

# Indiana Constructor

NOVEMBER/DECEMBER 2006 • \$3.95

A Publication of the Associated General Contractors of Indiana

## THE BKD BUILD INDIANA *Awards*



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# Indiana Constructor

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**Wurster/Smoot CLC, a Joint Venture.**

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# THE BKD BUILD INDIANA *Awards*

## *Rewarding Excellence*

The BKD Build Indiana Awards and the BKD Governor's Award recognize AGC of Indiana members who have demonstrated exceptional partnering, outstanding project management, innovative construction techniques or materials, sensitivity to the environment and surroundings, contribution to the community, distinctiveness and quality craftsmanship. The BKD Build Indiana Awards are presented to the most outstanding entry in the categories of Industrial/Utility, Private Sector, both under and over ten million dollars, Public Sector, both under and over ten million dollars and Renovation. This year there were no entries in the Public Sector (under \$10 million) category. The BKD Governor's award is presented when a company's project significantly exceeds all award criteria and is recognized to be "truly outstanding."

A company may be nominated by itself, an employee, a subcontractor or a citizen of a community that has benefited from the project. Nominated projects are required to have an AGC of Indiana general contractor or construction manager. The nominations were judged this year by general contracting members of the Fox Valley General Contractors Association in Illinois. The projects nominated this year were of the highest caliber and reached a new record of twenty-six entries.



The award piece itself is symbolic of our state. It is made of limestone from Indiana quarries and green glass, typical of the glass manufactured in Indiana for Ball Jars and Coca-Cola bottles. The BKD Build Indiana Awards and the BKD Governor's Award reflect quality and superiority of purpose by means of an etched-glass panel, held in place by limestone columns, resting on a solid base of polished limestone.

# THE BKD BUILD INDIANA *Awards*



## *Industrial/Utility Project*

Cinergy Gibson Station FGD Project  
*Bowen Engineering Corporation*



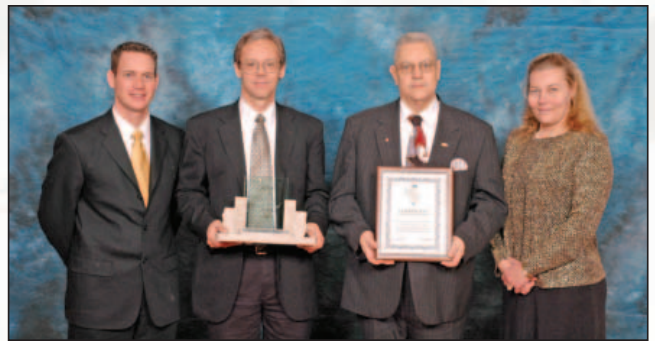
## *Private Sector Project (up to \$10 million)*

American Patriot Group Office Building  
*Key Construction Company, Inc.*



## *Public Sector Project (over \$10 million)*

Birck Nanotechnology Center  
*Pepper Construction Co. of Indiana, LLC*



## *Private Sector Project (over \$10 million)*

Conrad Hotel and Residential Tower  
*Hunt Construction Group, Inc.*



## *Renovation Project*

Park 100 Foods Kokomo Revisions for CMS  
*Charles C. Brandt Construction Co.*



## *Governor's Award*

Clarian Pathology Laboratory  
*Wurster Construction Company, Inc.*

Photography by Greg Persell



*Certificates of Merit* were awarded to the following:

**Industrial/Utility Projects**

Pepper Construction Co. of Indiana, LLC  
Journal and Courier Printing Press Facility

**Renovation Projects**

W.R. Dunkin & Son, Inc.  
Anderson High School Phase 1 Renovation  
Trotter/Turner  
Broad Ripple High School Renovation

W.R. Dunkin & Son, Inc.  
Highland High School Phase 1 Renovation  
Weddle Bros. Building Group, LLC  
Indiana University – Assembly Hall Scoreboard  
E & B Paving, Inc.  
R-27383, Interstate 80/94 Borman  
Expressway Reconstruction

**Private Sector Projects** (up to \$10 million)

CDI, Inc.  
Aisin Brake & Chassis, Inc. – Terre Haute Facility Phase II  
Pepper Construction Co. of Indiana, LLC  
Crosspoint Sanctuary  
Taylor Bros. Construction Co., Inc.  
Cummins Child Development Center Expansion  
Pepper Construction Co. of Indiana, LLC  
Keystone Art Cinema & Indie Lounge

**Private Sector Projects** (over \$10 million)

Pepper Construction Co. of Indiana, LLC  
Clarian North Medical Center  
Pepper Construction Co. of Indiana, LLC  
Metropolis Lifestyle Center  
Weigand Construction Co., Inc.  
Musculoskeletal Center

**Public Sector Projects** (over \$10 million)

Deig Bros. Lumber & Construction Co., Inc.  
David L. Rice Library  
Hagerman Construction Corporation  
Isaac Ray Treatment Center  
Weddle Bros. Construction Co., Inc.  
Joint Ordnance Engineering & Logistics Facility  
– Building 3373  
Weigand Construction Co., Inc.  
Purdue University – Bindley Bioscience Center  
F.A. Wilhelm Construction Co., Inc.  
Red Skelton Performing Arts Center  
Weddle Bros. Building Group, LLC  
Southern Indiana Career & Technical Center  
Hagerman Construction Corporation  
Windsor Dining Hall

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## INDUSTRIAL/UTILITY





*Industrial/Utility Project*

## Cinergy Gibson Station FGD Project Bowen Engineering Corporation

**Bowen Engineering** recently completed the highly successful site-civil project for the retrofit of three wet FGD scrubbers on units one, two and three of Cinergy's 3,300 megawatt Gibson Generating Station in Owensville, Indiana. This project consisted of installing 48,000 cubic yards of complex, concrete foundations, 5,000 tons of reinforcing steel, 200 tons of large, embedded anchor bolts/support steel and underground piping systems; all within the footprint of one of the nation's largest fossil power plants.

