No. 07-2191

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner

v.

SUMMIT CONTRACTORS, INC.,

Respondent;

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Nominal Respondent.

On Petition for Review of an Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE

Employers engaged in construction work must comply with the Occupational Safety and Health Act. Under the Secretary of Labor's enforcement policy, an employer's safety-related duties on a multi-employer construction site are not limited to its own employees; an employer must also refrain from violations that endanger other employers' employees on the site. In addition, a "controlling" employer -- typically a general contractor -- who has supervisory authority over a worksite may be cited for violations that it reasonably could have prevented or abated through the exercise of its supervisory authority.

Although the multi-employer policy has long been accepted by this and other courts, the Occupational Safety and Health Review Commission held that the Secretary may not enforce the controlling employer aspect of her multi-employer policy because it is inconsistent with 29 C.F.R. § 1910.12(a), a regulation promulgated by the Secretary in 1971. The Secretary seeks review of that determination. Because the case is important and novel, oral argument in the amount of 25 minutes per side is appropriate.

JURISDICTIONAL STATEMENT

The Occupational Safety and Health Review Commission had jurisdiction over this enforcement proceeding pursuant to section 10(c) of the OSH Act, 29 U.S.C. § 659(c). The Commission issued a final order on April 27, 2007 that disposed of all of the parties' claims. A-10.[1] The Secretary filed a petition for review with this Court on May 21, 2007. A-8. This Court has jurisdiction pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b).

STATEMENT OF THE ISSUE

In the construction context, the Secretary of Labor will cite the "controlling" employer -- usually the general contractor who has supervisory authority over the worksite -- for OSHA violations that the employer could have prevented through the exercise of its supervisory authority, whether or not its own employees were exposed to the hazard. In a 2-1 decision, however, the Commission held that the Secretary barred herself from enforcing a controlling employer theory of liability through an administrative regulation, 29

[1] Citations denoted "A-___" are to the Secretary of Labor's Separate Appendix. Citations denoted "Dec. ___" are to the April 27, 2007 Decision of the Occupational Safety and Health Review Commission, which is attached to this brief as an addendum.

C.F.R. § 1910.12(a). The Secretary promulgated 29 C.F.R. § 1910.12(a) in 1971, for the purpose of adopting Construction Safety Act standards as OSHA standards. In the Secretary's view, 29 C.F.R. § 1910.12(a) does not address controlling employer liability in any way.

The issue is whether the Secretary's interpretation of 29 C.F.R. § 1910.12(a) is entitled to controlling deference under *Martin v. OSHRC (CF & I)*, 499 U.S. 144 (1991).

The most apposite cases, in addition to *CF & I*, are *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir.1977), and *Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999). The most apposite statutory provisions are 29 U.S.C. §§ 654 and 655.

STATEMENT OF THE CASE

The Secretary cited Summit as a controlling employer under her multi-employer enforcement policy for a violation of 29 C.F.R. § 1926.451(g)(1)(vii), which requires fall protection when employees engaged in construction work are working on scaffolds more than 10 feet above a lower level. Summit challenged the citation before the Commission, arguing that it should not be held accountable for

the violation because its own employees were not exposed to the hazard.

The Commission ruled that an administrative regulation, 29 C.F.R. § 1910.12(a), precludes the Secretary from issuing citations based upon a controlling employer theory of liability, because the regulation includes a sentence directing an employer to protect "his" employees. The Secretary timely petitioned this Court for review of the Commission's decision. Venue is proper in this Court because the alleged violation occurred in Arkansas. 29 U.S.C. § 660(b).

STATEMENT OF FACTS

1. *Overview of the Secretary's multi-employer enforcement policy in the construction context.*

This case centers upon the Secretary's policy in OSHA cases of citing controlling employers on multi-employer construction sites. Therefore, a discussion of the Secretary's multi-employer enforcement policy will aid the Court in deciding this case.

Congress enacted the OSH Act with a broad remedial purpose in mind: "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29

U.S.C. § 651(b). When it first enacted the statute, Congress wanted the Secretary to quickly issue safety and health standards to protect employees and their workplaces. Therefore, Congress authorized the Secretary, through section 6(a) of the OSH Act, 29 U.S.C. § 655(a), to adopt certain pre-existing "national consensus standards" and "established Federal standards" as OSHA standards without notice and comment rulemaking during the first two years of the OSH Act's existence.

The Secretary used section 6(a)'s fast-track rulemaking authority to adopt established federal standards to govern the construction industry. Before the OSH Act went into effect, the Secretary had promulgated safety and health standards under the Construction Safety Act of 1969, 40 U.S.C. § 333, which applied only to certain federally-funded and federally-assisted construction contracts.[2] In May 1971, the Secretary announced that she was adopting the Construction Safety Act's substantive standards as OSHA standards:

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[2] The Construction Safety Act, as amended, is now codified at 40 U.S.C. § 3704.

> *Adoption and extension of established safety and health standards for construction*. The standards prescribed in part 1518 of this title and in effect on April 28, 1971, are adopted as occupational safety and health standards under section 6(a) of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each 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) (May 29, 1971).[3] Thus, as of mid-1971, the safety and health standards promulgated under the Construction Safety Act were applicable to all construction sites within the OSH Act's coverage. *See* 36 Fed. Reg. 10466 (May 29, 1971); *see also* 29 C.F.R. § 1910.11(a) ("The provisions of this [subpart] adopt and

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[3] Technical changes were subsequently made to this provision, and the standards contained in part 1518 were redesignated to part 1926. In its current form, section 1910.12(a) reads:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each 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).

extend the applicability of established Federal standards . . . with respect to every employer, employee, and employment covered by the [OSH] Act."). That is, "the Secretary adopted the [Construction Safety Act's] standards under OSHA to apply to *every* employer, not just those with construction contracts with the federal government." *CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 719 (7th Cir. 1999) (emphasis in original).

At the same time she adopted these substantive standards to regulate the construction industry, the Secretary issued a field operations manual to instruct OSHA compliance officers on how to cite employers at construction sites where more than one employer was present. In that manual, the Secretary acknowledged that, "[b]ecause of the nature of the construction industry and the complex employer relationships involved, difficult issues as to which employer should be cited will often arise." A-81 (Field Operations Manual at VII-7, ¶ 10(e) (May 20, 1971)). "The general principle to be followed in issuing citations," the manual directed, "is that the employer creating a hazard endangering employees (whether his own or those of another employer) will be

cited." A-80.[4]

Shortly thereafter, the Secretary began issuing citations to employers on multi-employer construction sites who created hazards, even where their own employees were not exposed to those hazards. *See*, *e.g.*, *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032 (2d Cir. 1975); *Martin Iron Works*, 2 BNA OSHC 1063 (No. 606, 1974). In addition, the Secretary cited general contractors for violative conditions created by subcontractors, even where the general contractors' own employees were not exposed to the hazards. *See*, *e.g.*, *Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (No. 504, 1973) ("Respondent's citation was issued because as general contractor it had control of the job site, and employees of subcontractors were affected by the hazardous nature of the scaffold"); *HRH Constr. Corp.*, 2 BNA OSHC 3044 (No. 3262, 1974) (ALJ decision).

