UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v. OSHRC Docket No. 03-1622

SUMMIT CONTRACTORS, INC.,

Respondent.

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional Trial Litigation

ANN ROSENTHAL
Counsel for Appellate Litigation

STEPHEN D. TUROW
Attorney for the Secretary

U.S. Department of Labor
200 Constitution Avenue, NW
Room S4004
Washington, D.C. 20210

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STATEMENT OF ISSUES

This case is before the Occupational Safety and Health Review Commission pursuant to a Direction for Review issued by Commission Chairman W. Scott Railton on July 26, 2004. In its December 16, 2004, Briefing Notice, the Commission requested briefing with respect to:

1. the issues raised in Respondent's petition for review, all of which relate to the validity of the multi-employer doctrine, used by the Secretary, the Commission, and most courts of appeals to assign OSH Act liability at construction worksites, particularly as the doctrine applies to general contractors; and

2. the effect to be given to the Commission's longstanding precedent upholding the Secretary's practice of citing general contractors for violations committed by subcontractors.

STATUTORY BACKGROUND AND THE MULTI-EMPLOYER DOCTRINE

Section 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), requires employers to "comply with occupational safety and health standards." The multi-employer doctrine addresses OSH Act violations at locations where several employers are working. On these sites, one employer may be responsible for the existence of violations that endanger only workers employed by other companies. In the very early years of OSH Act enforcement, however, the Commission held that an employer could be cited for a violation only if its own employees were exposed. *See, e.g., Hawkins Constr. Co.*, 1 (BNA) OSHC 1761 (No. 949, 1974). And an employer with exposed employees had no defense, even if it had no control over or ability to abate the violation. *Robert E. Lee Plumbers*, 3 (BNA) OSHC 1150 (No. 2431, 1975).

Reviewing courts found the Commission's position seriously flawed. In 1975, the Second Circuit relied on the OSH Act's statutory language and purpose to hold that an employer's duty to comply with OSH Act standards "is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard." *Brennan v.*

OSHRC (Underhill), 513 F.2d 1032, 1038 (2nd Cir. 1975). It held that the Secretary "need only show that a hazard has been committed" and that either the cited employer's employees or employees of other employers "in a common undertaking" were exposed. *Ibid.*

At the same time, the Seventh Circuit rejected the other aspect of the Commission's rule, holding that Congress did not intend to impose strict liability on employers simply because their employees were exposed to hazards created or controlled by others. *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975). Both *Underhill* and *Anning-Johnson* recognized that a strict rule equating an employer's liability with exposure of its own employees failed to implement the OSH Act in a reasonable manner, given the realities of multi-employer worksites.

In an effort to resolve this conflict, in 1976 the Secretary published a Federal Register notice seeking comment on a proposed citation policy for multi-employer worksites. 41 FR 17639 (April 27, 1976). The proposed policy would allow citations to be issued to an employer that creates a violation; an employer with the ability to abate it, including an employer "such as the general contractor" with safety responsibility for the worksite; and an employer that exposes its workers to "readily apparent" violations. *Id.* at 17640. Two weeks later, the Commission abandoned its position limiting liability to employers of workers endangered by an OSH Act violation. Instead it adopted a multi-employer doctrine virtually identical to that proposed by the Secretary. *Grossman Steel & Aluminum Corp.*, 4 (BNA) OSHC 1185 (No. 12775, 1976).

Under the multi-employer doctrine announced by the Commission in *Grossman*, an employer is liable for a violation it creates or controls even if its own employees are not exposed to the hazard. *Id.* at 1188. Because the general contractor on a construction site has overall control of and responsibility for safety on the worksite, the Commission made clear that the general contractor was liable "for violations it could reasonably have been expected to prevent or

abate by reason of its supervisory capacity." *Ibid.* In addition, the Commission agreed with the Seventh Circuit in *Anning-Johnson* that an employer whose employees are exposed to a hazard it did not create or control may defend on the basis that it took reasonable action to protect its employees against the hazard or that it lacked the expertise to recognize the condition as hazardous. *Id.* at 1189.

In light of Grossman, the Secretary took no further action on her proposal for a formal multi-employer policy.[1] Subsequently, the multi-employer worksite doctrine received widespread judicial approval, and the Commission has applied it for the last 30 years.

STATEMENT OF FACTS AND PROCEEDINGS

This case arises from an Occupational Health and Safety Administration (OSHA) citation issued on August 25, 2003 to Summit Contractors, Inc. (Summit) for a violation of 29 CFR 1926.451(g)(1)(vii), which requires fall protection when employees are working on scaffold that is more than 10 feet above a lower level. Summit is a general contractor with approximately 180 employees, most of whom are project superintendents who coordinate and supervise construction activity, but generally do not perform the physical construction work. Tr. 258-59. Summit does not deny that the standard was violated or that it knew about and had authority to abate the violation. Tr. 25-26, 48.[2] Rather, Summit contends that, as a general contractor, it cannot be cited under the OSH Act for a violation created by its subcontractor, as long as no Summit employees were exposed to the hazard. SB at 4-5.

In December 2002, Summit entered into a contract with Collegiate Development Services

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[1] Instead, OSHA has provided guidance on applying the doctrine to its own personnel. From time to time, OSHA has amended this guidance.

[2] "Tr." refers to the January 27, 2004 Transcript of Proceedings. "SB" refers to Summit's Opening Brief.

(Collegiate), under which Summit was completely responsible for construction of a dormitory at the Philander Smith College in Little Rock, Arkansas. Tr. 32-33, 108, 192; Ex C-7, p. 23, § XXV; Dec. at 13. The contract provided that Summit would have "exclusive authority to manage, direct and control" construction activities at the site. Ex. C-7, p. 23, § XXV. Specifically, Summit assumed responsibility for providing all materials, labor, supervision, transportation, utilities and other services necessary to complete the project, as well as for scheduling and supervising all of the work to assure that it was completed on time and in accordance with the plans and specifications. *Id.* at p.1, § IA; p. 2, §§ IE, IIA; p. 22, § XXII. Importantly, the contract also assigned Summit responsibility for occupational health and safety, including compliance with relevant laws. *Id.* at p. 3, § III, p. 15, § XIIIB2. In particular, Summit had to take reasonable precautions to protect workers at the site and prevent injury to them, and to provide and maintain safety equipment and programs. *Id.* at p. 2, § IF, p. 14, § XIIIA1, p. 15, §§ XIIIB1a, XIIIB3. Finally, Summit had to select subcontractors who would comply with the provisions of the contract between Summit and Collegiate. *Id.* at p. 10, §§ XB and XC.

Summit had four full-time supervisors who performed daily inspections at the Smith College site, but it subcontracted all of the actual construction work on the project. Tr. 38, 48-49, 62, 101-02, 194-95. It hired All Phase Construction, Inc. (All Phase) to perform the masonry work. Tr. 44, 103-104, 167-69, 261-262. Summit's contract with All Phase, which Summit drafted, bound All Phase to the terms of the contract between Summit and Collegiate. Ex. C-8, p. 2, Art. 6. It obligated All Phase to comply with all laws, including OSH Act requirements concerning the safety of workers at the site. *Id.* at p. 3, Art. 9; p. 6, Art. 15; p. 13, ¶ 4; p. 14, ¶ 10; p. 15, ¶¶ 23 & 27; p. 17 (opening paragraph). Further, the contract established Summit's supervisory authority over the site and provided Summit with mechanisms to ensure that All

Phase would comply with its contractual obligations, including the obligation to comply with health and safety standards. *Id.* at p. 2, Art. 3d; p. 5, Art. 14; p. 13, ¶¶ 4 and 5; p. 14, ¶ 18.

