Recent Decision Keeps Prevailing Wage in the Spotlight; New Crane and Derrick Rules Released by OSHA

We begin our fall issue with a story about another prevailing wage decision from an Ohio court. Prevailing wage has been a hot topic over the last year as numerous cases have dealt with the issue of when prevailing wage must be paid on a construction project. In this article, Ben Hyden analyzes the most recent opinion that deals with a condominium development project. The development consisted of a three-story parking garage (funded through a grant from the city of Cincinnati) and a 49-unit condominium development constructed on top of the parking garage (paid for entirely from private funds). Should prevailing wage be required for the entire project, or only for the portion funded in part by the city of Cincinnati?

In our “What the Courts Are Saying” column we start with a case from the Ohio Court of Appeals for Cuyahoga County. A supplier’s inability to prove that materials were delivered on a specific date or that the materials were actually incorporated into the project appears to be the death knell for the supplier’s lien claim. Our second case this month comes from the Ohio Court of Appeals for Clark County. There the Court held that a negligence per se standard should not apply to an accident victim’s claim against a contractor. The city ordinance at issue was not created to impose a duty to protect public safety as the ordinance was created to allocate liability between the city and a contractor performing road work.

In our OSHA Corner, Andrew Balcar covers the new crane and derricks rule issued by OSHA. This article covers what the new standard requires, some best practices to remain in compliance, and where more information about the new standard can be found.

Also included is an article highlighting the Top Gun 2010 Construction Claims Seminar. For the past seven years Top Gun has been the Midwest’s premier construction claims program. This year, the Eighth Annual Top Gun will be held at The Conference Center at OCLC in Dublin, Ohio. Top Gun is an educational seminar that provides construction professionals with the tools to minimize claims, successfully navigate through the claims process, and increase the likelihood of an acceptable resolution to a claim.

Also, in this issue you will find an announcement regarding our listing of other upcoming seminars.

Taking Registrations for Top Gun 2010!
To reserve your spot at Top Gun 2010, go to www.bricker.com/seminars or call 1-800-750-1525 or 614-227-4989.
Ohio courts continue to address what has become one of the state’s hot button issues – prevailing wage. The most recent decision from the 1st District Court of Appeals for Hamilton County provides guidance for determining what constitutes a “public improvement” under Ohio’s prevailing wage law.

The case of Cincinnati ex rel. Zimmer v. Cincinnati (September 29, 2010), Appeal No. C-090850, arose from the Parker Flats Development Project located in downtown Cincinnati. This development consisted of a three-story parking garage (funded through a $600,000.00 grant from the city of Cincinnati) and a 49-unit condominium development constructed on top of the parking garage (paid for entirely from private funds).

Parker Flats was constructed on property that was conveyed to the developer by Cincinnati for one dollar, although it had a fair market value of $230,000.00. Cincinnati retained no ownership rights in the property, and while a portion of the parking garage was to be made available to the public at the same rates charged for metered parking on the city streets, Cincinnati was not to receive the revenue from these spaces.

Cincinnati and the Parker Flats developer entered into a funding agreement which provided that the funding provided by Cincinnati would be expended only on certain aspects of the parking garage. Because use of the public funds was limited only to the construction of the parking garage, Cincinnati and the developer agreed that the construction of the parking garage was subject to Ohio’s prevailing wage law. However, they decided to treat the housing development being constructed on top of the garage separately and proceeded as if it was exempt from the prevailing wage law.

Two Ohio taxpayers objected to this arrangement. The taxpayers sent letters to Cincinnati’s solicitor and the Ohio Attorney General asking them to compel Cincinnati and the developer to comply with Ohio’s prevailing wage law for the housing development. When the solicitor and the attorney general failed to act, the taxpayers filed a taxpayer suit, under R.C. 733.59, in Hamilton County’s common pleas court.

