Victor O. Schinnerer & Company, Inc.

Claims Study

An Analysis of Injured Workers Claims Against Design Professionals in Illinois

Comparing Claims Before and After the Repeal of the Illinois Structural Work Act

According to reports from the United States Occupational Safety and Health Administration, construction work continues to trail only mining and agricultural work in the rate of injuries and fatalities. Construction produces the highest number of fatalities of any industry. And injuries in construction cause significant harm to the workers and their families, the industry as a whole, and construction productivity.

Workers compensation statutes, while intended to remedy the harm caused by an injury incurred in the normal course of employment, often limit an injured construction worker's recovery to lost earnings and medical expenses. These laws grant immunity to the employer, which is usually a subcontractor or specialty contractor on a job site. In a quest for additional compensation, injured workers are often aided by eager plaintiff attorneys who attempt to sue anyone who might be at all connected with the injured worker. These other parties who are not shielded by workers compensation laws are often subjected to recovery actions that are often coercive rather than remedial. In some cases, these unprotected parties are held liable even though such parties may be less culpable than the injured worker's employer.

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Depending upon the statutory definition of employer, potential third party defendants include the prime contractor, the project owner, the design professional providing construction site services, and equipment suppliers or manufacturers. Design professionals who carry professional liability insurance or have significant assets and participate in the construction process symbolize a deep pocket for those workers who have suffered extensive losses without adequate recovery.

Forcing Statutory Liability on Design Professionals

Some states have statutes that impose liability upon certain parties that may be found to have failed to ensure structural safety on construction sites. Perhaps the most misguided statute that placed exposure on a party without the authority to carry out the statutory responsibility was the Illinois Structural Work Act (SWA).

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Establishing a cause of action in violation of the SWA was easy. Under the SWA, it was only necessary to show that a "device" involved in an injury was used to complete a building or other structure and that the "device" was unsafe, not safely placed or operated, or there was a failure to provide such a "device." Liability reached those in charge of the work who violated the SWA and proximately caused the injury to the plaintiff. Significantly, the party actually "in charge" of the claimant's work remained immune from tort suit under the SWA because of the workers compensation immunity.

The SWA Generated Claims and Costs

As the professional liability insurer for the largest number of Illinois design professionals, the CNA/Schinnerer program tracks the cost of claims. All claims against design professionals cost them significant expenses. Any claim against a design firm results in expenditures of time and money. Since a professional service firm's time is its source of income, claims can have a significant negative effect on a firm's financial stability unless the firm passes the costs of the lost productivity and expense to its clients. Claims, especially claims without merit, drive up the costs of professional services.

Based on the claims statistics of the CNA/Schinnerer program, we have profiled the claims brought under the SWA from 1990-1994, the last five years before repeal. The findings are as follows:

- There were 93 injured worker claims brought against CNA/Schinnerer policyholders that were reported to the insurance program. They represented about 36 percent of *all* claims brought against our policyholders in Illinois. Nationally, roughly 8 percent of all claims brought against CNA/Schinnerer policyholders during this period were claims from injured workers or the representatives of deceased workers.

- In Illinois, less than 10 percent of the injured worker claims filed during this period resulted in an indemnity payment by CNA/Schinnerer on behalf of our policyholders. The payments—and the significant defense costs of these claims to the insurance company—averaged more than $146,000 per claim. The cases with payments actually represented only 3.4 percent of all the claims brought in Illinois against CNA/ Schinnerer policyholders. The costs recognized by the CNA/Schinnerer program are in addition to the deductible obligation of the insured firms and any lost time and expenses incurred by the firms. The other 90 percent of SWA claims, while not requiring a payment by the insurer for the injury, cost design professionals in terms of time, legal expenses, and damage to their reputation.

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Repeal Lowered Claims Costs and Financial Damage to Firms

After the repeal of the SWA, the frequency of claims dropped significantly. In looking at a five-year period starting one year after the repeal (1996-2000), the differences are striking. The findings are as follows:

- Only about 12 percent of all claims brought against CNA/Schinnerer policyholders in Illinois during this period were related to worker injuries. This reflects a drop of 67 percent from the comparison period during which the SWA influenced claims.