On June 18, 2003, while driving on an adjacent street, OSHA Compliance Safety and Health Officer (CSHO) Richard Watson observed scaffolding violations at the construction site that exposed masonry workers to serious fall hazards. Tr. 32-33. He photographed workers laying brick from a scaffold platform approximately 12 feet above the ground without guardrail protection or a personal fall arrest system. Tr. 34-37, 44; Ex. C-1. Watson returned to the construction site the next day. Tr. 37. As he approached, he again saw workers on scaffolds approximately 12 and 18 feet above the ground without fall protection. Tr. 37, 46. He photographed these violations from the street. Tr. 45, 46; Ex. C-3. As Watson walked to Summit's jobsite trailer, he noticed workers on another scaffold inside the building (12 feet above ground) without required fall protection. Tr. 45-46. He photographed this violation from ten feet in front of the job trailer. Tr. 37, 45-46; Ex. C-2.

During the subsequent inspection, Watson met with Jimmy Guevara, the project superintendent and competent person, as well as with Summit's Safety Director and Project Manager. Tr. 40, 43, 118, 233-234. Guevara told Watson that the scaffolding was leased, erected, and used only by All Phase and that he had observed similar scaffolding violations on prior occasions. Tr. 40, 44, 79, 118-20, 129. When he told All Phase to correct them, All Phase complied, but it repeatedly committed the same violations after moving and reassembling the scaffolds. Tr. 42, 118-122, 129-31. Summit did nothing to compel All Phase to comply with the scaffolding requirements as a matter of course, and it did not ask All Phase to use fall protection on June 18 or 19. Tr. 92, 125-27, 131. Guevara said that it was Summit's corporate policy not to be responsible for the safety of subcontractors' employees. Tr. 42-43, 131-32, 134-36.

Rather, Summit instructed its superintendents that, if they observed subcontractor OSHA violations, they should request that the subcontractor abate them. Tr. 131-32. If a subcontractor repeatedly violated OSHA requirements, Summit superintendents were to notify their superiors, who would raise the matter with the subcontractor. Tr. 222-23.

OSHA cited Summit and All Phase for violating scaffolding fall protection requirements on June 18 and 19. Tr. 47. The Summit citation was based on Summit's control of the site, knowledge of the violation, and failure to use its authority abate the violations. Tr. 84-89.

JUDGE'S DECISION

On June 2, 2004, Judge Ken S. Welsch issued a Decision and Order finding Summit liable for the violations. Judge Welsch noted that, while Summit did not create the violations and its employees were not exposed to the hazard, a subcontractor hired and supervised by Summit violated 1926.451(g)(1) when the subcontractor's employees used a scaffold without fall protection or guard rails. Dec. at 4. Further, the judge noted that the violations were "open and obvious and in plain view" and that four Summit representatives were regularly at the site where they could readily have observed the violations. *Ibid.* In fact, Summit's project superintendent had observed the same violation on prior occasions, and he knew that the conditions constituted violations of the OSHA scaffolding provisions. *Ibid.*

In response to Summit's assertion that, in its capacity as general contractor, it was not liable for the violation, the judge described longstanding Commission precedent holding general contractors in violation of the OSH Act for a subcontractor's failure to comply with an OSHA standard if the general contractor "could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite." Dec. at 5. The judge noted that variations of this principle – broadly referred to as the "multi-

employer worksite doctrine" – have been accepted "in six circuits and rejected outright in only one." Dec. at 6. This case arose in the Eighth Circuit, which has accepted the multi-employer worksite doctrine, and may not be appealed to the Fifth Circuit, the only circuit that has rejected it, so the judge applied the doctrine. Dec. at 7.

To determine whether Summit had sufficient supervisory authority to prevent or abate the violations, the judge examined Summit's contracts with All Phase and Collegiate, as well as testimony about the degree of control actually exercised by Summit. Dec. at 7-14. Based on this evidence, the judge found that Summit had a number of ways, including "authority to terminate, suspend or withhold contract payments" from All Phase, to enforce compliance with OSHA requirements. Dec. at 14. The judge concluded that, given this level of control and authority over All Phase's activities, Summit failed to exercise reasonable care to prevent or abate the violation. Dec. at 15. When Summit had observed similar violations prior to June 18, it merely asked All Phase to correct the problem. *Ibid.* Moreover, Summit knew of the violations on June 18 and 19, but failed to take reasonable steps to address them. *Ibid.* Thus, the judge held, the Secretary properly cited Summit. *Ibid.*

ARGUMENT

SUMMIT VIOLATED THE OSH ACT BECAUSE IT KNEW OF ALL PHASE'S FAILURE TO COMPLY WITH FALL PROTECTION REQUIREMENTS BUT DID NOT EXERCISE ITS AUTHORITY TO REQUIRE COMPLIANCE

I. Introduction.

On many worksites, including virtually all construction worksites, working conditions are controlled and affected by more than one employer. "Typically, a construction job will find a number of contractors and subcontractors on the worksite, whose employees mingle throughout the site while work is in progress." *Grossman Steel & Aluminum Corp.*, 4 (BNA) OSHC 1185,

(No. 12775, 1976); John E. Bulman, et. al, *The Horns of a Dilemma*, 21 SPG-Construction Law. 5 (Spring 2001) ("employees of multiple contractors, subcontractors, and other employers all work in close proximity to one another on the typical construction project"). In some cases, a contractor's violation of an OSHA standard may not have any effect on its own workers' safety or health, and the employer of the exposed workers may have no power to correct the condition. *Brennan v. OSHRC (Underhill)*, 513 F.2d 1032, 1038-39 (2nd Cir. 1975) (steel erection contractor's violation endangered only masonry contractor's employees); Bulman at 5 ("safety violations caused by one employer often threaten all employees who work at the [construction] site"). Often the *only* employer with authority to assure safe and healthful working conditions throughout the site is the general contractor. *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 729 (10th Cir. 1999).

In recognition of this reality, and in accord with Congress' explicit intent to protect construction workers, *Legislative History of the Occupational Safety and Health Act of 1970*, 92 Cong., 1st Sess., p. 1215 (June 1971) (statement of Rep. Steiger), the Secretary, the Commission, and nearly all courts to address the issue have agreed for almost thirty years that, on multi-employer worksites, the responsibility for compliance with OSHA standards rests with employers who create or control worksite conditions, as well as with those who expose their workers to the hazards. Thus, in *Universal Constr. Co.,* a case virtually on all fours with this one, a general contractor with overall control of a worksite was liable for fall protection violations that it did not require a subcontractor to correct, even though only the subcontractor's employees were endangered. *See also R.P. Carbone Construction Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998) (same). Similarly, a contractor is liable for the violations it commits, even if the only workers endangered are employed by other contractors. *E.g., Beatty Equipment Leasing,*

Inc. v. Secretary of Labor, 577 F.2d 534 (9th Cir. 1978). And a contractor whose workers are endangered by violations the contractor neither created nor controlled may also be liable, but only to the extent that it fails to take "realistic steps" to provide its workers with alternative protection. *Bratton Corp. v. OSHRC*, 590 F.2d 273, 275 (8th Cir. 1979).

There is no cause for the Commission to undo this well-settled precedent allocating liability to the employer that is responsible for creating or controlling the hazardous condition. Application of the multi-employer doctrine makes clear that both the creating and controlling employers are responsible for "compl[iance] with occupational safety and health standards promulgated" under the OSH Act. 29 U.S.C. 654(a)(2). It not only promotes the OSH Act goal of assuring safe and healthful working conditions, but also clarifies that employers are liable only for violations whose existence or consequences they could have prevented.

The role of the general contractor on a construction site is particularly critical in this regard. As in this case, it is usually the general contractor who sets the rules and establishes the norms for the worksite, controls the scheduling of work, allocates resources among subcontractors, governs their relationships with each other, and is responsible for ensuring that the work is completed in accord with statutory and contractual requirements. *Supra* at 4. Thus, it is entirely appropriate to cite the general contractor, in this case Summit, for a violation that it could have prevented or corrected.

