BEFORE THE UNITED STATES

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

SUMMIT CONTRACTORS, INC.,

Respondent.

Docket No. 03-1622

BRIEF OF THE *AMICI CURIAE,*

THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE CONTRACTORS' ASSOCIATION OF GREATER NEW YORK, THE TEXAS ASSOCIATION OF BUILDERS, AND THE GREATER HOUSTON BUILDERS ASSOCIATION IN SUPPORT OF SUMMIT CONTRACTORS, INC.

Of counsel:

David S. Jaffe, Esq.
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005-2800

Raymond G. McGuire, General Counsel
Contractors' Ass'n of Greater New York
Kauff McClain & McGuire LLP
950 Third Avenue, 14th Floor
New York, New York 10022

Arthur G. Sapper, Esq.
Robert C. Gombar, Esq.
James A. Lastowka, Esq.
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8246

COUNSEL FOR *AMICI CURIAE*

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THE GREATER HOUSTON BUILDERS ASSOCIATION
IN SUPPORT OF SUMMIT CONTRACTORS, INC.**

I. IDENTITY AND INTEREST OF THE *AMICI CURIAE*

A. Identity of the *Amici Curiae.*

1. The National Association of Home Builders (NAHB) represents more than 220,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 1.84 million new housing units projected for 2005, making housing one of the largest engines of economic growth in the country. The NAHB has often appeared as *amicus curiae* or a party before the Supreme Court of the United States and other courts in cases of great public interest.

2. The Contractors' Association of Greater New York, Inc. (CAGNY) is a multi-employer association of the leading construction managers and general contractors in the Metropolitan New York area. CAGNY's members are responsible for the bulk of the high-rise

commercial and residential buildings erected in New York City. CAGNY represents its members' interests as they are affected by regulatory and other agencies.

3. Founded in 1946, the Texas Association of Builders is an affiliate of the National Association of Homebuilders and has thirty-one local home builders associations across Texas. With a membership of more than 10,000 and representing over 555,000 jobs and $36 billion of the Texas economy, the Texas Association of Builders plays a crucial role in providing housing for Texans by representing the residential construction, remodeling, and development industry. The Texas Association of Builders is dedicated to creating a positive business environment for the housing industry by addressing the housing issues of the people of Texas.

4. The Greater Houston Builders Association (GHBA) is a non-profit trade association that was chartered in 1941 to promote home ownership, foster free enterprise, and serve the common interests of the participants in the residential construction industry. It represents all aspects of the residential construction industry in the greater Houston metropolitan area. The GHBA has approximately 1,600 corporate, business, and professional members. Most of the largest homebuilders in America, as well as hundreds of small businesses and sole proprietorships who build from five to 50 homes a year, are active members of the GHBA.

B. Interest of the *Amici Curiae* in This Case.

The issues before the Commission include an issue of great importance – whether general contractors are subject to citation if they are considered "controlling" employers but have neither created nor exposed their employees to a violative condition. This issue is of vital interest to the *amici*, all of whom have many members who are general contractors and thus subject to citation as "controlling employers" under Commission precedent, such as *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976), and *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976).

II. ARGUMENT

A. Section 1910.12(a) Limits the Obligation To Comply with Part 1926 under the OSH Act to Protection of One's Own Employees.

1. *It Is Proper for the Commission to Address the Argument.*

The Commission has asked that the briefs address "the effect to be given to the Commission's longstanding precedent upholding the Secretary of Labor's practice of citing general contractors for violations committed by subcontractors." The Commission noted its decisions in *Grossman Steel* and *Anning-Johnson*.

Although the Commission's concern with *stare decisis* is proper, that principle bars reconsideration only of previously considered questions. As the Secretary has acknowledged in this case,[1] the Commission has never before considered the effect of § 1910.12(a) on so-called multi-employer liability. Cases are not precedent on a point that they did not consider.[2] Moreover, the Commission has also at least twice recently indicated that, in a proper case, *stare decisis* would not be an obstacle to consideration of this issue. In *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1112-13 (No. 97-1918, 2000), and in *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1725-26 n. 12 (No. 95-1449, 1999), the Commission declined to address this same issue solely because it had not been adequately briefed – not because it was foreclosed by precedent.[3] Certainly, the courts of appeals, which would no doubt reach the issue and consider it seriously,[4] should have the benefit of the Commission's discussion of the matter.

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[1] Secretary's Motion to Dismiss Counterclaim at 9 (Dec. 16, 2003) ("Motion to Dismiss").

[2] *E.g., Northwest Airlines, Inc.*, 8 BNA OSHC 1982, 1988 (No. 13649, 1980); *Artuso v. Hall,* 74 F.3d 68, 72 (5th Cir. 1996); *United States v. Doherty,* 969 F.2d 425, 428 (7th Cir.), *cert. denied*, 506 U.S. 1002 (1992).

[3] The Commission stated in *McDevitt*:

> .... Relying on this portion of the court's decision, as well as the fact that the scaffolding standards cited here are construction standards, McDevitt argues that

2. *The Secretary's View Is Ordinarily Entitled to Only As Much Weight as It Intrinsically Deserves. It is Not Entitled to* Chevron*-Level Deference. Inasmuch as § 1910.12(a) Is Clear on Its Face, the Secretary's View Here is Not Entitled to Weight at All.*

The Secretary may argue that under *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), her view of § 1910.12 is entitled to prevail if it is merely reasonable. A recent Supreme Court decision makes clear that such an argument would be incorrect. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court held that an agency interpretation not fashioned in rulemaking or formal adjudication, but in litigation, is not entitled to *Chevron*[5]-level deference – *i.e.*, that it prevails if it is merely reasonable. Under *Mead*, such a view is entitled to only as much as weight as the Commission believes, in its *de novo* examination of the interpretive issue, that it intrinsically deserves. *Mead* specifically spoke to the OSH Act, for it expressly characterized *CF&I Steel* as requiring only *Skidmore* weight: It stated that only "some weight" need be given to OSHA's "informal interpretations" and not the "the same deference as norms that derive from the exercise of ... delegated lawmaking powers." 533 U.S. at 234-35, citing *CF&I Steel,* 499 U.S. at 157. Hence, *Chevron*-level deference is inappropriate here.

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the cited standards "apply only to the employer [CPD], not to the general contractor for a subcontractor's employees."

The D.C. Circuit did not resolve this question in *Anthony Crane* because "the parties have not briefed this issue, nor has any court that has adopted the multi-employer doctrine explicitly considered it." *Id.* at 1307. *For the same reasons, we decline to resolve this argument here.* Neither party has concretely addressed the relationship between § 1910.12(a) and the doctrine in their briefs before the Commission. McDevitt merely quotes to the relevant language from *Anthony Crane* without any supporting analysis, while the Secretary does not address the argument at all. Under these circumstances, we do not decide this issue here. [Emphasis added.]

[4] *E.g., Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1307 (D.C. Cir. 1995), and *IBP, Inc. v. Herman*, 144 F.3d 861, 865-66 (D.C. Cir. 1998).

[5] *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

More importantly with respect to this case, the Commission owes the Secretary's views no attention whatever if § 1910.12(a) is clear on its face. *CF&I Steel*, 499 U.S. at 156-57; *Reich v. General Motors Corp.*, 89 F.3d 313 (6th Cir. 1996). This is certainly the case here.

