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Review Commission

Contractor Liability

In *Chao v. Summit Contractors Inc.*, the U.S. Court of Appeals for the Eighth Circuit is asked to reconsider whether the Occupational Safety and Health Act allows the secretary of labor to impose multi-employer liability. The parties' briefs have been filed, and the court is poised to make a decision on whether to schedule oral argument. Attorneys Stephen C. Yohay and Elizabeth M. Walsh provide an update on the issues facing the Eighth Circuit and the status of the case that could compel a change in OSHA's enforcement authority in construction.

OSHA Authority to Cite Construction Contractors For Subcontractors' Violations in Doubt on Appeal

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Ms. Walsh specializes in the resolution of construction disputes including mediation, arbitration, and litigation. In addition to

in a case that has attracted considerable attention in the "OSHA world" since it was decided in April 2007, a divided Occupational Safety and Health Review Commission ("OSHRC") has called into question the validity of the "Multi-Employer Citation Policy" implemented by the Occupational Safety and Health Administration ("OSHA"). *Summit Contractors Inc.*, 21

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BNA OSHC 2020 (No. 03-1622, 2007). OSHA appealed the decision to the U.S. Court of Appeals for the Eighth Circuit in St. Louis, Mo. (*Secretary of Labor v. Summit Contractors Inc.*, No. 07-2191). All briefs have been submitted, including *amicus curiae* briefs by the Building and Construction Trades Department, AFL-CIO, supporting OSHA, and a group of construction industry associations, supporting Summit. The Eighth Circuit is expected to set a date for oral argument in the near future. The appellate briefing presents the Court with fascinating and important questions about OSHA's authority to issue multi-employer citations.

The Multi-Employer Citation Policy

OSHA's current Multi-Employer Citation Policy is described in an OSHA Directive, CPL 2.124 (1999) (*see* paragraphs X.C-X.E.). The Policy provides that although employers may not have employees of their own exposed to a safety hazard, they still may be cited for a safety or health violation if such employers create the hazard, if they control the work site, or if they have the authority to correct the hazard to which another's employee is exposed.

The citation in *Summit* arose from scaffolding violations committed by a masonry subcontractor on a construction project. In addition to citing the subcontractor for the violations, OSHA also cited Summit on the basis that, as general contractor, Summit was the "controlling employer." A critical fact is that no Summit employees were exposed to the hazard created by the violation.

The OSHRC Summit Decision

In vacating the citation issued to Summit, former OSHRC Chairman W. Scott Railton and Commissioner (now Chairman) Horace A. Thompson III agreed in separate opinions that OSHA's Multi-Employer Citation Policy is invalid in the construction context when applied against a "controlling employer" who neither creates nor has employees exposed to the cited safety hazard. The two Commissioners premised their decision on the language in 29 C.F.R. § 1910.12(a), a regulation promulgated by OSHA in 1971. Section 1910.12(a) states that "[e]ach 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" (emphasis added). Section 1910.12(b) defines "construction work" as "work for construction, alteration, and/or repair, including painting and decorating."

Chairman Railton and Commissioner Thompson essentially held that based on the language of Section 1910.12(a), a general contractor's obligation is limited to protecting "his employees." As such, a general contractor engaged in "construction work" may only be cited if it has employees exposed to the hazard or it created the hazard. OSHA is therefore precluded from citing a general contractor engaged in "construction work" solely on the basis that it meets the definition of a "controlling employer."

In his lead opinion, Chairman Railton noted that what he perceived as OSHA's historically inconsistent application of the Multi-Employer Citation Policy was a factor in his decision. "It seems to me that the checkered history of the multi-employer doctrine as expressed in

the Secretary's ever-changing compliance guidelines . . . taken in contrast with a regulation [§ 1910.12(a)] which has not been amended since 1971, results in the latter trumping whatever reliance the Commission can place on the varying nature of the policy," Railton wrote. 21 BNA OSHC at 2024. Coincidentally, the decision was issued on the last day of Railton's term as a commissioner.

Commissioner Thompson wrote separately that § 1910.12(a) clearly was intended to be a limit on OSHA's powers. "It was intended to limit the Secretary's discretion to impose under the OSH Act the duty under the [Construction Safety Act] of prime (general) contractors at construction sites," Thompson wrote. 21 BNA OSHC at 2027.

In dissent, Commissioner Thomasina V. Rogers asserted that the majority had "reversed over thirty years of Commission precedent." She wrote that the policy reflects a valid use of [OSHA's] enforcement authority," and she accused the two other commissioners of "rewrit[ing] history more to their liking." 21 BNA OSHC at 2031, 2032.

The OSHRC Summit Decision Applies Only to 'Construction Work'

The OSHRC *Summit* decision does not affect OSHA's authority to continue issuing citations under its Multi-Employer Citation Policy when employers are not engaged in what is defined as "Construction Work" under § 1910.12(b), but rather are engaged in "General Industry" work that is subject to the standards in 29 C.F.R. Part 1910. "Construction work" is defined in § 1910.12(b) as "work for construction, alteration and/or repair, including painting and decorating." In determining whether work is "construction" or "general industry," the key is the nature of the work being performed, not the nature of the employer performing it.

