

The Owner's Role in Contractor Safety

Risk, Responsibility, and Role

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Employment, Injury, Illness, and Fatality Numbers Point to the Problem

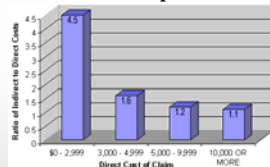
- **Employment**
 - 5,477,820 people in Construction
 - 137,896,660 people in the US Workforce
 - 3.97%
- **Injuries**
 - 74,460 Construction
 - 916,400 Total
 - 8.12%
- **Fatalities**
 - 908 Construction
 - 4679 Total
 - 19.41%

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2

Direct and Indirect Cost of Accidents

- A 2002 study of BLS data showed that the average accident in construction costs \$27,000, compared to \$15,000 for all industries
- **Direct Costs:**
 - Medical and Workers Comp
- **Indirect Costs:**
 - Morale, delays, absenteeism, investigation, replacement
- In 2013, the US spent over \$61 billion in worker's comp
- The total cost of fatal and nonfatal injuries in the construction industry were estimated at \$11.5 billion



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3

OSHA to Increase Penalties

- The Federal Civil Penalties Inflation Adjustment Act of 1990 exempted OSHA from increasing its penalties to account for inflation. The new budget, signed into law on Nov. 2 by President Barack Obama, contains an amendment that strikes the exemption.
 - Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015
- Now, OSHA is directed to issue an interim final rule increasing its penalties to account for current inflation levels, which would raise proposed fines by about 80 percent. This would mean the maximum penalty for a willful violation would rise to \$124,709 from the current \$70,000. The adjustment was effective Aug. 1, 2016. In subsequent years, OSHA also will be allowed – for the first time – to adjust its penalty levels based on inflation.

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4

Who is Responsible for Safety?

- Employer
- Worker
- Prime Contractor
- Service Provider
- Supplier
- Architect
- Engineer
- Regulator
- Union
- Owner



Image Credit: <http://www.urbanremaininmichigan.com>

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5

Owner's Liability is Difficult to Study

- **Ski Slope Liable For Worker's Construction Death**
 - Bortz v. Tuthill \$1.2M Verdict, Nov '15
- **Hillsborough jury awards \$64M to work-site accident victim**
 - Matthews v. Mosaic, March '15
- **Construction Injury Nets \$5M Settlement in Western NY**
 - Worker Fell, Aug '14

The Legal Intelligence

TBO Tampa Bay Online

BUSINESS FIRST


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6

Requirements for Health and Safety Vary

- International Law
 - Council Directive 89/391/EEC – EU
 - Council Directive 92/57/EEC – EU
 - Safety and Health in Construction Convention C167 – ILO
- Federal
 - 29 CFR 1910 – OSHA
 - 29 CFR 1926 – OSHA
 - 10 CFR 851 – DOE
 - 23 CFR 655 – FHWA
- State
 - OSHA approved state plans
 - New York Scaffold Law
- Local
 - Permitting, inspections, etc
- Funding Authority
- Owner
 - Specifications and contracts
 - Management systems
 - OSHAS 18001, ANSI Z10, etc
 - Company specific requirements

OSHA-Approved State Plans



Legend:
• OSHA approved state plans (private sector and public employees)
• Federal OSHA (private sector and most federal employees)
• OSHA approved state plans (for public employees only; private sector employees are covered by Federal OSHA)

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7

Why Do Owners Become Engaged in Contractor Safety?

- Obligation
 - Legal
 - Contractual
 - Regulatory
 - Ethical
- Desire
 - Perception
 - Culture
 - Reputation
 - Public Relations
- Common Sense
 - Morale
 - Productivity
 - Schedule
 - Financial



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8

Drivers and Voices of Safety

- Four main drivers (obligations) influence owners:
 - Contractual
 - Regulatory
 - Liability
 - Moral Duty
- Five main voices inform owners:
 - Academia
 - Jurisprudence
 - Regulators
 - Contracts
 - Industry

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9

Owner Involvement in Construction Safety is Correlated with the Ability to Control Accidents

- Levitt conducted research to understand the cost of accidents and suggested owners take the following measures to achieve better safety performance:
 - Provide safety and health guidelines that the contractor must follow.
 - Require the use of permit systems for potentially hazardous activities.
 - Require the contractor to designate a responsible supervisor to coordinate safety on the site.
 - Discuss safety at owner-contractor meetings.
 - Conduct safety audits during construction.
 - Require prompt reporting and full investigation of accidents.

