

The image features two golden, stylized 3D figures against a white background. The figure on the right is standing upright, wearing a hard hat and carrying a large, rectangular box on its back. The figure on the left is in a crouching or crawling position, also wearing a hard hat. The text 'Mock Trial 2014' is centered over the figures, and 'The Measured Mile' is positioned below it.

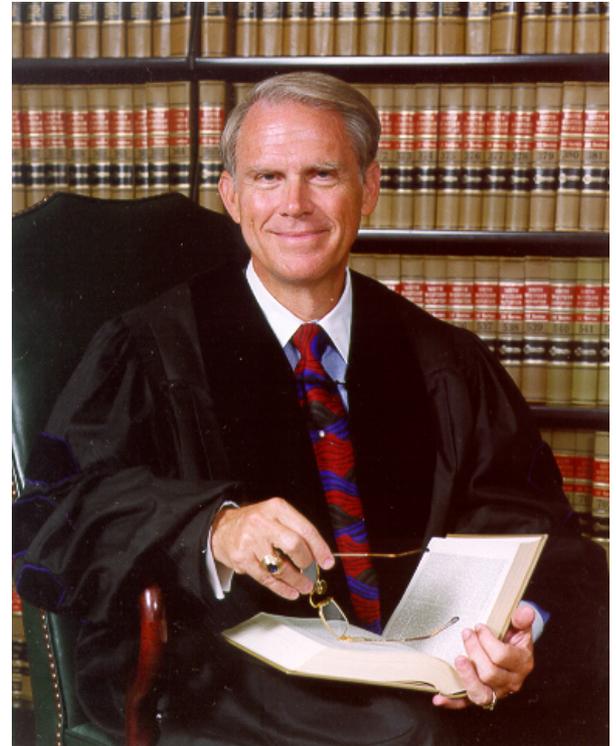
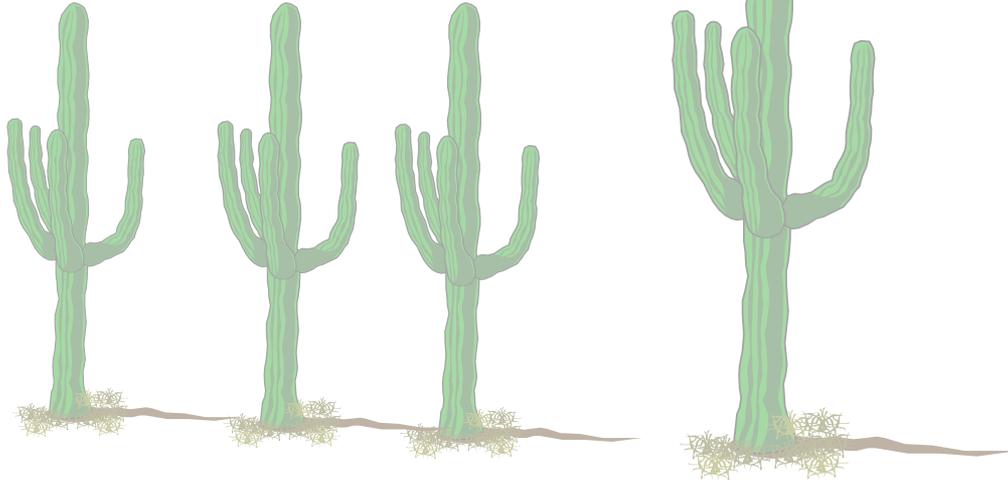
Mock Trial 2014

The Measured Mile

Hon. John M. Marshall

Presiding

- Senior Judge of the 14th Judicial District Court, Dallas County, TX
- **MC²**, PLLC - *real trials, real judges, real appeal.*
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- Honorary Professor of the University, UMCS, Lublin, Poland
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Expert for the Contractor on Twotown



