

Fifth Circuit to Hear Oral Arguments in Hensel Phelps Case in August 2018

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PRACTICES Labor and Employment, OSHA

In June 2017, the Occupational Safety and Health Review Commission (the “Commission”) applied Fifth Circuit precedent and determined that employer Hensel Phelps could not be liable for a violation of the Occupation Safety and Health Act (the “Act”) based solely upon a subcontractor’s employees’ exposure to the condition, and vacated a citation issued by OSHA.

The case arose from a complaint relating to an unprotected excavation at a construction site. Hensel Phelps was the general contractor on the site, but the employees at issue were employed by a secondary subcontractor, CVI Development, LLC (CVI). Following a complaint, an OSHA compliance officer conducted an inspection that uncovered the CVI employees were working next to an excavated, vertical, wet soil wall that was not properly sloped or otherwise protected from cave-in hazards, in full view of Hensel Phelps’ management.

The parties stipulated to facts necessary to establish a *prima facie* violation of the cited regulation, 29 CFR 1926.652(a)(1). The sole issue remaining before the Commission was if Hensel Phelps could be held liable for the conduct as a “controlling employer.” Under the Fifth Circuit precedent, OSHA regulations protect only an employer’s own employees. Accordingly, the Commission held that Hensel Phelps could not be held liable for CVI employees’ exposure to the hazard, and vacated the citation.

OSHA appealed the decision to the Fifth Circuit in *Melerine. Acosta v. Hensel Phelps Constr. Co.*, No. 17-60543. The case has been fully briefed and oral arguments are tentatively scheduled for August 8, 2018.

The Fifth Circuit’s decision could have far reaching implications on the applicability of OSHA’s multi-employer policy. The longstanding policy allows OSHA to cite an employer that creates a hazard, even if the employees exposed to the hazard are those of other employers.¹ If the ALJ decision is upheld, OSHA’s multi-employer policy would continue to be unenforceable in the Fifth Circuit as to other employer’s employees.

¹ [Multi-Employer Citation Policy](#), OSHA.Gov (Dec. 10, 1999).