Prior to Bowen's involvement with this project, Bowen was virtually unknown to the southern Indiana community of power plants. When Bowen's team approached Cinergy with an interest to assist on this high profile project, Cinergy's management team was extremely reluctant with Bowen given their comfort with existing, onsite General Contractors. Cinergy's apprehension was soon put to rest, as Bowen's expertise and reputation for driving out unnecessary costs was soon realized during pre-proposal conferences.

Bowen was selected as the successful, low bidder on the initial \$21 million work package which was based on a conceptual design with established work quantities. The five largest structures were constructed in ten massive concrete pours each ranging from 1,800 to 3,000 cubic yards. Bowen simultaneously constructed 66,000 square feet of elevated, concrete decks. Bowen utilized fifty-two meter pumps to pour these decks, reaching elevations as high as 115 feet above the ground.

# RENOVATION





*Renovation Project*

## Park 100 Foods Kokomo Revisions for CMS Charles C. Brandt Construction Co.

The scope of work for this 15,000 square foot project consisted of gutting the walls, ceilings and floor and rebuilding walls at the perimeter and corridor locations. All mechanical and electrical systems were replaced, a new water service was put in place, and some of the roof structure was reinforced. This project completed in a very short time frame due to the cooperative efforts of the owner and all the construction team members.

Park One Hundred Foods was committed to shipping a new product line for one of their largest customers. The Kokomo plant required renovation to accommodate new equipment, and the new process needed to be producing product by mid July. Construction discussions began in February and site construction began shortly afterward, before the discussions had gotten very far beyond the conceptual stages.

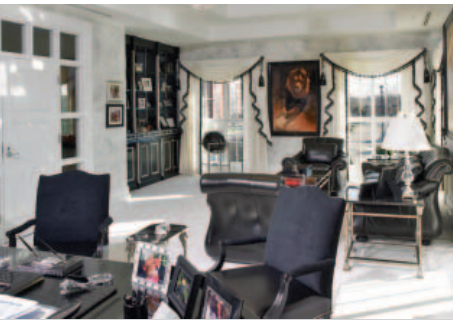
One of the qualities that set **Charles C. Brandt** apart in the industry is their ability to undertake unique and challenging projects. They rolled up their sleeves, brought team members together and communicated the goals they needed to achieve. They encouraged the group to perform at whatever level was necessary to get the job done. The construction crew asked the questions and then went to work researching the answers. The project team faced a tight time schedule with no wiggle room and lots of pitfalls along the way, but the team rose to the challenge each and every day of the job.

**Other AGC/I members involved with the project:**

AAA Roofing Company, Inc.

ERMCO, Inc.

PRIVATE SECTOR (UP TO \$10 MILLION)





*Private Sector Project (up to \$10 million)*

## The American Patriot Group Office Building Key Construction Company, Inc.

The American Patriot Group Office Building is a distinctive building that has borrowed the classic lines from the Capitol Building, the White House and Monticello. The combined styles have given it the classical look with style uniquely it's own. With over 11,000 square feet the building only contains seven offices. It truly is one of a kind.

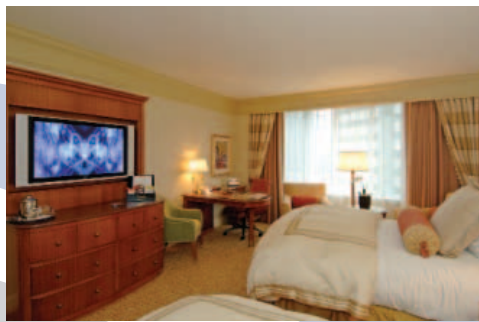
The American Patriot Group Building was a once in a lifetime construction project for **Key Construction**, constructed for a unique client who demanded the best. The owner wanted a building that blended the architectural lines of the Capitol Building, the White House and Monticello and wanted it completed within six months. A copper dome, textured concrete, a pure hand culled Italian marble entry and a twenty-five foot tall replica model for the column selection are a few of the items that were unique to this project. Due to the high water table for the project, the site had to be raised to achieve a stable building foundation. The site then had to be blended into the surrounding lots to achieve a harmonious relationship with the surrounding environment, so as to look as if it had always been there, and not a complete redo of the existing natural surroundings.

It's distinctive style, and quality construction has made it a new Evansville landmark. The American Patriot Group Building has now affectionately become known as the Evansville White House.

### **Other AGC/I members involved with the project:**

N.M. Bunge, Inc.	Koberstein Trucking, Inc.
E & B Paving, Inc.	Midwest Roofing-Sheet Metal
Goebel Mechanical, Inc.	Wink Tile Company, Inc.

PRIVATE SECTOR (OVER \$10 MILLION)





*Private Sector Project (over \$10 million)*

## Conrad Hotel and Residential Tower Hunt Construction Group

The Conrad is a twenty-three story, 390,000 square foot Hilton flagship hotel. This hotel has 243 guest rooms, restaurant and lounge, fitness center and spa facility, swimming pool, a three-level 55,000 square foot parking garage, ballrooms, meeting rooms, street level retail space and five levels of high-end condo residences. The Hunt team was able to deliver the project while absorbing extensive project enhancing design changes within a compressed schedule.

