Basics About Construction Claims, Court Decision on Prevailing Wage Penalties Highlight March Issue

This month, we open with an article on the basics about construction claims. Construction projects are typically an exciting and challenging time for an owner. A new facility is being built to provide new space or to expand or renovate existing space. These projects are most often very complex. This complexity can lead to a variety of problems that may result in claims. Ben Hyden provides the basics about some of the claims that can arise on a construction project. Ben also provides some best practices for use in drafting contract documents to help protect the owner during the claims process.

In our “What the Courts Are Saying” column, we begin with a case a case from the Ohio Supreme Court. The Court was asked to determine if the statutory penalties were mandatory where a contractor was alleged to have violated the prevailing wage laws. The Court held that, unless a statutory exception applies, the penalties in R.C. § 4115.10(A) are mandatory penalties that must be imposed against a party that violates the prevailing wage law. Our second case this month comes from the U.S. Court of Appeals for the Sixth Circuit. A contractor’s defective foundation work resulted in the complete replacement of the new structure. The court was asked to determine what effect a policy exclusion had on the insurer’s duty to defend the contractor against claims resulting from the defective work itself and resulting from the damages that were caused by the defective work.

In “Bricker on Construction Documents,” Mark Evans provides some practical tips on the use of these specific mechanisms for modifying construction contracts. Most standard forms of owner-contractor construction contracts have several types of provisions for modifying the contract. This article will discuss the various types of modification provisions in the AIA-A201 General Conditions of the Contract for Construction and the EJCDC C-700 Standard General Conditions of the Construction Contract and discuss the circumstances when each of these types of modification provisions should be used.

Employers may wonder what they can do when they take every precaution to protect employees from harm, yet an employee may disregard safety procedures resulting in a citation. In the OSHA Corner, Andrew Balcar looks at the elements of the unpreventable employee misconduct defense. Andrew also provides some tips on developing a great safety program that will pay dividends by improving employee morale and productivity, lowering workers’ compensation rates, and providing an exemplary OSHA compliance record.

Also, in this issue you will find an announcement regarding our listing of upcoming seminars.
Owner’s Construction Claims – The Basics

Highlights: Construction projects are typically an exciting and a challenging time for an owner. A new facility is being built to provide new space or to expand or renovate existing space. These projects are most often very complex. This complexity can lead to a variety of problems that may result in claims. In this article, Ben Hyden provides the basics about some of the claims that can arise on a construction project. Ben also provides some best practices for use in drafting contract documents to help protect the owner during the claims process.

The goal of every owner is to have a successful project. Typically, this means a project that is completed on time and within budget, without any defects, and a project that is completed with minimal or no claims. Unfortunately, this goal is not always achieved.

Construction projects can be complex and are often subject to costly disputes. Unfortunately, some project owners have experiences involving projects with leaking roofs, HVAC systems that do not work, cost overruns, and contractors’ claims eclipsing several millions of dollars.

When a construction project goes bad, the owner is often left trying to pick up the pieces by defending a multitude of claims and repairing work that was never designed or constructed properly. However, the owner is typically not the party directly responsible for a project’s problems. After all, owners do not install roofs or HVAC systems. Owners do not design buildings or coordinate the details within the construction documents. These are the responsibility of the contractors and design professionals hired by the owner to construct buildings.

In most cases, in order to recoup any damages incurred by an owner during a construction project, the owner must file a claim against the responsible party -- generally either a contractor or design professional. This article will explain some of the theories of recovery that may be available to an owner.

What is a Claim?
The term claim has developed a bit of a sinister meaning in regards to its use on construction projects. A claim, however, is nothing more than a request by one party to another party for some type of relief under a contract. The AIA A201-2007 General Conditions of the Contract for Construction define the term claim as “a demand or assertion by one of the parties seeking payment of money, or other relief with respect to the terms of the contract” and “other disputes and matters in question between the owner and contractor arising out of or relating to the contract.”

