STA

SUBCONTRACTOR NEWS

Subcontractors Trade Association, Inc.

Serving NY Metropolitan Region

March 2004

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2004
CONSTRUCTION AWARDS

...also act now to reserve advertising in the journal and support the STA and its good work!

STA Payment Bond Bill: On Its Way to the Governor

On March 17, 2004, a Subcontractors Trade Association sponsored bill (S1099/A5805), which would require a payment bond to be posted on certain "hybrid" projects in New York State, was passed in the NYS Senate and will be delivered to Governor Pataki for his consideration. This legislation, sponsored by Senator Kemp Hannon and Assemblyman Ronald Tocci, was passed in the Assembly on February 23, 2004. On March 9th, the bill had been reported out of the Senate Judiciary Committee to the floor of the Senate.

UNDER THE NYS LIEN LAW, as currently constructed by the courts, contractors, subcontractors, and material suppliers do not have any lien rights for labor performed or materials furnished for public improvements where no public funding has been established to finance the public improvements. This effectively leaves contractors, subcontractors and material suppliers who do not have any lien rights for labor performed or materials furnished for public improvements where no public funding has been established to finance the public improvement. This effectively leaves contractors, subcontractors and material suppliers without effective remedies to ensure

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Retainage in Escrow Bill Reported to Senate Floor

ON MARCH 9, 2004, the STA'S top priority bill (S1089B/A4620C), which would require owners of private construction projects to place retainage held from contractors, subcontractors and suppliers into an interest-bearing escrow account until such time the retainage is released, was reported out of the Senate Judiciary Committee to the floor of the Senate. The Assembly version of the bill has also shown signs of movement in the house and on March 16th was reported out of the Assembly Economic Development, Job Creation, Commerce and Industry Committee to the Codes Committee.

This legislation, which has

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President's Message: Workers' Comp Reform

GREGORY FRICKE, JR.

The Governor has announced his plans for Workers' Compensation reform.

The main thrust of the proposal appears to deal with an increased benefit combined with cost cutting modifications to various provisions of the existing law.

While we applaud the Governors efforts to re-engineer this benefit program, we are concerned that this may fall well short of his expectations.

Any discussion about reform of workers' compensation must include discussion on the reform of Labor Law Sections 240 & 241. The Safe Place to work act as it is sometimes referred to.

If we are to truly accomplish the Governors objective and ease the burden business currently endures and stop jobs from leaving this great city and state, and spark development, we must have the courage to face the issue in total.

In 1996 while we are certain the administration had the best of intentions, the Workers' Compensation Reforms passed at that time did nothing more than shift premium costs from Workers' Compensation to General Liability.

The absolute liability standard in the safe place to work act is categorically unfair. Every other state has eliminated this statute on the merits with the exception of New York.

The existing law does not allow the employer to present any defense what so ever; even when it is clear that the worker caused or contributed to the accident. We must develop some sort of Contributory Negligence Standard to replace the existing strict liability standard. The employer must be able to offer a defense.

No one, I will say again, No one wants to advocate for any reduction in benefits for the worker, in fact, we are fully in support of the increased benefit the Governor has proposed.

But the time has come that we must face the fact that the continued abuses of the existing law has driven carriers out of New York and as a result this has driven premiums up egregiously.

We have got to take our heads out of the sand. We have been and continue to be in a crisis. If contractors cannot get insurance buildings will not be built and workers will not work.

Let's take this state back from the Special Interests of the Trial Lawyer, and join us in this discussion and add your voice to our message. The Governors office has not released the actual draft language of his bill. Help us raise the Governors' and the legislature awareness of this critical issue.

Call the STA offices and you will be given contact information for the State Legislature and the Executive Chambers.

Its time for you to make a difference. ■

Proposed Workers' Compensation Law for NY State

By John Blackmore

JOHN BLACKMORE

If You Believe Workers' Compensation Insurance is Expensive Now, Look at What's Being Proposed in Albany!

State Senator Guy J. Vellela and State Assemblywoman Susan John have co-sponsored a bill to amend the workers' compensation law in New York State. This bill, if passed in its current form, could not only put many establishments out of business, but would in some instances, allows an employee to sue his/her employer. This provision of the bill would further erode the exclusive remedy an employer now enjoys under the workers' compensation law.

