UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR

Complainant,	§	
	§	OSHRC DOCKET
v.	§	No. 03-1622
SUMMIT CONTRACTORS, INC.	§	
	§	REGION VI
Respondent.	§	

SUMMIT'S OPENING BRIEF ON REVIEW

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STATEMENT OF THE CASE

A. Factual Background — Summit's Method of Doing Business

Summit Contractors, Inc. is a general contractor. Summit's method of doing business is to subcontract all the actual construction work out to independent subcontractors, and to maintain only a limited presence at the job site.[1] In this case, Summit was the general contractor for the construction of a student dormitory at Philander Smith College in Little Rock, Arkansas. (Tr. 32-33, 36 76, 103).[2] All the work was subcontracted out to subcontractors and there were only four Summit employees on the job, a superintendent and three assistant superintendents. (Tr. 104, 109, 102-103, 184-185; JL. 8). The superintendents' job was to schedule the numerous subcontractors as it came time to perform their respective parts of the job so the work could be completed in an orderly way and the dormitory could be completed by the beginning of the fall semester. (Tr. 104, 108, 109-110, 127-128, 195-196; JL. 19). Scheduling is, in and of itself, a very time consuming job because of the constant "juggling" of the various subcontractors. (Tr. 186). Summit's superintendents were also responsible for checking the subcontractors' work to make sure it complied with the plans and specifications before authorizing progress payments and scheduling the next subcontractor. (Tr. 110-111, 115, 127). However, apart from making sure that the finished product complied with the plans and specifications, Summit's superintendents did not tell the subcontractors the details of how to do their work — that was up to the subcontractors. (Tr. 188-189). The subcontractors likewise hired,

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[1]Summit's method of doing business, and policy and practice regarding responsibility for subcontractors' compliance with OSHA, is a matter of record. *See e.g. Secretary v. Summit Contractors, Inc.*, 19 BNA OSHC 2089, 2091 (Schoenfeld, J. 2002).

[2]Annotations to the January 27, 2004, hearing transcript will be designated "Tr." Annotations to the trial depositions of Stephen Gammon and Jon Lee will be designated "SG" and "JL."

fired, paid and directed their own employees and provided their own tools and equipment. (Tr. 185-186, 202-203).

Summit always enters into written Subcontract Agreements with each subcontractor. The Subcontract Agreement specifically provides that the "Subcontractor has the sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act." (C-8, Attachment A ¶ 4; JL. 10).

Summit does not assume responsibility, either contractually or in actual practice, for ensuring that subcontractors comply with OSHA. (Tr. 66, 69-72, 132, 135-136, 167, 186, 190, 198, 201, 225, 244-245, 247-248; JL. 8, 10; SG. 4). It is infeasible for Summit to attempt to ensure subcontractor compliance with OSHA for at least three reasons. First, because Summit does not have the manpower or expertise to police the subcontractors and ensure they are in compliance with OSHA. Summit would necessarily have to change its method of doing business and hire and train a number of additional people to do nothing but police the subcontractors. (Tr. 246-248). Second, if Summit were to assume responsibility for subcontractor compliance with OSHA, Summit would become liable at common law for injuries to subcontractor employees — a liability that Summit does not otherwise have. (Tr. 244-248). Third, in the final analysis, the only way Summit can really *compel* a subcontractor to comply with OSHA is by terminating the subcontractor, which could bring the entire construction project to a halt. (Tr. 248-252; JL. 17-21, 40-42, 44, 52-55).

Although Summit does not assume responsibility for subcontractors' compliance with OSHA, Summit does not ignore safety violations that it becomes aware of. If a Summit superintendent observes a safety violation during the course of his normal duties he will bring that to the attention of the guilty subcontractor and request that the subcontractor correct it. (Tr. 130-131,

135-136, 187-188, 222, 244-245; JL. 11, 17). Likewise, if one subcontractor complains of safety violations created by another subcontractor, Summit will request that the offending subcontractor correct the hazards. (Tr. 228-229; JL. 38-39). But Summit does not have the authority to discipline subcontractor employees or otherwise compel them to comply with OSHA standards. (Tr. 131-132, 188-189, 229; JL. 11-12, 17).

B. OSHA's Asserted Basis For The Citation To Summit

The citation in the present case is based on scaffold violations by the masonry subcontractor, All Phase Construction, Inc. (Tr. 44-47, 79, 139, 190-191). Summit employees did not erect or work on or near the scaffold. (Tr. 76, 78-79, 124). The CSHO acknowledged that Summit had not created the violation and that no Summit employees were exposed to the violation. (Tr. 83, 89).

The CSHO cited All Phase Construction for a violation of 1926.451(g)(i)(vii) as the "creating" and "exposing" employer, and proposed a penalty of $2,500. All Phase settled the case and paid a penalty. The CSHO cited Summit for the same violation and proposed a penalty of $4,000. (Tr. 79-85). He cited Summit on the theory that Summit was the "controlling" employer. (Tr. 84-85). The CSHO acknowledged that the cited standard, 1926.451(g)(i)(vii), does not use the term "controlling employer" and does not impose a duty on a general contractor to ensure that a subcontractor complies with the provisions of that standard. (Tr. 82, 86, 98). He testified that Summit is considered to be the controlling employer, and thus responsible for ensuring subcontractor compliance, under OSHA's multi-employer citation policy at CPL 2-0.124, incorporated into the Field Inspection Reference Manual. (Tr. 85-86, 89-90, 94).

C. Summit's Contentions

Neither the OSH Act nor any validly promulgated regulation imposes a duty on one employer to ensure that some other, separate employer complies with OSHA. Thus, there is no statutory or regulatory authority for OSHA to issue citations and levy fines against one employer for violations committed by another employer. This means OSHA has no legal authority to cite Summit on the theory that Summit should have ensured that All Phase Construction complied with 1926.451(g)(i)(vii). Summit therefore contends that the citation in this case should have been dismissed for the following reasons:

1. The cited standard, 29 C.F.R. 1926.451(g)(i)(vii), does not impose a duty on Summit to ensure that All Phase Construction complies with that standard. Thus, the cited standard does not itself confer authority for citing Summit here.

2. There is no regulatory authority for citing Summit for the subcontractor's violation. To the contrary, OSHA's own regulations, including, specifically, 29 C.F.R. 1910.12(a), preclude multi-employer liability.

3. The CSHO asserted that Summit was cited as the "controlling" employer under OSHA's multi-employer citation policy in CPL 2-0.124. However, that policy, which is incorporated into OSHA's Field Inspection Reference Manual, has no legal force and cannot confer authority, in and of itself, to cite one employer for a violation committed by another employer.

