

The CORNERSTONE



Next Meeting:

November 10, 2009 @ Noon-Lunch

Anthe's on the Lake

October 2009 Issue



Hower House was completed in 1871 by John Henry Hower, a leading Akron industrialist who was active in the milling, reaping and cereal industries. Hower and architect Jacob Snyder designed this house in the Second Empire Italianate style. The floor plan, known as the "Akron Sunday School Plan", features rooms radiating from a large octagonal center hall. The plan was used for churches across the United States. This 28-room mansion is capped with a mansard roof and soaring tower, and is filled with hundreds of treasures and furnishings the Hower family collected from around the world.



Hower House

Completed 1871

60 Fir Hill

Akron OH



In 1901, John Henry's son Milton Otis, his wife Blanche, and their two children, Grace and John, came to live in the house. The elderly Hower and his second wife moved to a smaller home nearby. Blanche continued to live in the house even after John Henry and Milton Otis both died in 1916. Sometime later, Grace and her husband, John, moved into Hower House with Blanche. The house was occupied by the Hower family for 100 years before it was deeded to The University of Akron in 1970. In 1973, Hower House was placed on the National Register for Historic Places.

Inside This Issue

Liability for Construction Claims	Page 2	Calendar of Events	Page 5
Avoiding the Risk of a Repeat Citation	Page 3-4	Guideline shows you the Way From Contractor to Partner	Page 6
Calendar Events	Page 5	News and Reviews	Page 7
Rigging Safety	Page 5	Updated Member and Officer Lists Apprentice of the Month: Nate Radar	Page 8



The construction industry is rife with situations in which one party may become liable to or for another party in the construction process. The easy relationships to define are:

1. The liability of the general contractor to the owner
2. The liability of the subcontractor to the general contractor
3. The liability of the architect to the owner
4. The liability of the surety for the default of its principle

The liability to and for the acts of subcontractors are generally defined by the subcontractors contracts. There are situations, however that arise where liability or responsibility for a subcontractor's acts are not so clearly defined.

Liability of General Contractor for Acts of Its Subcontractors

The general conditions document most recognized in the construction processes is AIA Document A201. Subcontractors generally adopt this document by reference. There are several sections that define the general contractor's liability for the acts of its subcontractors.

A. Liability for Supervision

The general contractor has the obligation to supervise and direct its subcontractors' work. The contractor is also responsible for and has control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under the contract. Since the general contractor is responsible for the means and methods of performance of the construction work, it follows that the general contractor is responsible for the work of its subcontractors. The general contractor is also responsible for discipline at the worksite. Specifically the contractor must enforce strict discipline and good order among the contractors' employees and other persons carrying out the contract. The contractor must not permit employment of unfit persons or persons not skilled in the task assigned to them.

In order to protect itself against its subcontractors' defective work or default, the general contractor will include clauses in its subcontract that allow it to (1) terminate a subcontractor; (2) complete the

subcontractors' work; (3) hold the subcontractor liable for any excess costs incurred

An owner who has a claim for defective work will file suit against the general contractor. The general contractor will then sue ('third party in') each subcontractor that performed the defective work.

B. Obligation of General Contractor to Coordinate Subcontractors

Besides being responsible for the acts of their subcontractors, general contractors also have an obligation to coordinate their subcontractors' work. General contractors generally prepare construction schedule to meet owner's desired completion date. The right to direct the general progress of the work implies an obligation on the part of the general contractor to keep the work in a state of forwardness. This allows the subcontractor to perform their work within the required time.

General contractors have taken to 'pass through' the obligations for coordination to their subcontractors. It is not unusual to find clauses in subcontracts that state:

The subcontractor shall coordinate the work with adjacent work and shall give due notice to other subcontractors of precedent or intersecting work to assure that all items are installed at an agreeable time and to facilitate the general progress of the work.

When there are multiple prime contractors (instead of one general contractor), then the owner usually becomes liable for the coordination.

Conclusion

On construction projects, several different parties may have liability for the acts of others. It is important to know not only your own risks, but the risks you may be assuming for the acts of others.

