXIS, but since then, the Sixth Circuit has elevated its significance—and its value as precedent in other cases—by designating it as a “published opinion” with a new citation: *Wolgast Corp. v. National Labor Relations Board*, 2003 U.S. App. LEXIS 22560, 2003 Fed. App. 0389P (6th Cir. 2003).
- *Daniel E. Terreri & Sons, Inc. v. Board of Mahoning County Commissioners* (Mar. 10, 2003), 2003-Ohio-1227, a case we summarized in our April 2003 issue, was just denied review by the Ohio Supreme Court on November 10, 2003. The 6-to-1 decision leaves standing the decision of the Mahoning County Court of Appeals that contractors who signed a public contract and then immediately requested a 15% increase in order to “extend their bid” had effectively abandoned the contract.
- The Ohio Supreme Court also determined earlier this month not to review a case we summarized in the August 2003 column: *Linworth Lumber Co. v. Z.L.H. Ltd.* (Aug. 4, 2003), 2003-Ohio-4190. A badly split Supreme Court voted 4-to-3 not to accept the case, which held that an owner had protected itself by filing a substantially compliant Notice of Commencement even though that Notice named an entirely different contractor from the one it should have named.

If you want to review any of these earlier summaries, remember that all of our back issues are available online at www.ohioconstructionlaw.com.

Now for the cases chosen for this month. We begin with a federal appellate decision of interest to anyone designing or constructing a stadium or other “assembly area” that must comply with the handicap access requirements of the Americans with Disabilities Act. Our next case is from the Court of Appeals for Hamilton County, which had to decide what “pumping” meant in a dewatering contract needed for the construction of a sanitary sewer. Finally, we turn to another Court of Appeals decision, this time from Cuyahoga County, that explains why an Ohio subcontractor might not be able to bring its contract dispute in an Ohio court.

Sixth Circuit Declares Unobstructed Views Not Enough To Satisfy ADA Requirements

Under the regulations implementing Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182, “assembly areas”—such as movie theaters and field houses—must provide wheelchair users with “lines of sight comparable to those for members of the general public.” The United States District Court for the Northern District of Ohio interpreted that standard to require stadium-style movie theaters to provide wheelchair users with unobstructed views of the screen from seats located next to or among the seats for the general public.

As of November 6th, at least in Ohio, Michigan, Kentucky and Tennessee (the states where the Sixth Circuit Court of Appeals interprets the federal law), this holding is no longer the law. According to the ruling in *United States v. Cinemark USA, Inc.*, 2003 U.S. App. LEXIS 22757, 2003 Fed. App. 0395P (6th Cir. Nov. 6, 2003), unobstructed views are no longer enough. In any public assembly areas, wheelchair users must also be provided with comparable viewing angles to those of the majority of non-disabled patrons. This opinion can be important to anyone who designs or builds a stadium, field house or assembly hall, as well as to those—such as school

districts and athletic teams—that operate such facilities.

The basis for the government’s suit against Cinemark was a standard in the Americans with Disabilities Act Accessibility Guidelines, Standard 4.33.3:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

Parsing the standard carefully, the court focused on the words “lines of sight **comparable** to those for members of the general public.” It quickly rejected the idea that “comparable” meant merely “capable of being compared.”

Contending that all of its stadium-style theaters met this standard, Cinemark moved for summary judgment (a judgment in its favor based on applying the law to uncontested facts, without the necessity of a trial). Two years ago, in November of 2001, the District Court granted Cinemark’s motion. According to that court, Cinemark provided all that the regulation required: unobstructed views of the movie screen for wheelchair users from seating located amidst or adjacent to seats for the general public.

After two years of briefing, oral argument, and deliberation, the Sixth Circuit disagreed. Parsing the standard carefully, the court focused on the words “lines of sight **comparable** to those for members of the general public.” It

quickly rejected the idea that “comparable” meant merely “capable of being compared.” The court felt such an interpretation would be meaningless, as any two lines of sight, no matter how different, could be compared. So “comparable” must, in this context, mean “similar,” or at least roughly similar. And similar lines of sight required similar viewing angles. So the court sent the case back to the District Court to determine exactly how similar the lines of sight had

to be to comply with the Americans with Disabilities Act standards.

In reaching this decision, the Sixth Circuit rejected several defenses by Cinemark, including one that seemed pretty compelling: Most of the Cinemark theaters were designed in compliance with the Texas Accessibility Standards, which had already received the blessing of the Department of Justice as meeting or exceeding federal accessibility requirements. In fact, the DOJ had issued a press release declaring that “builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well.”