For example, when a contractor is performing work at an existing facility, such as in an electric power plant outage, a chemical plant turnaround, or as a resident contractor in an industrial facility, the Multi-Employer Citation Policy still may be applied if the contractor's work is not "construction work," but rather is considered as "general industry" work subject to the standards in 29 C.F.R. Part 1910.

The reason for this result is that the OSHRC *Summit* decision is premised exclusively on an interpretation of § 1910.12(a), which applies to "construction work," and not upon an examination of OSHA's basic authority under the OSH Act to issue multi-employer citations.

OSHA's Authority to Issue Multi-Employer Citations – the Broader Issue

Given OSHA's success through the years in persuading OSHRC and most courts to affirm multi-employer citations, it seems almost an article of faith in OSHA jurisprudence that the Act confers such power on the agency. There is, however, in fact nothing in the OSH Act stating that one employer may be held responsible for the actions of another. Section 5(a)(2) of the Act provides simply that "each employer . . . shall comply with occupational safety and health standards promulgated under this Act." As such, the OSH Act simply

gives OSHA no explicit authority to cite an employer for violations committed by another employer.

Nonetheless, OSHA's authority to issue multi-employer citations has been upheld by several U.S. Courts of Appeals. Such courts have generally deferred to OSHA's view that it is a reasonable interpretation of Section 5(a)(2) to cite an employer because it arguably controls a work site even where another employer violates a standard. See, e.g., *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 [6 OSHC 1077] (8th Cir. 1977) and *Universal Constr. v. OSHRC*, 182 F.3d 726 [18 OSHC 1769] (10th Cir. 1999).

In appellate briefing, however, Summit has sought to expand the scope of the issues and has invited the Court to revisit the question whether, apart from 29 C.F.R. § 1910.12(a), any multi-employer liability is permitted under the OSH Act. In its *Summit* reply brief, OSHA has argued at length in support of its authority. Consistent with prior court decisions and its longstanding position on the issue, OSHA contends on general policy-oriented grounds that the Act's overall purpose of protecting employee safety is best served by permitting the agency's continued practice of citing non-exposing employers for violations of standards, whether in construction or not. OSHRC and the courts, OSHA argued, should continue to defer to OSHA's "judgment" as to that issue.

One of the courts that supported OSHA's authority to issue multi-employer citations is the Eighth Circuit in its 1977 decision in the *Knutson* case, cited above. In that case, however, OSHA and OSHRC were in agreement that OSHA is invested with such authority under the Act, and that point seemed important to the Court in its decision to defer to the agencies' interpretation of the Act. The posture of the two agencies is somewhat different now, however, inasmuch as the OSHRC majority in *Summit* has raised questions about that issue, albeit limited to the context of the specific regulation, 29 C.F.R. § 1910.12(a), rather than as to the statute as a whole. Nonetheless, if the Eighth Circuit does not agree with Summit's interpretation of the regulation, it will be interesting to see if the Court will take a fresh look at the broader issue and reconsider whether OSHA's "judgment" as to its authority under the Act remains reasonable and merits continued deference. Courts generally defer to an agency's interpretation of the statute it enforces, but only if the interpretation is reasonable.

Regardless of how the Eighth Circuit rules, it certainly may be anticipated that both arguments will continue to be raised in OSHRC enforcement proceedings in subsequent cases involving multi-employer citations. This will be especially so if the Review Commission adheres to the Railton-Thompson analysis in future cases.

Questions Created by the *Summit* Decision

While the appeal has been pending, OSHA announced that it would not change its enforcement policy and would continue to issue citations to non-exposing, "controlling" construction employers. Often, OSHA regards only decisions of the courts, rather than OSHRC, as establishing binding precedent. This may be especially so where, as here, former Chairman Railton's term as Commissioner has expired.

Further, the OSHRC *Summit* decision is not binding on states that have their own state plans for regulating occupational safety and health. Many state agencies that adjudicate state-issued citations follow the precedent of OSHRC, but such adherence generally is not strictly required. Similarly, state OSHA enforcement agencies are not required to follow federal enforcement policies and frequently do not do so, so long as the state standards are "at least as effective" as federal standards in protecting employees.

The OSHRC *Summit* decision also does not affect other legal principles that influence the relative obligations of contractors on a construction site as to safety and health issues, such as state tort law, building codes, voluntary consensus codes and standards, contract terms or insurance considerations. It is questionable, therefore, how much the decision, even if affirmed, will have a practical effect on the extent to which owners or general contractors seek to direct, influence or control OSHA compliance and safety performance by subcontractors.

Nonetheless, if affirmed, the OSHRC *Summit* decision could compel a change in OSHA's enforcement authority in construction and could have a significant impact in cases in which citations are issued after serious construction accidents. For example, OSHA citations often are used in state court damage actions or other collateral litigation as evidence of a contractor's failure to meet a recognized duty of care, and significant OSHA citations can affect the settlement value of such collateral claims.