By Margery Newman, Ogletree Deakins Law Office, member ASA Chicago Board of Directors and National Subcontractors Association





S A F E T Y Z O N E

Avoiding the Risk of a Repeat Citation

The Occupational Safety and Health Act of 1970 (Act) created the Occupational Safety and health Administration (OSHA) and provided it with the charge of promulgating and enforcing what would eventually amount to literally hundreds and, in some industries, thousands of federal and state regulations regarding occupational safety and health. As part of its enforcement charge, OSHA has the duty to inspect workplaces and issue citations to determine whether an employer is in violation of the Act, the regulations, or the General Duty Clause (Section 5(a)(1)). If OSHA issues a citation following an inspection, employers are frequently tempted to settle quickly and informally for a reduced penalty rather than contest the citation without considering future consequences. Foregoing potential factual and legal defenses for quick and easy resolution of a citation involving and alleged violation of a specific regulation, however, can create a much larger risk in the future: a Repeat citation with substantial monetary penalties. This article will discuss what constitutes a repeat citation, when an employer is at risk of receiving a repeat citation, and what employers can do to limit the possibility of receiving a repeat citation.

What is a Repeat Citation

A repeat citation is a type of violation for which OSHA may cite an employer under section 17(a) of the Act if, as the name implies, OSHA has previously cited the employer for a 'substantially similar condition' and the Occupational Safety and Health Review Commission has affirmed the previous citation. For employers with more than on facility or worksite, the alleged repeat violation can occur at any of the employer's facilities or worksites nationwide, regardless of where the initial citation occurred. Federal OSHA can use state OSHA citations as the basis for a repeat citation and vice versa. OSHA maintains a national online database (which is available to the public at <http://www.osha.gov/pls/imis/establishment>) on which a Compliance Officer can, and will, search for any citation previously issued to an employer anywhere in the nation. While there is not any specific time requirements for OSHA to consider an alleged violation a repeat, OSHA policy states that the present alleged violation must occur within three years of the date that the previous citation became a final order of the Commissions of the final abatement date, whichever is later. Repeat violations carry proposed penalties of up to \$70,000. Thus, to an unformed employer, what may seem like a harmless or other than serious citation, with a nominal or no proposed penalty, may lay foundation for a subsequent repeat citation and a \$70,000 penalty at any of an employer's facilities or worksites across the nation over the next three years. For this reason, many employers are aggressively defending any citation that is not legally or factually valid.

How to Protect your Employees, Business from a Repeat Citation

Contesting a citation is one way to lessen the possibility of receiving a repeat citation in the future, because it preserves the employer's factual and legal defenses and gives the employer's business time to correct any potential violations and ensure that they do not occur in the future. As discussed, settling a citation, even those classified as other than serious, can expose the employer to a potential repeat citation that will result in a penalty of up to \$70,000. Once a settlement agreement is entered into and affirmed by the Commission, the employer loses the right to contest those citations as any point in the future and can no longer raise any legal and factual defenses that may exist even if the citations form the basis for a future repeat citation. Therefore, contesting a citation where factual and legal defenses exist, preserves the employer's right and allows the
(continued next page)

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protect itself from receiving a repeat citation based on a factually or legally deficient citation.

Once an employer contests a citation in good faith, it not only preserves the employer's opportunity to raise factual and legal defenses, but also it affords the employer the opportunity to abate any other substantially similar hazards before the citations can be sued as a basis for a repeat citation at the cited facility and elsewhere across the country.

If the employer settles a citation, or it becomes the final order of the Commission following litigation, it is prudent to alert the employer's management at each of its facilities or worksites across the country of the cited hazard and thereafter take timely measures to abate the cited hazard and to prevent future employees' exposure to the hazard. In addition, if the employer eventually agrees to accept a citation, the employer should attempt to have it amended and the Alleged Violation Description (AVD), which is the description of how the violation factually occurred contained in the body of the citation itself, carefully drafted to accurately reflect the specific facts and circumstances of the hazard so that it will be difficult for OSHA to prove that the hazard alleged in any future citation is substantially similar to the hazard alleged in the prior citation.