The Commission initially rejected these theories of liability, holding instead that employers may be cited under the OSH Act

[4] The Secretary made no suggestion in this manual that 29 C.F.R. § 1910.12(a) placed any limits on her multi-employer enforcement policy.

only if their own employees were exposed to the conditions at issue. *See, e.g., Hawkins Constr. Co.*, 1 BNA OSHC 1761 (No. 949, 1974); *Gilles & Cotting*, *supra*. Once that exposure was established, however, the employer was not permitted to defend on the ground that it neither created nor controlled the conditions giving rise to the hazard. *See Bratton Corp. v. OSHRC*, 590 F.2d 273, 277 (8th Cir. 1979); *Robert E. Lee Plumbers, Inc.*, 3 BNA OSHC 1150, 1151 (No. 2431, 1975). Thus, under the Commission's early approach, "exposing" employers were held to a strict liability standard, while "creating" and "controlling" employers escaped liability altogether, so long as their own employees were not exposed to the hazard at issue.[5]

Two courts of appeals rejected the Commission's early approach. *See Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th

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[5] In her 1974 field operations manual, the Secretary followed the Commission's approach of citing only "exposing" employers. The Secretary made clear, however, that she was doing so as "a matter of policy." A-78 (Field Operations Manual at X-14 (Jan. 22, 1974)). The Secretary did not suggest that that policy was either compelled by the OSH Act itself or by any of her regulations, including 29 C.F.R. § 1910.12(a), and she challenged the Commission's restrictive approach in the courts of appeals. *See, e.g., Underhill Constr. Corp.*, 513 F.2d at 1035.

Cir. 1975); *Underhill Constr. Corp.*, 513 F.2d 1032. In *Anning-Johnson*, the Seventh Circuit rejected the strict liability aspect of the Commission's position, holding that a subcontractor who neither created nor controlled the hazardous condition could not be held liable simply because his own employers were exposed to that condition. 516 F.2d at 1086-1088. The Second Circuit in *Underhill* rejected the notion that only exposing employers could be held liable: "In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking." 513 F.2d at 1038.

Against the backdrop of these competing decisions, the Secretary sought public comment on her enforcement policy in April 1976. A-76 (41 Fed. Reg. 17639 (April 27, 1976)). In that notice, the Secretary proposed to cite "an employer who creates or causes hazardous conditions to which his employees or those of any other contractor or subcontractor engaged in activities on the multi-

employer worksite are exposed." 41 Fed. Reg. at 17640. In addition, the Secretary proposed to cite general contractors and other "controlling" employers who had "the ability to abate the hazardous condition regardless of whether he created the hazard in the first instance," as well as employers whose employees were exposed to hazards that were "readily apparent." *Ibid.* The Secretary noted that the proposal would "further the [OSH] Act's objectives and most effectually use the enforcement tools at [her] disposal." *Ibid.*

The Secretary invited comments on the proposal to be submitted no later than May 27, 1976. *Ibid.* Before the comment period ended, however, the Commission issued two decisions that, in reliance on the court of appeals' decisions in *Anning-Johnson* and *Underhill*, largely adopted the approach set forth in the Secretary's Federal Register notice. *See Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694, 4409, May 12, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, May 12, 1976). In those decisions, the Commission announced its position that "a contractor that has either created a hazard or controls a hazardous

condition" has a duty to comply with OSH Act standards even if his own employees are not exposed to the hazard. *Anning-Johnson Co.*, 4 BNA OSHC at 1199; *see also ibid.* ("we note that typically a general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or to take the necessary steps to assure compliance"). The Commission announced further that employers whose employees were exposed to hazards would likewise incur liability, unless they could demonstrate that they lacked actual or constructive knowledge of the violative conditions or, having such knowledge, could not have prevented or abated them through the exercise of reasonable diligence. *See Grossman*, 4 BNA OSHC at 1188-89.

The Secretary took no further action on her proposal after the Commission decided *Anning-Johnson* and *Grossman*. She did, however, rely on those decisions in subsequent cases to hold "creating" and "controlling" employers liable for OSHA violations. *See, e.g.*, *H.B. Zachry Co.*, 8 BNA OSHC 1669, 1670-72 (No. 76-

2617, 1980); *Gil Haugen d/b/a Haugen Constr. Co.*, 7 BNA OSHC 2004, 2006 (Nos. 76-1512 & 76-1513, 1979); *Knutson Constr. Co.*, 4 BNA OSHC 1759, 1761 (No. 765, 1976). In addition, the Secretary instructed OSHA compliance officers, in various field operations manuals and other directives, to cite both "exposing" employers and employers who were "in the best position to correct the hazard or to assure its correction." A-74 (OSHA Instruction CPL 2.49, at 3 (Dec. 23, 1981)). Under the current policy, a general contractor or other employer having control over a worksite may be cited for violations that it could have prevented or abated through the reasonable exercise of its supervisory authority, whether or not its own employees were exposed. A-65 (OSHA Instruction CPL 2-0.124 (Dec. 10, 1999)).

Although the Secretary "has imposed liability under the [multi-employer] doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the [OSH] Act," *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Cir. 1999), employers have mounted vigorous challenges to the doctrine's validity ever since the Commission decided *Anning-*

Johnson and *Grossman* in 1976. Six courts of appeals, including the Eighth Circuit, have upheld the multi-employer doctrine as a proper exercise of the Secretary's statutory authority. *Universal Constr.*, 182 F.3d at 728; *United States v. Pitt-Des Moines, Inc.,* 168 F.3d 976 (7th Cir.1999); *R.P. Carbone Constr. Co. v. OSRHC,* 166 F.3d 815 (6th Cir.1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir.1978); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir.1977); *Brennan v. OSHRC,* 513 F.2d 1032 (2d Cir.1975). Only the Fifth Circuit has rejected it. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981).

