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MULTI-EMPLOYER LIABILITY

The Occupational Safety and Health Review Commission reaffirmed and extended its approval of the Multi-Employer Citation Policy in *Secretary of Labor v. Summit Contractors, Inc.*, which allows the Occupational Safety and Health Administration to cite construction employers for exposing another employer's workers to a hazard. The authors of this article say the decision is relatively unsurprising given long-standing trends in OSHA policy and Review Commission and court of appeals case law. However, they say the Review Commission's fresh endorsement of an established doctrine brings old questions into sharper relief and highlights uncertainties in the breadth of multi-employer liability.

Multi-Employer Policy Raises Questions About Scope of Employers' Liability

BY BARUCH A. FELLNER AND DANIEL P. RATHBUN

The Occupational Safety and Health Review Commission reaffirmed and extended its approval of the Multi-Employer Citation Policy in *Secretary of Labor v. Summit Contractors, Inc.*[1] The decision, which allows the Occupational Safety and Health Administration to cite construction employers for exposing *another employer's* workers to a hazard, is relatively unsurprising given long-standing trends in OSHA policy and Review Commission and court of appeals case law. But the Commission's fresh endorsement of an established doctrine has brought old questions into sharper relief and highlighted uncertainties in the breadth of multi-employer liability.

Multi-Employer Policy and the Summit Decision. As outlined in OSHA Instruction CPL 02-00-124, the Multi-Employer Citation Policy allows OSHA to cite multiple employers at a single worksite for creating a hazard, or for failing to prevent or correct a hazard, *even if their own workers are not exposed*. Instead, a ''creating'' em-

[1] *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC, 8/19/10; 2010 OSAHRC LEXIS 61; 23 OSHC 1196; 40 OSHR 725, 8/26/10.

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ployer is liable simply for having introduced a hazard into the workplace.[2] A ''controlling'' or ''correcting'' employer is liable for hazards that it did not take ''reasonable care'' to detect and prevent.[3] For example, a general contractor faces the possibility of citation where its subcontractor's employees are exposed to a hazard.[4] A subcontractor faces the possibility of citation where it installed or insufficiently maintained equipment that exposed another employer's workers to a hazard.[5]

The *Summit* decision is concerned, not with the Multi-Employer Citation Policy itself, but with the doctrine's application in construction contexts. A specific OSHA standard that governs construction work says that ''each employer shall protect the employment and places of employment *of each of his employees*.''[6] Thus, when considering an earlier citation against Summit Contractors in 2007, the Commission seized upon the italicized language to find that the Multi-Employer Citation Policy was not applicable since Summit's own employees were not exposed to the cited hazard.[7] The Eighth Circuit read § 1910.12(a) differently, however, and allowed the Multi-Employer Citation Policy to apply ''so long as employees of the cited employer [were] also present [but not necessarily exposed]'' at the worksite.[8] The Commission's August 19 decision was its ''first opportunity to reconsider'' its interpretation of § 1910.12 in light of the Eighth Circuit's reversal, and it made a complete about-face.[9] The Secretary had again cited Summit Contractors[10] under the Multi-Employer Citation Policy for providing its subcontractor with an electrical (or ''spider'') box having insufficient ground-fault protection.[11] Although Summit had rented the spider box from a separate entity, the Review Commission found that it was both a ''creating'' and ''controlling'' employer.[12] It had ''created'' the hazard by bringing the defective equipment into the worksite.[13] Moreover, since its superintendent had ''observed the progress of the project and worksite conditions,'' it could ''reasonably [have been] expected to prevent or detect and abate the violative condition.''[14]

Policy Implications of Summit Decision. From a policy standpoint, *Summit* has solid footing in the purposes and historical administration of the OSH Act. The Act's stated purpose is to ''assure so far as possible [that] every working man and woman in the Nation [has] safe working conditions.''[15] It is less about defining the interactions between employers and employees than it is about the ''fundamental objective'' of prevent[ing] occupational deaths and serious injuries.''[16] As several courts of appeals have recognized, while Section 5(a)(1) of the OSH Act gives employers a general duty to protect *their own* employees from recognized hazards, Section 5(a)(2) permits the Secretary to develop standards that bind employees *regardless* of whether their own employees are exposed.[17] OSHA created the Multi-Employer Citation Policy soon after the Act's passage, and the Review Commission had endorsed it by 1976.[18] A majority of Circuit courts have since accepted it, and only one has definitively rejected it.[19] In essence, then, *Summit* just extends the status quo to construction worksites where it was already impliedly applicable.