The successful construction of this hotel was made possible by **Hunt Construction** who served as Construction Manager, and by the local building trades who worked under a Project Labor Agreement. This agreement insured there was no lost time on the project. In addition, the City of Indianapolis helped make the project such a success by having daily involvement via attending construction meetings and assisting with the coordination of city affairs.

This project involved many unique and innovative construction techniques and materials. With materials coming from around the globe including China and Brazil, a network of logistical expeditors was put in place to oversee the approval and procurement of such long-lead materials. The Conrad Hotel Tower is a facility that took four hundred thousand man-hours to build, and as can be seen by the hotel's amenities, it is a flagship hotel that represents what Indianapolis stands for.

### **Other AGC/I members involved with the project:**

Baker Concrete Construction, Inc.

Barth Electric Company, Inc.

The Blakley Corporation

Bowen Engineering Corporation

Broady-Campbell, Inc.

Nies Eggert Waterproofing  
Company, Inc.

Santarossa Mosaic & Tile Co., Inc.

Spohn Associates, Inc.

**PUBLIC SECTOR (OVER \$10 MILLION)**





*Public Sector Project (more than \$10 million)*

## Birck Nanotechnology Center Pepper Construction Co. of Indiana, LLC

The Center is located in Discovery Park at Purdue University, and it is the largest and most advanced nanotechnology university research cleanroom constructed to date. The building consists of three levels, with the third level housing the air filtration equipment including twenty-seven air handling units. An enclosed walkway on the second floor provides access to the adjacent Bindley Bioscience Center. The heart of the building is a 25,000 square foot Class 10–100–1,000 nanofabrication cleanroom.

The mechanical and electrical systems in the Birck Nanotechnology Center were so much more complex even than a hospital, with considerations for electro-magnetic interference and separate air handling systems for different laboratories. The concrete slabs were more complex than those designed for automated storage and retrieval systems, with construction of isolated slabs and suspended floors for vibration control and support of sensitive equipment. Safety considerations were built into the building, with consideration for the high-toxic and flammable gases that would be used in research – gases so toxic that they could not be breathed.

**Pepper** was also charged with maintaining not just a clean environment, but a sterile environment throughout the project. As the building progressed, the protocol progressed until trades people were working in full protective suits and the materials were being decontaminated prior to installation.

### **Other AGC/I members involved with the project:**

Architectural Glass & Metal Co.

The Blakley Corporation

Circle B Construction

Dalmatian Fire, Inc.

Irving Materials, Inc.

Maxim Crane Works

Nies Eggert Waterproofing  
Company, Inc.

Santarossa Mosaic & Tile Co., Inc.

Don Scharer Masonry, Inc.

Shambaugh & Son, LP

Thyssen Krupp Elevator Company

# GOVERNOR'S AWARD





*Governor's Award*

## Clarian Pathology Laboratory Wurster/Smoot CLC, a Joint Venture

The Clarian Pathology Laboratory is a six-story 323,000 square foot building with three levels of parking under three levels of laboratory, educational and administrative space. In addition to being connected to the People Mover system, the new facility is also connected to each of the hospitals – Methodist Hospital, University Hospital and Riley Hospital for Children – through an amazing network of pneumatic tubing, one of the largest in the country, that delivers blood and tissue samples from the hospitals to the lab in a matter of minutes.

This project's ultimate significance is two-fold. For Clarian, this project is another step toward uniting three hospitals into one. Reducing redundancy in operations and equipment of three laboratories down to one, increasingly automated facility will save Clarian at least five hundred thousand dollars per year in costs.

This project's second significant impact resonates even further than the ten million tests that the new lab will now be able to do each year. The facility is one of three new construction projects embedded in the canal district targeted by the economic development initiatives of BioCrossroads to make Indianapolis a leader in the life sciences industry. It and two other buildings are leading the way by putting bricks and mortar where brownfields once lied.

The Clarian Pathology Laboratory is like no other – uniquely designed and uniquely constructed. It will take its place, next to the People Mover, as a recognizable symbol of the progress that Clarian Health Partners and the City of Indianapolis have made in the life sciences arena. At the same time it will vitally serve the need of its surrounding community by providing more efficient, more accurate and faster results for patient care.

### **Other AGC/I members involved with the project:**

Architectural Glass & Metal Co.

Barth Electric Company, Inc.

CDI, Inc.

Dalmatian Fire, Inc.

Hagerman Construction Corp.

Milestone Contractors, LP

Nies Eggert Waterproofing  
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Safety Management Group

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Spohn Associates, Inc.

F.A. Wilhelm Construction Co., Inc.

# To Preserve or Not Preserve- That is the Question

## Recent Decision from Indiana Supreme Court Discusses Preservation of Evidence



By Steven J. Strawbridge  
Locke Reynolds, LLP

**C**onstruction sites are dangerous places. It is an unfortunate fact of life that construction workers sometimes receive serious injuries which may even prove fatal. General contractors often are unsure concerning what duty, if any, they have to preserve equipment, debris, or other construction material that potentially could become evidence at a later date. Indiana has long recognized that worker's compensation benefits are usually the exclusive remedy with no right to file litigation against the general contractor when its employees are injured. Even so, the injured employee may have the right to sue third parties.

The general contractor is confronted with the practical problem of deciding what objects and construction material might be used as evidence at a later date. That question is complicated when one considers the potential of complex products liability litigation which could be filed by the injured employee against the manufacturer of a product. Under some circumstances, a general contractor could benefit if an independent action filed by its employee against a third party generates funds which ultimately might be returned in part to the general contractor.