In the lawsuit, the taxpayers claimed that the construction of the parking garage and the housing development was a single project. Because a preliminary injunction had been issued by the trial court stopping the project in mid construction unless prevailing wages were paid on the condominium portion, the developer and the taxpayers eventually entered into a consent judgment in which the developer agreed to pay prevailing wages for the construction of the housing development so that construction could continue without further interruption. Cincinnati continued to deny that prevailing wages were owed. Ultimately, Cincinnati was granted summary judgment by the trial court who determined that the housing development was not subject to Ohio’s prevailing wage law. The taxpayers appealed.

On appeal, the core issue was what constituted the “project” for purposes of Ohio’s prevailing wage law. This issue was critical because Ohio’s prevailing wage statutes, R.C. 4115.03 through R.C. 4115.16, require contractors and subcontractors on public improvement projects to pay laborers and mechanics the so-called “prevailing wage” on construction projects that are public improvements as defined under R.C. 4115.03(C). If the public improvement project was only the parking garage, then the prevailing wage law did not apply to the construction of the housing development. However, if the construction...
of the parking garage and the housing development together made up the public improvement project, then prevailing wage requirements applied to the construction of both.

The Court found that, for the purposes of Ohio’s prevailing wage law, only the parking garage was a public improvement project and affirmed the trial court’s decision to grant summary judgment in favor of Cincinnati. In coming to this conclusion, the Court looked first to the contract between Cincinnati and the developer. The contract contained an explanation for what was intended to be the public improvement portion of the project and delineated how the $600,000.00 of public funds from Cincinnati was to be spent. The contract addressed only the parking garage, which, according to the Court, indicated that the funds received from Cincinnati were to be exclusively used for the parking garage.

The taxpayers argued that the parking garage and the housing development could not be divided because the developer was selling parking spaces in the garage to the purchasers of the housing units. The taxpayers argued that the two projects were intertwined because of the agreements selling the garage spaces even though Cincinnati was not involved in these agreements in any way. The Court rejected this argument stating that a governmental entity cannot be bound to prevailing wage requirements through an independent contract to which it was not a party.

Next, the taxpayers argued that treating the projects separately violated R.C. 4511.033, which states that “[n]o public authority shall subdivide a public improvement project into component parts or projects * * * unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.” The Court also rejected this argument, reasoning that Cincinnati contributed funds for the construction of the parking garage so that a portion of it could be used by the general public while shopping or dining in its downtown district. The Court found this independent and unrelated to the development of more housing in Cincinnati’s district.

Finally, the Court looked to whether the benefit received by Cincinnati from having a housing development constructed in its downtown district was sufficient to turn the construction of the development into a benefit to the public authority. In its analysis, the Court, relying upon Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations (1991), 61 Ohio St.3d 366, contrasted the difference between how a project may benefit the public as a whole and how a project may benefit a public authority. The Court concluded that the mere fact that Cincinnati may receive some benefit from the private construction of the housing development, i.e., more housing in its downtown district, is not, standing alone, enough to make such construction a benefit to the public authority.

There has always been a tension in public/private development projects between the amount of public funding made available to the private developer and the potential additional costs of requiring prevailing wage. It is likely that an appeal to the Supreme Court of Ohio will be sought in this case. If the Court accepts the appeal it should provide additional clarity on this issue.
Eighth Annual Top Gun Construction Claims Seminar Slated for November 18, 2010

For the past seven years Top Gun has been the Midwest’s premier construction claims program. This year, the Eighth Annual Top Gun will be held at The Conference Center at OCLC in Dublin, Ohio. Top Gun is an educational seminar that provides construction professionals with the tools to minimize claims, successfully navigate through the claims process, and increase the likelihood of an acceptable resolution to a claim.

What to expect at Top Gun 2010

Construction Contracts and Front End Documents
Owners, contractors, and design professionals must be aware of the key provisions in their contract documents. Minor changes to the language found in contract documents can cause the risk to shift in your favor … or against you. We will focus on the key clauses in contract documents, what those clauses mean, and how the clauses can lead to successful projects.

