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## **THE FURTHER EXPANSION OF THE MULTI-EMPLOYER WORKPLACE DOCTRINE**

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### **I. Introduction**

Last year, the U.S. Court of Appeals for the Eighth Circuit unequivocally held that an employer can no longer avoid OSHA liability simply by subcontracting work to another entity. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8<sup>th</sup> Cir. 2009). The Summit Contractors case validated OSHA's ability to cite employers regardless of whether a violation affects the employer's own employees. Now, the OSHA Review Commission has adopted the Eighth Circuit's reasoning as its own, further validating OSHA's multi-employer workplace doctrine. In light of this development, OSHA will undoubtedly increase its focus on work sites, particularly construction sites, where it can cite multiple employers for a single safety or health violation.

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## **II. OSHA's Multi-Employer Policy**

Section 5(a) of the Occupational Safety and Health Act broadly requires employers to furnish each of its employees a workplace free from recognized hazards and to comply with all occupational safety and health standards developed by OSHA. Thus, of the Act creates two types of obligations: 1) a “general duty” obligation running *only* to the employer’s own employees; and 2) an obligation to obey all OSHA standards with respect to *all* employees, regardless of their employer.

This second obligation formed the basis for OSHA’s “multi-employer worksite policy,” under which the Agency decided it had the authority to issue citations not only to employers who exposed their own employees to hazardous conditions, but also to employers who created a hazardous condition that endangered employees, whether its own or those of another employer. This policy gave OSHA the ability to issue citations to multiple employers even for violations that did not directly affect the employer’s own employees. This policy had particular import in the construction industry, with many different employers having employees at a site at any given time.

Since the early 1980s, OSHA has continuously expanded the scope of its multi-employer worksite policy. By 1994, OSHA’s policy instructed its compliance officers to issue citations to any employer who:

- 1) exposed its own employees to a hazardous condition;
- 2) created a hazardous condition that endangered any employer’s employees;
- 3) was responsible for correcting a hazardous condition even if its own employees were not exposed to the hazard; or

- 4) had the ability to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority.

This fourth category has historically caused the most consternation among employers as well as courts. In particular, construction industry employers have frequently challenged OSHA's ability to cite them for violations where their own employees are not exposed to any hazards related to the violations. In these cases, the employers have relied primarily upon language in 29 C.F.R. § 1910.12(a), an introduction to OSHA's construction industry standards, which appears to limit the scope of an employer's obligations under OSHA's construction industry standards to the employer's own employees.

### **III. The Summit Contractors Decisions**

In June 2003, OSHA issued citations to Summit Contractors, Inc., which was the general contractor for the construction of a college dormitory in Little Rock, Arkansas, and All Phase Construction, Inc., a subcontractor Summit hired to perform exterior masonry work. OSHA's compliance officer had observed All Phase's employees working on scaffolds more than ten feet above the ground without wearing fall protection equipment. Summit had subcontracted the entire project and, consequently, had only four employees on site: a project superintendent and three assistant superintendents and no tradesmen. Summit's project superintendent had observed All Phase employees working on scaffolds without wearing fall protection equipment on two or three separate occasions and had advised All Phase to correct these problems. Based on those facts, OSHA cited Summit because it had the ability to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority.

After an Administrative Law Judge upheld the citation against Summit, the OSH Review Commission vacated the citation on review. *Sec. of Labor v. Summit Contractors, Inc.*, 21

O.S.H. Cas. (BNA) 2020 (O.S.H.R.C. Apr. 27, 2007). Specifically, the Review Commission held that 29 C.F.R. § 1910.12(a) prohibited OSHA from imposing an obligation on general contractors to protect the employees of their subcontractors from hazardous conditions. The Review Commission's decision abruptly reined in the previous expansion of OSHA's multi-employer worksite policy by restricting OSHA's ability to cite employers for violations that did not affect their own employees.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the Review Commission's decision. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815. The court found that Congress intended the OSH Act to require employers to adhere to OSHA's standards, regardless of whether the endangered employee was their own. The court acknowledged the heavy burden placed on these employers: “[T]he controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite.” 558 F.3d at 823 (emphasis added). The court's decision validated OSHA's expansive view of the circumstances under which an employer has the ability to correct or abate violations committed by another employer.

