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Inside:

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The Occupational Safety and Health Review Commission Strikes Down OSHA's Multi-Employer Policy

The Occupational Safety and Health Administration (OSHA) is responsible for enforcing health and safety standards in workplaces throughout the country. OSHA has promulgated standards covering both general industry and construction sites. The enforcement of these standards is fairly straightforward in the general industry sector. Typically, OSHA inspects the facility, finds a violation, and cites the employer for exposing his/her employees to a hazardous/violative condition. However, construction sites are vastly different because of the number of employers working at a site and employee mobility throughout the site. In certain situations, an employer can have employees working in an area where they are exposed to hazardous conditions not created by that employer. To address situations like this, OSHA developed the multi-employer policy.

Under the multi-employer policy, in addition to the employer that has employees exposed to the hazardous condition, OSHA may also issue citations to the employer that is responsible for correcting the hazardous condition even if that employer has no employees working at the site. The logic behind this policy is to hold a general contractor responsible for ensuring that all subcontractors at a construction site comply with OSHA rules.

The legal justification for the multi-employer policy is 29 U.S.C. §654(a)(2) of the Occupational Safety and Health Act (OSH Act), which states that:

> Each employer …
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

This section creates a specific duty for all employers, regardless of whether they have employees exposed to comply with OSHA's rules and regulations. The purpose of the multi-employer policy is to allow OSHA to hold those employers responsible who either create a hazardous condition or control the site even if those employers do not have any employees exposed to the hazardous condition.

The multi-employer policy was recently struck down by the Occupational Safety and Health Review Commission (the "Commission") in the decision *Secretary of Labor v. Summit Contractors, Inc.* The Commission held that the multi-employer policy was contrary to OSHA's regulation, 29 C.F.R. 1910.12(a).

In *Summit*, Summit Contractors, Inc. ("Summit") was the primary contractor on a construction job in Little Rock, Ark. Summit Contractors only employed four employees whose responsibilities were to coordinate subcontractors and work at the job site. All Phase Construction, Inc. ("All Phase") was subcontracted to do brick masonry work. To perform this work, All Phase employees were required to use scaffolding. While performing the masonry work, OSHA observed that All Phase employees were exposed to hazardous conditions, including not being protected from falls while working on scaffolds at 12 to 18 feet above ground. The only employees exposed to these hazardous conditions were All Phase employees. Summit neither created the hazardous condition observed by OSHA nor had any of its employees exposed to these hazards.

OSHA issued citations to both All Phase and Summit. OSHA's rationale for citing Summit was that it was a controlling employer that could have corrected the hazardous condition and as such was liable pursuant to OSHA's multi-employer policy.

Summit contested the citations arguing that OSHA's multi-employer policy was invalid because it was

contrary to 29 C.F.R. 1910.12(a), which states the following:

> Standards. The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of *his* employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph. (emphasis added).

In essence, Summit's position was that because it had no employees exposed to the hazard and because it did not create the hazard, the regulations prohibit the issuance of a citation to it for hazards created by All Phase. The administrative law judge hearing the case disagreed with Summit and upheld the citation.

Summit appealed to the Commission, which agreed with Summit and struck down the multi-employer policy. The two commissioners that formed the majority, wrote separate opinions. Both noted the history of OSHA's multi-employer policy and the inherent conflict with 29 C.F.R. 1910.12(a).

According to the Commissioners, 1910.12(a) imposes obligations on employers only for that employer's employees. In other words, it precludes OSHA from issuing citations to general contractors that have no employees exposed to a hazardous condition and who did not create the hazard. The Commission reasoned that because OSHA was bound by its regulations, it could not circumvent them through its multi-employer policy. Therefore, unless OSHA modifies the limitation imposed by 1910.12(a) through the rule making process, the Commission held that OSHA could not enforce the multi-employer policy against an employer who did not create the hazard or have employees exposed to a hazardous condition in violation of OSHA's standards.

The dissenting Commissioner, however, disagreed with the majority, stating the OSH Act and prior case law has set a precedent for allowing OSHA to enforce the multi-employer policy. The dissent noted the purpose behind the policy was to ensure that general contractors, because of their unique supervisory control over construction sites, abate hazards that are created. Based on past precedent, the purpose of the policy and that 1910.12(a) can be read to allow OSHA to cite controlling contractors under the multi-employer policy, the dissenting Commissioner would have allowed OSHA to use the policy without requiring OSHA to subject the policy to the rule making process.

OSHA has appealed the decision of the Commission to the United States Court of Appeals for the Eighth Circuit and will most likely continue to enforce the multi-employer policy in Circuits that have upheld its use. While there is speculation that the Court of Appeals will reverse the decision of the Commission, the Commission's decision will remain as precedent, making OSHA's enforcement of the policy difficult.

The impact of the Commission's decision is mixed. One view is that the decision should lead to greater internal enforcement of safety and health rules on construction sites. For instance, it can be argued that general contractors no longer fearing that exercising too much control over the worksite will result in OSHA citations, will now be inclined to take more of an initiative in ensuring that its subcontractors comply with OSHA's rules. However, the contrary view is that there will be no incentive for general contractors to ensure the safety of employees of its subcontractors. Typically, on a construction site, general contractors are the only entities that can ensure that a site is in compliance with OSHA's rules. Therefore, without the threat of OSHA citations, the general contractor may not have the incentive to ensure compliance with OSHA's rules and regulations.

Regardless of how this decision is viewed, general contractors still must be cognizant of the fact that if an employee of a subcontractor is injured or becomes ill because of a work site hazard, the general contractor can still be sued by the employee under common law, which is separate and apart from OSHA liability. Therefore, it behooves a general contractor to be proactive and enforce OSHA's standards at the construction site to minimize the potential of injuries or illnesses. ■

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Editor's Note: The information presented in this article is for informational purposes only. Questions concerning a specific situation should be addressed to your legal counsel.