4. The OSH Act does not confer authority on OSHA to cite one employer for violations committed by another employer.

5. Interpretation of the OSH Act to create multi-employer liability contravenes the intent of Congress, as reflected in the legislative history of the Act, and violates established principles of statutory construction.

6. The "remedial purpose" of the Act does not legally justify imposition of a duty on Summit to ensure compliance by employers.

7. The principle of multi-employer liability violates section 4(b)(4) of the Act, 29 U.S.C. 653 (b)(4), because it operates to increase an employer's liability

at common law.

8. Even if the principle of multi-employer liability did not contravene the language of the Act, the intent of Congress, and existing regulations, OSHA's multi-employer citation policy must still be promulgated as a rule under the APA because the current policy is different than OSHA's previous multi-employer policy, and the change has a significant impact.

9. It is infeasible for Summit to ensure that subcontractors comply with OSHA because Summit does not have the manpower or the expertise to police the subcontractors and know whether they are in compliance, because undertaking such responsibility would increase Summit's liability at common law, and because ensuring compliance by terminating offending subcontractors would disrupt and possibly halt a construction project and subject Summit to liquidated damages.

These specific issues have not been squarely ruled on by the Commission. To the extent that the Commission has previously upheld multi-employer liability on other grounds, Summit requests that the Commission reconsider those holdings in light of the legal principles raised here.

D. Judge Welsch's Decision

Judge Welsch agreed that the violation of § 1926.451.(g)(1)(vii) was committed by All Phase Construction and that only All Phase's employees were exposed to the violation. He held "It is undisputed that Summit did not create nor was (sic) its employees exposed to the lack of fall protection on the scaffold." Decision at 4. He also acknowledged that it was Summit's policy not to assume responsibility for subcontractors' compliance with OSHA. *Id* at 8-9. Nonetheless, he reasoned that, under Review Commission precedent, Summit was responsible for the subcontractor's violation because Summit had sufficient "control" of the job site to compel All Phase to comply with OSHA. *Id* at 9-15. Judge Welsch summarily rejected Summit's contention that 29 C.F.R. 1910.12(a) limits an employer's responsibility to his own employees by stating, without any supporting authority, that "Summit's reading of § 1910.12 is too narrow." *Id* at 8. In finding that Summit had

sufficient control to compel compliance by All Phase Construction, Judge Welsch relied on various provisions in the contract agreements that are typical and necessary in the construction business to comply with financing requirements, liability insurance requirements and mechanics lien laws and have nothing to do with oversight of subcontractors' safety policies or compliance with OSHA. Judge Welsch also closely tracked the Commission's reasoning in *Secretary v. IBP, Inc.* 17 BNA OSHC 2073 (Rev. Comm. 1997),which was subsequently reversed in *IBP, Inc. v. Herman*, 144 F.3d 861, 18 BNA OSHC 1353 (D.C. Cir. 1998). Judge Welsch recognized that OSHA's CPL 2-0.124 cannot confer authority in and of itself to cite one employer for violations committed by a different employer. Nevertheless, he applied the criteria in the CPL to find Summit guilty. Decision at 15. Even though the violation was admittedly *committed* by All Phase Construction, Judge Welsch held that Summit had violated § 1926.451(g)(1)(vii) by proxy. *Ibid.* Finally, Judge Welsch rejected Summit's infeasibility defense on the principal ground that fall protection on the scaffold was technically and economically feasible. He did not address Summit's uncontradicted evidence that it was infeasible to assume responsibility for subcontractor compliance with OSHA because Summit has neither the manpower nor the expertise to do so, that by assuming such responsibility Summit would increase its liability at common law, and that terminating subcontractors for safety violations would disrupt and probably halt the construction project and subject Summit to liquidated delay damages. Decision at 5 n.3.

STATEMENT OF THE ISSUES

1. Does OSHA have the legal authority to require a general contractor to ensure that an independent subcontractor complies with the OSHA standards as to the subcontractor's own employees?

2. Does OSHA have the legal authority to cite and levy fines against Summit for a violation committed by All Phase Construction, Inc., an independent subcontractor?

ARGUMENT AND AUTHORITIES

A. There Is No Legal Authority For Citing Summit For The Violation Committed By All Phase Construction

The fundamental question here is whether OSHA (or the Commission) has the legal authority to make one employer responsible for OSHA compliance by another employer, and to issue citations and levy fines against one employer for violations committed by another employer. What is the source of such claimed authority?

1. The cited standard does not confer authority

Nothing in the cited standard, 1926.451(g)(i)(vii), imposes a duty on Summit here. The standard requires that "Each employee on a scaffold" be protected from falling. The language throughout 1926.451 makes it clear that the standard only imposes a duty on the employer of the employees working on the scaffold.[3] Nothing in the standard states or implies that Summit had a

[3] *See e.g.* 1926.451 § (a)(6) (Appendix contains examples to enable *employer* to comply); § (b)(1)(ii) (*employer* must demonstrate full planking not required); § (b)(2)(ii) (*employer* must demonstrate exception for 18 inch wide walkways); § (d)(3)(viii) (*employer* must make demonstration regarding outrigger); § (e)(9)(i) (*employer* shall provide safe access for employees erecting scaffold); § (f)(15) (*employers* must satisfy criteria regarding use of ladders); § (g)(2) (*employer* shall have a competent person determine feasibility of fall protection).

duty to ensure that All Phase complied with the standard. Even CSHO Watson admitted this is true. (Tr. 83-86).

2. OSHA's multi-employer citation policy does not confer authority

OSHA's current multi-employer citation policy was promulgated in 1999 as OSHA INSTRUCTION CPL 2-0.124 to replace the previous policy in Chapter III of OSHA's Field Inspection Reference Manual (FIRM). *See* BNA Occupational Safety and Health Reporter, Vol. I, p.21:9791. It is well settled, however, that the FIRM does not have the force or effect of law. *See e.g. Secretary v. D.M. Sabia Co.*, 17 BNA OSHC 1413, 1415 n.6 (Rev. Comm. 1995). Therefore, CPL 2-0.124 cannot independently confer authority to cite Summit.

3. The OSH Act does not confer authority

The duties of employers are set forth at 29 USC 654(a). That section provides

> (a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this Act.