In a recent September 26, 2006 decision (*Glotzbach v. Froman*, 854 N.E.2d 337 (Ind.2006)), the Indiana Supreme Court addressed what obligations a general contractor had, given the circumstances of that case, to preserve evidence and avoid a "spoliation of evidence" claim.

Spoliation of evidence has, in recent years, been a controversial topic in Indiana. The claim, as its title suggests, relates to the mishandling of evidence for use in a judicial proceeding. More technically, "[s]poliation of evidence is 'the intentional destruction, mutilation, alteration, or concealment of evidence.'" Spoliation claims can have significant impact on lawsuits, in that successful claims allow an inference "that the missing evidence was unfavorable to" the party that mishandled it. In other words,

the Court assumes the worst when evidence is missing. Spoliation of evidence can also lead to obstruction of justice charges, criminal sanctions, attorney sanctions, and contempt charges.

### CASE FACTS

In the *Glotzbach* case, the Court was confronted with an injured construction worker case. Midwest Material Services, Inc., provided environmental waste services to its customers, including environmental cleanup and the handling and transfer of hazardous materials. In the spring of 2000, Midwest was engaged to clean a large holding tank for Ashland Chemical, Inc. Midwest frequently obtained workers from National Industrial Maintenance, Inc., to serve under Midwest's supervision, and National had assigned its employee, Drew Froman, to the Ashland project.

On May 5, 2000, William Darling, one of Midwest's owners, and Froman began emptying the tank using an electric pump, hose, and other equipment belonging to Midwest. The tank was nearly empty when Darling noticed air bubbles in the hose and instructed Froman to turn off the pump. Shortly after Froman switched off the pump, there was an explosion which caused fatal burns to Froman.

After receiving medical treatment for minor burns, Darling returned to the Ashland site where he was interviewed by the South Bend Police and Fire Departments. Darling told the South Bend Police that he did not know the brand name of the pump, but that it was "explosion-proof." At Ashland's suggestion, Darling then removed Midwest's equipment and debris from the explosion site. Three days after the explosion, Indiana Occupational Safety and Health Administration ("IOSHA") Officer Debbie Rauen contacted Darling and asked whether he still possessed any of the equipment or debris. Darling confirmed that he did, and Rauen instructed him not to dispose of it. When Rauen and South Bend Fire Department

**The general contractor is confronted with the practical problem of deciding what objects and construction material might be used as evidence at a later date.**



officials interviewed Darling four days later, he reported that everything he had collected from the Ashland site had been thrown away.

Froman's Estate filed a wrongful death complaint against Midwest and "John Doe Company" as designer, manufacturer, and distributor of the pump. The Estate later amended the complaint to add claims against Midwest for negligent and intentional spoliation of evidence and punitive damages. Midwest moved to dismiss both the wrongful death claim and the spoliation claim. The trial court dismissed the wrongful death claim after the Estate conceded that Midwest was Froman's employer for purposes of the Worker's Compensation Act. The Worker's Compensation Act therefore provided the exclusive remedy for this industrial accident and barred a tort claim against Midwest. The trial court denied Midwest's motion to dismiss the spoliation of evidence and punitive damages claims, but certified its order for appeal. The Court of Appeals affirmed the trial court. The Indiana Supreme Court vacated the Court of Appeals' ruling and agreed to hear the case.

In examining the spoliation claim, the Indiana Supreme Court ("Court") returned to some unsettled issues from a 2005 opinion, when it refused to recognize an independent spoliation claim (one not tied to another claim, such as a wrongful death claim). The 2005 opinion had left open the issue of whether there can be third-party spoliation claims (those by non-parties to the litigation). The Court examined two Court of Appeals cases in finding that an employee has no third-party spoliation claim against an employer where the Worker's Compensation Act applies to claims from a workplace accident.

In refusing "to recognize an independent cause of action under the circumstances presented by" the case, the Court based its opinion on both case law and public policy. Essentially, the Court refused to recognize a special relationship between Midwest and Froman, wherein Midwest would be required to maintain evidence for Froman. The Estate contended that a special duty was created by "IOSHA's instruction to Darling to retain the debris." The Court, in disagreeing, expressed concern with the ramifications of imposing special duties on the employer to maintain evidence for employees. Additionally, the Court recognized that employers already have incentives to preserve evidence, especially the possibility of recovering worker's compensation benefits, through subrogation rights, from a manufacturer of a defective product causing injury to an employee.

Ultimately, the Court found its logic in the first-party context

(between parties to an underlying lawsuit) compelling in the third-party context. In particular, the Court showed concern with the speculative nature of damages in spoliation claims, as the Court did not wish to burden jurors with the "guesswork" of calculating what damages could have been collected had the evidence been preserved and presented at trial. The Court also refrained from negating the purposes of the Worker's Compensation Act, under which the legislature has sought to foreclose litigation. In other words, the Court did not wish to create an escape mechanism, through spoliation claims, that would foster litigation against plaintiff's employer. Additionally, considering practical ramifications, the Court did not wish to force employers to keep "useless equipment indefinitely or to refrain from repairing equipment." As such, the Court saw spoliation claims, under the circumstances, as imposing great costs with little benefit.

