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Reversal of Fortune: Upstream Contractors' Victory in Summit is Short-lived

by *Timothy Liam Epstein*



On February 26, 2009, a three-judge panel in the Eighth Circuit defeated an Occupational Safety and Health Review Commission ("OSHRC") decision overriding the Secretary of Labor's ("Secretary") multi-employer worksite policy for issuing citations. The reversed decision had potential to significantly reduce general contractors' liability for safety violations on a multi-employer worksite. Instead, the Eighth Circuit returned the Secretary's ability to cite multiple employers for a single violation, leaving many general contractors frustrated that their efforts protesting the unfairness of the multi-employer worksite doctrine have been rendered futile.

Solis v. Summit Contractors, Inc. (formerly *Chao v. Summit Contractors, Inc.*) arose from citations issued to Summit Contractors, Inc. ("Summit") for an alleged scaffolding violation. Summit was the prime contractor hired to build a college dormitory in Arkansas. In June of 2003, an OSHA Compliance and Health Officer ("CSHO") observed and photographed several employees of a subcontractor, All Phase Construction, Inc., working without safety harnesses on scaffolds. Consequently, the CSHO issued Summit a citation for this safety violation as the "controlling employer," consistent with the agency's multi-employer worksite doctrine.^[1] Incidentally, the only Summit employees on the worksite were a job superintendent and three assistant superintendents who served to coordinate vendors, schedule work for the subcontractors, and guarantee that the subcontractors completed their work according to their contracts. The CSHO also issued All Phase a citation as the exposing employer. *Sec'y of Labor v. Summit Contractors*, OSHRC Docket No. 03-1622 (April 27, 2007).

On June 14, 2004, an administrative law judge affirmed the citations, rejecting Summit's argument that the multi-employer worksite doctrine is invalid because Summit lacked sufficient control to prevent the violation over the worksite as a general contractor. The judge reasoned that the multi-employer worksite doctrine must apply in this case because it is based on long-standing precedent followed by the Commission, and many, if not most, circuits accept it. *Sec'y of Labor v. Summit Contractors*, OSHRC Docket No. 03-1622 (June 14, 2004).

Summit's appeal to the Occupational Safety and Health Review Commission ("OSHRC") to review the 2004 decision proved fruitful. The OSHRC vacated Summit's citation in its entirety, holding that the multi-employer worksite doctrine did not apply to Summit because it directly conflicted with another Secretary of

Labor regulation, 29 C.F.R. § 1910.12(a). Summit's main argument in its appeal to the OSHRC was that a general contractor could not be cited as a creating or exposing employer because the multi-employer worksite doctrine is in direct conflict with 29 C.F.R. § 1910.12(a). This regulation states in part that "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..." Summit contended that this sentence limited the Secretary's ability to issue citations, allowing the Secretary to issue citations only to contractors whose own employees were exposed to the hazard. The OSHRC agreed with this argument, holding that the Secretary's reliance on the multi-employer worksite doctrine was inappropriate given the existence of a wholly contrary, prior existing regulation. *Sec'y of Labor v. Summit Contractors*, OSHRC Docket No. 03-1622 (April 27, 2007).

Further, the OSHRC's April 27, 2007 opinion criticized the multi-employer worksite doctrine's precarious past. Thirty-three years ago the Commission held in a footnote as "*dictum*" that a general contractor is "responsible for violations it could reasonably have expected to prevent or abate by reason of its supervisory capacity," reasoning that as a supervisor with great resources, a general contractor is the most capable entity to correct safety hazards. However, the Secretary, not the Commission, has the right to establish policy enforceable in court. The OSHRC also criticized the Secretary's erratic application of this policy evidenced by its numerous and frequent revisions of its citation policy in the Field Operations Manual. The OSHRC concluded that the multi-employer worksite doctrine's inconsistency with §1910.12(a), coupled with the Secretary's irregular interpretation of the policy, precluded reliance upon it in citing *Summit*. A concurrence and a dissent accompanied the OSHRC opinion. *Sec'y of Labor v. Summit Contractors*, OSHRC Docket No. 03-1622 (April 27, 2007).

