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OSHA NEWSLETTER

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Multi-Employer Worksite Doctrine Applies to Worksites in Texas, Louisiana or Mississippi

Matthew Deffebach and Mini Kapoor Ph.D.

On November 26, 2018, the Fifth Circuit issued its decision in *Acosta v. Hensel Phelps Constr. Co.*,[1] upholding OSHA's Multi-Employer Worksite Doctrine—enabling OSHA to cite employers who are "controlling," "exposing," or "correcting" safety hazards at worksites - and overturning its precedent in *Melerine* (holding that "OSHA regulations protect only an employer's own employees").[2]

In *Hensel Phelps,* Hensel Phelps Construction Company ("Hensel") entered into a contract with the City of Austin to build a library. Hensel, as general contractor, was in control of the worksite, through its presence as on-site management. Hensel contracted with Haynes Eaglin Watters, LLC ("HEW"), and HEW subcontracted with CVI Development, LLC ("CVI"). While the project was in process, OSHA inspected the site and found CVI employees working in allegedly unsafe conditions.

Among others, Hensel was cited under OSHA's multi-employer citation policy, which permits OSHA to issue a citation to a "controlling employer," or one who has control over a worksite who should have detected and prevented a violation through the reasonable exercise of its supervisory authority—whether or not its own employees were exposed to the hazard. Hensel contested the citation. An administrative law judge found that Hensel was a "controlling employer" and that Fifth Circuit precedent precluded the citation because the workers exposed to the hazard were CVI employees, not Hensel employees. After the Commission denied review, the Secretary filed a petition for review at the Fifth Circuit.

The Fifth Circuit addressed the issue of whether the Secretary may issue a citation to a general contractor at a multi-employer construction worksite who controls a potentially hazardous condition at that worksite, even if the condition affects another employer's employees. The court found that *Melerine* predated *Chevron*, the seminal case that established the standard used to determine judicial deference given to administrative agencies.[3] Applying *Chevron*, the court found that 29 U.S.C. Section 654(a)(2) ("Each employer . . . shall comply with occupational safety and health standards promulgated under this chapter.") was unambiguous in that it applied to "all employers."

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Under *Hensel Phelps*, it may be prudent for any employer having control over a worksite in Texas, Louisiana or Mississippi (where the Fifth Circuit law would apply) where the employer's contractors or other parties work or provide services, to monitor and ensure that the worksite is in compliance with OSHA requirements even if the employer's own employees do not work at the site. *Hensel Phelps* is also noteworthy because with this decision all states under the Federal OSHA program now follow the multi-employer policy. Further, controlling employers in states not under the Federal OSHA program should also be mindful about *Hensel Phelps* because the case may influence appellate courts or tribunals in those jurisdictions.

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[1] No. 17-60543

[2] *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981)

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

California Enacts New Law for Recordkeeping Violations after Trump Administration Nullifies Volks Rule

Matthew Deffebach, Allan Gustin, Jasmine Culpepper Tobias

Effective January 1, 2019, California Assembly Bill 2334 extends the period for which the California Division of Occupational Safety and Health, Cal/OSHA can issue citations for recordkeeping violations. AB 2334 expands the definition of an "occurrence" for purposes of the statute of limitations for recordkeeping violations. The definition provides that an occurrence continues until it is corrected, the Division discovers the violation, or the duty to comply with the requirement that was violated no longer exists. A six-month statute of limitations applies to citations issued under Cal/OSHA for an occurrence of a violation. Accordingly, California employers could be subject to recordkeeping violations for as long as five years, the amount of time employers must maintain injury and illness records.

The new law appears to be a reaction to the Trump Administration's nullification of the Obama-era OSHA rule, "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness," also known as the *Volks* rule. In other words, the Trump Administration rule set aside the Obama Administration's effort to override *AKM LLC d/b/a Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012), a U.S. Court of Appeals for the District of Columbia which held that OSHA cannot issue citations for failing to record injuries or illnesses beyond the six-month statute of limitations set out in the OSHA Act.

Controlling Employers May Benefit from Comprehensive Safety Policies for Contractors

Matthew Deffebach, Mini Kapoor Ph.D., Andrea Levenson

In S*ecretary of Labor v. Suncor Energy U.S.A., Inc.*[1], the Review Commission limited a controlling employer's "reasonable care" obligations in the context of scaffolding issues in a confined space at a construction site. In *Suncor*, one of Suncor's contractors erected scaffolding inside the confined space and made modifications to this scaffolding at a multiemployer worksite. Two employees of another contractor, while using the scaffolding to examine welds inside the confined space, fell and suffered severe injuries. OSHA cited Suncor for violation of §1926.451(g)(1), for lack of fall protection while employees were working on the scaffold. After an administrative law judge upheld the citation, the Commission reversed.

The Commission found that Suncor met its obligation of reasonable care, emphasizing that a controlling employer's obligation "depends in part on the nature, location, and duration of the conditions." Here, the fact that the defective scaffold and failure to use fall protection was hidden in the confined space and that no Suncor employee was designated to work inside the confined space were significant as to lack of the controlling employer's knowledge of the hazard. Further, the Commission considered three factors: the nature of the work, the scale of the project, and Suncor's efforts to "hire only safety-conscious contractors." First, the Commission explained that the controlling employer is not required

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to enter a confined space unless its own employees are working in that space. Next, the Commission pointed out that "Suncor's safety efforts were more than commensurate with the size, complexity, and the short time frame associated with this project." Third, it applauded Suncor's efforts to hire safety conscious contractors and extensively train contractor employees on safety and work rules, including a policy that provides for punishing safety violators.

Under *Suncor*, it may be prudent for controlling employers at multi-employer sites to have comprehensive safety programs for contractors working at the site.