## CONCLUSION

Although this decision from the Indiana Supreme Court appears limited to the specific circumstances in question, it is significant that the highest court in Indiana did not believe there was a viable spoliation claim against the general subcontractor. The Court held that an employee whose injuries are covered by the Worker's Compensation Act has no claim against the employer for spoliation of evidence related to that incident.<sup>1</sup> This provides some measure of protection for general contractors confronted with the very real question concerning what "evidence" would have to be preserved every time an employee is injured. To the extent that the employee is covered by the Indiana Worker's Compensation Act, there are already various benefits available for the employee. The Worker's Compensation Act also allows an injured employee to assert claims against third parties which may provide additional compensation. Even so, it would be contradictory for a general contractor protected by the exclusive application of the Indiana Worker's Compensation Act to then become liable to the employee for failure to preserve "evidence" which might be used to assert a claim against third parties. This recent opinion from the Indiana Supreme Court can be used to exclude certain types of claims for spoliation against the general contractor, at least where Worker's Compensation Act benefits are available. It remains to be seen whether or not the Indiana legislature is prepared to consider mandating different rules which would apply to spoliation of evidence claims.

*For more information regarding this article, please contact Steve Strawbridge at (317) 237-3800 or [sstrawbridge@locke.com](mailto:sstrawbridge@locke.com).*

**It remains to be seen whether or not the Indiana legislature is prepared to consider mandating different rules which would apply to spoliation of evidence claims.**

<sup>1</sup> Of note, the Court further stated that, "The legislature is, of course, free to provide a different rule if it concludes otherwise."

# The Continuing Evolution of OSHA's Multi-Employer Citation Policy



By Lewis D. Beckwith &  
Gregory N. Dale  
Baker & Daniels, LLP

**U**nder the general duty clause, an employer is responsible only for the protection of its own employees. This is because the general duty clause requires each employer to furnish “to each of his employees” employment “free from recognized hazards that is causing or likely to cause death or serious physical harm.” This always has been and still is the rule.

However, with respect to compliance with standards, the law does not require each employer to protect only “his” employees. Instead, the law says that “each employer shall comply with occupational safety and health standards . . .” In addition, there is language in the OSHAct and the regulations referring to “every working man and woman” and “every employment and place of employment of every employee engaged in construction work.”

The meaning of this language has been the subject of considerable discussion and OSHA litigation. The early cases involving interpretation of this language involved OSHA's view that equated an employer's duty to comply with standards with an employer's duty to comply with the general duty clause. In other words, in its early days, OSHA interpreted the law as requiring an employer to protect only its own employees from violations of standards. Under this interpretation, OSHA did not cite employers who created a violation but had no employees exposed to the hazard. However, under this interpretation, OSHA cited employers whose employees were exposed to the violation regardless of whether the employer created the hazard. Because of claims of unfairness, these interpretations did not last long.

Generally, today, the language of the interpretations now in place distinguish between “exposing” employers, “creating” employers, and “controlling” employers. However, some recent cases suggest a possible trend toward returning to the rule that an employer's own employees must be exposed to a hazard in order for that employer to be cited. Indeed, 29 C.F.R. § 1910.12 provides that “[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate” general industry standards. Referring to this language, at least three (of

12) U.S. Courts of Appeals have suggested that the construction standards may require an employer only to protect its own employees. On the other hand, at least three U.S. Courts of Appeals (including the court with jurisdiction over Indiana) have disagreed.

Earlier in October of this year, the Occupational Safety and Health Review Commission heard arguments in a dispute involving OSHA's citation of a general contractor for violations allegedly committed by a subcontractor. Squarely at issue in the case is OSHA's multi-employer citation policy. Among the evidence presented in the October argument was the contention that the general contractor entered into a contract under which it stated that it was “completely responsible for construction of [the project].”

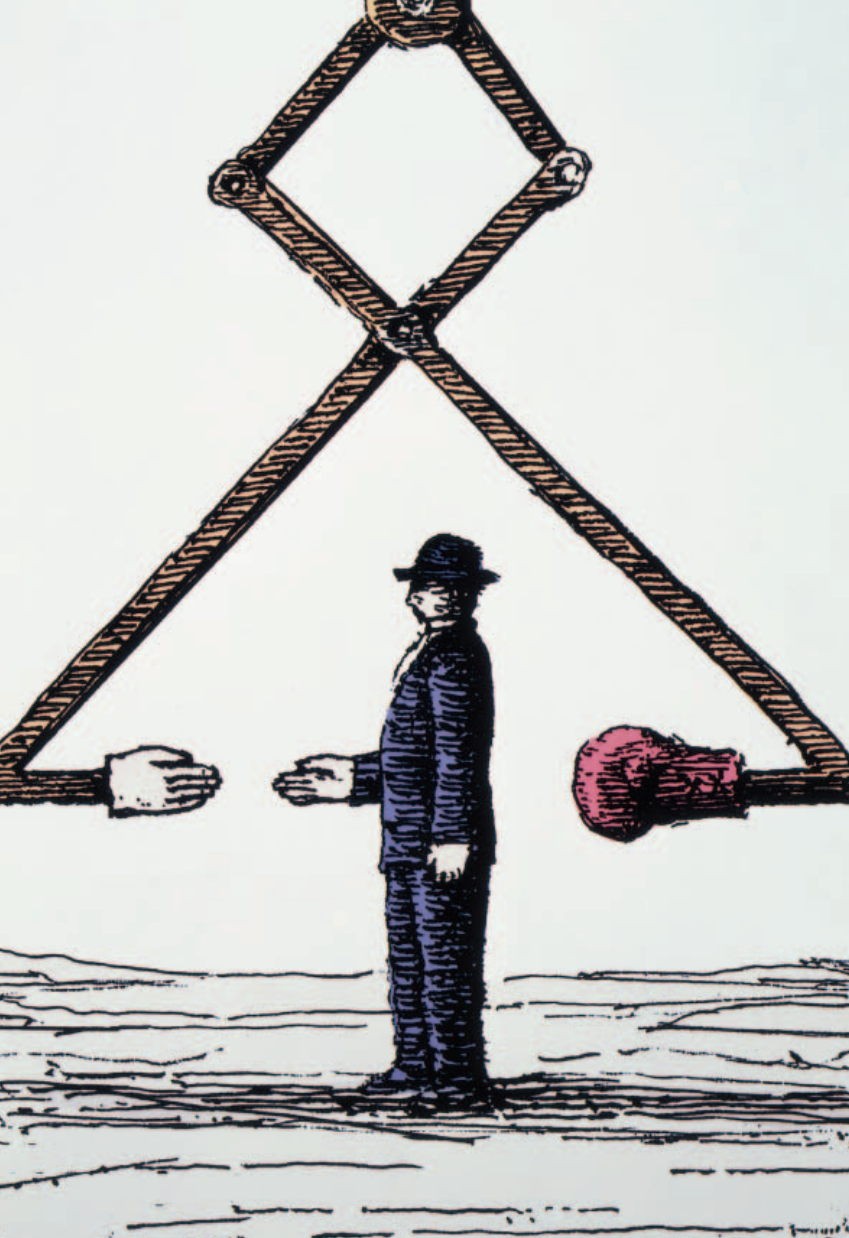
The Department of Labor has long argued that the language of the OSHAct and the regulations covers safety requirements between employers and employees and between contractors, subcontractors and their employees. Among the briefs submitted to the Commission in this October's case was a brief from construction industry associations arguing that the Commission has incorrectly applied the policy since its adoption in 1976. The industry association brief took direct issue with the prevailing view, cited in a case called Anning-Johnson, in which the Commission stated that “typically a general contractor ... possesses sufficient control over the entire worksite ... to take the necessary steps to assure compliance.”

