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The U.S. Court of Appeals for the Eighth Circuit in *Solis v. Summit Contractors, Inc.*, reinstated OSHA's ability to issue citations to general contractors at multi-employer worksites. By vacating a 2007 decision by the Occupational Safety and Health Review Commission (OSHRC), the Eighth Circuit reestablished OSHA's nearly 30 year-old policy allowing it to issue citations to general contractors as the "controlling employer" for a subcontractor's violation of a safety hazard, even if none of the general contractor's employees was exposed to the cited safety hazard, and the general contractor neither created the hazard nor was required to correct it.

Eighth Circuit Reinstates Multi-Employer Worksite Liability

By Steve McCown and Jeffrey J. Sun

In a divided and much-anticipated opinion in *Solis v. Summit Contractors, Inc.*, the U.S. Court of Appeals for the Eighth Circuit reinstated a Department of Labor policy allowing the Occupational Safety and Health Administration (OSHA) to issue citations to general contractors at construction sites when they have the ability to prevent or abate hazardous conditions created by subcontractors.[1]

The Multi-Employer Citation Policy

As it existed for over 30 years, the multi-employer citation policy allowed OSHA to issue a citation to any employer who was the *creating employer* (creating the hazardous condition), *correcting employer* (responsible for correcting a hazard, i.e. given the responsibility of installing and/or maintaining particular safety/health equipment or devices), *controlling employer* (has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them), or the *exposing employer* (employer whose employees are exposed to the hazard). As a result, general contractors on construction sites could receive OSHA citations as a controlling employer for a subcontractor's violation, even if none of the general contractor's employees was exposed to the cited safety hazard, and the general contractor neither created the hazard nor was required to correct it.

The OSHRC's *Summit* Decision

However, on April 20, 2007, in *Summit Contractors, Inc.*, the Occupational Safety and Health Review Commission (OSHRC), the body responsible for carrying out the adjudicatory functions of OSHA, overruled the multi-employer citation policy and held that it was impermissible to cite a general contractor if it did not create the hazard and none of its own employees had been exposed to the hazard.[2]

In that case, Summit was the general contractor for the construction of a college dormitory and had subcontracted masonry work to All Phase Construction, Inc. ("All Phase"). OSHA cited Summit as the controlling employer for a violation of the scaffolding construction safety standard that required personal fall protection on scaffolds that lacked guardrails, despite the fact that Summit advised All Phase to correct these problems before the citation.[3]

Summit contested the citation, arguing that 29 C.F.R. section 1910.12(a), the regulation establishing OSHA's construction standards, only placed a duty on employers to protect its own employees, not the subcontractor's employees, so Summit could not be cited as the controlling employer when its own employees were not exposed to the hazardous condition.

The OSHRC agreed with Summit's position and vacated the citation based on: (1)what it called the "plain language" of the regulation, which states, in part, "[e]ach employer shall protect the employment and places of employment of each of *his employees* engaged in construction work" (emphasis added); and (2) the Secretary's "checkered history" on multi-employer worksite liability characterized by inconsistent application and elucidation.

OSHA refused to change its multi-employer citation policy in light of the OSHRC's decision in *Summit*, and the Secretary of Labor filed a petition for review to the Eighth Circuit Court of Appeals on May 21, 2007.

The Eighth Circuit Vacates the OSHRC's Decision

The Eighth Circuit utilized a grammatical interpretation to determine whether the plain language of section 1910.12(a) precluded the controlling employer citation policy. The court separated the regulation into two parts, holding that as reconstructed, section 1910.12(a) requires that: (1) an employer shall protect his employees; and (2) an employer shall protect the places of employment of each of his employees. The Eighth Circuit held that part 2 means that an employer shall protect the places of employment, including others who work at the place of employment, so long as the employer also has employees at that place of employment. Therefore, the court ruled that the plain language of the regulation did not preclude the controlling employer citation. The court stated that to hold otherwise would render part 2 – the duty to protect places of employment – superfluous and redundant if it only required the employer to protect his own employees as Summit contended. The Eighth Circuit continued by stating that even if section 1910.12(a) were ambiguous, it would defer to the Secretary's interpretation that the regulation does not preclude controlling employer citations. The court further concluded that the Secretary's interpretation of the regulation has not been applied inconsistently over time.

The dissenting judge disagreed with the Court's conclusion that section 1910.12(a) was ambiguous and required deference to the Secretary's interpretation. The dissent further noted that it was "absurd as a matter of rational policy" to hold a general homebuilding contractor that often has no "employees" engaged in construction work at the places of employment responsible for the violations of the subcontractor. The dissent concluded by stating, "[i]t is not Congress's policy pronouncements that need to be revised, it is the Secretary's, and now this court's misinterpretation of them."

Conclusion

While the multi-employer citation policy has been revived, there is potential for further review of the *Summit* decision and further litigation due to the court's lack of unanimity, particularly the dissenting judge's commentary. It is also important to note that while the *Summit* decision applies only to the construction industry, as opposed to general industry work, employers should be aware of their OSHA responsibilities at all multi-employer worksites and ensure compliance.

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[1] No. 07-2191, 2009 U.S. App. LEXIS 3755, at *2 (8th Cir. Feb. 26, 2009).

[2] *Summit Contractors, Inc*., OSHRC Docket No. 03-1622 (2007).

[3] OSHA cited All Phase as the creating and exposing employer.