Under these circumstances, shouldn’t a theater owner or designer be able to rely on compliance with the Texas Accessibility Standards? The American Institute of Architects thought so, and it submitted an *amicus* brief to make that argument. (An *amicus* brief is submitted by a non-party who has an interest in the outcome of the case, to be sure the court gets to hear that entity’s concerns.) The AIA wanted to shield architects from potential suits by owners whose theaters were found to be non-compliant with the federal guidelines.

But the Sixth Circuit disagreed with the AIA because several government publications had stated that a building’s compliance with certified state or local ordinances was merely “rebuttable evidence” that the building complied also with the Americans with Disabilities Act Guidelines. Rebuttable evidence is not incontrovertible evidence. While it gave “a presumption in favor of the builder, . . . that presumption may be overcome,” according to the Sixth Circuit.

Still, the Sixth Circuit was reluctant to say that Cinemark could be fined or made to pay compensatory damages to wheelchair users (two remedies the government had sought) when its theaters had been built to comply with Texas standards certified by the federal government. The court suggested, instead, that the most appropriate relief might be prospective only.

Since this decision conflicts with a decision on the same issue by the Fifth Circuit Court of Appeals, *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), it is quite likely that we have not heard the last of this issue.

Sewer Contractor Gets Soaked For “Pumping” in Dewatering Case

Utility contractors, especially those constructing a sanitary sewer, often need to rely upon a dewatering subcontractor to lower ground water levels to make the construction possible. A recent case out of Hamilton County illustrates why it is important for the parties to a dewatering contract to make certain

its terms are clear. The court in *Kelly Dewatering & Construction Co. v. R.E. Holland Excavating, Inc.* (Oct. 24, 2003), 2003-Ohio-5670, found ambiguity in the term “pumping.”

In *Kelly*, a sanitary sewer contractor issued a purchase order to the dewatering sub. The scope of work included installing 15 dewatering points, pumps, discharge line, and standby pumps. The terms were \$66,450 for “pumping for 6 months,” and \$225 per day for “additional pumping.”

The dewatering system was installed at the end of April 2000. The pumps were first turned on on May 11, 2000, and ran for 5 days, plus an additional 5 days at the end of May. The pumps were not turned on again until the end of July, and they ran continuously until February 12, 2001. The system was removed as soon as it was practical, on April 2, 2001.

A conflict arose when the sewer contractor wanted to pay only for the actual amount of time the pumps operated (about 7 months), while the dewatering sub wanted payment for the entire amount of time its equipment was on the job (nearly 12 months) at the base price of \$66,450 plus \$225 for each day beyond 6 months. This difference amounted to about \$29,000.

The trial court found for the dewatering sub and the appeals court agreed. The courts held that the contract for dewatering services was ambiguous, i.e., it could be reasonably interpreted in more than one way. The sub wanted to interpret the contract broadly, for “pumping” to include the goods and services for the entire time its dewatering equipment was on site—whether it was being used or not. The sewer contractor argued for a more narrow interpretation of “pumping.” It wanted to count only the actual amount of time the pumps were running.

The courts turned to a well-established principle of law that says an ambiguous contract should be interpreted against the party that drafted the contract. In this case, it was the sewer contractor’s purchase order that governed the project. Therefore, the courts took the subcontractor’s view, and the sewer contractor had to pay for the entire time the dewatering equipment was on its site.

Ohio Sub Who Works Elsewhere Can’t Always Sue Contractor in Ohio

In today’s economy, more and more contractors and subcontractors are traveling further to bid jobs and perform contracts, with the result that state lines don’t mean much in the construction industry anymore. Or do they?

Earlier this month, a decision out of the Court of Appeals for Cuyahoga County, *American Office Ser-*

vices, Inc. v. Sircal Contracting, Inc. (Nov. 13, 2003), 2003-Ohio-6042, ruled that an Ohio subcontractor could not bring suit in Ohio against a Missouri contractor for whom the sub had performed work in Missouri on a contract that applied the law of Missouri. The court did not say the subcontractor could not bring suit; it just could not do so in Ohio.

The case arose from renovation work on the University of Missouri’s Columbia campus. The plaintiff subcontractor had worked for the University before, so it received notice of the project. Interested, it sent subcontractor bids for upholstery work in the auditorium to several potential contractors. One of them called to follow up, eventually negotiating a contract, all by phone, fax, or regular mail. The contract specified that any disputes would be decided under Missouri law.