Levitt, R.E. (1982) Improving Construction Safety Performance: The User's Role.

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10

Owner's Proactive Involvement Improves Safety Performance

The owner's direct involvement in the safety process during construction is perhaps the most important factor to favorably impact project safety performance.

- Owners set their expectations on safety from the very beginning of a project, especially the zero-injury objective;
- Owners monitor near miss rates, safety inspection records, and other types of injury statistics (TRIR, lost-time injury rate, etc);
- Owners maintain accident statistics by each contractor on their projects, and also include the contractor's injury statistics in their own accident records;
- Owners aggressive in safety use proactive criteria to evaluate and select contractors.
- Owners participate in the safety recognition program and financially support the program

Huang, X., & Hulse, J. (2006). Owner's role in construction safety. Journal of construction engineering and management.

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11

Owner's Proactive Involvement Improves Safety Performance

- Owners actively participate in safety training and orientation
- Owners assign a full-time safety representative on site with various responsibilities including:
 - enforcing safety rules;
 - reviewing safety performance on site and submitting reports to the home office;
 - monitoring pre-task analysis programs;
 - participating in safety recognition programs;
 - participating in safety and/or tool box meetings.
- Owners impose requirements on the safety programs developed by contractors and emphasize specific items, including:
 - emergency plan (medical and hazardous materials),
 - daily JSA (job safety analysis) conducted on the project site
 - mandated substance abuse program;

Huang, X., & Hulse, J. (2006). Owner's role in construction safety. Journal of construction engineering and management.

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12

Safety Leadership from Owners Has Significant Impact on Performance

- Between 2007 and 2012, fatalities on Chinese High Speed Rail (HSR) projects per trillion (RMB) spent dropped from 173.2 to 44.5
- Researchers identified four principle behaviors:
 - Owners should be fully engaged in project safety by implementing managerial measures itself and working with contractors and subcontractors.
 - Owners should reinforce safety management all through the project lifecycle.
 - Owners should manage safety risks in a systemic, proactive and real-time manner because construction risks are everywhere and constantly changing.
 - Owners should promote organizational learning in hazard and accident management.

C. Wu, et al. (2015). Roles of owners' leadership in construction safety: The case of high-speed railway construction projects in China. *Int. J. Proj. Manag.*

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13

There are Many Other Studies Encouraging Owner Engagement

- Smallwood, J. (1998). **Client influence on contractor health and safety in South Africa.** *Building Research & Information*, 26(3), 181-189.
- Lipka, G. (1999). **Owner involvement in construction at a national laboratory.** *Implementation of Safety and Health on Construction Sites*, 617-623.
- Gambatese, J. A. (2000). **Owner involvement in construction site safety.** In *Construction Congress VI@s Building Together for a Better Tomorrow in an Increasingly Complex World* (pp. 661-670). ASCE.
- Musonda, I., Pretorius, J. H., & Haupt, C. T. (2013). **Assuring health and safety performance on construction projects: Clients' role and influence.** *Acta Structilia*, 19(1), 71-105.
- Votano, S., & Sunindijo, R. Y. (2014). **Client safety roles in small and medium construction projects in Australia.** *Journal of Construction Engineering and Management*, 140(9), 04014045.

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14

Campbell Institute White Paper

- The Campbell Institute surveyed their member organizations on safety management methods they employ
- Five major steps in the contracting lifecycle, representing opportunities for owner engagement with the contractor, were identified
- Best Practices and Common Challenges were identified in each step



Inouye, J. (2015). *Best Practices in Contractor Management*. The Campbell Institute.

