UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Docket No. 03-1662

SECRETARY OF LABOR,

Complainant,

v.

SUMMIT CONTRACTORS, INC.,

Respondent.

BRIEF OF THE *AMICUS CURIAE,* BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ON BEHALF OF THE SECRETARY OF LABOR

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INTRODUCTION

The Building and Construction Trades Department, AFL-CIO (BCTD) appreciates the opportunity to file this *amicus* brief on behalf of itself, its fifteen affiliated national and international unions and their 3 million members. The BCTD and its affiliated unions have long taken an active role in promoting safe work practices and effective regulation to ensure that the employees who build this nation do not pay for their work with their health or their lives.

This case raises an issue of critical importance in ensuring all workers in this industry a safe and healthful workplace: the ability of the Occupational Safety and Health Administration (OSHA) to look to the employer that has the right to control workplace conditions on a multi-employer worksite to exercise that control in a way that protects the workforce. In this case, Summit Constructors – a general contractor that, through its contractual arrangements and in its daily practices, retained a degree of control over safety and health conditions on its multi-employer worksite – and its *amici* are asking the Occupational Safety and Health Review Commission (the Commission) to abandon its longstanding precedent holding general contractors liable when they fail reasonably to exercise the kind of control Summit retained. And in so doing, Summit and its *amici* are calling on the Commission to reject OSHA's application of its multi-employer worksite doctrine to general contractors as "controlling employers."

The Secretary of Labor has demonstrated in her brief that OSHA's multi-employer worksite doctrine is consistent with the language and intent of the Occupational Safety and Health Act (OSH Act). She has, moreover, shown that OSHA is entitled to articulate and utilize this enforcement policy, based on its interpretation of the Act, without undertaking formal notice and comment rulemaking, and that her reasonable interpretation is entitled to the Commission's

continued deference. And, she has shown that there is no reason, in law or policy, for the Commission to reverse its own longstanding case law holding general contractors responsible when they fail to take reasonable steps, within the scope of their control, to detect and prevent or abate, or require their subcontractors to prevent or abate, hazardous conditions.

The BCTD fully endorses the Secretary's position in this case, and will not repeat her arguments. Instead, we write separately to provide a context for the issues raised in this case, and in particular, to address the attempt by Summit and its *amici* to cast the Secretary's enforcement policy, and the Commission's precedent, as completely at odds with the manner in which the construction industry operates.

In this regard, Summit and its *amici* are urging the Commission to repudiate its application of the multi-employer worksite doctrine to general contractors by arguing that perpetuation of this doctrine will create tort liability where none otherwise exists, in contravention of Congress' command that the Act not "[e]nlarge . . . the common law . . . with respect to injuries, diseases or death of employees arising out of . . . employment." 29 U.S.C. § 653(b)(4). Summit and its *amici* further contend that this enforcement policy will impose tremendous, unanticipated burdens on general contractors, that will cause otherwise prudent contractors to change their practices in order to avoid liability, leaving employees at greater risk.

The fact is, however, that OSHA's enforcement policy, as endorsed by the Commission, of requiring general contractors to exercise a reasonable degree of oversight on otherwise fragmented construction sites is solidly grounded in principles recognized in the public health community and the construction industry, as well as under longstanding common law, as necessary for providing construction employees with safe and healthful workplaces.

The purpose of this brief is therefore to provide a counterpoint to the impression that Summit and its *amici* have endeavored to create, by providing the Commission with information about construction industry practice on multi-employer worksites, and about common law principles that have long guided the relationship between general contractors and their subcontractors' employees. Finally, we will briefly address recent state law developments addressing the multi-employer worksite policy.

I. Safety and Health on a Multi-Employer Construction Worksite: The Recognized Need for Central Coordination and Control

Construction is among the most dangerous industries in the United States. In 2002, when the non-fatal illness and injury rate for all private sector employees was 5 per 100 workers, the rate in the construction industry – where occupational injuries are seriously underreported[1] -- was 6.8.[2] Construction workers die on the job at even more disproportionately high rates. While construction workers comprise approximately 7% of the U.S. workforce,[3] 20% of the workplace fatalities in 2002 – *1,131* out of a total of 5,575 workplace deaths – were among construction workers.[4]

The tasks construction workers perform are intrinsically dangerous, exposing these workers to vast arrays of safety and health risks. But the very nature of construction makes it

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1 THE CONSTRUCTION CHART BOOK: THE U.S. CONSTRUCTION INDUSTRY AND ITS WORKERS (Center to Protect Workers Rights 2002) at 33 (hereinafter "THE CHART BOOK") (based on 2001 data). THE CHART BOOK is available on-line at http://www.cpwr.com/chartbook.htm.