3. *Section 1910.12(a) Controls the Resolution of This Issue.*

The standard cited here is 29 C.F.R. § 1926.451(g)(1)(vii), a provision in 29 C.F.R. Part 1926. Section 5(a)(2) of the Act states that employers must comply with "occupational safety and health *standards promulgated under this Act.*" (Emphasis added.) A standard as it is "promulgated under this Act" consists not merely of provisions imposing duties but also of scope and application provisions. Hence, the Commission has long held that an employer cannot be found in violation of § 5(a)(2) unless the employer violated the standard as defined by its scope and application provisions.[6]

This is especially true of § 1910.12(a). The standards in Part 1926 had not originally been adopted under the OSH Act but under the Construction Safety Act.[7] It was § 1910.12(a) that not only made the standards in Part 1926 "standards promulgated under [the OSH] Act" but stated *how* they would apply under the new statute. 36 Fed. Reg. 10466, 10467 (1971). In this respect, § 1910.12 is itself a "standard," for it sets out the coverage of and duties imposed by the construction standards. Hence, it has long been held that the application of Part 1926 under the OSH Act is governed by § 1910.12(a). *E.g., CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 717-18

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[6] *E.g., Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Gulf States Utilities Co.*, 12 BNA OSHC 1544 (No. 82-867, 1985).

[7] Formally, the "Contract Work Hours and Safety Standards Act of 1969," 40 U.S.C. §§ 327-333, but usually known as the "Construction Safety Act" or "CSA." The CSA standards were originally codified in 29 C.F.R. Part 1518. See 36 Fed. Reg. 7340 (April 17, 1971). Part 1518 was redesignated as Part 1926 on December 30, 1971. 36 Fed. Reg. 25,232 (1971). To avoid confusion, we refer to it as Part 1926 throughout.

(7th Cir. 1999); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 (1st Cir. 1993) ("*SGH*"); *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373 (6th Cir. 1987).

This conclusion would follow even if Section 5(a)(2) of the OSH Act lacked the phrase "promulgated under this Act." It is a core principle of the Fifth Amendment guarantee of due process of law that the government is bound by its own regulation, even if it deprives an official or agency of a statutory or constitutional power he or it would otherwise have. *United States v. Nixon*, 418 U.S. 683 (1974) ("So long as this regulation is extant it has the force of law"; president denied himself power over special prosecutor); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (until revised, Attorney General bound by regulation delegating decisional power to board).

4. *Section 1910.12(a) is Clear and Unambiguous.*

Section 1910.12(a) states in part:

> § 1910.12 Construction work.
> (a) *Standards*. The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards ... and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

Inasmuch as § 1926.451 prescribes no multi-employer rules of its own, the controlling provision here is the second sentence of § 1910.12(a), and specifically the phrase "each of his employees".

The plain meaning – indeed, the only possible meaning – of the phrase "his employees" in this sentence is that the compliance duty of an employer under Part 1926 pertains only to one's own employees. This meaning has been recognized without contradictory authority in two contexts – directly under the regulations themselves and under the General Duty Clause. As to

the regulations, the Fifth Circuit held in 1981 that former § 1910.13(a)[8] (now incorporated into § 1910.15(a)), which governed the coverage of the ship repair standards in Part 1915 and was identical in substance to and published simultaneously with § 1910.12, explicitly limits an employer's duty to protect only "his employees." *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 712 (5th Cir. 1981). The D.C. Circuit in *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1307 (D.C. Cir. 1995), noted that § 1910.12(a) "by its terms only applies to an employer's *own employees* ...." (Emphasis in the original.) The court observed that the phrase "his employees" "seemingly leav[es] little room" for liability for exposure of employees not one's own and that it is in "marked tension" with OSHA's reliance on "control." The same court later stated in *IBP, Inc. v. Herman*, 144 F.3d 861, 865-66 (D.C. Cir. 1998), that, "We see tension between the Secretary's multi-employer theory and the language of the statute and regulations ...." The First Circuit has similarly read § 1910.12(a) as requiring an employer to provide safety "for *its own* employees." *SGH*, 3 F.3d at 5 (emphasis in the original).

As to the General Duty Clause, the Commission,[9] the courts[10] and the Secretary[11] have long agreed that the identical phrase in the General Duty Clause means that employers owe a

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[8] Section 1910.13(a) read as follows:

> § 1910.13 Ship repairing.
> (a) *Adoption and extension of established safety and health standards for ship repairing.* The standards prescribed by Part 1501 [later, Part 1915] of this title and in effect on April 28, 1971, are adopted as occupational safety or health standards under section 6(a) of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in ship repair or a related employment. Each employer shall protect the employment and places of employment of each of his employees engaged in ship repair or a related employment, by complying with the appropriate standards prescribed by this paragraph.

[9] *Access Equipment*, 18 BNA OSHC at 1724; *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1866 n.14 (No. 89-1300, 1992), *aff'd*, 3 F.3d 1 (1st Cir. 1993); *Frye's Tank Serv., Inc.*,

duty to only their own employees. In addition, the use in § 1910.12(a) of key phrases peculiar to the General Duty Clause ("each of his employees" and "employment and a place of employment") shows that the drafters of § 1910.12 used the General Duty Clause as a drafting model. Accordingly, the two provisions must be construed alike.

5. *The Regulatory History and Background of § 1910.12(a) Compel the Conclusion That It Means What It Says.*

The regulatory background of § 1910.12(a) makes clear that the second sentence was adopted to address an important difference between the OSH Act and the CSA. Unlike the OSH Act, which was directed at "employers," "employees" and "employment," the CSA was a government contracts statute directed to "contractors," "subcontractors," "laborers," "mechanics," and "contracts."[12] The drafters of § 1910.12 were intimately familiar with Part

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4 BNA OSHC 1515, 1517 (No. 4648, 1976), *aff'd sub nom. Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126 (10th Cir. 1979).

[10] *E.g.*, *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Cir. 1999) ("duty under [§ 5](a)(1) flows only to its employees, as indicated by the language specifically limiting the employer's obligation to maintain a hazard-free workplace to 'his employees.'"); *Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999) ("[T]he words 'his employees' indicate that the duty imposed by 654(a)(1) is limited to an employer's own employees.").

[11] OSHA FIELD INSPECTION REFERENCE MANUAL § III.C.2.c(2)(a)(2) (1994) (Attachment A) states: "The employees exposed to the Section 5(a)(1) hazard must be the employees of the cited employer." The Secretary has recently reiterated this view. See Letter to James H. Brown from Russell B. Swanson (July 25, 2003) (Attachment B), *relying upon* OSHA INSTRUCTION CPL 2-00.124, MULTI-EMPLOYER CITATION POLICY (Dec. 10, 1999) ("only exposing employers can be cited for General Duty Clause violations"). The Secretary so agreed in this case. See Motion to Dismiss at 4 n.1 (§ 5(a)(1) "limits employer liability to hazards to which its own employees are exposed ...").

