IN THIS ISSUE...

Air Conditioning Contractors of America
Greater New York Chapter
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Greater New York Contractors' NEWS

Air Conditioning Contractors of America
Greater New York Chapter

www.accany.org **PLEASE ROUTE THIS PUBLICATION WITHIN YOUR ORGANIZATION** April 2011

President's Message

Michael Newman

I think it is safe to say that winter is finally over. Now is the time to prepare for the spring and hopefully another HOT summer.

The March meeting featured Will Matlin Esq. of the law firm Hoffman & Roth, LLP. He discussed creating an indemnification agreement that protects your company, avoiding indemnification agreements that place liability on your company for the negligent acts of others, partial

Turn to President's Message on page 3

ACCA, a federation of 60 state and local affiliated organizations, is the leading trade association representing the business, educational, and policy interests of the nation's heating, air conditioning, ventilation and refrigeration contractors. ACCA represents over 9,000 small businesses nationwide through its federation of affiliates.

PRESIDENT'S MESSAGE *Continued from page 1*

indemnity and what that means to your company and certificates of insurance. It was a great meeting. For more information please contact Will Matlin at 212-964-1890.

This year we will be focusing on increasing the membership within our organization and seeking out greater participation from our contractors, suppliers and associate members. If anybody has an idea or issue relating to our business and industry, please get in touch with us and we will make it happen. How can ACCA help you this year? Are there any issues or topics you want to hear about this year?

Please use ACCA as a networking experience and a place where you can bring the hottest and most relevant business topics back to your day to day operations.

Thank you for your support and I look forward to seeing you at the next meeting! Don't forget Casino night April 6th at Westbury Manor! ***— Mike Newman***

Make a habit of checking the ACCA Chapter website at www.accany.org

ACCA Greater NY Chapter

Editor's Notes

by Anthony N. Carbone

WELCOME TO SPRING 2011 AND THE BEGINNING OF THE AIR CONDITIONING SEASON. Planned maintenance begins and hopefully, another round of hot weather will arrive. Last year's record heat has left a long memorable impression on many people. Those who suffered through last year's record high temperatures aren't happy to imagine another season of miserable discomfort. With that in mind, many homeowners are going to put their tax refunds to good use. Consumers will plan ahead with a reinvestment strategy for their homes. With a lot of consumers lining their "nests," we will see an influx of inquires for new installations of air conditioning....in this case, hopefully, HVAC contractors will be "winning."

It had been rumored that 2 step distribution was around the corner for the Carrier Corporation and on March 2, 2011 it was announced that Watsco will enter a "joint venture" with Carrier Northeast which has 210 million dollars in sales for 2010 from 28 locations in 11 states (see the article on page 7). Watsco will own 60% of Carrier Northeast distribution, assuming all customary regulatory approvals are received. These are changing times where all corporations are looking to shed overhead. This may be a cost cutting measure implemented by Carrier Corporation. Northeast distribution currently employs 230 people.

Our last program meeting at the LaGuardia Marriott was of great interest. This was one of the most relevant topics we have ever presented. I want to thank William Matlin of Hoffman & Roth LLP for his excellent presentation regarding liability indemnification and hold harmless clauses, what their validity is and what does an "Accord Liability Certification" actually provide to the party who requests it. This one hour presentation was extremely informative. You would have paid hundreds of dollars for this consultation from this seasoned and experienced attorney. Hats off to our president Mike Newman from Standard Refrigerator for suggesting this recent topic. You can't afford to miss our next meeting as well as our social gatherings that bring together many of our leaders from our industry, in one space, sharing important and topical current information that can't be replicated elsewhere. If you are not a member we invite you to learn the importance of joining us at the Greater New York Chapter of ACCA. You won't be disappointed!! ***– Anthony N. Carbone***

Notes From National

Existing Residential Building Performance Improvement Is Under ANSI Public Review

Air Conditioning Contractors of America Educational Institute (ACCA-EI) Standards Task Team (STT) announces an American National Standards Institute (ANSI) public review period for a new standard "Existing Residential Building Performance Improvement." The public review period started on March 11, 2011 and will close on April 25, 2011.

This proposed standard identifies the metrics, tolerances, approved procedures, and required documentation to (1) evaluate the current performance, (2) establish the basis to create performance improvement specifications, (3) identify approved approaches to implement the specified improvements, (4) and establish the procedures to objectively assess the performance change of the completed improvements.

