Eighth Circuit Overrules Review Commission in OSHA/Summit Multi-Employer Case

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The U.S. Court of Appeals for the Eighth Circuit, in a 2-1 decision, ruled that in the case of Elaine Chao v. Summit Contractors, OSHA regulation 29 C.F.R. Sec. 1910.12(a) "is unambiguous in that it does not preclude OSHA from issuing citations to employers for violations when their own employees are not exposed to any hazards related to the violations." Therefore, according to the ruling, the Occupational Safety and Health Review Commission (OSHRC) "abused its discretion in determining that the controlling employer citation policy conflicted with the regulation."

The Court of Appeals for the Eighth Circuit did suggest,, that OSHA's overall multi-employer policy may need to go through rulemaking.

Summit Contractors Inc. was the general contractor for the construction of a college dormitory in Little Rock, Ark. Summit subcontracted the exterior brick masonry work to All Phase Construction Inc. In June 2003, an OSHA compliance officer observed All Phase employees working on scaffolds over 10 feet above the ground without fall protection or guardrails in violation of 29 C.F.R. § 1926.451(g)(1)(vii).

None of Summit's employees were exposed to any hazard created by the scaffold violation, but OSHA nonetheless cited Summit for this violation based on the "controlling employer" aspect of OSHA'S so-called multi-employer citation policy.

Summit contested the citation, arguing that OSHA's regulation, 29 C.F.R. § 1910.12(a), requires an employer engaged in "construction work" to protect only its own employees, not those of any subcontractor. That regulation applies only to "construction work," not "general industry" (operations and maintenance). Therefore, according to Summit, § 1910.12(a) precluded citations to a controlling employer whose own employees were not exposed to a hazardous condition created by another contractor on the jobsite.

The administrative law judge upheld the citation, but in a 2-1 decision, the OSHRC and held that § 1910.12(a) requires each employer to protect only its own employees.

On Feb. 26, in a 2-1 decision, a three-judge panel of the United States Court offer the Eighth Circuit in St. Louis reversed OSHRC and held that §1910.12(a) does not preclude the citation to Summit, even though the general had no employees exposed to the unguarded scaffold. Essentially, the court deferred to OSHA on the ground that the citation reflected one of several reasonable interpretations of the ambiguously worded regulation (*Solis v. Summit Contractors.,* 2009 U.S. App. LEXIS 3755 (8th Cir. 2009)).

The vigorous dissenting opinion adopted the view that the regulation is clear, and that is does not allow citations to employers whose employees are not exposed to the cited condition.

The decision, while important for construction work, **does not resolve the long-standing debate over OSHA's multi-employer citation policy**. The decision is narrow, it is not unanimous, and it only addressed the meaning of 29 C.F.R. § 1910.12(a). The court expressly did not evaluate the overall policy, and even suggested that OSHA might need to conduct rulemaking on the policy as a predicate to its continued use in enforcement.

There also is a hint that the basic question whether Section 5(a)(2) of the act permits multi-employer citations for violations of standards could be open for further litigation. The court also stated that to be subject to a multi-employer citation, an employer must have employees at the cited worksite, a point that could become significant in the current rulemaking on the proposed cranes and derricks standard for construction. Given all this, it is fair to expect that challenges to the multi-employer policy will continue to be raised.

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