

NIGHTMARES IN HOSPITALITY ::: CONVENTION 2010 BROCHURE
Making Successful Changes ::: New OSHA Ruling ::: Maintenance

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It's a familiar story. Summit Contractors was the general contractor for the construction of a college dormitory. Summit's contract with the owner provided that Summit had the exclusive authority to "manage, direct, and control" the construction. The contract also required that Summit supervise all safety precautions and take "reasonable precautions for safety" for employees on the project. Summit had four superintendents on the project to oversee the work of the subcontractors.

One of the subcontractors was All Phase. Summit's subcontract with All Phase stated that "use of the site" would be performed under Summit's direction, and Summit retained the right to terminate the subcontract if All Phase disregarded OSHA regulations.

As the work proceeded, Summit's superintendents observed All Phase employees working on scaffolds without fall protection. When that occurred, Summit's superintendents brought the issue to All Phase's attention, and All Phase responded each time by installing the necessary protection.

One fateful day, however, an OSHA inspector came to the site and observed All Phase employees working without fall protection. Summit's superintendents had not observed the situation this day and had no knowledge of the situation.

The citation issued to Summit involved OSHA's "controlling employer" and multi-

employer citation policy. When the case first went before the Occupational Safety and Health Review Commission in 2007, the Commission ruled that Summit could not be cited for the subcontractor's violations because Summit did not create the violation and none of Summit's employees were exposed to the hazard. However, the Labor Department appealed that ruling to the federal appeals court and in early 2009 the Eighth Circuit Court of Appeals reversed the Commission. The Court ruled that OSHA is permitted to issue citations to employers even when their own employees are not exposed to any hazards related to the violations.

The case was therefore sent back to the Review Commission, which issued a decision on July 27. The Commission held that an employer can be held liable for another employer's OSHA violation if the employer could reasonably be expected to prevent violations due to its supervisory authority and control of the worksite. The Commission ruled that a controlling employer, who has general supervisory authority over the worksite, "must exercise reasonable care to prevent and detect violations on the site."

Applying this test for liability, the Commission held that Summit was liable for All Phase's violations. The principal factors that led to this result were (a) the broad authority delegated to Summit in the owners' contract, (b) the authority reserved by Summit in the subcontract, and (c) the fact that Summit previously observed that All Phase employees worked at the site on scaffolds without fall protection. Therefore, even though Summit's employees did not create the violation, and even though none of its employees were exposed to the hazard,

Summit was cited for the OSHA violations. (This is not to say that the subcontractor, All Phase, got off scot-free. Summit's citation was in addition to, and independent of, the fall protection citations issued directly to All Phase.) [Secretary of Labor v. Summit Contractors, OSHA Dock. No. 031622 (July 27, 2009)].

The lesson from this case for general contractors and CMs is probably "do it right or don't do it at all." One alternative, perhaps in theory only, is for a general contractor or CM to decline any responsibility or authority to oversee or enforce safety on the project. That is, if the contract documents provided that the general contractor had no responsibility to oversee safety by others on the job, and that each contractor had complete and exclusive responsibility for safety of its operations and employees, OSHA might not be able to categorize the general contractor as a "controlling employer." However, such a contractual arrangement may be unacceptable to an owner. On the other hand, if the general contractor retains authority over the control of the worksite, including safety, the contractor will have to be vigilant to be sure that none of the subcontractors violate any of the applicable OSHA requirements.

Larry Feheley is a Director at Kegler Brown Hill and Ritter and this article is published with his permission. The above article is to provide general information about the subject discussed. It is not meant to be all-inclusive or comprehensive. Kegler Brown is not rendering any legal or professional advice by way of this article. Larry can be reached at lfeheley@keglerbrown.com.