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.	§	

RESPONDENT'S REPLY BRIEF ON REVIEW

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I. Introduction and Restatement of the Issue

OSHA's multi-employer citation policy at CPL 2-0.124 states that a general contractor must monitor whether independent subcontractors comply with OSHA standards and, if they do not, must compel the subcontractors to come into compliance by a system of progressive discipline, withholding payment, and ultimately termination. Thus, the controlling issue in this case is whether a general contractor has a legal duty to ensure that *other* employers are in compliance with OSHA.

II. The Effect of § 1910.12(a)

In its opening brief Summit pointed out that neither the Act, nor the legislative history, nor the standard under which Summit was cited here, imposes a duty on one employer to ensure compliance by another employer. Summit also pointed out that OSHA's own implementing regulation at 29 CFR § 1912.12(a) *precludes* such a duty by stating that a construction employer is only responsible for protecting "each of *his* employees engaged in construction work . . . by complying with Part 1926 standards." (Emphasis added).

The Commission has previously noted the importance of § 1910.12(a) but declined to rule on it because it has never been argued or briefed to the Commission. *See Secretary v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1723 n.12 (Rev. Comm. 1999). In this case, the preclusive effect of § 1910.12(a) was thoroughly briefed and argued in opening briefs by Summit and its *amici*, putting this issue squarely before the Commission for the first time.

In response, the Secretary has made only the most insubstantial argument against application of §1910.12(a), and the Union makes no argument against it at all. The Secretary argues:

> The provision plainly states that each employer must protect both the "employment" and "places of employment" of each of his employees. It therefore requires employers to comply with standards at all sites

> where they are working, and such compliance is intended to protect all workers who are predictably present at those sites.

Secy's Br. at 25. This argument gives no meaning to the phrase "each of his employees," for it would read precisely the same if the words "each of his" were absent from the second sentence of § 1910.12(a). Indeed, the Secretary never says what the phrase or the second sentence *does* mean. Instead, she says that the *first* sentence of § 1910.12(a) "frames the obligation in terms of 'every employee' at the construction site." This not only ignores the second sentence but ignores the difference between them. The first sentence made Part 1926 applicable under the OSH Act without regard to whether employees were engaged in federally-funded construction, while the second sentence stated *how* Part 1926 was to apply under the new OSH Act – *i.e.*, that the standards under Part 1926 apply when one's own employees are affected by or exposed to a violative condition. The Secretary's argument would make the second sentence entirely redundant with the first.[1]

The Secretary's argument is also inconsistent with her own interpretation of § 5(a)(1) of the Act. She acknowledges that the language "his employees" in § 5(a)(1) limits an employer's duty under that section to his *own* employees. Secy's Br. at 15. Why, then, does use of *the same*

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[1]The Secretary also argues that the second sentence of section 1910.12(a) cannot mean what it says because the preamble accompanying it was silent. She asserts, "It would not have been reasonable for the Secretary to resolve this important a question without stating that she was doing so or giving reasons for her action." But OSHA did not explain *any* of the major policy decisions it made when it adopted the start-up standards in 1971. OSHA did not explain why it adopted section 1910.5(d), or did not adopt section 1926.16, or erroneously deleted scope provisions from many national consensus standards, such as those in NFPA 30-1969 when OSHA first adopted section 1910.106. The reason is that OSHA was expressly freed from any duty of explanation by section 6(a) of the Act, which permitted OSHA to act "Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section,...." Nor was explanation needed. The second sentence was adopted because everyone understood that section 5(a)(2) imposed the same employment-related duty as section 5(a)(1), which is why the Commission so held in its early case law.

language in § 1910.12(a), promulgated "one month after the effective date of the OSH Act," not mean the same thing? The Secretary offers no explanation for this inconsistent (and opportunistic) interpretation.

Finally, the Secretary's response regarding § 1910.12(a), at most, supports only the view that a *creating* employer may be cited. In her brief she states:

> The provision also makes clear, in the first sentence that construction employers must *comply* with these standards wherever their employees are working . . .
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> ***
>
> It therefore requires employers to *comply* with standards at all sites where they are working . . . .

