Insights, News & Events

OSHA'S MULTIEMPLOYER CITATION POLICY: A CHANGING LANDSCAPE

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Effective June 1, 2017, the Occupational Safety and Health Review Commission (the federal agency that reviews Occupational Safety and Health Administration safety violation cases) adopted the decision by one of its administrative law judges in a significant case for the construction industry.

In Secretary of Labor v. Hensel Phelps Construction Co., Docket No. 15-1638 (June 1, 2017), the Review Commission held that OSHA was barred from citing a general construction contractor under the Occupational Safety and Health Act of 1970 for an alleged safety violation as to which the general contractor's own employees were not exposed. The alleged violation took place on a construction site in Austin, Texas. This ruling has immediate implications for construction employers in Texas, Louisiana and Mississippi, and could preview a split among federal circuit courts of appeal regarding the secretary of labor's enforcement powers under the OSH Act.

Background

For decades, OSHA has cited employers for safety violations under what is referred to as the "controlling employer" doctrine. For purposes of that doctrine, the secretary of labor has interpreted the OSH Act to allow OSHA to cite multiple employers for an individual safety violation regardless of who employs the workers that were exposed to the cited hazard. The most common situation in which this doctrine is applied occurs when OSHA cites a general construction contractor for a safety hazard created by a subcontractor. For OSHA, liability is not limited to only those

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employers who created the hazard and/or exposed their own employees to it. OSHA also considers it important to consider citing the employers who "control" the place of work and thus, might reasonably have been expected to remedy the hazardous situation regardless of whether their own workers were exposed to the cited hazard.

Notwithstanding, since the 1981 ruling in Melerine v. Avondale Shipyards Inc., 659 F.2d 706 (5th Cir. 1981), it has been law in the 5th Circuit that protection under the OSH Act extends only to an employer's own employees. Under this interpretation of the OSH Act, an employer who does not expose its own employees to hazard may not be cited for the safety violation. This view, of course, is squarely at odds with the secretary of labor's "controlling employer" doctrine and OSHA's multiemployer citation policy" (1999), which ostensibly allows OSHA to cite a controlling employer regardless of who the exposed employees work for.

In the Hensel Phelps Construction Co. case, the employees who were exposed to the alleged safety hazard worked for a subcontractor. OSHA believed, however, that it should cite the general construction contractor because of its arguably controlling employer status. After being cited, the general construction contractor contested the safety citation by pointing out, among other things, that it did not employ the exposed workers and thus, could not be found liable for the cited violation under Avondale Shipyards. After taking evidence and considering the parties' briefs, the administrative law judge granted the general construction contractor's summary judgment motion, and dismissed the safety violation citation that OSHA had issued.

The secretary of labor thereafter sought discretionary review of the administrative law judge's ruling, but the Review Commission denied that request and adopted the judge's decision as the final agency order in the case. By doing so, the Review Commission found that the case was governed by Avondale Shipyards regardless of views by other circuit courts of appeal and even the Review Commission's own prior rulings. This was because the law as interpreted by the 5th Circuit was controlling, since that was the federal appellate jurisdiction in which any review of the agency's final order would be heard.

Impact

How does this ruling change the safety compliance landscape and application of OSHA's multiemployer citation policy on a going forward basis?

This decision by the OSH Review Commission reopens a debate concerning the reach of OSHA's "controlling employer" doctrine that began in the 1970's, but has never been fully resolved. Because this ruling may affect many construction projects in Texas, Louisiana and Mississippi (the states within the 5th Circuit), the secretary of labor may decide to appeal it to the 5th Circuit. If the secretary of labor does so, the appeals court will determine whether its view has changed since Avondale Shipyards, or whether it still interprets the OSH Act's protections to extend only to an employer's own employees.

On the other hand, should the secretary of labor decide not to appeal this ruling, then nonexposing employers in Texas, Louisiana and Mississippi who are cited by OSHA for "controlling employer" safety violations may have a "new" defense to raise when contesting safety violation citations arising out of OSHA's multiemployer citation policy.

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