Notably, no court addressed the possible relevance of 29 C.F.R. § 1910.12(a) to multi-employer enforcement issues until the D.C. Circuit did so in *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995).[6] There the court stated in *dictum* that it was "not clear" that the multi-employer doctrine was consistent with section 1910.12(a), which "by its terms only applies to an

[6] In *Melerine*, the Fifth Circuit relied in part on 29 C.F.R. § 1910.13(a) in determining that "the class protected by OSHA regulations comprises only employers' own employees." 659 F.2d at 712. Section 1910.13(a), which adopts certain maritime standards as OSH Act standards, has language identical in relevant respects to the language in 29 C.F.R. § 1910.12(a) that is at issue here.

employer's *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine." 70 F.3d at 1307 (emphasis in original). However, noting the lack of briefing on the issue, the *Anthony Crane* court did not resolve whether section 1910.12(a) placed any limits on the Secretary's enforcement authority. *Ibid.* Subsequent to *Anthony Crane*, the Tenth Circuit upheld controlling employer liability in *Universal Constr.*, 182 F.3d at 730. The court there acknowledged the concerns raised in *Anthony Crane*, but upheld the Secretary's enforcement policy on the ground that it was consistent with the OSH Act's language and purpose. *Id.* at 731.

2. *The Secretary cites Summit for a fall protection violation pursuant to her multi-employer worksite policy.*

Summit was the general contractor for a construction project in Little Rock, Arkansas, and in that capacity had general supervisory authority over the project. Dec. 2. In June 2003, OSHA inspected the worksite and observed employees of a masonry subcontractor, All Phase Construction, working on scaffolds without appropriate fall protection. *Ibid.* Although Summit had employees at the worksite, none of its employees were exposed to

the hazard created by the scaffold. *Ibid*.

Following the inspection, the Secretary cited both All Phase and Summit for violating 29 C.F.R. § 1926.451(g)(1)(vii), which requires that employees on scaffolds more than 10 feet above a lower level shall be protected from fall hazards through the use of a personal fall arrest system or guardrail system. Dec. 3. Although Summit's own employees were not exposed to the fall hazard at issue, the Secretary cited Summit as the controlling employer pursuant to her multi-employer enforcement policy. *Ibid*.

3. *The ALJ rejects Summit's challenge to the Secretary's controlling employer theory of liability.*

Summit contested the citation before the Commission pursuant to section 10 of the OSH Act, 29 U.S.C. § 659, and the matter was referred to an ALJ. Summit argued among other things that the Secretary's own regulation, 29 C.F.R. § 1910.12(a), precluded her from citing controlling employers whose own employees were not exposed to the hazardous condition. Dec. 3. Again, that provision states:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to

> the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each 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) (emphasis added). According to Summit, section 1910.12(a) only places a duty on employers to protect their own employees. Dec. 3. Consequently, Summit argued, the Secretary's controlling employer theory of liability is inconsistent with section 1910.12(a) and is therefore unenforceable. *Ibid.*

The ALJ rejected Summit's position and upheld the citation by Decision and Order issued June 14, 2004. A-42. The ALJ first noted that the Secretary's multi-employer enforcement policy had been upheld on numerous occasions by the Commission and the vast majority of appellate courts to have considered the issue. A-47. The ALJ also determined that Summit's reading of section 1910.12(a) was "too narrow," and that that provision "does not prohibit application of an employer's safety responsibility to employees of other employers." A-49.

4. *The Commission vacates the citation on the ground that 29 C.F.R. § 1910.12(a) prohibits controlling employer liability.*

The Commission accepted the case for discretionary review, *see* 29 U.S.C. §§ 659(c), 661(j), and Summit once again argued that section 1910.12(a) barred the Secretary from citing general contractors whose own employees were not exposed to the hazard in question. In response, the Secretary argued that section 1910.12(a), enacted at the very outset of the OSH Act's existence, was merely intended to announce the adoption of Construction Safety Act standards as OSHA standards, and was not intended to address multi-employer liability at all.

The Commission agreed with Summit and vacated the citation by order issued April 27, 2007. Dec. 10. Writing separately, Chairman Railton and Commissioner Thompson both found that the plain language of 29 C.F.R. § 1910.12(a) precludes "issuance of a citation to a general contractor having none of its employees exposed to the hazard." Dec. 8 (Separate opinion of Chairman Railton); Dec. 13-14 (Separate opinion of Commissioner Thompson). Because Summit's own employees were not exposed to the fall hazard at issue, the Commission held that the citation ran afoul of

section 1910.12(a).

In so ruling, Chairman Railton and Commissioner Thompson refused to give deference to the Secretary's interpretation of section 1910.12(a). Dec. 9 n.6; Dec. 18. According to Chairman Railton, the reasonableness of the Secretary's interpretation was diminished by the fact that the "application and elucidation of her enforcement policy has been anything but consistent." Dec. 5. Chairman Railton also found that the Secretary's interpretation rendered the phrase "each of his employees" superfluous as used in section 1910.12(a). Dec. 9.

For his part, Commissioner Thompson relied on the fact that the Secretary's initial enforcement policy following section 1910.12(a)'s promulgation did not include controlling employer liability. Dec. 16-17. Although he recognized that the Secretary's initial enforcement policy *did* authorize the citation of employers who created hazards, even when their own employees were not exposed to those hazards, Commissioner Thompson reasoned that in doing so the Secretary recognized "that reasonably predictable exposure generally runs with the creation of the hazard." Dec. 18.

Finally, Commissioner Thompson found it significant that the Secretary did not adopt the Construction Safety Act's multi-employer enforcement policy when she adopted that statute's substantive standards. Dec. 15-16.

Commissioner Rogers dissented. Dec. 20. After noting that controlling employer liability had been sustained by several courts (including the Eighth Circuit) as a valid exercise of the Secretary's enforcement authority under the OSH Act, she determined that section 1910.12(a) is at least ambiguous on the question. Dec. 21, 28. Thus, rather than upsetting over thirty years of precedent allowing controlling employer liability, Commissioner Rogers would have deferred to the Secretary's "reasonable and longstanding" interpretation of section 1910.12(a) under the authority of *Martin v. OSHRC (CF & I)*, 499 U.S. 144 (1991). Dec. 29, 31.

SUMMARY OF ARGUMENT

The OSH Act authorizes the Secretary to cite controlling employers on multi-employer construction sites for OSHA violations that they could have abated through the proper exercise of their supervisory authority, even if the controlling employer's own employees were not exposed to the hazard in question. *Bratton Corp. v. OSHRC*, 590 F.2d 273, 276 (8th Cir. 1979); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977). In the decision below, however, the Commission held that the Secretary barred herself from exercising that statutory authority when she promulgated 29 C.F.R. § 1910.12(a) in 1971. That holding is incorrect and must be reversed by this Court.

29 C.F.R. § 1910.12(a) does not cabin the Secretary's prosecutorial discretion to cite controlling employers. Instead, section 1910.12(a) serves an entirely different purpose: it adopts Construction Safety Act standards as OSHA standards and thereby extends their application to all construction sites governed by the OSH Act. Section 1910.12(a)'s language and context show that the adoption and extension of established Federal standards into the

OSHA realm is all that the regulation was intended to accomplish. Indeed, because section 1910.12(a) was promulgated without notice and comment procedures under section 6(a) of the OSH Act, the Secretary could not have created new substantive rules governing her enforcement authority through section 1910.12(a). *See* 29 U.S.C. § 655(a) (temporarily authorizing Secretary to bypass notice and comment for the limited purpose of adopting "national consensus standards" and "established Federal standards").