Summit is not the first time a general contractor, or even Summit in particular, protested the multi-employer worksite doctrine. Summit objected to citations issued by the Virginia Occupational and Safety Health Program ("VOSH") under Virginia's multi-employer worksite statute (resembling the Secretary's own doctrine) in *Davenport v. Summit Contractors, Inc.*, 45 Va.App. 526 (2005). Additionally, in such administrative adjudications as *Access Equipment Services, Inc.*, 18 OSHC (BNA) 1718 (1999), the OSHRC criticized the lack of guidance regarding this doctrine afforded by Congress in the Occupational Safety and Health Act of 1970 ("OSHA") ("Lacking specific guidance, the courts and the Commission have tried to resolve this issue in a manner which best fulfills the 'stated congressional purpose in an equitable manner.'").

This opinion posed as a victory, albeit short-lived, for general contractors, eliminating some of their broad responsibilities to the employees of subcontractors. General contractors attempting to avoid liability in construction negligence cases quickly saw this as an opportunity of which they needed to take advantage, particularly regarding issues of controlling employers. In *Aguirre v. Turner Construction Co.*, 2008 U.S. Dist. LEXIS 87143 (N.D.Ill., Oct. 27, 2008), the Northern District of Illinois granted the general contractor's request to cross-examine an expert witness using the *Summit* decision's definition of a controlling employer. Although the Court recognized that *Summit* was still under review in the Eighth Circuit, the Northern District permitted the use of the opinion, stipulating that the plaintiffs could tender the decision's uncertain future to the jury. *Aguirre v. Turner Construction Co.*, 2008 U.S. Dist. LEXIS 87143 (N.D.Ill., Oct. 27, 2008). Additionally, the April 2007 decision caused the Secretary to alter its multi-employer approach to issuing citations. For instance, the Secretary withdrew eight of eleven violations it previously issued to Standard Building Company as a direct result of the new precedent, stating that the Secretary could no longer cite a controlling employer where the employer did not create or expose its own employees to the condition. *Standard Bldg. Co., Inc., and Standard Sys., Inc.*, 22 OSHC (BNA) 1187 (2007).

This departure from past precedent was controversial and brief, as soon thereafter the Secretary exercised its right to appeal final decisions of the OSHRC to the United States Court of Appeals. On February 26, 2009, the Eight Circuit reversed and remanded the OSHRC's ruling, holding that the

Secretary is permitted to rely on the multi-employer worksite doctrine when citing multiple contractors for a single violation. The Court stated that the language of §1910.12(a), applying grammatical construction rules, should be read "(1) that an employer shall protect the employment of each of his employees... (2) and that an employer shall protect the places of employment of each of his employees." Based on this interpretation, the Eighth Circuit determined that part (2) would be redundant of part (1) if it only required the employer to protect its own employees. Thus, §1910.12(a) does not conflict with the multi-employer worksite doctrine, allowing the Secretary to issue citations to contractors even when their own employees are exposed to the hazard. *Solis v. Summit Contractors, Inc.*, Docket No. 07-2191 (Feb. 26, 2009).

Additionally, the Eighth Circuit determined that even if §1910.12(a) was ambiguous and conflicted with the multi-employer worksite doctrine; the Court should afford deference to the Secretary's interpretation of the statutory language. The Eighth Circuit rejected Summit's contention that the Secretary's original interpretation of §1910.12(a) restricted the employer's responsibility to only his own employees, and disagreed with its argument that the Secretary has erratically interpreted §1910.12(a) since its adoption. *Solis v. Summit Contractors, Inc.*, Docket No. 07-2191 (Feb. 26, 2009).

The Eighth Circuit's discussion of alternative arguments was also unfavorable to Summit. Summit made several arguments with which the Court strongly disagreed: that the definition of "employer" applied by the Secretary is overly broad, that the Secretary lacks legal authority to implement the controlling employer citation policy, that other regulations require an employer to provide a safe worksite only for its own employees, that the multi-employer worksite doctrine would broaden an employer's liability at common law, and that the policy runs counter to the goals of OSHA. In concluding, the Eighth Circuit admitted that the multi-employer worksite doctrine, specifically the controlling employer policy, places a heavy burden on a general contractor to have to oversee all of the employees and facets of a worksite. Accordingly, the Eighth Circuit recommended that addressing this concern is a task more suitable for Congress and the Secretary, and not an issue for the courts to decide.

