

WHAT IS THE MULTIPLE EMPLOYER WORKSITE LIABILITY THEORY?

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It is well settled that in a Section 5(a)(2) case alleging a specific violation of an OSHA regulation, the employer may only be cited when its own employees had access or exposure to the hazard. See Martin Ironworks, Inc., 2 OSHC 1063 (1974); Hawkins Construction Co., 1 OSHC 1761 (1974). However, over the years this general rule of OSHA liability has been greatly expanded by one exception to the general rule, the multiple employer worksite liability theory.

As a result of decisions by the Occupational Safety and Health Review Commission (“Review Commission”) as well as the U.S. Courts of Appeals for the Second and Seventh Circuits, the multiple employer worksite liability theory was established. See Brennan v. OSHRC & Underhill Construction Corp., 513 F.2d 1032 (2nd Cir. 1975); Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975). In Underhill, the Court noted that previous Review Commission precedent supported the view that an employer could only be cited when its employees are exposed to an OSHA violation. In this case, the Court was faced with a situation in which one subcontractor on a high rise construction site received OSHA citations. There was no proof that the subcontractor’s employees were exposed to a hazard. The Court noted that the construction site contained “generally a number of employers and employees.” Specifically, the Second Circuit stated:

[T]here were four hundred and thirty-seven of the subcontractor's employees on site as well as unidentified tradesmen and two groups of bricklayers . . .

Underhill, *supra*, 513 F.2d at p. 1038. Noting that none of the subcontractor’s employees were allegedly exposed to the hazard, the Court in Underhill ruled that when a multiple employer worksite exists, the Secretary of Labor can issue a citation to an employer who created a hazard even if the only employees exposed to the hazard were employed by another employer. See Underhill, *supra*. Thus, the Court for the first time recognized the multi-employer exception to the general liability theory. This theory was also recognized in the Anning-Johnson decision in the Seventh Circuit.

In formulating the multi-employer worksite exception, the U.S. Court of Appeals and the Review Commission described, in detail, the public policy behind the formulation of such an exception. The courts stated that the exception was necessary to protect employees in situations where large numbers of employees employed by various companies were commingling in a specific work setting. In order to further the goals of the Act and protect untrained and unsuspecting employees, the courts decided that it was necessary to allow the Secretary of Labor to hold an employer liable for exposing another employer’s employees to a hazard. Also, by recognizing this exception, the courts as well as the Review Commission were seeking to require more communication and coordination between employers on the jobsite.

After the initial decisions, the Review Commission viewed the multiple employer worksite liability theory as having a limited applicability. For example, in Grossman Steel & Aluminum Corp., 4 OSHC 1185, 1188 (1975), the Review Commission stated:

[W]e continue to believe that the Act can be most effectively enforced if each employer is held responsible for the safety of its own employees. We agree with the courts however, that the rule should be modified with respect to the construction industry. This is required by the unique nature of the multi-employer worksite common to the construction industry.

The Review Commission went on to delineate the public policy behind the exception by explaining that:

Typically, a construction job will find a number of contractors and subcontractors on the worksite. Those employees mingle throughout the worksite while work is in progress.

[A]s a practical matter, it is impossible for a particular employer to anticipate all of the hazards that other employers may create as the work progresses.

Grossman, *supra*, 4 OSHC at p. 1188.

As a result of these early cases, it became clear that the courts would apply the multiple employer worksite liability theory to general contractors and/or any subcontractors. In Underhill, the Court established that a subcontractor who creates and controls a hazard may be cited when any employer's employees are exposed to the hazard. The Review Commission placed even greater responsibility on general contractors.

The general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under Section 5(a)(2) . . .

Anning-Johnson Co., 4 OSHC 1193, 1999 (1976).

The first reported case addressing the multiple employer worksite liability theory in general industry worksites occurred in 1979. In Harvey Workover, Inc., 7 OSHC 1687 (1979), the Review Commission expanded the multiple employer worksite theory to a general industry employer. Since that point, the Review Commission, U.S. Courts of Appeal and state courts have routinely applied this multiple employer worksite theory to any job site which contains agents, representatives, or employees employed with, at least two different employers or business entities. As with the construction employers, the key determination will be whether, in fact, the employer on a multiple employer worksite has created or has control over the hazard. If an employer is found to either have created or controlled the hazard, that business entity may in fact be liable for alleged OSHA violations when none of its own employees were exposed to the hazard.