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June 3, 2005

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Washington, D.C. 20036-3419

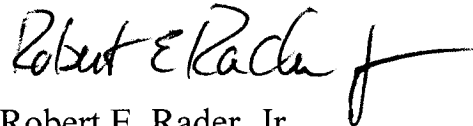
VIA TELECOPY (202)606-5050
AND FEDERAL EXPRESS

Re: *Secretary of Labor v. Summit Contractors, Inc.*
OSHRC Docket No. 03-1622

Dear Mr. Darling:

We are filing herewith Respondent's Reply Brief on Review. Eight copies are also being sent today via Federal Express.

Sincerely,



Robert E. Rader, Jr.

RER/clv/enclosures

cc(w/encl.):

Mr. Stephen Turow

VIA FEDERAL EXPRESS

Mr. Arthur G. Sapper

VIA FEDERAL EXPRESS

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VIA FEDERAL EXPRESS

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR

Complainant,

v.

SUMMIT CONTRACTORS, INC.

Respondent.

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OSHRC DOCKET
No. 03-1622

REGION VI

RESPONDENT'S REPLY BRIEF ON REVIEW

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I. Introduction and Restatement of the Issue

OSHA's multi-employer citation policy at CPL 2-0.124 states that a general contractor must monitor whether independent subcontractors comply with OSHA standards and, if they do not, must compel the subcontractors to come into compliance by a system of progressive discipline, withholding payment, and ultimately termination. Thus, the controlling issue in this case is whether a general contractor has a legal duty to ensure that *other* employers are in compliance with OSHA.

II. The Effect of § 1910.12(a)

In its opening brief Summit pointed out that neither the Act, nor the legislative history, nor the standard under which Summit was cited here, imposes a duty on one employer to ensure compliance by another employer. Summit also pointed out that OSHA's own implementing regulation at 29 CFR § 1912.12(a) *precludes* such a duty by stating that a construction employer is only responsible for protecting "each of *his* employees engaged in construction work . . . by complying with Part 1926 standards." (Emphasis added).

The Commission has previously noted the importance of § 1910.12(a) but declined to rule on it because it has never been argued or briefed to the Commission. *See Secretary v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1723 n.12 (Rev. Comm. 1999). In this case, the preclusive effect of § 1910.12(a) was thoroughly briefed and argued in opening briefs by Summit and its *amici*, putting this issue squarely before the Commission for the first time.

In response, the Secretary has made only the most insubstantial argument against application of §1910.12(a), and the Union makes no argument against it at all. The Secretary argues:

The provision plainly states that each employer must protect both the "employment" and "places of employment" of each of his employees. It therefore requires employers to comply with standards at all sites

where they are working, and such compliance is intended to protect all workers who are predictably present at those sites.

Secy's Br. at 25. This argument gives no meaning to the phrase "each of his employees," for it would read precisely the same if the words "each of his" were absent from the second sentence of § 1910.12(a). Indeed, the Secretary never says what the phrase or the second sentence *does* mean. Instead, she says that the *first* sentence of § 1910.12(a) "frames the obligation in terms of 'every employee' at the construction site." This not only ignores the second sentence but ignores the difference between them. The first sentence made Part 1926 applicable under the OSH Act without regard to whether employees were engaged in federally-funded construction, while the second sentence stated *how* Part 1926 was to apply under the new OSH Act – *i.e.*, that the standards under Part 1926 apply when one's own employees are affected by or exposed to a violative condition. The Secretary's argument would make the second sentence entirely redundant with the first.¹

The Secretary's argument is also inconsistent with her own interpretation of § 5(a)(1) of the Act. She acknowledges that the language "his employees" in § 5(a)(1) limits an employer's duty under that section to his *own* employees. Secy's Br. at 15. Why, then, does use of *the same*

¹The Secretary also argues that the second sentence of section 1910.12(a) cannot mean what it says because the preamble accompanying it was silent. She asserts, "It would not have been reasonable for the Secretary to resolve this important a question without stating that she was doing so or giving reasons for her action." But OSHA did not explain *any* of the major policy decisions it made when it adopted the start-up standards in 1971. OSHA did not explain why it adopted section 1910.5(d), or did not adopt section 1926.16, or erroneously deleted scope provisions from many national consensus standards, such as those in NFPA 30-1969 when OSHA first adopted section 1910.106. The reason is that OSHA was expressly freed from any duty of explanation by section 6(a) of the Act, which permitted OSHA to act "Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section,...." Nor was explanation needed. The second sentence was adopted because everyone understood that section 5(a)(2) imposed the same employment-related duty as section 5(a)(1), which is why the Commission so held in its early case law.

language in § 1910.12(a), promulgated “one month after the effective date of the OSH Act,” not mean the same thing? The Secretary offers no explanation for this inconsistent (and opportunistic) interpretation.