Although the OSHA Review Commission is not compelled to adopt the Eighth Circuit's reasoning, it did just that in a recent decision also involving Summit Contractors. *Sec. of Labor v. Summit Contractors*, 23 O.S.H. Cas. (BNA) 1196 (O.S.H.R.C. Aug. 19, 2010). In that case, OSHA cited Summit Contractors for failing to provide ground fault circuit interrupter (“GFCI”) protection in two pieces of electrical equipment it purchased for use at a multi-employer construction site in Pennsylvania. The Review Commission held that with respect to the hazard, Summit Contractors was both the controlling and the creating employer. Summit Contractors was the controlling employer because its superintendent “exercised overall authority regarding

safety-related matters at the worksite.” Slip op. at p. 15. Specifically, the Review Commission found that the superintendent walked the site twice daily, held weekly meetings where he advised the foremen of any observed safety issues, and had ordered the equipment without GFCI protection. The Review Commission also found that Summit Contractors was the “creating” employer in that the Company: 1) ordered the electrical equipment without specifying that it be outfitted with GCFI protection, did not check for GCFI protection upon delivery of the equipment to the site, and 3) required that the subcontractors use the equipment as provided. The Review Commission also rejected Summit Contractors’ argument that it relied upon the expertise of the equipment supplier and was “dumbfounded” that the supplier sent equipment that was not outfitted with GFCI protection. The Review Commission held that Summit Contractors could not “subcontract” out its responsibility for the condition of the equipment.

#### **IV. Effect of *Summit Contractors* Decisions on Employers**

The *Summit Contractors* decisions will doubtless reenergize OSHA’s enforcement of its standards at construction sites, and there will be more citations issued to the “controlling employer,” whether that employer is the general contractor, the construction manager, or any other employer with control over a subcontractor. The decision also opens the door for OSHA to use its multi-employer worksite policy in its inspections beyond the construction industry, from manufacturers who subcontract out maintenance work, for example, to office property managers who subcontract out window cleaning and who maintain any level of control over the “means and methods” by which the subcontractor performs the actual work. OSHA has applied the multi-employer worksite policy to factory settings, where it cited the factory operator where an employee of a subcontracted cleaning company was killed while working at the factory. Ultimately, the citation was dismissed based on the operator’s lack of actual control over the

subcontractor, but the application of the multi-employer worksite policy was validated. *See IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

## **V. Recommendations**

Accordingly, it is recommended that all employers carefully evaluate the degree to which they control the means and methods of a subcontractor's work and implement immediate actions to ensure the exercise of reasonable care in identifying and correcting violations, including:

- While an employer cannot discharge its OSHA liability by contract, contractual language can be protective to the extent to which a particular employer limits its responsibility and ability to correct or abate dangerous conditions at a multiple employer site. Employers must carefully review contractual language to identify the degree of control the employer exercises over other employers.
- When working with a subcontractor, the employer should review the subcontractor's safety-related documentation, including personal protective equipment records and safety programs and policies, to ensure they are up-to-date and address the particular hazards (e.g., fall, electrical, excavation hazards) to which the subcontractor's employees are expected to be exposed.
- When working at a multiple employer worksite, the employer with supervisory responsibility must either inspect the worksite itself or ensure that inspections are being conducted by a subcontractor frequently enough to be able to identify and correct observed safety and health violations. This includes training on-site managers and supervisors to identify safety and health violations.
- The employer must also implement an effective system either for correcting any safety and health violations that it observed during these inspections or for ensuring that the subcontractor corrects any observed violations. This should include documenting the completion of any corrective action recommended.
- The employer should develop a system for subcontractors to monitor their employees, correct violations, and report to the general contractor, the construction manager, etc.
- The employer should require the subcontractor to immediately report injuries both to the proper regulatory authority (as applicable) and to the employer. The employer should maintain documentation of any worksite injuries to

subcontractors' employees, as well as any corrective action taken to address any hazardous conditions that led to the injury.

- An OSHA 300 log should be maintained at the work site to record work-related injuries and illnesses.

## **VI. Conclusion**

Under the Obama Administration, it can be expected that OSHA will begin to more aggressively enforce compliance with workplace safety and health laws and regulations. The newly invigorated multi-employer worksite policy will be another tool employed by the Agency in its mission. Employers who exert control over other employers must assess their potential liability as a "controlling employer" and develop appropriate administrative procedures and written documentation to demonstrate compliance with a controlling employer's duties.