The language of subsection 654(a)(1) expressly limits the duty of an employer to provide a safe work place to "his" employees and OSHA acknowledges that there is no multi-employer liability under that section. However, since subsection 654(a)(2) does not expressly limit the duty of an employer to comply with safety and health standards to "his" employees, OSHA "interprets" that subsection to impose two duties on a general contractor. The first duty is to comply with OSHA

standards himself so that he does not create a hazard to his employees or employees of other contractors on the job. The second duty is *to ensure that all other employers on the same job site comply with OSHA standards*. This supposed second duty is at issue here.

Such interpretation is contrary to the overall language of the Act and to the intent of Congress. The most recent case on point is *IBP, Inc. v Herman*, 144 F.3d. 861 (D.C. Cir. 1998). In *IBP, Inc.* the court observed that OSHA's interpretation is inconsistent with the language of the Act as a whole. The court pointed out that, "the Act defines the term 'occupational safety and health standard' as one 'reasonably necessary or appropriate to provide safe or healthful *employment* and places of *employment.*'" Section 652(5) of the Act "defines 'employer' as 'a person engaged in a business affecting commerce *who has employees.*'" *Id.* at 865. (emphasis in original). Section 652(6) defines "employee" as "an employee of an employer who is employed in a business of *his* employer which affects commerce." (Emphasis added). Putting these definitions together, the court observed that the Act defines an "employer" in reference to "his" employees, not those of another entity. The court therefore concluded that this plain language of the statute limits liability to the employment relationship and undermines any interpretation imposing multi-employer liability. *Id.* *See also Melerine v. Avondale Shipyards, Inc.*, 659 F.2d. 706, 710-712, nn.12, 17 (5th Cir. 1981).

There is language throughout the Act to the same effect. Sections 655(d) and 655(b)(6)(A), which respectively permit an employer to obtain permanent and temporary variances from standards, require the employer to show that he will provide safe workplaces "to *his* employees" or "safeguard *his* employees." (emphasis added). That only an employer whose own employees are exposed can obtain a variance indicates that only such an employer would need a variance. *Avondale Shipyards, Inc.*, 659 F.2d at 712. Similarly, section 655(b)(4) requires that the delay in a standard's effective

date be long enough to permit employers to familiarize themselves "and *their* employees" with the new standard. Likewise, section 657(e) requires OSHA to afford a right to accompany the inspector to representatives of the employer and "*his* employees." (emphasis added).

In short, the plain language of the OSH Act establishes that an employer is only responsible for his own compliance and his own employees. There is nothing in the Act itself that even hints that one employer has the duty to ensure compliance by some other employer.

4. Interpretation of the Act to create multi-employer liability contravenes the intent of Congress and violates established principles of statutory construction

(a) Congress' intent is reflected in the legislative history of the Act

The legislative history of the Act clearly states that Congress intended to make employers responsible only for "the health and safety of *their* employees." Senate Report No. 91-1282, p.9, October 5, 1970; House Report No. 91-1291, p. 21, July 9, 1970 *reprinted in* Senate Subcommittee on Labor, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong., 1st Sess. (Comm. Print 1971) ("Leg. Hist"). *Accord: Avondale Shipyards, Inc.*, 659 F.2d. at 711 and n.17. Thus, as quoted above, section 654(a)(1) of the Act imposes a general duty on each employer to furnish a safe workplace to "each of *his* employees." (emphasis added). The employer's duty to comply with specific standards under section 654(a)(2) is likewise limited to his own employees. When the Senate committee drafted section 654(b), which imposes a duty on employees to comply with safety and health standards, the committee cautioned that this did not diminish "the employer's responsibility to assure compliance [with those specific standards] *by his own* employees." Senate Report No. 91-1282 at pp. 10-11. (emphasis added).

When the two clauses of section 654(a) are read together there is no doubt that Congress intended to confine liability to the employment relationship. This intent is confirmed by comparison of the OSH Act with the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.*, another workplace safety act drafted by the same congressional committees. The Coal Mine Health and Safety Act does not impose liability on employers but, rather, on mine "operators," *i.e.* those who "own" or "operate" a mine. *See e.g.*, 30 U.S.C. §§ 802(d) & 814(a) (1976). In other words, Congress understood the distinction between one who operates or controls a workplace and one who is an employer, and intended that liability under the OSH Act be based on the employment relationship, not on who operates or controls the work site.

Congress could have defined employee differently. For instance, in the National Labor Relations Act, 29 U.S.C. § 152(3), Congress declared that "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer" unless specifically stated otherwise. But Congress chose to define employee under the OSH Act as an employee of "*his*" employer. Thus, in marked distinction to both the National Labor Relations Act and the Coal Mine Safety and Health Act, Congress specified that duties under the OSH Act only run from an employer to his own employees.

Indeed, the OSH Act's co-drafter, Representative Steiger, described his bill, which was passed by the House, as assuring effectiveness and equity to employees "and to those by whom they are employed." Leg. Hist. at 1060. *See also* Senate Report at 8, Leg. Hist. at 148 ("his employees"); Senate Report at 10, Leg. Hist. at 150 ("affected employees . . . their employers"), Senate Report at 11, Leg. Hist. at 151 ("employees . . . their own places of employment"); House Report No. 1291 at 19, Leg. Hist. at 831, 849. There is absolutely nothing in the Act or legislative history to support

OSHA's interpretation.[4]

(b) Congress' intent is further reflected in OSHA's initial interpretation and enforcement policy

It is important to understand that the "interpretation" of the Act that OSHA advances here, and the multi-employer citation policy that is the basis for the citation to Summit, are different than they used to be. When the Act was first passed, OSHA *acknowledged* that the Act does not make a general contractor responsible for compliance by all the subcontractors on the job. When OSHA promulgated its very first Compliance Operations Manual setting forth instructions to its compliance officers for issuing citations on multi-employer work sites, OSHA specified that citations should be issued only to the employer who *creates* a hazard or whose employees are *exposed* to a hazard. Compliance Operations Manual, Ch. X. E. (1972 ed.). These instructions were carried forward in subsequent revisions of the Manual.[5]

Thus, OSHA's initial interpretation of the Act and OSHA's initial multi-employer citation policy are an admission that the Act itself does not impose the duty on a general contractor to ensure subcontractor compliance with OSHA. The Act has not changed. There is therefore no basis for OSHA's present "interpretation" and multi-employer citation policy. Rather, OSHA's present interpretation and policy clearly conflict with the Act and implementing regulations. *Cf IBP, Inc. v*

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[4]The Commission has acknowledged there is nothing in the legislative history "explicitly authorizing" multi-employer liability. *Secretary of Labor v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1724 (Rev. Comm. 1999). The Commission has nonetheless approved multi-employer liability on the ground that nothing in the legislative history precludes it. As seen from the above discussion, however, the legislative history shows pretty clearly that Congress did not intend to make one employer liable for compliance by another employer.