This proposed standard is referenced as BSR/ACCA 12 ERBP-201x; it and the required response form can be downloaded at www.acca.org/ansi. Comments must be submitted on the response form in accordance with the instructions on the form. Comment response forms and questions must be addressed to Dick Shaw at standards-sec@acca.org. •

ACCA Joins ConsensusDOCS Coalition

The Air Conditioning Contractors of America (ACCA), has joined the ConsensusDOCS Coalition. ConsensusDOCS is a coalition of 33 design and construction industry associations that creates standard contract documents for use by all participants in the construction industry.

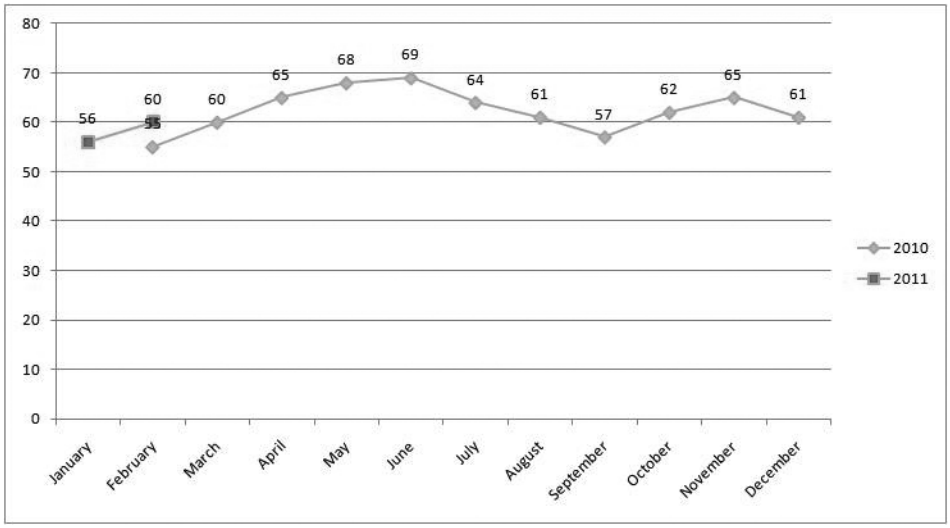
As a member of the coalition, ACCA now has the opportunity to provide input and feedback into the creation and updates of the contracts that are available through ConsensusDOCS. ACCA members also receive a 20 percent discount when purchasing the documents.

"ACCA joined ConsensusDOCS to give our members access to a large number of contracts that have been created and reviewed by experts in the construction industry to make them fair for all parties involved," said Hilary Atkins, ACCA's general counsel, and senior vice president of finance & administration. "While each of these documents should be reviewed by the contractor and their legal counsel before using them, this library gives contractors a solid starting point to work from, making the process easier."

To find out more about ConsensusDOCS visit www.acca.org/members/consensusdocs. •

Contractors Gaining Confidence

The Contractor Comfort Index (CCI) shows that contractors, while still cautious, are becoming more confident in their outlook for short-term growth. The Air Conditioning Contractors of America (ACCA) began measuring contractor attitudes toward short-term economic growth with the CCI in February 2010.



For February 2011, the CCI is 60. The CCI also shows that contractors are feeling more confident than they were 12 months earlier when the CCI was 55.

The CCI is calculated based on a survey of the association's contractor members, who are asked how positive they feel about new business prospects, existing business activity, and expected staffing decisions in the short-term future. Weighted and averaged into one number, a CCI of 50 or above reflects anticipated growth.

The CCI is released prior to the start of each month; the next index number was to be released during the last week of March.

Watsco and Carrier to Form Distribution Joint Venture for the Northeast

Watsco, Inc. announced that it has executed a letter of intent to form a joint venture that will include Carrier Corporation's company-operated HVAC distribution network in the northeast United States. Following the transaction, Watsco will own 60% and Carrier 40% of this joint venture. The transaction is subject to the completion of a definitive agreement and receiving customary regulatory approvals.

Carrier's company-operated northeast distribution network had revenues of approximately $210 million in 2010, with 230 employees serving 11 states from 28 locations, including New York, New Jersey and Connecticut. Products sold include a broad offering of Carrier, Bryant and Payne-brand residential, light-commercial and applied-commercial systems, along with related parts and supplies. Watsco has also agreed to contribute to this joint venture its northeastern locations, which serve customers in New York, New Jersey and all of New England with 2010 revenues of approximately $60 million.

There are approximately 74 million central air conditioning and heating systems installed in the United States that have been in service for more than 10 years. Older systems often operate below government mandated energy efficiency and environmental standards. Watsco has an opportunity to accelerate the replacement of these systems at a scale greater than its competitors as the movement toward reducing energy consumption and its environmental impact continues. •

Johnson Controls Agrees to Acquire EnergyConnect

Johnson Controls, a global leader in delivering products, services and solutions that increase energy efficiency in buildings, and EnergyConnect, a leading provider of smart grid demand response services and technologies, announced the signing of a merger agreement under which Johnson Controls would acquire the outstanding shares of EnergyConnect. The transaction, which is subject to customary closing conditions, is expected to be completed by July.

