

Akerman Practice Update

CONSTRUCTION

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OSHA Can Cite General Contractor for Violations Caused by Subcontractor

By Paul J. Waters
paul.waters@akerman.com

Paul Waters is a Shareholder in the Tampa, FL Office. He is a member of the Labor & Employment practice group.

In a divided opinion, the Eighth Circuit Court of Appeals has upheld an Occupational Safety and Health Administration (“OSHA”) policy that allowed OSHA compliance officers to issue citations to general contractors for hazards created on their construction sites by subcontractors. (*Solis v. Summit Contractors, Inc.*, No. 07-2191, 8th Cir. Feb. 26, 2009).

In this case, Summit Contractors Inc. was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit subcontracted the entire project, so they only had four employees on the entire jobsite. One of the subcontractors was All Phase Construction, Inc., responsible for performing masonry work. As many as three times during the course of All Phase’s work, Summit’s project superintendent caught All Phase employees working without fall protection gear on scaffolds that lacked guardrails. Each time, the project superintendent warned All Phase to correct the problem. However, when All Phase’s employees moved the scaffold to another location, they again would work without fall protection or guardrails.

An OSHA compliance officer eventually saw All Phase’s employees working without fall protection. Although no Summit employee was exposed to any fall protection hazard, the OSHA inspector issued Summit a citation for violation of the scaffolding fall protection standard based on OSHA’s “multi-employer citation policy.”

Under its “multi-employer citation policy,” OSHA took the position that, when a violation was discovered on a construction site, the agency potentially could issue a citation to a number of different employers:

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“it is impossible under the OSH Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors ...”

- the employer that created the violation;
- any employer whose employees were exposed to the violation;
- any employer responsible for correcting the violation on the jobsite, and;
- any employer responsible for controlling the work on the jobsite.

In this case, OSHA asserted that Summit, as the general contractor or “controlling employer,” had the ability to prevent or abate the hazard created by All Phase’s employees through reasonable exercise of its supervisory authority.

Summit contested the citation, arguing that OSHA’s regulations place a duty on an employer to protect only its own employees, not those of any subcontractor. Therefore, because Summit’s employees were not exposed to the fall protection hazard, OSHA exceeded its authority by citing Summit for All Phase’s violation. After the hearing, the Administrative Law Judge (“ALJ”) rejected Summit’s position. On review, however, the Occupational Safety and Health Review Commission vacated the citation, with two Commissioners finding that the plain language of OSHA’s regulations required each employer to protect only its own employees. One Commissioner (the current Chair, Thomasina Rogers) agreed with the ALJ.

OSHA appealed that decision to the U. S. Court of Appeals for the Eight Circuit. In a split decision, the court found that OSHA’s “controlling employer” citation policy did not conflict with OSHA regulations. Further, writing for the court, Judge Raymond W. Gruender went on to say “[e]ven if the regulation were ambiguous, we would defer to [OSHA’s] reasonable interpretation” of her own regulations.

The court then discussed Summit’s various alternative arguments, including that the “controlling employer” citation policy was an “ill-conceived policy that is counterproductive to the goals of the OSH Act.” The court conceded that it was “uncertain what potential benefits are gained in citing both a subcontractor and a general contractor for a single OSHA violation when the general contractor had informed the subcontractor of the violation on prior occasions.” However, the court stated that this was a “policy concern” that should be addressed to Congress or OSHA, and not the courts.

Judge C. Arlen Beam dissented, finding that the regulation in question unambiguously “does not support ‘controlling’ person citations such as those issued in this case.” He further observed that “it is impossible under the OSH Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors, many of whom are larger employers than the general or prime contractor.” He also recognized that, in the case of residential construction, “the supposed general homebuilding contractor often has no ‘employees’ at all ‘engaged in construction work’ at ‘places of employment’ contemplated by the regulation.” Thus, he agreed with Summit that “to impose the Secretary’s rule on these employers is . . . absurd as a matter of rational policy.”

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Ft. Lauderdale

Stacy Bercun Bohm
David M. Hawthorne
Jeffrey C. Lynne
Scott W. Rostock
Leslie M. Tomczak
Carmen I. Tugender
 Las Olas Centre II
 350 East Las Olas Boulevard, Suite 1600
 Ft. Lauderdale, FL 33301-2229
 954.463.2700

Los Angeles

David P. Dapper
Nowland C. Hong
Julie M. McGoldrick
Bridget M. Moss
Robert M. Shaw
Michael S. Simon
Michael B. Wall
 725 South Figueroa Street, 38th Floor
 Los Angeles, CA 90017-5438
 213.688.9500

Madison

Hugh N. Anderson
Robert J. Smith
 222 West Washington Avenue, Suite 380
 Madison, WI 53703
 608.257.5335

Miami

Robert I. Chaskes
Oscar A. Sanchez
Paul A. Shelowitz
Susanne Zabloudil
 One Southeast Third Avenue, 25th Floor
 Miami, FL 33131-1714
 305.374.5600

New York

Richard Bowers
Ken Gordon
 850 Third Avenue, 19th Floor
 New York, NY 10022
 212.751.8600

Tallahassee

John C. Lovett
Frank N. Tsamoutales
Cameron J. Yarbrough
 Highpoint Center, 12th Floor
 106 East College Avenue
 Tallahassee, FL 32301
 850.224.9634

Orlando

Kimberly A. Ashby
Ginny Childs
Megan Costa Devault
Bill P. Gray
Erik E. Hawks
Harold E. Morlan II
Robert B. Nadeau, Jr.
 CNL Center II at City Commons
 420 South Orange Avenue, Suite 1200
 Orlando, FL 32801-3336
 407.423.4000

Tampa

Pedro F. Bajo
Irene A. Bassel
 SunTrust Financial Centre
 401 East Jackson Street, Suite 1700
 Tampa, FL 33602-5250
 813.223.7333

Tysons Corner

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J. Michael Littlejohn
Hal J. Perloff
Owen J. Shean
J.R. Steele
Brian P. Waagner
 8100 Boone Boulevard, Suite 700
 Vienna, VA 22182-2683
 703.790.8750

West Palm Beach

Lawrence P. Rochefort
 Esperante Building
 222 Lakeview Avenue, Suite 400
 West Palm Beach, FL 33401-6183
 561.653.5000

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