

Challenging OSHA's Multi-Employer Citation Policy

by James J. Gonzales and Kristin R. B. White

This article analyzes the history of OSHA's multi-employer citation policy, and discusses the Occupational Safety and Health Review Commission's recent landmark decision in Secretary of Labor v. Summit Contractors, Inc.

Construction, gas exploration, and other Colorado industries often take exception to the Occupational Safety and Health Administration's (OSHA) attempts to cite multiple employers for a hazardous condition at multi-employer worksites. Those employers should take note. On April 27, 2007, in *Secretary of Labor v. Summit Contractors Inc.*,¹ the Occupational Safety and Health Review Commission (Commission) concluded that the "controlling employer" theory of liability under OSHA's multi-employer citation policy was inconsistent with 29 C.F.R. § 1910.12(a) regarding general contractors that neither create nor expose employees to construction worksite hazards. The Commission recognized the significance of challenging OSHA's multi-employer citation policy by inviting *amicus* briefs and scheduling a rare oral argument session. This article analyzes OSHA's multi-employer citation policy, summarizes case law leading to *Summit Contractors*, and addresses the potential effect of that decision on Colorado employers.

OSHA's Multi-Employer Citation Policy

Although OSHA policies are not binding on the Commission, the Commission has looked to them in the past² to help resolve interpretations under the Occupational Safety and Health Act (OSH Act).³ OSHA's expression of the multi-employer citation policy has evolved over the years, its 1999 version providing that: "On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard."⁴

In considering whether to cite more than one employer at a worksite, OSHA characterizes culpability in terms of "creating," "exposing," "correcting," or "controlling" employers.⁵ In other words, an employer may be cited for a hazardous condition if: (1) it

created the safety hazard at issue; (2) its employees are exposed to the hazard; (3) it is expected to correct the hazard; or (4) it controls subcontractor work. OSHA then considers whether the citable employer's actions met its obligations with respect to the type of culpability OSHA determines the employer to have.

OSHA considers a creating employer one that causes a hazardous condition in violation of an OSHA standard. A creating employer is citable even if the only employees exposed are employed by other employers.

An exposing employer is one whose own employees are exposed to the hazard, regardless of who created the condition. If the hazardous condition was created by another employer, OSHA may cite the exposing employer that (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition; and (2) failed to take steps consistent with its authority to protect its own employees. If the exposing employer lacks the authority or means to correct the hazard, it may be cited by OSHA for failing to (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures.⁶

A correcting employer is engaged in a common undertaking on the same worksite and is tasked with correcting a known hazard. This often occurs where a correcting employer is responsible for installing or maintaining safety equipment.⁷

Liability of Controlling Employers

Summit Contractors concerns OSHA's theory of controlling employer liability. OSHA expects a controlling employer to exercise supervisory authority over the worksite. This includes correcting safety and health violations or requiring another employer to correct them. Liability can be established by contract or, in the absence

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of explicit contractual provisions, by a pattern and practice of exercising supervisory control. OSHA expects a controlling employer to prevent and detect violations by other employers on the site.

The extent of measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. The controlling employer normally is not required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards, condition, or expertise as the subcontractor should have. The level of diligence OSHA expects a controlling employer to exercise is affected by the scale of the project; the nature and pace of the work; the frequency with which the number or types of hazards change as the work progresses; and knowledge about the subcontractor's safety history, safety measures, safety violations, and level of expertise. OSHA considers whether the purported controlling employer conducted periodic inspections of other employers, implemented an effective system of correcting hazards, and enforced other employers' compliance with safety and health requirements.

In the construction industry, OSHA attempts to establish controlling employer liability where a general contractor reserves a specific contractual responsibility to inspect, supervise, or correct subcontractor safety violations. This may take the form of a specific contract right, policy, or practice to require another contractor to adhere to safety and health requirements and to correct violations. Even where there is no explicit contractual provision assigning responsibility to supervise safety, OSHA may attempt to find an employer culpable in other ways. OSHA may consider a general contractor to be a controlling employer if it routinely exercises broad control, inspection, and supervision over subcontractors at the site.