The Owner’s Claims Against a Contractor
When evaluating a potential claim against a contractor, the owner’s evaluation must start with the construction contract. After all, the relationship between the owner and contractor is governed by the terms of the construction contract. The construction contract defines the obligations of each party. An owner’s claims against a contractor, more often than not, arise when a contractor fail to perform an obligation that it was required to perform under the construction contract. These types of claims are commonly referred to as “breach of contract” claims.

When evaluating whether an owner has a valid breach of contract claim against a contractor, the owner must evaluate not only the contract form itself (which may be very short), but also all of the documents incorporated into the contract by reference. These documents, referred to as the “Contract Documents,” establish both parties’ obligations under a contract.

Most frequently, construction contracts incorporate the drawings and technical specifications prepared by the design professional. Most technical specifications also incorporate various industry standards and manufacturers’ requirements, which also may become part of a contractor’s contractual obligations to an owner. An owner should always take a close look at the contract and the various documents that may be incorporated by reference into the contract when evaluating a potential claim against a contractor.

Breach of Contract - Warranty
The most common claim made by an owner against a contractor is to recover the costs incurred by an owner in correcting “defective” or “nonconforming” work performed by the contractor on a project. These claims arise from the general warranty that is included in most of the form construction contracts in use today.

The general warranty in Section 3.5 of the AIA A201-2007 General Conditions states:

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract
Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials or equipment not conforming to these requirements may be considered defective. The Contractor’s warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

Under this warranty, a contractor has an obligation to perform its work in accordance with the contract documents and free from defects not inherent in the quality of the work. Put simply, under this warranty, the contractor has an obligation to install the work in the manner required by the contract documents. If the contractor does not, the contractor will have breached the warranty and its contract with the owner.

As an example, a contractor breaches the warranty if the contractor failed to construct a roof system in accordance with the manufacturer’s recommendations when compliance with the manufacturer’s recommendations is required by the specifications. Furthermore, a contractor can also breach the warranty by installing shingles that contain a manufacturing defect.

**Breach of Contract - Indemnification**

Indemnification is a contractual right to reimbursement for costs incurred by one party from another party. Since indemnification is a contractual obligation, the breadth of the scope of a party’s obligation to indemnify another is defined by the terms of the contract.

Broad Indemnification provisions are important in Ohio, because on most public construction projects, the owner is required contract with multiple prime contractors. For example, the owner may hold separate contracts for, among others, the general trades contractor, the plumbing contractor, the HVAC contractor, and the electrical contractor.

This arrangement puts the owner right in the middle of the disputes that arise between the separate contractors. In fact, in cases where purely economic losses are in dispute, the law precludes the multiple prime contractors from directly suing each other because they are not in privity of contract.

When one prime contractor delays another prime contractor, the delayed prime contractor’s chosen remedy is most often against the owner. If the owner is then required to pay monetary damages to the delayed contractor, the owner, if the contract documents contain broad enough indemnification language, may bring an indemnification claim against the contractor responsible for the delay to recover the costs paid to the delayed contractor.

It should be noted, however, that the indemnification language contained in most of the standard form construction documents is not broad enough to allow an owner to seek indemnification in the manner described above. These provisions can, and should, be modified to broaden their scope, especially in a multiple prime contracting environment.

**The Owner’s Claims Against the Contractor’s Performance Bond**

Performance bonds help assure that a construction contract is properly performed. As a result, anytime a contractor breaches an obligation under a bonded contract, the surety that provided the bond may be looked to as a source of recovery for the owner’s damages. Generally, anytime that an owner makes a claim against a contractor the owner can make the same claim against the contractor’s surety bond. On most public projects, the terms of the bond are set by law.

Surety bonds used on private projects can be very different. As a result, the bonds must be reviewed carefully because they may contain several conditions that must be met before the surety is obligated to perform. An owner should be careful to fulfill every condition contained in the bond.

