

University of Nevada, Reno

**RIPE FOR APPEAL: WHO IS CONSIDERED AN “EMPLOYER” WHEN
DETERMINING LIABILITY FOR MULTI-EMPLOYER WORKSITE
SAFETY VIOLATIONS?**

A thesis submitted in partial fulfillment of the
requirements for the degree of Master of Judicial Studies

by

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I. ABSTRACT

This thesis explores the vexing question of whether or when a general contractor in overall control of a worksite could be held liable for the injury or death of an employee belonging to a subcontractor. This substantive issue has been considered by the Occupational Safety and Health Review Commission (Hereafter, the Commission) and the courts for more than forty years. Years of legal confusion have followed regarding the definition of “employer” and “employees” and their overall safety responsibilities. This confusion occurs because of language in 29 C.F.R. § 1910(a), which refers to “his” employees. However, under the Multi-Employer Worksite Doctrine a general contractor may be liable for all employees on the worksite. In 1995, the United States Court of Appeals for the District of Columbia Circuit noted a certain tension between the language of 29 C.F.R. § 1910.12(a) and the Secretary of Labor’s multi-employer policy.¹

This thesis reviews the most substantive issues that have been litigated and why this matter is ripe for appeal to the U. S. Supreme Court. The issue is whether a “Controlling Employer” theory of liability, defined by the Secretary of Labor as “an enforcement scheme grounded in contract,”² fits within the full scope and application of this “employment-based” duty under § 1910.12(a) of a construction employer to “protect . . . his employees” by complying with the 29 C.F.R. Part 1926 standards.³ Meanwhile, every contractor on a worksite will likely be advised by its corporate counsel to reconsider the language in its contracts, as well OSHA’s multi-employer policy, and take “reasonable care” to ensure its “places of employment” are free of hazards.

¹ *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306-07 (D.C. Cir. 1995).

² 29 Code of Federal Regulations, Part 1926

³ *Id.*

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II. INTRODUCTION TO THE ACT

The multi-employer worksite doctrine can best be defined in plain language with this hypothetical: “May a general contractor in control of a large work site be held legally responsible for the unsafe acts of a subcontractor’s employees?” This seemingly simple question has frustrated general contractors, subcontractors, litigators and the courts since OSHA created as a federal agency.⁴ In 1970, “Congress enacted the Occupational Safety and Health Act (hereafter, the “Act”), to establish a comprehensive regulatory scheme designed to assure so far as possible ... safe and healthful working conditions for every working man and woman in the Nation.”⁵ Employers are required to “furnish to each employee 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 [their] employees.”⁶ Congress did not define “each employee.” As such, did Congress mean “each employee of the general contractor,” or did the phrase mean “each employee of the general contractor, plus every subcontractor on the worksite?” This question is the seminal issue at the core of the multi-employer worksite doctrine. The Act assigns distinct regulatory responsibilities to two administrative actors; the Secretary of Labor (Secretary) and the Occupational Safety and Health Review Commission (hereafter, the “Commission” or “OSHRC”).⁷

⁴ <https://www.osha.gov/about.html>

⁵ *Martin v. OSHRC*, 499 U.S. 144, 147, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (quoting 29 U.S.C. § 651(b)). See also <https://www.osha.gov/about.html>.

⁶ 29 U.S.C. § 654(a)(1).

⁷ *Id.*

The Secretary, through the Act's rule-making powers, "set[s] and enforce[s] workplace health and safety standards."⁸ The Secretary is required to set standards to ensure that "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his [or her] working life."⁹ "If the Secretary...determines upon investigation that an employer failed to comply with such a standard, the Secretary may issue a citation and assess a monetary penalty."¹⁰

The Commission carries out the adjudicatory functions of the Act.¹¹ In accordance with § 659(c), "[i]f an employer wishes to contest a citation, the Commission must afford the employer an evidentiary hearing and 'thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty.'"¹² Hearings are governed under the provisions of 29 C.F.R. 1905.20. Under 29 C.F.R. 1905.25, all forms of discovery are permitted, especially depositions. An Administrative Law Judge (ALJ) presides over the evidentiary hearing and subsequently issues an initial decision. The ALJ's initial decision "...becomes the order of the Commission unless the Commission grants discretionary review."¹³ The parties are entitled "to seek review of an adverse Commission order in an appellate court, which must treat as 'conclusive' Commission findings of fact that are 'supported by substantial

⁸ *Id.*; (internal citation omitted); See *Delegation of Authority and Assignment of Responsibilities for Occupational Safety and Health Programs*, 48 Fed. Reg. 35,736 (Aug. 5, 1983) (delegating authority to OSHA).

⁹ 29 U.S.C. § 655(b)(5); see Charles Noble, *Liberalism at Work-The Rise and Fall of OSHA*, (1968).

¹⁰ *Id.*, 29 U.S.C. §§ 658–659, 666.

¹¹ 29 U.S.C. § 651(b)(3); *Martin*, 499 U.S. at 147, 111 S.Ct. 1171

¹² *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009).

¹³ *Id.*, quoting 29 U.S.C. § 661(j).

evidence.”¹⁴

III. DEFINITIONS

A. Definitions of “Employer”

Employer Defined within the Act – The Act is remedial legislation designed for “every working man and woman in the Nation and should not be given narrow or technical construction.”¹⁵ The Act defines “employer” as follows: “a person engaged in a business affecting commerce that has employees, but does not include the United States (with the exception of the United States Postal Service) or any State or political subdivision of a State.”¹⁶

Employer as defined by 29 C.F.R § 1910.12(a) - 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.

Employer Defined by Common Law - Courts have specifically held that application of the Common Law definition of “employer” and concomitant principles is inappropriate when determining whether the Act has been violated.¹⁷ As explained by the Fourth Circuit Court of Appeals, “there is no uniform nationwide definition [of employer], [a]s a Congressional enactment of nationwide application, [the Act] requires a single consistent definition of ‘employer’ throughout the country so that there will be

¹⁴ *Id.*, quoting 29 U.S.C. § 660(a)–(b); *Martin*, 499 U.S. at 147-481, 111 S. Ct. at 1174.

¹⁵ *Frohlick Crane Service, Inc. v. Occupational Safety and Health Review Comm’n*, 521 F.2d 628, 631 (10th Cir. 1976).

¹⁶ 29 U.S.C. § 652(5).

¹⁷ *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974). Accord, *Frohlick*, *supra*.

uniform application of this national legislation in all states.”¹⁸ Further, courts must look to the purpose of the Act when defining “employer.”¹⁹ Notably, private agreements between parties assigning identity as “employer” cannot supersede the Act.²⁰

B. Definition of “Employee”

Employee defined by the Department of Labor - The Department of Labor asserts that “the Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees.”²¹ Therefore, OSHA holds that the term “employee” covers *all* employees, including supervisors,²² corporation presidents²³ and stockholders²⁴ who work as employees. Labor Department trainees are company employees even if not contracted to those particular companies, as defined by OSHA - Many persons receive occupational or

¹⁸ *Brennan, supra*; (discussing that “Congress has enacted much social legislation similar to OSHA, imposing duties on ‘employers’ for the benefit of their ‘employees.’ Since an employment relationship is the predicate for the operation of all these statutes, the court has had to consider the proper definition of employer and employee to determine the reach of these statutes. In a line of cases involving the delineation of the outer perimeter of statutes’ Coverage through the definition of employer and employee, the Court has established the purpose of the statute and not the technical distinctions of the Common Law as the referent of decision. See *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (Fair Labor Standards Act); *United States v. Silk*, 331 U.S. 704, 713, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947) (Social Security Act); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (FLSA); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (Wagner Act).”)

