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Insight — 7/1/2009 12:00:00 AM

A recent ruling by a federal circuit court upheld an Occupational Safety and Health Administration (OSHA) policy of citing general contractors for safety violations committed by their subcontractors. For several years, the Secretary of Labor has maintained a policy known as the "Controlling Employer Citation Policy" or "Multi-Employer Policy." This policy provides that OSHA may issue citations to general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by a subcontractor through the reasonable exercise of supervisory authority, regardless of whether the general contractor created the hazard or whether the general contractor's own employees were exposed to the hazard.

In this case, Summit Contractors was a general contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit subcontracted the entire project and had only four employees on the construction site: a project superintendent and three assistant superintendents. Summit subcontracted the exterior brick masonry work to All Phase Construction. On three separate occasions, Summit's project superintendent observed All Phase employees operating without personal fall protection on scaffolds that lacked guard rails and advised All Phase to correct this problem. However, when All Phase's employees moved the scaffolds to another location, they would again work without fall protection and without guard rails.

In June 2003, the OSHA compliant safety and health officer observed All Phase employees working on scaffolds over 10 feet above the ground without fall protection or guard rails, in violation of OSHA regulations. None of Summit's employees were exposed to any hazard created by the violation. Nonetheless, the OSHA officer issued Summit a citation for violation of OSHA regulations, based on the controlling employer policy.

After an administrative law judge upheld the citation, Summit appealed to the Occupational Safety and Health Review Commission ("OSHRC"). OSHRC agreed with Summit that OSHA regulations require each employer to protect only its own employees and therefore preclude implementation of the controlling employer citation policy. On that ground, OSHRC vacated the citation. The Secretary of Labor appealed to the United States Circuit Court of Appeals, Eighth Circuit.

At issue before the court was interpretation of the following regulation implemented under the OSHA Act.

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 prescribed in this paragraph.

29 CFR § 1910.12(a).

Analyzing the grammar of this section, the court discussed whether an employer has a duty to protect its employees' "employment" or "places of employment." The court found that protecting employees' "employment" is limited to requiring employers to protect their own employees. However, the court found that the second phrase, which requires an employer to protect his employees' "places of employment" does not preclude the interpretation by the Secretary of Labor under its controlling employer policy.

Interestingly, one of the three judges that heard the case disagreed with the decision. That judge found the court's analysis of the regulation to be simply wrong. Further, the court was troubled because "it is impossible under the OSHA Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors, many of whom are larger employers than the general or the prime contractor." Perhaps the dissent opens the doors for a potential appeal to the United States Supreme Court. There is no indication whether Summit will appeal.

Whether the OSHA Act is implemented and enforced by OSHA, or a state agency under delegation of OSHA's regulatory authority, contractors should anticipate that the controlling employer policy (or, multi-employer policy) will be readily enforced on construction job sites.

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