The subcontractor went to Missouri to perform its work. But when a dispute arose over payment and workmanship, the subcontractor wanted it decided closer to home, in Ohio. So it brought suit in the Cuyahoga County Municipal Court, asking that it be paid the balance of its contract and that the court declare it was not liable for allegedly defective seat backs.

Objecting to being sued in Ohio, the defendant contractor put in a “special appearance” in Cuyahoga County. This court appearance was for one purpose only: To argue that Ohio was the wrong place for the lawsuit, as the defendant had not been “transacting any business” in the state, one of the requirements for suing an out-of-state business in Ohio. The trial court agreed with the contractor and granted its motion. So the Ohio subcontractor appealed.

On appeal, the court looked at the two requirements for suing an out-of-state defendant in an Ohio court, in other words, having “personal jurisdiction” over that defendant: (1) the facts must comply with the state’s “long-arm statute” (so named because it dictates when the “long arm of the law” can reach a particular defendant); and (2) suing in Ohio must be consistent with federal due process standards.

Ohio’s long-arm statute, Ohio Revised Code § 2307.382, lists several different circumstances that might make a defendant subject to suit in Ohio, but the only one relevant to this contract dispute was “transacting any business” in Ohio. The subcontractor argued that the telephonic contractual negotiations fulfilled this requirement. According to the plaintiff, the defendant contractor had transacted business in Ohio when it called to follow up on the unsolicited bid the plaintiff had sent.

The subcontractor went to Missouri to perform its work. But when a dispute arose over payment and workmanship, the subcontractor wanted it decided closer to home, in Ohio.

After looking at earlier cases on the “transacting business in Ohio” standard, the Court of Appeals decided it wasn’t necessary to determine whether the telephonic negotiations were enough to meet the standard. Even if these could be seen as transacting business, they would not satisfy the second prong of the test—they wouldn’t meet the federal requirement for due process. To satisfy that requirement, there would have to be a showing that the contractor had deliberately intended to do business in Ohio and to take advantage of the “benefits and protections” of Ohio law. Without such a showing, it would be unfair to subject the Missouri resident to suit in an Ohio court.

Looking at the facts of the contract negotiation, the Court of Appeals found the defendant contractor, Sircal, had the better argument:

The parties agree that American initiated contact with Sircal by submitting an unsolicited subcontractor bid for the project, and that Sircal then negotiated a contract with

American whose employees performed the work in Missouri. Under these circumstances Sircal, which had not transacted business in Ohio before, did not reasonably subject itself to Ohio law; instead, it responded to American’s desire to do business in Missouri and subject itself to the laws of that state.

So the Court of Appeals affirmed the decision of the Municipal Court that the dispute did not belong in an Ohio court.

Jurisdictional decisions such as this one always turn on specific facts, making it hard to predict the outcome. If the contractor in this case had often dealt with Ohio subcontractors and had transacted business in the state frequently—even if by phone, facsimile and mail—the outcome could have been different. But the case sounds a note of caution to Ohio contractors who might assume they can always turn to the courts of their home state to settle their contract disputes. Sometimes, they cannot.

HOLMAN, GILLIS AND SHEVELOW ON

Construction Documents

Lien Waivers—Not Necessarily Waving Goodbye to Hassles

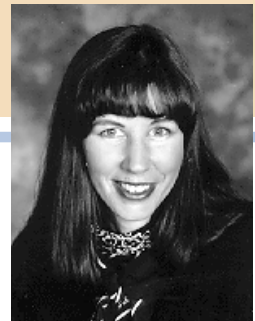
Forty-second in a Series—Each issue of ohioconstructionlaw.com discusses important terms found in typical construction documents. This month, Doug Shevelow, P.E., explains an often misunderstood procedure in the AIA Document A201, the General Conditions: Lien Waivers.

Mechanics’ liens are a significant security—sometimes the only security—that a prime contractor or subcontractor has to ensure that it will be paid in full. Mechanics’ liens are statutory creatures, meaning that no two states’ mechanics’ lien procedures are exactly alike.