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1 OSHRC, No. 13-0900, 2019 WL 654129 (Feb. 1, 2019)

OSHA Issued Final Rule on Recordkeeping

Matthew Deffebach, Allan W. Gustin, Jasmine Culpepper Toibias

OSHA issued a final rule rescinding portions of the Obama Administration electronic reporting rule. Effective February 25, 2019, employers with 250 or more employees are only required to electronically submit the OSHA Form 300A (Summary of Work-Related Injuries and Illnesses), instead of submitting the OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report). OSHA determined that the new rule would better protect employee privacy by eliminating the risk that sensitive information, including descriptions of workers' injuries and body parts affected, would be publicly disclosed pursuant to a Freedom of Information Act request.

The final rule does not impact an employer's duty to retain physical copies of the Form 300 and Form 301 on-site. OSHA will continue to obtain the Form 300 and 301 in connection with investigations.

Three public health advocacy groups—Public Citizen's Health Research Group, the American Public Health Association, and the Council of State and Territorial Epidemiologists—have twice filed joint suits against OSHA regarding the final rule. In their first lawsuit, filed June 25, 2018, the groups assert that OSHA violated the Administrative Procedure Act's notice-and-comment requirement by posting on its website that it would longer require submissions of the Form 300 and 301 in May 2018. OSHA subsequently issued a proposed rule relating to the May 2018 posting on July 30, 2018. OSHA filed a motion to dismiss the first lawsuit, and the motion was denied on December 12, 2018.

The groups' second lawsuit was filed January 29, 2019. That suit contends that OSHA did not provide a reasoned explanation for the change; did not adequately consider comments submitted in opposition to the rule change; and relied on considerations that do not have a basis in law.

The pending lawsuits did not impact the due date for Form 300A submissions for the 2018 Calendar Year, which was March 2, 2019.

Increased Bar for Establishing Existence of a Heat Hazard to Sustain a General Duty Violation

Matthew Deffebach, Mini Kapoor Ph.D., Andrea Levenson

In its February 28, 2019 decision in *Sturgill*[1], the Review Commission found that the Secretary's evidence was insufficient to show that a heat hazard existed to sustain a violation of the general duty clause.

In *Sturgill*, MR, a temporary employee with various preexisting medical conditions was tasked with pushing pieces of roofing material off a roof into a dumpster below, on his first day of work. The temperature during his working hours ranged from 72°F to 82°F. The employee collapsed at the worksite, he was diagnosed with heat stroke and later died from complications due to heat stroke.

OSHA cited Sturgill, including for a violation of the general duty clause (29 U.S.C. § 654(a)(1)), for exposing employees "to the hazard of excessive heat."

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An administrative law judge affirmed the citation. The Commission vacated.

The Commission found that there was insufficient evidence of a hazard to sustain a general duty clause violation. Specifically, it found that data from the National Weather Service and expert testimony that lacked a factual basis and reasoning behind the opinion were insufficient to show that a heat hazard existed. The Commission also found that medical privacy laws prevented the employer from asking about the worker's medical history, and thus, Sturgill had no basis to believe that the employee may have had medical conditions that could endanger his health if he performed the assigned work. Based in part on this analysis, the citation was vacated.

While *Sturgill* was decided on the narrow facts of the case, it appears to raise the Secretary's bar for showing that a heat hazard existed under the general duty clause, including requiring fair notice to the employer regarding the employee's preexisting health conditions. Also noteworthy is the Commission's disapproval of using the general duty clause for anything other than as a "stopgap measure to protect employees until standards could be adopted." Under *Sturgill*, an employer cited for general duty violation should closely assess whether the Secretary's evidence is sufficient to show the existence of the alleged hazard.

[1] *A.H. Sturgill Roofing Inc. v. Sec'y of Labor*, OSHRC, No. 13-0224, 2019 WL 1099857 (Feb. 28, 2019).

OSHA Issues FAQs for Respirable Crystalline Silica for General Industry

Matthew Deffebach, Allan W. Gustin, Jasmine Culpepper Tobias

On March 25, 2016, OSHA published a final rule regulating occupational exposure to respirable crystalline silica for general industry, and the standard became enforceable on June 23, 2018. The standard requires employers to protect employees from exposure above the permissible exposure limit of 50 ug/m3 averaged over an eight hour day.

OSHA has recently published 64 Frequently Asked Questions (FAQs) regarding the final rule. The FAQs were developed with consultation from industry and union stakeholders.

The FAQs provide guidance for the Scope and Application (29 C.F.R. § 1910.1053(a)), Definitions (29 C.F.R. § 1910.1053(b)), Exposure Assessments (29 C.F.R. § 1910.1053(d)), Regulated Areas (29 C.F.R. § 1910.1053(e)), Methods of Compliance (29 C.F.R. § 1910.1053(f)), Written Exposure Control Plan (29 C.F.R. § 1910.1053(f)(2)), Housekeeping (29 C.F.R. § 1910.1053(h)), Medical Surveillance (29 C.F.R. § 1910.1053(j)), Communication of respirable crystalline silica hazards to employees (29 C.F.R. § 1910.1053(j)), Recordkeeping (29 C.F.R. § 1910.1053(k)), and Temporary Employees.

Employers covered by the standard should review the entire list of FAQs.

In Other News

OSHA Increases Maximum Penalty Amounts

Effective January 23, 2019, the maximum penalties OSHA can assess for violations increased, to adjust for inflation. The maximum penalties are set forth below:

Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	$13,260 per violation
Failure to Abate	$13,260 per day beyond the abatement date
Willful or Repeated	$132,598 per violation

If you have any questions, please visit the Haynes and Boone **Occupational Safety and Health Act (OSHA) and Workplace Disasters page** of our website or contact one of the lawyers listed in this newsletter.

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