Secy's Br. at 25. (Emphasis added). This argument does not justify citing Summit because Summit did not violate the cited standard, All Phase Construction did. Quite clearly, OSHA did not cite Summit because Summit failed to "comply" with the standard but, rather, because Summit did not compel All Phase to comply. Nothing in the Secretary's strained and illogical interpretation of § 1910.12(a) even addresses this issue.

The utter barrenness of the Secretary's brief on § 1910.12(a) is reflected in its complete failure to mention § 1926.16, a regulation prominently mentioned in the briefs of Summit, its *amici*, and the Secretary's *amicus*. The Secretary has no answer to the showing of Summit and its *amici* that OSHA's simultaneous adoption of the second sentence of § 1910.12(a) and rejection of § 1926.16 demonstrate that Part 1926 was never intended to impose on general contractors a duty to control and oversee subcontractors. She never explains why, if the Secretary intended all along to impose such a duty, she did not just adopt § 1926.16 with the rest of Part 1926 or adopt a version tailored to the OSH Act. The answer is obvious. She did not intend Part 1926 to apply that way

under the OSH Act. That is why her first compliance manual imposed no such duty of control.

In view of the arguments and responses on this issue, the Commission may vacate the citation in this case simply on the ground that it is precluded by § 1910.12(a). Such a narrow ruling would be unassailable. It would make unnecessary any reconsideration of Commission case law, not place the Commission at odds with the views of any court of appeals, leave case law on § 5(a)(1) intact, and require this question to be considered in rulemaking.

III. The Secretary's Policy Arguments

In its opening brief Summit demonstrates that neither the OSH Act nor its legislative history provides authority for the proposition that one employer has a duty to ensure compliance by another employer. The Secretary does not really contradict that fact. Instead, much of the Secretary's brief is devoted to the policy argument that OSHA's multi-employer citation policy should be upheld because it advances the "purpose" of the Act by promoting workplace safety. Secy's Br. At 13-23. There are at least two responses to this argument. First, there is no evidence that the multi-employer policy has any impact on safety at all. Second, even if it does, it may not be legally implemented without specific statutory or regulatory authorization.

The multi-employer policy is premised on the theory that the more employers held responsible for correcting a violation, the more likely it will get done. "This is, of course, not necessarily true. Placing responsibility in more than one place is at least as likely to cause confusion and disruption . . . on a construction site. Such a policy might in effect prove to be counterproductive." *Anning-Johnson Company v. OSHRC and Brennan*, 516 F.2d 1081, 1089, 3 BNA OSHC 1166, 1171-1172 (7th Cir. 1975). The briefs of the Secretary and the Union seem to verify the Seventh Circuit's analysis. The Secretary's brief asserts that the multi-employer citation

policy has been in effect for 30 years. Secy's Br. at 3. Yet, according to the Union, construction injury rates remain disproportionately high. Union's Br. at 3-4. This suggests that the multi-employer policy has little effect on safety.

In *Anning-Johnson*, the Seventh Circuit also observed that a policy of citing multiple employers for the same violation will disrupt traditional contractual relationships on a construction project, cause confusion and possibly litigation over indemnification provisions, be economically wasteful and, in some cases, totally impractical, and could even shut down an entire project.[2] Therefore, the Court held, even assuming *arguendo* that holding multiple employers responsible for the same violation is good policy, it is "a policy choice of such magnitude and would lead to results under the Act, not intended by Congress, that it may not be appropriately adopted without more direct statutory authorization." 516 F.2d at 1088-1089, 3 BNA OSHC at 1171.

This point was recently reaffirmed in a case arising under Virginia's approved state OSHA plan in a case against Summit. In *C. Ray Davenport, Commissioner, Department of Labor and Industry v. Summit Contractors, Inc.*, ___ S.E. 2d ____, (No. 1643-04-2, Va. App., May 3, 2005), Summit was cited under the same multi-employer policy as in this case. The Court of Appeals of Virginia dismissed the citations, observing that even if the "policy judgment" reflected in the multi-employer policy really does advance worker safety, such a policy may not be implemented absent specific statutory or regulatory authorization.