The acquisition would position Johnson Controls' Building Efficiency business as a demand response leader in the large commercial, industrial and institutional markets. EnergyConnect's demand response technology and service platform provides energy managers and facility operators real-time energy information and access to energy markets, enabling them to control their energy spend. The combination of energy efficiency, smart building technologies and demand response services creates an additional platform for growth in a rapidly growing segment of the energy market. •

People & The Workplace

By Alan B. Pearl,
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Is an Anti-Union Shift Taking Over Politics?

States like Wisconsin, Indiana, and Tennessee have recently debated legislation that would limit the power of unions in the public workforce. This anti-union sentiment has most recently appeared in the federal government in the form of the National Right-to Work Act ("NRWA").

If passed, this new legislation would repeal the provisions in the National Labor Relations Act ("NLRA") and the Railway Labor Act ("RLA") that permit employers and unions to draft agreements requiring union membership and payment of union dues or fees a condition of employment. A similar bill was introduced to the House in 2009, but failed to pass in that year's political climate. Two years later, the political attitude has changed significantly which could result in the successful submission of this bill.

The purpose of the legislation would be to prevent unions from requiring individuals to join their ranks and/or pay union dues unless employees voluntarily chose to do so. Not only would it lessen the strength of unions, but it would also allow employers wider latitude with selection of individuals that they could hire.

This bill has been referred to the Senate for consideration. This office will update you frequently with the progress of this bill.

Sexual Harassment: the Employer's Role and Liability

Regardless if you are a sports fan or not, most people have heard that Brett Favre has been sued for sexual harassment by two former New York Jets ("Jets") employees. What most people don't know is that the Jets organization and one of their managers are also named in this lawsuit.

The alleged harassment occurred during the time that Favre played for the Jets. Two former Jets massage therapists allege that Favre made sexually harassing comments towards them and contributed to a hostile work environment. After the two women rejected Favre's advances, it is claimed that they were fired by a Jets manager who allegedly knew about the harassing behavior but did nothing to stop it. The suit also claims that the Jets do not have an appropriate anti-sexual harassment policy in place, and failed to take action that would have prevented the alleged sexual harassment.

These types of cases can be confusing for employers that think that responsibility for sexual harassment lies solely at the feet of the harasser. In order to understand how this type of lawsuit can be made against an organization, employers need to know the scope of liability for their employees' actions.

Employers may be liable for the misconduct of a supervisor which is made possible by the abuse of his or her authority. When a tangible job benefit of the employee is affected as a result of the supervisor's harassment, the employer will be held strictly liable, regardless of whether any higher management authority was aware of the harassment or whether the employee reported the harassment. This is so because the supervisor's action in affecting the tangible job benefit is deemed to be the act of the employer.

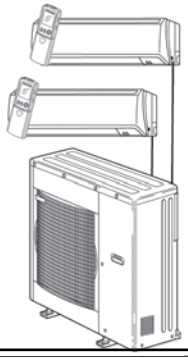
When a tangible job benefit is not affected, the employer can be held liable for the supervisor's harassment unless the employer can prove the following two-prong affirmative defense: i) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and ii) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The employer must prove both prongs of the affirmative defense by a preponderance of the evidence.

A key element in the first prong is whether the employer has established, disseminated, and enforced an anti-harassment policy and complaint procedure. An adequate policy and complaint procedure will help establish that the employer made reasonable efforts to prevent harassment. However, a policy alone is not sufficient if it is not enforced. An employer's response to complaints of harassment will determine whether the employer acted reasonably to promptly correct any harassment behavior. The employer must respond by promptly, thoroughly and impartially investigating any allegations of harassment.

It remains to be seen whether the Jets will be able to prevail in court. However now is an excellent time to review internal policies and developing a tight defense before being caught unaware.

Portnoy, Messinger, Pearl and Associates can help you further understand the topics discussed in this article, and adapt your internal HR policies accordingly. Of course, any questions about the above topics can be addressed to me at ABPearl@pmphr.com. •



Accident Management for Companies with Medium-Size Fleets

By Kelly Hiner/Enterprise Fleet Management

In a typical fleet, 20 percent of the drivers will be involved in some type of loss in any given year. Whether the damage is a cracked windshield or the vehicle is a total loss, it's important not to learn by "accident" that what initially seems like "low cost claims management" may not actually be low cost. In the long run, it could end up costing a lot more with more expensive repair bills, longer downtime while the vehicle is out of service, and lower resale value if not repaired to the highest quality standards.