¹⁹ *Clarkson Const. Co. v. Occupational Safety and Health Review Comm’n*, 531 F.2d 451, 458 (10th Cir. 1976).

²⁰ *Frohlick Crane Service, Inc. v. Occupational Safety and Health Review Comm’n*, 521 F.2d 628, 631 (10th Cir 1976).

²¹ *Secretary of Labor v. Trinity Industries, Inc.*, 504 F.3d 397,402 (3d Cir. 2007), citing *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982–83 (7th Cir.1999); *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306 (D.C.Cir.1995); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 141 (6th Cir.1993); *Secretary of Labor v. James R. Howell & Co.*, 19 BNA OSHC 1277 (O.S.H.R.C.2000).

²² *Secretary of Labor v. Kensington Elec. Prods. Co., Inc.*, 1 O.S.H. CA’s. (BNA) 3095 (No. 1424, 1973).

²³ *Secretary of Labor v. FEC, Inc.*, 1 O.S.H. CA’s. (BNA) 3043 (1972).

²⁴ *Dri-Mix products Corp.*, 6 OSAHRC 728 (O.S.H.R.C.A.L.J.), 3 O.S.H. Cas. (BNA) 1191, 1975 WL 4784

job training under Labor Department contracts, but are not employees of the contractor and thus not directly protected by the Act, which refers only to employees. However, OSHA has issued regulations requiring all such contractors to include in their contracts an agreement to give these trainees the same safety and health protection as provided by the Act, keep the same records, and include these clauses in all subcontracts. “Failure to Comply” subjects the contractor to loss of the contract and debarment from future contracts.

This means, for example, that a trainee being taught bulldozer operation by a company under the Labor Department’s Job Corps program will be afforded the same protection as employees of that company. Leased Employees are considered company employees as defined by the Act; the Commission has held that leased employees are not considered employees of the leasing company under the Act.²⁵ Because such employees are defined under the Act as one “employed in the business of his employer,” leased employees are considered employees of the company that leased them, not employees of the leasing company itself.²⁶ The employer must report deaths or injuries of leased employees.²⁷ These deaths or injuries must be reported on the OSHA Form 300 Log within 24 hours of occurrence.²⁸

C. History of 29 CFR 1910.12(a)

²⁵ *Secretary of Labor v. Team America Corp.*, 18 O.S.H. CA’s. (BNA) 1572 (Nos. 97-1230, 97-1626, 1998).

²⁶ *Id.*

²⁷ *See* 29 C.F.R 1904.31

²⁸ *Id.*

“Protect Employment,” according to the regulation equals “Employer has Duty to Protect Other Individuals who Work at His Place of Employment.”²⁹ Upon review by a three-judge panel, the Eighth Circuit undertook a grammatical analysis and interpretation of § 1910.12(a).³⁰ The majority found that the regulation mandated that employers provide two distinct protections to employees. First, an employer must protect the “employment” of each of his employees.³¹ In other words, the employer must protect his own employees. Second, an employer must protect the “places of employment” of each of his employees.³² Thus, an employer has a duty to protect *other individuals who work at his place of employment*, as long as the employer’s own employees are also working at that place of employment. Accordingly, the court held that the plain language of §1910.12(a) does not preclude OSHA’s “Controlling employer” citation policy and held that the Secretary’s policy did not violate § 1910.12(a).³³

IV. DEVELOPMENT OF THE MULTI-EMPLOYER WORKSITE DOCTRINE

Although the general rule is that employers are responsible only for the safety of their own employees, there are special rules for multi-employer worksites (usually involving the construction industry). Since its creation in 1971, the multi-employer worksite doctrine paradigm has evolved significantly. Initially, the “multi-employer worksite policy adopted the creating employer and the exposing employer citation

²⁹ 29 C.F.R. 1920.12(a).

³⁰ *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 829 (8th Cir. 2009).

³¹ *Id.* at 824.

³² *Id.*

³³ *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 829 (8th Cir. 2009).

policies...” and was narrowly construed.³⁴ Accordingly, employers “who exposed their own employees to hazardous conditions or who created hazardous condition endangering employees (whether his own or those of another employer)...” were subject to citation.³⁵

A logical evolutionary process has flowed since 1971. This has included policy decisions by the Secretary of Labor, decisions by Administrative Law Judges, statutory amendments and decisions from various U.S. Courts of Appeals. The twin cases of *Anning-Johnson Co.* and *Grossman Steel and Aluminum Corp.* (details below) represent the first instances of the multiemployer worksite doctrine being upheld by the Commission.³⁶ In 1976, the Secretary announced a revised position on the multi-employer worksite doctrine, to wit: “a contractor who has either created a hazard or controls a hazardous condition has a duty . . . to comply with [the Act’s] standards even if the contractor’s own employees are not exposed to the hazard.”³⁷ This position is known as the “exposing employer” policy.

The Secretary has revised the Multi-Employer Worksite Doctrine multiple times. In 1981, the Secretary issued another revision to the multi-employer worksite doctrine known as the “Correcting Employer Citation Policy.” This revision permitted the Secretary “to issue citations to the employer responsible for correcting the hazard even if its own employees were not exposed to the hazard.”³⁸ The Secretary eventually revised

³⁴ *Id.*; citing *City Wide Tuckpointing Serv. Co.*, 3 OSAHRC 194, 195–96, 201 ¶ 6 (1973); *Gilles & Cotting, Inc.*, 4 OSAHRC 1080, 1080 (1973).

³⁵ *Id.*, quoting OSHA Field Operations Manual ¶ 10, at VII–6–8 (May 20, 1971).

³⁶ *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197–9, CCH OSHD ¶ 20,690 (O.S.H.R.C. May 12, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975–1976 CCH OSHD ¶ 20,691 (O.S.H.R.C. May 12, 1976).

³⁷ *Solis*, 558 F.3d at 820.

³⁸ *Id.*, at 821 citing OSHA, Field Operations Manual OSHA Instruction CPL 2.49 (Dec. 23, 1981).

the multi-employer worksite doctrine and added “the creating employer and the controlling employer citation policies.”³⁹ As early as 1995, the United States Court of Appeals for the District of Columbia Circuit remarked on the tension between the language of § 1910.12(a) and the Secretary’s multi-employer policy.⁴⁰ Later, the Secretary issued an additional instruction, Compliance Performance Letter (CPL) 2.0.124, clarifying the multi-employer citation policy. This instruction set forth four citation policies under the multi-employer worksite doctrine: exposing employer, correcting employer, creating employer and controlling employer—as the 1994 version.⁴¹

On November 9, 2009, a new Field Operations Manual (FOM) was issued as publication number CPL 02-00-148; however, no changes were made to the multi-employer policy. Accordingly, the Secretary directed that the specific and detailed guidance set forth in CPL 02-00-124 remained controlling. The ebb and flow of these changing policies regarding an employer’s liability for other than its own employees illustrates why the private sector has grown frustrated with OSHA over the last four decades.

Simply stated, responsibilities under the multi-employer policy are dependent on the employer’s role, not its job title. If the employer meets the criteria of a creating, controlling, exposing, or correcting employees, then it has safety and health obligations under OSHA’s regulations. While these principles, as originally formulated, were restricted to the construction industry, the Commission has since held that they are

³⁹ OSHA, Field Inspection Reference Manual OSHA § V.C.6 (Sept. 26, 1994).