II. The judge correctly applied established precedent in concluding that Summit violated the OSH Act.

Under established precedent in both this Commission and the Eighth Circuit, where this case arose, Summit is liable for the violations because it "could reasonably have been expected to prevent or abate [them] by reason of its supervisory capacity" as general contractor.

Grossman, 4 (BNA) OSHC at 1188; *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977). This case highlights the vital role that a general contractor can play to assure safe working conditions without exceeding the scope of its traditional supervisory role. When Summit took minimal steps to address a serious hazard, its subcontractor responded and promptly abated the hazard. Tr. 118-19. However, when Summit failed to address All Phase's repeated failure to comply with scaffolding requirements, workers were exposed to a serious hazard. Tr. 33, 37, 42.

The judge's finding that Summit had sufficient authority to control the working conditions at issue cannot be questioned. Dec. at 8-15. As a matter of law, employers cannot contract away OSH Act responsibility. *Anning-Johnson Co.*, 516 F.2d at 82. Nevertheless, the existence of a contract spelling out the general contractor's supervisory control is probative of the extent of that control. Here, overwhelming evidence of this control is found in Summit's contract with Collegiate, which gave Summit "exclusive authority to manage, direct and control" construction activities at the site. Ex. C-7, p. 23, § XXV. Summit assumed responsibility for providing all materials, labor, supervision, transportation, utilities and other services necessary to complete the project, as well as for scheduling and supervising all of the work to assure that it was completed on time and in accordance with the plans and specifications. *Id.* at p.1, § IA; p. 2, §§ IE, IIA; p. 22, § XXII.

Importantly, the contract also assigned Summit responsibility for occupational health and safety, including compliance with relevant laws. *Id.* at p. 3, § III, p. 15, § XIIIB2. In particular, Summit had to take reasonable precautions to protect workers at the site and prevent injury to them, and to provide and maintain safety equipment and programs. *Id.* at p. 2, § IF, p. 14, § XIIIA1, p. 15, §§ XIIIB1a, XIIIB3. Summit had to select subcontractors who would also comply

with the provisions of its contract with Collegiate. *Id.* at p. 10, §§ XB and XC. The subcontract with All Phase reiterates Summit's contractual obligation to Collegiate to take steps to protect the health and safety of workers on the construction site, binds All Phase to the same obligation, and provides an indemnification clause for any liability Summit incurs if All Phase fails to comply. Ex. C-8, Articles 6, 9, 13, 15, Attach A, § 4, Attach B, No. 20.

In addition, the record makes clear that Summit actually controlled the site. As the judge pointed out, it was "Summit, not the subcontractors, [that] dictated the terms of the subcontract and what occurred on the worksite." Dec. at 14. Throughout the project, Summit, *inter alia,* hired and had authority to fire subcontractors; controlled the sequencing of work, telling subcontractors when to start and finish their work; and controlled the quality of work, ensuring through inspections that subcontractors performed their work in accordance with the contract specifications and blueprints. Dec. at 13.

It is significant that whenever Summit asked All Phase to correct a hazard, All Phase complied. Tr. 118-120. Summit's superintendents could, and did, have safety concerns abated merely by raising the issue with a subcontractor and requesting abatement. Tr. 43, 111, 118-19, 131. In fact, there is no indication that a subcontractor had ever, or would ever, refuse to abate a hazard that a Summit supervisor identified. But if a subcontractor did refuse, Summit had numerous mechanisms available to protect its supervisory authority. Senior Summit officials could discuss the need for OSHA compliance with the subcontractor. Tr. 222-23 (Summit policy contemplated repeated violations being addressed by high-level Summit personnel). In addition, a contractual provision permitted Summit to withhold the ten percent retainage owed to All

Phase until All Phase corrected any breach of its subcontract.[3] Ex. C-8, p. 2, Art. 3d; Tr. 132-33. Summit could also suspend All Phase from performing additional work until it corrected a safety violation. Ex. C-8, p. 5, Art. 14a. Likewise, Summit could bar from the site, temporarily or permanently, any All Phase employee who failed to comply with Summit's instruction to correct a safety hazard. Ex. C-8, Attach A, ¶ 5D. In the extremely unlikely event that none of these options worked, Summit could terminate its relationship with All Phase. Ex. C-8, p. 5, Art. 14b; Tr. 104-5. Clearly, Summit could have ensured compliance with little, if any, interruption in the construction schedule and with no interference to its contractual relationship with All Phase.

Summit failed to exercise reasonable care by declining to take any of these steps to address either All Phase's pattern of violations or the violations at issue. Tr. 42-43, 62, 102, 118-122, 125-27, 129-32, 140-42; Dec. at 15. To the contrary, Summit explicitly instructed its representatives not to require subcontractor compliance with health and safety standards. Ex. C-5, pp. DOL 18-19; Tr. 42-43, 71, 131-32, 151, 188, 247. It did not even follow its own minimal policy of having high-level Summit officials contact All Phase about repeated violations.[4] Tr. 222-23; Jon Lee Dep. at 37.

Clearly, Summit could have prevented or abated the violations promptly by exercising its supervisory authority in a reasonable fashion. As the judge correctly found, Summit's failure to do so violated Section 5(a)(2) of the OSH Act. Accordingly, under this Commission's established precedent, the ALJ's decision must be upheld.

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[3] Although Summit argued below that this provision only applied to deviations from building specifications, nothing in the contractual language supports such a narrow reading.

[4] Summit's failure to address All Phase's repeated violation of the scaffolding standard is among the facts that distinguish this case from *IBP v. Herman,* 144 F.3d 861, 863 (D.C. Cir. 1998).

III. Imposing liability on Summit is consistent with the OSH Act.

A. The multi-employer worksite doctrine is consistent with the language and history of the OSH Act, as well as with OSH Act caselaw.

The OSH Act was created to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444-45 (1977). The single most important statutory mechanism for achieving this goal is the Act's command to employers to "comply with occupational safety and health standards." 29 U.S.C. § 654(a)(2); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984). Nothing in the language, history, or purpose of this provision limits the employer's compliance duty to situations where a violation would endanger only its own workers. To the contrary, such a limitation would frustrate the Congressional intent to protect "every working man and woman." *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 984-85 (7th Cir. 1999); *Recent Case, Occupational Safety & Health Act--On Mulitemployer Jobsite...*, 89 Harv. L. Rev. 793, 797 (Feb. 1976) (early OSHRC rulings refusing "to hold employers liable when the work areas they control violate the Secretary's standards seem[] inconsistent with the purpose of OSHA").

In urging the Commission to abandon these well-accepted principles, Summit and *amici* insist that Congress intentionally chose not to require employers to comply with OSHA standards if noncompliance would endanger only workers employed by others. In fact, however, as virtually every court or commentator to address the multi-employer doctrine has concluded, Congress did not speak directly to how the OSH Act's enforcement mechanisms would apply to hazards not controlled by the endangered workers' own employers. *See, e.g., Anning-Johnson Co. v. OSHRC*, 516 F.2d at 1087; 89 Harv. L. Rev. at 798. Congress did make clear, however,

that it expected the Act to protect all workers, including construction workers. H. Rep. No. 91-1291, 91st Cong., 2d Sess., p. 14-16 (July 9, 1970). The out-of-context snippets of statutory language and references to employers' duties to protect their employees that Summit and *amici* have extracted from the statute and its history do not support their contrary position.

1. Statutory Language. Summit is charged here with a violation of Section 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), which unequivocally requires it to "comply with occupational safety and health standards." This requirement is not limited to compliance with standards that protect Summit's own workers.