[12] Section 107(a) of the CSA stated:

> It shall be a condition of each contract which is entered into under legislation subject to Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267), and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or

1926, for Parts 1910 and 1926 were being drafted at the same time.[13] When the Labor Department adopted regulations under the CSA, it included § 1926.16, which expressly imposed liability outside the employment relationship. Hence, the Labor Department drafters believed that the contract-based language of the CSA permitted regulations imposing safety duties that ran beyond an employer's own employees. Yet, only a few weeks later, the drafters adopted a series of regulations beginning with § 1910.12, all of which imposed duties only with respect to one's employees.[14]

The contrast between the language of § 1910.12 and § 1926.16 is so striking that the only one conclusion can be drawn: In contrast to the CSA, the drafters saw that the OSH Act's repeated and prominent references to "employer," "employee," "employment", "place of employment," *etc.*, confined liability to the employment relationship, and they drafted § 1910.12 accordingly. Later, the drafters made this even clearer by adopting paragraph (c) of § 1910.12[15] (37 Fed. Reg. 3512, 3513 (Feb. 17, 1972)) and § 1910.11 (37 Fed. Reg. 26008 (Dec. 7, 1972)), which stated that regulations reflecting CSA coverage rules do not apply under the OSH Act. In sum, the drafters adopted § 1910.12(a) to indicate that Part 1926 would not impose under the OSH Act the extra-employment liability that was imposed under the CSA.

> safety, as determined under construction safety and health standards promulgated by the Secretary by regulation based on proceedings pursuant to section 553 of title 5, United States Code, provided that such proceedings include a hearing of the nature authorized by said section. In formulating such standards, the Secretary shall consult with the Advisory Committee created by subsection (e).

[13] Part 1926 (originally Part 1518) was proposed on Feb. 2, 1971 at 36 Fed. Reg. 1802, and published in final form on April 17, 1971 at 36 Fed. Reg. 7340. Part 1910 was published on May 29, 1971 at 36 Fed. Reg. 10466. Soon thereafter, the Labor Department even amended the two parts in the same document. 37 Fed. Reg. 3512, 3513 (Feb. 17, 1972).

[14] 36 Fed. Reg. 10466, 10467-69 (1971), adopting 29 C.F.R. §§ 1910.12-1910.16.

6. *OSHA's Position Is Unreasonable. It Results in a Far-Reaching, Vague, Burdensome and Disruptive Policy Without Rulemaking.*

There are strong reasons of national and regulatory policy why the Commission should follow § 1910.12 as written. If it did, the Secretary would be compelled to come to grips with the problems inherent in the controlling-employer aspect of the multi-employer doctrine and to resolve them in rulemaking.

The controlling-employer aspect of the multi-employer doctrine is onerous, vague, intrusive, unworkable, and, contrary to § 4(b)(4) of the Act, disruptive of state tort law. It requires general contractors to be the policemen of other employers even when their own craft workers are off the jobsite or they have none.[16] It requires them to make sure that subcontractors train, oversee and discipline their own employees.[17] It forces them to ensure the safety of equipment that their own employees will never use and to oversee the safety of tasks in which they do not participate.[18] And it imposes directly on general contractors large and frequently unbearable costs and burdens.

Take, for example, the home building industry, which *amicus* NAHB knows well.[19] That industry has many small firms that operate over limited geographic areas. The vast majority of NAHB single-family home builders are very small. About 81 percent of them build fewer than 25 homes per year; about 61 percent build ten homes or fewer. Competitive pressures to hold

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[15] See § 1910.12(c): "This section does not incorporate subparts A and B of part 1926 of this chapter. Subparts A and B have pertinence only to the application of" the CSA.

[16] *E.g., Bertrand Goldberg Assocs.*, 4 BNA OSHC 1587 (No. 1165, 1976).

[17] See *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 820 (6th Cir. 1998) (general contractor "must apprise itself as to what safety efforts the subcontractor has made"), citing *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1900 n.3 (No. 89-1394, 1992).

[18] *E.g., McDevitt*, 19 BNA OSHC at 1108-09 (lead opinion) and 1113 (dissenting opinion).

down costs, and thus prices to customers, force them to be lean in capital and labor. These pressures, in turn, force them to rely heavily on specialized subcontractors to perform much or even all of the actual labor. Work typically performed by subcontractors includes excavation, framing, roofing, plumbing, electrical, tile, finish carpentry, masonry, painting, dry wall, and paving. During the past 40 years, this trend has significantly accelerated. In 2003, two-thirds of home builders subcontracted 75 percent or more of the construction costs, whereas in 1959 only 31 percent of them subcontracted that percentage. About 19 percent of the builders subcontracted less than 25 percent of their construction costs in 1959 compared to only 4 percent of builders in 2003. In 2002, 26 subcontractors were used on an average home, compared to 23 in 1999.[20]

Because their volume of work is unpredictable and seasonal, home builders must keep their managerial and laboring workforces small. They *cannot*, therefore, maintain on their payroll the number of managers that the controlling-employer doctrine requires for supervision of their subcontractors' safety practices. It is common for a small builder with no craft employees (*i.e.*, laboring employees) of his own to have only a few (sometimes no more than one or two) managerial employees, who must travel back and forth among about four sites scattered around a 50 square mile area. In addition, subcontractors and their employees work off and on at the typical home building site; the general contractor often has little control over and less knowledge of when they might be working on a given site. It is not possible, therefore, for home builders to comply with the requirement of the controlling employer aspect of the doctrine that it

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[19] OSHA has acknowledged that, in a rulemaking, it "must respond rationally to ... differences among ... industry sectors." 57 Fed. Reg. 6356, 6399 (1992) (PSM preamble), citing *Building and Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1272-73 (D.C. Cir. 1988).)

[20] The information in this paragraph is from Gopal Ahluwalia, "Subcontracting and Channels of Distribution," HOUSING ECONOMICS (May 2003) (Attachment C).

supervise all subcontractors.[21] Moreover, the general contractors' managerial employees frequently lack the expertise to oversee specialty contractors. While the builder knows *something* about every specialized contractor's work, the builder rarely knows enough to completely oversee all of the work or to satisfy himself that the contractor is diligently implementing its safety program.

These problems are exacerbated by the vagueness of the controlling-employer aspect of the current multi-employer doctrine, which gives general contractors no clear idea of how much oversight is enough. The policy tells them only that they must exercise "reasonable oversight" – which, with all respect, provides them with no useful guidance and permits unpredictable second-guessing by OSHA and the Commission. As former Commissioner Visscher noted in *McDevitt*, 19 BNA OSHC at 1115: "The 'duty to supervise' ... lacks any definition as to its scope. ... W[as the general contractor] to walk the worksite more frequently? Hire separate safety inspectors? Train [subcontractor] employees on how to erect scaffolding? Assume permanent responsibility for [the subcontractor's] OSHA compliance?" The vagaries of the controlling-employer aspect of the multi-employer doctrine impose an unfair disadvantage on general contractors who try to oversee subcontractors, for competitors can underbid them by taking advantage of the aspect's lack of clarity and allocate less money to such oversight.

The controlling-employer aspect of the multi-employer doctrine has also had an unexpected and unlawful effect on an important feature of state tort law governing construction site safety: It has destroyed the distinction drawn by that law between a general contractor's general supervisory power to ensure completion of the work on time and according to contract

[21] See 57 Fed. Reg. at 6399 (standard is economically infeasible if it "threaten[s] massive dislocation" in an industry, citing *American Iron and Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991)).

specifications – the exercise of which would not expose one to tort liability – and control of the *manner* by which the work was to be accomplished – which would expose one to liability.[22] The controlling-employer aspect has left this distinction with no room to operate, for it forces all general contractors to oversee the safety efforts of subcontractors and thus be exposed to substantial tort liability should employees of their subcontractors be injured.[23] This destruction of the fabric of state tort law violates the command of § 4(b)(4) that the Act not "enlarge" or "affect in any ... manner" the common law or statutory ... duties, or liabilities of employers ... under any law with respect to injuries ....."[24]

Given the express wording of § 1910.12(a), the Commission should not allow OSHA to avoid rulemaking on such issues. Rulemaking forces agencies to deal with complex issues on the basis of a broad factual record and in a way that is accountable to elected officials. The requirement to publish a proposed rule for public comment forces unnoticed complexities to the surface and enhances a rule's legitimacy. *See generally Chamber of Commerce v. OSHA,* 636 F.2d 464, 470-71 (D.C. Cir. 1980). Policy-makers must then scrutinize any proposed rule closely in light of these comments, for it must not only meet the OSH Act's criteria of feasibility

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[22] *See, e.g.,* in addition to the cases cited in nn. 23 & 30, RESTATEMENT SECOND (TORTS), § 414 cmt. c (1965); *Indian River Foods, Inc. v. Braswell*, 660 So.2d 1093, 1097-98 (Fla. App. 1995) (owner not liable unless retains or exercises control over the way that the work is done), *reh'g denied, review denied*, 672 So.2d 542.

