

Hensel Phelps Decision Vacates Willful Citation Because Exposed Workers Were Not General Contractor's Employees

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PRACTICES OSHA, Labor and Employment

In *Secretary of Labor v. Hensel Phelps Construction Co.*, Docket No. 15-1638 (June 1, 2017), the Occupational Safety and Health Review Commission (the "Commission") held that due to longstanding Fifth Circuit precedent, OSHA could not hold Hensel Phelps liable for a safety violation based solely upon a subcontractor's employees' exposure.

In this case, Hensel Phelps had been contracted by the City of Austin to build a library. Hensel Phelps then subcontracted Haynes Eaglin Watters, LLC ("HEW") who further subcontracted CVI Development, LLC ("CVI") to perform excavation and other work. After a complaint was received, OSHA's compliance officer conducted an inspection at the worksite and found that employees of CVI were working next to an excavated wall in intermittent rain without proper sloping or other protection from cave-in hazards. Hensel Phelps, as the general contractor, had instructed CVI to continue work in that area, even after some concerns had been raised.

The parties had agreed to a stipulated record; so, the *prima facie* elements necessary to establish the cave-in protection citation were proved. The sole issue before the ALJ was whether Hensel Phelps, "as the General Contractor for the library project, [could] be held liable for the violation as a 'controlling employer.'" *Id.* at 8. Hensel Phelps argued that based on Fifth Circuit case law, OSHA's controlling employer policy had been "invalidated and is unenforceable." *Id.*

Somewhat hesitantly, the Commission reasoned, "[t]he stipulated record clearly establishes that Respondent had sufficient control and authority over this jobsite, including subcontractor CVI and its employees, to reasonably be expected to prevent and/or correct the violation in this case... Accordingly, [the citation] would be affirmed under applicable Commission case law." *Id.* at 10. However, the violation occurred in Austin, Texas, within the geographical jurisdiction of the Fifth Circuit Court of Appeals, who unambiguously stated, "OSHA regulations protect only an employer's own employees." *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981). Because the Commission's decision would be appealed to the Fifth Circuit, the Commission applied the precedent of the Fifth Circuit, holding Hensel Phelps "cannot be liable for a violation of the Act based solely upon a subcontractor's employees' exposure to the condition." *Hensel Phelps*, Docket No. 15-1638 at 11. The Commission agreed with the ALJ's decision, and Hensel Phelps's willful citation was vacated.

OSHA has since appealed the decision to the Fifth Circuit, presumably in hopes that the Fifth Circuit will overrule its holding in *Melerine. Acosta v. Hensel Phelps Constr. Co.*, No. 17-60543 (5th Cir. filed Aug. 4, 2017). It remains to be seen whether OSHA's "controlling employer" policy will live on in Texas, Louisiana, and Mississippi (the states within the Fifth Circuit) after the *Hensel Phelps* ruling.