In addition, if enacted, this bill, which is scheduled to commence in December 2004, would increase the maximum benefits payable under workers' compensation in increments of $75 until reaching a level equal to 2/3rds of the state average weekly wage as promulgated in December 2006. Included in this bill are proposed measures which are designed to decrease premium costs for basic workers' compensation benefits, but would expose the employer to potential uncovered claims. For example, the bill would:

- Excluding from basic coverage, serious, willful or repeat violations cited by a government entity such as OSHA, within the previous five years. Allowing in this circumstance the employee to waive statutory benefits and sue his/her employer directly.
- Permit a collective bargaining agent to select a substitute carrier from the one selected by the employer or the State Insurance Fund.
- Permit prompt payment of medical bills where there is employer provided health insurance benefits after a compensation claim has been controverted.
- Permit prompt payment of medical bills from a medical trust fund created under the bill when an employer does not maintain health insurance benefits.
- Permit high wage earners to purchase additional wage replacement benefits from the carrier selected by his/her employer.
- Require the suspension of compensation benefits when the payee is incarcerated for a felony.
- Permit the Workers' Compensation Board to evaluate the efficacy of carriers providing compensation coverage.
- Permit the Board to promulgate a fee schedule for durable medical goods.
- Permit the Board to assess attorney fees against a carrier that unsuccessfully controverts a claim.
- Permit the Board to promulgate a fee schedule for pharmaceutical services.

The maximum benefit level for workers' compensation in New York is currently $400 per week, which ranks among the lowest in the country. However, many people do not realize that New York is one of the few states that allow an employee to receive benefits for the rest of his/her life. Most other states stipulate a maximum amount of weeks that an employee can receive benefits. Still, other states have offsets once an individual reaches the age of 65 or is receiving social security benefits.

As many of you are aware, New York is the only state that allows an employer to be brought into and held responsible, based on negligence, to a third party action. This despite the fact the employee is receiving workers' compensation benefits, which in theory should be the employee's sole remedy for his/her injuries against their employer.

Many would agree that a benefit level increase is in order. However, without any changes made to the labor laws or the length of time an employee can collect workers' compensation benefits, the proposed changes in this bill would do irrevocable harm to many industries, especially the construction industry. ■

LEGAL LOG

FOR WHOM THE SUBGUARD BELLS TOLL

By Jay Kushner, Esq. — Goldberg & Connolly, STA Legal Counsel

JAY KUSHNER, ESQ.

At a recent STA General Membership meeting, a select panel discussed issues such as how subcontractors could create the "right profile" to obtain new loans, "higher bonding lines" and better insurance coverage at the "best rate" — surely all topics of great interest to subcontractors. However, the discussion did not generate optimism within this audience of subcontractors. One very interesting question was posed by a member of the audience concerning the impact of "Subguard" on the construction industry. It appeared that few people attending were knowledgeable or even familiar with Subguard and little light was shed by the panel on this insurance product. We thought that some discussion in Legal Log could serve STA's membership interest.

What then is Subguard? Subguard is a form of insurance in use for some ten years. Some say it will take the place of surety bonds. If this in fact occurs, subcontractors will be the losers. Subguard is an insurance product most suitable for use on large projects with large subcontracts. It is intended to protect owners, general contractors and construction managers *against defaults of subcontractors*. Subguard could benefit subcontractors in an indirect manner but that is not the purpose of this policy. The purpose of the policy is to benefit or protect the owner, the general contractor or the construction manager, as the case may be, against a defaulting subcontractor. If an important subcontractor defaults, there is no doubt that a project may suffer and other subcontractors could be hurt by resulting delays and interferences; but Subguard does not cover these losses. It covers the losses incurred by the owner, the general contractor or construction manager when a subcontractor defaults. It does not protect subcontractors against the failure of owners, general contractors or construction managers to make timely payments to trade subcontractors.

On the other hand, payment bonds and other remedies such as mechanic liens, trust fund provisions, etc. provide remedies for subcontractors when the owners, general contractors or construction managers fail to provide timely and adequate payments to subcontractors. In short, Subguard may benefit subcontractors only in an indirect way and is not intended to be an adequate substitute for a payment or a performance bond which may directly protect a subcontractor. It is true that Subguard may indirectly benefit subcontractors by providing funds to an owner or general contractor when an important subcontractor defaults triggering subguard payment to the owner or general contractor on a project. In such event, the owner or the general contractor, as the case may be, would receive the proceeds of the Subguard policy to help fund a successor subcontractor. Perhaps this would keep the project viable for the other subcontractors on the project but it would not assure that result nor prevent the delay of finding a willing and suitable subcontractor to complete the work. An adequate payment bond for the benefit of subcontractors is more likely to offer better protection to legitimate subcontractors who perform their work in a proper manner but fail to receive the payment they have earned at the project. By following the required procedures on the payment bond, a fund is available for the subcontractor under a traditional payment bond.

Generally, Subguard, developed by Zurich U.S. Construction in 1995, is usually less expensive than surety bonds but also requires larger deductibles that can range in substantial six figures, making it feasible on the largest projects. Generally, Subguard, offers more control to the Owner or General Contractor but the question arises as to whether an Owner (in distinction to a General Contractor) has the capability to fashion a remedy for a subcontractor default, perhaps making it more suitable for general contractors.. An important aspect of Subguard use is prequalification of subcontractors. Surety companies are more likely to prequalify subcontractors than owners are likely or capable of doing. Nevertheless, with a tightening bond market, Subguard may well evolve into a standard usage.