[23] *E.g., Lawson-Avila Constr., Inc. v. Stoutamire,* 791 S.W.2d 584, 597 (Tex.App. 1990). There, a general contractor was found liable and grossly negligent for not "conduct[ing] job site inspections to observe whether or not the subcontractors working under his control are, in fact, performing as they should in accordance with safety requirements." The source of the requirement was stated to be "OSHA."

[24] Section 4(b)(4) states:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of

and significant risk,[25] but must be supported by evidence sufficient to carry a burden of proof.[26] Rules must then survive the demanding review processes imposed by the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 et seq. ("Reg-Flex Act"), and the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. § 801 *et seq.* ("SBREFA"), which force agencies to be realistic and balanced, and to base rules on facts rather than guesswork.[27] Rules affecting construction work must be considered by the National Advisory Committee on Construction Safety and Health. [28] Allowing OSHA to develop in litigation rules as important as those governing multi-employer problems in construction work undermines this process and evades congressional-mandated processes governing the setting of important national policy.

> employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

[25] The requirement of § 3(8) that standards be "reasonably necessary and appropriate" means that compliance must be technologically and economically feasible (*Am. Textile Mfgs. Inst. v. Donovan,* 452 U.S. 490, 504 (1981)) and regulate a significant risk. *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980).

[26] *Atlantic & Gulf Stevedores, Inc. v. OSHRC,* 534 F.2d 541, 551 (3d Cir. 1976) (OSHA has "affirmative burden to demonstrate the reasonableness of" a standard).

[27] For example, OSHA submitted to the Office of Management and Budget under the Paperwork Reduction Act a "Supporting Statement for the Information-Collection Requirements of the Chromium (VI) Standard for General Industry, Maritime, and Construction (29 CFR § 1910.1026, § 1915.1026, and § 1926.1126) (October 2004) (Attachment D), which stated in part:

> In responding to the Small Business Regulatory Enforcement and Fairness Act (SBRFA) panel, the Agency changed its regulatory approach to the Maritime and Construction Industries. For these industries, OSHA will not require exposure monitoring of any kind; will not have an action level; will require medical surveillance only for person with signs or symptoms; and will not require regulated areas. However, employers must still meet the PEL with engineering controls and work practices.

[28] See § 1911.10(a); *National Constructors Ass'n v. Marshall*, 581 F.2d 960 (D.C. Cir. 1978).

The rulemaking on the lockout standard exemplifies the kind of analysis of multi-employer issues that rulemaking demands. OSHA proposed and employers commented specifically on an early version of that standard's multi-employer provisions, § 1910.147(f)(2)(i)-(ii). *See* 54 Fed. Reg. 36644, 36681 (1989). OSHA's regulatory impact analysis made "estimates of the hours and costs associated with" those provisions and found that they would range from 44,400 hours and $710,400 annually for small manufacturing firms to 75,600 hours and $1,209,600 annually for large ones, assuming it would take 15 seconds per lockout event to notify employees and 30 seconds to notify outside contractors, and that outside contractors were involved in 10 percent of all lockout events. OSHA Office of Regulatory Analysis, *Regulatory Impact and Regulatory Flexibility Analysis of 29 C.F.R. § 1910.147 (The Control of Hazardous Energy Sources – Lockout/Tagout)*, pp. VI–39-40 (August 1989) ("the RIA") (Exhibit 71 in OSHA Rulemaking Docket No. S-012A) (Attachment E).

Multi-employer provisions in other standards have similarly been adopted only after OSHA conducted detailed rulemakings that examined them in depth. *See, e.g.*, the preamble to confined spaces standard, 58 Fed. Reg. 4462, 4491-94 (1993) (multi-employer provisions "rewritten and reorganized" in light of comments). *See also* the discussions back and forth between OSHA and OMB about the multi-employer provision of the hazard communication standard, § 1910.1200(e)(2), at 52 Fed. Reg. 31852, 31865 (1987) (first publishing provision); 52 Fed. Reg. 46075, 46077 (1987) (OMB letter disapproving of provision); and 53 Fed. Reg. 29822, 29842-45 (1988) (proposal discussing OMB objections at length and noting consideration by construction advisory committee).

In sum, the Commission should follow § 1910.12(a) as it is written and require any different rules to be adopted in rulemaking.

B. Any Liability Outside the Employment Relationship Must Be Limited To The Circumstances Identified By The Second Circuit in *Underhill.*

Alternatively, *amici* submit that the Commission should re-examine its case law and confine any extra-employment liability on construction sites to employers who physically create a violative condition while engaged in a joint undertaking with another employer. This would conform the multi-employer doctrine to its source, the Second-Circuit's decision in *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032 (2d Cir. 1975), the case on which, at bottom, any multi-employer liability theory rests. Such a holding would resolve this case, significantly reduce the conflict between Commission case law and § 1910.12(a), eliminate the inconsistency between the control aspect and § 4(b)(4), alleviate a great many of the difficulties faced by construction employers trying to cope with multi-employer liability, and give OSHA an incentive to hold rulemakings on this issue.

1. *It Is Proper for the Commission to Address the Argument.*

Re-visiting the controlling-employer aspect of the Commission's multi-employer case law would be proper. As the Commission noted in its briefing order, its case law on this issue was announced in *Grossman Steel* and *Anning-Johnson*. Neither case, however, involved either a controlling or even a creating employer, but only an exposing one – specifically a non-creating, non-controlling subcontractor. The controlling-employer aspect of the multi-employer doctrine was announced there in dictum and in the absence of a concrete factual setting or record from which the Commission could judge its implications and effects, and very likely without briefing on that precise question. *Amici* intend no criticism here; in the mid-1970's the Commission was faced with difficult problems concerning multi-employer worksites, and it concluded that it needed to speak broadly rather than legislate interstitially from case to case. The Commission's later decision in *Access Equipment*, 18 BNA OSHC at 1723-1725, concerned only a creating

employer, while *McDevitt*, 19 BNA OSHC at 1109-1112, which involved a controlling employer, did not re-examine the doctrine. It is, therefore, entirely proper for the Commission to, after a time, step back and re-examine the controlling-employer aspect in the light of experience, in a concrete factual setting, and with briefing that focuses sharply on the issue.

The Commission also has the interpretive freedom to examine this issue afresh, for as discussed in Part II.C.2 on p. 27 below, and as the Commission has at least twice held, its consideration of statutory issues is *de novo*.