Bidding and Contractor Selection
Over the past year there have been a wide variety of bid challenges and related court decisions. We will review the various bid standards applicable to public owners. Public owners need to know which bidding standard applies and which key provisions should be included in their bid documents. Contractors will learn what needs to be provided to owners based upon the various bid standards.

Understanding and Managing the Schedule
Completing a project on time requires strict compliance with various types of schedules. A thorough understanding of the scheduling process and the elements of the project schedule are necessary when creating and maintaining the project schedule. We will focus on describing the various types of schedules, the elements that make up the schedule, and how problems on the project can impact the schedule.

Project Disruption and Delay
Once a claim is presented, one of the most difficult tasks is the calculation of damages that were caused by the delay. We will outline the various types of delay and acceleration claims and discuss how to develop an accurate estimate of the damages incurred as a result of a claim.

Project Documentation
Accurate and contemporaneous documentation is typically the most crucial factor in resolving claims.

The quality of the project records can make or break a claim. We will analyze good and bad project records to demonstrate what information should be included in your project records. We will also discuss case law relevant to project information and retained records.

Claims During and After Construction
Claims can arise at any point during a project. The key to successfully resolving a claim is to understand and follow the contractual requirements that apply to the claim process. We will review the basics about claims, the various causes of claims, and the contractual provisions that are the key to resolving claims. We will also focus on warranty provisions related to defective and non-conforming work.

Insurance & Indemnification
With the various types of insurance policies that are available it can be difficult to understand exactly what coverage is needed on a project. What is builders risk insurance, who provides it, and when is it needed? What does “additional insured” coverage actually provide? We will explain how each of the most frequently used policies protect owners, contractors, and design professionals. We will also review the key issues that should be considered when selecting the types of coverage and the amount of coverage to be provided. We will also look at indemnification provisions and their enforcement when damages are incurred.

Mediation & Hot Topics
Most major construction disputes are resolved through some form of negotiation or mediation. Understanding the mediation process is important for any person involved in the construction industry. We will have two experienced attorneys/mediators share their thoughts and stories about how to succeed in mediation.

See the flyer on the next page for more information about Top Gun 2010.
Bricker & Eckler LLP presents the 8th Annual
2010 TOP GUN
Construction Claims Seminar

Thursday, November 18, 2010
The Conference Center at OCLC, Dublin, Ohio

AGNEDA
7:15 a.m. – 7:45 a.m. REGISTRATION
7:45 a.m. – 8:00 a.m. WELCOME AND INTRODUCTIONS
Jack Rosati, Jr., Esq., Bricker & Eckler LLP, Construction Practice Group Chair
8:00 a.m. – 9:00 a.m. CONSTRUCTION CONTRACTS AND FRONT END DOCUMENTS
Sylvia Gillis, Esq., Bricker & Eckler LLP
Andrew Balcar, B.S., Esq., Civil Engineering, Bricker & Eckler LLP
9:00 a.m. – 10:00 a.m. BIDDING AND CONTRACTOR SELECTION
Kim Brown, Esq., Bricker & Eckler LLP
Chris McCloskey, B.S., Esq., Civil Engineering, Bricker & Eckler LLP
Denny Humbel, Turner Construction Company
10:00 a.m. – 10:15 a.m. BREAK
10:15 a.m. – 11:15 a.m. UNDERSTANDING AND MANAGING THE PROJECT SCHEDULE
Ben Hyden, Esq., Bricker & Eckler LLP
Andy Englehart, P.E., Esq., Construction Process Solutions, Ltd.
11:15 a.m. – 12:00 p.m. PROJECT DISRUPTION AND DELAY
Mark Evans, P.E., Esq., Bricker & Eckler LLP
Robert Vail, VN Services
12:00 p.m. – 1:00 p.m. LUNCH
1:00 p.m. – 2:00 p.m. PROJECT DOCUMENTATION
Scott Davis, B.S., Esq., Civil Engineering, LEED AP, Bricker & Eckler LLP
Michael Leary, P.E., RV Buric Construction Management Consultants
2:00 p.m. – 3:00 p.m. CLAIMS DURING AND AFTER CONSTRUCTION
Doug Shevelow, P.E., Esq., Bricker & Eckler LLP
Chris McCloskey, B.S., Esq., Civil Engineering, Bricker & Eckler LLP
3:00 p.m. – 3:15 p.m. BREAK
3:15 p.m. – 4:00 p.m. INSURANCE AND INDEMNIFICATION
Sam Wampler, Esq., Bricker & Eckler LLP
Desmond Cullimore, P.E., BCEE, Construction Fellow, Bricker & Eckler LLP
Joe Urquhart, Willis
4:00 p.m. – 4:45 p.m. MEDIATION AND HOT TOPICS
Sam Wampler, Esq., Bricker & Eckler LLP
John Petro, Esq., Williams & Petro, Co., LLC