2 "2003 Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types" (Bureau of Labor Statistics, U.S. Department of Labor 2005), available at http://www.bls.gov/iif/home.htm.

3 THE CHART BOOK at 34.

4 "2003 Census of Fatal Occupational Injuries" (Bureau of Labor Statistics, U.S. Department of Labor 2005), available at http://www.bls.gov/iif/home.htm.

singularly difficult to control safety and health hazards, for "the organization of the work and work environment are complex and constantly changing." Ringen, *et al.,* "Why Construction is Different," 10 OCCUPATIONAL MEDICINE: STATE OF THE ART REVIEWS 255, 256 (1995). Throughout the life of a multi-employer project, workers perform in an environment created and affected by a constantly shifting complement of contractors, subcontractors, and employees.

> [S]everal employers may work on a large construction site simultaneously: the general contractor and subcontractors who do electrical wiring, finish concrete flooring, deliver and install marble exteriors or install roofing. . . . A worker's location on a site may change regularly in relation to other workers; therefore the worker's potential exposure as a bystander to such hazards as welding fumes or dusts also changes. [And], as the work develops – for instance, as a building's walls are erected or as the weather changes – the ambient conditions such as ventilation and temperature can change markedly.

Id.

As the Commission recognized long ago, "[i]n this situation, a hazard created by one employer can foreseeably affect the safety of employees of other employers on the site." *Grossman Steel & Aluminum Corp.,* 4 OSHC (BNA) 1185, 1188 (1976). Thus, an employer that leaves a hole uncovered, a concrete slab inadequately cured, or a scaffold improperly braced – to name only a few examples – creates risks for any employees who come within the zone of danger, regardless of the identity of their employer. And, "as a practical matter it is impossible for a particular employer to anticipate all the hazards which others may create as the work progresses[.]" *Id.* Indeed, the very fragmentation of work is itself a major contributing factor to the high injury and fatality rates on multi-employer construction sites, as demonstrated by a recent study documenting the link between increasing rates of construction subcontracting and deteriorating worker safety.[5]

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[5] H. Azari-Rad, P. Phillips, W. Thompson-Dawson, *Building Health and Safety Into Employment Relationships in the Construction Industry: Subcontracting and Injury Rates in*

For all these reasons, the construction industry is increasingly focused on improving workplace safety, recognizing that doing so makes sense not only from a workers' safety standpoint, but from a business perspective as well. *See, e.g.,* AGC GUIDE FOR A BASIC COMPANY SAFETY PROGRAM 2 (Associated General Contractors 1994) (hereinafter AGC GUIDE) ("AGC believes that safety must be a top priority for both moral and economic reasons.") As early as the bidding process, owners are requiring potential contractors to pre-qualify to bid by using their safety and health records to demonstrate their commitment to safety and health, and are requiring successful bidders to implement effective safety programs.[6] It is, moreover, well recognized – both within the public health community and within the industry – that centralized coordination, oversight and accountability are critical to achieving safe and healthful worksites.

A. Recognition by Public Health and Safety Professionals

The American Industrial Hygiene Association (AIHA) and the American National Standards Institute/American Society of Safety Engineers (ANSI/ASSE) both endorse the view that the entity positioned to exercise control over the participants on the worksite must take an active role in ensuring safe work practices by all of those participants. In its guidance document, *Health and Safety Requirements in Construction Contract Documents,* AIHA GUIDELINE 4-2005 (2005), AIHA notes that the prime contractor is typically responsible for preparing an overarching, project-specific safety and health plan that details the potential hazards on the site, "as well as the means and methods that the prime contractor will employ for controlling the hazards and providing adequate safeguards for all construction workers." *Id.* at 6. The guidance

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Construction, PROCEEDINGS OF THE 55TH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION (2003), available at http://www.press.uillinois.edu/journals/irra/proceedings2003/azari-rad.html.