In short, the Secretary's "good purpose" argument cannot trump the specific language of the statute and the implementing regulation of § 1910.12(a). Nor can it override the time-honored

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[2]A fact that is substantiated in the record in this case. *See* Tr. 104-105, 248-252. This potentially drastic effect was also recognized by the United States Court of Appeals in *IBP, Inc. v. Secretary of Labor*, 144 F.3d 861, 867, 18 BNA OSHC 1353, 1357 (DC Cir. 1998).

purpose of legally established independent contractor relationships. A policy decision with such profound consequences should properly be made by the legislature, not by unelected agency administrators. At the very least, formal rulemaking is necessary, with the opportunity for meaningful input from those who will be affected.

The Secretary's policy argument is also based on the false premise that the general contractor is in the best position to ensure compliance by the subcontractors. Again, there is no evidence to support this theory. It presumes that the general contractor has "overall control and responsibility for safety on the worksite," has the manpower to police dozens of subcontractors' compliance with OSHA, and has the expertise to recognize when a certain subcontractor, or trade, is not in compliance with applicable OSHA standards. In reality, just the opposite is true. For instance, the evidence in this case shows that Summit does not have the manpower or the expertise to be responsible for subcontractors' safety. (Tr. 246). The brief of *amici* National Association of Homebuilders, *et al.*, confirms that this is true in the construction industry generally. NAHB Br. At 10-12.

The Union's argument is based on this same faulty premise. The Union argues that the general contractor should be held responsible for subcontractors' safety because the exposure of subcontractors' employees is ever changing, depending on where they are working on the project, and it is "impossible" for a particular employer to anticipate the hazards his employees may be exposed to. Union's Br. at 4. But the Union does not explain why it is more "possible" for the general contractor to be aware of the exposure of a subcontractor's employees than the subcontractor himself who actually assigns and oversees the work of those employees.

The Secretary also argues that, as a matter of policy, "there is no conceptual basis" for

distinguishing between an employer's responsibility for protecting his own employees and a general contractor's responsibility for protecting employees of subcontractors. Secy's Br. at 27. But there is a huge conceptual difference between an employer and a non-employer under the Act. A general contractor like Summit does not employ employees who actually perform construction work. The general contractor only schedules the work of the numerous subcontractors and oversees the progress of the work generally. The potentially affected employees are employed by the separate subcontractors. The general contractor has no authority over the employees of the subcontractors. Indeed, in many cases where there are numerous construction workers on a project the general contractor does not even know which employees are employed by which subcontractor, or sub-subcontractor. Each subcontractor hires, fires, pays, disciplines and promotes his own employees. The subcontractor trains his own employees and supplies their equipment and safety gear. The subcontractor assigns their work, regulates their working hours and determines how they should do their work. The subcontractor is a legally independent, separate employer. As such, he is responsible for the safety of his own employees. *Secretary v. Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (Rev. Comm. 2005).

By this policy argument, the Secretary is essentially contending that the subcontractors and their employees should be treated as employees of the general contractor for purposes of liability under the OSH Act. The Commission rejected this theory of liability in *Secretary v. Timothy Victory*, 18 BNA OSHC 1023 (Rev. Comm. 1997). In *Timothy Victory*, OSHA attempted to cite Victory, a boat owner, on the theory that he controlled the actions of scuba divers using his boat to harvest sea urchins. The Commission reaffirmed its earlier decision in *Secretary v. Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (Rev. Comm. 1992), that only an "employer" may be cited for a

violation of the Act. The Commission then observed that it had previously subscribed to the "legal proposition" that "the term 'employer' under the Act is not limited to employment relationships defined under common law principles but rather is to be broadly construed in light of the statutory purpose..." *Id.* at 1026. The Commission went on to say that it has modified that proposition to conform to the Supreme Court's decision in *Nationwide Mutual Insurance Co., v. Darden*, 503 U.S. 318 (1992), and that the Commission now interprets the term "employee" under common law principles. *Ibid.*[3] Thus, the Commission concluded, in order to prove a violation against Victory, "The Secretary bears the burden of establishing that Victory exercised an *employer's* control over the divers as opposed to a *boat owner's* control over persons aboard his vessel..." *Id.* at 1027. (Emphasis in original). And since the Secretary had not proved that Victory hired, fired, trained, supplied equipment, controlled work hours, and other common law elements of an "employer's control" the citations were properly dismissed.

