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Federal Appeals Court Overturns Administrative Agency Decision in *Summit Contractors*

On February 26, 2009, the U.S. Court of Appeals for the Eighth Circuit overturned the decision of the Occupational Safety and Health Review Commission in *Secretary of Labor v. Summit Contractors, Inc*. In *Summit*, a majority of the Review Commission ruled that the multi-employer citation policy promulgated by the Occupational Safety and Health Administration (OSHA), expressed in Directive CPL20.124, was not enforceable because the policy was contrary to 29 C.F.R. § 1910.12(a), at least insofar as it applied to a general contractor who neither created nor had employees exposed to a cited hazard. See also Anthony Crane Rental, Inc. v. Wright, 70 F.3rd 1298, 1306-07 (D.C. Cir. 1995) (§ 1910.12(a) by its terms only applies to an employer's *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine) (emphasis in original). The multi-employer citation policy purports to authorize OSHA to issue citations to general contractors at construction sites irrespective of whether the general contractor's own employees were exposed to the hazard or whether the general contractor created the hazard.

The Review Commission's decision to invalidate the OSHA policy was premised on the language of the regulation at § 1910.12(a). The language of § 1910.12(a) provides:

> The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under § 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*. (emphasis added)

The majority of the Commission found that the second sentence of the regulation precluded enforcement of the policy when applied to a "controlling" contractor who neither created the cited hazard nor had employees exposed to it. In this connection, the language contained in the second sentence of § 1910.12(a) is analogous to the language of § 5(a)(1) of the Occupational Safety and Health Act. That section, commonly known as the General Duty Clause, requires an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S. § 654(a)(1). The use of the phrase "his employees" has been repeatedly found to restrict the general duty to an employer's own employees. See, e.g., United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982 (7th Cir. 1999). The Review Commission found that the language in the regulation, like the general duty clause, limited a construction employer's obligations to protecting its own employees, and not those of other employers.

The federal appeals court disagreed. Interpreting the regulation in accordance with basic rules of grammar, the court found that the language of the second sentence of the regulation, grammatically reconstructed, imposes two distinct obligations: (1) that the employer protect the "employment" of each of its employees, and (2) that the employer protect the "places of employment" of each of its employees. In other words, the court found that although the first obligation requires that an employer protect only its employees, the second obligation is more expensive and does not limit the employer's duty to the protection of only its own employees. According to the court, "the plain language of Part (2) does not preclude an employer's duty to protect the place of employment, including others who work at the place of employment, so long as the employer also has employees at that place of employment."

What Does This Mean?

The ruling of the court does not mean that the legality of OSHA's multi-employer citation policy is settled and may actually make understanding the law more complicated for employers. Here is why: The OSH Act provides that workplace safety will be administered and enforced by either federal OSHA or a state operating an authorized plan that is at least as effective (if not the same) as the federal scheme. See 29 U.S.C. § 667. There are 26 states and U.S. territories that have approved state plans that regulate safety (four of those plans - New Jersey, Connecticut, New York and the Virgin Islands - apply only to public sector employees otherwise excluded from the reach of the federal act). Contested cases arising in states in which there is no approved state plan (OSHA states) are decided by judges of the Review Commission. Contested cases arising in states with an approved plan (state plan states) are heard by state agencies or courts, and not the Review Commission. Because most of those approved state plans are patterned after, and substantially similar to, the program established by the federal Act, decisional law in those state plans typically recognizes that decisions of the federal courts and the Review Commission interpreting provisions of the federal Act are, if not controlling, persuasive. Nevertheless, although persuasive, the decision of the Review Commission binds only the administrative law judges deciding cases in states in which OSHA exercises jurisdiction.

The decision of the Eighth Circuit overrides the Review Commission decision - but only in those states (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota) over which the Eighth Circuit Court of Appeals has jurisdiction. At least for now, the ruling of the Review Commission remains controlling law in OSHA states (other than those comprising the Eighth Circuit). However, even in the Eighth Circuit, the decision may not be the last word. One of the three judges on the appellate panel that issued the decision strongly disagreed with the decision of the other two judges. The reasoning of the dissent could encourage the employer in *Summit* to request reconsideration by all of the judges on the court, which could result in a different outcome. In the interim, however, the ruling of the court in *Summit* controls for cases that arise in the court's jurisdiction.

As noted, the Review Commission's decision (and for that matter the decision of the Eighth Circuit) are not binding in state plan states. What then, if any, is the effect of the *Summit* decision in approved state plans? To answer this question, there are at least two ancillary questions. First, which, if any, of the state plans has adopted a multi-employer citation policy? Second, if a state plan has adopted a multi-employer citation policy, has it simply incorporated the language of the regulation at 29 C.F.R. § 1910.12, such that it is susceptible to a *Summit*-type argument, or has the state taken appropriate measures to adopt a multi-employer citation policy independent of and protected from the reasoning of *Summit*? Virtually all of the states operating a state plan applicable to the private sector have adopted some form of multi-employer citation policy. In the great majority of those state plans, the federal multi-employer policy has simply been adopted by reference. Several of those states, however, notably Vermont, Virginia, Michigan, Oregon, Washington, California and North Carolina, have taken action administratively to allow multi-employer citations or have received state court approval of multi-employer citation policies. Although the effectiveness of the steps taken is largely untested at this point, employers should expect that those states, as well as OSHA (and even its state plan counterparts that have not taken affirmative steps to override the Review Commission decision in *Summit)*, will continue to issue citations to controlling employers on multi-employer work sites.

Finally, it is worth noting that one important question was left unanswered by the appeals court: whether any employees of the employer in *Summit* were engaged in construction work. In *Summit*, the employer had four individuals working on the job site: a project superintendent and three assistant superintendents. Because the court did not consider whether those individuals were engaged in construction work, it sent the decision back to the Review Commission to determine, among other unresolved issues, whether Summit's employees were engaged in construction work.

The lesson to construction employers is that although the law remains unsettled, employers should take appropriate steps to enable them to demonstrate that they have reasonably exercised supervisory authority to prevent or abate hazardous conditions on job sites where they have employees engaged in construction work, even if their own employees are not exposed to the hazards created by those conditions.