2. *The Commission Should Limit Multi-Employer Liability to the Circumstances in Underhill.*

Although the Commission's discussion of the so-called "controlling" employer in *Grossman Steel* did not expressly cite any authority, it is clear that it principally relied on *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032 (2d Cir. 1975). But *Underhill* was extremely limited, and imposed no duty to supervise other employers. It concerned only a creating subcontractor, one who placed materials near floor edges above employees of other employers working on lower levels. The Second Circuit held the employer liable because it both created the condition *and* controlled the area in which it occurred:

> *[I]t was Dic-Underhill that created the hazards* and maintained the area in which they were located. It was an employer on a construction site, where there are generally a number of employers and employees. It had control over the areas in which the hazards were located and the duty to maintain those areas. *Necessarily it must be responsible for creation of a hazard.*

513 F.2d at 1039 (footnote omitted; emphasis added). *Accord, United States v. MYR Group, Inc.*, 361 F.3d 364, 366-67 (7th Cir. 2004) (approving liability for creating employer).

The other apparent foundation of *Grossman Steel* was the Seventh Circuit's decision in *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975). But that decision concerned only non-controlling, non-creating subcontractors and, with respect to general contractors, had

only the following tentative dictum: "[W]e are not at all sure that a general contractor, who has no employees of his own exposed to a cited condition is necessarily excused from liability under the Act." This said nothing about *when* a general contractor might be liable. *Grossman Steel*'s principal rationale for the multi-employer doctrine – that "a hazard created by one employer can foreseeably affect the safety of employees of other employers" (4 BNA OSHC at 1188) – justifies the imposition of liability on creating, not controlling, employers. Even the "multi-employer citation policy" in OSHA's first COMPLIANCE OPERATIONS MANUAL (Nov. 15, 1971) covered only creating and exposing, not controlling, employers.[29]

The Commission's *Anning-Johnson* decision (4 BNA OSHC at 1199 n.21) likewise stated, without any factual support or discussion, that "typically a general contractor ... possesses sufficient control over the entire worksite ... to take the necessary steps to assure

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[29] The manual stated at Chap. X, ¶ E, p. X-7:

> E. Establishment Operated by Employee of One Employer While Employees of a Second Employer Are Also Working in That Establishment
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> 1. Generally, each employer is responsible for the working conditions of his own employees. Difficult matters of judgment in citing will arise where employees of different employers are working in the same establishment. For example, employees of an employer who operates an establishment may be present, along with employees of a second employer (or contractor) who may be working in or on the same establishment, such as employees whose employer has contracted with the operating employer to perform such work as remodeling, general maintenance, or special services.
>
> 2. The following guidelines will be helpful in determining which employer to cite. If a question remains in any case, contact the Regional Administrator for guidance as to particular situations.
>
> a. If an employer creates a violating condition and that condition affects his employees or another employer's employees, or both, then the employer who created the condition will be cited. Two or more employers who create a violating condition may each be cited for the violation.
>
> b. An employer, although not creating the hazard, may be cited if he knew or reasonably should have know of the hazard before permitting his employees to work in the hazardous area or with hazardous equipment.

compliance." The Commission appeared to rely on *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451 (10th Cir. 1976), but that case concerned (among other things) an exposing employer. The same is true of the subsequent decisions in *Knutson Constr. Co.*, 4 BNA OSHC 1759 (No. 765, 1976), *aff'd,* 566 F.2d 596 (8th Cir. 1977), where the Commission found "that Knutson's employees had access to the zone of danger underneath the scaffold," and *Beatty Equipment Leasing, Inc.*, 4 BNA OSHC 1211 (No. 3901, 1976), *aff'd*, 577 F.2d 534, 536 (9th Cir. 1978), which concerned a creating employer.

More importantly, none of the Commission's foundation opinions in this area, or its later opinions, provide legal or policy support for broadly requiring one employer to police the conduct of another. The Commission never explained how the limited language of *Underhill* could justify the imposition of a duty on general contractors to seek out and prevent violations by subcontractors. Specifically, the Commission never explained how it could dispense with the element of creation that was essential to *Underhill*, or transmute control over a particular geographical work *area* into control over the operations of other employers.[30] The Commission cited no source in the language of the Act that authorized it to impose on one entity a duty of supervision over another.[31] The Commission also appeared to be unaware that the law had drawn a crucial distinction pertaining to general contractors: The existence of a general

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[30] State tort law distinguishes sharply between these situations. *E.g., Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997) (general contractor not liable unless he has retained a contractual right of control over manner of subcontractor's work); *Halmick v. SBC Corporate Servs., Inc.*, 832 S.W.2d 925, 928-29 (Mo.App. 1992) (owner's control over property not same as control over operations; no liability unless he retains right of operational control).

[31] In the era when *Grossman Steel* and *Anning-Johnson* were issued, the Supreme Court had not yet begun to emphasize strongly the importance of basing decisions on statutory language. *See, e.g.,* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VANDERBILT L. REV. 1 (2005) (forthcoming) (noting sharp increase in cases emphasizing tie to statutory language from Burger to Rehnquist Court), *available at* Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=534982>.

supervisory power in the general contractor to ensure completion of the work on time and according to contract specifications did not mean that the general contractor thereby controlled the *manner* by which the work was to be accomplished.[32] The Commission was not yet aware that a control doctrine forcing general contractors to control the manner of work would likely violate § 4(b)(4) of the Act. And the Commission never explained or justified its implicit assumption that all general contractors have the resources to police all subcontractors.

Amici note also that the Commission has never been able to prescribe – and likely never would be able to sufficiently prescribe through case law – clear and coherent rules of conduct that general contractors can understand and follow. Construction sites are so varied and dynamic that any attempt to prescribe detailed rules of conduct would fail or be unmanageably prolix. The current rule – which amounts to a prescription for "reasonable" oversight – is so vague as to leave general contractors at sea, at the mercy of unscrupulous competitors, and open to unpredictable second-guessing by zealous compliance officers, particularly in the emotional aftermath of an accident. In many segments of the construction industry, the costs of a duty to supervise the safety programs of subcontractors cannot be borne. The economic waste imposed by the doctrine is immense. General contractors ostensibly must learn their subcontractors' business, duplicate much of their expertise, and check on things that the subcontractor is already required to perform and check on. In the end, inasmuch as general contractors are necessarily more remote from the work than their subcontractors, it is doubtful that the controlling-employer aspect has had anywhere near enough of a salutary effect on employee safety to justify its immense and unpredictable costs.

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[32] See n. 22 and accompanying text on p. 13 above.

C. THE OSH ACT DOES NOT IMPOSE LIABILITY OUTSIDE THE EMPLOYMENT RELATIONSHIP.

If the Commission does not vacate this citation item under § 1910.12(a), or confine liability to creating employers, then *amici* respectfully submit that § 5(a)(2) of the OSH Act does not impose liability for violations to which one's own employees are not exposed.[33] *Amici* urge the Commission to join with the Fifth Circuit, the only court to have closely analyzed the statutory language and legislative history,[34] and hold that the Act does not impose such liability. Not only do the Act's words and legislative history provide no source for that duty but, on the contrary, they show clearly that Congress intended to confine liability to the employment relationship.

Amici appreciate the ramifications of this argument. Among them is that parts of some important standards imposing extra-employment liability would be invalid. But some clearly predictable and manageable bounds must be placed on the multi-employer liability doctrine. As it now stands, the Commission's case law on the controlling-employer aspect imposes vague, wasteful and unmanageable duties, upsets a broad array of established working relationships, and has had unintended and disruptive legal consequences.

