Welby, Brady & Greenblatt, LLP
ATTORNEYS AT LAW

Issue 22, Spring 2016
REPORT

WELCOME

Message to our Readers

Thank you for reading the Spring 2016 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present articles written by our team. Alexander A. Miuccio, CIC & BCA General Counsel, shares his monthly contribution, *Attorney's Column*, published in the Construction Industry Council newsletter, Town is Not Stopped from Denying Contractor's Delay Claim; Our new Associate, Kriton A. Pantelidis, presents Selecting Counsel – The Right of an Insured Under a Reservation of Rights; and Thomas H. Welby, Partner, shares his monthly contribution, Safety Policy, also published in the Construction Industry Council newsletter, Minimizing the Dangers of Hydrogen Sulfide in the Construction Workplace.

For more articles like these, visit our website at **www.wbgllp.com** or scan this QR code with your smartphone.

SAFETY POLICY: Minimizing the Dangers of Hydrogen Sulfide in the Construction Workplace

By: Thomas H. Welby, Partner

Thomas H. Welby

We've all caught a whiff of hydrogen sulfide gas, with its odor of rotten eggs. It's a colorless, extremely toxic gas, produced from decaying organic matter. It is detectable at concentrations as low as 0.13 parts per million, but a temporary loss of smell ("olfactory fatigue") can occur at levels of 100 to 150 ppm, which can result in the mistaken, and potentially lethal, belief that the gas has cleared away.

The applicable OSHA construction standard limits H2S exposure to 10 ppm, with an 8-hour limit. Exposure to levels above 300 ppm can cause coma in less than 20 minutes, and serious eye damage, while 500 ppm can cause loss of coordination and unconsciousness within 5 minutes. Exposure at levels over 1,000 ppm can cause almost immediate coma and death. The inhalation of H2S can also cause fluid to build up in the lungs (pulmonary edema) 24 to 72 hours after exposure. Other effects of exposure include nausea, tearing of the eyes, conjunctivitis, headaches, loss of sleep, bronchial construction, fatigue, drowsiness, loss of appetite, headaches, irritability, throat irritation, and coughing.

In the construction industry, H2S sickness and fatalities are most commonly associated with confined spaces (pits, manholes, tunnels, and wells) and work in or near sewers or landfills. Work in marshy areas and in hot weather (which accelerates the breakdown of organic material) also heightens the risks of exposure. In researching this article,

Continued on Page 2

I read a nightmarish account of how H2S (a/k/a "swamp gas") was released as workers drove test pilings into a 27' deep pit, excavated on marshy land on a New Jersey barrier island. A worker collapsed into the pit, and others attempting his rescue were sickened. Several were hospitalized, one remaining in a coma for five days. A local police officer fell unconscious, and drowned in water that had accumulated at the bottom of the pit, and approximately 30 area residents were seen in the local emergency room.

The speed at which exposure can cause unconsciousness is sometimes referred to as hydrogen sulfide's "knockdown effect," and it can produce both an inability to escape the area of exposure, and serious injuries from falls. Even workers who do not wholly lose consciousness can quickly become unable to extricate themselves, or respond to instructions. In some cases, workers who do lose consciousness due to inhaling H2S, suffer longer-term health effects, including headaches, reduced attention span and memory, cardiovascular and motor problems.

In addition to being highly toxic if inhaled, H2S is highly flammable and explosive. As a liquid, hydrogen sulfide can cause frostbite and, as a gas, it burns, and produces sulfur dioxide and other toxic vapors and gases.

To protect your employees, you need to ascertain whether hydrogen sulfide is present and, if it is, at what levels. OSHA recommends a "Job Hazard Analysis," to identify sources of H2S, evaluate potential respiratory, fire, and explosion hazards, and devise control strategies. A "qualified person" should use proper test equipment (*e.g.*, detector tubes, direct reading gas monitors, alarm-only gas monitors, and explosion meters) to monitor the air before, and at regular times during, any work activity during which H2S exposure is possible.

OSHA commends OSHA Sampling and Analytical Method 1008, which involves specially-constructed H2S samplers, containing silver nitrate coated silica gel, and NIOSH Method 6013, in which air samples, collected with a glass tube and sampling pump, are analyzed with ion chromatography.

Whatever testing method you select, do <u>not</u> rely on your sense of smell to monitor the air Eliminating the source is obviously the ideal strategy — but, if that is not possible, then engineering controls, administrative controls and safe work practices must be effectuated.

Exhaust and ventilation systems are a primary method of reducing H2S levels. Because H2S is flammable and corrosive, it is essential that your system be:

- Explosion-proof;
- Non-sparking;
- Grounded;
- Corrosion-resistant; and
- Separate from other exhaust ventilation systems.

When work is being performed in confined spaces, ventilating systems should be operated continuously, and in accordance with all relevant OSHA standards.