Defense of a Repeat Citation

If the employer is unfortunate enough to receive a repeat citation, it should develop a defense strategy to contest the classification of the citation as repeat; that is, that the new citation is not 'substantially similar' to the prior citation themselves, it must be prepared to put forward documentary and testimonial evidence to establish that the previously cited hazardous condition did not create a substantially similar hazard as contained in the repeat citation. Therefore, the employer should be prepare to argue that the prior citation was not 'substantially similar' to the present citation, as well as any other legal or factual defense that may exist to the present citation.

Conclusion

When a employer receives a citation from OSHA or a state occupational safety and health organization, it must carefully consider the potential for a repeat citation prior to settling the citation for any reason. Only after closely reviewing whether it has factual or legal defense to the citation, and its obligation to abate any similar hazards to its facilities across the nation, should an employer consider settling a citation. If the employer accepts a citation without undertaking these considerations, the potential liability for a repeat citation will clearly exist in the future.

By Mark A. Lies, II & Daniel R. Flynn, Seyfarth Shaw LLP





Calendar of Events 2009 - 2010

October 13, 2009	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
November 10, 2009	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
December 11, 2009	ANNUAL CONSTRUCTION "INDUSTRY HOLIDAY CELEBRATION" HILTON (BEAU'S RESTAURANT) 11 AM—4 PM
January 12, 2010	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
February 9, 2010	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
March 9, 2010	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
April 13, 2010	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON
May 11, 2010	MCANEO LUNCHEON MEETING PRIME RESTAURANT (ANTHE'S) NOON

Rigging Safety

One of the most necessary yet dangerous activities on a construction site is rigging and hoisting. Many projects cannot be installed without some form of rigging and hoisting, even though improper rigging causes many accidents and injuries.

There are four main rigging accidents. These includes damaged equipment. This would be slings with broken strands, improper clamping, and hooks without safety latches or that are damaged.

Good equipment may be misused through improper sizes of slings and slings that are made of the wrong material for the materials being handled, or the lift angle is too small when using a choker sling, and wrapping the sling around sharp edges. Insecure slings and loads not balanced are the third hazards. Finally, there is the danger of uncontrolled movement. Lack of tag lines, lateral movement of the load during lift, and weather factors can all cause unanticipated movements.

To control rigging hazards, there are some safety checks to take. Do not use damaged equipment; inspect before use. Install clamps and U-bolts properly. Inspect hooks before a lift, especially safety latches. Use right size sling and sling angle on the load. Secure the hoisting areas from other trades and from 'sightseers'. Never hoist loose material. Small pieces such as nuts and bolts can become deadly missiles in just a few feet. Have an emergency plan in the event of an accident, especially at night or on a weekend lift when assistance may be minimal.

When done incorrectly, rigging may have catastrophic consequences. Knowing your equipment, using proper equipment, and knowing the safety hazards when rigging and hoisting can reduce exposure to accidents and injuries.— **John Conley, Member MACSC, Director SMCA**

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**Guideline shows you the Way
from Contractor to Partner**



Have you ever considered why companies that perform *construction* are called *subcontractors*? Shouldn't they be called sub-constructors or sub-builders, or something more fitting to what they *do* rather than what they *sign*? According to one subcontractor, it was only after World War II that the term 'contractor' came into favor over the term 'builder'. The change occurred as the art of examining contract language became an essential skill for people who build things for a living. As contracts gained in importance, the relationships between builders were redefined in terms of words instead of activities.

As every builder knows, even the best contract contains language subject to interpretation (and liability!), and no contract can fully define the working relationships on a given project. Frustration with the contemporary focus on contracts and contract language is one reason that re-establishing trust and a spirit of working together on projects is important to many subcontractors and other members of the construction team. Partnering offers a partial solution to developing relationships that are based on cooperation, communication, and prevention or quick resolution of disputes.

