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JUNE 2007

After over 30 years of enforcing OSHA's policy of citing general contractors on multi-employer construction worksites when a subcontractor creates a safety or health hazard, the OSHA Review Commission abolishes "controlling employer" liability when the general contractor neither created nor exposed its employees to the hazard.

OSHA

A Littler Mendelson Newsletter
specifically for the Occupational Safety
and Health Industry

"Controlling Employer" No Longer Liable Under Multi-Employer Worksite Doctrine

By Steven G. Biddle

For over 30 years, when there is a safety or health hazard on a construction or other multi-employer worksite, the Occupational Safety and Health Administration (OSHA) generally issues citations to more than one of the employers on the worksite. These often include the "creating employer," the "correcting employer," and the "controlling employer," even if the actual employees of these employers were not exposed to the hazard. OSHA defines the "controlling employer" 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." Based on this interpretation, general contractors on construction sites often receive OSHA citations for a subcontractor's violation, even if none of the general contractor's employees were exposed to the hazard, and the general contractor neither created the hazard nor was required to correct it.

The Decision

On April 27, 2007, the Occupational Safety and Health Review Commission changed all this in deciding the *Secretary of Labor v. Summit Contractors, Inc.*, case. Specifically, the Review Commission ruled that federal law precludes OSHA from citing a controlling employer engaged in construction work for failing to ensure that other employers at the worksite comply with safety and health standards. In the words of the dissenting judge, the decision "reversed over 30 years of legal precedent" involving multi-employer liability.

In *Summit Contractors*, Summit was the general contractor for construction of a college dormitory in Little Rock, Arkansas. An OSHA

investigator visited the site and found that the masonry subcontractor's employees were working on scaffolds without appropriate fall protection. Under the "controlling employer" doctrine, OSHA issued a citation to the masonry subcontractor, but also to Summit alleging it violated OSHA's construction industry fall protection standard even though no Summit employee was exposed to the hazard. In essence, and consistent with its policies, OSHA determined that Summit had a duty to ensure that all of the subcontractors' employees used appropriate fall protection.

The Review Commission invalidated the citation against Summit based on what it called the "plain language" of the applicable safety regulation that states, in part: "Each employer shall protect the employment and places of employment of each of *his employees* engaged in construction work." (emphasis added.) The Review Commission majority held that the phrase "his employees" means an employer engaged in construction work is only responsible for the safety and health of its own employees and does not require the general contractor to ensure that its subcontractors comply with occupational safety and health standards.

Impact of the *Summit Contractors* Decision

Although the *Summit Contractors* decision is a significant blow to the multi-employer liability doctrine, a few concerns remain for employers. First, the decision applies only to the construction industry because it was based on OSHA's construction standards. Thus, other multi-employer worksites, such as employers in other industries that contract out portions of their work, may not enjoy the

benefits of this decision.

Second, general contractors still may be cited for safety and health hazards created by their subcontractors if any of the general contractor's employees are exposed to the hazard, or if they create the hazard to which their employees are exposed. Accordingly, general contractors still should make every effort to ensure safe working conditions throughout the worksite.

Finally, OSHA has already filed a petition asking the U.S. Court of Appeals for the Eight Circuit to review the *Summit Contractors* decision, so it remains to be seen if the decision will be upheld. Nonetheless, at least for the time being, OSHA will have a difficult time upholding citations issued to "controlling employers" that neither created a hazard or exposed their employees to it.

If you have any questions regarding this decision or any other occupational safety and health issue, please contact one of Littler's OSHA attorneys listed below.

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