**The Owner’s Claims Against the Design Professional**

Some problems on a construction project may not be the fault of a contractor at all. A contractor is typically hired to construct a facility according to a set of plans, which does not necessarily entail a guarantee that the finished project will function as desired. While design professionals are not expected to prepare perfect plans, design professionals are expected to meet a minimum standard of care in performing their services. In Ohio, the standard of care for architects is contained in the Ohio Administrative Code, O.A.C. § 4703-3-07(A)(1):

> In practicing architecture, a registered architect shall act with reasonable care and competence and shall apply the technical knowledge and skill which is ordinarily applied by registered architects of good standing, practicing in the same locality.

In *Cincinnati Riverfront Coliseum v. McNulty* (1986), 28 Ohio St.3d 333, the Ohio Supreme Court announced the rule for holding a Design Professional liable for negligent design:

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**Broad Indemnification provisions are important in Ohio, because on most public construction projects, the owner is required contract with multiple prime contractors.**
Generally, one who contract[s] in a specialized professional capacity to provide the design for a particular structure may be held to respond in damages for the foreseeable consequences of a failure to exercise reasonable care in the preparation of the design. If the services provided to the owner by the design professional service fall below the required standard of care, then the design professional may be liable to the owner for the resulting damages.

**Other Claims Available to the Owner**

**Special Warranties.** In some instances there may be other special warranties required by the contract or given by a manufacturer, say for example, a roof manufacturer. However, some roof warranties exclude coverage if the work was installed improperly. So, if the contractor agreed to install the work in accordance with the contract documents, failed to do so, and the manufacturer’s warranty does not apply, the owner should then look back to the contractor under the general warranty described above.

**Conclusion**

An owner’s most powerful tools, and potentially the owner’s nightmare, in the claim process are the contract documents. Remember Rule 13 of Bricker & Eckler’s 20 Rules for Public Owners’ Contracting Success:

*Use contracts that protect your interests and that are consistent with your expectations.* Have your contracts, including owner-architect agreement, owner-construction manager agreement, and owner-contractor agreement, drafted to protect you. Good contract documents that are drafted to protect the owner from project specific risks can be both a sword and a shield for the owner throughout the claims process.
BRICKER & ECKLER’S 20 RULES FOR
PUBLIC OWNERS’ CONTRACTING SUCCESS

These Rules represent our collective wisdom, over 100 years of construction law experience and over 100 years of construction experience. While no one can guarantee success, we believe that if an Owner understands and follows these Rules, the Owner will have a successful project. We emphasize the need for deep understanding of the Rules. To help you, we shall include articles in Brickerconstructionlaw.com explaining them. If you need further assistance, please contact us.

1. Analyze and understand the risks and requirements of each of your projects, and how your team will eliminate or minimize those risks and meet those requirements.

2. Beginning with the hiring process, communicate your expectations to your team and follow through to see that each team member meets those expectations.

3. Conduct a thorough evaluation of your design professional and, if applicable, construction manager candidates so you hire a team of competent, cooperative, and responsive professionals for each of your projects.

4. Require that your drawings be well coordinated using a competent third person to review them for conflicts. Discuss coordination with your design professional candidates, understand the process, and see that the process becomes part of the owner – design professional agreement.

5. Understand and address any green building issues (LEED, etc.). Begin early during the hiring process by discussing any green building issues with your design professional and, if applicable, construction manager candidates. Incorporate each team member’s responsibilities for any green building issues into its contract.

6. Provide sufficient time so that your design professional can complete the design process, including the coordination of the plans and specifications, and, if applicable, there is time for a constructability review by your construction manager.

7. Hire competent project administration, including observations and inspections, so that through your design professional and/or construction manager you have knowledgeable eyes inspecting the Work each day to guard you against defective and non-conforming Work.

8. Make sure that your representatives, design professional, and/or construction manager, are knowledgeable about the roofing and through wall flashing Work and that your representatives carefully review the plans, specifications and shop drawings and then inspect the Work as it is being installed.

9. Provide for the commissioning of new HVAC systems or major modifications to existing systems.

10. Carefully think through how the risks for unforeseen site conditions will be evaluated and allocated.

11. Include contractor hiring criteria in your bidding documents that will permit you to evaluate and hire qualified contractors.