[5] Referenced versions of OSHA's Manual are reproduced in the appendix. Since these are public documents the Commission may take judicial notice of them.

Herman, 144 F.3d. at 865 (remarking on the "tension" between OSHA's current policy and the Act and regulations).

(c) Congress' intent is also reflected in subsequent attempts to amend the Act

In 1993, Senators Kennedy and Metzenbaum introduced S.B. 575, "Comprehensive Occupational Safety and Health Reform Act," in which they sought to amend the Act to make general contractors responsible for subcontractor violations on a construction site. S.B. 575 was never passed, but it proves Congress' belief that the original Act does not contemplate multi-employer liability. Otherwise, there would be no need for the proposed amendment in S.B. 575. [6]

(d) OSHA's present interpretation contravenes established principles of statutory construction

One axiom of statutory interpretation is that an agency's initial interpretation, adopted contemporaneously with the passage of the statute and followed by the agency over a long period of time, should be accorded more weight than a more recent interpretation that is completely opposite. *See e.g. Udall v. Tillman*, 380 U.S. 1, 16 (1965), *Power Reactor Development Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961) (contemporaneous construction of the statute "by the men charged with the responsibility of setting its machinery in motion" is entitled to particular respect), *Leary v. United States*, 395 U.S. 6, 25 (1969) ("a longstanding, contemporaneous construction of a statute by the administering agency is entitled to great weight"). "[T]he Supreme Court continues to accord extra deference to longstanding interpretations [citations omitted], just as it has suggested that shifting interpretations are entitled to less . . ." *Butterbaugh v. Department of*

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[6] An excerpt of S.B. 575 containing the pertinent language to make general contractors liable for subcontractor violations is included in the appendix.

Justice, 336 F.3d 1332, 1341(Fed. Cir. 2003).

OSHA's initial interpretation, adopted contemporaneously with the passage of the Act in 1971 and published in its Manual until 1993, was that an employer could only be cited if he created a violation or if his own employees were exposed to a violation. That initial interpretation should be accorded more weight than OSHA's present interpretation and multi-employer citation policy.

5. OSHA's own regulations preclude multi-employer liability

In 1971, when OSHA adopted by reference "established federal standards" governing construction and maritime work originally adopted under other federal statutes, it wrote scope provisions establishing their reach under the OSH Act. These scope provisions provide that "[e]ach employer shall protect the employment and places of employment of each of *his* employees engaged in [construction; ship repair; shipbuilding; shipbreaking; or longshoring] by complying with the appropriate standards ..." 36 Fed. Reg. 10466, 10467-69 (1971). In 29 CFR 1910.12(a) OSHA specifically established the scope of the construction standards at issue in this case, stating that "[e]ach employer shall protect . . . each of *his* employees engaged in construction work . . . by complying with Part 1926 standards. (emphasis added). This language "leav[es] little room" for and is in "marked tension" with extra-employment liability. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306 (D.C. Cir. 1995). At the same time OSHA defined the scope of the standards it was adopting by reference, OSHA also adopted a regulation stating that standards do not protect a "class of persons larger than employees." *See* 29 CFR 1910.5(d). In fact, even in later rulemakings, OSHA has acknowledged that it lacks the authority to impose extra-employment liability. For instance, in 1990, OSHA decided to not extend liability for construction site safety to engineers,

stating that "OSHA observes that the Agency's jurisdiction is based on the employer/employee relationship." 55 Fed. Reg. 42306, 42311-12 (1990).

The intent of 1910.12(a) to limit liability to the employment relationship is emphasized by the distinction between 1910.12(a) and 1926.16. The regulation at 1926.16 applies to government jobs under the Contract Work Hours and Safety Standards Act. On those jobs, OSHA specifically made the general contractor responsible for subcontractor violations. But in 29 CFR 1910.12(a) OSHA stated that the contractor on a non-government job is only responsible for complying with construction standards *as to his own employees*. In 1926.10 OSHA specifically recognized that there is difference between the duties of government contractors and non-government contractors. These regulations make it absolutely clear that a non-government general contractor like Summit may not be cited for violations by an independent subcontractor.[7]

6. The principle of multi-employer liability, as reflected in OSHA'S multi-employer citation policy, violates section 4(b)(4) of the OSH Act because it operates to increase an employer's liability at common law

Section 4(b)(4) of the Act, 29 U.S.C. 653(b)(4), provides that

> Nothing in this Act shall be construed . . . to enlarge . . . or affect in any other manner the common law . . . rights, duties or liabilities of employers and employees . . . with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

The CSHO testified that in order to avoid being cited under OSHA's multi-employer citation

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[7]Summit points out the distinction between the duties of government and non-government contractors because it emphasizes there is no regulation that confers authority to cite Summit for All Phase's violation. Summit does not suggest that OSHA *could* have made general contractors responsible for subcontractor violations on non-government jobs if OSHA had wanted to. The regulations at 29 C.F.R. 1910.12(c) and 29 C.F.R. 1926.10 make it clear that the source of authority for holding a general contractor responsible for subcontractor safety on a government job stems from the Contract Work Hours and Safety Standards Act, not from the OSH Act.

policy, a general contractor must inspect the job site to detect subcontractor safety violations and must compel subcontractors to correct any violations detected, to the point of terminating the subcontractor's contract if necessary. (Tr. 91-97). Judge Welsch's Decision is to the same effect. Decision at 14. But a general contractor who does this, in order to avoid citation by OSHA, enlarges his liability at common law for injuries to subcontractors' employees. Imposition of multi-employer liability also upsets the common law and contractual rights and duties of all the other parties in the construction process.

(a) OSHA's multi-employer citation policy operates to enlarge the general contractor's common law liability

It is well established that a general contractor has no common law duty to oversee the safety of subcontractors' employees. However, if a general contractor assumes responsibility for subcontractors' compliance with OSHA in order to avoid citation under OSHA's multi-employer citation policy, this *creates* a common law duty of care to employees of subcontractors that the general contractor does not otherwise have. Once the general contractor creates this duty of care, employees of the subcontractors are entitled to rely on the general contractor to ensure that their own subcontractor/employer complies with OSHA regulations. Then, if the subcontractor does not comply with OSHA regulations and the subcontractor's employee is injured as a result, the employee can bring a civil tort action against the general contractor for not fulfilling the duty of care that the general contractor created by assuming responsibility for the subcontractor's compliance. *See* RESTATEMENT (Second) OF TORTS Sec. 414-415.