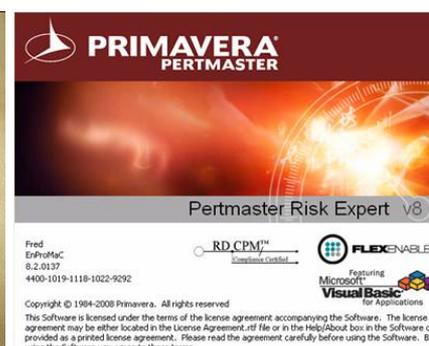
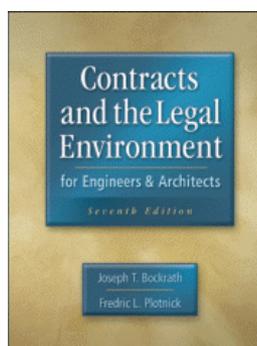
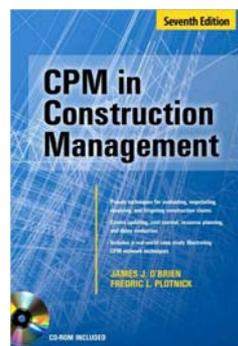
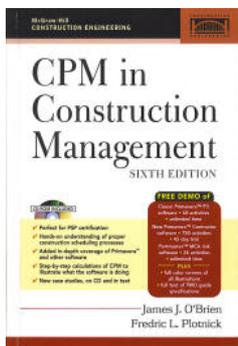
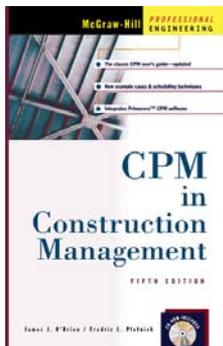
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Mock Trial 2014

The Measured Mile

Traditional Methodologies

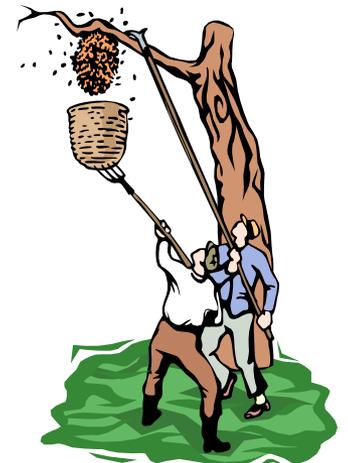
- Traditional methodologies for measuring the cost impact of disruptions are much like those for measurement of delay prior to the advent of CPM.

- Often, a blunderbuss of alleged causative (other side) leading to disruptions is filed against a chart indicating planned versus actual costs.



Measured Mile

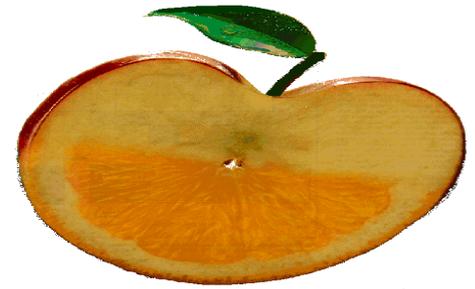
- The "measured mile" approach to isolating the disruption costs of acceleration is generally accepted by the courts as being a reasonable way of determining the damages incurred over and above those which should have been expected.



Dwight A. Zink in April 1986 edition of the AACE journal *Cost Engineering*



Measured Mile



- The most appropriate use of a measured mile comparison ... assumes that the contractor has already proven, by other means, that owner-liability exists (e.g., formal or constructive change orders), that the type of damage being alleged actually occurred.

- Liability - Causation - Damage



Measured Mile

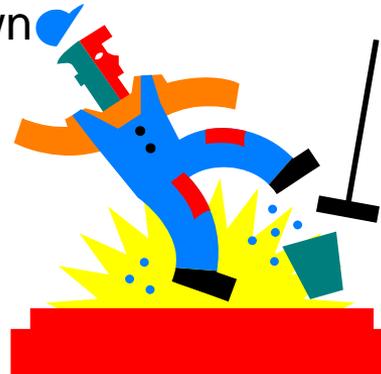
- Measured Mile akin to a claim in tort
- Responsibility – Causation – Damages



Who planted that
@#\$\$@ tree here?



Car accident in Northtown
Slip & Fall in Southtown



Who me?