⁴⁰ *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306-07 (D.C. Cir. 1995).

⁴¹ *Id.*, citing OSHA, Field Inspection Reference Manual OSHA Instruction CPL 02-00-124 (Dec. 10, 1999).

applicable to all multi-employer situations.⁴² Under OSHA policy, citations at multi-employer worksites will only be issued to employers whose employees are exposed to the hazard, unless all of those employers have met OSHA criteria that absolve them of responsibility.⁴³ If all employers have met the criteria, the agency will then cite an employer whose employees have not been exposed but who is in the best position to correct the hazard or ensure its correction.⁴⁴

In order for this to occur, the employer who created the hazard could not have had any of its employees exposed to the condition. Furthermore, no other employer whose workers were exposed could have had the authority or the ability to correct the hazard. In citing the employer who is in the best position to correct the hazard, OSHA may look to the employer with general supervisory responsibility over the worksite or to the employer who created the hazard, though in some instances they may be the same employer. OSHA's authority in this regard is not in doubt. The Commission has upheld citations issued at multi-employer sites against employers that were in a position to correct a hazard regardless of whether its own employees had access to the hazard.⁴⁵

According to the Commission, an employer has a responsibility to prevent hazards from being created and to correct hazardous conditions under its control, even if the only workers with access to the hazard are those of other employers at the multi-

⁴² *Harvey Workover, Inc.*, 7 O.S.H. CA's. (BNA) 1687(1979) (holding "[w]e no longer find the distinction between construction sites and other worksites valid. The safety of all employees can best be achieved if each employer at multi-employer worksites has the duties to (1) abate hazardous conditions under its control and (2) prevent its employees from creating hazards").

⁴³ 15 Emp. Coord. *Workplace Safety* § 7:22 (March 2010).

⁴⁴ Occupational Safety & Health Administration Field Operations Manual, Ch. V-F-4.

⁴⁵ *Secretary of Labor v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009).

employer site.⁴⁶ The Commission first articulated the multi-employer worksite doctrine in two companion cases from 1976.⁴⁷ In *Grossman Steel*, the Commission stated: “The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors . . . Thus, we will hold the general contractors responsible for violations it could have reasonably have been expected to prevent or abate by reason of its supervisory capacity.”⁴⁸

In *Anning-Johnson*, the Commission stated: “Once a cited construction subcontractor has established that it neither created nor controlled the hazardous condition, it may affirmatively defend against the Secretary's charge by showing either (a) that its employees who were or may have been exposed to the hazard were protected by means of realistic measures taken as an alternative to literal compliance with the cited standard, or (b) that it did not have nor with the exercise of reasonable diligence could have had notice that the conditions was “hazardous.”⁴⁹

In fact, one court has observed that an employer’s duty to comply with OSHA standards exceeds his general duty to his own employees, so that OSHA may establish a violation by showing that a hazardous condition created by an employer was accessible either to its own employees or to those of other employers engaged in a common undertaking.⁵⁰ For example, an employer whose employees erected a scaffold at a construction site was properly cited for noncompliance with OSHA requirements

⁴⁶ *Secretary of Labor v. Anning-Johnson Co.*, 4 O.S.H. CA’s. (BNA) 1193 (1976).

⁴⁷ *Anning-Johnson Co.*, *supra*, and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (1976).

⁴⁸ *Id.*, 4 BNA OSHC at 1188.

⁴⁹ *Secretary of Labor v. Anning-Johnson Co.*, 4 O.S.H. CA’s. (BNA) 1193 (1976).

⁵⁰ *Brennan v. Occupational Safety and Health Review Comm’n*, 513 F.2d 1032 (2d Cir. 1975).

applicable to the scaffold, even though its employees left the construction site after the scaffolding was installed and were never exposed to the hazard.⁵¹ Furthermore, at least half of the federal appellate courts have upheld the multi-employer doctrine for construction sites.⁵²

The multi-employer doctrine has also been applied to citations involving criminal liability. The Seventh Circuit held that an employer who was found to have committed a willful violation that resulted in the death of another subcontractor's employee could be held criminally liable for the death of that employee.⁵³ The court looked to the language of the OSH Act that imposes criminal liability where an employer commits a willful violation that results in the death of "any" employee. The court reasoned that the use of "any" employee, as opposed to "his" employee as used elsewhere in the statute, supported its holding.⁵⁴

Both the Commission and some courts seem to have softened their stance, under these circumstances, regarding OSHA's normal burden in proving noncompliance with a safety or health standard. One aspect of that burden is proof that employees of the cited employer have exposure to the hazard. However, the above cases indicate that access of employees other than those of the cited employer can fulfill the requirement.⁵⁵

⁵¹ *Beatty Equipment Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978).

⁵² *Universal Const. Co., Inc. v. Occupational Safety and Health Review Comm'n*, 182 F.3d 726 (10th Cir. 1999); *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815 (6th Cir. 1998); *Beatty, supra.*; *Marshall v. Knutson Const. Co.*, 566 F.2d 596 (8th Cir. 1977); *Brennan, supra.*; *Solis v. Summit Contractors, Inc.*, 22 O.S.H. CA's. (BNA) 1496 (8th Cir. 2009).

⁵³ *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999).

⁵⁴ *Id.*

⁵⁵ *Secretary of Labor v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009).

A. General Contractor Liability

At multi-employer construction sites, a general contractor is responsible for all OSHA violations it could reasonably be expected to have prevented or detected because of its supervisory capacity over the worksite, whether or not the general contractor or a subcontractor actually created the violation.⁵⁶ A general contractor is not expected to duplicate the safety efforts of a subcontractor, but it must at least appraise itself of the safety efforts made by the subcontractor. Thus, a general contractor was liable for a subcontractor's safety violations where it failed to read the subcontractor's safety program and failed to notice fall protection violations that were in plain view for two weeks.⁵⁷ However, in another case, a citation against a general contractor was vacated because the general contractor could not have reasonably known that a repair technician for another general contractor would enter the worksite after hours.⁵⁸

However, despite the fact that the general contractor at a worksite was obligated by contract to assume responsibility for certain hazards where a subcontractor had repeatedly requested that the hazards be corrected, the Commission affirmed a citation of the subcontractor resulting from these hazards because the subcontractor was "in control" of the cited conditions. According to the Commission, control is established when an employer has the expertise and personnel to abate a hazard—requirements the subcontractor met. Nonetheless, the Commission was sharply critical of OSHA's policy, under its current enforcement guidelines, of not citing a responsible general contractor

⁵⁶ *Knutson Constr. Co.*, 4 BNA OSHC 1759 (1977).

⁵⁷ *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815 (6th Cir. 1998).

⁵⁸ *Secretary of Labor v. Turner Const. Co.*, 19 O.S.H. Cas. (BNA) 1926 (O.S.H.R.C.A.L.J.), 2002 O.S.H.D. (CCH) P 32573, 2002 WL 1181043.

whose employees are not exposed to a hazard, while citing a subcontractor who was not directly responsible for the hazard but whose employees were exposed to it.⁵⁹

In assessing responsibility of employers who have control over a hazard, an employer's actual authority, not the employer's designation, is paramount. If, for example, an employer has the requisite degree of supervisory Control over the worksite, it need not be a "general contractor" in the technical sense.⁶⁰ Thus, where an employer was not the general contractor, it was still found to be the culpable employer because it was responsible for construction of the roof and controlled the conditions of that worksite.⁶¹ Conversely, an employer who was nominally the prime contractor on a worksite was held not to be subject to the liabilities of a general contractor where it maintained no general supervisory authority over either the worksite or other contractors.⁶²

Because an employer who is a "true" general contractor exercises considerable control over a multi-employer worksite, it will be difficult for such an employer to avoid responsibility for a hazard even if it did not create the condition. As indicated above, it must be "reasonable" to expect the contractor to have detected the violation, but this standard can be met fairly easily for an employer who has supervisory control over a worksite. A general contractor may escape liability if OSHA exercises its discretion to cite only those employers whose workers are exposed to the hazard, even though these

⁵⁹ *Lee Roy Westbrook Constr. Co.*, 13 BNA OSHC 2104 (1989).