12. Exercise your discretion and hire qualified contractors that can be expected to work as part of a cooperative team to complete your Project on time, on budget, and free from defects.

13. Use contracts that protect your interests and that are consistent with your expectations. Have your contracts, including owner-architect agreement, owner-construction manager agreement, and owner-contractor agreement, drafted to protect you.

14. Train your Team in how to use your Contract Documents. Do not stop simply with good Contract Documents that will protect your interests. Your Team needs to know how to use them. Take the additional step and provide this training.

15. Include indemnification provisions in your contracts with your contractors, design professional, and, if applicable, construction manager, that will protect you from claims caused by other persons.

16. Be decisive and responsive - understand what you are required to do and do it in a timely and competent manner.

17. Ensure that your Contract Documents require a clear and detailed notice of any problem that would affect your budget, completion dates, or the quality of the Work.

18. Deal with all problems on your projects immediately, including contemporaneous documentation; do not let small problems grow into major disputes. If you sense you have a significant problem, contact your legal counsel immediately.

19. Keep your contractors’ sureties informed about any significant problems. If you have a significant problem with a contractor on your project, you want the contractor’s surety informed and involved as early as possible.

20. Have the insurance provisions in your Contract Documents reviewed by your insurance professional, follow his or her recommendations for modifying those provisions and have your insurance professional verify that you have the required coverage.

“By failing to prepare, you are preparing to fail” – Ben Franklin

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All too often a Public Owner will contract with someone who does not do what the person promises to do. These Rules are intended to help protect Public Owners from those broken promises; they are not intended to state the Owner’s obligations under its Agreements.
Our first case for the month of March comes from the Ohio Supreme Court. The Court was asked to determine if the statutory penalties were mandatory where a contractor was alleged to have violated the prevailing wage laws. The Court held that, unless a statutory exception applies, the penalties in R.C. § 4115.10(A) are mandatory penalties that must be imposed against a party that violates the prevailing wage law. Our second case this month comes from the U.S. Court of Appeals for the Sixth Circuit. A contractor’s defective foundation work resulted in the complete replacement of the new structure. The court was asked to determine what effect a policy exclusion had on the insurer’s duty to defend the contractor against claims resulting from the defective work and resulting from the damages that were caused by the defective work.

Ohio Supreme Court Declares Prevailing Wage Penalties Mandatory

Prevaling wage in Ohio continues to be a hot button issue. The most recent development answers the question of whether penalties associated with prevailing wage violations that do not meet a statutory exception are mandatory or discretionary. In Bergman v. Monarch Construction Company, 2010-Ohio-622, the Supreme Court of Ohio determined that the statutory penalties for a violation of the prevailing wage laws are mandatory where the violation did not result from one of the statutory exceptions.

In Bergman, Miami University hired Monarch Construction Company as the general contractor to construct student housing. Monarch hired a subcontractor, Salyers Masonry, to perform the masonry work on the project.

The Department of Commerce investigated Salyers and found that it had underpaid multiple employees. Many of these employees filed suit against Monarch, Salyers, and Miami University. The trial court dismissed Miami University because there was not a single allegation of wrongdoing alleged in the complaint. The court issued a default judgment against Salyers because it failed to respond to the complaint—leaving only Monarch to answer the complaint.

Ohio Revised Code 4115.10(A) states:

Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to 25 per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of 75 per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement.

The code provides for two penalties for a violation of the prevailing wage law. In addition to recovering back pay, an employee may recover a sum equal to 25 percent of the back pay, and the director of commerce shall receive a payment equal to 75 percent of the back pay.
The appellate court determined that the penalties were discretionary because of the use of the words “may recover” in the statute. The Supreme Court, however, declared that this language is not discretionary with regard to levying the penalty. The language “may recover” pertains to the choice the employee has “to enforce his or her right to recover the underpayment.” If an employee commences and proves his or her case, the penalties are mandatory.

The Supreme Court stated that the legislative intent of prevailing wage law is to “provide a comprehensive, uniform framework for, inter alia, worker rights and remedies vis-a-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state.”

