

CM Liability for Jobsite Safety: The Fine Line Between Managing the Work and Controlling It.

By Michael S. Zicherman, Esq.

Without doubt, safety is a paramount concern on all construction projects. Nobody wants to see a worker injured, but accidents unfortunately do happen, and when they do, Construction Managers often find themselves as defendants in the resulting personal injury lawsuits, even if they did not employ the injured worker.

Whether a CM will be liable to an injured worker it did not employ is not easily answered. Contractual privity is not required, and liability will not be found or avoided simply by reference to the title "Construction Manager." Because a Construction Manager's duties vary from contract to contract, courts have concluded that it is not possible to create a fixed rule applicable to all CMs. As such, the general rule applicable to Construction Managers is the same as that for owners and contractors.

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Construction Managers, therefore, will be liable for an accident if they actively participate in the work by supervising or controlling the work that gives rise to the injury or if they have the contractual obligation to do so. Actual supervisory control or input into how the work is performed (i.e., means and methods) is typically required to impose liability; general supervisory control is insufficient. However, even if a CM does not intend to actively participate in the work, it may still be exposed to liability if its actions give the perception that it has authority to do so.

By way of example, Construction Managers are under constant pressure to make certain that projects are on schedule and that trade contractors are adhering to that schedule. In an effort to expedite the work, avoid delays, or get a job back on schedule if it is behind, there may be a temptation by the CM's field representatives to take a more active approach with the trade contractors and subcontractors.

If the CM oversteps its authority and affirmatively directs or pressures a contractor to do something, it may open itself up to potential liability for any resulting injury. Sometimes, not much control is required. But, this can be a very fact sensitive inquiry that sometimes results in sharply divided appellate court decisions. Just such a case occurred in New York. While the court ultimately held that the CM was not liable, the dissenting judges thought there were enough factual questions to let the issue of liability go to a jury.

In that case a concrete laborer was seriously injured during a concrete pour, when the hose leading from the pump truck clogged. The CM representative, who was supervising the work at the time, was yelling for the workers to "hurry up" in clearing the jammed hose. In an effort to clear the jam, the laborer prematurely disassembled the hose prior to releasing the built-up pressure, which caused it to violently swing around and strike the laborer. The laborer sued the CM, claiming that the CM's superintendent made him feel pressured to get the job done quickly by yelling at him to hurry up.

A three judge majority found there was no supervisory control by the CM and ruled that the case was properly dismissed against the CM. However, the two judges that dissented held that the case should not be dismissed because when the Construction Manager's superintendent

yells at workers to hurry up, and the workers feel pressured to act quickly in response, it is possible to infer that the superintendent has the authority to direct them, and, indeed, to take action against them should the workers disobey his commands.



The sentiment expressed by the dissent in that New York case is not unique. In a case out of Ohio, the trial court refused to grant summary judgment to the Construction Manager, and upheld a \$3.5 million jury verdict against the CM. While the appellate court reversed the judgment, it specifically mentioned that there was no

claim by the plaintiff that he felt pressured by the schedule to complete his work, thereby suggesting that if the contractor felt pressured by the CM's construction schedule, and it was this pressure that caused or contributed to the accident, the outcome on appeal might have been different.

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In yet another decision, a CM had instructed the injured worker to finish his work or get to a point where drywall could be moved in through the area where he was working. The trial court dismissed the action against the Construction Manager. While the appellate court affirmed the dismissal, it held that CM's single statement alone does not give rise to the level of active participation in the project to result in liability. Thus, it leaves open the question as to what else is required to result in liability: multiple instructions, threats of termination, etc. All that is certain, though, is that liability was not precluded.

It is important for Construction Managers to know and understand the circumstances that might result in their assuming more risk than they had intended by their actions. As these cases aptly demonstrate, the nature of a Construction Manager's role on a project easily leaves it exposed to liability for personal injuries sustained by other contractor's employees.

There is no clear-cut formula by which a CM can ensure that it will be able to avoid liability for jobsite accidents, but generally the operative factors are whether the CM has the contractual authority to control the work, exercises actual control of the work, or, as reflected in the cases above, possibly gives the appearance that it has such control. Fortunately, each of the Construction Managers in these cases was able to avoid liability to the injured worker, but the lesson to be learned is that Construction Managers must be careful not to overstep the bounds of their contractual authority or else they may be vulnerable for any resulting jobsite injuries. **CM**



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