If engineering and administrative controls do not suffice to reduce exposure levels below OSHA's 10 ppm limit, the employer must provide respiratory protection and other personal protective equipment, including eye protection and, possibly, fire-resistant clothing. For exposures below 100 ppm, use an air-purifying respirator, equipped with specialized canisters or cartridges for hydrogen sulfide. A full-face respirator will provide eye protection.

Exposures above 100 ppm are "IDLH," which means "Immediately Dangerous to Life and Health." At these levels, employees need a full-face pressure demand, self-contained breathing apparatus, with a minimum service life of thirty minutes, or a combination full-face pressure, demand-supplied respirator, with a self-contained, auxiliary air supply.

It is mandatory to complete a PPE hazard assessment and equipment selection process, in compliance with OSHA regulations before beginning any work activities in which H2S may be encountered. You need to comply with OSHA'S Respiratory Protection standard (29 C.F.R. 1910.134) which includes, among other things, proper respiratory selection, fit testing, medical evaluations, and training. Respiratory equipment must also be inspected regularly prior to use, and worn or damaged equipment removed from service. OSHA also publishes a "Small Entity Compliance Guide for the Respiratory Protection Standard" (call 202-693-2300 for help in accessing this material).

Needless to say, if your employees work in confined spaces or are otherwise at risk of H2S exposure, they must be trained about H2S hazards, and how to control them. Training topics should include sources of exposure, symptoms, detection methods, exposure limits, protective work-

place practices, emergency plans, rescue techniques and first aid, and confined space procedures.

It is critical that employees be trained, also, in rescue procedures, since there are many stories of multiple fatalities occurring when would-be rescuers are themselves overcome by H2S while attempting to help others. Rescuer protection should include positive-pressure, self-contained breathing apparatus, and a safety line, to allow for rapid exit.

Paying special attention to hydrogen sulfide is a "no-brainer," if your trade involves work in confined spaces, or in proximity to sewers or landfills. There are other contexts, however, in which exposure is possible (I suspect the workers on the barrier island in New Jersey did not anticipate encountering it) and it is such dangerous, nasty stuff that air monitoring (if perhaps not the full panoply of preventative measures) is a good idea, even if you're not working in manholes or other confined spaces, where decaying organic matter is likely to be found.

A review of your operations for possible exposure to hydrogen sulfide is an opportune time to review, and to ascertain that you are in compliance with, the updated OSHA rule for construction work in confined spaces, which became effective in August 2015. The final rule is available online at https://www.osha.gov/FedReg_osha_pdf/FED20150504.pdf.

Scan here to learn more about Thomas H. Welby

Town is not Estopped from Denying Contractor's Delay Claim

By: Alexander A. Miuccio, Partner

Alexander A. Miuccio

The legal doctrine of equitable estoppel prevents one party from taking advantage of another when, through misrepresentation or misconduct, the other party relied upon the misrepresentation to his or her detriment, resulting in an injustice. In the recent case of *LAWS Construction Corp. v Town of Patterson*, a contractor sought to rely on the Town Supervisor's statements for payment of escalation costs caused by the Town's delay in starting the project.

Background: In July of 2005, LAWS submitted a successful bid to perform work on a Town construction project. When construction was subsequently delayed, LAWS (and the other successful bidders) were given the option to withdraw their bids. At a meeting shortly thereafter, the Town Supervisor was asked whether the Town would reimburse the bidders for increased costs in labor and materials that would be incurred due to the delay. In response, the Town Supervisor wrote a letter advising all bidders that "there appears to be no prohibition regarding application of contingency monies built into the contracts toward potential increases in costs of material and labor due to the extended time factor." In reliance on this representation, LAWS declined to withdraw its bid, entered into a written contract with the Town, and ultimately performed the required work. LAWS was later told by a Town agent during construction to request payment for the increased costs at the completion of the work.

During the course of the project, LAWS submitted 14 requisitions for payment, none of which included cost escalations. All of these requisitions were paid. LAWS's requisition No. 15, seeking reimbursement for the increased costs of labor and materials caused by the delay in construction in the sum of $121,119.93, was rejected by the Town. LAWS commenced this action against the Town to recover for the increased costs of material and labor associated with the delay in construction. LAWS claimed it would not have entered into the contract if it was not assured that its increases in labor and material would be paid. The Town moved for summary judgment dismissing LAWS's complaint.

Decision: The court granted the Town's motion and dismissed LAWS's complaint, relying on the well settled principle of law that the theory of estoppel is generally not available against a municipality, absent a showing of "exceptional circumstances". The appellate court affirmed, finding that the exceptional circumstances involving wrongful or negligent conduct of a governmental agency subdivision, or its misleading nonfeasance, did not exist here. According to the court, the Town Supervisor's letter indicating that there was no prohibition in the contract preventing the awarding of delay damages did not constitute an agreement to specifically do so. Absent such a specific agreement, the Town was not estopped from denying payment for the increased cost of labor and materials.