In Ohio, a mechanics’ lien claim against funds on a public project can cause a prime contractor much consternation because the Owner must by law withhold those funds if the lien claimant has correctly filed all the necessary paperwork. The Owner, although seemingly not part of the dispute, can also be negatively impacted because the prime contractor may not be able to complete the project if too much money is tied up. A lien claim against the constructed im-



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provements on a private project can give an Owner equal amounts of frustration.

To protect itself, an Owner wants to make sure that monies it has already paid out have trickled their way down to all the first tier and lower tier subcontractors and suppliers who could place a mechanics’ lien on the project. If the subs and suppliers have been paid,

there should be no lien claims. The mechanism an Owner uses to gain the assurance that potential lien claimants have been paid in full is the Lien Waiver.

The AIA General Conditions of the Contract for Construction, Document A201, touches on lien waivers in two places. Subparagraph 9.3.3 requires the Contractor to warrant that work which has been previously paid for “to the best of the Contractor’s knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances. . . .” The Contractor gains the necessary “knowledge, information, and belief” by getting lien waivers from all of its subcontractors and suppliers.

Subparagraph 9.10.2 allows an Owner to make receipt of all lien waivers a precondition to the Contractor’s receipt of final payment.

AIA Document G706 is the Contractor’s Affidavit for Release of Liens. This is a sworn and notarized statement that all subcontractors and suppliers have been paid out of previous draws. The Application for Payment itself, AIA Document G702, also requires a contractor to certify that all previous obligations have been satisfied through the following language:

The undersigned Contractor certifies that to the best of the Contractor’s knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, **that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner,** and that current payment shown herein is now due.

Several questions frequently arise with regard to lien waivers. They are presented below along with some Ohio case law on point.

Are mechanics’ lien rights waivable as a precondition to getting the job?

Yes, according to an unreported case from the Franklin County Court of Appeals dating back to 1977. See *Steveco, Inc. v. C&G Investment Assoc.* (1977), Franklin Cty. App. 77AP-101, 1977 Ohio App. LEXIS 7341. In *Steveco*, a masonry subcontractor signed a subcontract with a general contractor on an apartment complex construction project. In the subcontract language, the subcontractor expressly waived its rights to file a mechanics’ lien on the project.

Later, the general contractor failed to pay the subcontractor in full and the subcontractor filed a mechanics’ lien against the project for the balance. The court held that because the subcontractor waived its lien rights as a precondition to being awarded the contract, the waiver was valid. The subcontractor had no lien rights.

There was valuable consideration because the subcontractor could have chosen to refrain from contracting under the clause waiving its lien rights, or it could have attempted to negotiate the language out of the contract.

This is not to say that the subcontractor had no rights at all, but only that it was unable to use a mechanics’ lien to help secure what it may have been legally entitled to.

Which comes first, the payment or the waiver? And what if one side reneges?

It doesn’t really matter, because a party waiving its lien rights must receive adequate consideration in order for the lien waiver to be valid. This is the lesson of *Beebe Construction Corp. v. Circle R Co.* (1967), 10 Ohio App.2d 127. In a sense then, all lien waivers in Ohio are conditional. The Owner or prime contractor must follow through on its promise to pay. A bait-and-switch invalidates the lien waiver.

Beebe differs from *Steveco* in that in *Beebe*, the general contractor tried to improve its position by hindering the subcontractor’s lien rights *after* the contract was signed.

The usual practice, however, should make the payment simultaneous with the lien waiver. To obtain its first draw on a job, the Contractor need not submit any lien waivers. But the Contractor is expected to use that draw to pay the subcontractors whose work it has included in its first payment application. When these subcontractors are paid, they sign lien waivers for the amount of their payment. Then, to obtain its second draw, the Contractor turns in these lien waivers to establish that it has paid its subcontractors to date. Payments from the second draw trickle down to the subcontractors in exchange for a second set of lien waivers, which in turn get submitted with the third application for payment, and so forth.

What if a Contractor compels a sub to sign a lien waiver for an entire pay application in exchange for accepting less?

The *Beebe* case answers this question, also, at least to the extent that the parties were aware that there was only a partial payment. In *Beebe*, the general Contractor paid the site work subcontractor on another apartment complex project only a portion of a particular pay request, in exchange for the subcontractor’s lien waiver for the entire amount. Despite signing the waiver, the site work subcontractor then filed a mechanics’ lien for the remainder.

The court explained that the partial payment was not adequate consideration for the lien waiver. It held that “a waiver of a mechanic’s lien in consideration of payments made by an owner or contractor, which he is legally bound to pay the claimant, does not constitute valuable consideration so as to make the lien waiver effective and binding.” So a prime

Contractor cannot coerce a sub into waiving its lien rights by accepting partial payment.