[6] "Improving Construction Safety and Performance," Construction Users Roundtable Report A-3 (July 1990), available at http://www.curt.org/pdf/135.pdf.

document continues by counseling that "[d]uring the construction phase, the prime contractor needs to continually demonstrate that the detailed [health and safety] program requirements outlined in the bid specifications, bid documents and proposal are adhered to throughout the course of the actual construction work." *Id.* at 23. And AIHA recommends incorporating provisions into the contract documents that specify how subcontractor noncompliance will be addressed, citing options that include removing the offending subcontractor from the site, withholding payment or suspending work. *Id.* at 27.[7]

ANSI's *Safety and Health Program Requirements for Multi-Employer Projects*, ANSI/ASSE A10.33-1998 (R2004), similarly prescribes an overall worksite structure under which a "project constructor" is responsible for supervising and controlling *all* construction work performed on the project, and for designating as a "senior project supervisor" an individual with final authority and overall responsibility for implementing the project safety and health plan. *Id.* ¶¶ 2.6, 2.10. Among the project supervisor's responsibilities are ensuring correction or abatement of all hazardous conditions on the site; regularly monitoring for potentially hazardous conditions; and immediately notifying the responsible contractor of any conditions or activities that may cause illness or injury to any employees. *Id.* ¶¶ 5.1, 5.2.

B. Recognition by the Construction Industry

The industry is increasingly accepting and implementing the principles embodied in the public health recommendations outlined above. Indeed, one need only look at the contract that Collegiate Development Services required Summit to sign in this case, and at the standard American Institute of Architects contract form that Summit normally uses, ALJ Decision at 9-11,

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[7] Thus, while the D.C. Circuit may regard halting work to save lives as "employ[ing] a howitzer to hit a small target," *IBP v. Herman,* 144 F3d 861, 867 (D.C. Cir. 1998), the public health community – and apparently, Summit itself (ALJ Decision at 14) – recognizes that under extreme circumstances, these are entirely necessary and appropriate steps to take.

to see how commonplace it is for owners to look to their general contractors to coordinate, monitor and enforce safe work practices across a multi-employer worksite.

The Associated General Contractors, one of the nation's largest organizations of general contractors, similarly advises its members to demonstrate their commitment to safety and health by establishing and conscientiously carrying out written safety policies and by requiring, as a matter of contract, all subcontractors to follow the safety rules. AGC GUIDE at 2, 12.

Finally, in their own construction contracts, federal agencies – as construction owners – routinely require their general contractors to assume contractual responsibility for ensuring safe work practices on a multi-employer site. The Army Corps of Engineers, for example, requires its construction contractors to follow its safety and health manual, which makes "the prime contractor . . . responsible for assuring subcontractor compliance with the safety and occupational health requirements contained in the manual." ¶ 01.A.18, U.S. Army Corps of Engineers, SAFETY AND HEALTH REQUIREMENTS MANUAL (EM 385-1-1) at 10.[8] The Department of Energy similarly requires its prime contractors to "ensure that subcontractors performing work on DOE-owned or leased facilities comply with [DOE's worker protection management requirements] and the contractor's own site worker protection standards." CONTRACTOR REQUIREMENTS DOCUMENT: WORKER PROTECTION MANAGEMENT FOR DOE CONTRACTOR EMPLOYEES, Attachment 2 to DOE Order 440.1A at 4.[9] The Bureau of Reclamation makes its contractors "responsible for ensuring . . . safe work performance of

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[8] The ACE Manual is available at www.hq.usace.army.mil/soh/hqusace_soh.htm. In the 5-year period 1996-2000, the Army Corps "supervised 66 million to 68 million work hours yearly by contractors . . . and reported a rate of nonfatal injuries with days away from work of one-fourth or less of the BLS rate for construction."

[9] DOE Order 440.1A is available at http://www.llnl.gov/es_and_h/sourcematerial/DOEo4401a.pdf.

employees and subcontractors," and requires contractors to "include provisions for coordination with [OSHA and Bureau of Reclamation] standards in the terms and conditions of all . . . subcontracts." RECLAMATION SAFETY STANDARDS, Section 3.1 (U.S. Department of the Interior 2002).[10] And all general contractors on work covered by the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 333 are held responsible for their subcontractors' safety and health violations. 29 C.F.R. § 1926.16.

In sum, OSHA's reading of how to implement its statutory mandate in the construction industry is fully in accord with the recommendations of the public health community and the industry itself for how best "to assure so far as possible every working man and woman [in the construction industry] safe and healthful working conditions." 29 U.S.C. § 651(b).