The Secretary normally takes the position that OSHA's multi-employer citation policy does not enlarge a general contractor's liability at common law because, by controlling the scheduling and

quality of subcontractors' work, the general contractor has already retained the requisite control to become liable for injuries to subcontractors' employees. But this is contrary to the common law rule reflected in the RESTATEMENT.[8] To become liable for injuries to a subcontractor's employees the general contractor must do more than simply retain "supervisory authority to direct the sequence of the work or prescribe alterations," *Oxford v. United States*, 779 F. Supp. 1230, 1236 (D. Ariz. 1991). The general contractor does not become liable "by the exercise of merely such superintendence as is necessary to insure that the subcontractor performs his agreement." *O'Keefe v. Sprout-Bauer, Inc.*, 970 F.2d 1244, 1251 (3rd Cir. 1992). The general contractor "cannot be liable so long as the independent contractors are responsible for their own means, methods and techniques in completing the work." *Schreiber v. Idea Engineering & Fabricating*, 117 Fed. Appx. 467, 471 (7th Cir. 2004).

Comment C to Section 414 of the RESTATEMENT OF TORTS addresses this specific point. Comment C states that for the general contractor to create this duty to the subcontractors' employees

> It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to

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[8]For case decisions reiterating the common law rule *see e.g. Davis v. R. Sanders & Associates Custom Builders, Inc. D/B/A Huntington Homes,* 891 S.W.2d 779, 781-782 (Tex. Civ. App. 1995) (rule stated in Texas), *Kaczmarek v. Bethlehem Steel Corporation*, 884 F. Supp. 768, 775, 777 (W.D.N.Y. 1995) (rule stated in New York), *O'Keefe v. Sprout-Bauer, Inc.*, 970 F.2d 1244, 1250-1251 (3rd Cir. 1992) (rule stated in New Jersey), *Crane v. Conoco, Inc.*, 41 F.3d 547, 551 (9th Cir. 1994) (rule stated in Montana), *Ramirez v. Alabama Power Company*, 898 F. Supp. 1537, 1544 (M.D.Ala. 1995) (rule stated in Alabama), *McKee v. Brimmer*, 872 F.Supp. 1536, 1540 (N.D.Miss. 1994) (rule stated in Mississippi), *Johnson v. Tosco Corporation*, 1 Cal Rptr. 2d 747, 755 (Cal. App. 1992) (rule stated in California), *Downs v. A & H Construction, Ltd.*, 481 N.W.2d 520, 524-525 (Sup. Ct. Iowa 1992) (rule stated in Iowa), *Rogers v. West Construction Company,* 623 N.E.2d 799, 800-801 (Ill. App. 1993) (rule stated in Illinois), *Hooper v. Pizzagalli Construction Co.,* 436 S.E.2d 145, 148 (N.C. App. 1993) (rule stated in North Carolina), *Oxford v. United States*, 779 F. Supp. 1230, 1235-1236 (D. Ariz. 1991) (rule stated in Arizona), *Helle v. Mid-State Consultants, Inc.*, 394 F.3d 873 (10th Cir. 2005) (rule stated in Wyoming).

> make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to [general contractors], but it does not mean that the [sub] contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Here, the evidence shows that Summit does not control the operative details of how the subcontractors do their work. Superintendent Jimmy Guevara testified that he does not direct the operative details of how the subcontractors do their work; he does not care how they actually do the work as long as it meets the plans and specifications when completed. (Tr. 188-189). Thus, the degree of supervision that Summit presently exercises does not make Summit liable at common law for injuries to subcontractors' employees. However, if Summit exercised the degree of supervision required by OSHA's multi-employer citation policy, and by Judge Welsch's Decision, Summit would become liable at common law for injuries to subcontractors' employees. OSHA's multi-employer citation policy and Judge Welsch's Decision thus operate to enlarge Summit's liability at common law in violation of section 4(b)(4) of the Act.

(b) OSHA's multi-employer citation policy upsets the common law rights and duties of the other parties in the construction process

The crux of OSHA's policy, and Judge Welsch's Decision, is that a general contractor must *enforce* the subcontractor's compliance with OSHA. CPL 2-0.124 E. 4. c. states that in determining whether to cite the general contractor for a subcontractor's violation, the compliance officer must determine whether the general contractor "Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections." *See also* Decision at 15. The CSHO testified, and Judge Welsch held, that to avoid citation for the

subcontractor's violation the general contractor must take whatever action is necessary to *compel* the subcontractor to correct the violation, even if that means withholding payment or terminating the subcontractor. (Tr. 91-97). *See also* Decision at 14.

The District of Columbia Circuit rejected this position in *IBP v. Herman.* In that case, IBP, the owner, contracted with DCS Sanitation Management, Inc., an independent contractor. It can be fairly stated that IBP's position was analogous to a construction general contractor and DCS was analogous to a subcontractor. There, as here, the "root hazard" was the failure of DCS to make sure its own employees were in compliance. There, as here, IBP pointed out safety violations to DCS when they were observed. The court held that pointing out safety violations was the most IBP "could be expected to do." 144 F.3D at 867, 18 BNA OSHC at 1357. IBP, was not required to terminate DCS in order to avoid citation by OSHA. *Id.*

In so ruling, the court also observed that requiring IBP to cancel its contract with DCS in order to correct the safety violations would potentially bring plant operations to a halt, thus employing "a howitzer to hit a small target." *Id.* The same principle applies here. If Summit terminated a subcontractor, that could bring construction to a halt. The delay from terminating a subcontractor has a domino effect. The down-the-line subcontractors cannot begin their work until the preceding subcontractor is finished. (Tr. 104-105, 249-252, 261-262; JL. 18-21, 40-42, 52-54). These down-the-line subcontractors cannot afford to stand idle during the delay caused by the termination so they will start on other pending jobs. Then, when Summit is ready for them, they are likely to be still tied up on other jobs, which results in still further delay. (Tr. 249-252). The result of all this is that termination of a subcontractor is likely to cause Summit to miss its contractual completion deadline with the owner. This subjects Summit to liability for liquidated delay damages.

(Tr. 248; JL. 19). Even if Summit does not end up paying liquidated damages, the disruption and delay from terminating and replacing a subcontractor and catching back up and rescheduling all the other subcontractors will have a severe financial impact on the project. (Tr. 111, 248-249).