To use the Secretary's phrase, "there is no conceptual basis" for distinguishing between the boat owner in *Timothy Victory* and Summit in this case. The Secretary asserts that it is "logical" to hold the general contractor responsible because the general contractor supervises the job site. But the general contractor's supervisory authority is analogous to that of the boat owner in *Timothy Victory*. The general contractor directs the overall sequence of the work and ensures that the work complies with the plans and specifications. But the general contractor does not exercise an *employer's* control over either the subcontractors or the workers because he is not their employer and

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[3]This is precisely the point made in Summit's opening brief. Even if the "statutory purpose" justification for expanding liability beyond the employment relationship was valid at the time of the Commission's decisions in *Grossman* and *Anning-Johnson*, it is no longer valid after *Nationwide*. Summit's Opening Br. at 20-21, 31.

they are not his employees. The general contractor does not direct the means, methods and techniques in completing the work. That is left to the expertise, discretion and authority of the subcontractor. Indeed, in this case, Summit's general superintendent testified he did not *care* how the subcontractor's employees actually did the work so long as it met the plans and specifications when completed. (Tr. 188-189).

IV. Private Contracts Do Not Create Statutory Duties

It is important to distill the Secretary's policy arguments and understand what she is really saying here. In essence, the Secretary says that where a general contractor contracts for a subcontractor to perform work in a timely manner in accordance with the plans and specifications, and that contract naturally and necessarily contains procedures for enforcing the contract, *those private, contractual remedies give rise to a statutory duty* to compel the subcontractor to comply with OSHA standards.

This argument is flatly contrary to law. It has long been established that a private contract cannot enlarge or diminish a party's duty under a given statute. *See e.g. Cartier v. Doyle*, 277 F. 150, 153 (5th Cir. 1921) (private contract cannot change the affect of a statute), *McQueen v. Salida Coca Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (private contract cannot affect the statutory scheme drafted by Congress). This principle has even been applied under OSHA. *See Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631, 3 BNA OSHC 1432, 1433 (10th Cir. 1975) (language in private crane lease agreement stating which party would be responsible for actions of the operator cannot control the statutory liability for the operator's conduct under OSHA), *Secretary v. Vergona Crane Co*, 15 BNA OSHC at 1785-1786 (language in private crane lease agreement stating which party would be considered the employer of the crane operator cannot control

the statutory liability for the operator's conduct).[4]

In *Allstate Painting, supra*, the Commission stated that "Only an employer may be cited for a violation of the Act, see 29 USC § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." 21 BNA OSHC at 1035. This is a correct statement of the law. Regardless of the Secretary's policy arguments, the terms of the contracts between the private parties on a construction site do not change the law or the Secretary's burden of proof. The terms of those private contracts may be relevant in any private action between the parties but they do not create a statutory duty under the Act. *Secretary v. Frohlick Crane Service*, 2 BNA OSHC 1011, 1012 (Rev. Comm. 1974) (stating that although the private contract may have significance in any action between the parties, it had no significance in determining liability under the OSH Act). Thus, whatever the terms of the contracts between Summit and the owner or Summit and its subcontractors, Summit may not be cited for a violation of the Act unless it is the employer of the affected workers.

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[4]The argument that a private contract gives rise to a statutory duty stems from Commissioner Cleary's *dictum* in *Secretary v. Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (Rev. Comm. 1976) that the general contractor's contractual "control" of a worksite "gives rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or to take the necessary steps to assure compliance." Commissioner Cleary cited no authority for this proposition other than *Clarkson Construction Co. v. OSHRC,* 531 F.2d 451, 3 BNA OSHC 1880 (10th Cir. 1976), where the Tenth Circuit, in a split decision, quoted a previous Cleary dissent that the Commission may "look to the employer who controls the working environment" and whether he "is also the employer for wage or tort purposes should not be a governing factor." In other words, the only "authority" for Commissioner Cleary's *dictum* was Commissioner Cleary himself, and such *dictum* does not overrule the legal axiom that the terms of a private contract do not affect the parties' duties under a statute. In any event, this *dictum* has been superseded by the Supreme Court's decision in *Nationwide* and the Commission's own decisions in *Timothy Victory* and *Allstate Painting.*

