

Construction & Real Estate

OKLAHOMA ESTABLISHES REGISTRATION REQUIREMENT FOR ROOFING CONTRACTORS

By Gerald L. Jackson

As sure as Spring arrives in Oklahoma, severe storms will roll across the state leaving behind damaged roofs and properties. In the past, another sure thing to arrive in Oklahoma after violent storms was out-of-state roofers, or so-called "storm chasers." While some storm chasing roofers are legitimate roofers, many provide shoddy quality workmanship, use below standards materials and fail to install the new roof to manufacturers' specification, thereby voiding warranty coverage. Unfortunately, by the time the property-owner learns of the poor quality work or has a warranty claim denied, the storm chasing roofer is long gone. A new Oklahoma law will make it harder for questionable out-of-state roofers to operate in Oklahoma.

This past legislative session, Oklahoma adopted the Roofing Contractor Registration Act (SB 2180). Under this Act, to do business in Oklahoma, a roofing contractor must register with the Construction Industries Board and provide a certificate of liability insurance of at least \$500,000. To register, the applicant roofing contractor must submit an application under oath setting forth the contractor's experience and quali-

fications, physical address and phone number, information on any other person who will act as the business entity, and proof the contractor has sufficient workers' compensation insurance coverage. The applicant must also disclose if he has ever been convicted of a felony. Failure to comply with the registration requirement will subject the violator to a misdemeanor that is punishable by a fine of up to \$500.00.

Other schemes commonly associated with storm chasers will also be prevented by Oklahoma's new Act. Some storm chasers engage in "rent-a-name" or other schemes to appear to be a local company. Under rent-a-name, the out-of-state company pays a local roofing contractor a flat fee or a percentage of storm related sales to utilize the name, telephone number and reputation of the local company. Another tactic is for the out-of-state company to purchase the telephone number of a roofing contractor who has recently closed or gone out of business.

The Oklahoma Act attempts to prevent these common tactics by prohibiting sharing or using the registration certificate number by any other company

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or business entity. The exception is where the applicant provided information at the time of registration on the identity of each member, partner or agent of the contractor that is intended to be covered by the registration. Additionally, the registration must be renewed each year.

Oklahoma cannot stop Spring storms and the damage they do, but the Roofing Contractor Registration Act will help protect property owners from suffering additional harm by out-of-state storm chasers.

CASE NOTES

by Michael Pacewicz, Director

Glover v. Mabrey, 10th Circuit, June 28, 2010

In this unpublished decision, the United States Court of Appeals for the Tenth Circuit held that a public contractor must allege that its petitions for redress from the government involve a matter of public concern in order to maintain a claim for retaliation. The contractor, which had provided services to the Oklahoma Department of Transportation for a number of years, brought suit against various ODOT officials who prepared a report recommending the contractor be suspended from obtaining future work with ODOT. The agency's commissioners approved the report and suspended the contractor.

The contractor asserted several causes of action, including one for retaliation for exercising the First Amendment right to petition to government for redress. The officials' actions were motivated by the contractor's prior judicial and administrative challenges to ODOT action, the contractor alleged. Addressing an issue of first impression for the Tenth Circuit, the court held that the contractor could not maintain its claim because it alleged only private contract disputes with ODOT, rather than matters which were of public concern. In essence, the court determined that public contractors should be treated like public employees when asserting violations of the right to petition to government for redress.

Notably, the court let stand the contractor's claim that it had been retaliated against by the defendants



for publicly criticizing ODOT for the increased cost of a highway project in which the contractor was involved. The use of public funds and the objectives, purposes and mission of a government agency are matters of public concern, the court reasoned.

M. Maropakis Carpentry, Inc., v. United States, Fed. Cir., June 17, 2010

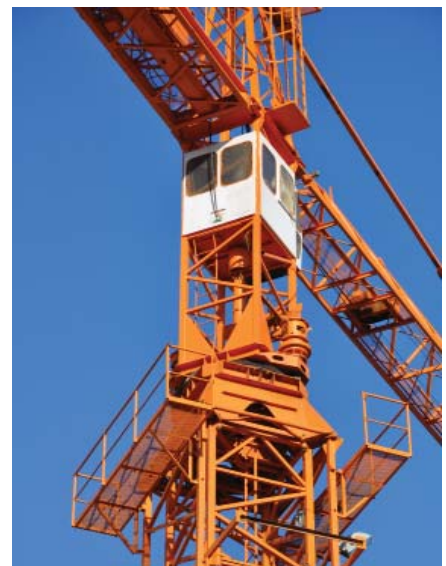
A contractor who fails to assert a valid claim under the Contract Disputes Act cannot rely on the invalid claim as a defense to a counterclaim brought by the government, according to the United States Court of Appeals for the Federal Circuit. The dispute in *Maropakis* involved work performed by the contractor at a Navy facility. The work was delayed several times and upon its completion, the contractor wrote to the government's contracting officer requesting that the contract time be extended. The government applied liquidated damages against the contract payments based upon the delays.