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15

Construction Users Round Table

- Construction Owners' Safety Blueprint (R-807)
- Identified five safety expectations owners should have:
 - Safety will be a core value of all parties involved in a project.
 - Safety will be integrated into all parties' work processes.
 - Operational discipline will be practiced at all levels.
 - Stakeholders will understand their client's expectations and will routinely meet or exceed them.
 - All stakeholders will manage safety as a business deliverable.
- Also provides guidance on establishing safety culture and monitoring safety performance
- Finally, the blueprint ends with the framework for a Construction Health and Safety Management System

Construction Users Roundtable (2012). *Construction Owners' Safety Blueprint (R-807)*.

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16

ASCE Policy Statement 350

- Policy first adopted in 1989 which describes the ideal safety role of each construction party
- Owners have responsibility for:
 - Assigning overall project safety responsibility and authority to a specific organization or individual, (or specifically retaining that responsibility);
 - Designating an individual or organization to develop a coordinated project safety plan and monitor safety performance during construction;
 - Designating responsibility for the final approval of shop drawings and details through contract documents; and
 - Including prior safety performance as a criterion for contractor selection.

American Society of Civil Engineers (2012). *Policy Statement 350 - Construction Site Safety*



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17

Summary: Research and Industry View

- The consensus of the research community is that owners must be involved in the safety management of their contractors to see the best safety performance
- Many industry publications outline the responsibility of the owner and steps owners can take to achieve improved safety performance from contractors
- Some recommendations include Owner programs on:
 - Prequalification and selection
 - Work hazard control, planning, and communication
 - Training and orientation of workers
 - Safety monitoring and physical engagement
 - Organizational and individual learning

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18

The General Rule of Non-Liability

- Except as stated in §410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Restatement (Second) of Torts §409 (1965)

- Ordinarily a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure...

Funk v. General Motors Corp., 392 Mich 91; 220 N.W.2d 641 (1974)

- "It is illogical and unfair that a landowner or other person who hires an independent contractor should have greater liability for the independent contractor's negligence towards the contractor's employees than the independent contractor whose liability is limited to providing workers' compensation coverage."

Privette v. Superior Court, 854 P.2d 721, 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72 (1993)

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19

An Exception to the Rule of Non-Liability: Retained Control

- "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Restatement (Second) of Torts §414 (1965)

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20

"An Unusually High Degree of Control"

- A "mere" owner would not ordinarily be rendered liable because, in contrast with a general contractor:
 - The owner typically is not a professional builder
 - Most owners visit the construction site only casually
 - Not knowledgeable concerning safety measures or supervising job safety
 - Is not part of the business of the typical owner
- "...exercised an unusually high degree of control over the construction"
- "It's internal divisions:
 - Drew up building plans
 - Wrote contractual specifications
 - Acted as architectural supervisor
 - Directly hired and fired subcontractors
 - Interpreted contract plans and specifications

Funk v. General Motors Corp., 392 Mich 91; 220 N.W.2d 641 (1974)

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21

Landowner vs. Sophisticated Corporate Owner

- Compared to a landowner, a sophisticated owner may:
 - Be likely to be experienced in construction safety
 - Have its own safety or construction staff
 - Employ a full time inspector on-site
 - Include elaborate procedures for the contractor to follow
 - May exercise an unusually high degree of control
- Factors:
 - Owner's size
 - Typical project size
 - Owner's power to negotiate greater control

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22

Comments to the Retained Control Exception

- Comment C to § 414:
 - In order for the rule stated in the Section to apply, the employer must have retained at least some degree of control over the *manner* in which the work is done. It is **not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.** Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

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23

Owner Liable: Edison

- Edison retained the authority to:
 - Order Bechtel to hire or terminate any subcontractor
 - Edison, not Bechtel, hired Babcock & Wilcox (Subcontractor)
 - An Edison site safety and insurance coordinator, Gary Western, was on the construction site daily
 - It was Western's responsibility to observe and report concerning the basic safety operation throughout the project and to assure that the safety provisions of the project contract were performed
 - Western frequently walked through the project, inspecting for safety compliance
 - He spoke about safety directly with employees of subcontractors, including Babcock & Wilcox employees
- Edison held "such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way"