The Secretary's interpretation also has the virtue of consistency. Throughout the OSH Act's history, the Secretary has never indicated that section 1910.12(a) restricts her authority to apply a multi-employer enforcement policy. To the contrary, the Secretary has consistently applied some version of that enforcement policy for more than 30 years.

The Secretary's interpretation is reasonable in light of section 1910.12(a)'s language and purpose, and therefore is entitled to controlling deference. *Martin v. OSHRC (CF & I)*, 499 U.S. 144 (1991). Accordingly, the Commission's decision should be reversed.

ARGUMENT

A. *The Commission has destabilized the law of multi-employer liability on the basis of a regulation that does not even address multi-employer issues.*

The Secretary has regulated the health and safety aspects of construction worksites under the OSH Act since 1971. Throughout that period, she has asserted the statutory authority to hold employers on multi-employer worksites liable for hazardous conditions, even where their own employees were not exposed to those conditions. *See Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Cir. 1999). After initially rejecting that view, the Commission held in 1976 that the Secretary may indeed apply a broad multi-employer enforcement policy and may, as part of that policy, cite "controlling" employers for violations they could have prevented or abated through the proper exercise of their supervisory authority. *See Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694, 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976). Six courts of appeals, including this Court, have agreed that the multi-employer doctrine is consistent with the policies underlying the OSH Act, and is therefore permitted under

that statute. *Universal Constr.*, 182 F.3d at 728; *United States v. Pitt-Des Moines, Inc.,* 168 F.3d 976 (7th Cir.1999); *R.P. Carbone Constr. Co. v. OSRHC,* 166 F.3d 815 (6th Cir.1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir.1978); *Bratton Corp. v. OSHRC*, 590 F.2d 273 (8th Cir. 1979); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir.1977); *Brennan v. OSHRC,* 513 F.2d 1032 (2d Cir.1975); *but see Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981).

General contractors and other controlling employers have thus been on notice, since at least 1976, that they have an obligation to protect *all* employees on the worksite from hazardous conditions that may be prevented or abated through the proper use of supervisory authority. In this case, however, the Commission cast aside 30 years of precedent and rejected the Secretary's use of controlling employer liability. And it did so on a remarkable ground: the Commission held that the Secretary intended, from the earliest days of the OSH Act, to *not* apply controlling employer liability in the construction context. As evidence, the Commission pointed to 29 C.F.R. § 1910.12(a), which states in part: "Each

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."

The Commission's decision "runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference." *Lyng v. Payne*, 476 U.S. 926, 939 (1986). The Secretary promulgated 29 C.F.R. § 1910.12(a), and in her view that regulation does not foreclose the use of controlling employer liability; indeed it does not address multi-employer liability issues at all. As explained in detail below, the Secretary's interpretation is perfectly consistent with section 1910.12(a)'s language, and that interpretation is reasonable because it furthers the remedial purposes of the OSH Act. Thus, the Commission should have accepted the Secretary's interpretation and allowed her decades-old enforcement practice to remain in place. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240 (1970) ("important policy considerations militate in favor of continuity and predictability in the law").

There is an irony in the Commission's decision that should not

be overlooked. The Commission based its decision on the rule that an agency is bound by its own regulations. Dec. 7, 19. Yet that rule is meant to vindicate legitimate reliance interests; that is, persons covered by agency regulations are entitled to rely on them and to order their affairs accordingly. *See Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942); *cf. Udall v. Tallman*, 380 U.S. 1, 17-18 (1965). Here, however, the Commission did not vindicate any legitimate reliance interests, but instead upset reliance interests by invalidating an enforcement scheme that has been a fixture of OSHA law since at least 1976. The Commission's decision does not serve the OSH Act's remedial purposes and should be reversed.

B. *The Commission failed to give appropriate deference to the Secretary's interpretation of 29 C.F.R. § 1910.12(a) and, consequently, its decision is "not in accordance with law."*

The Administrative Procedure Act provides that a reviewing court must set aside an agency decision that is "not in accordance with law." 5 U.S.C. § 706. An agency decision is "not in accordance with law" if it rests upon a legal error. *See Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1137 (8th Cir. 1988).

The Commission decided this case based upon its interpretation of 29 C.F.R. § 1910.12(a). Because the meaning of a regulation is a question of law, *see White Indus., Inc. v. FAA*, 692 F.2d 532, 534 (8th Cir. 1982), and because the Commission misinterpreted section 1910.12(a), its decision must be set aside as "not in accordance with law." 5 U.S.C. § 706.

Although this case presents a question of law, the Court is not free to adopt its own interpretation of section 1910.12(a). "In situations in which the meaning of regulatory language is not free from doubt, the reviewing court should give effect to the agency's interpretation so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC (CF & I)*, 499 U.S. 144, 150-51 (1991) (internal quotation marks and citations omitted); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Long Island Care at Home, Ltd. v. Coke,* 127 S.Ct. 2339, 2007 WL 1661472 (2007).

The Supreme Court has made clear that it is the Secretary's interpretation, not the Commission's, that warrants deference. *CF & I*, 499 U.S. at 158. Therefore, this Court "must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks and citation omitted). "[I]t is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

C. *Section 1910.12(a) does not address multi-employer enforcement issues.*

This Court's first task is to ascertain whether section 1910.12(a)'s plain language unambiguously addresses the issue of controlling employer liability. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("deference is warranted only when the language of the regulation is ambiguous"). Bearing in mind that "the meaning of statutory language, plain or not, depends on

context," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), it must be concluded that controlling employer liability "is not governed by clear expression" in section 1910.12(a). *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980). Therefore, the Secretary's reasonable interpretation of that regulation must be given effect. *CF & I*, 499 U.S. at 150-51.

1. *As its language and context make clear, section 1910.12(a) was intended to extend the Secretary's enforcement authority over construction sites, not to limit her enforcement authority.*

An agency's exercise of its enforcement discretion is "an area in which the courts have traditionally been reluctant to interfere." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.). Therefore, this Court "must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears." *Ibid.* Contrary to the Commission's holding, no "secretarial commitment" to refrain from enforcing controlling employer liability is to be found in section 1910.12(a). Indeed, the regulation's language and context reveal that multi-employer enforcement issues are simply not addressed. Rather, the Secretary promulgated section 1910.12(a) for the sole purpose of adopting

Construction Safety Act standards as OSHA standards and thereby expanding her regulatory authority over the health and safety aspects of construction sites throughout the Nation.