Commissioner Horace A. ''Topper'' Thompson's dissent, although well-reasoned, is unpersuasive in light of four decades of policy and precedent. The principal argument for rejecting the Multi–Employer Citation Policy—that Congress only intended OSHA to enforce its requirements against the employer whose name is on the hardhat of the exposed employee—does not sufficiently further the purposes of the OSH Act. That employer may not have the ability or the knowledge to protect its employees while other employers who *do* would have no incentive to comply with OSHA's requirements. The argument that the Supreme Court's *Darden* decision requires a common law understanding of the employment relationship is too broad,[20] and while the U.S. Court of Appeals for the District of Columbia Circuit has given it some consideration in dicta,[21] two other

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[2] *See* OSHA Instruction CPL 02-00-124.

[3] *See id*.

[4] *See Universal Construction Corp. v. OSHRC*, 182 F.3d 726, 732; 18 OSHC 1769 (10th Cir. 1999) finding that a general contractor's authority over the worksite obliged it to correct a hazard to a subcontractor's employees ''even without that subcontractor's consent.''

[5] *See* OSHA Instruction CPL 02-00-124.

[6] *See* 29 C.F.R. § 1910.12(a) (italics added).

[7] *See Sec'y of Labor v. Summit Contractors, Inc.*, OSHRC, 4/27/07; 21 OSHC 2020.

[8] *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 824-25; 22 OSHC 1496 (8th Cir. 2009).

[9] *See Summit*, 2010 OSAHRC LEXIS 61; 23 OSHC 1196, at *5.

[10] The instant case was actually pending review while the Eighth Circuit heard and reversed the first *Summit* case.

[11] *Id.* at *1-2. The requirement of ground-fault protection comes from another OSHA standard, 29 C.F.R. § 1926.404(b)(1).

[12] *Id.* at *9-10.

[13] *Id.*

[14] *Id.*

[15] OSH Act, § 2(b).

[16] *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10; 8 OSHC 1 (1980).

[17] *See, e.g., U.S. v. Pitt-Des Moines*, 168 F.3d 976, 983; 18 OSHC 1609 (7th Cir. 1999); *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1038; 2 OSHC 1641 (2d Cir. 1975).

[18] *See Summit*, at *3-4.

[19] *See id.* at *5, n.8. Compare *Universal Constr. Co. v. OSHRC*, 182 F.3d 726; 18 OSHC 1769 (10th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815; 18 OSHC 1551 (6th Cir. 1998); *Marshal v. Knutson Constr. Co.*, 566 F.2d 596; 6 OSHC 1077 (8th Cir. 1977); *U.S. v. Pitt-Des Moines*, 168 F.3d 976; 18 OSHC 1609 (7th Cir. 1999); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534; 6 OSHC 1699 (9th Cir. 1978); *New England Tel. & Tel. Co. v. Sec'y of Labor*, 589 F.2d 81; 6 OSHC 2142 (1st Cir. 1978); *Brennan v. OSHRC*, 513 F.2d 1032; 2 OSHC 1641 (2d Cir. 1975) with *Southeast Contracs., Inc. v. Dunlop*, 512 F.2d 675; 3 OSHC 1023 (5th Cir. 1975).

[20] As the Summit majority noted, *Darden* is applicable to two inquiries—whether a cited entity has *any* employees, and whether a particular employer has an employment relationship with a particular worker—neither of which governs the Multi-Employer Citation Policy's application. *See Summit*, at *8.

[21] *See IBP v. Herman*, 144 F.3d 861, 865; 18 OSHC 1353 (D.C. Cir. 1998) (citing *Darden* to draw the Multi-Employer Citation Policy's ''logic'' into question). As Thompson notes, the DC Circuit's reservations about the Multi-Employer Citation Policy suggest that the *Summit* decision *itself* could face challenges on appeal (since the D.C. Circuit would be the most likely forum for appeal), but the policy still would remain viable in the majority of Circuits that have endorsed it.

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Circuits have expressly rejected it.[22] Arguments premised upon the wording or intent of OSHA's construction industry standards face similar flaws. Regardless of the grammar rules that the dissent relies upon for its favored interpretation, the Secretary adopted the Multi-Employer Citation Policy contemporaneously with her construction industry standards.[23] Indeed, she specifically *designed* it for construction worksites.[24] No relevant industry differences or any logical reasons compel the conclusion that the Multi-Employer Citation Policy should apply to all other worksites but not to construction worksites.

Policy's Promise of Mischief and Litigation. Given the Obama Administration's commitment to unbridled enforcement and regulation by ''shaming,'' the careful, judicious and objective application of the Multi-Employer Citation Policy cannot be considered a foregone conclusion. Some of our concerns follow.