Measured Mile

- The second most important consideration in performing a measured mile analysis is the level of detail of which both worker hours and work progress are tracked.



Measured Mile - The Expert Takes Center Stage

Courts Scrutinize The Expert - Your Credibility Is On The Line. As explained by the Court of Federal Claims:

"Contract Boards have accepted the Measured Mile method on occasion. We assume that a finder of fact faced with such a method of estimating damages would want to have confidence in the experts' ability and objectivity. A court would be particularly concerned to know how the experts picked periods of productive and non-productive construction for comparison. We did not have such a level of confidence in plaintiff's experts. Cross examination showed their choices of productive and non-productive periods to be arbitrary at best. More likely, they were chosen to achieve a pre-determined result."

Daewoo Engineering and Const. Co., Ltd. v. US, 73 Fed. Cl. 547, 580-81 (2006)

Measured Mile - Must Compare Equivalent Types of Work

PW Const., Inc., v. US, 53 Fed. Appx. 555, 557 (Fed. Cir. 2002) (court vacates award for lost productivity claim finding contractor's expert incorrectly calculated lost productivity claim under measured mile method where rates used did not compare equivalent types of work)

But work is not required to be exactly the same. Productivity calculations are not subject to "absolute exactness" and type of work in both periods need only be "reasonably alike." *Clark Concrete Contractors, Inc. GSBCA No. 14340, 1999 WL 143977.*

Many federal cases approve use of a proper measured mile analysis but the expert must have the tools needed to properly prepare this analysis, including sufficient records and periods of comparable impacted and unimpacted work.

Measured Mile – Too Many Impacts

In re Electric Machinery Enterprises, Inc., 416 BR 801, 853-54 (Bkrtcy M.D. Fla. 2009) ("Moreover, while a measured mile analysis is inherently difficult to perform on electrical work, the difficulty is compounded on a project such as this one where the contractor experienced multiple different impacts. Segregating the damages for each discrete impact on the Project was impractical if not impossible. Accordingly, the Court concludes that the measured mile analysis cannot be used in this case to calculate EME's damages.")

