



Pictures, Pictures, Pictures.....

What is the Focus?

By: Jim Redmond, AGC NYS Safety Services Director

AGC NYS has been actively involved in providing jobsite inspection services for our Members for over two decades. Our style of conducting inspections has not changed in that time and we are firm believers that the practice of taking pictures of violations observed during a safety walkthrough is counterproductive at many levels. It has become glaringly obvious that taking pictures of violations for the inclusion in safety reports has become the norm. Many of our members utilize such a practice as they conduct their own internal inspections. Practically all of the safety consultants which provide jobsite inspection services market that they include pictures as part of the safety reports they generate. It seems that owners believe that by doing so, they can get a better sense of what safety issues exist at their projects by reviewing reports with pictures included.

Is this the way to go? Here at AGC NYS, we do not believe so and it seems appropriate to take some time to share our thoughts regarding this practice. Obviously, your company will ultimately decide if documenting inspection results with the inclusion of pictures is the best practice for you. At the end of the day, it will be yours to defend so it is clearly a corporate decision that needs to be made. That being said, make sure your company is aware of the many pitfalls that go along with such procedures.

Over the years, the AGC NYS safety services division has lost potential clients because we refuse to conduct jobsite safety inspections that include pictures from the walkthrough. Despite our efforts to caution a contractor regarding this practice, they make a determination that it would be helpful to them in their efforts to maintain a safe jobsite. How a contractor wishes to document a safety inspection is entirely up to them but we will not waver on our stance because we believe it is a bad practice and it could potentially harm a contractor by doing so. AGC NYS is cognizant of this and would never compromise our firm belief in this regard and throw caution to the wind for a business opportunity. We are here to serve our members and we believe we would

not be doing so if we performed inspections in this manner.

The purpose of conducting a jobsite inspection is to identify and correct safety violations as well as to preplan for upcoming activities. At what point did witnessing an employee violating a safety rule become a photo opportunity? Personally, I believe the proper response when observing a violation is to engage the employee and immediately correct it. What happens and what exposure is a company taking on when the employee gets injured after the picture is taken? Let's say the employee is standing on the top of a step ladder, which is a clear violation of OSHA safety rules, and falls after a picture is taken. Is that not problematic? Would anyone with a sound mind consider the point that perhaps we should have discontinued the practice by immediately stopping the employee? Why would one let a violation continue so a photograph can be taken?

An incident similar to the one just described occurred recently here in New York State. If you have not already guessed, the picture that was taken just prior to the employee getting hurt was used as evidence in the case. The picture showed the employee in violation smiling for the camera as the safety professional took a picture for inclusion in a report. It is safe to say it may have been prevented if the safety professional acted in the more appropriate manner by stopping the violation immediately. In this particular case, the employee was not seriously injured but received a handsome settlement. What if the employee was killed due to the incident? Personally, I would not want to be the one snapping photos instead of putting a halt to the condition regardless of the significance of the injury. How about you?

It doesn't seem like something one could easily defend. After all, safety inspections are designed to identify and correct violations observed. Taking the time to take a picture seems to minimize the serious nature of



a violation if remedies can be delayed until a photo is taken. We have always been more concerned about stopping it instead of getting a picture for a report. Something we think is notable to consider. What do you think?

It is also important to note that little is to be gained by taking pictures of employees in violation. If it is a concern, why would one allow it to continue? My experience from helping contractors manage their safety program and from working with the employees that perform the work is that results stem from relationships and accountability. AGC NYS and our members have had great success with improving employee safety habits by building relationships and through interaction with employees. Taking their picture puts them on the defensive and undermines the importance of what you are trying to emphasize. Pictures are worth a thousand words but actions speak volumes. What message do you think you send when you take a picture of the violation instead of stopping it?

Over the years we have also had the opportunity to review safety reports generated by safety professionals that utilize picture taking during their inspection process. It is stunning to see pictures included in those reports that show alleged violations that do not exist or shows violations that are obvious and not noted. We have also observed reports where it notes violations, accompanied with pictures, for contractors that were not their employees but are subcontractors. In the event an accident occurred, it is likely these reports would be obtained through the discovery process and would be damaging even though the affected employer(s) may have lacked any knowledge that the violation existed. On that note, it is critical that your company is in tune to the practices of subcontractors, consultants and others that frequent your projects. Be aware that their actions can cause potential liabilities to your firm.