While the construction industry may well see more of Subguard type of insurance on construction projects... it does not offer the protection to a subcontractor that a contractor's payment bond offers. Subguard type insurance is essentially for the use and protection of an owner or general contractor and in some cases for a construction manager.

While the construction industry may well see more of Subguard type of insurance on construction projects, from the subcontractors vantage point, it does not offer the protection to a subcontractor that a contractor's payment bond offers. Subguard type insurance is essentially for the use and protection of an owner or general contractor and in some cases for a construction manager. It is not a weapon in a subcontractor's arsenal and subcontractors should not be persuaded otherwise. ■

BOND PAYMENT

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payment for their work or materials where a public improvement is financed with private funds.

A prime example of this problem is where a private entity leases property from the state or a public corporation, and thereafter constructs a building on this property for the benefit of the private entity. As construed by the courts, this improvement is immune from mechanic's liens. The real property is owned by the public entity, eliminating the possibility of a private lien. But there also exists no public funding for the construction of the building, thereby eliminating the possibility of a public improvement lien. A subcontractor or supplier, therefore, is left without any lien rights whatsoever on such a project.

If signed by the Governor, this legislation will require that a payment bond be posted by the private entity, which will provide all parties supplying labor and /or materials to the project with a measure of payment projection. Since no lien rights are available, contractors, subcontractors and suppliers will be able to file a claim against the payment bond. ■

RETAINAGE BILL

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been advanced by STA for several years, would require any interest earned on such escrowed retainage to accrue to the benefit of the parties from whom retainage has been held, that is , the contractor, subcontractors and suppliers working or providing material on the project. By having retainage placed in an escrow account, contractors, subcontractors and suppliers will have far more assurance that they will actually receive the money that they have earned in the event an owner's financial status becomes questionable later on. Isn't it funny that you have to pass a law to protect your money that is being withheld from you by an action called RETAINAGE a word that cannot be found in the dictionary? ■

PRESERVE RIGHT TO CLAIMS

by Thomas D. Czik, Esq.

THOMAS D. CZIK, ESQ.

PRESERVE RIGHT TO CLAIMS BY SPECIFICALLY EXCLUDING CLAIMS IN PARTIAL RELEASES

Often, when a subcontractor signs a partial release in exchange for a progress payment, the release is ambiguous as to what rights or claims the subcontractor is actually releasing. If the subcontractor later makes a claim against the general contractor for items such as indirect or impact costs for change order work performed during that period, the general contractor may argue that the subcontractor's claim is barred by the release. One way for subcontractors to avoid this potential problem when signing releases is to include language that excludes claims that they may want to pursue.

Intent to Waive Rights Not Lightly Presumed by Court

A recent case shows the problems inherent in not particularizing claims in a release. A general contractor contracted with an owner to build a new tennis stadium. The contractor subcontracted the masonry work. After the project was completed, the subcontractor sued the contractor for unpaid contract work and claims for delays and inefficiencies. The contractor asked the court to rule that the subcontractor was not entitled to make the claim because the subcontractor had signed partial releases throughout the progress of the work. The contractor argued that the subcontractor had plainly waived its right to payment for extra work as well as the claims. The subcontractor claimed that the partial releases were only receipts relating to the specific progress payments owed at the time it submitted the partial releases and were not general releases.

The partial releases stated they were "expressly limited, and unconditional, to the extent of, and as covered by, payments actually received by the subcontractor" through the date signed. The court found that it was not clear what monies the partial releases covered and that a trial would be needed to determine the monies the contractor and subcontractor intended the partial release to waive. Based on the limiting language of the partial releases, the court stated it was not "unmistakably manifested that the subcontractor intended to surrender its rights to additional monies and such waivers should not be lightly presumed". [Navillus Tile, Inc., v. Turner Construction Company].

Subcontractors Should Specify Claims Excluded from Partial Release

Although the court did not dismiss the subcontractor's claims, the subcontractor may have to endure a trial and let a jury decide what claims the subcontractor intended to waive when it signed the release. To avoid this problem, when signing partial releases, subcontractors should make certain that they specifically detail any claims excluded from their release. This benefits the subcontractor because it can reserve its claims, even if it can not calculate the exact dollar amount of the claim until later.

If the general contractor balks when it sees that the subcontractor has inserted exclusionary language in its partial release, the subcontractor needs to explain that it will actually benefit the general contractor. First, the general contractor will be protected from surprise claims. By permitting its subcontractor to specifically exclude specific claims in the release, it will be clear to a judge or arbitrator what claims the subcontractor reserved and that the subcontractor had an opportunity to notify the general contractor of other claims but did not. Also, by giving the subcontractor a chance to list specific claims, the general contractor and the subcontractor can avoid later disputes over which claims were and were not covered by the release.

