



# Safety Agency Applies Federal Law To Bar Employer Safety Violation Citation

AGENCY'S APPLICATION OF 5TH CIRCUIT APPEALS COURT PRECEDENT WILL BENEFIT EMPLOYERS

## Insights

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The federal agency that reviews OSHA safety violation cases, also known as the OSH Review Commission, recently adopted the decision of one of its Administrative Law Judges who applied 5th Circuit precedent to reject a safety violation citation against a construction employer working in Texas. The June 1, 2017 decision is no doubt significant for the construction industry, as the Review Commission held that the Occupational Safety and Health Administration (OSHA) could not cite a general construction contractor for an alleged safety violation under the Occupational Safety and Health Act of 1970 (OSH Act) when the general contractor's own employees were not exposed (*Secretary of Labor v. Hensel Phelps Construction Co.*)

This ruling has immediate implications for construction employers in Texas, Louisiana, and Mississippi. It could also preview a split among federal circuit courts of appeal regarding the Secretary of Labor's enforcement powers under the OSH Act.

### **Background: OSHA Has Taken Broad Approach For Liability Purposes**

For decades, OSHA has cited employers across the country 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 employers who *created* the hazard or *exposed* their own employees to it. OSHA also considers it important to consider citing those employers who "control" the place of work. Thus, the agency will cite non-exposing employers when they might reasonably have been expected to remedy the hazardous situation regardless of whether the company's own workers were exposed to the cited hazard.

Nonetheless, since the 5th Circuit Court of Appeals' 1981 ruling in *Melerine v. Avondale Shipyards, Inc.*, it has been circuit law (for agency review cases arising out of Texas, Louisiana, and Mississippi) that protection under the OSH Act only extends to an employer's own employees. Under this interpretation, 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 broader Multi-Employer Citation Policy (1999), which among other things, authorizes OSHA to cite *a controlling employer* regardless of who the exposed employees work for.

### **Agency Applies 5th Circuit Appeals Court Interpretation**

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 the *Avondale Shipyards* interpretation of federal safety law.

After taking evidence and considering the parties' briefs, the Administrative Law Judge (ALJ) granted the general construction contractor's summary judgment motion and dismissed OSHA's safety violation citation. The Secretary of Labor thereafter sought discretionary review of the ALJ's ruling, but the Review Commission denied that request and instead adopted the ALJ'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 the views by other circuit courts of appeal – and even prior decisions by the Review Commission. This was because the law as interpreted by the 5th Circuit controlled the situation because that was the federal appeals court in which any review of the agency's final order would take place.

### **What's Next?**

Given this ruling, one might now wonder how it changes the safety compliance landscape for employers in Texas, Louisiana, and Mississippi, especially as it applies to the application of OSHA's Multi-Employer Citation Policy. One thing is for sure: the OSH Review Commission's decision 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 Secretary of Labor may decide to appeal the matter to the 5th Circuit Court of Appeals. 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 non-exposing employers in those three states who are cited by OSHA for "controlling employer" safety violations may have a "new" defense to raise when contesting such citations under OSHA's Multi-Employer Citation Policy.

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