Statutory Analysis

To establish a violation of an occupational safety or health standard, the Secretary of Labor (Secretary) has the burden of proving: (1) the applicability of the cited standard; (2) the employer's non-compliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation (in other words, that the employer either knew of, or with the exercise of reasonable diligence could have known, the violative conditions).⁸ OSHA's multi-employer policy appears most readily applicable to construction standards under 29 C.F.R. Part 1926.⁹ However, OSHA's multi-employer policy is not derived from or based on the provisions of a specific construction standard. Indeed, this policy appears to be independent of the Secretary's own regulation concerning construction work:

Each employer shall *protect the employment of each of his employees* engaged in construction work by complying with the appropriate standards proscribed in this paragraph.¹⁰

Similarly, § 5(a) of the OSH Act, 29 U.S.C. § 654(a), itself contains wording that does not specifically support OSHA's more expansive applications of its multi-employer policy:

Duties of employers and employees. (a) each employer (1) shall furnish to *each of his employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to *his employees*; (2) shall comply with the Occupational Safety and Health Standards promulgated under this chapter.¹¹

However, OSHA contends that its multi-employer citation policy is based on the § 5(a)(2) statutory provision that "each employer . . . (2) shall comply with Occupational Safety and Health standards promulgated under this chapter."¹²

Astute contractors, operators, and other employers recognize the risk of voluntarily adopting contracts, programs, policies, and practices that actively supervise and direct the on-site work of subcontractor employees. These measures can be and are used by OSHA to hold a conscientious employer responsible for another employer's negligence. The controlling employer liability theory also complements OSHA's enforcement policy to refrain from citing the self-employed subcontractor, to reduce proposed penalties for the smaller subcontractor, and to leverage the economic burden of subcontractor safety noncompliance against a deep-pocket contractor or operator.

Accepting broad responsibility to supervise, inspect, assess, and remedy a subcontractor's on-site safety noncompliance requires significant staffing and funding not necessarily available or feasible at multiple or remote sites. Adopting such responsibility converts the issue from whether the contractor or operator is a controlling employer to the more problematic burden of disproving an alleged failure to effectively fulfill such responsibility. OSHA uses a subjective, *ad hoc* calculus to determine whether an admitted controlling employer did enough to prevent subcontractor safety violations. By placing its own employees on-site solely to monitor a subcontractor's safety compliance, the employer may be cited for exposing these employees to subcontractor hazards regardless of controlling employer issues.

Case Law Prior to *Summit Contractors*

The Commission first discussed the multi-employer citation policy in 1976, in the companion cases of *Anning-Johnson Co.*¹³ and *Grossman Steel & Aluminum Corp.*¹⁴ Prior to 1976, the Commission had taken the position that a general contractor does not bear joint responsibility with a subcontractor for compliance with OSHA regulations. In *Grossman Steel*, the Commission modified its position, stating:

We have, however, reconsidered our prior decisions in light of the court decisions in *Brennan v. OSHRC* (Underhill Construction Corp.) and *Anning-Johnson*. We continue to believe that the OSH 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 this *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.*¹⁵

The Commission went on, in *dicta*, to state:

Additionally, the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisor capacity.¹⁶

In 1994, the Commission held that a general contractor is responsible for violations by other employers where a general contractor could reasonably be expected to prevent or detect violations due to its general supervisory authority and control over the worksite.¹⁷ This duty may affect an employer even if its own employees are not exposed to the hazard.¹⁸ Under Commission precedent, an employer that either creates or controls the cited hazard has a duty under § 5(a)(2) of the OSH Act to protect its own employees and those of other employers “engaged in the common undertaking.”¹⁹ Specifically, an employer may be held responsible for violations by other employers “where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.”²⁰

In *Access Equipment Systems*,²¹ the Commission reaffirmed OSHA’s multi-employer citation policy. In that case, a scaffold that Access had erected and leased to a subcontractor collapsed, killing three employees of another subcontractor. The Commission determined that Access could be held responsible for failing to determine the weight the scaffold safely could bear.²²

The Fifth Circuit has differed with OSHA’s interpretation, rejecting the multi-employer citation policy based on the former 29 C.F.R. § 1910.13(a), which similarly required the employer to protect the employment and place of employment of each of its employees.²³ However, as the Commission observed in *Access Equipment Systems*, the Fifth Circuit represents a minority among the circuits, most of which have adopted principles associated with multi-employer liability, including the Second, Sixth, Seventh,

Eighth, Ninth, and Tenth Circuits.²⁴ In *McDevitt Street Bovis, Inc.*,²⁵ the Commission held that case law decided by the former Fifth Circuit rejecting the multi-employer citation policy does not preclude application of the Commission’s precedent in other circuits.

