OSHA Review Commission Rejects Controversial "Controlling Employer" Doctrine

Insights
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No safety issue has generated more controversy among employers than OSHA's application of its multi-employer worksite policy. Under this policy the Agency can cite general contractors for safety violations by subcontractors on the site, even though the general contractor neither created the hazard nor exposed its own employees.

While this policy arose, and is most often seen, in the construction industry, it is applicable in the general industrial setting as well. The decision relied on language in the Act dealing only with the construction industry, but the "controlling employer" doctrine, as it is called, has been applied in manufacturing and other industries, as well. Consequently, the decision has potential impact far larger than that one industry.

Now, Commissioners Railton and Thompson have soundly rejected OSHA's approach of citing a general contractor as a "controlling" employer simply because the general contractor has some level of contractual and practical control and responsibility for the contractors on its site. *Summit Contractors, Inc*.

Background Of The Doctrine
Construction employers have long argued that the OSHAct only permits citations of an employer for 1) exposing its own employees to a hazard, regardless of who created it, or 2) creating a hazard to which other employees were exposed. Ignoring the plain language of the Act, OSHA took the position that the often extensive contractual rights of a general contractor should not allow it to avoid citation where the general contractor arguably could have required its subcontractor to correct hazards and maintain a safe workplace. General contractors responded with the explanation that there are numerous legal and practical reasons why a general contractor cannot manage the day to day affairs of a subcontractor, including the oversight and management of its safety program.

OSHA justified the use of a controlling-employer citation as a means to cite a general contractor who is indifferent to the safety performance of its contractors, arguing that such citations would motivate general contractors to better manage work sites. But a fear of being cited as a controlling employer has actually discouraged some general contractors from more actively managing the safety efforts of their subcontractors.

A general contractor could arguably lessen its exposure to a controlling-employer citation by using its contracts to expressly limit its responsibility for safety, and by running the job in such a way that it actively surrendered all day-to-day responsibility for the safety efforts of its subcontractors. General contractors were thus placed in the Hobson's choice of either attempting to limit exposure to OSHA citations by abdicating responsibility or increasing their exposure to OSHA citations as a result of doing what many of them viewed as the "right thing."

The Effect Of The Decision

While these debates will continue, the Commission has decisively stated that federal OSHA's multi-employer policy cannot be used against the contractor who neither created the hazard nor had employees who were exposed to it. We assume that OSHA will appeal the decision to a U.S. Court of Appeals. Many observers believe that a court will uphold the Commission's decision. On the other hand, some Circuit Courts have upheld aspects of the multi-employer doctrine, and OSHA may take the position that controlling employer citations are appropriate in those jurisdictions.

In the interim, employers should consider the following points:

- Even if *Summit* is followed, you remain responsible if you expose your employees to hazards created by other parties on your worksite, and should not relax efforts to ensure that you are taking all necessary steps to prevent your employees from being exposed to a hazard, even one you did not create.

- You continue to be responsible for hazards you create, even if it does not affect your own employees.

- General contractors and other employers may feel an increased freedom to monitor subcontractor safety compliance, especially if the *Summit* decision is ultimately upheld.

- You should review your contractual and "real-world" relationships with other employers working on the same site to determine the best approach in light of *Summit*. Many general contractors or property owners require contractors working on site to submit safety plans for approval or contractually commit to follow OSHA standards. Other employers provide a template of a safety plan or specific guidelines, training, or some level of periodic oversight by the general contractor's or property owner's managers or safety personnel.

- Employers in the 27 states which maintain State-OSHA plans should consult with counsel to determine the effect of the *Summit* decision on their State agency's enforcement approach.

- Contractor employers should review with counsel and consider the effect of *Summit* on pending federal OSHA cases, and perhaps even on State-plan OSHA cases. We will continue to monitor

OSHA's response, and in particular, the issuance of any enforcement guidance.

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