II. The Multi-Employer Worksite Doctrine is Fully Consistent with Common Law Principles

Summit argues in its brief that the multi-employer worksite doctrine violates Section 4(b)(4) of the OSH Act because it increases an employer's common law liability. Summit Brief at 15.[11] Indeed, the *amici* suggest that the Commission only adopted the view that controlling employers could be held liable under the Act because it "was not yet aware that a control doctrine forcing general contractors to control the manner of work would likely violate § 4(b)(4) of the Act." AB:20. Thus, Summit and its *amici* are attempting to lead the Commission to believe that the principles that underlie the multi-employer worksite doctrine are inconsistent with accepted tort principles and that their acceptance has accordingly placed general contractors in a position they could never have anticipated. *See, e.g.,* AB:12 ("The controlling-employer

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[10] The Bureau of Reclamation's safety standards are available at http://www.usbr.gov/ssle/safety/RSHS/rshs.html.

[11] Summit's opening brief will hereinafter be cited as "SB:[page number];" the brief of its *amici* as "AB:[page number]"; and the Secretary's brief as "OSHA:[page number]."

aspect of the multi-employer doctrine has . . . had an unexpected and unlawful effect on an important feature of state tort law").

These arguments are at once misleading and overblown. First, as the Secretary points out in her brief, Section 4(b)(4) is framed as a directive to the *courts*, not to the Agency. That is, the Section directs courts and litigants not to look to the Act as the basis for "enlarg[ing] . . . or affect[ing] in any other manner the common law . . . rights, duties or liabilities of employers and employees . . . with respect to injuries, diseases, or death of employees arising out of, or in the course, of employment." 29 U.S.C. § 653(b)(4); *see* OSHA:34. It says nothing about the Agency's ability to carry out its statutory obligations.

Second, and perhaps more to the point, is the fact that rather than destroying the fabric of state tort law, OSHA and OSHRC's formulation of the controlling employer doctrine – that a general contractor may be held responsible for the manner in which it exercises the control that it has retained for itself – finds strong support in state tort law.

In the sections below, we will first add support to the Secretary's argument that implementation of the multi-employer worksite doctrine does not, in any way, contravene Section 4(b)(4). We will then show that the doctrine is fully compatible with the common law expectations of general contractors.

A. Section 4(b)(4) Prevents Courts from Using OSHA Rules to Enlarge Contractors' Liability

Even assuming, *arguendo,* that OSHA's application of the controlling employer aspect of the multi-employer worksite doctrine was a total departure from state law tort principles, there is no danger that its continued endorsement by the Commission would expand state tort liability. As federal and the state courts have consistently held, § 4(b)(4) precludes OSHA standards from creating a private right of action. Federal: *Ellis v. Chase Communications, Inc.*, 63 F.3d 473,

478 (6th Cir. 1995) ("law of this circuit [is] that OSHA does not create a private right of action"); *Crane v. Conoco, Inc.*, 41 F.3d 547, 553 (9th Cir. 1994) ("OSHA violations do not themselves constitute a private cause of action"); *Richard v. Anderson*, CCH Prod. Liab. Rep. P16,702 (D. Del. 2003) ("every court faced with the issue has held that OSHA creates no private cause of action"). State: *Knight v. Burns, Kirkley & Williams Construction Co.*, 331 So. 2d 651, 654 (Ala. 1976) ("plaintiff does not have a private civil remedy . . . because of a violation of the Occupational Safety and Health Act of 1970 or the regulations promulgated thereunder"); *Scott v. Matlack*, 39 P.3d 1160, 1168-69 (Colo. 2002) (same); *Mingachos v. CBS, Inc.*, 196 Conn. 91, 110 (1985) ("Neither Connecticut nor federal law provides that alleged violations of OSHA can be the basis of a private right of action 'with respect to injuries, diseases or death of employees arising out of and in the course of employment'"). There is no reason to conclude that the courts would reach a different conclusion regarding the multi-employer doctrine.