The industry associations argued that the language of 1910.12(a) is very clear in that the phrase at issue is “each of his employees.” Thus, the industry argued that the only possible meaning of the language is that compliance is required of an employer only to the employer's own employees.

Many in the industry are watching the outcome of this case to see whether the interpretation of the multi-employer citation policy will change once again. Stay tuned.

*For more information regarding this article, please contact Lew Beckwith at (317) 237-1438.*





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# THE TERMS, THEY ARE A'CHANGIN'...

NLRB Redefines "Supervisor" in Long-Awaited Decision, But Does it Matter to You?



By Michael H. Boldt and Ryan McCabe Poor  
Ice Miller, LLP

**Y**ou might have heard your friends in organized labor issue a collective howl in October when the National Labor Relations Board issued new, broader guidelines for determining who is a "supervisor" – and thus not entitled to union representation – under the National Labor Relations Act. In a long-awaited decision, *Oakwood Healthcare, Inc.*, 348 NLRB. 37 (2006), the Board determined that permanent charge nurses (in your world, working foremen) at a Michigan hospital qualified as supervisors under the NLRA, and thus would be excluded from the bargaining unit.<sup>1</sup> The Board's decision has generated quite a bit of buzz among employers and unions, and some disagreement among professionals as to its potential for impact in the construction industry – in which unions and employers generally operate under very different rules and with varying degrees of relationships. So, what does the decision mean to you? As with most conclusions, it depends on who you are and what you are doing. First the decision, then the discussion.

Section 7 of the NLRA provides that, "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) follows with prohibitions: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the Act]." So, under the Act, only employees have the right to organize and bargain and only employees are protected from unfair labor practices.

What about supervisors? Well, section 2(3) states that the term "employee" does not include "any individual employed as a supervisor," leaving them unauthorized to join a union or organize and unprotected from what would otherwise be unfair labor practices. That leads us to the definition of the term "supervisor," from which came the collective howl.

Under section 2(11) of the Act, "supervisors" are those individuals who have the authority to hire, transfer, suspend, discipline, assign, or to responsibly direct employees etc., or to

effectively recommend the above, if using independent judgment to do so. Seems clear? Not really, especially when you get into the difficult areas of working foremen, lead persons, team leaders, and others like them. Working charge nurses sparked the debate in the *Kentucky River* and *Oakwood Healthcare* cases, but as you can imagine, they may be the health care equivalent of the working foreman or lead person in the construction industry.

Following the Supreme Court's direction in *Kentucky River*, the Board in *Oakwood Healthcare* clarified (and broadened) its interpretation of some of the terms used in the NLRA to define supervisory authority: "assign," "responsibly to direct," and "independent judgment." "Assign" now extends beyond assignments of employees to job classifications, work sites, and work hours to include assignments of significant overall duties and tasks to employees. "Responsibly to direct" applies not only to direction of entire departments but also to one-on-one task direction with authority to take corrective action, with an emphasis on accountability for any failure to do so. The Board had previously taken the position that "independent judgment" excluded "ordinary professional or technical judgment in directing less skilled employees to deliver services;" however, the new decision holds that "independent judgment" can be exercised even if it is exercised using professional or technical expertise, shifting the focus from the kind of discretion to the degree/amount of discretion. Although the precise contours of the Board's new interpretation have yet to be determined, the guidelines arguably broaden the management-aligned category of the supervisor — and narrow the category of employees entitled to union representation.<sup>2</sup>

Now, we circle back to the original question – Does a potentially broadened classification of supervisors matter to you, as a construction industry employer? Maybe. Maybe not. The answer will depend on (1) whether you are already a union contractor or whether you operate an open shop (and want to stay that way), and (2) in the case of a union contractor, whether you want to extend coverage of your collective bargaining agreements to supervisors.