In *Beebe*, the president of the General Contractor, who obtained the lien release, also was a general partner of the Owner. So presumably the Owner knew that a lien claim could still arise. What about an Owner who relies upon a lien waiver, assuming that it was given for full and valid consideration? Shouldn't such an Owner have a solid defense against a mechanics' lien? The Ohio courts have not spoken directly on this point. But an Owner could protect itself by inquiring into the payment status of all subs that have filed Notices of Furnishing, even though this is not normally done.

What happens when a Contractor falsely represents to the Owner that all subcontractors and suppliers have been paid in full?


The Contractor may very well have committed fraud. Depending on the language of the certification, whoever signed the representation that all subcontractors and suppliers had been paid in full from previous

Owner payments may be personally liable. That person may have some explaining to do if a mechanics' lien later shows up on the project, filed by a sub who supposedly had been paid in full.

If the Contractor's financial difficulties deteriorate to the point of filing for bankruptcy, such fraudulent lien waivers may come back to haunt the Contractor. A debt based on fraud is not dischargeable in bankruptcy, and a bankruptcy court will look at the signing of patently false lien waivers as evidence of a debtor's fraudulent conduct, as did the court in *Bernard Lumber Co. v. Patrick*, 265 B.R. 782 (Bankr. N.D. Ohio 2001).

In sum, then, a lien waiver is not to be taken lightly. It is a statement signed under oath, and to swear that all subs and suppliers have been paid to date when they have not been is akin to lying on the witness stand. An Owner who relies on such a falsely sworn statement to its detriment will be able to bring a fraud claim against the signer **personally**. The shield usually provided by the corporate form will do little to protect the corporate officer who has signed his or her name to a false affidavit.

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Hindsight About

Unforeseen Site Conditions

Dimensions, Elevations, Above-Ground Conditions— Really Unforeseen?

This month, as promised, ohioconstructionlaw.com begins a new feature: an every-other-month column on Unforeseen Site Conditions. The column, which will alternate with the OSHA Corner, is written by one of our resident Professional Engineers, Doug Shevelow, a Construction Claims Analyst. How can even an insightful P.E. write about something unforeseen? We wondered about that, too, and that is why we decided to call this offering “Hindsight About Unforeseen Site Conditions.”

Last month’s lead article, “Dealing with Unforeseen Site Conditions—Excedrin Headache # 112,” explained how most standard form contracts grant relief to a Contractor who encounters either a Type I (different from the Owner’s representations) or Type II (highly unusual) site condition.

The article then discussed two ways an Owner can use an exculpatory clause to shift the risk of unforeseen site conditions back onto the Contractor: (1) by waiving any warranty that the bid documents are either accurate or complete; or (2) by requiring the Contractor to make a site investigation before submitting its bid.

The article finished by examining case law from around the country regarding the Contractor’s duty to make a reasonable investigation of subsurface conditions before bidding, concluding that courts have held that the Owner must make reasonable accommodations for the Contractor to do so.

This month we introduce a new column by focusing on the requirement for a reasonable site investigation with regard to things that are more readily observable than subsurface conditions—dimensions, elevations, and other above-ground features. These features are often depicted in the construction drawings.

According to the *Spearin* Doctrine, the Owner warrants that the construction drawings are sound and accurate. (For a discussion of the Supreme Court case that spawned the *Spearin* doctrine, see the March 2000 issue, which can be found on our website, www.ohioconstructionlaw.com.) But sometimes, during a pre-bid investigation, a Contractor fails to notice obvious discrepancies between the plans and the actual field conditions. What happens then? Suppose a contractual clause requires the Contractor to verify all dimensions and elevations?

Generally these clauses are enforceable against the Contractor, thwarting the *Spearin* Doctrine. For instance, in *Appeal of Bowie & K Enterprises, Inc.*, IBCA No. 1788 (1986), dense undergrowth surround-

ing a building did not excuse a Contractor from making a reasonable effort to discover that building dimensions did not match the dimensions on the plans. Also, in *Appeal of Hercules Painting Co.*, ASBCA No. 42204 (1993), the Board of Contract Appeals found that a bidder had no recourse after failing to attend the pre-bid conference and to verify field dimensions. These shortcomings meant that the bidder had to complete the lump sum contract at the bid price, even though actual quantities of painting were greater than anticipated.