The majority of courts have also recognized that OSHA standards have no effect on the question whether a particular employer owes a duty of care under common law negligence principles. Thus, the Sixth Circuit stated in *Ellis*, 63 F.3d at 478: "[E]ven if an OSHA violation is evidence of Chase's negligence (or conclusive evidence, in the case of negligence *per se*), Chase must owe a duty to Ellis under a theory of liability independent of OSHA, as OSHA does not create a private right of action." *See also, e.g.*, *Scott v. Matlack*, 39 P.3d at 1166-67 (OSH Act cannot be used to "'enlarge' an employer's duty beyond that of the common law . . . because the OSH Act would actually create the defendant's duty"); *Mingachos*, 196 Conn. at 110 ("both the state and federal OSHA acts do not intend to 'supersede or in any manner affect' existing rights, duties or liabilities of affected parties for those matters arising out of or in the course of employment"). For this reason, while the majority of state courts permit reference to OSHA

standards as *some* evidence of the standard of care in the industry, they do not view it as conclusive. *Scott v. Matlack*, 39 P.3d at 1166; *Canape v. Petersen*, 897 P.2d 762, 765-67 (Colo. 1995) and cases cited therein.

In short, continued adherence to the multi-employer worksite doctrine would not violate Section 4(b)(4) by enlarging state law. Instead, under a proper reading of Section 4(b)(4), the doctrine and its controlling employer prong should have no effect on state law.

B. The Principles Underlying "Controlling Employer" Liability under the OSH Act are Consistent with Common Law Principles

The doctrine, moreover, is fully consistent with common law principles.[12] As Summit points out in its brief, the general rule under tort principles is that a general contractor will not be "liable for physical harm caused to another by an act or omission of the [subcontractor] or [its] agents." 2 RESTATEMENT OF TORTS (2d) § 409. Numerous exceptions, however, "have so far eroded 'the general rule' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." *Id.* Comment b. Indeed, "so riddled is the rule insulating a general contractor from an independent contractor's negligence that . . . 'it would be proper to say that the rule is primarily important as a preamble to the catalog of exceptions.'" *Summers v. Crown Construction Co.,* 453 F.2d 998, 999 (4th Cir. 1972), *quoting Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.,* 277 N.W. 226, 228 (Minn. 1937).

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[12] In fact, a textbook that touts itself as "written to fulfill the need for an up-to-date practical teaching resource that focuses specifically on the needs of modern construction professionals" counsels that "a construction company can be held at least partially liable for the safety and health of workers, even when it is not the employer of record," as, for example, when a contractor and subcontractor are "assigned *shared liability.*" David L. Goetsch, CONSTRUCTION SAFETY AND HEALTH at iii and 4 (Prentice Hall 2003) (emphasis in original). Under this concept, "[c]ourts often hold general contractors at least partially liable for the actions of their subcontractors, claiming that, if they did not know about unsafe conditions, they should have." In addition, "[c]onstruction companies that serve as general contractors are expected to exercise control over all aspects of a construction project and can be held liable." *Id.* at 4.

The most relevant of these exceptions is found in Section 414 of the RESTATEMENT, which sets forth the conditions for holding a general contractor liable for failing reasonably to exercise the control it retains over its subcontractors' work. The section provides that "[o]ne who entrusts work to a [subcontractor], but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the [general contractor] owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Section 414 does not speak to the liability of a general contractor that maintains "operative control" over the details of how the subcontractor is to do any part of the work. That liability is instead governed by "the rules of that part of Agency [law] which deals with the relation of master and servant." *Id.* Comment a. Instead, this Section applies in cases like this one, when the general contractor "retains a control less than that which is necessary to subject him to liability as a master," as, for example, when he "retain[s] only the power to direct the order in which the work [is] done, or *to forbid its being done in a manner likely to be dangerous.*" *Id.* (emphasis added)

> Under this rule,
>
> > applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job[, . . .] the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.

Id. Comment b.

As with the multi-employer worksite doctrine, the central issue in applying this common law rule is determining the scope of the general contractor's retained authority. As the Texas

Supreme Court has explained, "[f]or the general contractor to be liable for negligence [under § 414], its supervisory control must be related to the condition or activity that caused the injury." *Clayton W. Williams, Jr., Inc. v. Olivo,* 952 S.W.2d 523, 528 (Tex. 1997). Thus, there must be a "*nexus* between the employer's retained supervisory control and the condition or activity that caused the injury . . . [such that] the *scope* of the [general contractor's] duty toward [its subcontractor's employees is] limited to the *scope* of its retained supervisory control." *Hoechst-Celanese Corp. v. Mendez,* 967 S.W.2d 335, 357 (Tex.1998) (emphasis in original). Under this view, while a general contractor's insistence that its subcontractors comply with various regulations and guidelines will not "impose an unqualified duty of care on the [general contractor] to ensure that [the subcontractor's] employees did nothing unsafe," *id.* at 358,

> an employer who is aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety may owe a duty to require corrective measures to be taken or to cancel the contract. Also, an employer who gives on-site orders or provides detailed instructions on the means or methods to carry out a work order owes the independent contractor employee a duty of reasonable care to protect him from work related hazards. In sum, the employer's duty of care is commensurate with the control it retains over the contractor's work.