The Secretary's contention that the Act's "remedial purpose" requires the general contractor to compel subcontractor compliance with OSHA, even if it means terminating the subcontractor, would rip apart a whole series of common law and contractual relationships and duties. A general contractor could never project with any certainty what its costs or liabilities might be. The clear import of the decision in *IBP v. Herman* is that a general contractor is not required to incur this kind of liability or loss because a subcontractor will not comply with OSHA standards.

7. The Secretary's "remedial purpose" argument is contrary to law

The Secretary's "remedial purpose" argument also flies in the face of the Supreme Court's decision in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992). In that case, the Fourth Circuit approved an expanded definition of "employee" under ERISA because it found the common-law definition inconsistent with the congressional statement of purpose in the Act. The Supreme Court reversed, holding that Congress is presumed to use "employee" in the common-law master-servant sense unless the statute defines the term otherwise. *Id.* At 322-25. The Supreme Court acknowledged that it had previously approved expansive interpretations of statutes where that furthered the stated congressional purpose, but stated that it was "abandoning" the policy of interpreting a statute "in light of the mischief to be corrected and the end to be attained." *Id.* The ruling in *Darden* applies here. Since the OSHA Act does not define employee as anything more than the common-law master-servant relationship, the Act may not be interpreted to make the general contractor responsible for ensuring that *other* employers on the job site protect *their own* employees

on the theory that would advance the purpose of the Act.[9]

8. Even if the principle of multi-employer liability did not contravene the language of the Act, the intent of Congress and existing regulations, OSHA's multi -employer citation policy must still be promulgated as a rule under the APA in order to confer legal authority to cite one employer for violations committed by another employer

As discussed above, the theory of multi-employer liability advanced here — *i.e.* making one employer responsible for ensuring compliance by another employer — contravenes the Act, the intent of Congress, and OSHA's own regulations. However, even assuming that were not so, OSHA still has no authority to cite a general contractor for violations committed by an independent subcontractor absent a validly promulgated regulation fairly imposing a duty on general contractors to ensure compliance by subcontractors.

The Administrative Procedure Act requires that all agency rules or regulations designed to "implement" or "prescribe law" must be promulgated via formal, notice and comment rulemaking to have the force and effect of law. 5 U.S.C. §§ 551, 553. OSHA acknowledges that its multi-employer citation policy has never been formally promulgated as a rule or regulation, but argues that the policy falls within the exemptions listed in 5 U.S.C. § 553(b)(A) for "interpretive rules, general statements of policy [and] rules of agency organization, procedure or practice." However, OSHA's denomination of the multi-employer policy, as an "interpretive" or "procedural" rule is not determinative of its legal status. *Brown Express, Inc. v. United States*, 607 F. 2d 695, 700 (5th Cir. 1979), *Columbia Broadcasting System Inc. v. United States*, 316 U.S. 407, 416, 422 (1942). "The

[9]As discussed below, even assuming that the Commission properly relied on this remedial purpose theory in earlier cases, that reliance is no longer justified because of the intervening decision in *Darden.*

label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481(2nd Cir. 1972). Rather, it is the substance of what the agency purports to do and has done that is decisive as to whether rule making is required. *Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp. 858, 863 (D.Del., 1970), *Brown Express*, 607 F.2d at 700, 702. *Accord: Associated Dry Goods Corp. v. EEOC*, 543 F.Supp. 950, 953 (E.D. Va. 1982). The substance of OSHA's policy is to make one employer liable for another employer's compliance or noncompliance. This is clearly more than an "interpretative" or "procedural" rule. Thus the requirement for formal rulemaking applies.

Even assuming that OSHA's multi-employer citation policy was not required to be promulgated as a rule in the first instance, the *change* in that policy *does* require formal rulemaking. Where a change in policy — even an informal, internal policy — has a substantial impact on regulated employers, due process requires that such a change be effectuated by formal notice and comment rulemaking. *Brown Express, Inc.* 607 F.2d at 700. (ICC practice of giving telephone notice of new applications for authority could not be discontinued without formal rulemaking because of

substantial impact on carriers).[10] *Accord: Cerro Metal Products v. Marshall*, 467 F. Supp. 869, (ED Pa, 1979) *affirmed* 620 F.2d 964, 981 (3rd Cir. 1980), *Marshall v. Huffhines Steel Company*, 488 F. Supp. 988, 999-1001 (N.D.Tex, 1979), affirmed *sub nom Donovan v. Huffhines Steel Company*, 645 F.2d 288 (5th Cir. 1981). (Holding that rulemaking was required before OSHA could change its interpretation of "compulsory process" to include an *ex parte* inspection warrant when OSHA's previous practice had been to give notice when it intended to apply for judicial authority to inspect), *Associated Dry Goods Corp. v. EEOC*, 543 F. Supp. at 963 (change of disclosure rules, although seemingly procedural, must be promulgated via notice and comment rulemaking because change had a substantive impact).[11]

Remember, OSHA's previous multi-employer citation policy provided that on multi-employer work sites, citations should only be issued to the employer who creates a hazard or whose

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[10]*Brown Express* is a particularly good statement of this legal axiom and is factually on point. In that case the Interstate Commerce Commission had established a *practice* of telephoning existing carriers to inform them when a new motor carrier applied for authority to serve a particular area so they could raise any objections to the application. This practice was also described in the Commission's Field Staff Manual. When the ICC attempted to change this practice and to eliminate the telephone notification without going through notice and comment rulemaking under the APA, Brown Express challenged whether the ICC could change its previous practice without formal rulemaking. 607 F.2d at 697-698. The ICC responded that formal rulemaking was not required because the previous practice had not been formally promulgated as a rule and the change was merely procedural. 607 F.2d at 700.

The court held that notice and comment rulemaking was required. Relying on long-established Supreme Court precedent, the court held that it made no difference that the ICC had labeled the change as "procedural." Rather, the proper test was whether the proposed change had a "substantial impact" on the regulated industry, or an important class of the members of that industry. 607 F.2d 701-702. Since the proposed change had a substantial impact on carrier's ability to become aware of and protest new applications for authority, notice and opportunity for comment under the APA was required before the change could be effectuated. *Id.*

[11]For other cases on point *see La Moille Valley Railroad Company v. I.C.C.,* 711 F.2d 295, 328 n. 74 (D.C. Cir. 1983) (collecting cases).

employees are exposed to a hazard. OSHA's current multi-employer citation policy is much different. Under the current policy, exposing employers are still cited. However, the general contractor is also cited if it does not, in OSHA's view, exercise "reasonable care" to detect subcontractor violations and then compel the subcontractors to come into compliance with OSHA. *See* CPL 2-0.124 X. E.

