General Contractors Could Be Cited for Safety Violations That Endanger Their Sub-Contractors or Other Non-Employees

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On November 26, 2018, the Fifth Circuit issued its decision in *Acosta v. Hensel Phelps Constr. Co.*, 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 v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981) (holding that "OSHA regulations protect only an employer's own employees").

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 obtained subcontractor, Haynes Eaglin Watters, LLC ("HEW"), and HEW contracted with sub-subcontractor CVI Development, LLC ("CVI"). While the project was in process, OSHA inspected the site and found CVI employees working in what OSHA believed to be were unsafe conditions.

OSHA cited CVI and Hensel for "exposing employees to a cave-in hazard from an unprotected excavation at a construction site." OSHA also cited Hensel under its 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 at the Occupational Safety and Health Review Commission found that Hensel met the requirements for being a "controlling employer." The administrative court applied the Fifth Circuit precedent in *Melerine* where the court held that "OSHA regulations protect only an employer's own employees," and found that the 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 of Labor may issue a citation to a general contractor at a multi-employer construction worksite who controls a hazardous condition at that worksite, even if the condition affects another employer's employees. The court found that *Melerine* and the cases it relied upon, predated *Chevron U.S.A v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[1] Applying *Chevron*, the court analyzed whether the *Melerine*'s construction of the relevant statute followed from unambiguous terms of the statute and therefore, left no room for agency discretion. Specifically, 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."

In summary, the Fifth Circuit fully adopted OSHA's Multi-Employer Worksite Doctrine, deciding that the Secretary has the authority under OSHA to issue citations to controlling employers at multi-

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employer worksites, and finding that *Melerine* and all the cases it relied upon were rendered obsolete to the extent they conflicted with this interpretation of § 654(a)(2).

Under *Hensel Phelps*, operators having control of worksites in Texas, Louisiana and Mississippi should monitor the worksites to ensure safe working rules are implemented and followed by the operators' contractors and all other parties working at the site regardless of whether the operator's own employees are exposed to the potential hazards. *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 in those jurisdictions.

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[1] *Chevron* is a seminal case that established the standard used to determine judicial deference given to administrative agencies.

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