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

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PRACTICES Labor and Employment, OSHA

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."

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.

[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).