This is obviously a substantial change. Summit would not have been cited under the previous policy. Under the new policy, however, general contractors are cited for subcontractors' violations on the theory that the general contractor has an affirmative duty to detect subcontractor violations and to compel the subcontractors to come into compliance. Under this new policy Summit *was* cited. This change in the multi-employer citation policy thus has a substantial impact on Summit.

Since the change in OSHA's multi-employer citation policy has a substantial impact on general contractors, that change is invalid and ineffectual unless formally promulgated under the notice and comment rulemaking procedures of the Administrative Procedure Act. *See, Batterton v. Marshall,* 648 F.2d 694, 708 (D.C. Cir. 1980), *Brown Express, Inc.* 607 F.2d at 700, *Associated Dry Goods*, 543 F. Supp. at 963.

B. <u>The Effect of Review Commission Case Precedent</u>

Judge Welsch held that the multi-employer citation "doctrine" is based on Review Commission precedent. Decision at 5-6. In its briefing notice the Commission requests briefing on the effect to be given such Commission precedent. In response, Summit believes it is important to understand how Commission precedent developed, and the issues actually before the Commission in those cases.

1. The Commission's initial case decisions rejected multi-employer liability

Commission case decisions initially held that the Act limits an employer's responsibility to his own employees, and the Commission consistently refused to uphold citations to an employer unless the employees of that employer were exposed to the hazard. *See e.g. Secretary of Labor v. Gillis and Cotting, Inc.*, 1 BNA OSHC 1388 (Rev. Comm., 1973), (general contractor cannot be cited for subcontractor violations because Congress intended liability only in the context of an "employment relationship"), *Secretary v. Home Supply Company*, 1 BNA OSHC 1615 (Rev. Comm. 1974) (violation created by subcontractor to which only subcontractor's employees were exposed may not be charged against general contractor), *Secretary v. City Wide Tuckpointing Serv. Co.*, 1 BNA OSHC 1232 (Rev. Comm. 1973) (employer can only be liable under the Act where its employees are exposed to the hazard), *Secretary v. Hawkins Construction Co.*, 1 BNA OSHC 1761 (Rev. Comm. 1974) (Act only places responsibility for maintaining safe working conditions upon those employers who have endangered their own employees), *Secretary v. Martin Iron Works, Inc.*, 2 BNA OSHC 1063 (Rev. Comm. 1974) (an employer can only be held liable under the Act for its own employees). The Commission's initial interpretation of the Act was affirmed by the Fourth Circuit in *Brennan v. Gilles and Cotting, Inc.*, 504 F.2d 1255, 2 BNA OSHC 1243, (4th Cir. 1974) and by the Fifth Circuit in *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675, 3 BNA OSHC 1023, (5th Cir. 1975).

2. The Commission's decisions in *Grossman* and *Anning-Johnson*

In 1975, the Commission reversed itself. This reversal was purportedly prompted by the Court of Appeals decisions in *Brennan v. OSHRC and Underhill Construction Corp.*, 513 F.2d 1032,

2 BNA OSHC 1641 (2d Cir. 1975) and *Anning-Johnson Co. v. OSHRC and Brennan*, 516 F.2d 1081, 3 BNA OSHC 1166 (7th Cir. 1975). In the first case, Underhill had committed the violation, but defended the citations on the ground that none of its own employees were exposed to the hazard. The Second Circuit upheld the citations, reasoning that even if Underhill's own employees were not exposed, Underhill nonetheless had a duty to comply with OSHA standards if its failure to do so would create hazards to employees of other contractors on the site. 513 F.2d at 1036-1038, 2 BNA OSHC at 1644-1646.

In *Anning-Johnson*, the facts were just the opposite. Anning-Johnson did not create the hazard but its employees were exposed. Anning-Johnson defended on the ground that it had not created the violation, did not have the ability or the authority to correct it, and could only "abate" the hazard to its employees by walking off the job. The Seventh Circuit held that the Act did not authorize OSHA to cite an employer who does not have the ability to abate the violation other than by walking off the job. 516 F.2d at 1090, 3 BNA OSHC at 1172-1173.

After *Underhill* and *Anning-Johnson*, the Commission issued its own decisions in *Secretary v. Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (Rev. Comm. 1975) and *Secretary v. Anning-Johnson Company*, 4 BNA OSHC 1193 (Rev. Comm. 1975), the two cases that are the foundation of the current multi-employer citation doctrine. In *Grossman*, the Commission stated it was reconsidering its prior decisions in light of the court decisions in *Underhill* and *Anning-Johnson*. The Commission reaffirmed that "the Act can be most effectively enforced if each employer is held responsible for the safety of its own employees," but modified that rule to say that "on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring *that its own conduct does not create* hazards to any employees on the site." 4 BNA OSHC at 1188.

(Emphasis added).

In *Anning-Johnson*, the Commission addressed the opposite situation, where a construction employer's employees are exposed to a hazard that has been created by some other employer. The Commission reiterated that exposure of one's own employees continues to be the primary basis of liability under the Act, but allowed a new affirmative defense whereby an employer may avoid liability if it can demonstrate that it did not create the hazard, that it could not realistically "rectify" the hazard in the manner contemplated by the standard, and that it had taken reasonable alternative measures to protect its employees under the circumstances. 4 BNA OSHC at 1198.

In other words, the Commission recognized that an employer should not be able to affirmatively create a hazard and then escape liability because "only" the employees of others are exposed, and that it is unfair to hold an employer absolutely liable for exposure of its employees to a hazard when that employer does not have the ability to abate the hazard. To this extent, the Commission's decisions in *Grossman* and *Anning-Johnson* were supported by the factual records in those cases and by the decisions of the Second and Seventh Circuits.

But then, the Commission made a quantum leap not supported by anything. In *Grossman*, Chairman Barnako wrote that "Additionally, the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety" and "is well situated to obtain abatement of hazards" created by or affecting other contractors. 4 BNA OSHC at 1188. Similarly, in *Anning-Johnson*, Commissioner Cleary wrote that "typically a general contractor...possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to fully comply with the standards or to take the necessary steps to assure compliance." 4 BNA OSHC at 1199.