One dissent accompanied this decision, disagreeing with the majority's finding that §1910.12(a) was ambiguous enough to require the Court to defer to the Secretary's own interpretation of the regulation. In his dissent, Judge Beam argued that if the Court read §1910.12(a) properly, it would find that it unambiguously contradicts the Secretary's multi-employer worksite doctrine. Furthermore, the dissent deemphasized the policy concerns that the majority raised in its conclusion recommending guidance from Congress or the Secretary, instead maintaining that even if §1910.12(a) were ambiguous, the policy concerns themselves should guide the Court in determining that the Secretary's policy unfairly burdens the general contractor. *Solis v. Summit Contractors, Inc.*, Docket No. 07-2191 (Feb. 26, 2009) (2-1 decision) (Beam, C., dissenting). To date, the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all accepted the multi-employer worksite doctrine in some form. *R.P. Carbone Const. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998); *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534 (9th Cir. 1978); *Universal Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999). The Fifth Circuit rejected the multi-employer worksite doctrine, while the D.C. Circuit has neither rejected nor accepted it. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

On April 2, 2009, Summit's attorneys filed a petition requesting the Eighth Circuit to rehear its case *en banc*. In its petition, Summit argued that this case is of substantial importance because it influences the liability of all general contractors and imposes a form of strict liability upon them. Consequently, according to Summit, the petition should have been granted for three reasons. First, Summit contended that the Court failed to address whether the Secretary could legally cite Summit based on a legal duty to ensure a subcontractor's compliance. Second, Summit proposed that this decision conflicts with Supreme Court decisions holding that the OSH Act does not specifically authorize the multi-employer citation policy, re-arguing that the definition of "employee" applied under the doctrine broadens the master-servant definition

provided by the Act. Lastly, Summit argued that although the Eighth Circuit commented on the need for clarification from Congress, it refused to address this as an argument because Summit had not raised that issue in its appellate brief (it was only mentioned in the *amici* brief). Summit asserted that this issue should still be considered as argument and ruled upon by the Eighth Circuit because Summit raised the issue at every other stage of litigation. *Solis v. Summit Contractors Inc.*, 8th Cir., No. 07-2191, *petition for rehearing en banc* (April 2, 2009).

The Court denied Summit's petition for rehearing en banc on May 6, 2009. The Court also denied the petition for rehearing by the panel, although it was noted in the Order that Judge Beam would grant this petition. *Solis v. Summit Contractors, Inc.*, 8th Cir., No. 07-2191, *Order denying petition for rehearing en banc* (May 6, 2009). Summit's deadline to submit a petition for certiorari with the Supreme Court was May 27, 2009.

The latest *Summit* decision proves, at the very least, that until Congress intervenes in the tension-filled debate between general contractors and the Secretary, courts will continually be required to address the multi-employer worksite policy. Strong dissents accompanied both the OSHRC decision and the Eighth Circuit opinion, demonstrating the inability of courts to unanimously agree on an interpretation of §1910.12 (a) in relation to the multi-employer worksite doctrine. Without guidance from Congress on this issue, the relationship between the Secretary and general contractors will remain unstable and tense. Contractors on all levels should be able to reasonably predict their responsibilities on worksites and whether they can be cited for safety hazards. Without a clear directive from Congress, contractors may find it nearly impossible to do so. Additionally, some expect this decision to cause an increase in the number of contested cases to the OSHRC. This increase may cause the OSHRC to be stretched too thin, and it may find itself ill-equipped to handle the fuller dockets. *Rogers Confirmed as OSHRC Chair, Sources Expect Active Commission*, 16 Inside OSHA 11, May 25, 2009.

Ultimately, Congress must recognize that it is nearly impossible and unfair to expect a general contractor to always be responsible for any safety hazard on its worksite, regardless of the employees exposed to the hazard or the contractor creating the hazard. It also must consider the capabilities of enforcement entities such as the OSHRC in upholding this strict standard of liability. Until then, it can be expected that *Summit* will not be the last of its kind in the debate over the multi-employer worksite doctrine.

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[1] The multi-employer worksite doctrine (clarified by the Multi-Employer Citation Policy under OSHA Directive CPL 2-0.124) allows the OSHRC to issue citations to general contractors considered "controlling," "creating," or "exposing" employers. The contractor's subjection to citations exists irrespective of whether it exposed its own employees to the hazard.

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