⁶⁰ *Olson Constr. Co.*, 5 BNA OSHC 1857 (1977).

⁶¹ *Secretary of Labor v. Double "A" Industries, Inc.*, 202 WL 465801 (2002, O.S.H.R.C.).

⁶² *Howard Elect. Co.*, 6 BNA OSHC 1518 (1978).

employers may have a defense.⁶³

B. Liability of Engineering & Architectural Firms

According to the Commission, even engineering and architectural firms can be held liable for Act violations at multi-employer worksites as employers if they:

1. Possess broad responsibilities in relation to construction activities; and
2. Are directly and substantially engaged in activities that are integrally connected with safety issues.⁶⁴

This is true even if the architectural or engineering firm has an agreement with the contractor expressly giving the contractor responsibility for safety.⁶⁵ While the Seventh Circuit has criticized the Commission's test and its failure to consider contract language allocating safety responsibility, the Seventh Circuit did agree that architectural and engineering firms are not automatically exempt from OSHA liability. However, the Seventh Circuit has suggested that contract disclaimers should be relevant when determining safety responsibility of professional firms.⁶⁶ The Commission has held that a construction management firm was not liable for safety violations where it did not have authority to control safety hazards but could only report them to the property owner.⁶⁷ OSHA must prove that the employer knew, or should have known, with the exercise of due diligence, of the actual circumstances that constituted a violation of the Act.⁶⁸

⁶³ 15 Emp. Coord. *Workplace Safety* § 7:22 (March 2010).

⁶⁴ *CH2M Hill Cent., Inc. v. Herman*, 131 F.3d 1244, 18 O.S.H. Cas. (BNA) 1106, 1998 O.S.H. Dec. (CCH) ¶31482 (7th Cir. 1997).

⁶⁵ *Secretary of Labor v. CH2M Hill Central, Inc.*, 17 O.S.H. CA's. (BNA) 1961, *14 (No. 89-1712, 1997).

⁶⁶ *CH2M Hill, Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999).

⁶⁷ *Fleming Constr., Inc.* (1999, OSHRC) 1999 WL 236048.

⁶⁸ *N.Y. State Gas & Elec. Corp. v. Secretary*, 88 F.3d 98, 105 (2d Cir. 1996).

V. GENERAL DISCUSSION

A. Current Status of the Law

Today there is no definitive, federal standard regarding the multi-employer worksite doctrine. And not surprisingly, it is not uncommon to find various courts in conflict with one another.⁶⁹ This is especially true in the federal administrative arena. There is currently a long-standing split among the federal circuit courts concerning the multi-employer worksite doctrine. For this reason the issue is ripe for review by the United States Supreme Court. Another possible remedy may be Congressional remedial legislation to clearly define which employer is responsible for which workers at multi-employer site. Until such time as Congress or the Court act definitively, the confusion will continue. Perhaps the results of the 2016 general election may stimulate the necessary changes within Congress.

B. Holdings of Appellate Courts on the Multiemployer Worksite Doctrine

Those appellate courts affirming the multiemployer worksite doctrine are the: Second Circuit,⁷⁰ Sixth Circuit,⁷¹ Seventh Circuit,⁷² Eighth Circuit,⁷³ Ninth Circuit,⁷⁴ Tenth Circuit,⁷⁵ and the DC Circuit.⁷⁶ Those circuit courts that have never addressed the issue of the multiemployer worksite doctrine are the: First Circuit, Third Circuit, Fourth Circuit,

⁶¹ 53 American Law Institute 1953–1965 *Restatement of the Law Second: Conflict of Laws*. Drafts. 1–13.

⁷⁰ *Brennan v. OSHRC*, 513 F.2d 1032 (2d Cir. 1975).

⁷¹ *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998).

⁷² *U.S. v. Pitt-Des Moines, Inc. v OSHRC*, 168 F.3d 976 (7th Cir. 1999).

⁷³ *Solis v. Summit Contractors v. OSHRC*, 558 F.3d 815 (8th Cir. 2009).

⁷⁴ *Beatty Equip. Leasing, Inc. v. OSHRC*, 577 F.2d 534 (9th Cir. 1978).

⁷⁵ *Universal Constr. Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999).

⁷⁶ *Summit Contractors, Inc. v. OSHRC*, 442 F. App'x. 570 (D.C. Cir. 2011).

Eleventh Circuit, and the Court of Appeals for the Federal Circuit. The only circuit court to have rejected the multiemployer worksite doctrine is the Fifth Circuit.⁷⁷

VI. APPELLATE COURT CASES AFFIRMING THE DOCTRINE

Our society has a long and tortured history that includes considerable employer indifference to the safety and health concerns of the common worker. In a long line of cases since *Anning-Johnson* and *Grossman Steel*, the Commission had reaffirmed and expanded the multi-employer worksite doctrine. Two of the major cases will be summarized to describe the history of this legal concept and the controversy surrounding this doctrine.

A. Universal Construction Company

Universal Construction Company (Universal) received a citation issued by the Secretary on October 16, 1997, for two serious violations at its construction site.⁷⁸ The citation alleged that “Universal failed to ensure that employees were instructed to stand firmly on the floor of the basket of an aerial lift, a serious violation of 29 C.F.R. §1926.453(b)(2)(iv); and that “Universal failed to ensure that each employee wore a body belt with attached lanyard when working from an aerial lift, a serious violation of 29 C.F.R. § 1926.453(b)(2)(v).”⁷⁹

Universal contested the citation and the matter was submitted to an ALJ for adjudication “...based upon stipulated facts and exhibits.”⁸⁰ The seminal issue before the

⁷⁷ *Melerine v. Avondale Shipyards, Inc. v. OSHRC*, 659 F.2d 706 (5th Cir. 1981).

⁷⁸ *Sec’y of Labor v. Universal Constr. Co., Inc.*, 18 O.S.H. CA’s. (BNA) 1390 (1998).

⁷⁹ *Id.*, at 1.

⁸⁰ *Id.*

Court was “...whether Universal, as a general contractor, was responsible for safety violations created by a subcontractor under the multi-employer worksite doctrine.”⁸¹

Universal asserted that the multi-employer worksite doctrine was “an unreasonable, arbitrary and capricious interpretation of the Act, and that the charges against it should be vacated for this reason.”⁸² Universal’s position was that “... the Commission strayed from the dictates of the Act, as promulgated, and ignored the Act’s legislative history, and that nothing in the legislative history or in the plain language of the Act supported the imposition of liability on employers who did not create the violative conditions and whose employees are not exposed to the violative conditions.”⁸³ Universal concluded that the primary purpose of the Act was to require employers to provide their own employees with safe working conditions.⁸⁴

Universal also opined that the Commission’s 1976 change in position on the doctrine “without justification” demonstrated that the Secretary’s interpretation of the statute as imposing such liability was arbitrary and capricious. Universal argued that, if the multi-employer worksite doctrine was not rejected, then in the alternative, it did not apply to the specific circumstances of this case. This was so, it contended, because the doctrine should not have been imposed on the basis of who controlled the worksite.