The validity of citations issued under the multi-employer citation doctrine often has been based on whether 29 U.S.C. § 654(a)(2) allows the employer’s duty to comply with standards to be imposed beyond the immediate employer-employee relationship.²⁶ The Commission’s answer has been that § 5(a)(2) of the OSH Act does not limit an employer’s duty to comply with standards only with respect to exposures affecting the employer’s own employees.²⁷ Also, the Commission decided in 1979 not to limit the multi-employer citation policy to the construction industry.²⁸

Liability of General Contractors

In many cases, notwithstanding the Commission’s reference to liability on the basis of some supervisory duty or right, the general contractor also happened to be the employer responsible for creating or exposing its employees to the particular hazard, and therefore was responsible for the violation on that basis. For example: in *Centex-Rooney Construction Co.*,²⁹ the general contractor on the project also was the employer in charge of the guardrails, and therefore created and controlled the violative conditions; in *Blount International Ltd.*,³⁰ the general contractor was the creating employer as to three violations affirmed against it; in *Gil Haugan, d/b/a Haugan Construction Co.*,³¹ citations issued to an employer for

exposing its own employees were affirmed on the basis that it was the general contractor on the site; and in *Knutson Construction Co.*,³² a scaffolding violation against a general contractor was affirmed, based on the general contractor's supervisory role and the fact that its own employees were exposed to the hazard.

In *Marshall v. Knutson Construction Co.*,³³ the Commission relieved the general contractor of liability for failing to detect a one-inch crack on the underside of a contractor's scaffolding platform before it collapsed. The Commission concluded that it was unreasonable to expect a general contractor to have such knowledge.

Similarly, in *Sasser Electric and Manufacturing Co.*,³⁴ OSHA cited an employer for a violation by a subcontractor that the employer had engaged to perform certain specialized work. The Commission dismissed the citation. Under Commission precedent, however, a general contractor that does not expose its employees and does not create the subcontractor's hazardous condition still may be considered liable for violations by a subcontractor where the general contractor could reasonably be expected to prevent or detect and abate the violation.³⁵

In theory, a general contractor's responsibility does not necessarily depend on whether the general contractor actually has the power and expertise to detect and abate the hazard.³⁶ Under OSHA's theory, a general contractor is presumed to have sufficient control, resources, and expertise to require subcontractors to comply with the safety standards and to abate violations.³⁷

Reliance on Subcontractor

Although recognizing an employer's duty to protect its own employees from exposure to a hazard created by another company, the Commission described certain circumstances in which an employer would be justified in relying on a subcontractor specialist to protect its employees.³⁸ A specialist may be relied on where the hazard relates to the specialist's expertise, and if the "reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely."³⁹

In *Sasser Electric and Manufacturing Co.*, for example, the cited employer had never performed the crane operations that it engaged the subcontractor specialist to perform, and the crane was under the control of the specialist. Accordingly, the cited employer "could not have known the requirements of the cited standard would not be followed."⁴⁰ In exercising reasonable diligence, a general contractor may rely on the assurances of a subcontractor, as long as it has no reason to believe that the work is being performed in an unsafe manner. However, in *Blount International*,⁴¹ the Commission found it reasonable to expect a general contractor to detect an electrical circuit ground fault problem even though the condition was by nature latent and hidden from view.

The Law in Colorado

Citations related to Colorado worksites ultimately may be reviewed by the District of Columbia (D.C.) Circuit or the Tenth Circuit, because a Colorado employer may appeal an adverse Commission decision to either circuit.⁴² Both circuits have addressed the multi-employer citation policy before *Summit Contractors*.

The D.C. Circuit already has identified tension between 29 C.F.R. § 1910.12(a) and the application of OSHA's policy. In *Anthony Crane Rental, Inc. v. Reich*,⁴³ the D.C. Circuit distinguished the question of how 29 U.S.C. § 654(a)(2) should be interpreted from the question of whether the alleged multi-employer duty was

consistent with the cited standards and regulations. The court noted that it had twice upheld OSH Act violations against chemical manufacturers charged with violating standards that specifically imposed a duty to warn downstream employees of hazards. However, the court was unwilling to apply multi-employer liability where the standards did not notify employers of the broader obligations and duties OSHA sought to enforce.