Finally, the Secretary’s response regarding § 1910.12(a), at most, supports only the view that a *creating* employer may be cited. In her brief she states:

The provision also makes clear, in the first sentence that construction employers must *comply* with these standards wherever their employees are working . . .

It therefore requires employers to *comply* with standards at all sites where they are working

Secy’s Br. at 25. (Emphasis added). This argument does not justify citing Summit because Summit did not violate the cited standard, All Phase Construction did. Quite clearly, OSHA did not cite Summit because Summit failed to “comply” with the standard but, rather, because Summit did not compel All Phase to comply. Nothing in the Secretary’s strained and illogical interpretation of § 1910.12(a) even addresses this issue.

The utter barrenness of the Secretary’s brief on § 1910.12(a) is reflected in its complete failure to mention § 1926.16, a regulation prominently mentioned in the briefs of Summit, its *amici*, and the Secretary’s *amicus*. The Secretary has no answer to the showing of Summit and its *amici* that OSHA’s simultaneous adoption of the second sentence of § 1910.12(a) and rejection of § 1926.16 demonstrate that Part 1926 was never intended to impose on general contractors a duty to control and oversee subcontractors. She never explains why, if the Secretary intended all along to impose such a duty, she did not just adopt § 1926.16 with the rest of Part 1926 or adopt a version tailored to the OSH Act. The answer is obvious. She did not intend Part 1926 to apply that way

under the OSH Act. That is why her first compliance manual imposed no such duty of control.

In view of the arguments and responses on this issue, the Commission may vacate the citation in this case simply on the ground that it is precluded by § 1910.12(a). Such a narrow ruling would be unassailable. It would make unnecessary any reconsideration of Commission case law, not place the Commission at odds with the views of any court of appeals, leave case law on § 5(a)(1) intact, and require this question to be considered in rulemaking.

III. The Secretary's Policy Arguments

In its opening brief Summit demonstrates that neither the OSH Act nor its legislative history provides authority for the proposition that one employer has a duty to ensure compliance by another employer. The Secretary does not really contradict that fact. Instead, much of the Secretary's brief is devoted to the policy argument that OSHA's multi-employer citation policy should be upheld because it advances the "purpose" of the Act by promoting workplace safety. Secy's Br. At 13-23. There are at least two responses to this argument. First, there is no evidence that the multi-employer policy has any impact on safety at all. Second, even if it does, it may not be legally implemented without specific statutory or regulatory authorization.

The multi-employer policy is premised on the theory that the more employers held responsible for correcting a violation, the more likely it will get done. "This is, of course, not necessarily true. Placing responsibility in more than one place is at least as likely to cause confusion and disruption . . . on a construction site. Such a policy might in effect prove to be counterproductive." *Anning-Johnson Company v. OSHRC and Brennan*, 516 F.2d 1081, 1089, 3 BNA OSHC 1166, 1171-1172 (7th Cir. 1975). The briefs of the Secretary and the Union seem to verify the Seventh Circuit's analysis. The Secretary's brief asserts that the multi-employer citation

policy has been in effect for 30 years. Secy's Br. at 3. Yet, according to the Union, construction injury rates remain disproportionately high. Union's Br. at 3-4. This suggests that the multi-employer policy has little effect on safety.

In *Anning-Johnson*, the Seventh Circuit also observed that a policy of citing multiple employers for the same violation will disrupt traditional contractual relationships on a construction project, cause confusion and possibly litigation over indemnification provisions, be economically wasteful and, in some cases, totally impractical, and could even shut down an entire project.² Therefore, the Court held, even assuming *arguendo* that holding multiple employers responsible for the same violation is good policy, it is "a policy choice of such magnitude and would lead to results under the Act, not intended by Congress, that it may not be appropriately adopted without more direct statutory authorization." 516 F.2d at 1088-1089, 3 BNA OSHC at 1171.

This point was recently reaffirmed in a case arising under Virginia's approved state OSHA plan in a case against Summit. In *C. Ray Davenport, Commissioner, Department of Labor and Industry v. Summit Contractors, Inc.*, ___ S.E. 2d ___, (No. 1643-04-2, Va. App., May 3, 2005), Summit was cited under the same multi-employer policy as in this case. The Court of Appeals of Virginia dismissed the citations, observing that even if the "policy judgment" reflected in the multi-employer policy really does advance worker safety, such a policy may not be implemented absent specific statutory or regulatory authorization.

In short, the Secretary's "good purpose" argument cannot trump the specific language of the statute and the implementing regulation of § 1910.12(a). Nor can it override the time-honored

²A fact that is substantiated in the record in this case. See Tr. 104-105, 248-252. This potentially drastic effect was also recognized by the United States Court of Appeals in *IBP, Inc. v. Secretary of Labor*, 144 F.3d 861, 867, 18 BNA OSHC 1353, 1357 (DC Cir. 1998).

purpose of legally established independent contractor relationships. A policy decision with such profound consequences should properly be made by the legislature, not by unelected agency administrators. At the very least, formal rulemaking is necessary, with the opportunity for meaningful input from those who will be affected.