Notwithstanding Universal’s arguments, the ALJ determined that “...the multi-employer worksite doctrine applied in this case.”⁸⁵ The ALJ found that control was

⁸¹ *Id.*

⁸² Universal’s Brief, p. 1.

⁸³ *Sec’y of Labor v. Universal Constr. Co., Inc.*, 18 O.S.H. CA’s. (BNA) 1390 (1998), at p. 3.

⁸⁴ Universal’s Brief, p. 11-12.

⁸⁵ *Sec’y of Labor v. Universal Constr. Co., Inc.*, 18 O.S.H. CA’s. (BNA) 1390 (1998), at p. 3.

precisely the factor that determined liability under the doctrine. “An employer was responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.”⁸⁶

B. Summit Construction Company

Many contractors face this vexing question: *Which OSHA Standard Applies?*⁸⁷

The doctrinal development in this area of law continued its ebb and flow when Summit Contractors (Summit), a general building contractor, was cited under the multi-employer worksite doctrine.⁸⁸ This case is important, as it illustrates the multiemployer issues faced by general contractors and the inconsistent rulings of the various appellate courts and the Commission.

In June 2003, Summit was the general contractor responsible for the construction of a college dormitory in Little Rock, Arkansas.⁸⁹ Only four Summit workers were present at the worksite: a job superintendent and three assistant superintendents.⁹⁰ Summit’s employees at the worksite were responsible for coordinating the vendors, scheduling the work for the various subcontractors, and ensuring that the work of the subcontractors was performed according to the contract. Summit had subcontracted the project’s exterior brick masonry work to All Phase Construction, Inc. (All Phase).⁹¹ All

⁸⁶ *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

⁸⁷ *Summit*, 21 BNA OSHC at 2024, 2007 CCH OSHD.

⁸⁸ *Secretary of Labor v. Summit Contractors, Inc.*, 21 OSHC (BNA) 2020 (2007).

⁸⁹ http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/mw/osh2010_significant_decisions.authcheckdam.pdf, p.2

⁹⁰ *Id.*

⁹¹ *Id.*, at p. 1.

Phase workers used scaffolding in the performance of their work. On June 18 and 19, 2003, an OSHA Compliance Safety and Health Officer (CSHO)⁹² observed and photographed All Phase employees working from scaffolds at 12-18 feet above the ground and not protected from falls.⁹³

None of the exposed workers were employed by Summit, nor did Summit create the hazardous conditions observed by the CSHO.⁹⁴ Some of Summit's superintendents were present at the worksite on June 18 and 19, and some of the instances were in plain view of Summit's trailer located on the worksite. Summit did not deny knowledge of the violative conditions observed by the CSHO. However, the CSHO did not perform a walk around inspection of the worksite until June 24, 2003, when Summit's safety officer could be present. At the time of the walk-around inspection, the scaffolding violations previously observed by the CSHO were corrected.⁹⁵

C. Standards under 29 C.F.R Part 1926

Summit's project superintendent recounted that he had observed All Phase employees working on scaffolds lacking guardrails and instructed All Phase, on two or three occasions prior to the inspection, to install the guardrails. Each time, All Phase would address and correct the violation but fall out of compliance when the scaffolding was moved to a different area of the worksite. Based on the CSHO's June 18 and 19 observations, OSHA cited Summit for a violation of the construction safety standard as

⁹² In the trade, CSHO is used interchangeably with Compliance Officer (CO).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

set forth at 29 C.F.R. § 1926.451(g)(1)(vii) as a “controlling” employer⁹⁶ with a proposed penalty of \$4,000.00. All Phase was also cited under the multi-employer doctrine as the employer who created the hazard and as the employer having employees exposed to the hazard. Section 1926.451(g)(1)(vii) states:

“For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.”⁹⁷

At hearing, Summit argued that the multi-employer worksite doctrine was invalid as to a general contractor who neither created, nor had employees exposed to, the alleged and cited hazard. Alternatively stated, Summit challenged the Secretary’s application of the doctrine to controlling contractors who have contractual authority over subcontractors.⁹⁸ Summit argued both at the hearing and while the matter was on review, that the doctrine as expressed in OSHA Directive CPL 2-0.124 (Multi-Employer Citation Policy) was not enforceable as it was contrary to 29 C.F.R. § 1910.12(a). That regulation 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.⁹⁹

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

As noted by the ALJ, Summit's argument focused on the second sentence of this regulation. Specifically, Summit's position is that because it had no employees exposed to the hazard, and did not create the hazard, the regulation prohibits the issuance of a citation to Summit for the hazard created by the subcontractor, All Phase.¹⁰⁰ The ALJ further noted that the Commission has on numerous occasions applied the doctrine to controlling employers like Summit and, therefore, rejected Summit's argument. Among others, he cited the Commission's decision in *Access Equipment Systems, Inc.*,¹⁰¹ and *McDevitt Street Bovis, Inc.*¹⁰² The judge issued a decision rejecting Summit's arguments, finding that the company had conceded the elements needed to prove the violation, affirming the citation as serious, and assessing a penalty of \$2,000 based on his finding that Summit was entitled to credit for good faith. As for the specific argument relating to § 1910.12(a), the ALJ simply noted his view that the regulation does not prohibit finding an employer responsible for the safety of employees of other employers. Summit timely appealed to the Commission.

VII. REVIEW BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

As early as 1995, the United States Court of Appeals for the District of Columbia noted a "marked tension" between the language of § 1910.12(a) and the Secretary's multi-employer policy.¹⁰³ In two prior cases, the Commission had declined to rule on the issue of whether § 1910.12(a) is consistent with, or has any effect on, the

¹⁰⁰ All Phase did not Contest the citations and paid the penalties proposed by the Secretary.

¹⁰¹ 18 BNA OSHC 1718, 1999 CCH OSHD ¶ 31,821 (No. 95-1449, 1999).

¹⁰² 19 BNA OSHC 1108, 2000 CCH OSHD ¶ 32,204 (No. 97-1918, 2000).

¹⁰³ *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306-07 (D.C. Cir. 1995).

multi-employer citation policy because the issue had not been briefed. However, in doing so, the Commission did not seem to suggest that the issue had been foreclosed or previously decided.¹⁰⁴ Summit argued that the “his employees” phrase of the second sentence of § 1910.12(a) describes a construction employer’s duty that is limited to its own employees. The Secretary argued that the first sentence describes a duty that is as broad as the working conditions of all employees on the construction site, effectively ignoring the “his employees” clause of the second sentence.

The Secretary vigorously asserted that because in *Anthony Crane Rental, supra*, the employer had had actually leased the crane, had created or had control over the dangerous conditions on the work site, had serviced the crane, and had performed work “integral” to the construction project, it could thus be held accountable under the OSH Act.¹⁰⁵ The court went on to say: “Here, the relevant regulation by its terms only applies to an employer’s *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine.”¹⁰⁶ In 1998, another panel of the same court similarly noted the tension between the regulation and the policy.¹⁰⁷ It too determined that it was unnecessary to decide the issue.¹⁰⁸ In a like manner, the Commission in a similar case noted “...the existence of the problems but, like the D.C. Circuit, declined to address it for not having been briefed.”¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at 1228

¹⁰⁶ *Id.*, at 1307.

¹⁰⁷ *Iowa Beef Processors*; 144 F.3d at 865-66.

