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OSHA SAFETY

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Federal Review Commission Decision Eliminates "Controlling Contractor" Liability in Construction

On April 27, 2007, the Federal Occupational Safety and Health Review Commission ("OSHRC") handed down a dramatic decision which accordingly to the dissenting judge in the case "reversed over 30 years of legal precedent" involving multi-employer liability. The decision, which is virtually certain to be appealed by the Occupational Safety and Health Administration ("OSHA"), eliminates OSHA's ability to issue citations to "controlling employers" on construction sites. This decision is a huge victory for general contractors and other controlling employers in the construction industry.

Under OSHA's multi-employer citation policy, in the past, OSHA has held liable any employer who was the creating, controlling or correcting employer on a jobsite even if its own employees were not exposed to a hazard. The "controlling employer" has been defined as "an employer who has general supervisory control over the worksite, including the power to correct safety violations itself or require others to correct them. Control can be established by contract or in the absence of . . . contractual provisions, by the exercise of control in practice." OSHA Instruction CPL 2-0.124 at X.E.1 (Dec. 10, 1999). As a result of this policy, OSHA has cited general contractors for violations of its subcontractor even when none of the general contractor's employees were exposed to the hazard nor did the general contractor create the hazard.

In Secretary of Labor vs. Summit Contractors, Inc., Summit,



the general contractor, was constructing a dormitory in Little Rock, Arkansas. Summit had a superintendent and three assistant superintendents on site. It also contracted with All Phase Construction, Inc. (“All Phase”) to perform masonry work. All Phase failed to properly protect its employees working on scaffold from fall hazards. None of Summit’s employees was exposed. Summit did not create the hazard. The compliance officer found, however, that All Phase’s fall protection violations were in plain view of the Summit job trailer and Summit had knowledge of the hazards. Therefore Summit, as the controlling employer, received the same violations as All Phase for the fall protection violations. All Phase did not contest the violations

Summit did contest. It argued that the controlling employer concept arising out of OSHA’s multi-employer citation policy was not enforceable. Summit also argued that the multi-employer policy was not valid because it was contrary to the language of 29 C.F.R. 1910.12(a). That standard states, in part:

Each employer shall protect the employment in place of employment of each of *his employees* engaged in construction work by complying with the appropriate standards prescribed in the paragraph. (Emphasis added)

In a well-reasoned decision, the OSHRC Chairman Scott Railton, held that 1910.12(a) limits applicability to an employer’s own employees.

Therefore, since Summit had no employees exposed to the hazard and it did not create the hazard, Section 1910.12(a) precluded OSHA from citing Summit for the hazard created by the subcontractor, All Phase.

There are several key points to keep in mind while savoring the victory of this decision. First, general contractors and other controlling employers on a construction site may still be cited if their employees are exposed to the hazard or if they create a hazard to which other employers/employees are exposed. As an employer, you should properly protect all employees from hazards that you create on a job site. Second, the decision only applies to construction employers subject to OSHA’s construction standards. It does not yet apply to general industry employers. The Commission never addressed the validity of or the applicability of the OSHA multi-employer citation policy to general industry employers. Third, and finally, in all likelihood OSHA will appeal the decision to the United States Court of Appeals. In the meantime, any construction employer being cited by OSHA as a “controlling employer” under the multi-employer theory, when none of its employees were exposed to the hazard and it did not create the hazard, has a significant defense to the citation based on Summit Contractors, and should seek to have such citations immediately deleted.

For further information, please do not hesitate to contact Charles P. Keller at (602) 382-6265.