V. No Deference Is Owed To The Secretary's Statutory Interpretation

The Secretary argues that "at most" the statute is ambiguous on the issue of multi-employer liability. Therefore, the Commission must defer to the Secretary's "interpretation"—reflected in the multi-employer citation policy—that a general contractor has a duty to ensure compliance by other contractor/employers on the job site. Such deference, the Secretary argues, is required by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

This argument fails for two reasons. First, as *amici* NAHB *et al* point out, the Commission has already held on two occasions that it owes the Secretary no deference on the issues of *statutory* construction. NAHB Br. at 27-33. Second, in any event, the factors warranting *Chevron* deference are not present here.

Summit believes, of course, that the OSH Act is unambiguous and there is no need to "interpret" it. As pointed out in Summit's opening brief, the statute is clear that there is no extra-employment liability. Summit's Opening Br. at 7-13. But even assuming this were not so, and even assuming there is a genuine issue of statutory interpretation, and even assuming that in some situations deference may be owed to OSHA's interpretation of the statute (as opposed to a regulation), deference to OSHA's interpretation is not required here because *Chevron* has been superseded by the holdings in *Christensen v. Harris County*, 529 U.S. 576 (2000) and *United States v. Mead Corp.*, 533 U.S. 218 (2001). Under these subsequent decisions, *Chevron* deference is only appropriate where the agency's interpretation has been formally promulgated as a rule. *Mead* at 226-227, *Christensen* at 587, *Chao, Secretary of Labor v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227-228 (2d Cir. 2002). Here, OSHA's interpretation, reflected in its multi-employer citation policy, has not been formally promulgated as a rule. It is therefore only entitled to the limited

deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead* at 227, *Christensen* at 587, *Le Frois Builder, Inc.* at 227-228.

Under *Skidmore*, an agency's interpretation is "not controlling" but is, instead, given only "weight," the amount of which will "depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which will give it power to persuade, if lacking power to control." 323 U.S. at 140. *See also Christensen* at 587 (agency view "'entitled to respect',...but only to the extent that [it has] 'the power to persuade'" (quoting *Skidmore* at 140).

As Summit points out in its opening brief, OSHA's current interpretation that general contractors have a duty to police and ensure compliance by independent subcontractors is directly opposite from its initial interpretation of the Act. Summit's Opening Br. at 12, 23-24. This fact has never been disputed by OSHA. Indeed, the agency has studiously avoided discussing its prior policy set forth in its *Manual* from 1973 until 1993. When OSHA's prior inconsistent interpretation and policy is combined with the plain language and legislative history of the statute and with OSHA's own implementing regulation at § 1910.12(a), it is evident that under *Skidmore* OSHA's current interpretation is entitled to *no* deference. Instead, the present case is analogous to *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) where the agency's interpretation was said not to "fare well" under the *Skidmore* guidelines because, having been promulgated eight years after the statute, it was not a contemporaneous interpretation, and because it was inconsistent with the agency's previously enunciated position.

VI. The Rulemaking Requirement

In its opening brief, Summit explained that even if the Act's authority is broad enough to allow citing a general contractor for failing to ensure that a subcontractor is in compliance, such an enforcement policy has such a significant impact that it must be formally promulgated as a rule. Summit's Opening Br. at 21. The Secretary responds that rulemaking is not required because the Commission has already held in *Secretary v. Limbach Company*, 6 BNA OSHC 1244, 1246 (Rev. Comm. 1977) that OSHA's multi-employer citation policy is only a "general statement of policy for the guidance of [OSHA] inspectors" and does not have a substantial impact or create liability on employers. Secy's Br. at 31. Summit submits that the record in the present case raises arguments and facts not considered by the Commission in *Limbach*. Even if *Limbach* is correct that OSHA's previous multi-employer citation policy need not be promulgated as a rule, that does not answer the question, raised here, whether the *change* in that policy must be promulgated as a rule.