¹⁰⁸ *Id.* at 866. In its most recent multi-employer decision, the United States Court of Appeals for the Tenth Circuit noted the D.C. Circuit’s decision in *IBP* but did not address the issue of conflict between the multi-employer policy and § 1910.12(a). *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, (10th Cir. 1999).

¹⁰⁹ *See Access Equip.*, 18 BNA OSHC at 1725 n.12, 1999 CCH OSHD at p. 46,780 n.12.

VIII. THE CONSTRUCTION SAFETY ACT

The Secretary issued § 1910.12(a) pursuant to section 6(a) of the OSH Act in order to adopt the Part 1926 standards originally enforced under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 (hereinafter variously referred to as the “Construction Safety Act” or “CSA”).¹¹⁰ The scope and application provisions of §1910.12(a) define the “regulatory universe” to which those construction standards apply.¹¹¹ Neither a reviewing court nor the Commission had ever before sought to resolve the “marked tension” between the Secretary’s multi-employer citation policy and § 1910.12(a).¹¹²

For a period of two years after the effective date of the OSH Act, the Secretary had the authority to “promulgate as an occupational safety or health standard, any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in any improved safety or health . . .” 29 U.S.C. § 655. The definition of “standard” and the phrase “established Federal OSH Act in § 1910.12(a), is indication that she intended the duties of an employer (in this case, a prime (general) contractor) under the OSH Act to be more limited than the duties of a prime (general) contractor under the Construction Safety Act

¹¹¹ See *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4-5 (1st Cir. 1993).

¹¹² See *Anthony Crane Rental Inc. v. Reich*, 70 F. 3d 1298, 1307 (D.C. Cir. 1995) (recognizing “the marked tension” between the multi-employer citation policy and “the language of § 1910.12[(a)] . . . that ‘[e]ach employer shall protect the employment and places of employment. . .’” See also *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1112-13, 2000 CCH OSHD ¶ 32,204 p. 48,782-83.

(CSA). “Control [constituting an employer as a “controlling employer”] can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.”¹¹³ In short, control can be established by contract or quasi-contract.

Significantly, beginning in 1983 and for years after that, OSHA continued to proscribe citations against non-exposing employers except in those limited circumstances when the Commission will normally defer to the Secretary’s reasonable interpretation of a regulation.¹¹⁴ The Secretary’s original multi-employer citation policy, allowing citation of creating as well as exposing employers, is consistent with § 1910.12(a)’s requirement that an employer must “protect the employment and places of employment of his employees.” It also comports with the purpose of the Act. The creation of violative employment conditions puts all employees at risk.

Indeed, the Commission has affirmed citations against so-called “non-exposure” creating employers when, on closer review, the employees of the creating employer, originally found to have been unexposed, were in fact exposed to the hazard.¹¹⁵ When the agency “...modifies or repeals the employment-based limitations imposed by the regulation, it may not by simple policy directive remove the substantive limitations on official discretion that now exist.”¹¹⁶ In *Vitarelli v. Seaton*, the Supreme Court held that

¹¹³ OSHA Instruction CPL 2-0.124 at X.E.1.

¹¹⁴ See *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 141 (6th Cir.1993).

¹¹⁵ See, e.g., *Anthony Crane Rental*, 17 BNA OSHC 2107, 1995-97 CCH OSHD ¶ 31,251 (No. 91-556, 1997).

¹¹⁶ *Id.*

even agencies with broad discretion must adhere to internally promulgated regulations limiting the exercise of that discretion.¹¹⁷

IX. REVIEW BY THE EIGHTH CIRCUIT COURT OF APPEALS

As explained above, however, § 1910.12(a) could be interpreted to permit citation for a violation of a Part 1926 standard of a controlling employer who neither created the violative conditions nor exposed his employees to the hazard.¹¹⁸ Following the Commission’s decision, the Secretary petitioned for review by the Eighth Circuit Court of Appeals.¹¹⁹ The Secretary decided to appeal in order “...to clarify which employer was a ‘controlling employer’ under the Secretary’s current multi-employer citation policy.”¹²⁰ Specifically at issue before the court was whether the Secretary’s policy of citing a controlling employer on a multi-employer construction worksite for the exposure of another employer’s employee violated Chapter 29 C.F.R. § 1910.12(a). On appeal, “[t]he Secretary argue[d] that the plain language of § 1910.12(a) does not preclude the controlling employer citation policy and that the courts should give deference to the Secretary’s interpretation of the regulation.”¹²¹ The Eighth Circuit held that “...the regulation unambiguously did not preclude Occupational Safety and Health Administration (OSHA) from issuing citations to employers for violations when their

¹¹⁷ *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959). *See also, Graham v. Ashcroft*, 358 F.3d 931, 932 (D.C. Cir 2004) (“It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion.” (citing *Padula vs. Webster*, 822 F.2d 97, 10 (D.C. Cir. 1987))).

¹¹⁸ http://scholar.google.com/scholar_case?case=5818709978050310446&hl=en&as_sdt=2&as_vis=1&oi=scholar

¹¹⁹ *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 822 (8th Cir. 2009).

¹²⁰ *Id.*, at 819.

¹²¹ *Id.*, at 820.

own employees were not exposed to any hazards related to violations, pursuant to Controlling Employer Citation Policy. This would apply even if the regulation were ambiguous. Then court would defer to Secretary's reasonable interpretation thereof.”¹²²

X. THE ADMINISTRATIVE PROCEDURE ACT

Following the mandate of the Eighth Circuit, the Commission limited its review in *Summit*¹²³ to two issues. First, the Commission considered the threshold issue of whether the Secretary “Did lawfully apply the Multi-Employer Citation Policy without first adopting it through the informal rulemaking process of the Administrative Procedure Act (the “APA”).”¹²⁴ Second, the Commission considered whether Summit has sufficient supervisory authority over the worksite to be properly cited under the “Controlling Employer Citation Policy.”¹²⁵

In general, prior to promulgating, amending or repealing a rule, the APA requires agencies to participate in a “Notice and Comment” or “informal” rulemaking period prior to taking action on a rule.¹²⁶ May OSHA adopt a Multi-Employer Worksite Citation policy without first complying with the rule-making requirement of the APA? The answer appears to be in the affirmative. “[C]ertain types of agency statements, including ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice’” are exempt from the APA’s “Notice and

¹²² *Id.*, at 823, 827.

¹²³ *Solis v. Summit Contractors, Inc.*, 22 O.S.H. CA’s. (BNA) ¶ 1777 (O.S.H.R.C. July 27, 2009).

¹²⁴ 22 O.S.H. CA’s. (BNA) 1777 at *2 quoting *Summit*, 558 F.3d at 826 n.6 (internal citations omitted).

¹²⁵ *Id.*, at 1.

¹²⁶ *See* 5 U.S.C. § 553.

Comment” requirement.¹²⁷ One appellate court has held that if the Secretary of Labor fails to prove all the elements of an alleged violation, the Commission decision and analysis are not findings of fact but conclusions of law.¹²⁸ Notably, the Commission previously held that a prior version of the multi-employer citation policy fell within the APA’s exemptions as the policy was neither a “standard” nor a “substantive rule.”¹²⁹

XI. EPILOGUE

As recently as June 24, 2015, the Commission decided the case of *Pullman Power, LLC*.¹³⁰ It is not necessary to recount the salient facts in *Pullman*, but it suffices to state that the seminal issue was “the multi-employer worksite doctrine.”¹³¹ OSHA issued a citation to *Pullman Power* because employees of a subcontractor *Pullman*’s worksite had been exposed to styrene levels above the permissible limit. The hearing judge dismissed the citations that had relied upon the multi-employer citation policy in effect at that time. The Secretary appealed to the Commission. The Commission summarized its decision: “We find that *Pullman*’s reliance on *Prime Roofing*, and its discussion of the *Scanlon* opinion, is misplaced.”¹³² The Commission addressed *Scanlon* because *Prime Roofing* arose in the First Circuit. See 29 U.S.C. § 660(a), (b); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000). Here, the relevant circuits are the Fourth, Eighth, and D.C. Circuits, none of which impose any of the special requirements discussed by the First Circuit in *Scanlon*. See *Volvo Constr.*

¹²⁷ 5 U.S.C. §553(b)(A).