The "Guideline on Partnering" developed and published by the American Subcontractors Association, the Associated Specialty Contractors and the Associated General Contractors of America, generally describes the benefits of partnering which include:

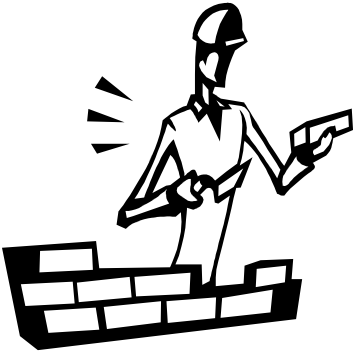
- ◆ Better control over safety and health issues
- ◆ Reduced exposure to litigation through communication and issue resolution strategies
- ◆ Increased productivity because of elimination of defensive case building
- ◆ Lower risk of cost overruns and delays because of better time and cost control over projects
- ◆ Increased opportunity for innovation and implementation of value and engineering in the work
- ◆ Potential to improve cash flow due to fewer disputes and withheld payments
- ◆ Improved decision making that helps avoid costly claims and saves time and money
- ◆ And enhanced role in decision making process as an active team member
- ◆ Increased opportunity for a financially successful project because of a non-adversarial win/win attitude
- ◆ Improved long-term relationship between team members for future projects

Achievement of these benefits requires implementation of the partnering process, which is also described in the guideline. The partnering process begins before bidding any project on which partnering will be used. The first step for a subcontractor is to become educated about the partnering process. The second step happens when a subcontractor bids a project on which the intention to partner is made clear, whether through a pre-bid conference, the invitation to bid, the project specifications, or other means. The third step is a post-award partnering meeting at the chief executive office level. The fourth step, which the guideline describes in detail is conducting a "partnership workshop" bringing together 'key team members from each stakeholder organization'...who actually will be involved in contract performance and those with decision making authority.

Much of the success of the partnering process rides on the partnership workshop. The workshop determines the framework that is supposed to foster cooperation, communication, and prevention or quick resolution of disputes. If this critical step succeeds, partnering may reap benefits for all construction team members that no contract alone ever could.

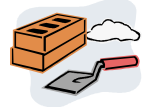
Learn more about partnering using the "Guideline on Partnering" one of the *Guidelines for a Successful Construction Project* www.constructionguidelines.org

[the American Subcontractors Association, Inc. founded in 1966, amplifies the voice of, and leads, trade contractors to improve the business environment for the construction industry and to serve as stewards of the community. ASA's vision is to be the united voice dedicated to improving the business environment in the construction industry]





Cornerstone News & Reviews



12:00 PM September 8, 2009

ROLL CALL: Firms represented were: Cemex, Inc., Dave Phillips Masonry, Inc., F B & S Masonry, GMR Builders, Quikrete Co., Thomas Kintz Construction, Valco Equipment Co., and W.L. Tucker Supply Co.

STAFF: Lynne Black, Executive Director

The Vice-President, Dave Phillips called the meeting to order at 1:05p.m.

50/50 Raffle: Tom Kintz of Thomas Kintz Construction won \$25. **Congratulations!**

MINUTES: The June minutes were distributed. A motion was made, seconded, and carried to approve the minutes as presented.

FINANCIAL REPORT: The Financial Report for the period ending August 31st, 2009 was distributed. A motion was made, seconded, and carried to approve the Financial Report as submitted.

APPRENTICE PROGRAM - the Apprentice Class of 2009-2010 will start on Thursday, September 17th, 2009 from 6pm-10pm weekly for a period of 36 weeks. This is a state approved training agency in the trade of masonry. Dave Phillips made a recommendation that the school be named the "Tommy Griebel Apprentice School" in memory of his carefree ways of 'Carpe diem' (seize the day) and his inspiration to us all to live life to its fullest, for tomorrow is promised to no one. His unexpected and tragic death reminded us all of his commitment to the Masonry Industry and its improvement. He was unsurpassed as he led the association to higher plateaus as the President. He will be missed by his friends and colleagues. The membership in attendance was in agreement to name the apprentice school after our President.

Tom Brown thanked the association for the "Harold Brown Memorial Fund" established to promote masonry in honor of his father who recently passed away. Tom Brown was appointed the chairman of the committee responsible for the fund.

ANNOUNCEMENTS - Flyers for the SANEO 1st Annual Clay Skeet Shoot to be held on Thursday September 10th, 2009 were distributed.