Prior to the OSH Act, federal regulation of worker health and safety on construction sites was limited. The Construction Safety Act applied only to employers with federal or federally-funded contracts, and only to employees working on projects governed by federal or federally-funded contracts. *See CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 719 (7th Cir. 1999). With the passage of the OSH Act, Congress determined that a broader class of employers and employees engaged in construction work should be governed by federal health and safety regulations. The Secretary met that congressional directive by adopting the Construction Safety Act's standards as OSHA standards in May 1971. *See Underhill Constr. Corp. v. Secretary of Labor*, 526 F.2d 53, 54-56 (2d Cir. 1975).

The Secretary adopted the Construction Safety Act's standards through the fast-track rulemaking authority provided in section 6(a) of the OSH Act, which permitted her to forego notice and comment

procedures only for the purpose of adopting national consensus standards and "established Federal standards." 29 U.S.C. § 655(a). Thus, the Secretary made it perfectly clear that her sole intent was to adopt Construction Safety Act standards as OSHA standards, and thereby to extend the coverage of those standards to construction industry employers throughout the private sector. For example, section 1910.12(a) is found within a subpart of the Secretary's regulations entitled "Adoption and Extension of Federal Standards." 29 C.F.R. part 1910, subpart B. Moreover, the Secretary stated in the opening provision of subpart B that her intent was to "adopt and extend the applicability of established federal standards . . . with respect to every employer, employee, and employment covered by the [OSH] Act." 29 C.F.R. § 1910.11(a). Her focus was entirely on expanding the statutory duties of construction industry employers, not on limiting them.

That focus also comes through in section 1910.12(a) itself, which provides:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of

> employment of every employee engaged in construction work. Each 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).

Construed within the overall context of subpart B, these two sentences must be interpreted to *extend* the Secretary's regulatory authority over construction sites, not to *limit* her enforcement authority (or employers' compliance responsibilities) in any way. As the first sentence states, the Construction Safety Act standards that previously applied only to federal projects now apply, as OSHA standards, "to *every* employment and place of employment of *every* employee engaged in construction work." 29 C.F.R. § 1910.12(a) (emphasis added). Section 1910.12(a)'s first sentence thus meets the regulation's objective by adopting the Construction Safety Act's substantive standards as OSHA standards and thereby extending their coverage to all employers and employees within the OSH Act's broad reach.

The second sentence reinforces that objective: "*Each* 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) (emphasis added). Thus, the second sentence underscores that *each* construction employer -- not just ones with federal contracts -- must protect *each* of its employees engaged in construction work -- not just employees who work on federally-funded projects. Moreover, by indicating that protection is achieved "by complying with the appropriate standards prescribed in this paragraph," the second sentence makes clear that employers' duties in this context are the same as those prescribed by section 5(a)(2) of the OSH Act. *See* 29 U.S.C. § 654(a)(2) ("Each employer shall comply with occupational safety and health standards promulgated under this chapter."); *see also Knutson*, 566 F.2d at 599 (under section 5(a)(2) of the OSH Act, a construction employer's duty to comply with OSHA standards runs not only to its own employees, but to other employers' employees as well).

To be sure, the second sentence refers to an employer's obligation to protect the employment and places of employment of "his" employees. 29 C.F.R. § 1910.12(a). But it does not say "*only*

his employees," and there is no reason to believe that the Secretary intended it to mean "only his employees." Instead, the second sentence "merely emphasizes the primary responsibility of the direct employer to comply with the appropriate standards." Dec. 28 (dissenting opinion of Commissioner Rogers); *see also Commissioner of Labor of N.C. v. Weekley Homes, L.P.*, 169 N.C. App. 17, 27, 609 S.E.2d 407, 415 (the second sentence "simply requires the contractor to comply with the appropriate construction industry standards"), *appeal denied*, 359 N.C. 629, 616 S.E.2d 227 (2005). Again, the second sentence emphasizes the extension of Construction Safety Act standards to all construction sites governed by the OSH Act; it is not a limitation on the Secretary's enforcement authority.

This interpretation is bolstered by the second sentence's final clause, which states that the employer must protect employees' employment and places of employment "by complying with the appropriate standards prescribed in this paragraph." 29 C.F.R. § 1910.12(a). As this Court has already determined, a controlling employer cannot "comply[] with the appropriate standards"

prescribed in section 1910.12(a) by protecting only his own employees. *Knutson*, 566 F.2d at 599. Thus, "his employees" cannot mean "only his employees" if the rest of the second sentence is to make any sense.[7]

In short, "context matters." *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 636 (D.C. Cir. 1994). It is clear that section 1910.12(a), when viewed in light of its overall context, serves no function other than the adoption and extension of Construction Safety Act standards into the OSHA realm. Section 1910.12(a) does not, and was not intended to, address controlling employer liability or any other aspect of the

[7] Under the Secretary's interpretation, the second sentence of section 1910.12(a) was arguably unnecessary, because the first sentence clearly implies that employers must protect employees on construction worksites in the manner prescribed by the OSH Act and 29 C.F.R. part 1926. But not all "legal instruments are drafted with complete economy of language," *White v. Roughton*, 689 F.2d 118, 120 (7th Cir. 1982), and it is hardly unusual for statutes and regulations to emphasize points that have been previously stated or implied. *See Shook v. District of Columbia Financial Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes Congress . . . drafts provisions that appear duplicative of others simply, in Macbeth's words, 'to make assurance double sure.'").

Secretary's multi-employer enforcement policy.[8]

2. *The Commission's determination that section 1910.12(a)'s plain language bars controlling employer liability does not withstand scrutiny.*

Despite this overwhelming evidence that section 1910.12(a) is silent on multi-employer enforcement issues, the Commission held that the regulation's plain language bars the Secretary from citing under a controlling employer theory. Dec. 8-9 & n.6, 13-14. The Commission so held because section 1910.12(a) refers to an employer's duty to "protect the employment and places of employment of each of *his* employees engaged in construction work." 29 C.F.R. § 1910.12(a) (emphasis added). According to the Commission, the word "his" means that the sentence unambiguously states that an employer's only duty is to protect his own employees. Dec. 9 n.6, 13.

The Commission's interpretation is wrong. For one thing, the Commission gave short shrift to section 1910.12(a)'s first sentence,

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[8] Notably, section 1910.12(a)'s preamble says not a word about multi-employer enforcement issues. *See* 36 Fed. Reg. 10466 (May 29, 1971). That silence is deafening. It would be strange for an agency to impose a significant restraint on its own enforcement authority without so much as acknowledging that fact.

which unequivocally adopts the Construction Safety Act standards as OSHA standards. That adoption has a significant consequence in light of section 5(a)(2) of the OSH Act: "[T]he duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of all the employees engaged at the worksite." *Knutson*, 566 F.2d at 599. Thus, a controlling employer cannot comply with OSHA construction standards by protecting *only* his own employees, and nothing in section 1910.12(a) should be read as authorizing an employer to fall short of his OSH Act duties.