The contractor sued, and the Court of Federal Claims granted the government's motion to dismiss, determining that the contractor's

letters did not meet the CDA's requirements for a claim. Because the invalid claim for contract extensions also formed the basis of the contractor's affirmative defense, the Court of Federal Claims granted summary judgment to the government on its counterclaim for liquidated damages.

On appeal, the Federal Circuit stated that the contractor's failure to follow the correct claim procedure meant the Court of Federal Claims had no jurisdiction over the contractor's claim. Relying on the language in the CDA, the circuit court also declined to create an exception to the claim requirements when the contractor's claim is made in defense to the government's claim.

Maropakis illustrates both the difficulty of navigating through the sometimes difficult claims process related to government projects, and the serious consequences that can follow from failing to follow the proper claims procedure. Government contractors would be well advised to consult with qualified legal counsel as soon as a potential dispute with the contract governmental entity arises.



2010 OKLAHOMA LEGISLATION IMPACTS WIND FARM CONSTRUCTION

By *LeAnne Burnett*

According to recent remarks by Denise Bode, a former Corporation Commissioner, now CEO of the American Wind Energy Association, Oklahoma has the wind resources sufficient to provide more than 30 times Oklahoma's current electricity needs. Oklahoma currently ranks 11th in the nation in wind installations, with 1,130 megawatts of wind power on line, and another 381 megawatts under construction. Oklahoma stands to benefit from the boom in wind energy development due to its resource potential and its centralized location.

Until this year wind development in Oklahoma has gone largely unregulated. The 2010 Oklahoma Legislature passed laws that affect Oklahoma wind energy development projects. The first bill puts restrictions on severing the surface estate and the airspace above it. SB1787 amends the Oklahoma Airspace Act, 60 O.S. 2001, §801 et seq., and requires that commercial wind and solar project developers lease airspace only from the surface owner. This bill took effect July 1, 2010.

The Legislature also created the Oklahoma Wind Energy Development Act (codified at 17 O.S. §§ 160.11-160.19), the first step toward regulating wind energy projects. The Oklahoma Corporation Commission has jurisdiction to enforce the Act. The act provides for decommissioning and financial security mechanisms to cover the estimated costs of decommissioning the wind energy facility. The Act also requires the project developer to:

disclose to the landowner the electrical output from the facility where the rental to the landowner is based on electrical output;

make available to the landowner operating records supporting the electrical output calculation;

file annual generating reports with the Corporation Commission;

and obtain general liability insurance on the operation of the facility in an amount consistent with prevailing industry standards, naming the landowner as an additional insured.

The Corporation Commission is authorized to promulgate rules to implement the provisions of the Act. This bill takes effect January 1, 2011.

Third, the new Aircraft Pilot and Passenger Protection Act, 3 O.S. § 120.1 et seq., which took effect on October 1, 2010, regulates through permits potential structural obstructions to air navigation. The Act applies to additions to structures and new structures planned to attain a certain height within a designated distance from military bases and most public-use airports. The Act does not specifically address wind turbine construction, ad-



ressing construction or alteration of tall structures generally. The new law explicitly does not replace local zoning authorities' ability to pass ordinances or regulations governing land use that may affect airports.

LeAnne Burnett serves as a shareholder and director in the Firm's Oklahoma City office.

OSU-OKC OFFERS A "GREEN" CONSTRUCTION DEGREE

As of this fall, Oklahoma State University-Oklahoma City offers an associate of applied science degree in renewable and sustainable energy. The degree answers the "green" construction movement's demand for accredited instruction and the industry's need for a source of qualified workers. In addition to general education requirements, the program offers classes in blueprint reading and drafting, mechanical equipment of buildings, ele-

ments of electricity and electronics and several specifically "green" courses:

- Leadership in Energy and Environmental Design ("LEED") standards and construction
- green building systems and sustainable construction
- renewable energy applications
- residential wind design and applications,
- solar design and applications
- geothermal design and applications
- residential energy audits
- commercial building energy audits

The University developed the degree program with input from an industry advisory committee.