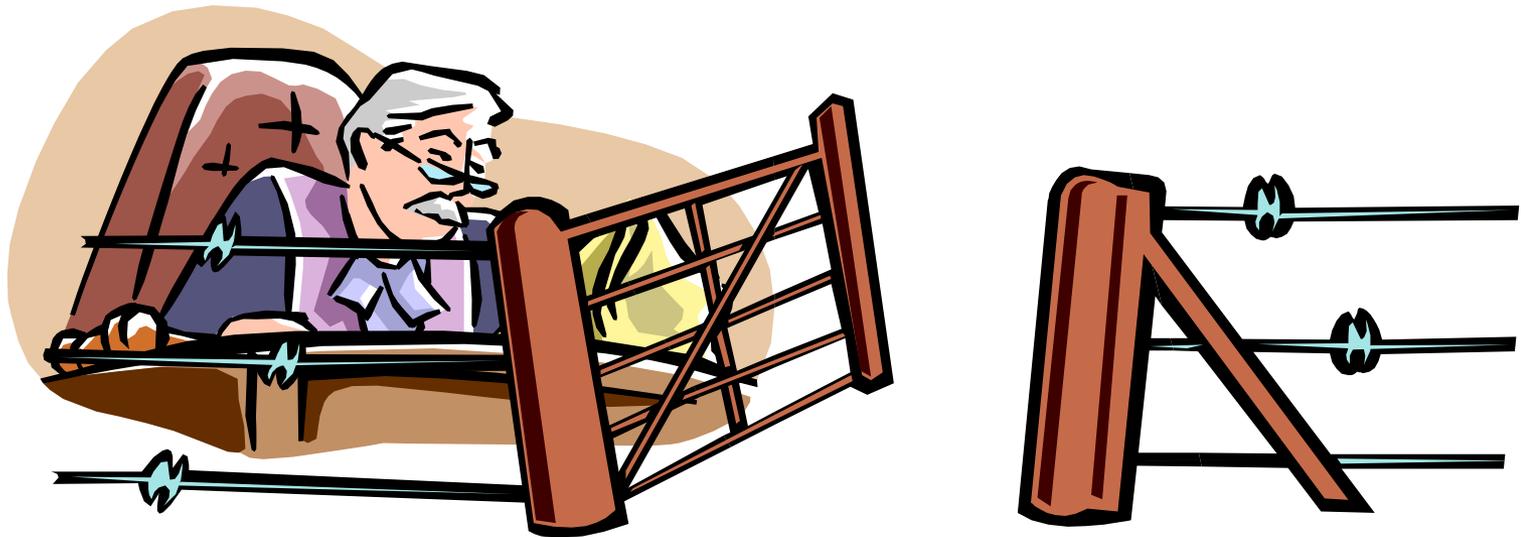
Today's Problem

- Roadway between two towns
- Two sections - Two contracts - Two contractors
- Each with Greenfield and old congested urban scope
- Each disrupted by changes and unanticipated conditions
- Plotnick represents contractor on OneTown project
- Carson represents contractor on TwoTown project
- Compare and contrast presentations



Voir Dire

Is the “Expert” competent to testify?



Direct Examination

Testimony for the Contractor





Fred's Testimony

- Doing well except for issues not our fault
- PIPE \$/1000 LF v \$/2 miles (~10,000 LF)
- PAVING \$/1000 LF v \$/2 miles (~10,000 LF)
- Pay us

Cross-Examination



Cross Examination of Fred

- Job from March 2012 to March 2013?
- Job labor agreement \$\$ raise in December?
- Only 1000 LF not impacted by issues?
- Only 500 LF Pipe / 300 LF Paving in Measured Mile baseline?
- Performance MAR-MAY JUN JUL-OCT NOV-MAR?
- Pipe is pipe? Paving is paving?
- What part of “hand excavate only” not understood?

Example Basis of Disruption Event?

QC NARRATIVES

Activities in Progress:

Concrete placement from [REDACTED]

Storm sewer crew started working on line N, from pond running along [REDACTED]

Did anything develop that may lead to a Change Order/Claim?

Electrical duct bank crossing [REDACTED] feeding lodging facility at [REDACTED] was broken, causing the trip wires to trip on pole.

Were there any Delays in Work Progress today?

Electrical duct bank crossing [REDACTED] feeding lodging facility at [REDACTED] was broken, causing the trip wires to trip on pole.

General Comments:

Verbal Instructions given by Government:

Safety Inspection / Safety Meetings:

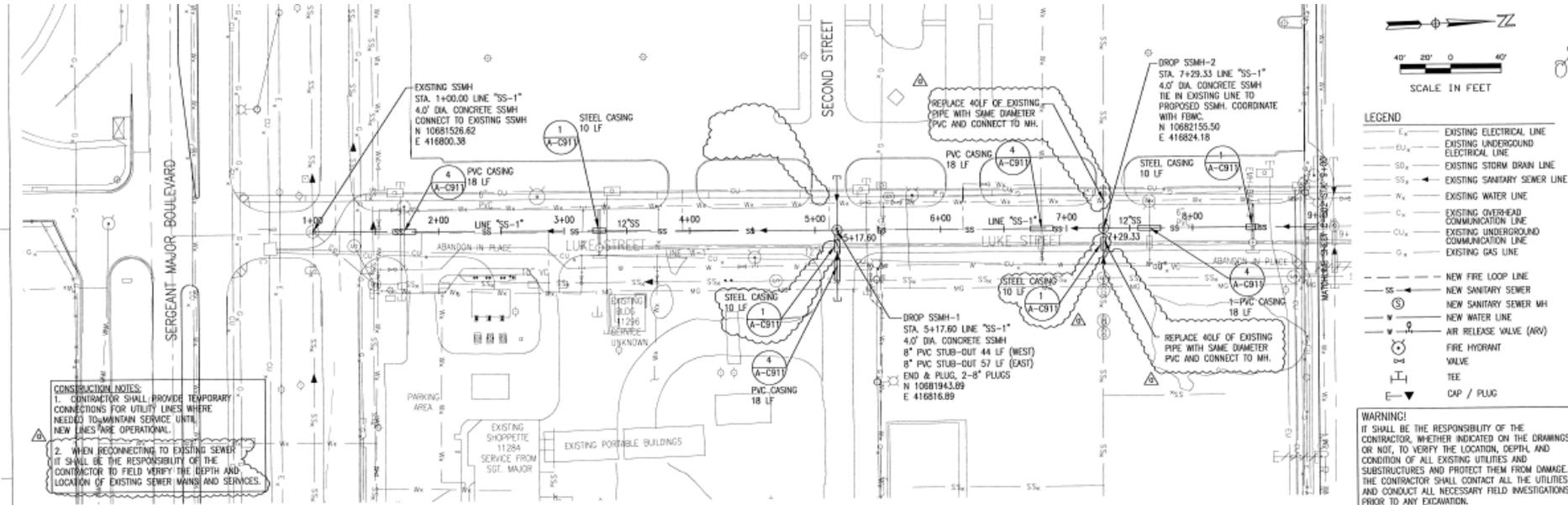
No safety meeting conducted today.