Both of these premises are fabricated from whole cloth. There was certainly nothing in the record in those cases to support the Commission's statement that general contractors dictate to subcontractors how they should do their job. Nor is there any statute or principle of law that a general contractor "normally" has a responsibility to assure that other contractors fulfill their obligations with respect to employee safety. As discussed above, the common law rule is that general contractors normally do *not* have this responsibility. Nor is there any basis for the hypothesis that a general contractor "possesses sufficient control" or is "well situated" to ensure compliance by other contractors. Again, as discussed above, just the opposite is true.[12]

The Commission's sole justification for this expansive new theory of liability was that it supposedly advances the purpose of the Act. However, the Commission did not actually analyze the intent of Congress as reflected in the legislative history of the Act and in similar statutes, did not consider the effect of OSHA's contrary implementing regulation at 29 CFR 1910.12(a), did not consider whether OSHA could change its prior enforcement policy and begin citing general contractors for subcontractor violations without formal rulemaking, and did not consider that its ruling would actually violate section 4(b) of the Act by increasing a general contractor's common law liability. Nor did the Commission consider that this new liability would foster citations to multiple employers for the same violation which would, as a practical matter, have a negative impact

[12]This hypothesis, carried to its logical conclusion, would require a general contractor to "assure" that all contractors comply with all laws. If the general contractor's "supervisory authority" over the construction site imposes a legal duty to ensure that subcontractors comply with OSHA regulations, why would the general contractor not also have the duty to ensure that the subcontractors comply with wage and hour regulations and equal employment regulations? This, of course, would turn the legal relationship and purpose of independent contractors on its head.

on workplace safety.[13]

3. Subsequent Commission Decisions

In subsequent cases, employers have frequently raised issues such as the legislative history, the effect of OSHA's contrary implementing regulations, and the necessity for formal rulemaking, that the Commission did not consider in *Grossman* and *Anning-Johnson*. But the Commission has routinely followed the rule established in those cases without much additional analysis. Indeed, in *Secretary v. Limbach Company*, 6 BNA OSHC 1244, 1246 (Rev. Comm. 1977), the Commission casually stated that the holdings in *Grossman* and *Anning-Johnson* did not raise any due process issues because they really did not create "a new theory of liability for employers."[14]

Thus, the Commission has assumed the underlying premise in *Grossman* and *Anning-Johnson* that a general contractor is responsible for ensuring that subcontractors comply with OSHA. The Commission has *assumed* that because a general contractor must exercise enough supervisory control of the project to ensure that it is completed according to the plans and specifications in a timely manner, such control makes the general contractor statutorily liable for enforcing the OSH Act against subcontractors. But there has never been a connection between a general contractor's necessary supervisory control and a legal duty to ensure that subcontractors comply with OSHA.

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[13]In *Anning-Johnson*, the Seventh Circuit noted this very impact. 516 F.2d at 1089-1090, 3 BNA OSHC at 1171-1172. The Court also held that a policy of citing multiple employers for the same violation was "of such magnitude" that it may not be adopted "without more direct statutory authorization." *Ibid.* Yet that is exactly what OSHA's current multi-employer policy calls for—*i.e.* issuing citations to multiple employers for the same violation. Hence the citations in the present case to both All Phase Construction and to Summit.

[14]This is a remarkable statement in view of the fact that before *Grossman* and *Anning-Johnson* a general contractor was not held responsible for ensuring that a subcontractor complied with OSHA, and after those decisions the general contractor *is* held responsible.

Even if a general contractor does have supervisory control of the jobsite, how does that create a *statutory duty* to enforce the OSH Act against the subcontractors?

Indeed, the whole theory of "control" is problematic. Does the supposed statutory duty depend on the degree of control exercised? If so, what degree of control triggers the statutory duty? Is it possible to exercise only minimal supervisory control and avoid the statutory duty? If so, then the Commission should specify the permissible level of minimal control so general contractors can avoid such liability. Or do Commission cases really stand for the proposition that the minimum supervision necessary to get the project completed is enough to trigger the statutory duty? In that case, it is a misstatement to say there is an issue of "control" because the general contractor is liable simply by virtue of its position as general contractor. In the present case, for example, Judge Welsch held that Summit exercised sufficient control to become responsible for subcontractor compliance because of contractual provisions whereby Summit indemnified the owner and reserved the right to withhold ten percent retainage from its subcontractors under mechanics lien laws. Such provisions are *always* in the contracts a general contractor must sign. If these provisions create a statutory duty to ensure that all other employers on the job site are in compliance with OSHA, then let there be no pretense about "degree" of control: OSHA and the Commission intend to make the general contractor liable for all safety on the construction site simply by reason of being a general contractor.[15]

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[15]Judge Welsch even held that Summit's control over subcontractor safety is proven by the subcontract provision which requires the subcontractor to be responsible for his own compliance with OSHA. Decision at 12. In other words, by insisting that a subcontractor contractually agree to be responsible for his own compliance with OSHA, Summit establishes its own liability for the subcontractors noncompliance. This is absolute liability under any guise. If this is a correct legal maxim then, as pointed out in note 12, by requiring the subcontractor to agree to comply with all laws, regulations and ordinances (a standard contractual clause) Summit actually makes itself liable for the subcontractors noncompliance!

CONCLUSION

To its credit, the Commission has more recently recognized that these underlying issues, not considered in *Grossman* and *Anning-Johnson*, could impact the validity of the multi-employer doctrine established by those cases. *Cf. Secretary v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1726, n. 12 (Rev. Comm. 1999). It is time for the Commission to consider these underlying issues. Equally important, the Commission should recognize that the "statutory purpose" justification espoused in *Grossman* and *Anning-Johnson*, even if arguably valid at the time, is no longer valid in view of the Supreme Court's subsequent decision in *Nationwide Mutual Insurance v. Darden*. The Commission should therefore reverse the quantum leap made by Commissioners Barnako and Cleary in *Grossman* and *Anning-Johnson*. The multi-employer doctrine, as currently enforced, imposes an impossible burden on general contractors. General contractors must choose between risking OSHA citations for subcontractor violations or risking common law liability for injuries to subcontractors' employees. The current doctrine is unfair and foments litigation. And it is wrong.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served via telecopy and federal express on Mr. Stephen Turow, Counsel for Regional Trial Litigation, Office of the Solicitor, United States Department of Labor, Room S4004, 200 Constitution Avenue, N.W., Washington, D.C. 20210, and Mr. Arthur G. Sapper, Counsel for *amicus curiae* brief, 600 13th Street, N.W., Washington, D.C. 20005 on this 28th day of February, 2005.

Robert E. Rader, Jr.