Plummer v. Bechtel, 440 Mich. 646; 489 N.W.2d 66 (1992)

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24

Owner Liable: Junkans

- Supreme Court of Wisconsin
- Sustained a jury's finding that an owner who had employed a contractor to construct a dwelling had nonetheless retained control and was subject to liability to an injured workman
- The owner:
 - personally *worked* on the job
 - *purchased* some of the materials necessary for the job
 - engaged such other tradesmen as the excavators, plumbers, and electricians

Lee v. Junkans, 18 Wis 2d 56, 60-61; 117 NW2d 614, 617 (1962)

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25

Owner Not Liable: Shell Offshore

- Shell took "an active interest in the safety of the employees of its independent contractor," but that did "not, in and of itself, constitute direct operational control"
- Shell's on-site employee held safety meetings with the general contractor and subcontractors
- He also had been previously involved in removing a crane operator who he observed to be performing his duties in an unsafe manner
- He did not, however, have the authority to remove or otherwise give orders to general contractor/subcontractor personnel. "Rather, he had to go through [the chief general contractor/subcontractor employee on the rig] in the form of suggestions or advice"

Duplantis v. Shell Offshore, Inc., 948 F2d 187, 193 (CA 5, 1991)

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26

Common Work Area Doctrine

- Funk is the seminal case on injury liability of the General Contractor

"We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen."

Funk v. General Motors Corp, 392 Mich 91; 220 NW2d 641 (1974)

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27

The Common Work Area 4-Prong Test

- Latham further clarified a 4-prong test to determine if a common work area cause of action can be sustained:
 - 1) The defendant contractor failed to take reasonable steps within its supervisory and coordinating authority...
 - 2) to guard against readily observable and avoidable dangers...
 - 3) that created a high degree of risk to a significant number of workers...
 - 4) in a common work area.
- A plaintiff must satisfy ALL four elements to proceed.

Latham v. Barton Malow Co, 480 Mich 105; 746 NW2d 868 (2008)

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28

1) The defendant contractor failed to take reasonable steps within its supervisory and coordinating authority...

- Plywood hole covers and daily inspections that were in place were "reasonable steps" only if they effectively served their purpose to prevent a fall. The jury was free to find that the hole covers were only reasonable when properly secured in place or if their purpose was properly communicated.

Hardy v. Monsanto Enviro-Chem Systems, Inc, 414 Mich 29; 323 N.W.2d 270 (1982)

- "The submitted evidence establishes that a barricade was placed around the area where plaintiff was working, and plaintiff testified that he took all his orders and direction from a foreman"

Porter v. DaimlerChrysler Corp, Unpub MI Court of Appeals, Docket 253025 (2005)

- Plaintiff carries the burden of demonstrating what reasonable steps should have occurred

Faulman v. American Heartland Homebuilders, Unpub MI Court of Appeals, Docket 269287 (2007)

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29

2) To guard against readily observable and avoidable dangers...

- A swinging sheet of steel moved by a crane is not open or obvious, as compared to workers at height without fall protection in *funk*

Samhoun v. Greenfield Constr Co, Inc, 163 Mich App 34; 413 N.W.2d 723 (1987)

- A risk was found to not be readily observable after multiple co-workers of the plaintiff failed to describe the hazard accurately or consistently

Pavia v. Ellis-Don Michigan Inc, Unpub MI Court of Appeals, Docket 224327 (2001)

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30

3) That created a high degree of risk to a significant number of workers...