First, as construed by the Commission, the Multi-Employer Citation Policy is only applicable in construction contexts ''so long as employees of the cited employer are also present.''[25] But the ''presence'' requirement invites enforcement ''creativity'' or even wholesale reexamination. Thus, in the most recent *Summit* case, the cited employer only had two employees at the worksite: both were supervisors who appear to have been stationed outside the subcontractor's working area.[26] In the 2007 *Summit* case, similarly, the cited employer had four supervisors who had seen the practice in question on ''two or three separate occasions.''[27] Given the OSHA enforcement juggernaut and the apparent un-importance of individual employer-employee relationships to Multi-Employer Citation Policy liability in the Commission's eyes, the Secretary will likely test the limits of ''presence'' or else seek to abandon it as a prerequisite for liability. The expanding parameters of a multi-employer worksite without the employer-presence requirement could even capture manufacturers or equipment-providers like the company that provided Summit with a ''spider'' box. On a broad read of the Multi-Employer Citation Policy, such entities are ''creating'' employers because they ''caused a hazardous condition that violated the Act.''[28] A world where trailer-bound administrators provide the basis for ''controlling'' employer liability, or where Astroturf makers face accountability for the hazards on a football field, seems well within reach.

Under this expanded reading of the Multi-Employer Citation Policy, an employer could not limit its OSHA liability by contract if it remained implicated in any small measure in relevant safety policies or training. Such a dragnet philosophy of Multi-Employer Citation Policy enforcement would serve exactly the opposite purpose of the OSH Act. The policy should not encourage ostrich-employers whose only means of escaping OSHA liability is to sever any vestige of responsibility for compliance with the Act. Further, the OSH Act may not ''be construed to supersede or in any manner affect'' common law rights and duties pertaining to employment.[29] The *Summit* majority rejected the defendant's § 4(b)(4)-preemption argument.[30] But if the employer had not expressly retained the responsibility to provide safe electrical equipment, or if it had delegated those duties to another entity, then the Commission may have reached a different result. At some point, it could not ignore such a delegation without ''affecting'' common law rights. And in any case, contractual language helps define ''reasonable care,'' which is the linchpin of the Secretary's method for determining whether to cite an employer under the Multi-Employer Citation Policy.[31]

Finally, while the Multi-Employer Citation Policy allows OSHA to cite multiple employers at a single worksite, it does not give any clear basis for choosing among them. The Multi-Employer Citation Policy was originally designed to prevent employers from hiding behind craft-rules to avoid responsibility for workplace safety.[32] But as its traditional justifications erode and it finds application in more workplaces, it runs the danger of seeming like nothing more than a means for OSHA to expand its ''target rich'' opportunities. Based on the text of *Summit* and a search of OSHA's Integrated Management Information System database, it appears that OSHA did not inspect or cite the subcontractor whose employees used the ''spider'' box. Questions of basic fairness shroud the further implementation of the Multi-Employer Citation Policy and will invite disputes among employers and employees and with the agency. What began some forty years ago as a ''good idea at the time'' (indeed, the lead author's idea) may yet become another monument to the doctrine of unintended and nefarious consequences.

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[22] *See Summit*, 558 F.3d at 828 (''the Multi-Employer Citation Policy is not premised on an expansive definition of employer or employee and does not conflict with the *Darden* decision''); *Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 402; 21 OSHC 2161 (3d Cir. 2007) (same).

[23] *See Summit*, at *3.

[24] *See Sec'y of Labor v. Harvey Workover, Inc.*, OSHRC, 8/23/79; 7 OSHC 1687, at *2, explaining that the Multi-Employer Citation Policy was originally meant for construction sites where ''the work of one employer's employees often requires [them] to work in or pass through areas where work has been performed by another employer's employees.''

[25] *See Summit*, at *6 (quoting the Eighth Circuit). While the Commission was only dealing with construction-industry contexts, the Multi-Employer Citation Policy's threshold requirements, e.g. a ''common enterprise'' or a ''multi-employer worksite,'' suggest that the ''presence'' requirement (or something like it) may have a more general application. *See* OSHA Instruction CPL 02-00-124. *But see IBP v. Herman*, 144 F.3d at 867; 18 OSHC 1353 (''the Company did not assume responsibility for safety control by sending three employees to perform quality control during the sanitation process'').

[26] *See Summit*, at *1.

[27] *See Summit*, at 558 F.3d at 822.

[28] *See* OSHA Instruction CPL 02-00-124.

[29] *See* OSH Act § 4(b)(4).

[30] *See Summit*, at *2, n.5.

[31] *See* OSHA Instruction CPL 02-00-124.

[32] *See Universal Construction*, 182 F.3d at 730; 18 OSHC 1769 (explaining that OSHA originally believed the policy was necessary because ''rules of craft jurisdiction'' could ''limit one subcontractor's ability to abate hazards posed to its own employees that were created by another subcontractor or a general contractor'').