In *IBP, Inc. v. Secretary of Labor*,⁴⁴ the D.C. Circuit found it unnecessary to decide the multi-employer citation policy's validity, but observed that it has a "checkered history":

We see tension between the Secretary's multi-employer theory and the language of the statute and regulations and we have expressed doubt about its validity before. . . . This previous "doubt" was expressed in *Anthony Crane Rental v. Reich* . . . where, without deciding the issue, the court questioned whether "the multi-employer doctrine is consistent with the Secretary's own construction regulation. . . ."⁴⁵

In 1999, the Tenth Circuit addressed the multi-employer citation policy in *Universal Construction*.⁴⁶ Universal Construction

contracted to construct an office and subcontracted portions of the project.⁴⁷ Universal Construction stipulated that its field manager and foreman were at the jobsite; were in a position to observe a subcontractor create a hazard and expose employees to the hazard; and had plenary authority to correct or direct the subcontractor to correct the subcontractor's hazard.⁴⁸ The Commission declined to review the administrative law judge's findings that sustained citations against Universal Construction.

Universal Construction appealed to the Tenth Circuit. The Tenth Circuit noted the D.C. Circuit's decision in *IBP* and conceded that "the multi-employer doctrine and the language of the Act are not perfectly harmonious," but did not resolve the underlying inconsistency between OSHA's multi-employer citation policy and 29 C.F.R. § 1910.12(a).⁴⁹ The Tenth Circuit deferred to OSHA's use of 29 U.S.C. § 654(a)(2) to support OSHA's multi-employer citation policy.⁵⁰

The Commission's *Summit Contractors* Decision

Summit Contractors represents the Commission's most thorough and critical analysis of OSHA's multi-employer citation policy. *Summit Contractors* involved a general construction contractor that subcontracted masonry work for a college dormitory in Arkansas to All Phase Construction.⁵¹ OSHA issued citations concerning All Phase employees being unprotected from scaffolding falls. None of the exposed workers was employed by Summit Contractors, and Summit Contractors did not create the purportedly hazardous condition.

OSHA cited Summit Contractors for violating construction scaffolding requirements as a controlling employer, pursuant to 29 C.F.R. § 1926.451(g)(1)(vii). Summit Contractors argued that the multi-employer citation policy was invalid as to a general contractor that neither created nor exposed employees to the cited hazard. Summit Contractors asserted that because it had no employees exposed to the hazard and it did not create the hazard, regulations prohibited the issuance of a citation to Summit Contractors for a hazard created by a subcontractor.

The Commission, citing the D.C. Circuit's analysis in *Anthony Crane Rental*, held that the specific limitation in the construction standard, 29 C.F.R. § 1910.12(a), precluded citing a general contractor that neither created nor exposed its employees to the hazard.⁵² Section 1910.12(a) was issued under the OSH Act in 1971 to adopt construction standards promulgated under the Construction Safety Act, 40 U.S.C. § 333. The regulation governs the scope and application of the construction standards:

The standards proscribed 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 proscribed in this paragraph.*⁵³

The Commission found unpersuasive the Secretary's argument that the first sentence of OSHA's regulation permits or allows cit-

ing a broader class of employers, including those whose employees are not exposed to the cited hazard. The Commission relied on 29 C.F.R. § 1910.12(a) to invalidate the “controlling employer” portion of OSHA’s multi-employer citation policy, but did not revisit the question of whether multi-employer citations are sustainable under § 5(a)(2) of the OSH Act. The Commission vacated the citation against Summit Contractors, finding OSHA’s reliance on its multi-employer citation policy impermissible given the contrary language of 29 C.F.R. § 1910.12(a).

The Secretary sought review by the Eighth Circuit Court of Appeals. The Eighth Circuit provided the Secretary a more favorable forum than the D.C. Circuit, as the Eighth Circuit previously had sustained the multi-employer citation policy in *Marshall v. Knutson Construction Co.*⁵⁴ There, the court relied on § 5(a)(2) of the OSH Act, not 29 C.F.R. § 1910.12(a).

The Secretary argued that the Eighth Circuit should reject the Commission’s *Summit Contractors* decision and endorse “controlling employer” liability. The Secretary argued that: (1) the court’s 1977 *Knutson* opinion found OSHA’s multi-employer citation policy consistent with 29 U.S.C. § 654(a)(2); (2) other circuit courts have concluded that § 654(a)(2) requires a “controlling employer to protect all employees, not just its own, from hazards within the employer’s control”; (3) 29 C.F.R. § 1910.12(a) is ambiguous; (4) the court should defer to the Secretary’s interpretation of 29 U.S.C. § 654(a)(2); and (5) 29 C.F.R. § 1910.12(a) does not address controlling employer liability and does not have the same meaning as 29 U.S.C. § 654(a)(1) and (2). The Eighth Circuit has not yet issued its decision concerning *Summit Contractors*.