<sup>1</sup> The Board's new guidelines were issued in response to the U.S. Supreme Court decision of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), which rejected the Board's assessment of whether certain nurses qualified as supervisors under the NLRA.

<sup>2</sup> Two related decisions issued at the same time applied the new guidelines, confusing the issue further by finding in a fact-sensitive inquiry that not all charge nurses at a nursing home in Montana are supervisors for purposes of the NLRA. Likewise, the Board held that lead persons at an aluminum and vinyl products manufacturing plant in Mississippi were also employees, and not supervisors as defined by the NLRA, because they did not assign other employees or use independent judgment in directing them. See *Beverly Enterprises-Minn. Inc. d/b/a Golden Crest Healthcare Ctr.*, 348 NLRB 39 (2006) and *Croft Metals, Inc.*, 348 NLRB 38 (2006).



## THE NON-UNION CONTRACTOR

The issue of determining which employees are supervisors and which are not most often comes up in the context of a union organizing drive. Obviously, since supervisors are not covered under section 7, they do not get to vote in an election to determine representation. If foremen are not determined to be supervisors, then they vote. That could be good or bad, depending on how you think they might vote. The likely impact of the Board's decision in this context then could be more Board hearings to determine who votes and who does not in elections. On the other hand, supervisory status will probably not be a critical issue if you want a union, and – like construction industry employers are allowed to do – you sign a pre-hire agreement without an election. In that case, as discussed below, you get the unit to which you agree.

However, non-union contractors should also be wary of section 8(a)'s unfair labor practice prohibitions, because they apply even to unrepresented employees and to topics beyond unionization. The Board has recently been more active in finding unfair labor practice violations against employers for interfering with “protected, concerted activity” that has nothing to do with unions or organizing, like banding together to complain about vacation or benefits. Whether an employee is a supervisor could be crucial in determining whether you have the right to discipline or discharge someone for banding together for such “mutual aid and protection,” regardless of the reason.

## THE UNION CONTRACTOR

The main concern for union contractors will be in determining which employees are covered under the terms of their collective bargaining agreements. Many such agreements in the construction industry specifically cover foremen, even supervisors in some cases. This is perfectly acceptable, but cannot be required because it is not a mandatory subject of bargaining. It is acceptable because supervisory employment terms are a permissive

subject of bargaining. An employer and a union may bargain over those terms, and include them in an agreement. However, the flip side of permissive bargaining lies in its name, permissive – it cannot be required. When an employer and a union negotiate an agreement, neither of them may insist to impasse or even require bargaining about supervisory terms. Accordingly, if you want to include supervisors in your agreements you may do so, or continue to do so; but, you may not be required to do so. The Board's decision, therefore, may broaden the category of employees over which you are not required to bargain.

## CONCLUSION

In the end, it remains uncertain what impact, if any, the broadening of the definition of supervisor will have on the construction industry. If you have a stable, long-term relationship with a

union or unions, you probably won't ever hear the words *Kentucky River* or *Oakwood Healthcare* again. If you have a more contentious relationship with your union(s) you might want to brush up on the cases with legal counsel, to see where things stand with your agreements and employees. If you operate on an open shop basis, you could have to deal with the decision in an organizing drive or in your day to day human resources functions.

The Board's decision will likely to remain controversial regardless of the industry in which it is applied, and legal challenges by unions are likely on several fronts. The only certainty in all of this is that the decision and its definitions will continue to be debated, tested, tried, and shaped.

*For more information regarding this article, please contact Mike Boldt at (317) 236-2100 or [boldt@icemiller.com](mailto:boldt@icemiller.com)*



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## Safety Award Winners Announced

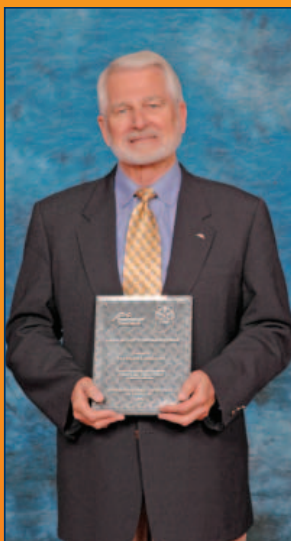
The 2006 Amerisure Safety Awards were distributed on November 17, 2006 at the BKD Build Indiana Awards. The purpose of the Amerisure Safety Awards is to recognize AGC/I members whose outstanding safety programs promote a safe, professional and productive worksite. Amerisure, the provider of AGC/I's general liability and workers compensation insurance program, sponsors these annual awards to underscore the importance of safety in the construction industry.

Nineteen participants submitted a written narrative discussing their safety programs and how they handle safety on the jobsite. Finalists for the awards received jobsite audits conducted by the AGC/I safety staff. AGC of Indiana thanks our 2006 judges for their dedication and effort: Jim Arendas of the Construction Advancement Foundation, Pete Anderson of the Michigan Chapter of AGC, and Scott Goodwin of the Ohio Chapter of AGC.

### The finalists of the Associate Member category of the Amerisure Safety Awards were:

ERMCO, Inc.  
Gradex, Inc.  
Gribbins Insulation Company, Inc.  
Shambaugh & Son, L.P.

The winner of the 2006 Amerisure Safety Award for Outstanding Safety Program for an Associate Member is **AAA Roofing Company, Inc.** AAA Roofing has an experience modification ratio, or EMR, of 0.58 and a recordable incident rate of 0.64 with 127,006 man-hours in 2005. They have made a full commitment to be non-compliant with the norm of their industry and defiant in what other contractors from their industry deem as the only way. This contractor has chosen to take the simple approach of installing guardrails on every roof



they work on to eliminate fall hazards. The benefits they are seeing from this approach are better protection for employees; owners are more accepting due to the reduction of liability, Incident Rate Reductions, and a lower EMR. As a member of the Associated General Contractors of Indiana, AAA Roofing is living up to the standards of Skill, Integrity, and Responsibility and their own standards of Value, Quality and Service. They represent themselves as a contrast to the roofing industry norm and as a model to be applauded and imitated for success in the roofing industry.

