

OSHA LAW NEWS

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OSHA'S MULTI-EMPLOYER CITATION DOCTRINE

Over the past year, I have advised many of you that a recent decision from the Occupational Safety and Health Review Commission out of Little Rock, Arkansas, had disposed of the multi-employer doctrine as it has historically been used against general contractors. That decision was reversed and vacated by the United States Circuit Court of Appeals for the Eighth Circuit on February 26, 2009. *Secretary of Labor v. Summit Contractors*, 2009 W.L. 465978 (C.A.8). It is expected that this decision will be appealed to the United States Supreme Court by Summit Contractors.

What this means: Basically, this means that OSHA is now, once again, empowered to enforce its multi-employer worksite policy for "controlling" employers. That policy provides that OSHA may issue citations to general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority regardless of whether the general contractor's own employees were exposed to the hazard.

This is basically a return to the way things were over a year ago. You can expect that compliance officers will be expanding citations to include subcontractors and the general contractor who they believe could have corrected or prevented the hazard through their authority as the "controlling" contractor on the overall job.

The Eighth Circuit Decision: The Court went through a rather extensive review of the history of this "controlling employer citation policy" and a detailed analysis of the "regulatory interpretation" to be applied to the specific language at issue in the case. The language in question is specifically 29 C.F.R. § 1910.12(a) which provides in pertinent part as follows:

Each employer shall protect the employment and places of employment of each of **his employees** engaged in construction work by complying with the appropriate standards provided in this paragraph.

Id. (emphasis added).

The original decision determined that the reference to "his employees" specifically limited the application of this provision to violations which expose employees of the cited employer. Unfortunately, the Eighth Circuit went through some grammatical calisthenics to determine that "the plain language of § 1910.12(a) does **not** preclude the Secretary's controlling employer citation policy."

It should probably also be noted that there is an extensive dissenting opinion by Eighth Circuit Justice Bean wherein he challenges the majority's analysis and interpretation of the language in the Act and ultimately makes the following strong statement for the benefit of general contractors:

The Court further concedes that OSHA is an intricate and function-specific regulatory scheme such that each employer on a worksite may be uniquely situated to know the very specific regulatory requirements affecting a particular trade. What the court fails to note, and which is equally true, is that it is impossible under the OSH Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors, many of whom are larger employers than the general or prime contractor. . . . To impose the Secretary's rule on these employers is, in my view, **absurd as a matter of rational policy.**

2009 W.L. 465978, p. 15 (C.A.8). Over the past year, we have assumed that compliance offers would not issue multi-employer citations because of the ruling by the Commission and because this case was on appeal. Now that it has been reversed, I would anticipate that there will be a wave of multi-employer citations regardless of the fact that this Eighth Circuit decision will be on appeal to the United States Supreme Court.

The way to deal with this potential exposure is to have strict OSHA enforcement policies on all subcontractors and a documented and enforced "three strikes and you're out" policy with regard to any violations by those subcontractors or their employees.

Additionally, it is always a good idea to include in your subcontract agreement specific language requiring your subcontractor to indemnify you for any liability or exposure related to their OSHA violations and specifically requiring them to be responsible for any penalties issued to you as a direct result of their OSHA violations while working as a subcontractor on your job.

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