It is axiomatic that where a change in policy, even an internal, informal policy, has a substantial impact on regulated employers, due process requires that such a change be effectuated by formal notice and comment rulemaking. *See* Summit's Opening Br. at 22-24 and cases cited therein. The facts in this case demonstrate beyond argument that the change in OSHA's multi-employer citation policy has a substantial impact. The cited standard in this case, 29 CFR 1926.451 (g)(1)(iv), imposes a duty only on the employer of employees using the scaffold. Prior to OSHA's current multi-employer citation policy, Summit was not cited under § 1926.451 because Summit employees do not work on scaffolds and Summit was not considered an "employer" within the meaning of the standard. No one can reasonably think that the term "employer" could be changed to "general contractor" without having a substantial impact on general contractors. Yet that is

exactly the effect of OSHA's current multi-employer citation policy. The standard says to cite the "employer" who in this case is All Phase Construction, but the multi-employer policy "guided" the compliance officer to cite and levy monetary fines against the general contractor, Summit. Summit would not have been cited and fined *but for* the multi-employer citation policy. The claim that the change in policy does not have a substantial effect is irrational and ignores reality.

The Secretary's contention that rulemaking is not required also ignores the constitutional safeguards intended by the Administrative Procedure Act. One of the fundamental purposes of the rulemaking requirements of the APA is to provide affected parties an opportunity to be heard when governmental authority has been delegated to unrepresentative agencies. *National Association of Home Health Agencies v. Schweiker,* 690 F.2d 932, 949 (D.C. Cir. 1982). Affected persons must be given "a chance to influence agency action." *Fountainhead Group v. Consumer Product Safety Commission*, 527 F.Supp. 294, 300 (ND NY 1981). The opportunity to be heard "is basic to fundamental fairness." *United Church Board v. SEC*, 617 F.Supp. 837, 839 (D. D.C. 1985). Fundamental fairness is the same as due process. *See e.g. Quill Corporation v. North Dakota*, 504 U.S. 298, 312 (1992) ("Due process centrally concerns the fundamental fairness of governmental activity.")

The Secretary acknowledges that in 1976 she published a notice in the Federal Register seeking comment on a new multi-employer citation policy expanding liability beyond the employer-employee relationship. Secy's Br. at 2. She recognized then that a policy changing who may be held responsible for violations on a multi-employer worksite would have a substantial impact that goes beyond an "interpretive rule" or "statement of policy." This is a judicial admission that undermines her present position. The Secretary's present position denies Summit and all other general

contractors due process of law.

VII. The Multi-Employer Doctrine Violates Section 4(b)(4) Of The Act

In its opening brief, Summit explained how the multi-employer doctrine and OSHA's multi-employer citation policy violate § 4(b)(4) of the Act by operating to increase a general contractor's common law tort liability. To avoid citation under OSHA's policy, the general contractor must compel the subcontractors to comply with OSHA standards as they perform their work. This necessarily requires the general contractor to control the means, methods and techniques used by subcontractors which, in turn, creates common law tort liability for injuries to subcontractors' employees. Summit also cited caselaw where this has happened—a general contractor assumed responsibility for subcontractors' safety practices in order to comply with OSHA's multi-employer policy and incurred substantial common law tort liability as a result. *See* Summit's Opening Br. at 15-20. Summit even provided evidence at the hearing that its liability insurance carrier has warned not to take responsibility for the subcontractors' safety because of this increased liability. (Tr. 245-246).

The Secretary makes two responses. First, she cites *United Steelworkers v. Marshall*, 647 F.2d 1189, 8 BNA OSHC 1810 (DC Cir. 1981) for the proposition that § 4(b)(4) only limits private causes of action based on the OSH Act or on an OSHA regulation. Secy's Br. at 34. But *United Steelworkers* is not relevant to the issues in the present case. In that case the Lead Industries Association (LIA) argued that OSHA's lead standard violates § 4(b)(4) because the medical removal provisions of the standard "affect" or "supersede" state workers compensation laws by ultimately reducing the number of workers compensation claims. *Id.* at 1234. The court held that § 4(b)(4) cannot be read *that* literally because *any* health standard that reduces the number of workers who file

workers compensation claims would arguably "affect" workers compensation schemes and therefore violate § 4(b)(4). That holding is inapposite here.[5]