- A modest elevation vs an extremely high elevation
Gilmore v. Sorensen Gross Constr Co, Inc, Unpub MI Court of Appeals, Docket 258033 (2006)
- A 20' fall was determined to not be "extremely" high
Perkoviq v. Delcor Homes-Lake Shore Pointe,Ltd 466 Mich 11 (2002)
- "Mishaps and falls are likely occurrences" where a worker tripped over steel beams laid on the ground
Davis v. Barton Malow Co, Unpub MI Court of Appeals, Docket 219643 (2001)
- "Plaintiffs own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers."
*Latham v. Barton Malow Co, 480 Mich 105; 746 NW2d 868 (2008)**

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31

3) That created a high degree of risk to a significant number of workers...

- "Plaintiff was one of only four men who would be working on top of the overhang"
Hughes v. PMG Building, 227 Mich. App. 1 (Mich. Ct. App. 1997)
- "While the greenhouse roof area may have been a 'common work area' at one time, there is no evidence to demonstrate that it was at the time of the incident"
Sprague v. Toll Bros, 265 F Supp.2d 792 E.D.Mich. (2003)
- "Although plaintiff argues that defendant had supervisory control over twenty-one subcontractors, there is no evidence regarding how many of those subcontractors would have workers at risk of falling"
Gilmore v. Sorensen Gross Constr Co, Inc, Unpub MI Court of Appeals, Docket 258033 (2006)

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32

4) In a common work area.

- "It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area"
Hughes v. PMG Building, 227 Mich. App. 1 (Mich. Ct. App. 1997)
- The common work area is typically broken down into two different parts:
 - Same Area
 - Same Risk

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33

4) In a common work area: Same Area

- Workers in the vicinity (under a porch) were not in the same area as the injured (on the roof of the porch), which defeated the common work area claim
Hughes v. PMG Building, 227 Mich. App. 1 (Mich. Ct. App. 1997)
- The danger to which [the plaintiff] was exposed was a live electrical line in the ceiling of a pharmacy. Other subcontractors working within the pharmacy area of the store, but not the ceiling, did not create a common work area.
Pinkowski v. Adena Corp, Unpub Mem. No 99-73247, MI Eastern Dist.(2000)

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34

4) In a common work area: Same Risk

- In Latham a worker fell from a mezzanine in which he removed the wire barrier. The court held that the actual risk was working at heights without fall protection, not working at heights.
*Latham v. Barton Malow Co, 480 Mich 105; 746 NW2d 868 (2008)**
- "Other individuals surrounding the trench or at other areas on the project were not exposed to the same risk, i.e., burial from a trench-wall collapse, as were plaintiff and the other trench worker."
Wallington v. City of Mason, Unpub MI Court of Appeals, Docket Nos. 267919, 269884 (2006)

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35

Retained Control and Common Work Area?

- The "retained control doctrine" . . . is subordinate to the "common work area doctrine" and is not itself an exception to the general rule of nonliability.
- Rather, it simply stands for the proposition that when the Funk "common work area doctrine" would apply, and the property owner has sufficiently "retained control" over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor.
Ormsby v. Capital Welding, 471 Mich 45; 684 N.W.2d 320 (2004)

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36

So What is Acceptable?

- “The requisite nature of this standard requires that the owner retain at least partial control and direction of the *actual* construction work, which is *not equivalent to safety inspections* and general oversight

Miller v. Great Lakes Steel Corp., 112 Mich App 122, 315 N.W.2d 558 (1982)

Samodai v. Chrysler Corp., 178 Mich App 252, 443 N.W.2d 391 (1989)

- “Although formulations such as “high degree of actual control” and “dominant role” suggest a fact-specific inquiry, one clear rule can be gleaned from Funk and its progeny. At a minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some *actual effect* on the manner or environment in which the work was performed.”