Conclusion

Summit Contractors represents Commission law under the OSH Act in those circuits that have not embraced OSHA’s multi-employer citation policy, and arguably in those circuits that have not squarely addressed 29 C.F.R. § 1910.12(a). Because the Tenth Circuit has not directly addressed the Commission’s application of § 1910.12(a) in *Summit Contractors*, Colorado employers are confronted with a material distinction and arguable choice between Commission and Tenth Circuit precedents.

Notes

1. *Summit Contractors Inc.*, ___ BNA OSHC ___ (No. 03-1622, April 27, 2007).

2. *See, e.g., Drexel Chemical Co.*, 17 BNA OSHC 1908, 1910, n.3 (No. 94-1460, 1997).

3. 29 U.S.C. §§ 651 *et seq.*

4. Occupational Safety and Health Administration (OSHA) Directive CPL 2-0.124: Multi-Employer Citation Policy (Dec. 10, 1999), available at www.osha.gov.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

9. *See, e.g.,* 29 C.F.R. Part 1926, Subpart B—General Interpretations concerning construction safety and health provisions of section 107, Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333: “By contracting for full performance of a contract subject to section 107 of the Act the prime contractor assumes all obligations prescribed as employer obli-

gations under the standards contained in this part, whether or not he sub-contracts any part of the work,” 29 C.F.R. § 1926.16(b), and “With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.” 29 C.F.R. § 1926.16(c).

10. 29 C.F.R. § 1910.12(a) (emphasis added).

11. 29 U.S.C. § 654(a) (emphasis added).

12. 29 U.S.C. § 654(a)(2).

13. *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 and 4409, 1976).

14. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 1275, 1976).

15. *Id.* at 1188 (emphasis added).

16. *Id.*

17. *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994).

18. *Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992).

19. *Anning-Johnson*, *supra* note 13; *Grossman Steel*, *supra* note 14.

20. *Centex-Rooney Constr.*, *supra* note 17 at 2130 (where conditions were in plain view and existed for a significant period of time).

21. *Access Equipment Systems*, 18 BNA OSHC 1718 (No. 95-1449, 1999).

22. *Id.* at 1723-26.

23. *Melerine v. Avondale Shipyards Inc.*, 659 F.2d 706 (5th Cir. 1981).

24. *Access Equipment Systems*, *supra* note 21 at 1725, n.12.

25. *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000).

26. *Universal Constr. Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999).

27. *Access Equipment Systems*, *supra* note 21 at 1723.

28. *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1688 (No. 76-1408, 1979).

29. *Centex-Rooney Constr.*, *supra* note 17.

30. *Blount Int’l Ltd.*, 15 BNA OSHC 1897 (No. 89-1394, 1992).

31. *Gil Haugan, d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004 (No. 76-1512, 1979).

32. *Knutson Constr. Co.*, 4 BNA OSHC 1759 (No. 765, 1976).

33. *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977).

34. *Sasser Electric and Mfg. Co.*, 11 BNA OSHC 2133 (No. 82-178, 1984).

35. *Centex-Rooney Constr.*, *supra* note 17.

36. *Red Lobster Inns of America Inc.*, 8 BNA OSHC 1762 (No. 76-4754, 1980).

37. *Haugan Constr.*, *supra* note 31 at 2006. *See also Lewis & Lambert Metal Contract, Inc.*, 12 BNA OSHC 1026, 1030 (No. 80-5295, 1984).

38. *Sasser Electric and Mfg. Co.*, *supra* note 34 at 2136.

39. *Id.*

40. *Id.* at 2135.

41. *Blount Int’l*, *supra* note 30 at 1899 (No. 89-1394, 1992).

42. 29 U.S.C. § 660(a).

43. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995).

44. *IBP, Inc. v. Secretary of Labor*, 144 F.3d 861 (D.C. Cir. 1998).

45. *Id.* at 865.

46. *Universal Constr.*, *supra* note 26.

47. *Id.* at 727.

48. *Id.*

49. *Id.* at 729-30.

50. *Id.* at 727-32.

51. *Summit Contractors*, *supra* note 1.

52. *Anthony Crane Rental*, *supra* note 43 at 1306-7.

53. 29 C.F.R. § 1910.12(a) (emphasis added).

54. *Knutson Constr.*, *supra* note 33. ■