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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. Begin 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 date, 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
This month we start with a case from the Ohio Court of Appeals for Cuyahoga County. A supplier’s inability to prove that materials were delivered on a specific date or that the materials were actually incorporated into the project appears to be the death knell for the supplier’s lien claim. Our second case this month comes from the Ohio Court of Appeals for Clark County. There the Court held that a negligence per se standard should not apply to an accident victim’s claim against a contractor. The city ordinance at issue was not created to impose a duty to protect public safety as the ordinance was created to allocate liability between the city and a contractor performing road work.

Supplier Can’t Prove Basic Facts Needed To Support Lien Rights

In the world of contracting and subcontracting, it is important to understand the details involved in obtaining an enforceable mechanic’s lien. There are requirements regarding the content and the timeliness of filing the lien affidavit. These requirements were at the heart of the recent Eighth Appellate District of Ohio case, JJO Construction, Inc. v. Penrod, 2010-Ohio-2601.

The Penrod case involved the construction of a Rite Aid drug store. J.O. Construction, Inc. (“JJO”) was the general contractor and subcontracted the installation of the heating, air conditioning, and ventilation equipment to Air Technologies. Air Technologies then contracted with Refrigeration Sales Corporation to supply the equipment. When Air Technologies refused to pay Refrigeration Sales for the equipment, Refrigeration Sales filed a mechanic’s lien affidavit.

Part of JJO’s contract with Rite Aid required JJO to post a bond large enough to cover the mechanic’s lien. In response to this lien being filed, JJO sued and claimed that the lien should not be enforced. The court addressed two issues with respect to the mechanic’s lien; the sufficiency of information provided in the lien affidavit and the timeliness of filing the lien affidavit.

JJO pointed out two errors in the content of the affidavit. First, Refrigeration Sales identified the owner as Rite Aid Corporation of Ohio when the correct name was Rite Aid of Ohio, Inc. The court pointed out that the language of the Ohio statute on the filing of mechanic’s liens, R.C. § 1311.06(A), says that the name of the owner must be included only “if known.” Because this “if known” language was used, the court determined that the name of the owner is not vital to the lien affidavit. Also, the court stated that the difference between Rite Aid’s correct business name and the one stated in the lien affidavit was inconsequential and thus did not make the affidavit unenforceable.

The second error that JJO pointed out in the content of the affidavit pertained to the property description. Ohio law, R.C. § 1311.06(A), requires the lien affidavit to include a legal description of the land. Refrigeration Sales provided an accurate legal description, but they also included an inaccurate permanent parcel number. JJO claimed that the inaccurate permanent parcel number made the lien affidavit defective. The court concluded that since the lien affidavit provided the correct legal description, as required by Ohio law, the fact that it also included an inaccurate permanent parcel number did not make it defective. So, JJO’s claims that the lien affidavit did not provide the correct information required by law were not successful.

