

Appellate Court Upholds Finding of Subcontractor  
Defective Work at Ameren's Taum Sauk Plant

by

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Missouri's Eastern District Court of Appeals has upheld a trial court's finding in favor of a general contractor and against a subcontractor for defective work the subcontractor performed at Ameren's Taum Sauk plant. The case is *Scheck Industrial Corp. v. Tarlton Corp.*, 2014 WL 3428402, decided July 15.

Tarlton Corporation had entered into a contract with Ameren to perform repairs at Ameren's Taum Sauk hydroelectric power plant. The contract required Tarlton to cut eight drain access ports into the lower section of the plant's penstock, weld steel collars composed of carbon steel around each port and install removable covers and doors over these ports. The penstock is a one-mile long tunnel, 18 feet in diameter, that transfers water from a water reservoir to turbines.

The upper portion of the penstock is comprised of A201 steel while the lower portion where the drain access collars were to be installed is composed of T-1 steel.

Tarlton did not have the requisite expertise to install the collars, so it entered into a subcontract with Scheck Industrial to perform these repairs of the penstock on a "time and materials" basis.

The lower portion of the penstock contained a different type of steel than the upper portion. Scheck Industrial did not investigate whether a different base metal was present and did not submit a new welding procedure. When 85% of the welding on the drain access ports was complete, Scheck Industrial identified cracking in the penstock just outside the completed welds.

Ultimately, Scheck Industrial applied a recommendation from an outside engineering firm (Briem Engineering) on a welding procedure to repair and rework the faulty welds. This included the removal of all defective welds, fixing the cracks in the penstock and rewelding.

Tarlton sought a total of \$733,416.00 from Ameren, reflecting the cost to complete the repair and rework of both Scheck Industrial and Tarlton. Ameren

initially rejected the claim, but eventually Scheck Industrial received payment for all of its work on the project except \$553,135.51 related to the repair and rework of the penstock.

Scheck Industrial filed a lawsuit against Tarlton for breach of contract and account stated seeking \$553,132.51. Tarlton counterclaimed for breach of contract, breach of warranty and indemnification and alleged that it was owed \$220,094.00 plus attorney fees for costs and expenses it incurred as a result of Scheck Industrial's faulty work and breach of contract.

After a four-day bench trial, the trial court awarded Tarlton \$220,094.00 for "labor and general conditions costs" and an additional \$190,383.19 for attorney fees. Scheck Industrial recovered nothing on its claim.

The \$220,094.00 broke down into \$94,599.00 for "support labor and remedial work" and the remaining amount was for general conditions costs including project management time, forklifts, job trailer rental, trucks, fuel, amounts paid to the outside engineering firm, testing costs for rewelds and related items.

On appeal, the Eastern District noted the testimony of Scheck Industrial's quality control consultant, who submitted Scheck Industrial's welding procedures for the drain access collars. He testified that he never saw or asked for the drawings or specifications for the project and that in hindsight the welding procedures he submitted and that Scheck Industrial used were not appropriate for welding A572 carbon steel to T-1 steel and would cause the penstock to crack.

The appellate court also noted that the subcontract contained an indemnity provision that indemnified for liability and loss. The provision required Scheck Industrial to "indemnify and hold harmless [Tarlton] from and against any and all loss, claims, suits, causes of action, liability, damages, costs [and/or] expenses . . . incurred by [Tarlton] . . . as a result of . . . any work or operations under or in connection with this Subcontract." The court found that this language was sufficiently broad that it supported Tarlton's counterclaim for its damages and attorney fees incurred by Scheck Industrial's improper work.

Rejecting Scheck Industrial's argument that Tarlton failed to mitigate its own damage, the Court of Appeals noted that Tarlton acted promptly to cease further defective welding. Tarlton worked with Scheck Industrial for a reasonable amount of time to develop a solution and when one did not come about, Tarlton retained an outside consultant.

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