Candelaria v. BC Gen. Contractors Inc., 236 Mich. App 67, 600 N.W.2d 328 (1999)

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37

Inherently Dangerous Activities

- The Second Restatement of Torts, 2d, §416:

- One who employs an independent contractor to do work involving a *special danger to others* unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

- As of 2004, the Inherently Dangerous Activities Doctrine specifically excludes employees:

- “We conclude that the inherently dangerous activity exception is limited to third parties and does not apply to employees of independent contractors injured while performing dangerous work”

Deshambo v. Neilsen, 471 Mich 27; 684 N.W.2d 332 (2004)

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38

Inherently Dangerous Activities

- Examples of “Inherently Dangerous Activities” include:
 - Repair of construction work on the structural steel framework
 - Installation of a press in a 13-foot pit or of boilers at a plant
 - Relining a blast furnace in a trench
 - Work as a lineman on a telephone pole
 - Excavation to install a sewer
- Inherently dangerous activities do not include:
 - Construction work in elevated outdoor work areas

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39

Inherently Dangerous vs. Ultrahazardous Activities

- “Ultrahazardous” activities are those which are likely to cause injury despite the greatest care
- As a matter of policy, one engaging in such activities is strictly liable for injurious results.
- Examples include:
 - Blasting Operations
 - Toxic exposure to plutonium
 - Toxic waste disposal
- No known cases have deemed construction work “ultrahazardous.”

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40

Reasonable Care and Premises Liability?

- The possessor of land is not liable to the invitee for injuries caused by an activity or condition on the land whose danger is known or obvious to them *unless the possessor should anticipate the harm despite such knowledge or obviousness*.

Restatement (Second) of Torts §343A (1965)

- A possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from unreasonable risks of harm caused by dangerous conditions on the premises.. This duty does not extend to the removal of open and obvious dangers.

Lugo v. Ameritech Corp. Inc, 464 Mich 512; 629 NW2d 384 (2001)

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41

Duty to Warn of Dangerous Conditions

- If the owner has specific knowledge of a hazardous condition on their property, they have a duty to warn a contractor
- Examples include:
 - Areas with potentially hazardous atmospheres
 - Environmental hazards such as asbestos, lead, PCB, etc
 - Structural deficiencies
 - Where there may be a “deliberate encounter”

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42

“...a Carefully Selected Contractor”

- Ordinarily a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure...
- “No cause of action exists for the negligent hiring of a subcontractor”
Campbell v. Kovich, 273 Mich App 227; 731 N.W.2d 112 (2006)
- “Michigan has not recognized a duty requiring an employer to exercise care in the selection and retention of an independent contractor. Furthermore, we hold that such a duty does not exist”
Reeves v. Kmart Corp, 229 Mich App 466; 582 N.W.2d 841 (1998)

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43

Does an OSHA rule create a duty?

- In Ghaffari, the plaintiff was on a construction site when he slipped and fell on copper pipes which were on the ground in violation of the Michigan OSHA regulations.
- The plaintiff argued that the Michigan OSHA regulation placed a duty on the defendant.
- The Court disagreed, stating that although violation of a Michigan OSHA regulation could be used as “evidence of negligence,” it does not impose a statutory **duty** on an employer.

*Ghaffari v. Turner Construction Co, 259 Mich. App. 608; 676 N.W.2d 259 (2003)**

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44

Contributory Negligence vs. Comparative Negligence

- Prior to Funk, a plaintiff could be barred from recovery if found to have contributed to even 1% of an incident under contributory negligence
- Funk cited a NY case that held:
 - “If the employer could avoid this duty by pointing to the concurrent negligence of the injured worker in using the equipment, the beneficial purpose of the statute might well be frustrated and nullified”
- “What pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice”

Placek v. Sterling Heights, 405 Mich. 638 (Mich. 1979)

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45

Summary: Legal Viewpoint

- Common Work Area Doctrine applies to general contractors
 - Funk is the seminal Michigan case
 - Does not apply to subcontractors
- Retained Control Doctrine applies to owners
 - Clarified in cases like Ormsby to be subordinate to the Common Work Area Doctrine
- Inherently Dangerous Exception
 - Clarified in Deshambo (2004) to only extend to 3rd parties
- Ultrahazardous Activity Doctrine has not been applied to construction
- Standard of Reasonable Care
 - Open and Obvious hazards are exempted
- Negligence Standards: Contributory vs Comparative

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46

Regulations Apply More Broadly

OSHA General Duty Clause

- Section 5 of the OSH Act of 1970: Duties
 - a) Each employer –
 - 1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
 - 2) shall comply with occupational safety and health standards promulgated under this Act
 - b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

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47

Rules of Construction: 29 CFR 1926.16

- **1926.16(b)**
 - By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.
- **1926.16(a)**
 - The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually.
 - Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility).
 - In **no case shall the prime contractor be relieved of responsibility** for compliance with the requirements of this part for all work to be performed under the contract.