Safety: (Inspections made, Deficiencies noted):

Daily safety inspection conducted today - see attached "Contractor Accident Notification Form" regarding collapsed electrical duct bank.

Safety: Corrective Action taken:

See attached "Contractor Accident Notification Form" regarding collapsed electrical duct bank accident that occurred today.



3.6.1 Utility Locations

Prior to digging, the appropriate digging permit must be obtained. All underground utilities in the work area must be positively identified by a private utility locating service in addition to any station locating service and coordinated with the station utility department. Any markings made during the utility investigation must be maintained throughout the contract.

3.6.2 Utility Location Verification

The Contractor must physically verify underground utility locations by hand digging using wood or fiberglass handled tools when any adjacent construction work is expected to come within three feet of the underground system. Digging within 0.061 m (2 feet) of a known utility must not be performed by means of mechanical equipment; hand digging shall be used. If construction is parallel to an existing utility the utility shall be exposed by hand digging every 30.5 m (100 feet) if parallel within 1.5 m (5 feet) of the excavation.

QA NARRATIVE(S)

Meetings Attended - QA Remarks

[redacted] Meet with [redacted], Contractors Superintendant this date concerning Concrete Duct-bank running North - South across [redacted]

[redacted] stated that he had previously meet with [redacted] concerning Concrete Duct bank [redacted] stated that Duct bank was electrical and contained feeders supplying power to street lights [redacted] further stated that feeders [redacted] active and that neither [redacted] claimed ownership to Duct-bank.

QA requested [redacted] set up site meeting with [redacted], to inform QA when all Parties could be present so that status & ownership of Duct-bank could be established.

QA requested that Contractor remove Soil from top of Duct-bank so Alignment of Duct-bank could be determined and Survey Duct-bank to determine its elevation relative to Concrete Pavement to be placed at that location.

Verbal Instructions Given to Contractor:

[redacted] Following QA's Request for Contractor to remove soil from Top of and Survey Concrete Duct Bank @ [redacted] St. - QA observed Back-hoe operator digging

QA instructed Earthwork Foreman [redacted] to instruct Back-hoe operator to only remove soil from top of Concrete Duct-bank so that it could be traced, and not to dig up or remove soil / backfill from sides of Duct-bank. [redacted].

Comments Pertaining to Contractors' CQC Activities:

[redacted] 1) PSI on site this date testing Concrete during Placement [redacted]

2) Concrete Paving along [redacted] Contractor CQC [redacted] stopped Pavement operations this date @ 1200 hrs. due to excessive evaporation rate. Specification require Max. Evaporation rate of 0.2 lb Water / ft² / hr. based upon ACI 305R.

Safety Inspection Results- The following observations were noted today:

[redacted] 1) QA Inspected jobsite for PPE this date, No deficiencies observed.