The statutory definition of an "occupational safety and health standard" supports the Secretary's commonsensical reading of § 5(a)(2). Under the Act, a standard "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Nothing in this language implies that the protection provided by a standard is limited by an employment relationship. 89 Harv. L. Rev. at 797 (the OSH "Act does not contain any limitation with respect to categories of employers that would qualify for responsibility to prevent hazards at a work area"). To the contrary, the definition indicates Congress' belief that the duty to comply with OSH Act standards falls on those employers who control the conditions addressed by the standards and can prevent hazardous conditions from developing. *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1197 (5th Cir. 1997).

Indeed, it is this focus on workplace conditions, and not on employment status, that effectuates the OSH Act's goal of abating workplace hazards by encouraging efforts to reduce occupational hazards at "*places of employment*," stimulating employers and employees to develop "programs for providing *safe and healthful working conditions*," and recognizing

"separate but dependent responsibilities and rights [for] achieving *safe and healthful working conditions*." 29 USC §§ 651(b)(1) and (b)(2) (emphases added); see also 29 USC § 662(a) (authorizing district court to address "*any conditions or practices in any places of employment*" that pose an imminent, serious danger) (emphasis added). As the multi-employer doctrine recognizes, more than one employer can occupy a place of employment or be responsible for working conditions affecting the employees of another employer working in the same area or on the same project.

Summit's reliance on the language of the Act's general duty clause and variance provisions, 29 U.S.C. §§ 654(a)(1), 655(b)(6)(A), and 655(d), which require an employer to protect "his employees" through means other than complying with standards, is therefore particularly unavailing. The fact that Congress referred to an employer's obligation to protect "his employees" in those sections only highlights the fact that Congress did not use similar language in the requirement that employers comply with standards. *Bates v. United States*, 522 U.S. 23, 30 (1997) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely").[5]

In fact, in rejecting similar arguments, several courts have found the distinction between the language of the Act's general duty clause, § 5(a)(1), and that of § 5(a)(2) to be compelling evidence that Congress did not intend to limit the protections provided by occupational safety and health standards to the employees of employers required to comply. *Underhill*, 513 F.2d at 1037-38; *Anning-Johnson Co.*, 516 F.2d at 1086; see also *Teal*, 728 F.2d at 804 ("Congress

[5] Summit's reliance on the 1969 Coal Mine Act is misplaced. "[T]here is nothing to suggest that Congress patterned the [OSH] Act after the Coal Mine Act." *Kasper Wire Works, Inc. v. Secretary*, 268 F.3d 1123, 1131 (D.C. Cir. 2001).

enacted sec. 654(a)(2) for the special benefit of *all* employees, including the employees of an independent contractor, who perform work at another employer's workplace.") (emphasis in original). These courts have recognized that the multi-employer doctrine is consistent with the unqualified statutory command in 29 U.S.C. § 654(a)(2) that employers "comply with occupational safety and health standards." *Id.* at 804-05.[6]

The Act's variance provisions, 29 U.S.C. § 655(b)(6) and (d), which require an employer to show, among other things, that its proposed alternative to complying with a standard provides equal protection to "his employees," provide scant support to Summit's position (SB at 9), and do not offer a useful window into Congress' intent on the issue of multi-employer worksite liability. In the first place, the legislative history, which focuses on permitting a variance when the employer "provide[s] equally safe and healthful conditions" and says nothing about the relationship between the employer and its own employees, is a strong indication that Congress likely did not intend the language to be read as narrowly as Summit suggests. Conf. Rep. No. 91-1765, 91st Cong., 2d Sess., p. 36 (Dec. 16, 1970). Moreover, even if Congress had consciously limited the applicability of what it clearly intended to be the Act's rarely-used variance provision to an employer's own employees, that would not show Congress intended a similar limitation to apply to § 654(a)(2), the provision that is the key to effectuating the Act's protective goal. *See Teal*, 728 F.2d at 804 (§ 654(a)(2) "represents the *primary* means for furthering Congress' purpose") (emphasis in original); *Underhill*, 513 F.2d at 1038 (same).

There is even less merit to the contention that the use of the word "employer" in

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[6] This argument is strengthened by Section 5 as a whole. Section 5(b) requires workers to comply with standards "which are applicable to [their] own actions and conduct." Since Section 5(a)(2) is the only one of the three related provisions that does not qualify the scope of the compliance obligation, it is most logical to conclude that Congress intended the Section 5(a)(2) obligation to be more expansive than that of Section 5(a)(1) or 5(b).

§ 654(a)(2) itself contemplated liability only within the employer-employee relationship. SB at 8-9. Merely because the Act governs "employers" does not mean that the duty to comply with standards imposed on an "employer" depends on the employer's own employees being endangered. If Congress had intended in § 654(a)(2) to require employers to protect only their own employees, it could have easily said so, as it did in § 654(a)(1). *Cf. United States v. Phommachanh*, 91 F.3d 1383, 1385-86 (10th Cir. 1996) (Congress' use of different words in same section of statute was presumably intended to convey distinct meanings).[7]

Congress' actions, as well as the words it used, are consistent with the position that an employer's compliance with standards is intended to protect all workers, not just the employer's own employees. Congress explicitly required OSHA to adopt, immediately after the Act became effective, *inter alia*, "national consensus standards," developed by entities like the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA). 29 U.S.C. § 655(a); S. Rep. No. 91-1282, 91st Cong., 2d Sess., p. 6 (Oct. 6, 1970). These standards require protection that is not confined to an employment relationship between the parties expected to comply and those to be protected. For example, the explicit purpose of former ANSI standard A120.1-1970, "Safety Requirements for Powered Platforms for Exterior Building

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[7] Contrary to Summit's assertion, nothing in *Nationwide Mutual Insurance v. Darden,* 503 U.S. 318 (1992) changes this result. SB at 20-21. *Darden* held only that a statutory reference to "employers" or "employees" is presumed to incorporate the common law definition of those terms. *Id.* at 322-25. It did *not* say that a statute imposing obligations on employers necessarily limits the beneficiaries of those obligations to workers employed by each obligated employer. Nor is there any reason to make such an assumption in general, particularly in the context of a statute that aims to prevent the injuries and illnesses that Congress found to "impose a substantial burden upon ... interstate commerce." 29 U.S.C. § 651(a). Congress may well impose obligations on employers primarily to benefit parties outside the employment relationship; for example, many whistleblower provisions are intended to benefit members of the public, and only incidentally the whistleblowing employee. *General Telephone Co. v. EEOC*, 466 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination"). There is no inconsistency between imposing liability on Summit as a common-law employer covered by the OSH Act and making it liable for compliance with standards applicable to work places it controls and where its contractors, themselves common-law employers, operate.

Maintenance," was "to provide for the safety of life and limb of users of exterior powered platforms, *as well as of others* who may be exposed." Part I, § 2 (emphasis added) (See 29 CFR § 1910.66 App. D (b) – (d)) (Attached as "A"). *See also, e.g., Ray v. Aztec Well Serv. Co.*, 748 F.2d 888, 890 (10th Cir. 1984) (NFPA standard requiring proper storage of liquid propane gas "clearly is intended to protect *any person* who may be in the area where LPG is stored") (emphasis added).

Congress also required that any rule OSHA adopts that "differs substantially from an existing national consensus standard" must "better effectuate the purposes of this Act than the national consensus standard." 29 U.S.C. § 655(b)(8). Given the emphasis it placed on assuring that employees receive all the protection provided by national consensus standards, Congress could not have intended to restrict the coverage of those standards and protect only some, rather than all, employees who would be endangered by violations of the standards.

More recently, by separate legislation, Congress explicitly required the Secretary to promulgate OSHA standards that impose responsibility on employers to protect workers that they do not employ. Congress directed OSHA to develop a chemical process safety standard that requires employers, *inter alia,* to "ensure contractors and contract employees are provided appropriate information and training" and to "train and educate employees and contractors in emergency response." Pub.L. 101-549, Title III, § 304, Nov. 15, 1990, 104 Stat. 2576. This provision, to be enforced under § 5(a)(2), is a clear ratification of the multi-employer doctrine requiring employers to comply with OSHA standards without regard to the employment relationship of the workers these measures would protect. *Bob Jones University v. U.S.,* 461 U.S. 574, 601-02 (1983) (subsequent consistent legislation supports agency's earlier statutory interpretation).