Properly managing accident costs is more likely to happen when working with a fleet management company whose repair team has completed technical training courses in collision repair. Such programs are offered by the Inter-Industry Conference on Auto Collision Repair (I-CAR). A not-for-profit international training organization dedicated to improving the quality, safety and efficiency of auto collision repair, I-CAR provides training in estimating, as well as various technical aspects of collision repair.

Getting the most satisfaction when a claim is settled begins with the initial estimate. Estimators who have completed I-CAR training not only are skilled at inspecting and analyzing collision damaged vehicles, they're well prepared to provide the most comprehensive repair plan to ensure the highest quality service at the lowest possible price.

Sometimes, when the I-CAR trained estimator is part of the customer's professional fleet management team, a decision may be made not to fix a vehicle. With access to all information about the customer's fleet, determining factors can include everything from how much money is still owed on the lease, to the vehicle's resale value, as well as the length of downtime and cost of renting a temporary replacement vehicle.

When the decision is made to repair a vehicle, knowing that all of the work is necessary and will be done correctly also depends on having the best possible relationship with the collision repair center. This includes monitoring repairs on a regular basis, keeping the customer apprised of hidden damages discovered and documenting the work is being done on the vehicle, especially additional repairs that may affect the final cost and/or length of downtime.

Working with collision repair professionals who are part of a fleet management company can also have other advantages for business owners. For example, the fleet management company may pay all repair expenses directly to the repair center and bill the customer as part of the lease agreement. This relieves the business owner from needing to track and monitor repair invoices or issuing checks to reimburse drivers for any repair expenses paid by them personally. In addition, the fleet management company can maintain any loss history reports with details of all aspects of any claims.

Managing vehicle accidents is a complicated business that requires experience and expertise to ensure timely handling of claims and quality vehicle repairs at the lowest possible cost. For businesses with medium-size fleets, the best advice is to partner with a fleet management company that can handle claims with minimal driver involvement; provide one-call service with a dedicated claims adjuster; locate repair facilities anywhere nationwide; handle all payment terms for repaired vehicles; easily arrange replacement vehicles; and dispose of totaled vehicles timely and efficiently. The bottom line, as always, is to get drivers back on the road as quickly as possible.

Kelly Hiner is Group Sales Manager for Enterprise Fleet Management in New York and can be contacted at 973-709-2499. Visit the company's web site at www.enterprisefleet.com or call toll free 1-877-23-FLEET. •

WELCOME NEW MEMBER

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Statement From Stuart S. Zisholtz, Esq.

Get Everything In Writing!

During most construction projects. a subcontractor is directed by the general contractor to work outside the scope of his original contract. Often these change orders are told to the subcontractor without any paper work.

In the private sector, the Courts have continuously held that based upon the General Contractor's conduct in orally directing the subcontractor to proceed with the work, the General Contractor could not argue that there were no written tickets or change orders. If the additional work was performed, the subcontractor was entitled to payment whether the change order was in writing or not.

In the public sector, however, the Courts have held that the failure by the subcontractor to obtain written authorization precluded the ability to recover for an oral change order.

In an unusual case, the Appellate Court in New Yolk rejected the argument from the General Contractor that the subcontractor cannot collect because it did not obtain written authorization for the change order. The Court based its decision on the fact that the General Contractor's own representative testified that the General Contractor directed the subcontractor to work overtime. The General Contractor's representatives also testified that they had agreed to pay for the premium time over and above the contract price just as they had done for other overtime previously performed on the project. There was also further testimony from the General Contractor's Project Manager that the subcontractor was instructed not to bother with daily tickets and to get the work done.

Based upon the evidence, the Court refused to accept the arguments raised by the General Contractor that they are absolved from liability because the subcontractor failed to obtain written authorization for the change orders.

As I indicated in the past, the most important aspect of any construction project is to get everything in writing. The more you have in writing, the better off you will be. If you fail to do so, you expose yourself to litigation. In this recent case, the subcontractor was fortunate enough to have the Court rule in its favor. However, it is an uphill battle considering the Courts generally rule against the subcontractor who fails to obtain the change orders in writing.

Never let your lien time run out!

For a free copy of a pamphlet pertaining to Mechanic's Liens and Payment Bond Claims, kindly contact me or the Association.

Stuart S. Zisholtz is a partner in the law firm of Zisholtz & Zisholtz, Mineola, New York, a general practice firm specializing in Construction Law and Mechanic's Liens. He is also a member of the Greater New York Chapter, ACCA. He can be reached at 516-741-2200. •

ACCA JUNE MEETING

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