OSHA’s Common Work Area Policy: Avoiding a Fall, But Still on Uncertain Footing

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Introduction

Historically, under the “common work area” policy (also known as the “multi-employer worksite” policy), OSHA could issue citations to general contractors for safety violations on jobsites where multiple employers (contractor, subcontractors, tradesmen, suppliers, etc.) share a common work area. General contractors were vulnerable to citations even where they did not create the hazard, did not expose their own employees to the hazard, and were not responsible for correcting the hazard. Over the past few years, the common work area doctrine came under increased scrutiny, with a resulting reduction of OSHA’s citation authority against general contractors. The common work area policy now appears to be restored, however, upping the ante on a general contractor’s responsibility to provide a safe jobsite for all employees on its jobsite, not merely its own.

Summit I

In the Summer 2007 edition of this newsletter, I wrote an article explaining how general contractors’ ability for jobsite safety violations had dramatically changed in the wake of the decision Secretary of Labor v. Summit Contractors, Inc. (OSHRC Docket No. 03-1622 April 26, 2007) (“New Fall Protection for Contractors: How the OSHA Review Commission has Changed Your Exposure to Project Safety Liability”). That decision (Summit I), rendered in April 2007, reversed more than thirty years of precedent regarding general contractor liability for jobsite safety violations under the common work area policy. For decades prior to the Summit I decision, general contractors could be penalized by OSHA for jobsite safety violations committed by virtually any subcontractor, tradesman or laborer on the jobsite, even if the general contractor did nothing to create the condition giving rise to the violation or to expose any of its own employees to it.

The Summit I decision held that in a multi-employer setting, where multiple trades and tiers of contractors are working on a jobsite, OSHA could not penalize one employer for the safety violations of another. This redefined the multi-employer worksite doctrine and provided general contractors with additional protection from liability for safety violations they were not best situated to correct. In Summit I, the Occupational Safety and Health Review Commission (OSHRC) held that OSHA improperly penalized Summit for safety violations committed by its subcontractor. Specifically, Summit’s masonry subcontractor used scaffolding without guardrails or personal fall protection. Summit subcontracted the entire job and had only supervisory staff on site, who repeatedly instructed the masonry subcontractor to add fall protection. Each time the masonry subcontractor moved its scaffolding, however, it again would work without fall protection or guardrails. OSHRC determined that Summit could not be held responsible
for the violations, and that OSHA’s attempt to do so was an application of the common work area policy that went too far.

In the Fall 2008 edition of this newsletter, I wrote an article identifying a number of states that appeared to be following Summit I’s lead, breaking with the long-established application of the common work area policy. This, of course, was good news for general contractors and other “controlling employers” whose jobsite policing responsibilities appeared to be reduced. In February 2009, however, Summit I was reversed, and OSHA may once again issue citations to general contractors for jobsite safety violations beyond their control.

**Summit II**

After the Summit I decision vacated the citation against Summit, the United States Secretary of Labor asked that the case be reviewed by the Eighth Circuit Court of Appeals, which hears appeals of cases decided in Missouri, Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Arkansas. In *Solis v. Summit Contractors, Inc.* (558 F.3d 815) (*Summit II*), the Eighth Circuit reviewed and reversed the OSHRC decision in Summit I. This effectively reinstated the common work area policy as it had been implemented prior to Summit I, at least in those states within the Eighth Circuit. As discussed below, the rationale behind the decision in Summit II serves as an important reminder for employers on multi-employer jobsites to closely monitor and maintain work conditions, regardless of the state in which the project is located.

**The Rationale Behind the Summit II Decision**

The court in Summit II took a fairly simple approach: in its review of OSHRC’s decision: it looked at the regulatory language OSHA used to support the common work area policy, and considered whether there was substantial support for OSHRC’s conclusion that the language conflicted with the policy. The specific language in question comes from the Code of Federal Regulations, and provides that “[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.” (29 C.F.R. § 1910.12(a)).

Summit urged that this language requires an employer to protect only its own employees. Under this view, general contractors would be responsible for making sure their own employees abide by applicable safety regulations, subcontractors would be responsible for their employees, and so on. The logic of this approach was appealing to OSHRC because it places responsibility with the entity best positioned to address the violation and correct it.

The Eighth Circuit disagreed, noting that the plain wording of the regulation requires that the employer must protect not only “the employment of his employees” but also must protect “the places of employment of his employees.” This includes areas of the jobsite not occupied or accessed by the employer’s employees. In Summit’s case, this meant
that Summit was properly penalized for its masonry subcontractor’s lack of fall protection on the scaffolding because this constituted a failure by Summit to protect the places of employment of Summit’s employees.

The *Summit II* decision is binding only on Eighth Circuit states for now, but the potential for other states and circuits to follow suit cannot be ignored. Whether other courts will follow the *Summit II* decision, however, is far from certain. Even the Eight Circuit acknowledged the appeal of restricting liability to the employer best situated to avoid creating the dangerous work area condition, that is, the “creating employer.”

Notwithstanding its ultimate decision against Summit, the Eight Circuit noted that the “creating employer” is uniquely situated to be familiar with the very specific regulations applicable to its particular trade. The court went on to observe that OSHA’s citation of the “controlling employer” places an enormous responsibility on general contractors to monitor all employees and all aspects of a jobsite. The court characterized these considerations, however, as “policy concerns” better addressed to Congress or the Secretary of Labor than to the courts.

More striking with the Eight Circuit’s acknowledgement that arguably OSHA could not lawfully apply the common work area policy in the first place, without formally adopting it through statutorily required administrative procedures. The court noted that the United States Supreme Court has stated that Congress did not intend for OSHRC to use its adjudicatory power to play a policy-making role, but this is exactly what OSHRC appears to have done in a series decisions issued in the 1970s that solidified the common work area policy in the arsenal of OSHA’s enforcement powers. The *Summit II* court then concluded that OSHA could be implementing its common work area policy unlawfully. Unfortunately, Summit could not benefit from the court’s apparent sympathies, which had been stirred not by either party but by an outside submission to the court on Summit’s behalf. Accordingly, the court declined to consider these issues in its decision. Nonetheless, strong arguments exist against the application of the common work area policy in states outside the Eighth Circuit, and these states’ treatment of the issue will be critical to the future landscape of OSHA’s authority. As long as the *Summit II* decision stands, however, it has important practical implications for contractors and other jobsite employers, regardless of whether the jobsite is in an Eighth Circuit state.

**What *Summit II* Means for General Contractors**

Although the *Summit II* decision comes from the Eighth Circuit and legally is applicable only in the seven states, general contractors and subcontractors alike should take note of OSHA’s broadening within the court’s jurisdiction authority over jobsite conditions. Under the common work area doctrine, OSHA may issue citations to the creating employer (in *Summit*, the masonry subcontractor who committed the safety violation) as well as the controlling employer (*Summit*). As noted above, even outside the Eighth Circuit, where general contractors like Summit probably would not be cited for the safety violations of other jobsite employers, OSHA may nonetheless issue citations to
“controlling” employers with the hope that the courts reviewing the propriety of such citations would agree with the Eighth Circuit.

Both general contractors and subcontractors should consider this carefully when negotiating the terms of their agreements. General contractors should be mindful of the additional supervisory responsibilities that could be required under the Summit II decision, and the associated costs. General contractors might consider contractual mechanisms to pass these costs on to the subcontractors and other jobsite employers. Subcontractors, on the other hand, knowing that their own safety violations could result in penalties to others up the contractual chain, may be on good footing to negotiate a reasonable middle ground for sharing responsibility for maintaining a safe jobsite. The time to address such terms is before you negotiate the contract.

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