2. Legislative History. The legislative history of the OSH Act also provides evidence of Congress' focus on eliminating hazardous conditions and creating workplaces where all workers will be safe. There are numerous Congressional references to requiring employers to provide a safe and healthful "place of employment," *see, e.g.*, S. Rep. No. 91-1282, 91st Cong., 2d Sess., p. 10 (Oct. 6, 1970), and pointing out that OSH Act obligations properly rest with entities who "control work environments." S. Rep. No. 91-1282 at 9; H. Rep. No. 91-1291 at 21. *See also United States v. Pitt-Des Moines, Inc.*, 168 F.3d at 983 (Congress' "primary focus was making places of employment, rather than specific employees, safe from related hazards"). Summit ignores these references in cobbling together, without context, a few isolated words and phrases from the legislative history in its attempt to demonstrate that Congress "pretty clearly" intended employers to be responsible only for their own employees (SB at 10-12). In fact, most of the quotes in Summit's brief refer to the general duty clause or variance provisions, or are simply irrelevant to the question of employer liability.[8] Nothing in the almost 1300-page legislative history supports Summit's contention that Congress unequivocally intended to exalt the identity of the employer who will abate the hazards over the core requirement to abate the hazard.

Subsequent unenacted bills, either expanding or restricting employer liability at multi-employer worksites, also provide no evidence of Congress' 1969 intent. SB at 13; *Mead Corp. v. Tilley,* 490 U.S. 714, 723 (1989) ("intermediate legislative maneuvers are not reliable indicators of congressional intent"); *U.S. v. Bohai Trading Co., Inc.*, 45 F.3d 577, 581 (1st Cir. 1995) ("under the Constitution, Congress speaks through duly enacted bills and resolutions"). Indeed,

[8] For example, one citation is taken from separate paragraphs in a section concerning employee obligations. SB at 11. S. Rep. No. 91-1282 at 10. Another citation is from a sentence concerning employees' right to participate in OSHA inspections at "their own places of employment." SB at 11. Of course, workers on a construction site have an interest in participating in an inspection of the entire area in which they are working, regardless of whether the inspection concerns the work of their own employer. *See* S. Rep. No. 91-1282 at 11.

unenacted bills may be found on both sides of this issue. *Compare* S. 575, § 304, Title XII (1993) (expanding the coverage of the multi-employer doctrine by applying it to the general duty clause and making general contractors responsible for a safety and health plan to protect all workers on a construction site) (Attachment B) *with* H.R. 978 (February 17, 2005) (limiting liability on multi-employer work sites to employers of exposed workers). The important point is that Congress has declined to amend the Act in more than 30 years, even though it has obviously been aware of the multi-employer doctrine. *U.S. v. Davison Fuel & Dock Co.*, 371 F.2d 705, 711-12 (4th Cir. 1967).[9]

Much more significant is action Congress actually took, such as ordering OSHA to promulgate the PSM provisions discussed above, which require employers to protect their contractors' employees. And in 1977, the full House Committee on Government Operations urged the Secretary to promulgate an OSHA standard "requir[ing] chemical formulators to identify any regulated substance in products they sell" so that "employers and workers can and will know what kinds of toxic dangers are present in the Nation's workplaces." House Comm. on Government Operations, *Failure to Meet Commitments Made in the Occupational Safety and Health Act,* H. Rep. No. 710, 95th Cong., 1st Sess. 15 (1977). This report helped prompt OSHA to propose a Hazard Communication standard a few years later that imposed the primary duty to communicate hazard information on the upstream chemical manufacturers for the benefit of downstream workers using chemicals purchased by their employers. *See United Steelworkers of America, AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 732 (3rd Cir.1985).

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[9] In any event, Summit misconstrues the intent of S. 575. SB at 13. The cited provision would have expanded general contractor responsibility beyond compliance with OSHA standards, making the general contractor also responsible for the development and implementation of a construction safety and health plan. See S.575 (1993), Title XII, Construction Safety. Thus, S.575 demonstrates recognition of general contractors' ability to protect worker health and safety and an intent to expand their role.

3. Caselaw. The fact that the multi-employer doctrine has received widespread judicial approval is an additional reason to adhere to it. *International Brotherhood of Elec. Workers v. ICC*, 862 F.2d 330, 338 (D.C. Cir. 1988) (consistency of agency interpretation with relevant case law is factor supporting deference to that interpretation). Almost every court to consider the doctrine has applied it. *Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984); *Beatty Equip. Leasing v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *Grossman Steel & Aluminum Corp.*, 4 (BNA) OSHC at 1188; *Commissioner of Labor, N.C. v. Weekley Homes, LP*, 2005 WL 588564 (N.C. App. March 15, 2005).[10] The Commission may not abandon this reasonable interpretation. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 154-56 (1991); *See also C.T. Taylor Co., Inc.*, 20 (BNA) OSHC 1083 (Nos. 94-3241 and 94-3327, 2003) (refusing to overturn Commission precedent consistent with a circuit court holding); *Dun-Par Engineered Form Co.*, 12 (BNA) OSHC 1949, 1956 (No. 79-2553, 1986) (revising OSHRC precedent to be consistent with the holdings of several courts of appeal).[11]

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[10] Although the D.C. Circuit has "questioned" the doctrine, *IBP, Inc. v. Herman*, 144 F.3d at 865-66, only the Fifth Circuit has rejected it. In several private tort suits, in which the Secretary did not participate, the Fifth Circuit said that injured plaintiffs who were not employed by defendants could not rely on OSHA standards to establish a duty of care because, according to the court, the standards protect only an employer's own employees. *E.g., Melerine v. Avondale Shipyards*, 659 F.2d 706, 710-11 (5th Cir. 1981). But those tort cases relied, we believe erroneously, on a *per curium* OSH Act decision, *Southeast Contractors v. Dunlop*, 512 F.2d 675 (5th Cir. 1975), in which the liability of employers for violations that do not endanger their own workers was not at issue. Because the instant case cannot be appealed to the Fifth Circuit, these cases are irrelevant to the disposition of this matter.

[11] If, as Summit argues, OSH Act liability is based on exposure of an employer's own employees, it is doubtful whether the defense available to an employer who neither creates nor controls a hazard would continue to be viable. That defense assumes that the non-creating, non-controlling employer's employees would be protected by holding the creating or controlling employer liable. If that assumption is false, the Congressional purpose to assure safe and healthful working conditions to every worker would necessarily mean that each employer would be strictly responsible for protecting its own employees even against hazards the employer does not create or control. That was what the Commission held pre-*Grossman*. See *Robert E. Lee Plumbers*, 3 (BNA) OSHC 1150 (No. 2431, 1975).

B. If the statutory language is inconclusive, the Secretary's interpretation is controlling because it is consistent with the statute's purpose and is otherwise reasonable.

Even if the inferences that can be drawn from the Act's language, purpose, and structure did not show conclusively that Congress intended the interpretation advanced by the Secretary, allowing application of the multi-employer doctrine, they certainly do not show a clearly contrary congressional intent. At most, the statute is ambiguous on this point. *Barnhart v. Walton,* 535 U.S. 212, 218-19 (2002) (statutory silence may create ambiguity). In this circumstance, the Commission must continue to respect the Secretary's interpretation, which is reasonable and at least consistent with the statutory language, and which helps "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Martin v. OSHRC (CF&I)*, 499 U.S. at 152-54 (Secretary's responsibility for and familiarity with the practicalities of OSH Act enforcement supports deference to her interpretations); *Joy Technologies v. Secretary*, 99 F.3d 991, 995-97 (10th Cir. 1996) (according deference and liberally reading health and safety statute to achieve its remedial purpose).