Id. at 358 (internal citations omitted).

With this understanding of common law principles, the Texas court held in *Lee Lewis Const., Inc. v. Harrison,* 70 S.W.3d 778 (Tex. 2001), for example, that by requiring its subcontractors to adhere to its safety rules or face expulsion from the jobsite, a general contractor had retained the right to control safety on a job site. When a subcontractor's employee violated the safety rules and fell to his death, the court held the general contractor liable for breaching its duty. *Id.* at 784. Under the same analysis, in *Tovar v. Amarillo Oil Co.,* 692 S.W.2d 469 (Tex. 1985), the court found that an oil lease owner retained supervisory control over specific safety conditions by requiring, in its contract with a well drilling contractor, that the contractor

implement certain safety precautions. When the owner observed but disregarded the contractor's failure to comply with the contractual specifications and an explosion ensued, the court found the owner liable to an injured contractor employee for failing to exercise reasonable care. *Id.* at 470; *compare, Chapa v. Koch Refining Co.,* 11 S.W.3d 153 (Tex. 1999) (premises owner does not incur a duty to ensure subcontractor employees' safety by merely placing a safety employee on the worksite).[13]

The principles discussed by the Texas courts and embodied in Section 414 have long found wide acceptance in the states. As a few examples, *see Beckman v. Butte-Silver Bow County,* 1 P.3d 348, 401, 404 (Mont. 2000) (under rule that the general contractor will be liable for the subcontractor's employees' injuries if the general "knows or should know that the independent contractor is performing work in an unreasonably dangerous manner, and if the [general contractor] retains the authority to direct the manner in which the work is to be performed," the court found that the plaintiff presented sufficient facts – establishing that general contractor retained the "means with which to both discover and cure" the dangerous conditions created by the subcontractor's work – to defeat summary judgment); *Dilaveris v. W.T. Rich Co.,* 424 Mass. 9, 673 N.E.2d 562, 565 (Mass. 1996) (where general contractor had opportunity to stop or prevent use of unsafe scaffolding, failure to do so makes issues of control and negligence questions for the jury); *Giarratano v. The Weitz Co.,* 259 Iowa 1292, 147 N.W.2d 824, 830 (Iowa 1967) (general contractor may be liable for own negligence in failing to exercise retained control, and not under doctrine of respondeat superior); *Parrish v. Omaha Public Power District,*

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[13] Although *Tovar* and *Chapa* technically involved the liability of premises owners, "Texas courts [have] generally discuss[ed] the premises owner and the general contractor in the same context when the case involves their liability for independent contractors' injuries" under Section 414. Johnson, D., *Employers' Liability for Independent Contractors' Injuries,* 52 BAYLOR L. REV. 1, 5 (2000).

496 N.W.2d 902, 912 (Neb. 1993) (interpreting § 414 to impose liability on a general contractor for a subcontractor's employee's injury when the general "(1) supervised the work that caused the injury to the employee; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (c) had the opportunity to prevent the injury but negligently failed" to do so); *Manhattan-Dickman Construction Co.,* 113 Ariz. 549, 558 P.2d 894, 898 (Ariz. 1976) (jury question whether general contractor retained such control over the method and manner of how work was performed that it had a duty to detect dangerous defects that made the work unsafe to others); *Summers v. Crown Construction Co.,* 453 F.2d at 999 (stating the rule under West Virginia law that a general contractor whose job superintendent has the authority to prohibit a subcontractor from doing its work in a dangerous manner has a duty to exercise reasonable care to protect the subcontractor's employees); *Moorehead v. Mustang Construction Co.,* 354 Ill.App.3d 456, 821 N.E.2d 358, 360 (Ill.App.Ct. 2004) (general contractor will be liable for failing to prevent its subcontractor from performing in an unreasonable dangerous manner, if the general contractor knows or should know of the subcontractor's conduct and, through retained control, has opportunity to prevent it).