The Commission also misread section 1910.12(a)'s second sentence. That sentence does not, as the Commission seemed to believe, simply refer to an employer's duty to protect "his employees." Dec. 13. Instead, it refers to an employer's duty to protect his employees' employment *and places of employment* by complying with the Construction Safety Act's substantive standards. *See* 29 C.F.R. § 1910.12(a). That phrasing is significant, because a duty to protect a place of employment is not limited to protecting one's own employees

from the hazards that may arise at that place of employment. *See Universal Constr. Co.*, 182 F.3d at 729-30; *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982-83 (7th Cir. 1999). Thus, section 1910.12(a) does not restrict the employer's duty to his own employees.

The Commission's plain language argument also fails because it rested upon a canon of construction that is a "feeble helper" in the interpretation of administrative regulations. *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). In determining that "his employees" as used in section 1910.12(a) means "*only* his employees," the Commission implicitly relied upon the canon *expressio unius exclusio alterius* -- "expressing one item of an associated group or series excludes another left unmentioned." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (internal quotation marks and citation omitted); *cf. Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1342-43 (D.C. Cir. 1999).

The Commission's reliance on the *expressio* canon was misplaced. That canon "has reduced force in the context of interpreting agency administered regulations and will not

necessarily prevent the regulation from being considered ambiguous." *Whetsel v. Network Property Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001). Here, the Commission gave "his employees" the narrowest possible reading without even addressing *why* the Secretary would have wanted to relieve construction employers of an important duty that flows directly from the OSH Act. Weighed against the contextual factors discussed above, the *expressio* canon is simply too thin a reed to support the Commission's interpretation.

Commissioner Thompson also reasoned (Dec. 13 n.6) that section 1910.12(a) is "semantically identical" to the OSH Act's General Duty Clause, which states that an employer must "*furnish to each of his employees* employment and a place of employment which are free from recognized hazards" that may cause serious harm "*to his employees*." 29 U.S.C. § 654(a)(1) (emphasis added). But the two provisions are not semantically identical. Section 1910.12(a), like section 5(a)(2) of the OSH Act (29 U.S.C. § 654(a)(2)), broadly requires employers to comply with standards, in this case the standards adopted from the Construction Safety Act.

See 29 C.F.R. § 1910.12(a). And, in the construction context, compliance with standards requires controlling employers to protect employees in addition to their own. *See Universal Constr. Co.*, 182 F.3d at 729-30; *Knutson*, 566 F.2d at 599. Thus, section 1910.12(a) contains no limitation of the sort prescribed in the General Duty Clause.[9]

Finally, Chairman Railton erred in suggesting that *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995), is persuasive authority for the Commission's plain language argument. Dec. 7-8. In that case, the court stated in *dictum* that

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[9] Commissioner Thompson also made much of the fact that the Secretary did not adopt 29 C.F.R. § 1926.16 when she adopted the Construction Safety Act's substantive standards. Dec. 15-16. Section 1926.16 allows prime contractors and subcontractors to "make their own arrangements" with respect to compliance with safety and health obligations on federal construction projects, but stresses that those arrangements in no way relieve the prime contractor of overall responsibility for safety compliance. 29 C.F.R. § 1926.16(a). According to Commissioner Thompson, the Secretary's failure to adopt section 1926.16 as an OSHA standard is evidence that the Secretary did not intend to place duties upon general contractors that extend beyond the protection of their own employees. Dec. 16. That is wrong: the Secretary did not adopt section 1926.16 because that provision is not a substantive standard suitable for adoption under section 6(a) of the OSH Act. *See* 29 C.F.R. §§ 1910.11(a), 1910.12(c), 1926.1. Nor would the Secretary have had any basis for importing interpretations of the coverage of the Construction Safety Act into the OSH Act.

section 1910.12(a) "by its terms only applies to an employer's *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine." 70 F.3d at 1307 (emphasis in original). As explained above, a careful, context-based reading of section 1910.12(a) shows that the regulation leaves ample room for invocation of the multi-employer doctrine. In any event, section 1910.12(a)'s relevance to multi-employer liability was not at issue in *Anthony Crane*, and the court did not have the benefit of the Secretary's views on that subject. *Ibid.* Having the benefit of those views, not even the D.C. Circuit would be likely to follow the *dictum* in *Anthony Crane*, rather than uphold the Secretary's reasonable interpretation of her regulation. *See Seminole Rock*, 325 U.S. at 414 (in interpreting a regulation, "the ultimate criterion is the administrative interpretation"); *cf. Whetsel*, 246 F.3d at 903-04 (Seventh Circuit overrules previous decision regarding meaning of an agency regulation, where prior panel did not have the benefit of the agency's interpretation).

3. *Interpreting section 1910.12(a) as imposing a restraint on the Secretary's multi-employer enforcement policy renders the regulation invalid.*

There is an additional contextual reason for rejecting the Commission's plain language argument. Because section 1910.12(a) was promulgated under section 6(a) of the OSH Act, 29 U.S.C. § 655(a), the Secretary could not have limited her enforcement authority in the manner claimed by the Commission without violating the OSH Act and the APA. "In interpreting a regulation, courts will ordinarily avoid a construction which raises doubt as to the validity of the regulation." *Northern Nat. Gas. Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960); *see also University of Iowa Hosps. and Clinics v. Shalala*, 180 F.3d 943, 951 (8th Cir. 1999) ("an agency may not interpret a regulation so as to violate a statute"). That rule applies with full force here.

As this Court and so many others have repeatedly observed, the Secretary has statutory authority under the OSH Act to apply a multi-employer enforcement policy. *See Knutson*, 566 F.2d at 599-600; *Universal Constr.*, 182 F.3d at 728. If, as the Commission found, the Secretary cabined her prosecutorial discretion through

section 1910.12(a) by announcing a limitation on her multi-employer enforcement authority, then she promulgated a substantive rule rather than a general statement of policy. *See Association of Irritated Residents v. EPA*, ___ F.3d ___, 2007 WL 2033262, at *7 (D.C. Cir. July 17, 2007); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (*per curiam*); *Cathedral Bluffs*, 796 F.2d at 536-39. Indeed, the Commission's decision rests on the premise that the Secretary barred herself from enforcing controlling employer liability *through a substantive rule*. *See*, *e.g.*, Dec. 19 (Separate opinion of Commissioner Thompson); *see also Cathedral Bluffs*, 796 F.2d at 536-37 (agencies are bound by substantive regulations but not general statements of policy).