The application of the multi-employer doctrine effectuates the statutory purpose by placing the responsibility to prevent and abate violations on those employers with the expertise, authority, and resources to do so. *See Central of Ga. R.R. v. OSHRC*, 576 F.2d 620, 623 (5th Cir. 1978) (OSH Act "focuses liability where the harm can in fact be prevented"); S. Rep. No. 91-1282 at 9 (OSH Act obligations properly rest with entities who control work environments); H. Rep. No. 91-1291 at 21 (same). The Secretary's enforcement experience over the past 30 years has shown that placing responsibility for complying with standards on employers who create or control violations will reduce the number of violations. *See CF&I*, 499 U.S. at 152-54.

Amici's oft-repeated argument that the Commission should not defer to the Secretary's statutory interpretations (Brief of the *Amici Curiae* (AB) at 27-33) has not been accepted by any court of appeals. *See Herman v. Tidewater Pac., Inc.*, 160 F.3d 1239, 1241 (9th Cir. 1998).[12] Deference to the Secretary's statutory interpretations is the only position consistent with *CF&I*. Although *CF&I* involved the interpretation of an OSHA standard, its rationale provides an equally persuasive basis for deferring to the Secretary's statutory interpretations. The Supreme Court placed less weight on the Secretary's authorship of the standard at issue than it did on her responsibility "'for the overall implementation' of the Act's policy objectives," 499 U.S. at 156 (quoting Senate Report); her role as enforcer, *id.* at 152; her policymaking expertise, *id.* at 153; and the fact that she is "the administrative actor in the best position to develop" the relevant expertise and knowledge. *Ibid; see also Pauley v. BethEnergy Mines,* 501 U.S. 680, 697 (1991) (citing *CF&I* for the proposition that courts must defer to the Secretary's reasonable statutory interpretation); *United States v. Mead*, 533 U.S. 218, 227-28 (2001) *citing Bragdon v. Abbott,* 524 U.S. 624, 642 (1998) ("[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). The Court's emphasis in *CF&I* on the Secretary's role and expertise in implementing the statute is dispositive because *Chevron USA v. NRDC*, 467 U.S. 837, 843 (1984), had already established that the agency charged with implementing a statute is entitled to deference for its reasonable interpretations of its governing statute. In cases involving interpretation of an ambiguous statutory provision, the Secretary's reasonable interpretations of

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[12] *See also, Universal Constr. Co. v. OSHRC*, 182 F.3d at 729; *Chao v. LeFrois Builders, Inc.*, 291 F.3d 219, 226-27 (2nd Cir. 2002); *L.R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1239-40 (4th Cir. 1998); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 859-60 (3d Cir. 1996); *Superior Elec. Co. v. OSHRC*, 18 BNA OSHC 1001, 1003 n. 8 (6th Cir. 1997) (not officially published); *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 1302 (D.C. Cir. 1995); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 531-32 (7th Cir. 1991).

the OSH Act, as well as of OSHA standards, are therefore entitled to deference. As a result, the Commission may not abandon "its longstanding precedent upholding" the multi-employer doctrine. OSHRC December 16, 2004 *Briefing Notice.*

Amici's implication that *CF&I* was wrongly decided because Congress intended the Commission to be "independent" of the Secretary is not a relevant subject for briefs to a tribunal that is required to follow the Supreme Court's commands. In any event, deferring to the Secretary's interpretations does not interfere with the Commission's independence. 499 U.S. at 156. Federal courts are also required to defer to agency interpretations, and they are clearly independent of and in no way "subservient to" those agencies. See AB at 30. Besides, this dispute is not at issue here because the interpretations of the Secretary and the Commission are in accord.[13]

C. 29 CFR 1910.12(a), which requires compliance with OSHA construction standards, is consistent with the application of the multi-employer doctrine.

Section 1910.12(a) states:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act 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.

The Secretary promulgated this provision one month after the effective date of the OSH Act,

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[13] For this reason, there is no point in debating the Javits statement on which *amici* place so much weight (AB at 29-33), but which the Supreme Court did not find compelling in *CF&I*. See *Amicus Curiae* Brief of the American Iron and Steel Institute at 4 (quoting Senator Javits to make the exact argument in CF&I that *amici* make here) (available on Lexis at 1989 U.S. Briefs 1541). That courts of appeals were divided before *Chevron* on how much deference to accord agency interpretations of the statutes they administer is one reason the Supreme Court decided *Chevron*, but it is completely irrelevant to the fact that, subsequent to *Chevron* (and *CF&I*, *Mead*, and their progeny), adjudicators must accord appropriate deference to agency interpretations. *Amici's* argument, if carried to its logical extreme, would prevent courts from deferring to agency interpretations of any pre-*Chevron* statute, including the one at issue in *Chevron* itself.

primarily to make existing Construction Safety Act standards applicable under the OSH Act. *CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 718, n.1 (7th Cir. 1999). The provision also makes clear, in the first sentence, that construction employers must comply with these standards wherever their employees are working, so that "every" employee's "employment and places of employment" are protected. In its second sentence, the regulation states that each employer must protect both the "employment" and "places of employment" of "each of his employees."

Read together, on their face the two sentences in the provision are completely consistent with the multi-employer doctrine, and nothing in its application or history suggests otherwise. 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. See *Pitt-Des Moines*, 168 F.3d at 985 (the multi-employer doctrine protects workers "with regular access to the areas controlled or directly impacted by the employer accused of violating a safety regulation"). In any event, the Secretary's interpretation of her *own* standard is clearly controlling, whatever weight is given her interpretation of the statute. *CF&I*, 499 US at 150-51 (well established that agency's construction of its own regulations entitled to substantial deference); *Paralyzed Veterans of America v. D.C. Arena, LP,* 117 F.3d 579, 584 (D.C. Cir. 1997) (same); *Siemens Energy & Automation, Inc.*, 21 (BNA) OSHC ___, slip op. at 8, n.8 (No. 00-1052, Feb. 25, 2005).

Summit and *amici* are simply wrong in asserting that the use of the term "his employees" in the second sentence of this provision indicates an intent to relieve construction employers of an obligation to comply with standards when their own workers are not endangered. SB at 14-15; AB at 5-8. They have no answer to the fact that the first sentence frames the obligation in

terms of "every employee" at the construction site. Moreover, nothing in the Federal Register publication that accompanied the regulation's issuance suggests that it was intended to address how the Secretary interpreted the duty to comply with the standards imposed by § 5(a)(2) or to deal with multi-employer liability. 36 FR 10466 (May 29, 1971). 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.

In addition, at virtually the same time, OSHA issued its first Field Operations Manual, which specifically directed the issuance of citations to employers who committed violations, regardless of whether their own employees were exposed to the resulting hazards. See 5/20/71 FOM, p. VII-6, ¶ 10b (Attachment C). OSHA has followed this practice consistently since that time.[14] *See, e.g.*, 41 FR 17639 (April 27, 1976); 59 FR 40964, 40982 (August 10, 1994) (discussion of general contractor liability in preamble to asbestos standard); OSHA CPL 02-00-124, *Multi-Employer Citation Policy* (12/10/99) ("continu[ing] OSHA's existing policy for issuing citations on multi-employer worksites") (Attachment D). These actions are persuasive support for the Secretary's reading of this regulation as consistent with, although not specifically addressed to, the contemporaneous multi-employer doctrine.[15]

D. General contractors may be liable as controlling employers for OSH Act violations.

Summit and *amici* both argue that, even if the Act allows an employer to be liable for violations that do not endanger its own employees, that liability should not extend to

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[14] In 1974, in acknowledgement of the Commission case law, the Secretary stopped citing employers for violations to which their own employees were not exposed. She resumed issuing such citations in 1976.

