



OSHA Loses Key Multi-Employer Case

By Anthony “Tony” Stergio, Shareholder, Andrews Myers

OSHA recently lost a bid to enforce citations for substantial violations against a general contractor. The citations at issue related to the exposure of a subcontractor’s employees to excavation hazards. An OSHA Review Commission Administrative Law Judge handed down the decision voiding the citations. This case is especially significant in terms of OSHA’s multi-employer liability theory, given that the facts of OSHA’s case were particularly strong. The general contractor’s Area Superintendent and Project Superintendent were actually present when the subcontractor’s employees were performing work in the unprotected excavation area.

Further, it was undisputed that:

- The general contractor knew that the work area was not properly protected from cave-ins;
- Despite the general contractor’s knowledge, it failed to adequately enforce the subcontractor’s compliance with safety and health requirements;
- The general contractor had sufficient control and authority over the jobsite, including the subcontractor and its employees, to reasonably be expected to prevent and/or correct the violations; and
- The general contractor’s management employees could have easily prevented the subcontractor’s employees from working in the unprotected excavation area and/or ordered them to come out of the unprotected area.

This is a big deal. If OSHA cannot prevail against a general contractor under these facts, it will be hard-pressed to do so in any case to follow.

The judge voided the citations to the general contractor based upon the fact that the violations occurred at a jobsite in Austin, Texas, which is in the geographical jurisdiction of the U.S. Court of Appeals for the Fifth Circuit. In 1981, the Fifth Circuit ruled that the Occupational Safety and Health Act only served to protect an employer's OWN employees from workplace hazards. On that basis, the Fifth Circuit concluded that OSHA regulations did not create any duty on behalf of a higher level contractor to the employees of a subcontractor. The Fifth Circuit expressly adopted the rationale of a former OSHA Commission Chairman who wrote that an employer cannot be held in violation of the Act if its employees are not affected by noncompliance with a standard.

In this case, the general contractor did employ the workers exposed to the hazardous condition. In addition, there was no evidence in the record that any of general contractor’s own employees were exposed to the hazardous condition. Accordingly, applying Fifth Circuit law, the judge held that the general contractor could not be liable for a violation of the Act based solely upon a subcontractor's employees' exposure to hazardous conditions.

At this point, OSHA could appeal the ruling to a panel of Occupational Health and Safety Review Commissioners, and thereafter to the Fifth Circuit, in an attempt to clarify, narrow, or reverse the Fifth Circuit view on multi-employer worksite rules. It should be noted, however, that the Department of Labor under the Trump Administration recently indicated that it is backing away from the strict enforcement of the analogous joint employer standard. Thus, the Trump DOL may not be inclined to challenge the strict Fifth Circuit standard.

At some point in the future, however, the difference in the Fifth Circuit’s take on the multi-employer standard from that of the other circuits (which generally accept OSHA’s multi-employer liability interpretation) will likely be resolved by the Supreme Court. Until then, this implementation of the Fifth Circuit standard is good news for general contractors and subcontractors with downstream subcontractors, at least within the jurisdiction of the Fifth Circuit: Texas, Louisiana, and Mississippi.

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