Many of our clients and members prohibit the taking of pictures at their sites for the purpose of documenting safety issues because they believe the proper response is to immediately correct the violation. AGC NYS could not agree more. Again, what is the benefit to allow it to continue? Many of our members have full time safety professionals that utilize pictures as part of their inspection reporting. Obviously employers have the ability to exercise what means and methods they will incorporate when generating a safety report. If pictures are going to be used as part of safety

inspection reports make sure that this practice does not create an unnecessary liability. Employers need to recognize they may have to defend themselves during legal proceedings and that all pictures, videos, notes, correspondences, etc. will be shared during the process. Your company will certainly be questioned regarding the information submitted. Pictures can also be deceiving and there may appear to be a violation because of the angle at which the photograph was taken. An excavation slope configuration may look to be problematic when it actually is compliant based on the soil type. In some circumstances, picture can appear to be incriminating even though a violation does not exist.

AGC NYS reached out to Glenn Monk, managing partner at Harrington, Ocko, and Monk LLP, White Plains, NY, to get some thoughts from a lawyer's perspective. Glenn provided the following insights.

"It seems obvious that stopping a worker from engaging in an unsafe practice should be the immediate priority over documenting the act itself. The challenge presented by the taking photographs of site conditions requires balancing how they can be used to help enforce safety and document a trade's performance on the one hand against the risk that they can be used against the company in an enforcement proceeding or litigation to weaken or challenge your position. Potential liability litigation and enforcement proceedings by OSHA or state or local authorities are a reality that flow from safety practices and worksite conditions and need to be considered as part of the documentation process. It is accepted that a picture can tell a thousand words, but the object is to ensure that the many words which a picture can communicate are necessary, accurate and, frankly helpful to the purpose for creating photographic evidence. In a situation where a worker or work is in progress and deemed to be unsafe, the better practice is to stop it, have it corrected and document the now corrected condition if that is deemed necessary. Photographs of the corrected condition may be useful so at a later time no claim can be made that the condition caused an injury or damage. After an accident occurs photographs may be necessary and helpful for a number of reasons, among them establishing the responsible party, the limits of how a condition contributed to an accident, supporting your company's lack of responsibility or challenging the fact the condition could have caused the damage or injury. That said, any pictures taken as part of your "regular course of business", such as progress photographs, or included in an accident report, will be discoverable and turned over to a potential adversary in litigation and possibly an

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enforcement agency in its proceedings if you challenge a violation or citation. Photographs of a walkthrough fall into the category of a "regular course of business" document and thus fall into the category that they are discoverable just like progress photographs. The better practice is to preserve the important attorney-client privilege that attaches to having legal counsel direct the taking of photographs or counsel retain an outside investigator to take photograph or, in a post-accident situation, have your liability carrier's investigator do so. In all of these situations those photographs are not taken in the "regular course of business" and potentially can be shielded from disclosure as privileged material. The pitfalls of photographing an unsafe work practice or condition before an accident occurs, rather than correcting it or stopping it beforehand, is simply the danger that the negative message in the picture will be used against you in a legal proceeding and you will have waived the protections which on Monday morning you realize should have been in play."

Finally, a walk-through occasioned by the need to accompany an enforcement agency's inspections is a different situation from the practice of routine photographs of job site inspections. Taking photographs of what the agency representative is photographing should be done to put you in the best position to challenge the interpretations the agency may put forward and to avoid the problem of those photographs showing an inaccurate or exaggerated perspective which will be relied upon against your company's interests. Here too, the person taking the photographs on your behalf should be experienced and conscious of avoiding incriminating documentation that indiscriminate taking of photographs can often generate."

It can be challenging to navigate through this issue and

AGC NYS has had numerous discussions regarding this over the years. We know where we stand on this and will continue to conduct our inspections in the same manner that has served our clients and their employees well. Despite our discussions, many disagree with us. That does not mean we are right and they are wrong. We just have different opinions. This topic is worthy of a healthy discussion with your management team and your counsel so your company practices can be soundly developed and executed.

The common denominator here is that safety professionals all strive for the same goal. The question remains, what is the best way to get there. In our opinion, pictures have very little value. We are dealing with people. People that we are supposed to care about; that we depend on to do a good job; that we preach to about the importance of working safely and that we want to go home safely after their work day is complete. People that deserve more consideration than making them the focus of a picture in which they are doing something wrong. What a terrible message we send when we put the emphasis on the picture first. It is tough to build relationships when we take that approach. It detracts from why we are really there. Instead, stop the violation immediately than have a conversation with the employee as to why they cannot continue the practice. Employees will appreciate that approach and that policy is one that we all can live by. 

AGC NYS appreciates the contributions provided by Glenn Monk, managing partner at Harrington, Ocko, and Monk LLP, White Plains, NY, www.homlegal.com regarding this issue.



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