[15] Although the multi-employer policy was at issue in many early OSH Act cases involving construction standards, neither the employers who were charged with the violations, the Commission, nor the courts suggested that § 1910.12(a) was relevant to the issue. Not until *Anthony Crane Rental*, in 1995, did a court even allude to the regulation's alleged tension with the multi-employer doctrine.

"controlling" employers such as general contractors, who do not themselves directly commit the violations at issue. But there is no conceptual basis for distinguishing between an employer that is responsible for allowing its own workers to ignore an OSHA standard and an employer that is responsible for allowing subcontractors under its control to ignore the standard. In both cases liability only exists when an employer fails to act reasonably to require compliance. If the Act allows liability for non-exposing employers, that liability logically extends to any employer responsible for a violation. Whether to cite a particular employer is a matter within the Secretary's prosecutorial discretion. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6 (1985); *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

There are powerful reasons for citing general contractors as controlling employers in situations like this one. The contractual and economic relationship between a general contractor and its subcontractors usually allows the general contractor to insist that a subcontractor comply with its demands; subcontractors often do not have sufficient power to resist that pressure, whether it is applied to obtain compliance with safety rules or to cut corners in the interests of perceived efficiency. *See Knutson Construction*, 566 F.2d at 599. In this case, for example, All Phase complied, albeit temporarily, every time Summit asked it to provide fall protection. Tr. 118-20. However, when Summit failed to ask, workers received no protection. Tr. 33, 37, 42.

Perhaps because it would be awkward to assert that general contractors should not be required to "supervise" their subcontractors, Summit and *amici* assert that general contractors should not be required to "police" their subcontractors. SB at 2, 31; AB at 10, 19; Tr. 66-67. But supervision of subcontractors is the essence of a general contractor's role. It is disingenuous to assert that, while taking complete responsibility for the physical property and the performance of the work (see, e.g., Ex. C-7 §§ IA, IE, XCXXV; Dec. at 13), Summit should have no

responsibility for the safety of employees performing the work. A general contractor cannot accept the authority necessary to assure the quality of subcontractors' work, the timely and proper completion of construction, and the physical integrity of the site, while simultaneously refusing to exercise the very same authority to assure compliance with legal requirements, including those relating to the health and safety of employees engaged in the common undertaking. *Universal Construction Co.*, 182 F.3d at 730-31.

Moreover, the multi-employer doctrine does not make general contractors strictly liable for the work of their subcontractors. SB at 30. As OSHA and this Commission apply the doctrine, a general contractor is liable for violations it did not create only if it (a) has supervisory control sufficient to have the violation abated, (b) has knowledge of the violative condition, and (c) fails to take reasonable steps to correct the condition or have the condition corrected. This is diametrically opposed to strict liability, which holds an entity responsible regardless of its knowledge or the reasonableness of its actions. *Black's Law Dictionary*, 934 (8th ed. 2004); *Rest. 2d Torts*, § 519, comment (d) (1977). General contractors need not develop the same level of expertise as their subcontractors or constantly inspect for health and safety violations to avoid liability. Rather, they must only address violations that a reasonable general contractor would detect and address. *Universal Constr. Co*, 182 F.3d at 732. A general contractor lacking the expertise to detect a violation or one who makes reasonable efforts to monitor health and safety activities, but misses some latent violations, is not liable. *R.P. Carbone*, 166 F.3d at 819-20.[16]

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[16] In contending that the multi-employer doctrine lacks sufficient specificity to permit employers to conform their conduct, *amici* fail to consider important points. AB at 12, 20. While not binding, OSHA's publicly available Multi-Employer Instruction details the broad contours that OSHA will consider when determining whether an employer has exercised reasonable care. OSHA CPL 02-00-124, § XE3&4. Likewise, the Commission and courts have identified relevant factors for assessing whether an employer acted reasonably under the circumstances. *See, e.g., Knutson*, 566 F.2d at 600-01. In any event, the doctrine creates an obligation consistent with venerable legal provisions requiring parties to act in a reasonable manner. *See, e.g., Brooks Well Servicing, Inc.*, 20 O.S.H. Cas.

Indeed, OSHA has explicitly instructed its personnel that "the measures that a controlling employer must implement to satisfy his duty of reasonable care [are] less than what is required of an employer with respect to protecting its own employees. [T]he controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired." OSHA CPL 02-00-124, § XD2. Thus, in *Knutson Constr. Co.*, 566 F.2d at 601-02, the court held that a general contractor was not responsible for load-testing its subcontractor's scaffold, stating that "[t]he general contractor's duty with respect to safety standard violations by its subcontractors is not necessarily full compliance, but depends on what measures are commensurate with its degree of supervisory capacity." Thus, the multi-employer doctrine demands only that a general contractor protect the health and safety of workers engaged in the construction project in a manner consistent with its traditional role as the supervisory authority at the construction site. *Grossman Steel and Aluminum Corp.*, 4 (BNA) OSHC at 1188; 89 Harv. L. Rev. at 797 (entity controlling the work area in best position to prevent hazards and assure "so far as possible" the health and safety of affected workers).

The parade of horribles in Summit's and *amici's* briefs is not applicable to this case, and ignores the fact that neither the Secretary nor the Commission has ever held that every general contractor is automatically in control of every worksite. A small home building contractor that has no realistic control over either when its subcontractors show up for work or the work that they perform is unlikely to be cited for the subcontractor's violation. AB at 10-12. While there

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(BNA) 1286 (No. 99-0849, 2003); Rest. (3d) Torts: Liab. Physical Harm § 3 (T.D. No. 1, 2001) (negligence consists of "not exercise[ing] reasonable care under all the circumstances"). Accordingly, although OSHA does not hold general contractors to the same standards as it expects of employers with respect to their own employees, see *infra*, the criteria used to impose liability on a general contractor for its subcontractors' violations are not fundamentally different than those use to impose liability on an employer in an ordinary single-employer setting.

may be some situations where it is the subcontractor who has leverage over the general contractor, those are not the situations addressed by the general contractor aspect of the multi-employer doctrine, or by the cases applying that doctrine, which traditionally involve general contractors who supervise large construction projects. See Dec. at 5, n.4 (citing multi-employer cases involving Summit, which employs 180 people and supervises major construction projects); *see also Underhill*, 513 F.2d 1033-34 (high rise construction project with 437 workers at the site); *Knutson Constr. Co.*, 566 F.2d at 597 ("general contractor at large construction site"); *Universal Construction Co.*, 182 F.3d at 727 (general contractor constructing a branch bank).

The multi-employer doctrine assures that worker protection does not depend on the fortuitous circumstance of whether a worker's own employer is well situated to protect that worker against occupational hazards. Under the doctrine, construction workers who must work under potentially falling objects or near heavy equipment are protected against these hazards, even if somebody other than their own employer is working above them or operating the equipment. *Cf. United States v. Pitt-Des Moines, Inc.*, 168 F.3d at 981; *Underhill*, 513 F.2d at 1038. Similarly, if an excavation contractor leaves an open, unguarded trench on a multi-employer worksite when it departs, the workers remaining on the site can depend on the general contractor to arrange correction of the resultant hazard. *Cf. Centex-Rooney Construction Co.*, 16 (BNA) OSHC 2127 (No. 2127, 1994) (general contractor's failure to have open and obvious hazards abated endangered workers employed by several contractors). Likewise, if two subcontractors each contend that the other is obligated to guard a floor opening to which both of their employees are exposed, the general contractor has the authority to resolve the dispute and assure that all workers are protected. See Tr. 149-50. In each of these scenarios, the general contractor's control over the worksite is the only reliable way to prevent or abate the hazard, and

there is nothing unfair or burdensome in requiring the general contractor to use that authority to obtain compliance.

IV. Summit and *Amici's* Remaining Arguments Concerning the Application of the Multi-Employer Doctrine are not Persuasive.