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[33] The Act makes repeated references to employees being exposed to or affected by violations. See the various forms of the words "exposed" or "affected" used in §§ 6(a), 6(b)(4), 6(b)(5), 6(b)(7), 6(c)(1), 6(d), 8(c), 10(c), 13(c), 16, 20(a)(3), (5)-(7). *See also Anthony Crane*, 70 F.3d at 1303 (discussing exposure issue).

[34] *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 712 (5th Cir. 1981); *Barrera v. E.I. duPont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. 1981) (OSH Act creates duties "only between employers and their employees," does not protect employees of business invitees); *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 321 (5th Cir. 1979); *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975) (per curiam).

1. *The Language And Legislative History Of The OSH Act Show That Congress Intended To Not Impose Liability Outside the Employment Relationship.*

Nothing in the words or legislative history of the OSH Act even suggests that one employer may be held responsible for conditions to which his own employees are not exposed.[35] On the contrary, the language of the OSH Act and its legislative history forcefully demonstrate that Congress intended to not impose such liability. Thus:

- Section 5(a)(2) uses the word "employer." This can only mean that liability is confined to the employment relationship for, just as it is meaningless to speak of one as a "parent" except in regard to his or her own child, it is meaningless to speak of a person as an "employer" except in regard to his own employee. As one court has observed:

> "[E]mployer" and "employee" are correlative terms. Each implies the existence of the other, just as "parent" implies the existence of a "child," and "husband" implies the existence of a "wife." A law that defines the rights and duties of husbands and wives has reference to the obligations of each husband to his own wife, not to the wife of another. Similarly, the duty of an employer to employees clearly means to his own employees and not to those of some other employer, unless the language permits no other conclusion.

Horn v. Shirley, 441 S.W.2d 468, 471 (Ark. 1969). Indeed, § 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees ..." while § 3(6) defines "employee" as "an employee of an employer who is employed in a business of ***his*** employer which affects commerce." (Emphasis added.) These definitions together mean that an "employer" within the meaning of § 5(a)(2) must be defined in reference to "his" employees, not

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[35] *See* John Zebrowski, Note, *OSHA: Developing Outlines of Liability In Multi-Employer Situations,* 62 GEO. L.J. 1483, 1485 (1974) ("nothing in the legislative history or in the Act itself gives guidance" on how standards "should apply to multi-employer situations"); *Horn v. C.L. Osborn Contracting Co.,* 423 F. Supp. 801, 808 (M.D. Ga. 1976) ("No legislative history nor statutory provision has been cited by the Plaintiff to support the proposition that Congress intended to create a duty on behalf of the employer with respect to persons other than its own employees"), *aff'd in relevant part, rev'd on another ground,* 591 F.2d 318, 321 (5th Cir. 1979).

that of another entity. *Compare* the National Labor Relations Act, 29 U.S.C. § 152(3), which states that the definition of "employee" generally "shall not be limited to the employees of a particular employer ...."[36]

- The two variance provisions of the OSH Act provide a clear window into what Congress saw as the duty imposed by § 5(a)(2). The permanent and temporary variance provisions in §§ 6(d) and 6(b)(6)(A) permit an employer to depart from a standard's literal words if he will provide safe workplaces "to *his* employees" or "safeguard *his* employees." (Emphasis added.) Thus, the only employers who can obtain a variance are those whose *own* employees are exposed. This necessarily means that Congress contemplated that only such an employer would *need* a variance. *See Melerine,* 659 F.2d at 712 (noting these provisions).

- Section 6(b)(4) requires that a standard's delay in effective date be long enough to permit employers to familiarize themselves "and *their* employees" with the new standard. (Emphasis added.)

- Section 8(e) requires OSHA to afford a right to accompany the inspector to representatives of the employer and "*his* employees."

The legislative history. The legislative history has no passages suggesting extra-employment liability.[37] The Senate committee that principally drafted the OSH Act stated that the duty imposed by § 5(b) of the OSH Act upon employees to obey standards would not

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[36] 29 U.S.C. § 152(3) states in part:

> § 152. Definitions
> When used in this subchapter--
>
> * * *
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise ....

[37] *Amici* conducted a page-by-page search of the legislative history.

diminish "the employer's responsibility to assure compliance by *his own* employees." S. REP. NO. 1282, 91ST CONG., 2D SESS. 10 (1970) ("Senate Report"), *reprinted in* SENATE SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong., 1st Sess. 150 (Comm. Print 1971) ("Leg. Hist.") (emphasis added). The Committee stated that research and training programs provided by the Act would help commit employees to the safety "efforts of *their* employers." *Id.* (emphasis added). The OSH Act's co-drafter, Representative Steiger,[38] described his substitute bill, which the House passed, 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"); S. Rep. at 10, Leg. Hist. at 150 ("affected employees ... their employers"; S. Rep. at 11, Leg. Hist. at 151 ("employees ... their own places of employment"); H.R. Rep. No. 1291, 91st Cong., 2d Sess. 19 (1970), *reprinted in* Leg. Hist. at 831, 849 ("his employees" protected by variance provision). There are no contrary passages.

Early implementation. OSHA's early implementation of the OSH Act evinced its understanding that Congress did not intend to impose extra-employment liability. As noted above, when OSHA in 1971 adopted by reference "established federal standards" governing construction and maritime work originally adopted under other federal statutes, it wrote scope provisions limiting their reach under the OSH Act to protection of one's own employees. See 36 Fed. Reg. 10466, 10467-69 (1971), adopting 29 C.F.R. §§ 1910.12-1910.16. These scope provisions bore an unmistakable resemblance to the "his employees" language of the OSH Act's

[38] The OSH Act is popularly known as the "Williams-Steiger Occupational Safety and Health Act of 1970." POPULAR NAMES ACT TABLE, 29 U.S.C.A. p. xxii; title of 29 C.F.R. Part 1975 (2004).

General Duty Clause.[39] OSHA's early multi-employer citation policy was soon changed by the FIELD OPERATIONS MANUAL (May 1974) to cover only exposing employers.[40] Similarly, the Commission also appreciated early Congress's intent on this issue. In *Martin Iron Works, Inc.*, 2 BNA OSHC 1063 (No. 606, 1974), the Commission held that an employer could not be held liable for violations of standards to which his own employees were not exposed.[41]

In sum, there is literally nothing in the Act or its legislative history that contains the slightest support for the imposition of liability outside the employment relationship. On the contrary, all indications are that Congress intended to confine liability to the employment relationship. The statute is not silent on this issue. The words "employer," "employee," "employment", and "place of employment" speak forcefully to it.[42] That is why the D.C. Circuit in *IBP* saw "tension" between the control theory and "the language of the statute."

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[39] Even in later rulemakings, OSHA agreed or implied that it lacks the authority to impose extra-employment liability. Thus, in 1990 OSHA decided to not extend liability for construction site safety to engineers, stating in part that "OSHA observes that the Agency's jurisdiction is based on the employer/employee relationship." 55 Fed. Reg. 42306, 42311-12 (1990). In 1986, OSHA told the D.C. Circuit that it lacked the authority to impose duties on building owners, remarking that they are "outside the domain of the OSH Act." OSHA Brief at 96 in *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1278 (D.C. Cir 1988) (remanding issue). (On remand, OSHA stated that it had authority over building owners, but it cited no statutory source. 59 Fed. Reg. 40964, 41013 col. 3 (1994).)

[40] OSHA FIELD OPERATIONS MANUAL Chap. X, ¶ F.1.b(4) (May 1974) (Attachment F): "An employer will not be cited if his employees are not exposed or potentially exposed to an unsafe or unhealthful condition – even if that employer created the condition."