Sometimes, though, Contractors are relieved from making a thorough site investigation when the Owner does not make sufficient provisions and allowances for the Contractor to do so. For examples, see *Clark Brothers Contractors v. State of Montana* (Mont. 1985), 710 P.2d 41, and *Appeal of Dayton Construction Co.*, HUD BCA No. 82-746-C34 (1983), which held that bid periods were too short to allow bidders to confirm elevations.

Regarding facility conditions, Contractors have been held responsible for observing that an existing catwalk would conflict with proposed ductwork (*Appeal of American Construction & Energy, Inc.*, ASBCA No. 52032 (2000)), and that certain pipes and valves did not really exist (*Appeal of Swepeco Corp.*, ASBCA No. 25118 (1981)).

On the other hand, Contractors have been deemed not responsible for discovering conditions that would have required destruction of the Owner’s property. See *Appeal of Southern California Roofing Co.*, PSBCA No. 1737 (1988), in which an extra layer of roofing was deemed not discoverable without cutting through the top layer of roof.

Contractors are also generally excused from having to use extreme measures to investigate. For instance, a Contractor was not required to use a high pressure hose to determine the true extent of rotten wood in *Appeal of Midwest Industrial Painting of Florida, Inc.*, ASBCA No. 35194 (1990).



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Investment Uptick Gives Employers Break on Workers' Comp Bills



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On October 20, 2003, the Workers' Compensation Oversight Commission voted to grant all Ohio employers a one-time 20% premium dividend on upcoming premium bills. The 20% dividend applies to bills for the first half of 2004 for private employers in the State of Ohio. For Ohio's public employers, the 20% discount is applicable to 2004 premiums that become due and payable after May, 2004.

The Bureau of Workers' Compensation was able to grant this discount because it enjoyed an 8.42% return on its investments through the third quarter of 2003, which resulted in a sizable surplus in the state insurance fund.

Until the most recent billing period for the second half of 2003, Ohio's employers had enjoyed 75% dividends for each half since 1996. They will welcome the 20% discount, although it does not alleviate the budgetary problems created by the elimination of the 75% discount for the second half of 2003.

If the performance of the Bureau of Workers' Compensation's investment program continues to be successful, as Ohio employers hope, the Bureau of Workers' Compensation should be able to continue its discount program in the years to come.

ADR Corner

The Uniform Mediation Act



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Mediation law in Ohio could soon change if the General Assembly passes a bill now pending before it. On October 16, 2003, Rep. W. Scott Oelslager introduced Ohio H.B. 303, which seeks the adoption of the Uniform Mediation Act, called the UMA for short. The UMA is the result of a joint effort by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.

Representatives from Ohio who served on the drafting committee for the Act include the Honorable Thomas Moyer, Chief Justice of the Supreme Court of Ohio, and Dean Nancy Rogers of The Ohio State University Moritz College of Law. The final draft of the UMA with full comments may be viewed online at <http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm>.

If adopted, the UMA will establish a privilege of confidentiality for mediators and parties to mediation. What does that mean to parties considering mediation as a way to resolve their disputes?

The Importance of Confidentiality. A legal privilege of confidentiality protects statements of parties and mediators, and other forms of "communication" within the privilege, from being used in later proceedings. One of the Ohio Rules of Evidence, Rule

501, provides that the General Assembly and the courts control what is to be privileged and what is not:

The privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience.

In the mediation context, what this means is that statements made during mediation may be deemed confidential and inadmissible as evidence in court if such statements fall within a privilege established by a statute or created by court decision.

When parties who are involved in construction find themselves unable to negotiate a resolution to their disputes, they often turn to mediation as the next step in an effort to avoid arbitration or litigation. Why is mediation so popular? Why are parties willing to sit down with a stranger and work through their problems? These are reasonable questions, and there are some answers.

First of all, mediation has become popular because it works. Except in some court-administered programs, it is a voluntary process. Being a voluntary process, to be successful, mediation depends heavily on trust

and credibility. In order to provide this trust and lend credibility to mediation, many states, including Ohio, have rules of evidence and laws that provide a measure of protection to the parties should they choose to mediate their dispute. These rules and laws allow the parties to speak freely during mediation without fear that what they say will be used against them later.