JJO’s second argument was that the lien affidavit was unenforceable because Refrigeration Sales waited...
too long to file it. Under R.C. § 1311.06(B)(3), the mechanic’s lien affidavit must be filed within 75 days from the date on which Refrigeration Sales last furnished material to Air Technologies. There was a dispute as to whether Refrigeration Sales actually delivered material to Air Technologies in the 75 days preceding the filing of the affidavit lien.

This question, according to the court, really just came down to whether Refrigeration Sales could prove one of two points; that they actually delivered the goods on the day they claim they did or that the goods were actually incorporated into the building. The court said that either of these two points would be easy to prove if they occurred and since Refrigeration Sales couldn’t provide proof to establish either point, then that proof probably didn’t exist. So, the court found that even though the information in the lien affidavit was sufficient, the mechanic’s lien was still unenforceable because Refrigeration Sales couldn’t prove they delivered materials to Air Technologies in the 75 day time period required by Ohio law.

**No Negligence Per Se Standard for Motorist Injured on Construction Project**

If a motorist sustains injuries while traveling on a road that is under construction, it is possible that the motorist could sue the construction company performing the road work and claim the construction company was somehow negligent in their work. If this happens, the outcome of the case will depend heavily on the standard used by the court to determine liability.

In a regular negligence suit, the motorist would have to show that the construction company owed the motorist a duty of care, that the duty was breached, and that breaching the duty proximately caused the motorist’s injuries. If, however, the court determines that the negligence *per se* standard applies, then all the motorist needs to prove is that the construction company violated a law and that will result in the construction company being held liable for the motorist’s injuries.

So, one can see that the standard applied can have a great impact on the outcome of the case. The Second Appellate District of Ohio was faced with determining which standard to apply in *Kooyman v. Staffco Construction, Inc.*, 2010-Ohio-2268.

*Kooyman* involved a construction contract to excavate a portion of road in the city of Springfield. Staffco Construction (“Staffco”) obtained a permit from the city to do work on three sections of the city’s roads. After the city closed the road, Staffco dug trenches, laid piping, and then backfilled the trenches with gravel when they were done. Once the gravel was put down, the city reopened the road. Gregory Kooyman was riding his motorcycle on the newly reopened road near one of the unpaved trenches when he lost control of his motorcycle and crashed, sustaining injuries.

Kooyman sued Staffco claiming Staffco was negligent for failing to restore the trench properly and negligent for failing to notify the city that the trench was ready to be repaved as required by a city ordinance. The city ordinance stated that anyone excavating a paved street must provide written notice to the city when they are done with their work, so that the city can restore the pavement. The ordinance goes on to say that the person performing the work is liable to the city for any claims which result from the excavation and that this liability stays in place until the city gives written notice that the city has taken over the work of repaving the road.

The trial court determined that Staffco violated this ordinance by not providing notice to the city that the road was ready to be repaved. Because of this violation, the trial court decided that Staffco was negligent *per se* and thus Kooyman did not need to prove the elements of negligence.

The Second Appellate District of Ohio did not agree with the trial court. The appellate court found that even if Staffco violated the city ordinance, negligence *per se* was not the correct standard to use. Negligence *per se* only arises when a person violates a law which imposes a duty to protect public safety. This city ordinance had a purpose of allocating liability between the city and the person performing road work, and thus was not created to impose a duty to protect the public safety. This ordinance established that Staffco was liable to the city for any claims arising against the city, but the appellate court held that a violation of this ordinance did not create automatic liability to Kooyman. Instead, Kooyman would have to prove that Staffco was negligent.

So, negligence *per se* should not have been the standard applied because the city ordinance was not created to protect public safety. Kooyman needed to prove that Staffco was negligent by showing that Staffco owed Kooyman a duty of care, that the duty was breached, and that breach proximately caused Kooyman’s injuries. The appellate court sent the case back to the trial court to apply the regular negligence standard instead of negligence *per se*.