¹²⁸ *Marshall v. CFI Steel Corp.*, 576 F.2d 809 (10th Cir. 1978).

¹²⁹ 22 O.S.H.CA’s. (BNA) 1777 at *3 citing *Secretary of Labor v. Limbach Co.*, 6 O.S.H. CA’s. (BNA) 1244, 1246 (O.S.H.R.C. December 20, 1977).

¹³⁰ *Secretary of Labor v. Pullman Power, LLC*; Docket No. 07-1796.

¹³¹ http://www.oshrc.gov/decisions/pdf_2015/07-1796.pdf, at p. 1.

¹³² *Id.*

Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581, 591 n. 9 (4th Cir. 2004); *Helm Fin. Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076, 1080 (8th Cir. 2000). “Because the original *Summit* decision has now been overruled by the Commission and the Eighth Circuit, we vacate the judge’s order granting partial summary judgment for Pullman and remand for further proceedings with regard to Items 1a and 1b in their entirety, and Item 2 to the extent it is based upon the Secretary’s allegation that Pullman was a controlling employer liable for the exposure of the another’s employee.”¹³³

XII. OBSERVATIONS AND CONCLUSIONS

Based upon the foregoing *Summit* decisions, apparently the Commission originally believed that the general contractor was not the proper party to be cited by OSHA inspectors, absent other circumstances. But after *Summit* was remanded from the Eighth Circuit, the Commission reversed itself. This points out the necessity for a general contractor to be extremely cautious as it begins subcontracting the various functions at a multi-employer work site.

General contractors should carefully delineate their roles regarding the work being performed by their subcontractors to ensure that they do not exert control over the latter’s employees to the degree that the former can be Considered the “employer,” and to further avoid assigning duties under the “multi-employer” workplace doctrine.

In the past, some commentators have suggested that OSHA adopt a “carrot and stick” approach in order to entice a more Cooperative attitude from general

¹³³*Id.* at 10:22.

Contractors.¹³⁴ Certain proposals have included incentives for self-reporting, such as the elimination of first-instance citations and limited penalties.¹³⁵

Other observers opine that OSHA has consistently relied upon an adversarial approach rather than emphasizing a collaborative strategy geared toward increasing worker safety and health.¹³⁶ The agency's approach has been criticized as failing American workers because it falls short of effectively addressing safety problems or helping employers in their compliance efforts.¹³⁷ Although even OSHA itself admits that "Ninety-five percent of the employers in the country do their level best to try to voluntarily comply"¹³⁸ with the law, the agency still treats those employers as adversaries-issuing them citations for what they have not done, rather than assisting them in complying with regulations to make the workplace safer. OSHA's early experiences confirm the importance of cooperation. In its early years, the agency antagonized employers by aggressively pursuing minor violations that created considerable ill will and discouraged voluntary compliance.¹³⁹ Although OSHA appears to have significantly increased its reliance on cooperative efforts, some observers find reasons to be skeptical about this approach.¹⁴⁰ These arguments include a belief that OSHA lacks evidence to show some of its recent cooperative programs have been successful. Second, that OSHA

¹³⁴ Randy S. Rabinowitz and Sidney A. Shapiro, *Punishment v. Cooperation in Regulatory Enforcement; A Case Study of OSHA*, 49 *Administrative Law Review* 713, Fall 1997.

¹³⁵ *Id.*, at 758-759.

¹³⁶ *Oversight of the Occupational Safety and Health Admin.*: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Comm., 105th Cong. Testimony of Pete Lunnie Jr., Executive Director of the Coalition on Occupational Safety and Health)

¹³⁷ Ellen Byerrum, *Decline in Inspection Numbers Prompts Renewed Emphasis, OSHA Official Tells BNA*, 26 O.S.H. REP. (BNA) No. 38 (Feb. 26, 1997).

¹³⁸ Sen. Michael B. Enzi, 35 *Harv. J. on Legis.* 335, Summer, 1998.

¹³⁹ *Id.*, at 761.

¹⁴⁰ James A. Gross, *The Broken Promises of the NLRB and OSHA: Conflicting Values and Conceptions of Rights and Justice*, 73 *Chicago-Kent Law Review* 351.

has a number of additional options that it can implement under its existing legal authority; but until it experiments with these changes, their impact is difficult to predict. Finally, that although the policy literature stresses that cooperative enforcement works better when regulatory beneficiaries are involved, OSHA has generally not yet found ways to integrate workers into its cooperative programs.¹⁴¹

Various policy literatures also stresses that cooperation should be paired with punishment, structured in a pyramid-like fashion, with initial or minor violations treated leniently, while repeated or significant violations are punished with increasingly severe sanctions. Unless violators are subject to escalating penalties, employers will not voluntarily comply because they will be at a competitive disadvantage with noncompliant companies.

Naturally, there are costs associated with providing a safe working environment. But logically, it must be considered that there are also costs associated with not providing the same safe working environment. On the human side, these costs would include the deaths and disabling injuries suffered by workers. On the financial side, these could include, but not necessarily be limited to, severe OSHA penalties, civil lawsuits, criminal prosecutions, and increased premiums for workers compensation insurance.

Nevertheless, some in Washington are prepared to reduce OSHA's capacity to enforce its regulations. The Bureau of National Affairs reported that President Obama's 2014 budget request subtracted \$2.8 million from the agency's compliance assistance program. Assistant Secretary for OSHA, Dr. David Michaels said the budget request

¹⁴¹ *Id.*, at 762.

would result in 33 fewer full-time employees, due to “reduced federal compliance activity from the consolidation of compliance assistance personnel in geographically dense regions and a decreased need for the development of outreach and training materials due to [the] completion of several recent initiatives. This form of micromanagement would prevent OSHA from adjusting its mix of cooperation and enforcement as more is learned about the effectiveness of each approach. There is no reason to believe that such micromanagement would be any more justifiable at other agencies.”¹⁴² However, former Secretary of Labor Hilda Solis once related that she wanted to hire 130 additional OSHA safety and health inspectors for fiscal year 2010.¹⁴³ Solis referred to the increased number of inspectors as “...a move toward at least beginning to enforce the OSHA laws.”¹⁴⁴ Addressing the American Society of Safety Engineers on June 29, 2009, the Secretary made it clear that her sense of urgency was fueled by ongoing worker death and injury reports from around the country. “As I have said since my first day on the job, the U.S. Department of Labor is back in the enforcement business. There will be no excuses for negligence. As long as I am the Secretary, the Department will go after anyone who puts workers at risk.”¹⁴⁵

XIII. OSHA’S SERIAL SAFETY VIOLATOR PROGRAM

The current Secretary of Labor, Thomas Perez, apparently shares the vision of former Secretary Solis. His Department has instituted a Serial Safety Violator Program that targets repeat violators. One especially egregious example comes from Maine and

