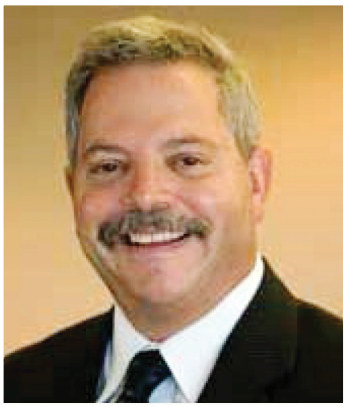

DC Circuit Upholds OSHA Multi-Employer Worksite Doctrine

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On December 14, 2011, the United States Court of Appeals for the District of Columbia rejected another Summit Contractors challenge to the Occupational Safety and Health Administration s (OSHA) Multi-Employer Worksite Citation Policy (the Policy). Summit Contractors, Inc. v. USDOL and OSHA, ___ F3d ___ (D.C. Cir., December 2011). This is at least the second time Summit vigorously challenged OSHA s Policy and lost. In its prior challenge, the Eighth Circuit Court of Appeals rejected Summit s hard and long fought claim finding OSHA's Policy consistent with the statute, applicable standards and the goals of the OSH Act. Secretary of Labor v. Summit Contractors and OSHRC, (8th Cir., 2009). The D.C. Circuit now joins all other Circuit Courts, each of which, have upheld challenges to the Policy. Most concerning about this decision is it undermines a prior D.C. Circuit case which had rejected application of this Policy based upon the facts of that case. In the prior D.C. Circuit decision it implied this Policy may be overly broad. See, Anthony s Crane Rentals, Inc. v. Reich. Also disappointing , is if the Summit D.C. Circuit decision was employer friendly, since any OSHA citation can be appealed to the D.C. Circuit, OSHA would have been hard pressed not to terminate its Policy until it successfully appealed to the Supreme Court.

Presently, there is no Circuit Court decision expressly rejecting OSHA s expansive reading of the law, OSH Act or its standards to issue independent citations to multiple employers for a single hazard pursuant to the Policy.

Under the Policy, OSHA may issue citations to general contractors (as well as the subcontractors) at construction sites who have sufficient control over the site to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of their supervisory authority. A general contractor may also be cited if it created the hazard (creating employer), or if its employees were exposed to the hazard (exposing employer) or if the general contractor is responsible for correcting the hazard (correcting employer) even if its own employees were not exposed to the hazard. The Policy has been a part of OSHA s enforcement scheme since promulgation of its first Field Operations Manual (FOM) in 1971. The Policy has been challenged repeatedly over the years, but the legal theory underpinning the Policy remains unscathed.

By way of background, in Brennan v. OSHRC, (Underhill Construction Corp.), 513 F.2d 1032 (2nd Cir., 1975), the Second Circuit held to sustain a citation under the Policy OSHA need only prove: (1) employer control and (2) employee access to a hazard not actual exposure. It is irrelevant whether the exposed employee was employed by the employer or another contractor. The Policy has been

successfully applied to construction managers, general contractors, subcontractors, lower tier subcontractors, materialmen and suppliers.

As to defenses, in Anning-Johnson Co., 1975-76 OSHRC Decisions CCH page 20690 and Grossman Steel and Aluminum, 1975-76 OSHRC Decisions CCH page 20691, the OSH Review Commission held that a third party employer would not be held liable for violating the OSH Act if it did not, or could not know, with reasonable diligence, of the hazardous condition which violated a standard. This narrow exception ordinarily is utilized by employers who face secondary liability for hazards arising from esoteric standards often times applicable to specialty subcontractors. To establish this limited exception, the Commission balances the exposure hazard, employer knowledge of the hazard, terms of the standard, and protection provided to employees against considerations of safety, efficiency and fairness.

In addition, the Policy can be defeated by fact based defenses, such as proving a lack of control, a lack of realistic alternative, or a lack of knowledge of the alleged hazard.

While an employer may not be able to avoid a citation resulting from a hazard created by another person or non-employee exposure, some contractors have resorted to explicit contract language and indemnifications to shift the responsibility for the penalty. Because the validity of these clauses are contractual and do not directly implicate OSH Act prosecution; the validity of these clauses are not an issue litigated before the OSH Review Commission but could be challenged in civil litigated between contractors.

In sum, general contractors who control a site can be held responsible for OSHA violations whether or not they create the hazard or whether or not their own employees are exposed. Likewise, subcontractors will be responsible for protecting their employees and the employees of others from hazards created by their own actions or hazards created by third parties.