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Bulletin

The *Summit* Decision: Is It Downhill for General Contractor Liability Under OSHA's Multi-Employer Worksite Doctrine?

Background

General contractors on construction projects should not be held accountable for safety violations that were created by a subcontractor on the project, provided no employee of the general contractor was exposed to the hazardous condition. On April 27, 2007, the Occupational Safety and Health Review Commission, the three-member body responsible for deciding contested violations, issued its decision in *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC No. 03-1622, and in so doing reversed precedent set more than thirty years ago, in what are commonly referred to as "multi-employer worksite" cases.

Construction sites are beehives of activity, with employees of multiple employers working on their particular part of the project. By the very nature of construction, the worksite is in constant change, a condition which makes safety violations almost inevitable. OSHA, in recognition of this reality, has applied a "multi-employer worksite" policy that permits more than one employer to be cited for a single safety violation. Obviously, this policy eliminates the opportunity for employers to argue that some other employer is responsible, and it also motivates each employer to seek corrective action for safety violations rather than ignoring ones that don't affect their own employees. The employer who "creates" the violation, one who "exposes" employees to the violation, as well as an employer who "controls" the site are all subject to a citation for a violation under the multi-employer citation policy. The controlling employer is typically the general contractor of the project in OSHA's view, as the general contractor has the power to direct the subcontracting employers.

Summit Facts and Decision

In *Summit*, OSHA issued a citation to Summit Contractors, Inc. ("Summit"), the general contractor on a dormitory construction project, for the scaffolding violations committed by one of its subcontractors. Although Summit did not create the hazard and none of its employees were exposed to it, Summit was cited as the "controlling" employer in accordance with OSHA's multi-employer worksite doctrine. The subcontractor was also cited as the employer who created the hazard and as the employer having employees exposed to the hazard.

Summit did not contest the existence of the hazard or deny that it lacked knowledge of the hazard. Rather, Summit argued that citations against "controlling" contractors, i.e., general contractors who only have contractual authority over subcontractors at a multi-employer worksite, are unenforceable. Summit's argument was based on the plain language of 29 C.F.R. § 1910.12(a), which states, in relevant part: "Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by com-

plying with the appropriate standards prescribed in this paragraph." Because Summit had no employees exposed to the hazard and did not create the hazard, it argued that the regulation prohibits the issuance of a citation against it for a hazard created by a subcontractor.

In a 2-to-1 decision, the majority of the Commission agreed with Summit's position and vacated the citation. Noting OSHA's "checkered history" with regard to its citation policy on multi-employer construction worksites, the Commission concluded that the phrase "his employees" in the applicable regulation precludes the issuance of a citation to a general contractor when none of its employees were exposed to the hazard.

Practical Implications

Although the *Summit* ruling will be greeted by general contractors as a long overdue change in policy, its practical effects may be limited. For example, the citation in *Summit* was issued under OSHA's construction standards, and multi-employer worksites are not the usual case in general industry; thus, its application to other industries is not certain. In construction inspections, the OSHA compliance officer will now seek evidence that one or more of the general contractor's employees has been exposed to the safety violation, thereby, permitting citation of the general contractor under traditional theories. Finally, OSHA has already started the appeals process which means the Secretary of Labor can seek to persuade the United States Court of Appeals for the Eighth Circuit that the *Summit* decision should be overruled. All general contractors should "stay tuned" for new developments, and, in the meantime, do the best job possible in preventing, and correcting, safety violations on their projects.

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