In addition, the language of the statute includes the words “shall be paid to the director” where it refers to the 75 percent apportionment of the penalty. Statutory use of the word “shall” must be construed as mandatory unless legislative intent dictates otherwise.

The Supreme Court distinguished between a violation that requires a mandatory penalty from a violation that incurs no penalty. There are exceptions to the mandatory penalty in the Ohio Revised Code. No penalty is assessed where the wage underpayment results from a “misinterpretation of the prevailing-wage statutes or an erroneous preparation of the payroll documents” and where restitution is made.

Despite Policy Exclusion, Insurer Has Duty To Defend Contractor

In this dispute over insurance coverage for defective foundation work, the contractor contracted with Frisch’s Restaurants, Inc. (Frisch’s) to build a Golden Corral restaurant in North Canton, Ohio. When the building was nearly complete—but not yet open—a shift in the soil led to the discovery that the foundation was defectively constructed.

The contractor tried to get its insurer to cover the damage—which was a total replacement of the entire building. The insurer refused citing that its policy excluded coverage for “that particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.”

The crux of the matter was whether the exclusion excluded damages for the particular piece of defective work—here, the foundation only—or whether it excluded all of the damage caused by the defective work—here the replacement of an entire building.

The Court of Appeals, relying on a similar decision from another court, acknowledged the parties’ agreement that the defective foundation would be excluded; but held that the insurer had a duty to defend the remainder of the claims because the language of the exclusion was specific to the particular piece of defective work and not to the rest of the non-defective work.

For more information about these cases, or to suggest a case to be included in our next issue, please email us or contact Andrew Balcar at (614) 227-8873.
Dispute Resolution Services

Construction disputes are often complex and expensive, and a great majority are ripe for resolution through mediation, because it offers parties the opportunity to resolve their disputes more cost-effectively than a trial in court or arbitration. The opportunity for success in mediation starts with selection of a skilled and experienced mediator who understands the dispute resolution process and has training and experience to guide the parties to their best opportunity for a win-win result.

Sam Wampler has 30+ years of experience as a trial attorney, mediator, arbitrator, civil settlement officer, and referee. He has litigated and settled hundreds of matters on behalf of contractors, owners, and design professionals over the years.

- **Reputation** – Sam has been recognized by Chambers USA as a leading attorney in Ohio construction law and is described as “a clever and hard-working lawyer” who is “easy to get along with.” He is a member of the Million Dollar Advocates Forum and has been recognized in California for his work in the Civil Law Settlement program and for distinguished service as Judge Pro Tem of the Superior and Municipal Courts in San Diego County.

- **Experience** – Sam served two years as chair of the Columbus Bar Association’s ADR Committee and has served as both a private mediator and mediator for various Ohio courts since 1998. Sam has conducted bench trials, arbitrations and jury trials in a variety of civil claims involving construction, engineering, fraud and real estate. He also serves by appointment as an arbitrator in construction disputes for the American Arbitration Association.

- **Knowledge** - Sam has written extensively on the topic of mediation and alternative dispute resolution techniques. His articles are available at www.BrickerConstructionLaw.com.

- **Training** – Sam has completed intensive studies in negotiation, advanced negotiation and mediation at Harvard Law School, and studied Advanced Mediation Techniques for Multi-Party and Complex Disputes at the Center for Dispute Settlement. He also participated as a select member in the Advanced Commercial Mediation Institute.

- **Cost-effective** – Mediation can be a very cost-effective method of resolving a complex construction dispute. There are always at least two or more parties involved. Sam can quote a daily rate that, when divided, usually represents a very small expense in comparison to other resolution options.

- **Teamwork** – Sam offers co-mediation, an effective service for disputes that involve highly technical issues. Partnering with a Bricker & Eckler Construction Department member who is a professional engineer or licensed architect, Sam manages the dispute resolution process while establishing a strong line of communication on the technical issues between the parties, providing the best opportunity for resolution.

- **Convenient** – The Bricker & Eckler LLP offices in Columbus, Cincinnati/Dayton or Cleveland will accommodate most mediations with no additional facility charges.