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**Even though the information in the lien affidavit was sufficient, the mechanic’s lien was still unenforceable because Refrigeration Sales couldn’t prove they delivered materials to Air Technologies in the 75 day time period required by Ohio law.**
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, and settlement officer. 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 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.
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.

OSHA Releases New Crane and Derrick Standards

OSHA recently issued new standards governing the use of cranes and derricks in construction. The rule takes effect on November 8, 2010, with the effective dates of some specific requirements being delayed anywhere from one to four years. The new standard replaces the existing rule that has been in place since 1971.

What are the major changes as a result of the new rule?

1. Ground Conditions

The new standards require the site to be prepared, and for a general contractor to inform the operator of any known hazards at the site. The “controlling entity” must make sure the required ground preparations are provided and must inform the operator of the location of hazards beneath the setup area. The “controlling entity” is defined as “an employer that is a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project – its planning, quality, and completion.”

The ground must be “firm, drained, and graded” so that the “equipment manufacturer’s specifications for adequate support and degree of level of the equipment are met.” In addition, the controlling entity must inform the operator of hazards beneath the equipment setup area if those hazards are identified in any of the project documents or if the controlling entity knows of the hazards.

What does this mean for the general contractor? It is similar to the multi-employer worksite doctrine. Even if the general contractor’s own employees are not exposed to a hazard, the general contractor may be subject to a citation where a subcontractor’s employee is exposed to a hazard.

In order to avoid a citation under this part of the new standard a general contractor may take certain precautionary measures. Contracts with subcontractors can be modified to require a specific process for verifying that the site has been prepared and the information has been provided to the subcontractor before the equipment is assembled. General contractors should also consider documenting the steps taken to prepare the site and provide a copy of the project documents to the subcontractor so the subcontractor can determine from the documents if any hazards are located in the setup area. These measures would provide some additional protection should OSHA knock on the door.

2. Qualified Operators

Operators must now be licensed to use covered equipment. Operators must also be trained by an accredited crane testing organization, through an audited employer program, qualified by the U.S. military, or licensed by a government entity. Operators, however, will have up to four years to obtain an accredited certification (unless the city or state the operator is working in has its own licensing requirements). Even though there is an extended period to obtain certification, during the four-year period the employer must ensure that the operators are competent to operate the equipment and provide training to the operators if they do not have the knowledge or ability to operate the equipment safely.

Employers must provide for the certification at no cost to the operators. In addition, the tests for certification may either be written or oral and “non-English speaking operators will have the ability to become certified using languages other than English.”

Additional provisions require riggers and signal persons to be qualified starting on November 8, 2010.

3. Increased Inspection Requirements

Another significant change is the increased frequency of inspections required by the
new standards. Equipment that has been modified or repaired must be inspected by a qualified person prior to initial use. Once the equipment is assembled a qualified person must verify the equipment was assembled according to the manufacturer’s criteria. If a manufacturer’s criteria is unavailable then the qualified person must determine if a professional engineer is needed to develop criteria for the equipment.

The equipment must be inspected after each shift, and monthly and yearly inspections are also required. In some cases, specific documentation must be kept that records the results of inspections. There are similar inspection requirements for wire rope that is used in conjunction with the equipment.

As a best practice, employers should update their safety manuals to include specific inspection requirements that must be met before employees are permitted to use the equipment. In addition, a log should be kept for each piece of equipment covered by the new standards with the log including all records related to the required inspections.

Who must comply with the new rules?
The rules apply to the construction industry and to the general industry when general industry employers undertake construction type work.

What equipment is covered by the new standards?
The covered equipment, and the equipment that is excluded from the new rule, is listed in 29 CFR 1926.1400.

Where can you find more information about the changes?
In a web chat on July 28, 2010, OSHA announced that it would provide additional compliance assistance material in the near future. The new standards, OSHA’s fact sheet regarding the new rules, and the archived web chat are all included on OSHA’s website: http://www.osha.gov/cranes-derricks/.