[41] *See also Hawkins Constr. Co.*, 1 BNA OSHC 1761 (No. 949, 1974); *Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (No. 504, 1973), *aff'd in relevant part, vacated in part on another ground*, 504 F.2d 1255 (4th Cir. 1974).

[42] Even if the Secretary should claim that the statute is silent, silence alone does not make for an ambiguity. *See, e.g., Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150 (D.C. Cir. 1996) (rejecting EPA's argument "that, since section 6945(c) is silent as to its application to Indian tribes, the statute is 'ambiguous'"); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power."); *see also American Bus Assoc. v. Slater*, 231 F.3d 1 (D.C. Cir. 2000) (Sentelle, J., concurring).

Amici acknowledge that there is a line of commonly cited cases to the contrary. In addition to *Underhill,* these include *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir. 1977); *Beatty Equipment Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534, 536 (9th Cir. 1978; *Universal Constr. Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); and *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998). *See also Access Equipment*, 18 BNA OSHC at 1723-1725.

At their core, these cases did little more than observe that § 5(a)(2) – unlike § 5(a)(1) – does not use the phrase "his employees" when it commands each "employer" to "comply" with occupational safety and health standards. But this contrast does not answer crucial questions, such as, which "employer" must comply? When? What does "comply" mean? Not to create violative conditions? To supervise other employers?

As to which employer must comply and when, the word "employer" and the other employment-based provisions of the Act point to a clear congressional intent: The employer whose employees are affected by the violation is the one who must comply. Any other answer ignores the clear employment-based terminology of the Act, including the word "employer" in § 5(a)(2). Tellingly, none of these decisions explained why Congress used employment-based terminology, and none identified a source in the statute's language or legislative history for extra-employment liability. An interpretation to be legitimate must rest on *some* source in the language of the statute. *E.g., Conoco, Inc. v. FERC,* 90 F.3d 536, 552-53 (D.C. Cir. 1996), *cert. denied,* 519 U.S. 1142 (1997).

As to whether the word "comply" can be stretched to mean that one employer must supervise another, the much-cited contrast in wording in §§ 5(a)(1) and (2) gains the Secretary no traction here. The only relevant difference between those provisions is the phrase "his employees" in § 5(a)(1). Its absence from § 5(a)(2) has given rise to the notion that the duty to

"comply" in § 5(a)(2) requires an employer to not *create* a violative condition regardless of whether one's own employees are exposed (as in *Underhill* and *Access Equipment*). *But this difference in wording could not justify a control doctrine.* Nothing in the difference in wording or any other part of the Act supports the imposition of a duty on one employer to supervise the conduct of another. All that § 5(a)(2) says is that an employer must "comply" with "standards" – nothing else. Any control test thus falls far outside the range of "available ambiguity" and is impermissible. *E.g.*, *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) (no deference because agency interpretation "has clearly exceeded the scope of available ambiguity"); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328 (1994) (no deference because the agency's interpretation "goes far beyond whatever ambiguity [the statute] contains").

2. *On Issues of Statutory Interpretation, the Commission Should State Firmly That It Owes the Secretary No Deference at All.*

The Secretary may claim that, under *CF&I Steel*, the OSH Act is ambiguous on this issue and that her views prevail if they are merely reasonable. First, as noted on p. 4 above, inasmuch as the Secretary did not fashion her interpretation in a rulemaking or a formal adjudication, but in litigation, *Mead* requires that her interpretation not be accorded *Chevron*-level deference. Under *Mead*, her interpretation must instead be given only to as much as weight as the Commission believes, in its *de novo* examination of the interpretive issue, that it intrinsically deserves. As we showed above, the Court in *Mead* pointedly indicates that this refinement of its deference doctrine applied to *CF&I Steel*.

More fundamentally, the Commission owes the Secretary no deference or weight whatsoever on issues of statutory construction. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *Amici* urge the Commission to not only adhere to this precedent, but to explain clearly to the various courts of appeals why it does not

defer to the Secretary on statutory questions. If the Commission does not clearly and firmly defend its intended role under the Act, the courts of appeals will continue to pay no attention to employers or *amici* who do, and will continue to fail to closely analyze whether *CF&I Steel* is apposite to questions of statutory construction. They will, by applying *CF&I Steel* to such questions, implicitly force the Commission to defer to the Secretary on questions of statutory construction, and ultimately destroy this important part of the Commission's intended role under the Act. For these reasons, the Commission should expressly reject the argument and explain its reasoning in detail.

At bottom, the Secretary's argument rests on *CF&I Steel*. But as the Commission has recognized, that decision says nothing about statutory construction. The Court's actual holding is confined to interpretation of the Secretary's own standards. The Court's discussion did not address deference to the Secretary's statutory constructions. And the essential premises underlying the reasoning of *CF&I Steel* — that the Secretary's power to construe standards is derivative of her power to adopt them, and that the Secretary is in a superior position to construe standards she authored — are inapplicable to construction of the Act. *See Kerns Brothers Tree Service,* 18 BNA OSHC 2064, 2067-68 n. 7 (No. 96-1719, 2000) (*CF&I Steel* applies only to standards; "[i]t does not address the question of deference concerning contested interpretations of the statute itself.").

Moreover, there is strong reason why *CF&I Steel* should not be extended further than its precise holding. That reason is *indisputable* congressional intent, not discussed in *CF&I Steel* but documented on p. 30 below and never plausibly denied by the Secretary, that Congress intended that the Commission be "an autonomous, independent commission which, ***without regard to the Secretary,*** can find for or against him on the basis of individual complaints."

In 1970, when Congress was considering various versions of the legislation that became the Act, a central dispute was who would decide enforcement cases. One proposal, advocated by labor unions and congressional Democrats, was to commit adjudication to the Secretary of Labor; the expectation was that the Labor Department would establish a departmental appeals board, *i.e.*, a board established by a cabinet agency or an independent agency (such as the Federal Trade Commission) to adjudicate cases brought by their enforcement bureaus. For example, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976), gave all administrative functions to the Department of the Interior. That department established an enforcement arm, the Mining Enforcement Safety Administration (MESA), and an adjudication arm, the Interior Board of Mine Operation Appeals (IBMA). The IBMA reviewed questions of law *de novo,* without deference to MESA,[43] and its views were given deference by courts for it was *they* who spoke for the cabinet department or officer, not the enforcement office.[44] Such departmental appeals boards were then the rule.

But in 1970, dissatisfaction and suspicion of the independence and objectivity of such boards ran so deep as to endanger passage of the Act.[45] The President threatened to veto any bill that placed all administrative powers in one agency. BOKAT & THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW at 42 (1st ed. 1988). To save the Act, Senator Javits drafted and

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[43] *See, e.g., Eastern Associated Coal Corp.*, 7 IBMA 133, 1976-77 CCH OSHD ¶ 21,373 (1976) *(en banc);* 1 COAL LAW & REGULATION, ¶ 1.04[9][b][iii], p. 1-49 (T. Biddle ed. 1990) ("Of course, the Board could independently decide questions of law."). MESA was later transferred to the Labor Department and became MSHA after the Federal Mine Safety and Health Act of 1977 was passed; the IBMA's functions were transferred to the newly-created Federal Mine Safety and Health Review Commission.

[44] *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight").