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48

Multi-Employer Worksites

- OSHA maintains a multi-employer citation policy.
- Employers may be cited as:
 - **Exposing:** An employer whose employees are exposed to the hazard.
 - **Creating:** The employer who caused a hazardous condition that violates an OSHA standard.
 - **Controlling:** An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require other to correct them.
 - **Correcting:** An employer who is engaged in a common undertaking, on the same worksite as the exposing employer, and is responsible for correcting a hazard.

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49

Multi-Employer Tension?

- 29 C.F.R. § 1910.12(a)
 - "Each employer shall protect the employment and places of employment of each of **his employees** engaged in construction work by complying with the appropriate standards prescribed in this paragraph"
- The Court concluded that the above section was unambiguous in that it did not preclude OSHA from issuing citations to employers when their own employees were not exposed to any hazards related to the violations

Solis v. Summit Contractors, 558 F.3d 815 (2009)
- Several other courts have noted the "tension" between the multiemployer policy and 1910.12(a)

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50

Regulations Vary by State

- New York Labor Law Section 200 and 240
 - §200 - General duty to protect health and safety of employees:
 - All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.
 - §240 – Scaffolding and other devices for use of employees:
 - All contractors and *owners* and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed

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51

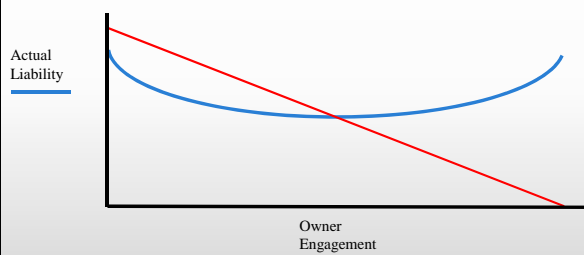
Regulation Varies by Country

- European Union - Council Directive 92/57/EEC
 - "the *client* or the project supervisor shall appoint one or more coordinators for safety and health matters... for any construction site on which more than one contractor is present"
- UK HSE Construction Design and Management CDM (2015)
 - CDM 2015 makes a distinction between commercial and domestic clients.
 - Client duties apply **in full** to commercial clients
 - Domestic clients duties normally pass to other dutyholders
 - Commercial Clients must make suitable arrangements for managing their project, enabling those carrying it out to manage health and safety risks in a proportionate way.

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52

Where Are We Currently: Engagement vs. Liability



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53

Moving Forward: Best Practices

- Contractor Safety Requirements Approach
 - "Trust but Verify"
- Remain mindful of the role of liability and the expertise of the contractor
 - The contractor is responsible for safety
 - The contractor controls the site
- Incorporate the best practices from research:
 - Contractor evaluation and selection
 - Control of risk via daily planning
 - Require flow-down compliance
 - Owner presence and monitoring

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54

When and How Should an Owner Intervene in the Field?

- Immediately Dangerous to Life or Health**
 - (29 CFR 1910.134) means an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere.
- Imminent Danger**
 - (29 CFR 1903.13) ...conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the Act, he shall inform the affected employees and employers of the danger and that he is recommending a civil action to restrain such conditions or practices.

