

Federal Court of Appeals Breathes New Life Into OSHA's Multi-Employer Citation Policy

BY KEN BULLOCK

In late 2018, the federal court of appeals covering Texas, Louisiana and Mississippi overturned thirty seven years' of precedent in deciding that the Occupational Safety & Health Administration (OSHA) can issue citations for a workplace hazard to entities other than the actual employer of the worker exposed to the hazard.

THE CASE:

The facts of the particular case are useful in understanding the implications of the court's decision. The case at issue involved construction of a public library in Texas. The city, acting as the owner, entered into a contract with a general contractor (GC). The GC maintained control over the work-site through on-site management personnel. As would be expected, the GC contracted with a subcontractor (Sub1) to perform a certain part of the work, and Sub1 also contracted with another subcontractor (Sub2) to perform certain work. During construction, Sub2's employees were working at the base of an unsupported dirt wall. OSHA received an anonymous complaint concerning the hazardous condition and conducted an inspection of the work-site. Following the inspection, OSHA issued citations to both Sub2 (employer) and to GC (non-employer) for the lack of proper support protecting workers in an excavation.

OSHA'S MULTI-EMPLOYER CITATION POLICY:

In issuing citations to both the GC and Sub2, OSHA relied upon what it refers to as its "Multi-Employer Citation Policy." Under this policy, OSHA takes the position it can issue citations to a number of different entities at a particular workplace for the same workplace hazard – regardless of whether the cited entities actually employed a worker exposed to the hazard. Instead, at a workplace where several different entities are working alongside each other, OSHA classifies those entities in one (or more) of the following categories:

- **"Creating"** – an entity that creates or causes a hazardous condition at the workplace.
- **"Exposing"** – an entity that exposes its employees to a hazardous condition.
- **"Correcting"** – an entity that is responsible for correcting a hazardous condition.
- **"Controlling"** – an entity that has supervisory authority or control over the workplace.

WHAT DOES IT MEAN FOR THE CONSTRUCTION INDUSTRY?

Although the federal appellate court limited its decision to upholding OSHA's citation to a non-employer under the "controlling" category of the Multi-Employer Citation Policy, the decision will likely have a broader impact potentially allowing OSHA to issue a citation under the other categories of the Multi-Employer Citation Policy as well. As a result, general contractors and subcontractors may now be subject to OSHA citations for creating a workplace hazard or failing to correct a workplace hazard even though none of their own employees are exposed to the hazard.

Compliance with OSHA's Multi-Employer Citation Policy will likely place different responsibilities on all entities at the work-site. For general contractors, compliance may involve an emphasis on monitoring and supervising safety across the entire work-site, including work performed by subcontractors. For subcontractors, compliance may call for emphasis on ensuring potentially hazardous conditions created by the work (e.g., an open trench) are monitored and reported to the "controlling" entity and, where possible under the subcontractor's scope of work, any hazardous conditions are appropriately corrected.

Finally, it should be noted that compliance with OSHA's Multi-Employer Citation Policy could lead to other consequences under state law, such as potentially increased exposure to lawsuits involving worker injuries as a result of exercising control over safety on the work-site. As a result, project-specific Owner Controlled Insurance Programs (OCIP) or Contractor Controlled Insurance Programs (CCIP) may well become increasingly important aspects of the overall construction risk management plan. ♦



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