A. OSHA did not need to engage in rulemaking before applying the multi-employer doctrine.

The multi-employer doctrine is not a "substantive rule," and the Secretary did not need to use Administrative Procedures Act (APA) rulemaking procedures to adopt it. SB at 21-22; 5 U.S.C. § 553(b) and (c). The APA's notice and comment requirement does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The multi-employer doctrine is an interpretation of the OSH Act that has gained wide-spread judicial acceptance, and OSHA's Instruction to its personnel is an internal manual explaining the Agency's policy on exercising its prosecutorial discretion in applying that doctrine. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-40 (D.C. Cir. 1986) (MSHA statement regarding citation of mine operators for contractor violations is a general statement of policy). The APA does not require the Secretary to engage in rulemaking either before she applies the multi-employer doctrine or before she develops enforcement policies consistent with the doctrine.

This Commission has long recognized that the multi-employer doctrine is not a substantive rule. *Limbach Co.*, 6 (BNA) OSHC 1244 (No. 14302, 1977). Health and safety standards or other regulations promulgated pursuant to the Secretary's authority under Sections 6 and 8 of the OSH Act establish specific, legally-binding employer obligations. 29 U.S.C. §§ 655(b), 658(a); *Montgomery KONE, Inc. v. Secretary of Labor*, 234 F.3d 720, 725 (D.C. Cir. 2000). In contrast, the multi-employer doctrine explains who may be liable for failure to meet

those obligations at multi-employer worksites. The only obligation at issue is the statutory requirement to comply with OSH Act standards. 29 U.S.C. § 654(a)(2). Thus, the multi-employer doctrine does not create an obligation; it merely recognizes an obligation contained in the OSH Act. *Cf. Erringer v. Thompson*, 371 F.3d 625, 603-31 (9th Cir. 2004) (HHS provisions establishing the scope of reimbursable Medicare costs is not a substantive rule because the provisions interpret and apply HHS' general statutory authority to consider claims for medical care).[17]

The *Limbach* decision is consistent with more recent judicial precedent. In *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 2005 WL 563975, * 10 (6th Cir., March 11, 2005), the Sixth Circuit held that a memorandum announcing an agency's implementation of its statutory interpretation was an interpretative rule. The court explained that "[i]nterpretive rules merely clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or regulation means." The *Dismas* court applied DC Circuit precedent that a rule is interpretative when "an agency is merely explicating Congress' desires [as opposed to when] the agency is adding substantive content of its own." *Id. citing American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). *See also Nason v. Kennebec County CETA*, 646 F.2d 10, 17-20 (1st Cir. 1981) (Secretary's statement regarding political activities of workers in CETA programs is interpretative because it construed existing statutory provisions); *Hemp Industries Ass.n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) ("[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. Legislative rules, on the other hand, create rights, impose obligations, or effect a change in

[17] An agency's interpretation and application of a statute always "has real consequences," but that does not make those actions substantive rules. *Paralyzed Veterans of America,* 117 F.3d at 588.

existing law pursuant to authority delegated by Congress.") (citations omitted).

This Commission and six circuit courts have upheld the Secretary's conclusion that the multi-employer doctrine is an interpretation necessary to effectuate Congress' intent that standards promulgated under the OSH Act protect workers at multi-employer worksites. No additional procedures are necessary. *Universal Construction Co.*, 183 F.3d at 782 n.2 (contention that rulemaking was required before applying the multi-employer doctrine is "clearly incorrect").

Nor was OSHA required to undertake rulemaking when it changed its enforcement guidance. SB at 22-24. *See* OSHA CPL 00-02-124, § IXA&B ("provid[ing] general policy guidance" consistent with "employers' statutory duty to comply with OSHA standards"). Rulemaking is not required to change the Secretary's enforcement policy within the parameters of the interpretation. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) (APA notice and comment applies to changes in substantive rules, not to changes in agency policy). In fact, there is no support for the blanket proposition that any change in policy constitutes a legislative rule for APA purposes. *Chief Prob. Officers of California v. Shalala*, 118 F.3d 1327, 1335-36 (9th Cir.1997). Here, OSHA has consistently interpreted the Act to prohibit an employer from violating standards, even if its own employees would not be exposed to the resultant hazard. *See* 5/20/71 FOM, p. VII-6, ¶ 10b and OSHA CPL 02-00-124. As a matter of prosecutorial discretion, OSHA may change its policy with respect to which employees to cite without engaging in APA rulemaking, especially if it determines that a broader exercise of its enforcement authority better achieves the purposes of the OSH Act. Summit is therefore mistaken in arguing that OSHA was required to undertake legislative rulemaking when it adopted or changed its enforcement guidance.

B. The application of the multi-employer doctrine does not impermissibly expand tort liability.

In asserting that the doctrine violates § 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), (SB at 15-20), Summit persists in misinterpreting that provision. *Summit Contractors, Inc.*, 20 (BNA) OSHC 1118 n.2 (No. 01-1891, 2003) (ALJ Spies) (finding, in an unrelated proceeding, the same interpretation to be contrary to Section 4(b)(4)'s language and the purpose). Employers' OSH Act obligations are unrelated to § 4(b)(4)'s statement that "[n]othing in th[e] Act shall be construed ... to enlarge or diminish or affect ... the common law or statutory rights, duties or liabilities of employers." That provision is instructive only in non-OSH Act proceedings, where it makes clear that: (1) the OSH Act does not provide a cause of action to individuals who have been injured during the course of employment and (2) no party can assert that an OSHA regulation, or the OSH Act itself, supersedes any element of a state or common law tort cause of action. *See Crane v. Conoco, Inc.*, 41 F.3d 547, 553 (9th Cir. 1994) (OSH Act does not create independent causes of action); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1234-36 (D.C. Cir. 1981). Nothing in § 4(b)(4) limits the administration of the OSH Act itself.

While the existence and implementation of the OSH Act may "have a great practical effect" on the rights of litigants in other forums, OSH Act provisions that leave common law and state law schemes "wholly intact as a *legal* matter" do not violate § 4(b)(4). *United Steel Workers,* 647 F.2d at 1236 (emphasis in original); *see also General Motors Corp., Electro-Motive Div.,* 14 (BNA) OSHC 2064, 2067 (No. 88-630, 1991) (mere existence of OSH Act provision does not change the essential nature of the state cause of action). To the extent that Summit's complaint is that OSH Act obligations should not affect state tort litigation, these

arguments must be made in the state proceedings, not in an OSHA enforcement proceeding. The application of the multi-employer doctrine does not violate § 4(b)(4) because it neither creates a private right of action for workers under the OSH Act nor does it relieve parties of any obligation to establish liability in state court proceedings based on state law.

CONCLUSION

For thirty years, the multi-employer doctrine has worked effectively to fulfill Congress' intent to further worker health and safety at construction sites without unduly burdening employers. The Commission should firmly uphold, not overrule, such carefully developed, long-standing, and valuable precedent. Applying the doctrine here, the Commission should affirm the judge's Decision and Order finding that Summit committed a serious violation of 29 CFR § 1926.451(g)(1)(vii) and assessing a penalty of $ 2000.00.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

ANN ROSENTHAL
Counsel for Appellate Litigation

STEPHEN D. TUROW
Attorney for the Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Room S4004
Washington, D.C. 20210

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Secretary's Response Brief was sent by US mail and telecopy on this 14th day of April, 2005 to:

Robert E. Rader, Jr.
Rader & Campbell
2777 Stemmons Freeway
Stemmons Place
Suite 1125
Dallas, Texas 75207

Arthur G. Sapper
McDermott Will & Emery
600 – 13th Street, NW
Washington, DC 20005-3096

Victoria L. Bor
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
900 Seventh Street, NW
Suite 1000
Washington, DC 20001

Stephen Turow
Attorney for the
Secretary of Labor