If the Commission is correct, then section 1910.12(a) was invalidly promulgated. When the Secretary enacted that provision, she did not go through notice and comment rulemaking; instead, she relied upon the fast-track rulemaking procedure set forth in section 6(a) of the OSH Act. *See Underhill*, 526 F.2d at 55-56. Yet section 6(a) only permitted the Secretary to bypass notice and comment for the purpose of adopting national consensus standards

and "established federal standards." 29 U.S.C. § 655(a); *see also* 29 U.S.C. § 652(10) (defining "established Federal standards"). In adopting established federal standards, the Secretary was not permitted to alter those standards in any substantive way. *See Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1117-18 (10th Cir. 1977); *Underhill*, 526 F.2d at 57.

No established federal standard in 1971 even remotely suggested that the Secretary should not enforce controlling employer liability on multi-employer construction sites. Therefore, the Secretary could not have cabined her prosecutorial discretion to enforce controlling employer liability through a section 6(a) rulemaking, even if she had wanted to. Instead, any substantive rule of that sort must be promulgated through notice and comment rulemaking. *Community Nutrition,* 818 F.2d at 948. Thus, the Commission's reading of the second sentence of section 1910.12(a) renders the sentence procedurally invalid, which is reason enough to reject that interpretation. *See University of Iowa Hosps.*, 180 F.3d at 951.

4. *The Secretary's early enforcement practice shows that she did not view section 1910.12(a) as a limitation on her enforcement authority.*

Finally, the Secretary's enforcement practice during the OSH Act's earliest days provides considerable support for her current and longstanding view that no regulation, including section 1910.12(a), stands as a bar to her use of controlling employer liability. *Cf. Tallman*, 380 U.S. at 16 (an agency's contemporaneous construction of a statute is entitled to particular respect).

Early decisions from the Commission and its ALJs show that the Secretary cited general contractors pursuant to a controlling employer theory of liability soon after section 1910.12(a) was promulgated. *See HRH Constr. Corp.*, 2 BNA OSHC 3044 (No. 3262, 1974) (ALJ decision); *Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (No. 504, 1973). In addition, the first field operations manual that the Secretary issued contemporaneously with section 1910.12(a)'s promulgation specifically authorized the citation of employers who created hazards, even when their own employees were not exposed to the hazards. *See* A-80 (Field Operations Manual at VII-6, ¶ 10(b) (May 20, 1971)). That manual, moreover, in no way suggested that

section 1910.12(a) placed any limits on the Secretary's enforcement authority. Therefore, the initial field operations manual establishes that the Secretary regarded section 1910.12(a) as simply irrelevant to multi-employer enforcement issues.

If, as the Commission claims, section 1910.12(a) evinces an enforcement policy that forecloses liability unless the employer's own employees were exposed to risk of harm, then the Secretary *immediately* violated that policy when she issued the initial field operations manual. To ascribe such erratic behavior to the Secretary is to reject the presumption of regularity that attaches to administrative action. *See Kinion v. United States*, 8 F.3d 639, 641 (8th Cir. 1993). Instead of rejecting that well-established presumption, this Court should view the Secretary's early enforcement policy and field operations manual as evidence that the Secretary did not intend section 1910.12(a) as a limitation on her multi-employer enforcement policy.[10]

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[10] According to Commissioner Thompson, the initial field operations manual is consistent with a reading of section 1910.12(a) that only authorizes citations of employers who exposed their own employees, because the Secretary understood at that time that "creating" employers generally exposed their own employees to

D. *The Secretary's interpretation of section 1910.12(a) is reasonable because it has been consistently applied and because it furthers the purposes of the OSH Act.*

For the reasons set forth above, controlling employer liability "is not governed by clear expression" in section 1910.12(a). *Milhollin*, 444 U.S. at 560. Accordingly, this Court must next ask whether the Secretary's interpretation is reasonable. *See CF & I*, 499 U.S. at 150-51. That answer to that question is emphatically yes.

The Secretary's interpretation -- i.e., that section 1910.12(a) does not address controlling employer liability at all, and thus does not restrict the Secretary's use of that theory of liability -- is consistent with the multi-employer enforcement policy that she has pursued over the past thirty years. And because that enforcement policy furthers the OSH Act's broad remedial goals, *see Knutson*, 566 F.2d at 599-600, the Secretary's interpretation of section 1910.12(a) necessarily furthers the statute's goals as well. It follows

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hazards. Dec. 18 & n.13. Yet the initial field operations manual plainly states that an employer who created a hazard may be cited for endangering employees, "whether his own or those of another employer." A-80. That language clearly does not equate "creating" employer liability with "exposing" employer liability.

that the Secretary's interpretation is worthy of deference.

1. *The Secretary has consistently applied a multi-employer enforcement policy.*

One measure of reasonableness is whether the agency has consistently applied its interpretation of the regulation at issue. *CF & I*, 499 U.S. at 157. In this case, that measure favors the Secretary. As the evidence shows, the Secretary has *always* interpreted the OSH Act as authorizing a broad multi-employer enforcement policy, and she has *never* regarded section 1910.12(a) as a bar to that policy.

The Secretary "has imposed liability under the [multi-employer] doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the [OSH] Act." *Universal Constr.*, 182 F.3d at 728; *see also Underhill Constr. Corp.*, 513 F.2d at 1035. Thus, from the early 1970s until the present day, the Secretary has cited employers on multi-employer construction sites for hazardous conditions they created or controlled, regardless of whether their own employees were exposed. *See, e.g.*, *McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000); *Martin Iron Works*, 2 BNA OSHC 1063 (No. 606, 1974);

Gilles & Cotting, Inc., 1 BNA OSHC 1388 (No. 504, 1973). And, throughout the entire history of the OSH Act, the Secretary has *never* taken the position that section 1910.12(a) places limits on her enforcement authority with respect to multi-employer worksites. Because the Secretary has consistently applied some version of a multi-employer enforcement policy without ever tying the contours of that policy to supposed limitations created by section 1910.12(a), it must be concluded that the Secretary has consistently regarded section 1910.12(a) as irrelevant to multi-employer issues.

The Commission nonetheless concluded that the Secretary's "application and elucidation of her [multi-employer] enforcement policy has been anything but consistent," and that her interpretation of section 1910.12(a) is entitled to less deference in light of those supposed inconsistencies. Dec. 5 (Separate opinion of Chairman Railton). The historical record tells a different story.