For further information or to schedule a mediation with Sam, please call Kathy Parker at 614-227-4956 or e-mail at kparker@bricker.com.
Modification of Contracts

The 113th article in a series—Each issue of BrickerConstructionLaw.com discusses important terms found in typical construction documents. Most standard forms of owner-contractor construction contracts have several types of provisions for modifying the contract. This article will discuss the various types of modification provisions in the AIA-A201 General Conditions of the Contract for Construction and the EJCDC C-700 Standard General Conditions of the Construction Contract and discuss the circumstances when each of these types of modification provisions should be used. In this article, Mark Evans provides some practical tips on the use of these specific mechanisms for modifying construction contracts.

Most standard forms of owner-contractor construction contracts include provisions for modifying the contract. The most common way to modify a contract is through a change order. Both the EJCDC C-700 and the AIA A-201 have specific provisions related to issuing change orders.

Generally, change orders are used when the owner orders additions, deletions, or revisions to the project, and all parties (owner, design professional, and contractor) agree to the price, time, and scope of the change.

The EJCDC C-700 document includes fairly straightforward change order process.

> Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions to the Work by a Change Order, or a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).

Similarly, the definition of a change order in the AIA A201 document is quite clear.

A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

1. The change in the Work;
2. The amount of the adjustment, if any, in the Contract Sum; and
3. The extent of the adjustment, if any, in the Contract Time.

The definitions for change orders in both sets of documents are fundamentally the same. Under each, the owner and contractor can mutually agree to modify the owner-contractor agreement by changing the contractor’s scope of work (either an addition or deletion), changing the amount of the contract (either increase or decrease the amount), and/or changing the contract time (either extend or shorten the time for performance).

Because a change order is a substantive modification to the original agreement between the owner and the contractor, the design professional does not have the authority to direct and approve this change without the agreement of the two parties to the contract (owner and contractor). However, there are limited circumstances where a design professional can order modifications without prior approval of the owner or contractor.

This is not to say that design professionals are not involved in the change order process. The design professional may be the party recommending a change order or, if the change order is requested by the contractor, the design professional is usually involved in the review and negotiation of the change order on behalf of the owner.

When the need for a modification arises, the parties can usually reach an agreement on the terms of a change order; however, this is not always the case. Disagreements can arise between the parties over the compensation to be paid or the amount of time that should be granted as a result of a modification.

If these disputes are not timely resolved, there is a risk that a project could be delayed. To avoid these types of delays, the EJCDC and the AIA documents both include a mechanism to allow the work included in a modification to proceed while the parties work out the terms of the modifications. In the AIA document, this is called a Construction Change Directive and...
in the EJCDC document it is called a Work Change Directive.

The definition of a Work Change Directive, as defined in the EJCDC C-700, does not change the contract price or contract times.

**Work Change Directive** -- A written statement to Contractor issued on or after the Effective Date of the Agreement and signed by Owner and recommended by Engineer ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract price or Contract Times.

Likewise, a Construction Change Directive, as defined in the AIA A-201 document, may be issued before there is any agreement on the adjustment of the contract sum or the contract time.

A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, withoutinvalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

The Work Change Directive and Construction Change Directive have mutual benefits to the owner and the contractor. For the owner, these modification provisions allow the work to proceed without delays related to the negotiation of a change order. For the contractor, they allow the contractor to proceed with the work with the security of having owner authorization to perform the work.

When a work change directive or construction change directive is issued, the intent is that the parties will resolve the related issues through negotiation, which will result in a change order. The last type of modification is the simplest one; it allows the design professional to require minor changes in the work. The EJCDC document refers to this type of modification as a Field Work Order, and the AIA document refers to it as a Minor Changes in the Work Order. The purpose of this type of modification is to allow the design professional to order minor changes that are consistent with the original design. They are not intended to enable the design professional to add or delete scope to the project.

In the EJCDC C-700 document, a Field Work Order is defined in Paragraph 9.04.A.