[45] Senate Report at 55, Leg. Hist. at 194 (debate "so bitter as to jeopardize seriously the prospects for enactment...."). *See also* the pointed remarks by Senators Dominick and Smith appended to the Senate Report at 61-64, Leg. Hist. at 200-03.

proposed an "important"[46] compromise – the establishment of an independent adjudicator. In urging that compromise, he assured the Senate that it would establish "an autonomous, independent commission which, ***without regard to the Secretary***, can find for or against him on the basis of individual complaints."[47] This remark by Senator Javits was and is important. This remark is apparently the only piece of legislative history that directly addresses the deference issue and the role of the Commission vis-à-vis the Secretary. It was on the strength of that assurance that Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required ...."[48] It was on the heels of that assurance that the Senate then voted in favor of the Javits compromise. As the Department of Labor's own historian has stated, Senator Javits "played a major role in the passage of the Act...."[49]

The Secretary's position on deference is flatly inconsistent with Senator Javits's statement. The Commission cannot both decide cases "without regard" for the position of the Secretary and give the Secretary's reasonable interpretation controlling regard. Moreover, ignoring Senator Javits's specific remarks on deference would, ironically, make the Commission even more subservient than the bodies that Congress in 1970 specifically rejected as insufficiently independent.

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[46] MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3, p. 7 (4th ed. 1998) (Act passed only after the Senate "passed a series of compromise amendments, including an important amendment by Senator Jacob Javits ....").

[47] Leg. Hist. at 463 (emphasis added).

[48] *Id. See also id.* at 193-94, 200-03, 380-94, 479; and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, MONTHLY LAB. REV. 22-23 (March 1981).

[49] Judson MacLaury, "The Occupational Safety and Health Administration: A History of its First Thirteen Years, 1971-1984," *available at* http://www.dol.gov/asp/programs/history/mono-osha13introtoc.htm#jud, *esp.* Chapter 1, "George Guenther Administration, 1971-1973: A Closely Watched Start-Up" (http://www.dol.gov/asp/programs/history/osha13guenther.htm) (Javits "a New York Republican who had played a major role in the passage of the Act...").

Respect for Congress requires that its undisputed intent be given as much effect as possible. Although Senator Javits's statement was noted in one *amicus* brief to the Supreme Court,[50] the employer's brief in *CF&I Steel* failed to quote or cite it, and the Court did not discuss it or note it. Thus, unless the Secretary can reconcile Senator Javits's statement with her position on deference, or unless there are compelling indications in *CF&I Steel* that it necessarily applies to statutory questions, *CF&I Steel* should not be extended any further than its precise holding.

The Secretary argued recently that Mr. Javits's remark does not rule out deference to the Secretary because it reflects only the independent role of courts, which nevertheless defer to agency interpretations. Sec. Br. at 23-24 & n.17 in *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003). The argument assumes that Senator Javits believed that the kind of deference (if any) that courts gave in 1970 to agencies' views was of the *Chevron* sort. But his use of the phrase "without regard" shows that he did *not* so believe. And this is perfectly understandable, for his remark instead echoed the *de novo* approach to statutory construction that had by 1970 been followed by many courts and been exemplified in, for example, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), in which agency views were at most given only "weight."[51] Although there was then also a widely-noted[52] line of conflicting cases holding that

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[50] Brief of Am. Iron and Steel Institute at 4, available on Lexis at 1989 U.S. Briefs 1541.

[51] *See also United States v. Swank,* 451 U.S. 571 (1981); *Morton v. Ruiz,* 415 U.S. 199, 236-37 (1974); *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 492-93 (1947). *See generally* K. DAVIS AND R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.1, p. 108 (3d ed. 1994). One example of such a decision is *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 719 (D.C. Cir. 1982), *rev'd sub nom. Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[52] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (2d ed. 1984); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); Mark Seidenfeld, *A*

courts must accept an agency interpretation with "a reasonable basis in law,"[53] that conflict was, for a time[54], not resolved entirely against the *Skidmore/de novo* approach until 1984, when the Supreme Court issued *Chevron*. That was long after Senator Javits spoke in 1970. Senator Javits's idea of judicial independence was opposed to that stated in *Chevron* and, inasmuch as it indisputably represents congressional intent, it is controlling here.

The Secretary may point to the Court's statement in *CF&I Steel* that the Commission has "the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context." 499 U.S. at 154. This is hardly a compelling contrary indication, for as noted above, the case law in 1970 did not make clear whether a court was required to give an enforcement agency's view *Chevron*-style deference or mere *Skidmore*-style "weight."[55] Thus,

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Syncopated Chevron*: Emphasizing Reasoned Decisionmaking In Reviewing Agency Interpretations of Statutes,* 73 TEX. L. REV. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

[53] *E.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969) (agency view upheld unless "unless there are compelling indications that it is wrong").

[54] That is, until 2001, when *Mead* substantially restricted *Chevron* and revitalized *Skidmore.*

[55] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (2d ed. 1984); *see also, e.g., Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes,* 73 TEX. L. REV. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

One line of cases required a court to adopt the interpretation it thought correct after giving the agency's interpretation "weight," the degree of which would vary with the technical complexity of the issue, the agency's expertise, etc. For example, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Court stated that while the agency's interpretations are "not controlling," they "do constitute a body of experience and informed judgment to which courts ... may properly resort for guidance." "The weight" given to the agency's interpretation, the Court stated "will depend upon the thoroughness evident in its consideration, ... [and] its consistency with earlier and later pronouncements...." *See generally* DAVIS & PIERCE, § 3.1 at p. 108.

The other line of cases held that "the reviewing court's function is limited" and that it must accept an agency interpretation with "a reasonable basis in law" (*e.g., NLRB v. Hearst*

CF&I Steel should not be extended beyond the precise rule it established – that the Secretary receives deference or weight only with respect to interpretation of standards.

III. CONCLUSION

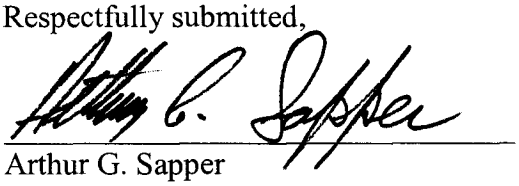
The Commission should vacate the item on the ground that, under the second sentence of § 1910.12(a), there was no violation. If it does not, the item should be vacated on the ground that the OSH Act did not impose any duty on Summit here.

Of counsel:

David S. Jaffe, Esq.
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005-2800

Raymond G. McGuire, General Counsel
Contractors' Ass'n of Greater New York
Kauff McClain & McGuire LLP
950 Third Avenue, 14th Floor
New York, New York 10022

Respectfully submitted,



Arthur G. Sapper
Robert C. Gombar
James A. Lastowka
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, DC 20005-3096
202-756-8246

Attorneys for the *Amici Curiae*

Publications, Inc., 322 U.S. 111, 130-31 (1944)) or "unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Inasmuch as the criterion for interpretation under this second line of cases is the reasonableness of the agency's interpretation, not its correctness in a court's eyes, this line of cases appeared to bar courts from interpreting statutes *de novo*.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2005, the foregoing was served by first class mail and telefacsimile upon the following:

Steven Turow, Esq.
Daniel J. Mick, Esq., Counsel for Regional Trial Litigation
U.S. Department of Labor
Room S4004
200 Constitution Avenue, NW
Washington, DC 20210
202-693-5466

and

Robert E. Rader, Jr., Esq.
Suite 1125
Rader & Campbell
2777 Stemmons Freeway
Dallas, TX 75207
214-630-9996

James A. Lastowka

Table of Attachments