NEW BUSINESS - In lieu of the unexpected death of the association President, Tom Griebel, and the closing of multiple mason contractors who were officers, the elections were held for the coming 3 year term 2010-2012 as follows:

Mike Rohr, *President*
Tom Kintz, *Vice President*
Dave Griebel, *Secretary*
Joe Campriana, *Treasurer*

Dave Phillips will continue in the capacity of President and Mike Rohr will remain Treasurer until the end of 2009

Special Thanks to Blasé Mahon and Cemex for sponsoring the open bar again this month. It is very much appreciated.



Next Meeting: **Tuesday October 13th, 2009**
Prime Restaurant at Anthe's on the Lake at NOON.

A motion for adjournment was made, seconded and carried for approval. The meeting was duly adjourned at 1:15pm.

Respectfully submitted,

Lynne Black
Executive Director

In honor of our long time friend and colleague the Masonry Contractors Association of Northeast Ohio has created the Tommy Griebel Memorial Fund to continue the growth of Masonry Construction. Proceeds have already been received and will be used to fund promotional and educational programs and the future of masonry construction. The fund is solely set aside money in his honor and memory. As the past President of this association we feel Tommy would have been honored by this. **Make checks payable to:**

Tommy Griebel Memorial Fund
C/O MCANEO
76 E. North Street
Akron, OH 44304-1203



**Masonry Contractors Association Of
Northeast Ohio**

76 E. North Street, 2nd Floor
Akron, Ohio 44304

(330) 762-9951 / (330) 762-9960 fax
Website: www.mcaneo.com / Email: director@mcaneo.com

Local student- Apprentice of the Month: Nate Radar

"When Nate enrolled, I worried about the dynamic of the class and whether it would affect how I taught," said masonry instructor David Radar. "As it turned out, Nathan has made me both a proud instructor and a proud father. I'm glad he enrolled in my class."

David Radar has been the masonry instructor at Pioneer Career & Technical Center in Shelby OH since 1981 and has sponsored 12 students, including four medalists, in the annual national masonry contest sponsored by SkillsUSA. In the school's SkillsUSA program Nate Radar was a national voting delegate during his junior year and assisted his successor delegate at the national meeting this past summer.

Nate Radar's volunteer work includes working with his church group to lay the foundation of a house sponsored by Habitat for Humanity. As the Ohio state winner, Radar won the second place medal in the secondary schools category at the 45th annual national masonry contest. The annual competition was held in conjunction with the SkillsUSA National Leadership Conference in Kansas City MO.

Radar is currently enrolled in the construction Engineering Technology program at Toledo University.

Membership List

- Ameriseal & Restoration
- Akron Urban League
- Benner Masonry Contractors
- C.J. Masonry
- Dave Phillips Masonry, Inc.
- Duer Construction Company
- Ed Kintz Construction
- Ed Schory & Son Co.
- Ferrante & Sons Masonry, Inc.
- F B & S Masonry, Inc.
- Foam Of Akron
- Geis Construction Company
- George Wischt & Sons, Inc.
- GMR Builders, Inc.
- Grapevine Masonry Construction
- Medhurst Mason Contractors
- Northeast Masonry, Inc.
- Smith & Gough Construction Co.
- Thomas Kintz Construction
- Warren G. Jones Construction
- West Side Brick and Stone



Officers 2010-2012

- Mike Rohr** **President**
- Tom Kintz** **Vice President**
- Dave Griebel** **Secretary**
- Joe Campriana** **Treasurer**

Vocational Members List

- Akron Public Schools— to be determined
- Central Hower School—John Vance
- Four Cities—Copley/Wadsworth/Norton/
Barberton—Don Beggert
- Maplewood Career Center –Robert Pavkov
- Joe Colucci- MCAA Instructor

Associate Members List

- Akron Hydraulic, Inc.
- The Belden Brick Company
- Bruder, Inc.
- Cemex, Inc.
- Charles Svec, Inc.
- Continental Products
- DiGeronimo Aggregates LLC
- ESSROC Cement, Inc.
- Fallsway Equipment
- The Henry Bierce Company
- Kelly Supply
- Koltcz Concrete Block
- LaFarge North America Cement
- Leppo, Inc.
- Liberty Equipment & Supply
- Masonry Services Corp.
- Prosoco, Inc.
- Quikrete Companies
- Raymond Builders Supply
- Valco Equipment
- WACO Equipment Co.
- W. L. Tucker Supply

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