As an example, Rule 408 of the Ohio Rules of Evidence provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

While this section may protect the parties to mediation to some degree, as we can see, there are many holes in the protection, and a creative lawyer will surely find the way through them when possible. It has been my experience, however, that a court will be reluctant to listen to any previous statements made in the course of negotiating a compromised settlement of a disputed claim. With busy court dockets, most courts encourage settlement discussions (including mediation), and only on rare occasions will they consider any statement made in furtherance of a settlement.

However, recognizing the need to promote mediation as a viable alternative to litigation, in 1997 the General Assembly enacted R.C. 2317.023. This statute provides specific protection for mediating parties so that their discussions will remain confidential. In substance, here is what the statute provides:

(B) A mediation communication is confidential. Except as provided in division (C) of this section, no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding.

As you would imagine, division (C) lists several exceptions allowing the use of discussions or other

communications that occur during mediation, e.g., consent, duty to report certain crimes, public records under certain circumstances, or if the need for disclosure outweighs the manifest injustice that would result from nondisclosure. The last exception is interrelated with Rule 408 of the Rules of Evidence, quoted above, and requires a court hearing and determination before disclosure can occur.

Soon after its enactment, the Supreme Court of Ohio reviewed R.C. 2317.023. The court put its stamp of approval on what it described as plain and unambiguous language that communications during mediation shall be kept confidential. In *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, the Court noted the importance of confidentiality as a “means to encourage the use of mediation and frankness within mediation sessions.” Based on the intent of the General Assembly as reflected in the “clear words of the statute,” the Court refused to permit disclosure.

So with Rule 408 and R.C. 2317.023 protecting the parties’ discussions during mediation from being used against them in a later court action, and the Supreme Court’s recognition of the importance of keeping mediation discussions confidential, why is the General Assembly now being asked to adopt the UMA?

What the UMA Would Add. To begin with, R.C. 2317.023 contains vague language, as it protects against disclosure or admissibility only in “civil proceedings” or “administrative proceedings.” The UMA, on the other hand, defines a “proceeding” more broadly:

“Proceeding” means a legislative hearing or similar process, or a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery.

This definition applies to a far broader spectrum of post-mediation proceedings, including arbitration or other processes that might dispose of the parties’ dispute. In support of the UMA, one would argue that parties contemplating mediation under it should have more comfort in disclosing information important to reaching resolution without fear that such disclosure will haunt them in a later proceeding. Providing this additional “comfort” helps to “encourage the use of mediation and frankness within mediation sessions.” This is particularly important in construction cases because many claims proceed to arbitration if not resolved through mediation. The current system does not address the disclosure of discussions during mediation in the context of arbitration, whereas the UMA does.

The exceptions to disclosure are limited under the UMA as well. Under the UMA, disclosure of

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communications made during mediation is permissible only for these purposes:

- proving threats of bodily harm,
- reporting abuse and neglect,
- establishing that a mediation was used as a pretext to further a crime, or
- proving in court either that a mediated settlement agreement was induced by fraud or duress, or that the mediator engaged in professional malpractice or misconduct.

While these exceptions may encroach on the goal of fostering full disclosure and frank discussions during mediation, their reasonableness, according to some, is self-evident.

The UMA has other features worthy of comment, but complete coverage is beyond the scope of this article. Perhaps the most important feature to the construction industry is the protection that it offers in the context of arbitration.

Although the AAA's Construction Industry Arbitration Rules preclude the use of "confidential information" disclosed to a

mediator during mediation, these Rules only apply to a AAA arbitration and do not have the force of law. The term "confidential information" is not well defined either. Moreover, if someone other than the AAA conducted the preceding mediation, the rules protecting "confidential information" disclosed to the mediator would not bind the AAA arbitrator. AAA arbitrators are also not bound by the rules of evidence (R-32 of the AAA Rules), but they are required to take into account applicable principles of **legal privilege**.

Because the UMA makes communications during mediation confidential and creates a statutory legal privilege, it seems that, if nothing else, the UMA would fill the gap left open by R.C. 2317.023. The UMA would protect the parties to a mediation from disclosure of privileged information generated as the result of mediation.

Next month we will begin a series of articles on how to prepare for a mediation to ensure success.

Editor's Note: This month's "What the Legislators Are Considering" contains the Legislative Service Commission's brief summary of House Bill 303, which would enact the Uniform Mediation Act in Ohio.

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When experience counts in construction matters, the attorneys of Bricker & Eckler LLP's Construction Law Department are ready to help you meet your construction law challenges.

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