- ⇨ During this period, the claims that resulted in a payment represented about 10 percent of the number of worker injury claims brought against our policyholders. Thus, during this five-year period, only 1.2 percent of all claims brought against our policyholders in Illinois resulted in a determination of liability on the part of the insured design firm for a worker injury. Nationally, during the same period, the percentage of injured worker claims in which a payment was made to compensate the injured worker by CNA/Schinnerer was 1.1 percent—the Illinois average did not significantly deviate from the national average.

Repeal Resulted in Prompt Payment When Liability Was Established

Perhaps even more significant is the drop in the cost of claims. The defense costs and indemnity payments for the claims following repeal of the SWA, in which the design firm was found liable or agreed to compensate the injured worker, averaged about $58,000. The significant drop from the $146,000 average during the active time of the SWA was in large part the result of reduced defense costs. Defense costs were usually significantly greater than the $18,000 average deductible obligation of our policyholders. Without the SWA distorting the responsibility of design firms, payments were made more quickly to those injured workers where it was clear that the design firm might have had some degree of culpability.

Normal Responsibility of Design Professionals

In most states, design professionals can be held responsible for worker injuries if they assume a duty by conduct or by contract for on-site safety programs. In addition, a professional standard of care to protect public health, safety, and welfare applies. When it is foreseeable that an individual might suffer an injury due to a design professional's failure to exercise due care, the design professional is potentially liable.

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Liability is predicated upon the unreasonableness of the design professional's conduct. Reasonableness is measured by whether the design professional knew of the hazardous condition and whether subsequent conduct was reasonable as defined by the contract and the circumstances. The design professional's status in combination with the knowledge of a potentially dangerous situation creates a duty to act to protect a worker from imminent harm.

Assuming Responsibility and Exposure by Contract

Design professionals usually have no right to stop work, engage in conduct that assumes control of the work and the safety obligations of the site, or have continuous on-site representatives, such that the design professional could exert any influence that could be construed by the statute as being in control of the work. When the design professional has not assumed a supervisory role, it is clear that the design professional is not in charge of the work.

The professional service fees charged by design professionals rarely include reimbursement for safety obligations. While a lack of compensation does not justify the design professional ignoring known dangers, an absolute duty is not necessary to impose liability in certain situations. Courts hold a design professional liable for injuries resulting from known damages when

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the design professional could have taken steps to prevent the accident. The courts do not allow the skilled design professional to blindly ignore obvious dangers at the construction site.

Arbitrary Statutory Responsibility Drains the Construction Economy

This study indicates that design professionals rarely are in the position where an objective analysis of the causes of a worker injury would determine that the design professional had responsibility. There are few cases (only 1.2 percent of all claims brought against our policyholders in Illinois during the study period) in which liability was established or a settlement made where an injured worker received compensation. The claims for which a payment was made on behalf of our policyholder in the absence of the SWA were not significantly different than those in our national statistics.

But if there is an arbitrary statutory responsibility imposed, Illinois would probably again significantly differ from the national norm. And it would harm the economy of the state. In each situation in which a cause of action against the design professional is allowed, the design professional would be forced to diminish productivity by expending time and money on defense. Clearly, claims that resulted in no payment intended to correct damage or harm drained the design professions and the economy of productive time and forced an increase in the cost of providing professional services.

Meritless worker injury claims against design professionals appear to result in:

- Unnecessary judicial administrative costs,
- Defense costs to those design professionals alleged to be negligent—costs that must be covered by increasing fees to all public and private clients,
- A loss of productivity because of the time that such claims consume, and
- Groundless damage to the reputation of the firm and its profession.

It is clear that design professionals and their firms that pay to defend themselves, and erode their productivity by responding to claims without merit, are victimized by a civil justice system that allows specious allegations or unfounded complaints to drive up the operating costs of professional service firms.