J. Kevin Bridston

Partner and General Counsel
303.295.8104
Denver
kbridston@hollandhart.com

Generals May Be Liable For Subs' Violations

Generals May Be Liable For Subs' Violations

Insight — 11/1/1999 12:00:00 AM

This summer, the United States Court of Appeals for the Tenth Circuit (covering Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) held that a general contractor may, under certain circumstances, be held liable for OSHA violations of a subcontractor.In Universal Construction Company v. OSHA, 182 F.3d 726 (10th Cir. 1999), the Tenth Circuit Court of Appeals approved the imposition of OSHA penalties against the contractor, based on a subcontractor's violation of construction safety standards, under the "multi-employer work site" doctrine.The multi-employer doctrine provides that an employer who controls or creates a work site safety hazard may be liable under OSHA, even if the employees threatened by the hazard are solely employees of another employer.The doctrine came about primarily in the construction industry because construction projects often involve multiple employers, including subcontractors, working in the same general area where hazards created by one employer may pose danger to employees of other employers.

In the Universal case, the contractor was cited for a subcontractor's employee's failure to wear and attach a safety belt to an aerial lift basket and for that employee subsequently climbing out of the lift basket onto a building roof.The contractor's field manager and foreman were at the job site and in a position to observe the violations.Moreover, they had authority to correct the hazards or to direct the subcontractor's foreman to correct the hazards, but failed to do so.There was no dispute that only the subcontractor's employees created the hazards for which the fines were assessed against the contractor.

The decision does not come as a particular surprise, as five of the eleven federal circuits previously adopted the multi-employer doctrine, and only the Seventh Circuit has rejected it.The Tenth Circuit held that 29 U.S.C. § 654(a)(2), which requires an employer to "comply with occupational safety and health standards promulgated under this chapter," is ambiguous as to its intent (specifically, whether it encompasses the multi-employer doctrine).Because the court concluded the intent was ambiguous, it deferred to the Occupational Safety and Health Administration's interpretation of the statute.In doing so, the court noted that the Agency's interpretation of the statute "furthers than rather frustrates the policy of the underlying Act.The Act was designed 'to assure so far as possible' every working man and woman in the nation safe and healthful working conditions.'. . .To achieve this end, Congress focused primarily on 'making places of employment, rather than specific employees, safe from work related hazards.'"

From a practical standpoint, the Universal decision does not necessarily

mean big changes are in order the general contractors.It does mean that general contractors must apply common sense to dealing with work site hazards.Obviously, general contractors should take steps to eliminate and reduce job site hazards, including implementing reasonable steps to observe and identify such hazards.If a general contractor notices a job site hazard, it further should take reasonable steps to alleviate the hazard, regardless of whose employees created the risk or whose employees are threatened by the risk.

Indeed, there is room under the Universal decision for a subcontractor in certain circumstances to be held liable for another subcontractor's OHSA violations, at least where the first subcontractor's employees are threatened by the hazard.Where rules of craft jurisdiction limit a subcontractor's ability to abate hazards created by another subcontractor, at the very least the subcontractor can and should ask the general contractor to correct or direct correction of the condition.

The bottom line is that on a construction site, a contractor may indeed be his brother's keeper, at least for purposes of complying with OSHA.Clearly, a contractor cannot simply turn a blind eye to subcontractors' OSHA violations, at least not without running the risk of substantial OSHA penalties.For this reason, if no other, a contractor should consider the Universal decision in drafting its subcontracts, and include appropriate provisions with respect to safety and indemnification.This doctrine may also have ramifications with respect to a contractor's liability to a subcontractor's employees for personal injury.

Kevin Bridston is a partner at Holland & Hart LLP and manager of Holland & Hart's Construction and Real Estate Litigation Group.