¹⁴² <http://www.bna.com/obama-requests-5705-n17179873302/>

¹⁴³ Occupational Safety & Health Reporter, vol. 39, no. 27, pg. 543; July 2, 2009

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

concerns a Maine roofing contractor's continued disregard of a federal U.S. Court of Appeals order to correct safety hazards and pay more than \$400,000 in fines. The Department of Labor had asked the court to hold the contractor in civil contempt. The owner of Lessard Roofing & Siding Inc. and Lessard Brothers Construction Inc., defied a December 2011 court order to correct violations levied from 2000 to 2011 by the Occupational Safety and Health Administration and pay \$404,000 in fines and interest. Most recently, OSHA had cited Lessard for fall-related hazards and fined him an additional \$287,000. "This is scofflaw behavior by a serial violator who demonstrates contempt — not only for the law and the U.S. Court of Appeals, but for the safety and lives of his employees," said Mary Ann Medeiros, OSHA's area director in Maine.¹⁴⁶

OSHA says even after obtaining the 2011 order against Lessard, the company continued to violate OSHA rules. On July 18, 2014, OSHA inspected a work site in Lewiston, ME, at which three Lessard employees were doing roofing work without required fall protection. Lessard told the *Portland Press Herald* he doesn't have the money to pay the fines, and the jobs he was cited for were finished years ago, so it's impossible for him to now prove that the hazards were abated. He said OSHA failed to notify him about the contempt hearing.¹⁴⁷

Underscoring the Secretary's vision of enhanced safety and health enforcement, OSHA appears to be internally reviewing its penalty policy. OSHA Chief Dr. David

¹⁴⁶ <http://www.dol.gov/sec/newsletter/#.VQnVp1J0y70>, March 12, 2015. See also *Durability + Design Magazine*, Tuesday, March 17, 2015.

¹⁴⁷ <http://www.safetynewsalert.com/jail-looms-for-owner-for-not-paying-osha-fines/>

Michaels explained the agency's rationale behind what critics have called "regulation by shaming" during the American Industrial Hygiene Association's fall 2014 conference.¹⁴⁸ "With one of the smallest agency budgets and approximately 2,500 inspectors," Michaels told the crowd of industrial hygiene and occupational safety and health practitioners, "that OSHA has to employ a variety of strategies to accomplish its challenging mission of protecting workers at over 8 million workplaces. We have an incredibly wide-ranging mission, covering everything from nail guns to nail salons," he said, and this must be completed with about the same number of staff as the Mine Safety and Health Administration, which oversees the nation's mines. "We cover everything else," he said. "So distributing resources is key; if all we do is eliminate the hazards of the places we inspect, then we're missing 95 percent of employers. So we try to do our inspections in ways that impact a whole industry, or a region. That's why we do the press release, that's why we do outreach. We know if employers see their neighbor or their competition get inspected and issued a fine, they think, 'Maybe that's a hazard I'd better take care of.' "

OSHA conducts about 40,000 inspections annually. "We know we're known for enforcement. Our fines and press releases get all the attention. We know that, and we know that enforcement has a real impact on workplaces. OSHA really does save lives. Our inspections have an impact," he said. Michaels said the agency makes a concerted effort to publicize enforcement actions, comparing OSHA to someone encountering a

¹⁴⁸ <http://www.bna.com/michaels-disputes-claims-n12884908338/>, Oct. 20, 2014. See also *Society for Human Resources Management Journal*; 10-21-2014.

mountain lion. “When you’re in the Southwest desert and you see a mountain lion, what are you supposed to do? You’re supposed to try to make yourself look big. That’s our philosophy. We’re a small agency, but we’ve got to try to look like a big agency because it’s a big country and there are lots of hazards.”¹⁴⁹

OSHRC Chair Thomasina V. Rogers told the ABA mid-winter conference on March 12, 2015, that if she had one regret about leaving office in April 2015, after serving more than 16 years, it's "the elephant in the room—the lack of adequate enforcement funding from Congress.”¹⁵⁰

At the same ABA conference, Assistant Secretary for OSHA, Dr. David Michaels related: "We're doing better; the average number of worker deaths a day are down. Michaels, who opened the meeting, also said that “in the halcyon years of OSHA”—the late 1970s—the organization had 38 inspectors per million workers. It now has only 23 inspectors per million.”¹⁵¹

The Senate Appropriations Committee approved a fiscal year 2017 budget for OSHA that totaled \$592 million.¹⁵² OSHA’s priorities for 2017 point decidedly towards increased enforcement. The proposed budget requested a 9 percent increase for federal enforcement and a 3 percent increase for state plan enforcement. OSHA’s enforcement budget would increase to \$226 million for federal enforcement and \$104.3 million for state plan enforcement. With the requested budget increase, OSHA would anticipate

¹⁴⁹ *Id.*

¹⁵⁰ *BNA Journal*, March 19, 2015 · Volume 45 Number 12

¹⁵¹ *Id.*

¹⁵² <http://www.dol.gov/dol/budget/2016/PDF/FY2016BIB.pdf> (p. 54)

adding 90 new positions, with two-thirds of those new positions dedicated to enforcement duties. OSHA asserts that the additional staff is necessary to handle the increased workload anticipated as a result of the new injury reporting requirements.¹⁵³

XIV. FINAL VEXING QUESTIONS

Do general contractors actually “suffer” any administrative consequences under the puzzling patchwork of federal appellate decisions? Are they burdened by the frustrating, tortured and often-conflicted OSHA interpretations of the multi-employer doctrine which may hold them responsible for the errors and omissions of their subcontractors? Are OSHA’s enforcement protocols too adversarial? The reluctance of courts and the Commission in the past to address these questions and finally unravel the perplexing legal maelstrom surrounding these issues suggests that a resolution may ultimately depend on state-of-the-art rulemaking by the Secretary or a definitive adjudication by the Supreme Court.

The most current data from the Bureau of Labor Statistics reveal that 4,821 workers were killed on the job in 2015.¹⁵⁴ Over the past four years, the job fatality rate has largely been unchanged from the rate of 3.4 deaths per 100,000 workers. Thus, when balancing lives versus safety costs, which side will ultimately be able to claim victory in this administrative contest. Even one workplace death is one too many. Perhaps over time, more employers will come to see that investments in workplace safety are investments investment in their human resources; the working men and women of America. The impact of a change in this area of workplace safety law will be legion. If

¹⁵³ <http://www.oshalawblog.COM/2015/02/articles/osha-requests-budget-increase-for-fy-2016/>

¹⁵⁴ www.osha.gov/ Tuesday, May 24, 2016; (the most recent statistics available).

the multi-employer worksite is upheld as a nation-wide standard of accountability, employers will be on clear notice as to what is expected of them. No longer can they hide behind the “subcontractor employees” argument. General contractors will understand that they have the ultimate legal responsibility for every worker on their site, regardless of which company is providing that worker’s paycheck.

On the contrary, if the multi-employer worksite is struck down, subcontractors must accept the fact that they remain ultimately responsible for the health and safety of their own workers, no matter what other companies have employees on the same worksite. They may no longer presume that the general contractor will provide worker’s compensation coverage for the employees of a subcontractor.

Ultimately the multi-employer citation policy may reach the U.S. Supreme Court. The split among the various appellate Courts on this issue will surely provide a sufficient number of novel questions for the Supreme Court to accept the inevitable petition. However, that the final resolution will remain too close to call, especially considering the Justices appointed during the Obama administration, the recent vacancy caused by the death of Justice Scalia, and the results of the 2016 General Election.

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