The subcontractor should also give the general contractor timely notice of the claim to ensure that it is able to comply with any notice provisions in the contract with the owner in case the claim is one that should be passed on to the owner. By avoiding ambiguous releases and including provisions concerning notice and claims in the subcontract, the general contractor and subcontractor can protect claims as well as prevent disputes.

Thomas D. Czik is a partner with Tunstead Schechter & Czik LLP in Jericho, New York. ■

ELECTRONIC PROCESSING FOR NYC BUILDING DEPARTMENTS

New York City Building Department as of April 5, 2004 will go totally electronic with the processing of Certificate of Occupancy Applications with the installation of the CO Module in Manhattan in the Building Information System (BIS).

The Construction Division will use computer-generated work orders and provide online access to CO inspection results. Scheduling of construction inspection will also be done through this electronic format. For Construction, Plumbing, Electrical (BEC) and Elevators, CO inspection signoffs will be entered directly in BIS and available online after the inspection. No more waiting for signed – off PW-6 forms to be delivered to the CO Unit. You will submit a single PW-6 to the CO Unit; the inspection units will no longer receive or process the PW-6 for sign-off. The status of your CO application will always be accessible online via BIS-on – the-Web. For detail information on this new service for Certificate of Occupancy see the STA'S website, www.stanyc.com and look under current bulletins. ■

WE NEED YOUR HELP!

To keep our legislative program moving forward we need your help and it will only take a few minutes of your time:

1) Just pick-up the phone and dial 1-800-544-6795 and say my name is (insert name), I am a subcontractor and I would like to urge Governor Pataki that his "Workers Compensation Cost Cutting Proposal" must be linked to reform of Labor Law 240/241 to provide a "negligence" standard.

2) Write Governor Pataki a letter asking him to sign into law Senate bill 1099 and Assembly bill 5805 providing a payment bond be posted on projects where a private entity leases property from the state or a public corporation, and thereafter constructs a building on this property for the benefit of the private entity. As construed by the courts, this improvement is immune from mechanic's liens.

3) Write a letter to your assembly person asking them to support assembly bill 4620C and to move out of the Code Committee and on to the floor of the assembly for a vote.

If you want help with the letters call the STA office and we will send you sample letters.

Thank You. ■

WORKERS' COMPENSATION

If your Workers' Compensation is costing you too much look into joining our Safety Group, the Empire State Subcontractors Safety Group. Members of the group receive up to a maximum of 25% up front on the premium, and for the last two years have been receiving a dividend of an additional 20%. Providing you a saving of 45% on your premium for workers' comp... For a quote or more information call John Blackmore at 516-733-9200, what do you have to lose? ■

FYI: Lobby Day Rally

MARCH 30, 2004
ALBANY, NEW YORK

On March 30, 2004 approximately 450 individuals from our industry rallied at our state capital to personally visit with individual members of the NY Assembly and NY Senate; to educate them on the abuse and harm that our industry is receiving because of Labor Law 240/241. They were given examples of how our cost of insurance has increased from 3% of our total operating cost to as much as 14%, when you can find an insurance carrier willing to write liability insurance in New York State. We also explained how many small companies the back bone of our industry are being forced to close because of the lack of availability and high cost of insurance.

It was also pointed out that New York State was the only state in the nation with an absolute liability, and that we are only trying to introduce a negligence standard to be part of 240/241. We also indicated that we were not taking away the right of the injury tradesman from initiating an action.

It was also demonstrated that the increase in insurance cost added $10,000.00 to the cost of affordable housing selling for $130,000.00 in Rockaway, NY.

The attendees were members of the following associations:

- Associated Building Contractors — Empire State Chapter
- Building Industry Employers of New York State
- Empire State Subcontractors Association
- General Building Contractors of New York State
- New York State Construction Industry Council
- New York State Minority Contractors Association
- New York State Roofing Contractors Association
- Subcontractors Trade Association

Of the sixty subcontractors in attendance at this rally, 32 were from our own STA. Almost all of the assembly persons and senators we spoke to agreed they would vote and support revision of Labor Law 240/241 if it gets to the floor of their chamber for a vote. However, we must get the leadership of both houses to move the bills out of committee and to the floor for a vote. This can only be done by writing to the leadership and asking for their support. Sample letters and addresses are available from the STA'S office. ■

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UPCOMING EVENTS

Executive Committee Meeting
May 6, 2004

Board of Directors Meeting
May 11, 2004 — 5:30PM

General Membership Dinner Meeting
June 30, 2004 — 5:30PM

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