The Flukes of Hazard:
OSHA Sets Its Sights On Design Professionals

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Construction sites are filled with dangerous conditions, and the Secretary of Labor has issued specific construction industry standards for safety. Construction site accidents frequently lead to citations for violations of the specific OSHA construction industry standards. A/E firms are not automatically exempt from OSHA liability and have been subjected to Department of Labor enforcement actions, penalties and fines where their services exceeded typical "AIA type" duties and approached "substantial supervision" of construction work or safety.

As project delivery methods combine and blur roles, the insulation that separates A/E's from OSHA has similarly blurred. As a result, the Department of Labor has been very aggressive with A/E enforcement actions. Understanding the nature of such liability can help A/E firms avoid being thrust into responsibility for OSHA fines and penalties. While some insurers will provide a limited defense fines and penalties are not insurable and may support enhanced penalties for future "repeated" violations. Recent enforcement actions and new OSHA regulations suggest that A/E's are "in season." Appropriate contracts and behavior will help A/E's stay out of OSHA's sights.

Traditional OSHA Exposure - Your Own Employees

The federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSHA") was enacted "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." OSHA requires employers to furnish employees with "employment and a place of employment, which is free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. §§ 654(a)(1) and 654(b). The Secretary of Labor has extremely broad authority to promulgate rules and standards for safety, as well as the authority to impose fines and penalties for violations of those rules and standards.

It seems clear that any employer can be held responsible for dangerous conditions encountered by its own employees in their "place of employment." In the construction industry, "Each employer shall protect the employment of each of his employees engaged in construction (emphasis added) work . . ." Construction work is defined to mean "work for construction, alteration, and/or repair, including painting or decoration." 29 C.F.R. § 1910.12. The analysis, then, is whether an A/E is "engaged in construction work." Not surprisingly, the OSHA Review Commission and federal courts look to both contracts and actual behavior to make that determination.

Multi-Employer Worksites - Others' Employees

But how could an A/E ever be responsible for someone else's employees? The answer lies in a legal "fiction" called the Multi-Employer Doctrine. In order to provide appropriate incentives to those in a position to control safety, the OSHA regulations impose responsibility on several parties, regardless of whether their own employees are exposed to hazards: (i) the employer who creates the hazard; (ii) the employer responsible for safety conditions at the site by contract or through conduct; and (iii) the employer responsible for correcting the hazard. The citations, then, are issued to those in the best position to correct or prevent the hazard. Like the parent that punishes both children for fighting, the Department of Labor frequently cites more than one employer, particularly in the contractor/subcontractor context. In the multiple-prime and construction manager context, the CM or A/E can be cited with all of the other trade contractors if that CM or A/E meets the "engaged in construction" test.

In The Trenches

OSHA has been especially aggressive against A/E's after high-profile accidents, and particularly so with respect to engineering firms with broad and daily involvement in construction. These citations are initially heard by an Administrative Law Judge in an administrative hearing. Administrative appeals go to the Occupational Safety and Health Review Commission. Further appeals go to the federal courts. With several layers of appeals, the litigation can last for years and can be very expensive. The fines, penalties and a substantial portion if not all of the litigation costs are not covered by insurance and can be crippling.

Substantial Supervision

An administrative law judge found that Skidmore, Owings & Merrill had failed to comply with certain standards during the construction of the Sears Tower in Chicago. In an appeal to the Occupational Safety and Health Review Commission, the citation was dismissed because SOM had not actually performed construction work, had not substantially supervised construction work, and had not created or controlled the dangerous conditions. Secretary of Labor v. Skidmore, Owings & Merrill, 5 O.S.H. Cas. (BNA) 1762 (1977). Subsequent enforcement proceedings against A/E's have applied the "substantial supervision" standard to find construction managers subject to OSHA enforcement and fines. See, Secretary of Labor v. Kulka Construction Management Corp., 15 O.S.H. Cas. (BNA) 1870 (1992).

Until recently, the only federal appellate court opinion on the issue of A/E OSHA exposure involved a Massachusetts engineer after a construction failure. There, metal decking collapsed under the weight of successive concrete pours made with the alleged approval of the structural engineer. The Secretary of Labor issued citations and sought fines from the engineer despite AIA-type contractual disclaimers of means, methods and safety. The Commission granted summary judgment in favor of the structural engineer and dismissed the citations because the engineer had not "substantially supervised" construction. The United States Court of Appeals for the First Circuit affirmed, noting that the engineer only visited the site periodically, maintained no office or trailer at the site, and the site was therefore not a "place of employment" with respect to the engineering firm. Reich v. Simpson, Gumpertz & Heger, Inc., 3 F.3d 1 (1st Cir. 1993). It seemed that traditional A/E's were usually outside of the typical enforcement range, while construction managers were usually inside it.