Engineer may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. These may be accomplished by a Field Order and will be binding on Owner and also on Contractor, who shall perform the Work involved promptly.

The AIA A201 document defines Minor Changes in the Work in Section 7.4.

The Architect has the authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

The Field Work Order in the EJCDC C-700 document and the Minor Changes in the Work Order in the AIA A-201 document effectively operate the same way. They give the design professional the authority to order changes to the work, but only to the extent that these orders do not affect price or time. Further, the design professional can issue these orders without approval by the owner and/or agreement by the contractor.

It is possible that a contractor may disagree that the Field Work Order or Minor Changes in the Work Order do not impact time or price. If a contractor believes that he or she is entitled to either time or money for this type of order, the contractor should raise this issue at the time the order is issued and not after the work is performed. Most standard contracts do not give the design professional the authority to act on behalf of the owner without owner approval. More importantly, under Ohio law and on public projects, the contractor would likely be barred from recovery without prior approval by the owner.
What’s New in the World

Of Job Safety?

The Occupational Safety and Health Administration (OSHA) can seriously affect any Contractor or construction project. Compliance with OSHA regulations can be time consuming and tedious, but it is essential to maintain a viable position in the construction industry. This month, as always, we report on recent developments in the world of OSHA.

A Silver Bullet –

The Unpreventable Employee Misconduct Defense

What if I told you how to never receive an OSHA citation against your company that would stand up in court? I mean your company would always win. If your company was a pro football team, it would be undefeated and the winner of the Super Bowl each year, and you would be Drew Brees. It’s a bit of a stretch, but I shall tell you how to get very, very close, and your company will enjoy many more benefits than just avoiding an OSHA citation that will stand up in court.

What I am going to tell you about in this article is the unpreventable employee misconduct defense, including the basic elements of that defense. Underlying the unpreventable employee misconduct defense is a great safety program that will pay dividends by improving employee morale and productivity, lowering workers’ compensation rates, and providing an exemplary OSHA compliance record.

Basic Elements

Employers are required to protect the safety and health of employees while the employees are in the workplace. Standards exist for those hazards that frequently occur in the workplace and, where a specific standard does not apply, the General Duty Clause requires employers to protect employees from other hazardous situations.

Employers may provide some level of safety training and protective measures, but what happens when an employee simply ignores company safety rules or discards life-saving safety equipment? Should the employer be penalized for an employee’s failure to follow the rules?

The basic elements of the unpreventable employee misconduct defense are set forth in Precast Services, Inc., 17 BNA OSHC 1454 (no. 93-2971, 1995), aff’d without a published opinion, 106 F.3d 401 (6th Cir. 1997).

• The employer has established work rules designed to prevent the violation;
• The employer has adequately communicated these rules to its employees;
• The employer has taken steps to discover violations; and
• The employer has effectively enforced the rules when violations are discovered.

Established Safety Rules

The first element of the unpreventable employee misconduct defense requires the employer to show that it has developed an adequate safety program. This is usually evident by the existence of a written safety program. However, not just any written safety program is sufficient.

The safety program must include safety rules that specifically address the hazards faced by employees. Failure to include a rule likely will not be outweighed by other factors, including where the employer actually provides the necessary safety equipment. Where the employer fails to develop safety rules to prevent a hazard faced by employees the safety training program will likely be labeled as inadequate.

The safety rules not only need to be specific to the hazards, but the rules also must be mandatory. In Meyers Contracting of Hudson, Inc., Rev. Com. Judge 1992, 1991-1993 OSHD ¶ 29,725, the employer made eye protection and safety belts available at the worksite. The employer’s failure, however, to have a specific safety rule requiring the use of the safety equipment caused the unpreventable employee misconduct defense to fail. The use of the protective devices was simply left to the discretion of the employees.

The safety rules also must be effective in theory and in practice. It’s one thing to have a very detailed safety rule written in a safety manual, but if the safety rule is not effective in practice then it’s basically worthless.