The Secretary also argues that "Nothing in § 4(b)(4) limits the administration of the OSH Act itself." Secy's Br. at 34. The Secretary cites no authority for this argument and it is obviously inconsistent with the plain language of § 4(b)(4), which does not say that it only applies in non-OSHA cases. Rather, § 4(b)(4) states that "Nothing in [the Act] shall be construed to...affect in any...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." 29 USC § 653(b)(4). The multi-employer doctrine "construes" § 5(a)(2) of the Act, 29 USC § 654(a)(2), to impose a duty on general contractors to ensure compliance by subcontractors. This construction of the statute is reflected in OSHA's multi-employer citation enforcement policy. The multi-employer policy "affects" the "common law rights, duties and liabilities of employers and employees" because it operates to make one employer liable at common law for injuries to employees of another

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[5]It is important to understand that the common law tort suits fostered by OSHA's multi-employer policy are not based on the OSH Act but on a common-law negligence theory. The first issue in each case is whether the general contractor owes a duty of care to the injured subcontractor employee. If the general contractor has not assumed responsibility for making sure the subcontractor uses safe means, methods and techniques in performing the subcontractor's work, then the general contractor owes no common law duty to the subcontractor's employees and the case is dismissed on summary judgment. *See e.g. Schreiber v. Idea Engineering & Fabricating,* 117 Fed. Appx. 467 (7th Cir. 2004), *Davis v. Sanders*, 891 SW.2d 779 (Tex. App. 1995), *Evans v. Lockwood-Greene Engineers, Inc.*, 13 BNA OSHC 1984 (ND Ga 1988). But if the general contractor *has* assumed that responsibility, then the general contractor has created a common law duty of care to the subcontractor's employees—*i.e.* a duty to ensure that their working conditions are safe. If a subcontractor employee is injured because his own employer, the subcontractor, has failed to comply with some OSHA standard, then the employee may sue the general contractor alleging that the general contractor was negligent in carrying out the duty *he created* by exercising control over the subcontractor's work safety practices. *See e.g. Lawson-Avila Construction, Inc. v. Stoutamire,* 791 SW.2d 584 (Tex. App. 1990). In some cases an OSHA standard may be introduced as a standard of care. In no event, however, is the cause of action based on the OSH Act or an OSHA standard.

employer.

The Union's brief actually proves this point. In attempting to argue that OSHA's multi-employer policy is consistent with common law principles, the Union cites many cases holding that where a general contractor controls whether a subcontractor follows safe work practices, the general contractor may be liable in a common law tort suit for an injury to the subcontractor's employee. *See e.g. Lee Lewis Construction, Inc. v. Harrison*, 70 SW.3d 778 (Tex. 2001). *See also* Union's Br. at 13-16 and cases cited therein.

In short, there is no reasonable doubt that the multi-employer doctrine, enforced in OSHA's multi-employer citation policy, adversely affects general contractors' common law tort liability. To avoid citation under OSHA's policy the general contractor must assume a degree of control over the subcontractors that results in common law tort liability the general contractor would not otherwise have. This violates § 4(b)(4).

VIII. At Most, The Secretary's Brief Only Supports Liability Of A Creating Employer

The Secretary's brief is largely devoted to arguing an issue that is not in this case—*i.e.* whether an employer who *creates* a violation is liable under the Act even if his own employees are not exposed. Throughout her brief the Secretary argues that "the single most important statutory mechanism" for achieving workplace safety "is the Act's command to employers to *comply*" with standards. Nothing "limits the employer's *compliance duty* to situations where a violation would endanger only its own workers." Secy's Br. at 13. "[T]he multi-employer doctrine is consistent with the unqualified statutory command in 29 USC § 654(a)(2) that employers *comply* with occupational safety and health standards." Secy's Br. at 16. "Merely because the Act governs 'employers' does not mean that the duty to *comply* with standards...depends on the employer's own employees being

endangered. * * * [A]n employer's *compliance* with standards is intended to protect all workers." Secy's Br. at 17. The new chemical process safety standard reflects congress' intent that employers "*comply* with OSHA standards without regard to the employment relationship of the workers these measures would protect." Secy's Br. at 18. Clearly, all these arguments support only a duty to not affirmatively *create* a violation.