The record shows that the Secretary's policy, as announced in field operations manuals and other internal guidance documents, evolved from (1) citing employers who created hazards and employers who exposed their own employees to unsafe equipment;

to (2) citing only employers who exposed their own employees to hazards; to (3) citing "creating" and "exposing" employers, as well as employers who have supervisory control over the worksite, even when their own employees were not exposed to the hazard. Dec. 5-7. The evolution of that policy does not, however, suggest any inconsistencies in the Secretary's interpretation of section 1910.12(a). Instead, changes to the policy reflected judgments within the Secretary's prosecutorial discretion, informed at least in part by the Commission's own evolving opinions regarding the multi-employer doctrine.

Contrary to the Commission's view, the Secretary's field operations manual offers no evidence that she has ever regarded section 1910.12(a) as a barrier to a broad multi-employer enforcement policy. Although the Secretary has rewritten the manual over the years, not a single edition -- including the first edition issued contemporaneously with section 1910.12(a)'s promulgation -- has ever suggested that section 1910.12(a) has anything to do with the question of multi-employer liability. Therefore, the manual supports the Secretary's view that section

1910.12(a) is silent on that question.

In any event, the various changes to the field operations manual reflected a permissible exercise of prosecutorial discretion, not an evolving interpretation of the Secretary's statutory or regulatory authority to enforce multi-employer liability.[11] In the early days of the OSH Act, the Secretary had to make judgments about how to best effectuate the statute's purposes in light of limited resources and potential legal risks. She initially decided to focus her enforcement efforts primarily on construction employers who created hazardous conditions, although, as the case law shows, she also cited employers under a controlling employer theory of liability. *See, e.g., Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (No. 504, 1973). Those efforts were rejected by the Commission, which held that employers could be cited only if their own employees were exposed to hazards. *See ibid.* The Secretary

[11] "The Commission has long held that OSHA's [field operations manual] and Field Inspection Reference Manual ("FIRM") contain only guidelines for internal application that do not have the force and effect of law and create no substantive or procedural rights to employers." *Erik. K. Ho*, 20 BNA OSHC 1361, 1377 n.23 (Nos. 98-1645 & 98-1646, 2003) (citing *FMC Corp.*, 5 BNA OSHC 1707, 1710 (No. 13155, 1977)), *aff'd*, 401 F.3d 355 (5th Cir. 2005).

challenged the Commission's restrictive position in the courts, *see*, *e.g.*, *Underhill*, 513 F.2d 1032, but also directed local OSHA administrators to cite only exposing employers, again as a matter of prosecutorial discretion. *See* A-76 (41 Fed. Reg. 17639 (April 27, 1976)). When the Commission changed course and authorized creating and controlling employer liability, *see Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694, 4409, 1976), the Secretary likewise expanded her enforcement efforts to include those theories of liability.

As this account shows, the Secretary refined her multi-employer enforcement policy from time to time in light of factors such as the governing legal climate. In doing so she exercised appropriate discretion as the prosecuting authority under the OSH Act. *See generally Chao v. OSHRC (Jindal United Steel Corp.)*, 480 F.3d 320 (5th Cir. 2007) (discussing Secretary's prosecutorial discretion); *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006) (same, in Mine Safety & Health Act context). At no time, however, did she announce the view that her multi-employer enforcement authority did not extend to the citation of controlling

employers on construction sites. To the contrary, employers have long understood that she has taken the exact opposite view. *See Universal Constr. Co.*, 182 F.3d at 728 ("The Secretary has imposed liability under the [multi-employer] doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the [OSH] Act.").[12]

Finally, even if changes to the Secretary's enforcement policy did reflect an evolving interpretation of section 1910.12(a), still the Secretary's present interpretation would be entitled to deference under the circumstances presented here. "[A]s long as the interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Long Island Care at Home v. Coke*, 127 S.Ct. 2339, slip op. at 10 (No. 06-593, June 11, 2007).

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[12] The Secretary has also reaffirmed her authority to cite controlling employers pursuant to her multi-employer enforcement policy in several rulemakings. *See*, *e.g.*, Final Rule, *Safety Standards for Steel Erection,* 66 Fed. Reg. 5196, 5202 (Jan. 18, 2001); Final Rule, *Basic Program Elements for Federal Employee Occupational Safety and Health Programs*, 60 Fed. Reg. 34851 (July 5, 1995); Final Rule, *Occupational Exposure to Asbestos*, 59 Fed. Reg. 40964, 40982 (Aug. 10, 1994); *see also* Request for Public Comment, *Citation Guidelines in Multi-Employer Worksites*, 41 Fed. Reg. 17639, 17640 (April 27, 1976).

Controlling employer liability has been a fixture of OSHA law since 1976. In addition, the Secretary's present enforcement policy has been in effect since 1992, and Summit has been cited under that policy on multiple occasions over the past decade. *See*, *e.g.*, *Summit Contractors, Inc.*, 20 BNA OSHC 1118 (No. 01-1891, 2003) (ALJ affirms citations issued pursuant to multi-employer policy in 2001); *Summit Contractors, Inc.*, 17 BNA OSHC 1854 (No. 95-55, 1996) (ALJ vacates citations issued pursuant to multi-employer policy in 1995 based upon lack of employer knowledge). Because Summit cannot claim unfair surprise, the Secretary's interpretation of section 1910.12(a) is entitled to controlling deference. *Coke*, 127 S.Ct. 2339, slip op. at 10; *CF & I*, 499 U.S. at 150-51.

2. *The Secretary's interpretation of section 1910.12(a) furthers the OSH Act's remedial purposes.*

"An interpretation that harmonizes an agency's regulations with their authorizing statute is presumptively reasonable." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991). The Secretary's interpretation of section 1910.12(a) is reasonable because controlling employer liability furthers the purposes of the OSH Act.

The reason is plain enough: "General contractors normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite." *Knutson*, 566 F.2d at 599. And, "[a]s a practical matter, the general contractor may be the only on-site person with authority to compel compliance with OSHA safety standards." *Universal Constr. Co.*, 182 F.3d at 730. Therefore, holding general contractors and other controlling employers responsible for OSHA violations, even when their own employees are not exposed to the hazard, helps to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

In contrast, the Commission's interpretation of section 1910.12(a) forecloses controlling employer liability and deprives the Secretary of an effective tool that she has used for decades to combat the "construction industry's historically very high injury rate." *Access Equip. Sys, Inc.*, 18 BNA OSHC 1718, 1725 (No. 95-1449, 1999). If the Commission's interpretation is permitted to stand, general contractors and other controlling employers will be

able to avoid OSHA liability even though, "[a]s a practical matter, the general contractor may be the only on-site person with authority to compel compliance with OSHA safety standards." *Universal Constr. Co.*, 182 F.3d at 730. That is a consequence the Nation's construction workers can ill afford.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review, vacate the Commission's decision, and remand with instructions for the Commission to reinstate the citation against Summit.

Respectfully submitted,

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I hereby certify that on July 30, 2007, I served two copies of the Secretary of Labor's Brief by overnight mail upon the following:

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