### The finalists of the Regular Member category of the Amerisure Safety Awards were:

Hagerman Construction Corporation  
Turner Construction Company of Indiana, LLC  
Weddle Bros. Building Group, LLC  
F.A. Wilhelm Construction Co., Inc.

The winner of the 2006 Amerisure Safety Award for Outstanding Safety Program for a Regular Member is **Bowen Engineering Corporation.** Bowen has an EMR of 0.64 and a recordable incident rate of 2.33 with 945,832 man-hours in 2005. Bowen has made a commitment to provide a safe work environment for their entire company. Their commitment extends beyond just being about their company but encompasses their owners and subcontractors. Their approach starts early in the bid process to evaluate what exposures are likely and to develop a plan to eliminate these long before danger is present. This type of commitment is what makes them a winner.



Photography by Greg Persell

Amerisure Safety Award Winners Announced

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# 2006 AGC/I Construction Industry Scholarships

The Associated General Contractors of Indiana awarded four \$3,000 Construction Industry Scholarships at the **BKD Build Indiana Awards** on November 17, 2006.



**Jeff Gielerek** has been attending IUPUI for two and a half years and hopes to graduate in Construction Technology in 2007. After high school, Jeff attended Purdue University in the Building Construction Management program. After his sophomore year he decided to enter a four year union sponsored apprenticeship program at Joseph J. D'Aries Carpenter Training Center in Kenilworth, New Jersey. He looks forward to applying the skills he has

learned to become a project manager or superintendent for a commercial general contractor or subcontractor in central Indiana.



**Haley Hypes** is a senior in the Construction Engineering and Management program at Purdue University. She has served as the treasurer for Beta Tau; the CEM honorary fraternity for the past two years. The largest task she has undertaken this semester is assembling a team from the CEM program to participate in the ASC-AGC Student Competition for the first time. After graduation she hopes to work for a construction company in the

Indianapolis area that offers diverse opportunities and values continued learning.



**David Michael** is a senior in the Building Construction Management program at Purdue University. David has been an active member of the AGC student chapter for the past year and a half. He looks forward to participating as a member of the competition team and plans to run for an officer position this year. David has worked for Kinder & Sons in Fort Wayne for the past two summers. After graduation he plans to be a project manager running all aspects of

two or three projects simultaneously.



**Chris Schoettle** is a senior in the Construction Technology program at IUPUI. He serves as the Treasurer for the Society of Student Constructors. When he was appointed treasurer the organization had not been active for several years, but through his dedication and hard work he has gotten the group back on track financially. Chris's passion and goal is to be a project manager for a general contractor in Indiana, managing large scale commercial projects.



In alternating years, the Purdue University School of Civil Engineering's Department of Construction and Engineering Management joins AGC/I in presenting the Frank Stubbs Memorial Scholarship. *The Frank Stubbs Memorial Scholarship* is a one thousand dollar scholarship given to an outstanding student in the Purdue School of Civil Engineering. This year's recipient, **Kevin Mason**, is from Hope, Indiana and is currently a senior in the school of Construction Engineering and Management at Purdue University. He has worked as an intern for AGC/I member Bowen Engineering Corporation for the past three summers. He is an active member in Beta Tau, the CEM honorary fraternity and is on the ASC-AGC Student Design-Build competition team this year. Kevin is also an Eagle Scout.

## Quarter Century Award

AGC/I is proud to congratulate **The Blakley Corporation** for over twenty-five years of membership in the Associated General Contractors of Indiana and welcome them to the Quarter Century Club. In today's marketplace, it is common for businesses to appear and disappear virtually overnight. To reach this important milestone is not only a tribute to their perseverance, but also a tribute to the Skill, Integrity and Responsibility of the company as well.

To mark this occasion in AGC history, AGC/I presented The Blakley Corporation their Quarter Century Award at the BKD Build Indiana Awards on Friday, November 17, 2006.



Photography by Greg Persell

**Wurster Construction** welcomes **Danyelle Stein** as a Contract Administrator to their main office in Indianapolis. She is currently working on the East 91st Street Christian Church expansion project.



Wurster Construction is excited to announce the recent hire of **Josh Russell** as its new Director of Business Development. Josh, who joined the Wurster team in July, spent his recent years in the environmental industry after receiving a Bachelor of Science degree from Ball State University in 1998. He will focus on building new, and maintaining existing relationships within the local construction industry.



Wurster Construction Co., Inc. is a third-generation, family-owned construction management firm specializing in privately negotiated projects in the healthcare, life science, retail, and religious markets within the Central Indiana Region. For more information about Wurster, visit [www.wursterconstruction.com](http://www.wursterconstruction.com) or contact Josh Russell at (317) 841-1000.

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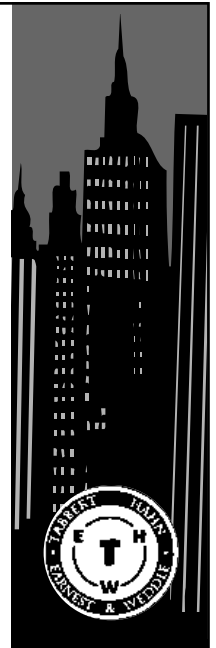


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