WORKERS' COMPENSATION LEGISLATIVE UPDATE: Finally, some positive changes for employers

By Madalene A.B. Witterholt

This summer the legislature made several changes to the Workers' Compensation Act. While some of them are technical in nature, many are encouraging to employers who haven't seen anything good in a long time. While the following is not exhaustive, it should give the reader a feel for the new legislation:

Permanent Partial Disability (PPD) rate decreases to maximum of \$323.00 with a minimum of \$150.00 per week. For the first time in this author's memory, the legislature has reduced the rate of compensation for an injured worker. An example of the realistic effect of this new PPD rate is that if an employee was to receive an award of 25% whole person PPD (a standard post surgical finding) that award would now be valued at \$40,375.00. This is a decrease of \$4,500.00 from the value of the award prior to 8/27/2010.

Workers' Compensation exclusive remedy provision tightened. As result of a series of cases stemming from the controversial Parret decision, employers were finding themselves liable outside the protection of the Workers' Compensation Court for on the job injuries. This litigation allowed injuries to go before juries in District Court and not have the awards limited by the Workers' Compensation guidelines. Specifically, the new legislation provides:

An intentional tort shall only exist when the employee is injured as a result of a willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. (emphasis added)

New causation requirement. Employment must be not only the major

cause of an employee's injury, it must be more than 50% of the cause of the employee's resulting disease, injury or illness to be specifically related to work. Note: the legislation specifically states that the denial of a claim under this provision of the Act will not create a separate cause of action in district court for this same injury.

Objective medical evidence becomes more objective. Doctors are directed to utilize evidence of impairment that is determined through objective methods that "cannot come under the voluntary control of the patient." Further, the law now provides:

When determining physical or anatomical impairment neither a physician, any other medical provider, a judge of the Workers' Compensation Court nor the courts may consider complaints of pain. For the purpose of making physical or anatomical impairment ratings

to the spine, physicians shall use criteria established by the AMA [American Medical Association]Guides . . .

This is significant in how doctors address a final determination of impairment and should minimize the effect of the dramatic, "coached" employee. Further, the employee's subjective pain can not be used as criteria in determining impairment under the AMA Guides.

Continuing medical maintenance. This is the aspect of Workers' Compensation Law that keeps a claim going on indefinitely. The new law narrows the scope of what can be awarded:

medical treatment that is reasonable and necessary to maintain Claimant's condition resulting from the compensable injury or illness . . . Continuing medical maintenance shall not include diagnostic tests, surgery, injections,



Workers Compensation Continued.

counseling, physical therapy or pain management devices or equipment, unless specifically authorized by the Workers' Compensation Court in advance of such treatment. (emphasis added)

An injection is not surgery. This is an area of much controversy in workers' compensation law and the findings by judges that an injection is a surgical intervention have resulted in excessively large awards being given to what are otherwise non compensable soft tissue injuries. Further, this new law should result in shorter time periods of TTD for employees getting them back to work faster and reducing over all costs.

What is the work place? The legislature has attempted to provide a map of where an employer starts and ends its responsibility for on the job injuries. Specifically,

[e]mployment shall be deemed to commence when an employee arrives at the employee's place of employment to report for work and shall terminate when the employee leaves the employee's place of employment, excluding areas not under the control of the employer or areas where essential job functions are not performed.

This raises the question of what is a place where essential job functions are not performed? Is it a cafeteria? Is it a restroom? These are places that case law touches on. This author believes that the general ingress and egress approach to responsibility for on the job injuries is now codified.

Permanent Total Disability is no longer permanent. An employee can now only get Permanent Total Disability (PTD) until he or she reaches "the age



of 100% social security retirement or for a period of 15 years, whichever is longer".

Number of Judges reduced. The new legislation allows for a phase out of the current ten judges to a total of eight. It also does not allow a judge to be re-appointed until he or she sits out for three years. Three of those judges shall be appointed to the Tulsa bench. The judges will now appointed for eight-year terms instead of the previous six-year terms. This should add more stability to the court and help keep the Tulsa cases moving more quickly, a positive for all involved in the system. Significantly, the appointments will involve a certain level of Senate confirmation.

Madalene Witterholt is a shareholder and director in the Firm's Tulsa office.

Our Practice

Crowe & Dunlevy's Construction Law Practice Group provides a comprehensive array of legal services to businesses engaged in the construction, real estate and related industries. Members of the practice group have extensive experience advising and assisting clients in all phases of real estate development and construction, from property acquisition through groundbreaking, applicable permitting, and project completion. The practice group's litigation team has successfully represented developers, contractors and builders in both state and federal court and with regulatory agencies. In addition to working with buyers and sellers, our real estate specialists frequently assist property owners in achieving and maintaining compliance with federal and state laws and regulations, including consideration of Brownfields development and voluntary cleanup programs for environmentally challenged properties.

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