The Commission's application of the multi-employer worksite doctrine and, in particular, the way in which Judge Welsch applied it in this case, are fully consistent with these common law principles. That is, Commission precedent requires a showing that the general contractor, through contract or practice, has retained sufficient control that it is reasonable to require it to prevent or detect and abate a particular hazardous condition. Here, Judge Welsch found that, both through its contract with the developer, granting it the right to oversee the construction work, and through its contract with All Phase, specifying their respective obligations, Summit expressly assumed and retained the responsibility for ensuring compliance with OSHA

regulations on the site. Thus, Summit retained "such . . . a right of supervision that [All Phase was] not entirely free to do the work in his own way." RESTATEMENT (2d) TORTS § 414 Comment c. Instead, by reason of contract, All Phase was obligated to comply with all applicable OSHA standards and requirements, and Summit had the contractual right and responsibility to supervise its conduct in that regard.

Contrary to Summit's assertions, the doctrine does not purport to impose strict liability on general contractors for the violations of their subcontractors. Instead, like Section 414, liability under the multi-employer worksite doctrine is premised on the general contractors' *own* failures to carry out those obligations that it has retained for itself. *See, Gass v. Virgin Islands Telephone* Corp., 311 F.3d 237, 245 (3d Cir. 2002) (§ 414 holds contractors liable for their own failures to exercise retained rights); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex.1985) (contractor must exercise any retained supervisory control "with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others"); *compare, Stockwell v. Parker Drilling Co.*, 733 P.2d 1029 1033 (Wyo. 1987) (general contract that retained no control over safety or other work details not liable under § 414).

In short, the principles underlying the multi-employer worksite doctrine, rather than enlarging or departing from established common law tort principles, faithfully adhere to those principles.

III. Current State Court Decisions Lend Support to the Secretary's Position

Two courts have recently considered the multi-employer worksite doctrine in state plan states, reaching opposite conclusions about the validity of holding contractors responsible when they fail to correct or require their subcontractors to correct hazardous conditions created by the subcontractors. While the decision of the Virginia Court of Appeals in *Davenport v. Summit*

Contractors, Case No. 1643-04-2 (Va.Ct.Ap., May 3, 2005), slip op. at 3, adopts the position espoused by Summit and its *amici* in this case, we respectfully submit that the better reasoned decision of the North Carolina Court of Appeals in *Commissioner v. David Weekley Homes,* 609 S.E.2d 407 (N.C. App. 2005) deserves the Commission's attention.

A. In *Davenport v. Summit Contractors,* yet another case involving Summit Contractors acting as a general contractor, the Virginia Court of Appeals refused to hold Summit liable "for a subcontractor's failure to protect its own employees."[14] Treating the question as whether the Virginia Occupational Safety and Health Program could "adopt a form of vicarious statutory liability," the court held that it could only do so with express legislative direction. And finding no such direction in either the statute or the agency's regulations, the court vacated the citation. *Id.*

In finding nothing in the agency's regulations supporting imputation of vicarious liability, the court noted that in developing its own set of construction industry standards, the Virginia Safety and Health Codes Board had expressly declined to adopt 29 C.F.R. § 1926.16, which provides that "a prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work." Slip op. at 4. Summit and its *amici* here go farther, arguing that OSHA's own failure to incorporate into its generally applicable construction safety standards the provisions developed under the Contract Work Hours and Safety Standards Act (CWHSSA) to order the relationship between federal contractors and their subcontractors demonstrates OSHA's intent "to indicate

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[14] The provisions of the Virginia Occupational Safety and Health Act, Code § 40.1-1 *et seq.* (*see, especially,* § 40.1-51.1), and the Virginia Occupational Safety and Health Program's Standards for the Construction Industry, 16 Va.Admin.Code § 25-175-1926, on which the court relied in *Davenport* are virtually identical to the parallel provisions of the OSH Act and federal OSHA standards. *See* slip op. at 3-4.

that Part 1926 would not impose under the OSH Act the extra-employment liability that was imposed under the [CWHSSA]." AB:9; *see also* SB:15.

This attempt to divine regulatory intent by comparing generally applicable construction standards to the rules governing federal contracting reaches too far, for these two sets of regulations address completely different sets of concerns. The provisions that OSHA has confined to work performed under CWHSSA describe the terms of the contractual relationships between the federal government, its contractors, and its contractors' subcontractors. As with the manuals and orders of the Department of Energy, the Corps of Engineers and the Bureau of Reclamation (*see supra* at 8), provisions like 29 U.S.C. § 1926.16 direct the manner in which the federal government structures its own contractual relationships, and shows that it has chosen to do so in a manner that ensures centralized, responsible oversight and accountability.