"De Facto" Control

Later cases ignored the A/E vs. CM distinction and instead analyzed the contractual and actual, or "de facto" roles of the design professionals in matters of means, methods and safety. In Secretary of Labor v. Foit-Albert Associates, Architects & Engineers, P.C., 17 BNA OSHC 1975 (1977), an engineer was hired by the project architect to provide site representation for construction of a multi-story university building. Concrete was being poured on an upper floor when the shoring system supporting the forms collapsed. Fresh concrete and rebar were poured onto three unfortunate laborers below. All three were injured. Several days earlier, the engineer had pointed to shoring deficiencies. The Secretary of Labor cited the engineer, but the Administrative Law Judge found the engineer not to have been engaged in construction work. The Review Commission agreed, citing the engineer's contractual exclusion of responsibility for means, methods and safety, and the lack of any evidence that the engineer acted to take responsibility on the site for such matters ("de facto" control). The Commission distinguished "pervasive supervisory control" of the project from the incidental review of the shoring work.

In another case, CH2M Hill was cited following a methane gas explosion during a Milwaukee sewer system construction project in 1988. The project was part of a $2.2 Million pollution abatement program, and included the construction of eighty miles of sewer tunnels. CH2M Hill was the lead engineering consultant for the project. The contractor's methane monitor detected high methane gas levels and caused an immediate evacuation of the tunnel - but the contractor forgot to turn off the electrical power. Three supervisors returned to the tunnel a few minutes later and turned on a grout pump, igniting the methane gas and causing a powerful explosion. The explosion killed all three men. Both the contractor and engineer were cited by the Secretary of Labor.

CH2M Hill's agreements contained AIA-type disclaimers of responsibility for "techniques and sequences of construction and the safety precautions incidental thereto and for performing the construction work in accordance with the construction contract documents." The case went to trial before an Administrative Law Judge, who dismissed the citations under the "substantial supervision" test. The Occupational Safety and Health Review Commission heard an administrative appeal and reversed, adopting a new test and sending the case back to another Administrative Law Judge. The new test proposed by OSHA redefined those "engaged in construction work" to include those who (1) possessed broad responsibilities in relation to construction activities, including both contractual and "de facto" authority for the work of the trade contractors, and (2) is directly and substantially engaged in activities that are integrally connected with safety issues . . . notwithstanding contract language expressly disclaiming safety responsibility. This intentionally includes architects and engineers. The Review Commission remanded the case for findings of "willful violations" under the new standard. That new standard resulted in an Administrative Law Judge finding 40 violations and fining CH2M Hill $5,000 per violation.

Finally, years after the accident, the appeal was heard by the United States Court of Appeals for the 7th Circuit in Chicago. The case was heard by the federal appeals court twice. Once in 1997, and again in 1999 (CH2M Hill Central, Inc. v. Herman, 131 F.3d 1244 ((7th Cir. 1997), and 192 F.3d 711 (7th Cir. 1999). At the outset, the Court considered "friend of the court" papers from organizations like AIA and NSPE, but expressly ruled that A/E's are not automatically exempt from OSHA responsibility under federal law under the old "substantial supervision" test or the newly proposed "de facto" test. The Court did urge OSHA to reconsider its proposal to ignore contract language in all circumstances. In any event, the Court found the evidence of a typical change order and construction change directive process did not fulfill either the "substantial supervision" or the "de facto control" tests. CH2M Hill's duties were more like the architects in the Skidmore and Simpson Gumpertz & Heger cases than the CM in Kulka. The Court of

Appeals vacated the findings of violations and the fines and weakened OSHA's ability to ignore its past enforcement guidelines.

A Word To The Wise

Exposure to OSHA fines is a continuum, with Owners or A/E's with AIA-type services on one end, and with General Contractors with express safety responsibilities on the other. The Department of Labor treats Construction Managers more like General Contractors, and AIA-type A/E's more like owners. Not exactly a bright-line test, but the cases can provide some guidance.

If you are a traditional A/E firm, with AIA-type duties, make certain that every agreement you sign contains traditional disclaimers of responsibility for means and methods of construction and for safety precautions. If you use AIA documents, paragraphs 2.6.2.1 and 2.6.2.2 of the 1997 B141, and paragraph 2.6.5 of the B151 are excellent provisions. Even a letter agreement can include similar language. Remember that actual conduct will be examined as well. Train your site representatives to avoid entanglement in safety issues.

If you provide CM or other non-traditional services, be aware that you are exposed to OSHA responsibilities and citations, even for the sins of others. Send your CM site representatives to OSHA training courses, prepare an OSHA compliance manual and be prepared to spend some money defending and negotiating citations periodically. Learn your rights and find competent counsel to assist you with OSHA citations and enforcement proceedings. If you do so, you may be able to avoid the Flukes of Hazard.

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NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.