

PERSPECTIVES

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A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

Recent Eighth Circuit Decision Has Significant Impact on General Contractors, Supports OSHA'S Controlling Employer Theory of Liability

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The Eighth Circuit Overrules the Commission

On February 26, 2009, in *Secretary of Labor v. Summit Contractors, Inc.* the United States Court of Appeals for the Eighth Circuit overturned the decision of the Occupational Safety and Health Review Commission ("OSHRC") and held that a controlling employer may be cited for OSHA violations even when it did not create the hazard and none of its employees were exposed to the hazard giving rise to the citation.

Summit Contractors ("Summit") was the general contractor for a construction project in Little Rock, Arkansas. It subcontracted the entire project, and therefore had only four employees on the site: a project superintendent and three assistant superintendents. All Phase Construction ("All Phase") was the subcontractor responsible for the exterior brick masonry work. On two or three occasions Summit's project superintendent observed All Phase employees operating without personal fall protection on scaffolds lacking guard rails. The superintendent advised All Phase to correct the problems; however, each time the All Phase employees moved the scaffold to another location, they would again work without fall protection and guardrails. None of Summit's employees were exposed to the hazard.

An OSHA Compliance Safety and Health Officer observed All Phase employees working on scaffolds over ten feet above ground without fall protection or guardrails. In addition to citing All Phase, the officer issued a citation to Summit, based on OSHA's controlling employer citation policy. That policy provides that OSHA may issue citations at construction sites to general contractors 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 created the hazard or whether the general contractor's own employees were exposed to the hazard.

The OSHRC had held that the multi-employer policy violated 29 C.F.R. §1910.12(a), which provides:

The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. 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 prescribed in this paragraph.

The Eighth Circuit concluded that the plain language of the regulation does not preclude the Secretary of Labor's controlling employer citation policy and therefore the Commission abused its discretion in determining that the controlling employer citation policy conflicted with § 1910.12(a).

Minimizing Exposure to Citations as Controlling Employer

The Eighth Circuit acknowledged that the "controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of the worksite," but noted these policy concerns should be addressed by Congress or the Secretary of Labor, not the courts. In the meantime, to minimize exposure to citations as controlling employer, it is important for general contractors and construction managers to understand OSHA's application of the policy.

A two step analysis will govern the decision as to whether an employer should be cited. The first issue is whether the employer has general supervisory authority over the worksite, including the power to correct safety and health violations itself or to require others to correct them. Control can be established by contract or by the exercise of control in practice. Additionally, even in the absence of explicit contract provisions granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be found to be a controlling employer, based on a combination of contractual rights that give it broad responsibility at the site involving almost all aspects of the job. Responsibilities of key significance in this analysis include the authority to resolve disputes between subcontractors, set schedules, and determine construction sequencing, because of the likelihood that these matters may affect safety.

The second step of the analysis is to determine if the controlling employer exercised reasonable care to prevent and detect violations on the site. The standard is a lower one than that required of an employer with respect to protecting its own employees. Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include the scale of the project, the nature and pace of the work, and how much the controlling employer knows about the safety history and practices of the employer it controls. More frequent inspections are needed if the controlling employer knows the other employer has a history of non-compliance, or if at the beginning of a project the controlling employer has no knowledge of the other employer's compliance history. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective health and safety efforts.

To avoid a finding that the controlling employer failed to exercise reasonable care in discovering or preventing violations, the controlling employer should conduct periodic inspections of appropriate frequency, implement an effective system for promptly correcting hazards, and enforce the other employers' compliance with safety and health requirements with an effective, graduated system of enforcement and follow up measures.

Conclusion

Iowa OSHA has incorporated the multi-employer citation policy in the Field Inspection Reference Manual (FIRM) and it is enforced exactly as it is written by Federal OSHA. Effective January 9, 2009, Federal OSHA implemented the OSHA Field Operations Manual (FOM), which replaces the September 26, 1994 Instruction that implemented the FIRM. The FOM is a revision of OSHA's enforcement policies and procedures manual that provides the field offices a reference document for identifying the responsibilities associated with the majority of their inspection duties. We are informed that Iowa will be adopting the Federal FOM as a replacement for the FIRM. That change is expected to go into effect in the late summer. The multi-employer citation policy in the FIRM and FOM both reference the same multi-employer policy.

Challenges to OSHA's controlling employer citation policy can be expected to continue. The two to one decision in *Summit* was a narrow one and included a vigorous dissenting opinion. The decision did not evaluate OSHA's overall multi-employer citation policy and, although the issue was not raised by the parties, the Court suggested that OSHA may need to submit the policy to the informal rulemaking process for continued use in enforcement. Nevertheless, at the present time, general contractors and construction managers must be vigilant in their supervision of the worksite to avoid liability for the safety infractions of other employers.

If you have questions regarding this and other OSHA issues, please contact a member of the Firm's [Employment and Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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HIRE PERSPECTIVES

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