These provisions thus address quite a different issue than how OSHA may enforce the balance of the safety and health standards contained in Part 1926 against parties that are engaged in relationships that the government has not created. In those cases of non-federal construction, the question is whether OSHA may hold general contractors responsible when, in their relationships with private construction owners or developers, on the one hand, and with their own subcontractors, on the other, they have assumed and retained a degree of control over worksite operations. And on this question, the North Carolina Court of Appeals has taken a better view than that expressed by the Virginia court.

B. In *Commissioner v. David Weekley Homes* – as in *Davenport* – a compliance officer observed subcontractor employees working without fall protection (a condition that, we

note, is one of the four leading causes of construction industry fatalities).[15] In *Weekley Homes* – as in *Davenport* – the compliance officer issued citations against the general contractor as well as the subcontractor, even though there was no contention that the general contractor created the hazardous condition.[16] But unlike the *Davenport* court, the court in *Weekley Homes* found, under these facts, that it was a reasonable interpretation of the statute to hold the general contractor responsible for failing to rectify the hazardous conditions.

In reaching that conclusion, the court understood (contrary to the view of the *Davenport* court) that the application of the multi-employer worksite doctrine does not raise questions of vicarious liability, *i.e.,* liability of a principal for the *breaches of its agents*. Rather, as explained earlier (*supra* at 17-18), the question is whether the general contractor has breached *its own obligations* in failing to prevent or abate a hazard. The court found it reasonable to interpret the statute's directive to employers to "comply with occupational safety and health standards or regulations" as requiring general contractors to take reasonable steps to protect subcontractor employees. And with that understanding, the court concluded that by failing to detect its subcontractors' obvious failure to use appropriate fall protection, Weekley had violated its own obligation to conduct "frequent and regular inspections of the job site," as required by 29 C.F.R. § 1926.20(b)(2). 609 S.E.2d at 415.

In sum, we submit that the North Carolina court's analysis of the multi-employer worksite doctrine is far better reasoned than that of the Virginia court, and thus provides the

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[15] OSHA has long recognized that the four major causes of construction industry injuries are falls from elevations, being struck by objects, being caught in or between objects, and electrical shock, and in fact, in 2003, falls and contact with objects and equipment accounted for over one-half of construction fatalities. "2003 Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types."

[16] In *Davenport,* Summit was also cited for failing to require hardhats. Slip op. at 1-2.

Commission with better guidance in considering the issues in this case. At the very least, however, the two decisions vividly demonstrate that the Act has no "plain meaning," but is instead sufficiently ambiguous that OSHA's reasonable interpretation is entitled to the Commission's deference.

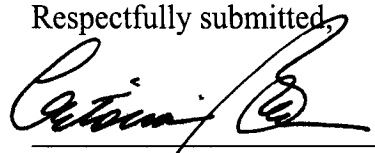
CONCLUSION

In this case, Judge Welsch found that Summit, the general contractor, contracted with the developer to assume control over worksite safety and health, and retained some of that control in its contracts with its subcontractors. Judge Welsch further found that Summit had exercised that control in two or three instances in which its supervisors observed that one of its subcontractors, All Phase, failed to provide appropriate fall protection for its employees, and that when the supervisors directed All Phase to abate the hazardous situation, the subcontractor did so. In the situation for which the CSHO issued citations, Judge Welsch found that the subcontractor had once again violated the fall protection standards, in an easily observable manner and over the course of a few days, and that Summit had failed to take reasonable steps, within its rights of control, to detect and abate the hazard. He therefore upheld the citations against Summit.

In so doing, the Judge correctly applied the principles OSHA has articulated in its multi-employer worksite doctrine for holding general contractors responsible, as controlling employers, for complying with OSHA standards – principles long embraced by the Commission. As the Secretary has demonstrated in her brief, and as we have shown above, these principles are fully consistent with the language and intent of the OSH Act and are, indeed, vital to safeguarding construction industry employees against illness, injury and death on the job.

We therefore respectfully urge the Commission to decline the invitation issued by Summit and its *amici* that it abandon its precedent for holding general contractors responsible under the Act and instead, to uphold the citations at issue in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on May 16, 2005, I served copies of the foregoing Brief of *Amicus* Building and Construction Trades Department, AFL-CIO, in Support of the Secretary of Labor, by fax and by first class mail on the following counsel:

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