Developments that may lead to a Change Order or Claim:

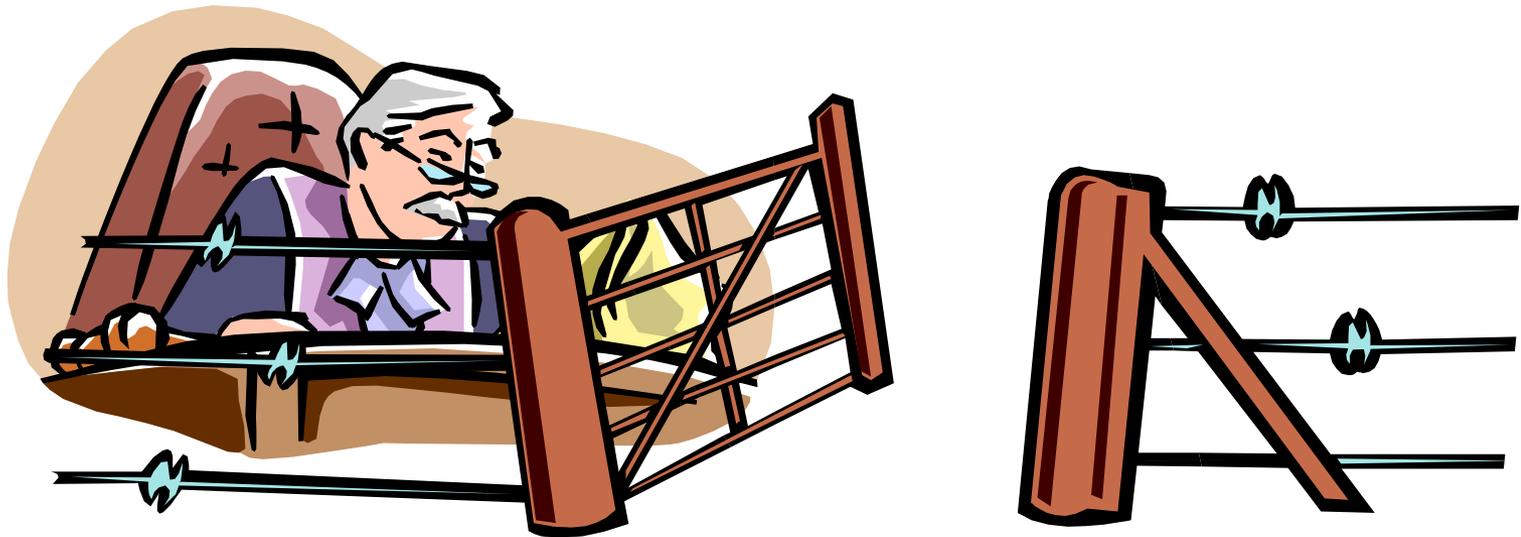
[redacted] None

Information, Instructions or Actions Not Covered in QCR:

[redacted] Following QA's specific instructions to Contractor Earthwork Superintendant [redacted] to ensure Back-hoe operator did not remove soil from sides of Duct-bank or damage Concrete Duct bank - Contractor under supervision of Project Superintendant [redacted] dug - up and broke Concrete Duct bank containing Live High Voltage Feeder.

Voir Dire

Is the “Expert” competent to testify?



Direct Examination

Testimony for the Contractor



Chris's Testimony

- Range of good performance while not impacted
- Basis of RESPONSIBILITY and CAUSATION
- Calculation of DAMAGES
- Demonstrated lower performance while impacted
- PIPE ___ mhrs/LF *for* 8234 LF v ___ mhrs/LF *for* 3825 LF greenfield
- PIPE ___ mhrs/LF *for* 8234 LF v ___ mhrs/LF *for* 3825 LF urban w/ legacy
- PAVING ___ mhrs/LF *for* 8234 LF v ___ mhrs/LF *for* 3825 LF flat runs
- PAVING ___ mhrs/LF *for* 8234 LF v ___ mhrs/LF *for* 3825 LF path & fill
- Adjustments made for seasonal productivity

Cross-Examination



Re-Direct Examination



Closing Arguments





Decision Time



Questions?

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