In the present case, of course, Summit was not cited because it failed to comply with the cited standard and thereby created a violation. Rather, Summit was cited because it did not compel All Phase Construction to comply with the standard. This is quite a different duty. The Secretary points to nothing in the statute or any regulation that imposes a duty on one employer to compel another employer to comply with OSHA standards. The Secretary's argument that § 5(a)(2) of the Act requires employers to comply with standards even if their own employees are not exposed, if valid, only justifies liability for a creating employer.

Upon analysis, most of the decisions by the Courts of Appeals cited by the Secretary likewise justify liability only for an exposing or a creating employer. *Brennan v. OSHRC and Underhill Construction*, 513 F.2d 1032, 2 BNA OSHC 1641 (2d Cir. 1975), *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 11 BNA OSHC 1857 (6th Cir. 1984), *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 18 BNA OSHC 1609 (7th Cir. 1999), and *Beatty Equipment Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534, 6 BNA OSHC 1699 (9th Cir. 1978) all affirmed citations against an employer who had created the violation. *Marshall v. Knutson Construction Company and OSHRC*, 566 F.2d 596, 6 BNA OSHC 1077 (8th Cir. 1977) affirmed citations, in part at least, because the general contractor's employees were potentially exposed to the violation.

Other circuits that have considered the issue have either questioned the principle of holding

one employer liable for ensuring compliance by another employer, or have rejected it altogether. *Secretary of Labor v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 16 BNA OSHC 1313 (1st Cir. 1993) (Section 1910.12(a) is binding on OSHA and limits construction employer's responsibility to his own employees), *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 2 BNA OSHC 1243 (4th Cir. 1974) (affirming OSHRC decision that employer may only be cited for exposure of his own employees), *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675, 3 BNA OSHC 1023 (5th Cir. 1975) and *Melerine v. Avondale Shipyards*, 659 F.2d 706, 10 BNA OSHC 1075 (5th Cir. 1981) (OSHA does not create liability outside the employment relationship) *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 17 BNA OSHC 1447 (DC Cir. 1995) and *IBP, Inc. v. Herman*, 144 F.3d 861, 18 BNA OSHC 1353 (DC Cir. 1998) (liability under the Act seems based on the employer-employee relationship, and there is "marked tension" between OSHA's multi-employer citation policy and § 1910.12(a)).

Only the Tenth Circuit, in *Universal Construction Co, Inc. v. OSHRC*, 182 F.3d 726, 18 BNA OSHC 1769 (10th Cir. 1999) has held that a general contractor has a duty to compel compliance by subcontractors. And that holding is due little weight because it was largely based on *Chevron* deference to the Secretary's interpretation of the Act before *Chevron* was superseded by *Mead* and *Christensen*.

In short, the Secretary's argument that the Courts of Appeals have almost uniformly upheld the principle that a general contractor has a duty to compel compliance by subcontractors is wrong. As the Virginia Court of Appeals noted in *Davenport v. Summit Contractors, supra*, "Due to the absence of any express OSHA provision or regulation, the federal courts have struggled to reach a principled consensus on whether general contractors have vicarious liability for violations committed

by their subcontractors." *Id.* at n 8. That is precisely why it is important for the Commission to issue a principled decision in the present case.

IX. Conclusion

As stated above, the Commission should at least vacate the citation in this case on the ground that it is precluded by 29 CFR § 1910.12(a). If the Commission goes further, the Commission should consider the question "What is the source of the supposed statutory duty of a general contractor to compel subcontractors to comply with OSHA?" Such a duty is not set forth in the statute or any regulation. It cannot be created by the terms of a private contract. Nor can it be based on any "interpretation" of the statute in view of the formally promulgated regulation at § 1910.12(a) to the contrary. Even if there were some source for this supposed duty, OSHA may not enforce such a duty through its current multi-employer citation policy without first subjecting that policy to the due process requirement of rulemaking. And, in the end, enforcement of such policy violates § 4(b)(4) of the Act.

Respectfully submitted,

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