In addition, employers cannot develop safety procedures that differ from the standards developed by OSHA. “An employer may not substitute employee warnings or training if physical guarding is required by a standard.” Jones Dairy Farm, Rev. Com. Judge 1992, 1991-1993 OSHD ¶ 29,895.

Adequate Communication of Work Rules to Employees

In many cases the unpreventable employee misconduct defense fails due to the employer’s failure to adequately communicate the safety rules to its employees. The best safety program ever written won’t protect employees if the program is not properly communicated to the employees.

In Warner Electric, Inc., Rev. Com. Judge 1989, 1987-1990 OSHD ¶ 28,449, a conductor or cable exploded when it was placed on top of a 12,000-volt buss. The employer had a written safety plan requiring the buss to be covered with approved protective equipment. The employer alleged that the accident would not have occurred had the employee followed the safety rule. The employer also alleged that due to hiring constraints imposed by the union and the frequent change of employees from job to job it was infeasible for the employer to implement an effective continuing safety program.
The Review Commission did not agree with the employer. The safety training was necessary due to the high risk of danger. The employer's weekly 30-minute safety talks were found to be insufficient to properly train the employees with respect to company safety rules. In addition, the employer failed to make sure that all employees read and understood the employer's safety manual. Simply having an employee read a safety manual and sign a form that says they read the manual may not be enough.

Discovery of Violations
The third element of the unpreventable employee misconduct defense requires the employer to take steps to discover violations of the employer's safety rules. The best safety plan ever drafted is not effective unless there is adequate inspection measures to ensure the rules are being followed. Detailed inspection practices can be developed by an employer to ensure compliance with company safety rules. Many employers hire company safety officers to perform this task. This element arises most often when an employer has taken no action to discover violations or when a supervisor knows or should have known that a violation occurred. In Pike Company, Inc., Rev. Comm. Judge 1999, 1999 OSHD ¶ 31858, an employer's defense of unpreventable employee misconduct was rejected where the employee used cross braces to access a scaffold. Even though a safety rule required the employee to use a proper means of access the employee failed to do so.

The problem for the employer was that it had several supervisors working close to where the violation allegedly occurred. The employee was in plain view, yet the supervisors failed to detect or otherwise take action when the employee violated a work rule. The judge determined that there was no evidence that the employer effectively communicated or enforced its safety rules at the work site. Contemporaneous documentation of inspections also is a sign that the employer has attempted to discover violations.

Effective Enforcement of Safety Rules
The fourth element of the unpreventable employee misconduct defense requires the employer to enforce the company safety rules. Discovering the violation is one thing, but employers must take action to effectively deter employees from repeating their mistakes. Company safety rules must include enforcement polices. Most enforcement procedures include a graduated disciplinary plan including a verbal warning, written warning, time off without pay, and termination. Disciplinary plans for supervisors should be tougher due to the supervisors' special role in enforcing the employer's safety plan. Where an employer fails to follow its own disciplinary plan the unpreventable employee misconduct defense likely will fail.

Employers also will generally be responsible for any violations that are created by their supervisors. In Propellex Corporation, Rev. Comm. 1999, 1999 OSHD ¶ 31,792, an employer failed to adequately enforce the safety rules. The employer developed specific safety rules, but the employer's production manager testified that inspection efforts were inadequate to detect and deter the violations that occurred. It also was alleged that the on-site supervisor not only failed to perform adequate inspections, but a crew leadperson also was alleged to have failed to follow the safety rules herself.

Conclusion
A successful defense based upon unpreventable employee misconduct depends on the effectiveness and enforcement of the employer's safety plan. Employers must keep thorough documentation of employee training and enforcement. This basic defense revolves around the effectiveness of the employer's training and disciplinary programs. The burden of proving unpreventable employee misconduct is placed upon the employer. “By its nature information with respect to the implementation of its written safety program will be in the hands of the employer, and it is not unduly burdensome to require it to come forward with such evidence.” Brock, Secretary of Labor v. The L.E. Myers Co., High Voltage Division and OSHRC, CA-6 1987, 1986-1987 OSHD ¶ 27,919; cert denied, US SCt 1987.