Continued on Page 4

Comment: This case demonstrates the heavy burden of establishing equitable estoppel against a governmental agency. Only in rare circumstances have the courts found that a municipality engaged in misleading conduct that would support equitable estoppel. Accordingly, contractors would be well advised when dealing with a governmental contracting agency to support its claims based on the explicit language of the contract document, rather than relying upon the equitable theory of estoppel.

Scan here to learn more about Alexander A. Miuccio

Selecting Counsel – The Right of an Insured Under a Reservation of Rights

By: Kriton A. Pantelidis, Associate

Kriton A. Pantelidis

Once an individual or business entity is sued, its first inclination is usually (rightfully so) to evaluate its available insurance policies and place its respective carriers on notice of the claim. However, many times – especially in the complicated, litigious world of New York – Insurers agree to "defend" their insureds but "reserve their rights" with respect to indemnification or some other issue. This leaves the insured in a precarious position: Its defense is being funded, but it is unclear whose coffers will satisfy any eventual settlement or judgment. Moreover, it risks insurance coverage – and conjointly carrier appointed defense counsel – "dropping out" at some point should the covered elements of a suit be severed from its uncovered components.

Under these reservation of rights circumstances, where an insurer claims it is obligated to cover its insured only for certain particularized grounds asserted in the underlying law suit, New York courts conclude that an inherent conflict of interest is possible. As a result, the law has become well settled: An insured has the right to **choose** its own attorney and the reasonable fees associated with that representation must be **paid** by the insurer.[1] This rule is so fundamentally entrenched that two judges of the New York Court of Appeals (the highest court in the state) recently described it as "black letter law."[2] Moreover, even if the insurer chooses to file a separate law suit against the insured to declare the insurance policy inapplicable to the underlying claim, it must pay for the insured's attorney's fees to defend that separate suit as well, but only in the instance the insured is successful as against the insurer.[3]

Myriad benefits inure to an insured when it is allowed to choose its own counsel. For example, it can select counsel: 1) experienced in a particular area of law (such as construction law); 2) familiar with representing individuals or business entities (regardless of size) as opposed to only advising insurers; 3) familiar with other aspects of its particular business; and 4) familiar with a geographic region, allowing for a "local counsel" advantage. Moreover, the insured will have easier direct access to counsel, have the ability to work closer on the litigation decision making process, and will avoid the risk of the insurer appointed counsel "dropping out," which necessitates the retention of new counsel who must "get up to speed" on the insured's dime. Finally, and most importantly, the insured may choose to be represented in the law suit by its own attorney who regularly represents it and is familiar with its business and key personnel.

However, all too often insureds are unaware of this right (and the concomitant advantages it bestows) because many insurers fail to advise of the entitlement. In fact, there appears to be a split between certain jurisdictions in New York – apparently not yet resolved by the Court of Appeals – as to whether an insurer is obligated to advise the insured of its right to select counsel.[4]

Their insurers' practices notwithstanding, insureds should be mindful of receiving a reservation of rights letter as it alters the relationship between the parties and upon receipt should seriously consider selecting their own counsel to represent them in the underlying litigation.

Scan here to learn more about Kriton A. Pantelidis

1. E.g., Pub. Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 401-02, 425 N.E.2d 810, 815 (NY 1981); First Jeffersonian Associates v. Ins. Co. of N. Am., 262 A.D.2d 133, 134, 691 N.Y.S.2d 506, 506-07 (1st Dep't 1999); City of New York v. Clarendon Nat. Ins. Co., 309 A.D.2d 779, 779, 765 N.Y.S.2d 802 (2nd Dep't 2003); Elacqua v. Physicians' Reciprocal Insurers, 21 A.D.3d 702, 706-07, 800 N.Y.S.2d 469, 473 (3rd Dep't 2005); State Farm Fire & Cas. Co. v. Ricci, 96 A.D.3d 1571, 1572, 947 N.Y.S.2d 265, 268 (4th Dep't 2012).

2. QBE Ins. Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105, 1110, 983 N.Y.S.2d 465, 468 (2014) (Pigott J., Dissenting).

3. Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 21, 389 N.E.2d 1080 (1979) and State Farm Fire & Cas. Co. v. Ricci, 96 A.D.3d 1571, 1574, 947 N.Y.S.2d 265, 269 (4th Dep't 2012)

4. See Elacqua v. Physicians' Reciprocal Insurers, 52 A.D.3d 886, 888-89, 860 N.Y.S.2d 229, 232 (3rd Dep't 2008) (holding insurer has an affirmative duty to inform insured of right to direct counsel and ruling failure to do so a deceptive business practice in violation of GBL § 349), compare with Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C., 278 A.D.2d 169, 170, 719 N.Y.S.2d 223, 224 (1st Dep't 2000) (commenting that cases cited by appellant due not impose an affirmative duty on insurer to advise of right to choose counsel). See also QBE Ins. v. Jinx, 22 N.Y.3d at 1110 (Pigott J. Dissenting) (stating in dicta that insurer has an obligation to inform insured and citing to Elacqua, but failing to discuss Sumo or any other supporting authority).