

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

HENSEL PHELPS CONSTRUCTION CO.,

Respondent.

DOCKET NO. 15-1638

Appearances:

Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Michael V. Abcarian, Fisher & Phillips, LLC, Dallas, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

This case was remanded by the Commission and the United States Court of Appeals for the 5th Circuit. *Acosta v. Hensel Phelps Construction Co.*, 909 F.3d 723 (5th Cir. 2018). In that decision, the 5th Circuit reversed its historical position on multi-employer liability under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, established thirty-seven years earlier in *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981). The 5th Circuit has now unequivocally held that “the Secretary of Labor has the authority under section 5(a)(2) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(2), to issue citations to controlling employers at multi-employer worksites for violations of the Act’s standards.”

Accordingly, for the reasons stated in my April 28, 2017 *Decision and Order*, Citation 1, Item 1 is AFFIRMED as an other-than-serious violation of the Act, and a penalty of \$12,471 is ASSESSED.¹

SO ORDERED.

/s/ Brian A. Duncan

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: February 20, 2019
Denver, Colorado

¹ The parties agreed, that should Citation 1, Item 1 be affirmed in this case, it should be reclassified to an other-than-serious violation with a revised penalty amount of \$12,471.00. (Stip. 127).