

FEDERAL REVIEW COMMISSION REAFFIRMS OSHA'S MULTI-EMPLOYER CITATION POLICY

By: George J. Miller
Wyatt, Tarrant & Combs, LLP

Since the early 1970's, OSHA has categorized employers on multi-employer worksites, such as construction sites, into four categories:

1. The creating employer—the employer that caused the hazardous condition.
2. The exposing employer—the employer whose own employees are exposed to the hazard.
3. The correcting employer—an employer engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard.
4. The controlling employer—an employer who has general supervisory authority over a worksite, including power to correct safety and health violations itself or require others to correct them.

Federal OSHA's current policy is found in OSHA Instruction CPL 2-0.124 (Dec. 10, 1999). The Kentucky OSH Program also recognizes these categories and follows this policy, which can be found in the Kentucky OSH Program Field Operations Manual, Chapter 5, p. V-10, and is accessible on line at: <http://www.labor.ky.gov/ows/osh/compliance/OSH+Field+Operations+Manual.htm>.

Under both the federal and the Kentucky multi-employer policies, an employer can be cited as a creating, correcting, or controlling employer, or a combination thereof, even if none of the employer's own employees have been exposed to the hazard for which the citation was issued.

A long simmering question has been whether a particular federal regulation (29 CFR § 1910.12) precludes the Secretary of Labor from citing such employers. In the 2007 case of Summit Contractors, a two person majority of the federal OSH Review Commission ruled that the Secretary lacks this

authority, and it dismissed the citation against Summit, the general contractor on a construction job which had been cited for an alleged exposure of a subcontractor's employees.

However, the Commission's decision was later overturned by the federal Court of Appeals for the Eighth Circuit, which ruled that the Secretary has the authority to issue such citations. The court then remanded the case to the Commission, which ultimately affirmed the citation against Summit.

A companion case involving a separate citation against Summit Contractors had been held in abeyance by the Commission, pending the outcome of the first case.

On August 19, 2010, the Commission issued its decision in the second case. In another split decision, the Commission affirmed the second citation and also took the opportunity to reaffirm — at some length — the Secretary's authority to issue such citations. The decision, including a long dissent by Commissioner Thompson, is too lengthy to summarize here, but it can be read on the federal Commission's website at http://www.oshrc.gov/decisions/html_2010/05-0839.htm.

After the first Summit decision by the Commission, but before the Court of Appeals' ruling in that case, the Kentucky OSH Review Commission addressed the same issue in the 2008 case of Commissioner v. Morel Construction Co., Inc., et al, KOSHRC Docket No. 4147-04 (Oct. 7, 2008)

However, unlike the federal Commission in the first Summit decision, the Kentucky Commission ruled that the Secretary has the authority to issue such citations. This decision can be accessed on line at: http://www.koshrc.ky.gov/2000_present.htm.

It does not appear that any Kentucky court reviewed this decision. Even if the U.S. or Kentucky

Employers have the right to challenge whether they have been properly categorized and, even if they are properly categorized, to present evidence that they are not liable.

During July 2010, nationwide 90 workers were killed on the job or died from workplace illnesses. Three of those deaths occurred in Kentucky.

Secretary of Labor has the authority to issue such citations, this does not mean that any and all such citations are meritorious. Employers have the right to challenge whether they have been properly categorized and, even if they are properly categorized, to present evidence that they are not liable. For example, under the multi-employer policy, controlling employers should be cited only if they failed to exercise reasonable care under the circumstances.

As interpreted by the federal Review Commission, this means that a controlling employer can be held liable for the violations of another employer only if the controlling employer knew or should have known of the violative conditions. See, e.g., *Secretary v. E.P. Guidi, Inc.*, OSHRC Docket Nos. 04-1055, 1056 (August 16, 2005).

Absent evidence that the controlling employer had, or should have had, such knowledge, the citation should be dismissed. ▲

Weekly fatality and catastrophe report

OSHA maintains a page on its website at http://www.osha.gov/dep/fatcat/dep_fatcat.html that tracks workplace fatalities and catastrophes nationwide on a weekly basis. The latest postings are through July 2010, a month in which 90 workers were killed on the job or died from workplace illnesses. Other deaths in July may be added in the months to follow as workers die from injuries received in July.

The OSHA site provides links to weekly summaries of fatalities and catastrophes resulting in the hospitalization of three or more workers. Employers must report these incidents to OSHA within eight hours. The summaries on the website include only preliminary information, as reported to OSHA area offices or to the states that operate State plans.

OSHA investigates all work-related fatalities and catastrophes. Once the investigations are complete, the summary reports are updated on the website.

During July 2010, three of the 90 deaths nationwide occurred in Kentucky. Following is a brief description of those, as posted by OSHA.

- July 3. Western Kentucky Correctional Complex, Fredonia. An employee walking to her car after work was struck by the vehicle of another employee who was pulling her truck out to also leave work.

- July 19. Brazeway Inc., Hopkinsville. An employee suffered an electric shock while operating a resistance welder. The employee was hospitalized after the injury and died five days later.

- July 22. Universal Linen Service LLC, Louisville. An employee was crushed when caught between an automatic laundry hopper on a shuttle conveyor and an industrial washing machine. ▲

Almost half of states run OSHA program

Kentucky is one of 21 states with their own OSHA plan, instead of letting the federal government do it. The Occupational Safety and Health Act of 1970 provides that any state may submit a plan to assert jurisdiction under state law over any occupational and safety issue, in accordance with federal standards.

States make an application to run their own plan, subject to approval by the U.S. Secretary of Labor. The federal government approves and monitors state plans and provides up to 50 percent of the state's operating costs.

The Kentucky OSH Program was initially approved in 1973 and granted final state plan approval June 13, 1985. Kentucky was the first state plan approved under revised federal benchmarks.

Besides Kentucky, 20 other states operate complete State plans — meaning they cover both the private sector and state and local governments. Four additional states (Connecticut, Illinois, New Jersey and New York) cover public employees only. Eight states were approved at one time but subsequently withdrew their programs.

The states with a complete State Plan are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming.

States must set job safety and health standards that are "at least as effective as" comparable federal standards. (Most States adopt standards identical to federal ones.) States have the option to promulgate standards covering hazards not addressed by federal standards.

A State must conduct inspections to enforce its standards and operate occupational safety and health training and education programs. ▲