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Leading Indicators Have a Role for the Owner

- Observations are made on the site
 - Personal protective equipment
 - Actions of the workers
 - Site conditions and housekeeping
- Acceptable and unacceptable observations are recorded and tracked
- Trends are identified, both in individual compliance areas and overall site performance
- Observations of particular concern are reported to the employer or general contractor

The charts show the following data:

- Total "PPE" Observations:** 20863 (97.7% Acceptable), 491 (2.3% Unacceptable)
- PPE Observations by Type:** Eye/Face (136), Hi-Viz Class II (195), Hearing (6), Other (8), Head (42), Foot (2), Hand (4), Hi-Visibility (94)
- Total "Actions" Observations:** 463 (93.6% Acceptable), 31 (6.4% Unacceptable)
- Actions Observed by Type:** (Data not fully legible)
- Total "Condition" Observations:** 3600 (95.0% Acceptable), 190 (5.0% Unacceptable)
- Conditions Observed by Type:** Electrical (48), Safe Access (22), Housekeeping (9), Openings/Rails (44), Rebar cap (9), Ladder/Scaffold (36), Lighting (2), Cylinders (5), Other (16)

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Example Leading Indicator Breakdown

The charts show the following data:

- Total "PPE" Observations:** 20863 (97.7% Acceptable), 491 (2.3% Unacceptable)
- PPE Observations by Type:** Eye/Face (136), Hi-Viz Class II (195), Hearing (6), Other (8), Head (42), Foot (2), Hand (4), Hi-Visibility (94)

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Example Leading Indicator Breakdown

The charts show the following data:

- Total "Condition" Observations:** 3600 (95.0% Acceptable), 190 (5.0% Unacceptable)
- Conditions Observed by Type:** Electrical (48), Safe Access (22), Housekeeping (9), Openings/Rails (44), Rebar cap (9), Ladder/Scaffold (36), Lighting (2), Cylinders (5), Other (16)

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Trending Leading Indicators

The table tracks metrics such as Total Observations, % Acceptable, and % Unacceptable for categories like PPE, Actions, and Conditions across multiple dates.

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Conclusion

- Employers are always responsible for safety
- The Owner is a necessary participant in construction safety, but that involvement must be carefully considered and executed
 - Case law is not clear as to how much Owner involvement is too much (or too little)
 - Academic and Industry publications focus on reducing injuries, illnesses, and fatalities, but often fail to consider risk or liability
- The Prime Contractor is responsible for safety on the site, but may only be liable for accidents in specific situations
- A requirements based approach to construction safety allows the owner to "trust but verify" that the contractor is proceeding with work in a safe manner

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Thank You!

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61



About the Speaker

Zach Hansmann is the Contractor Safety Manager at Michigan State University, and is currently managing the construction safety aspects of the Facility for Rare Isotope Beams (FRIB) Project at MSU. He previously served as the Environmental Coordinator for the University, where he was responsible for campus-wide compliance with asbestos, lead, and other hazardous material requirements. Zach maintains the Certified Safety Professional (CSP) and Certified Hazardous Materials Manager (CHMM) designations, is on the Board of Directors and the Construction Safety Division of the Michigan Safety Conference, and is an authorized OSHA outreach instructor. He holds degrees from Michigan State University in Human Biology (B.S.) and Construction Management (M.S.), and is currently a Ph.D. student in Planning, Design, and Construction, studying the owner's involvement in construction safety.



Zach Hansmann - The Owner's Role in Contractor Safety: Risk, Responsibility, and Role

62



Monday, August 29, 2016: 11:15 AM-12:15 PM
Diplomat (Omni Shoreham)

Track: Workplace Safety and Industrial Hygiene
Level of Course: Senior

As owners increase their focus on managing risk through contractor safety programs, contractors are being asked to spend an increasing amount of time and money to comply with owner requirements, while owners add contract language and place personnel in the field. This can be warranted in some instances, unnecessary in others, and in some cases may add liability exposure to the owner without improving safety performance or reducing risk. In this session, the speaker will provide a framework for an owner to manage contractors by reviewing current industry research, highlighting relevant case law, and proposing new best practices.

Author: Zach Hansmann, M.S., CSP, CHMM

Zach Hansmann - The Owner's Role in Contractor Safety: Risk, Responsibility, and Role

63