

SUBCONTRACTORS CAN'T FOBB-OFF SAFETY TO GENERAL CONTRACTORS

By: Bill Preston

Certainly, for the Canadian Construction Industry, safety of the people and the project has become a dominant consideration. All standard construction contract documents specifically impose a safety obligation upon all participants. Regular "tool-box" meetings are no longer unusual. Yes, sometimes the contract language purports to transfer this obligation, but these terms haven't been particularly effective in avoiding OH&S prosecutions; and, a recent Ontario Court of Appeal case splashes cold water on the notion that a builder can avoid liability for damages caused by their unsafe method of work by seeking to hide behind what others on the job site said and directed. In *Jelco Construction Ltd. v. Vasco*, the subcontractor tried to avoid liability for fire damage to the project on the basis that the general contractor's site supervisor had said: **"I will take responsibility if anything happens."**

The project involved replacing the exterior brick wall of a 14 story multi-residential high rise while the residents continued to occupy their units. The design called for removing the exterior brick walls and attaching steel ledger angles to the exposed butt ends of the concrete floors for the purpose of supporting the new bricks. While, the general contractor's chosen method of work involved:

- Place steel load-bearing bulkheads in the residential units next to the exterior wall.
- Remove 20' wide stripes of brick from the top of the building to the bottom (drops).
- Repair the butt ends of the concrete floors exposed by the drop.
- Drill core holes in the butt ends and bolt the ledger angles to the butt ends.
- Lay the new brick supported by the ledger angles.

By mid October and somewhat concerned about impending winter conditions, Jelco removed the exterior wall of the first drop and, using the three holes in the ledger angles which had been made during the fabrication process, bolted all of the ledger angles to the butt ends of the exposed 14 floors. It was then that it was decided that each of the angles needed more bolts. So, on Friday evening, Jelco's site supervisor phoned Vasco and asked him to come over early Saturday morning to torch cut additional holes into the angles. There was no written contract prepared for Vasco's work; it was all verbal.

When Vasco arrived at the job site on Saturday morning, he discovered that the scaffolding was still all in place and that the ledger angles from the 1st floor to the 14th floor of the drop were bolted to the building. His 45 years of welding experience immediately recognized that there was a real risk of fire if he torched holes into these angles because up on the scaffold he couldn't control the sparks. Indeed, at trial, he candidly admitted that Jelco's proposed method for his work was dangerous to himself, the building, the workers, and the occupants. Vasco immediately expressed this risk to Jelco's site supervisor and recommended that all of the angles be brought down to the ground where the sparks could be better controlled. But, Jelco's supervisor pushed back - it was too time consuming; moving the angles up and down the scaffolding was too difficult; and, if the angles were now removed it would be difficult to re-align the core holes when his crew had to re-bolt them to the building. Rather, the supervisor instructed Vasco to

torch cut the additional holes needed in the ledger angles while they were bolted to the building and offered him the assistance of a Jelco labourer to watch for and control sparks.

So, Vasco started as the supervisor directed, without any precautions such as fire blankets, water supply, or even a fire extinguisher. Fortunately, all went well until the 13th floor. There, Vasco discovered that the exterior of the bulk-heads had been covered with tar paper. He knew that this posed even a greater risk, so he told Jelco's site supervisor that he did not want to continue. But, the general contractor's site supervisor convinced him otherwise. He promised an additional labourer for the purpose of holding a piece of plywood between where Vasco was cutting and the tar paper, while the supervisor himself would be on the level below watching for sparks. The supervisor also assured Vasco **“don't worry, if anything happens it will be my responsibility.”**

Vasco then cut two holes at the 13th floor successfully. But, while cutting the third hole, “something happened.” A fire started on the level below and the supervisor was desperately trying to extinguish it with his bare hands. Promptly, Vasco, the two labourers, and Jelco's site supervisor fled, and the Fire Department was called. The fire caused uninsured property damage to the project, to Jelco's equipment and supplies, and many months of delay during which Jelco was terminated by the Owner. Jelco sued Vasco in negligence for \$448,307.75; while, Vasco defended on the basis that Jelco had voluntarily assumed all the risk of fire. Vasco also counterclaimed for his unpaid subcontract work and damage to some of his equipment. What did the Court's do?

The Trial Judge found Vasco 50% liable for Jelco's loss and refused Vasco's claim for his subcontract price on the basis that Vasco “substantially failed to perform his subcontract work because it was not done in a good and workmanlike fashion.” The judge noted that Canadian law no longer favours the defence that the other party assumed all of the risk and mentioned that judges today prefer to split the responsibility between the negligent parties as the Judge sees fit. Thus, here, Jelco's site superintendent's statement could not prevent Jelco from suing Vasco because:

1. The supervisor's statement was a spur-of-the-moment cavalier remark;
2. The supervisor made the statement at a time when he had not near as much awareness of the degree of danger as Vasco's 45 years of experience permitted him;
3. And, this supervisor did not use the right language - which is: **if there is a fire, Jelco will not sue you and will indemnify you for any action by others.**

On the other hand, the Judge ruled that Vasco should only pay 50% because the general contractor's site superintendent not only carelessly permitted a subcontractor to work unsafely, but he also encouraged the dangerous method of subcontract work after he had been warned by a person who knew better than he did. Vasco appealed. What did the Court of Appeal do?

The Ontario Court of Appeal supported all of the trial judge's findings except two. First, they reduced Vasco's liability to 25% because, the general contractor's site supervisor had to know that he had at least some level of pressure on Vasco to go ahead though the supervisor ought to have known he should not. The Court pointed out that this doesn't absolve Vasco, but it does tip the scale of responsibility in favour of Vasco, thus reducing his liability from 50% to 25%. Also,

the Appeal Court shaved Jelco's damage claim such that Vasco's eventual responsibility was reduced to \$58,783.57.

CONCLUSION

So, what can we learn from Vasco's disastrous Saturday? To me:

1. Never choose your method of work based upon someone else at the job site saying that they would take the risks; rather,
2. Though it may be a general contractor, owner or consultant with a lot of influence on the job site mandating that you adopt a dangerous method of work, either kick sand in their face or insist that they see your lawyer before you start your work as they direct.