The Secretary's policy argument is also based on the false premise that the general contractor is in the best position to ensure compliance by the subcontractors. Again, there is no evidence to support this theory. It presumes that the general contractor has "overall control and responsibility for safety on the worksite," has the manpower to police dozens of subcontractors' compliance with OSHA, and has the expertise to recognize when a certain subcontractor, or trade, is not in compliance with applicable OSHA standards. In reality, just the opposite is true. For instance, the evidence in this case shows that Summit does not have the manpower or the expertise to be responsible for subcontractors' safety. (Tr. 246). The brief of *amici* National Association of Homebuilders, *et al.*, confirms that this is true in the construction industry generally. NAHB Br. At 10-12.

The Union's argument is based on this same faulty premise. The Union argues that the general contractor should be held responsible for subcontractors' safety because the exposure of subcontractors' employees is ever changing, depending on where they are working on the project, and it is "impossible" for a particular employer to anticipate the hazards his employees may be exposed to. Union's Br. at 4. But the Union does not explain why it is more "possible" for the general contractor to be aware of the exposure of a subcontractor's employees than the subcontractor himself who actually assigns and oversees the work of those employees.

The Secretary also argues that, as a matter of policy, "there is no conceptual basis" for

distinguishing between an employer's responsibility for protecting his own employees and a general contractor's responsibility for protecting employees of subcontractors. Secy's Br. at 27. But there is a huge conceptual difference between an employer and a non-employer under the Act. A general contractor like Summit does not employ employees who actually perform construction work. The general contractor only schedules the work of the numerous subcontractors and oversees the progress of the work generally. The potentially affected employees are employed by the separate subcontractors. The general contractor has no authority over the employees of the subcontractors. Indeed, in many cases where there are numerous construction workers on a project the general contractor does not even know which employees are employed by which subcontractor, or sub-subcontractor. Each subcontractor hires, fires, pays, disciplines and promotes his own employees. The subcontractor trains his own employees and supplies their equipment and safety gear. The subcontractor assigns their work, regulates their working hours and determines how they should do their work. The subcontractor is a legally independent, separate employer. As such, he is responsible for the safety of his own employees. *Secretary v. Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (Rev. Comm. 2005).

By this policy argument, the Secretary is essentially contending that the subcontractors and their employees should be treated as employees of the general contractor for purposes of liability under the OSH Act. The Commission rejected this theory of liability in *Secretary v. Timothy Victory*, 18 BNA OSHC 1023 (Rev. Comm. 1997). In *Timothy Victory*, OSHA attempted to cite Victory, a boat owner, on the theory that he controlled the actions of scuba divers using his boat to harvest sea urchins. The Commission reaffirmed its earlier decision in *Secretary v. Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (Rev. Comm. 1992), that only an "employer" may be cited for a

violation of the Act. The Commission then observed that it had previously subscribed to the “legal proposition” that “the term ‘employer’ under the Act is not limited to employment relationships defined under common law principles but rather is to be broadly construed in light of the statutory purpose...” *Id.* at 1026. The Commission went on to say that it has modified that proposition to conform to the Supreme Court’s decision in *Nationwide Mutual Insurance Co., v. Darden*, 503 U.S. 318 (1992), and that the Commission now interprets the term “employee” under common law principles. *Ibid.*³ Thus, the Commission concluded, in order to prove a violation against Victory, “The Secretary bears the burden of establishing that Victory exercised an *employer’s* control over the divers as opposed to a *boat owner’s* control over persons aboard his vessel...” *Id.* at 1027. (Emphasis in original). And since the Secretary had not proved that Victory hired, fired, trained, supplied equipment, controlled work hours, and other common law elements of an “employer’s control” the citations were properly dismissed.

To use the Secretary’s phrase, “there is no conceptual basis” for distinguishing between the boat owner in *Timothy Victory* and Summit in this case. The Secretary asserts that it is “logical” to hold the general contractor responsible because the general contractor supervises the job site. But the general contractor’s supervisory authority is analogous to that of the boat owner in *Timothy Victory*. The general contractor directs the overall sequence of the work and ensures that the work complies with the plans and specifications. But the general contractor does not exercise an *employer’s* control over either the subcontractors or the workers because he is not their employer and

³This is precisely the point made in Summit’s opening brief. Even if the “statutory purpose” justification for expanding liability beyond the employment relationship was valid at the time of the Commission’s decisions in *Grossman* and *Anning-Johnson*, it is no longer valid after *Nationwide*. Summit’s Opening Br. at 20-21, 31.

they are not his employees. The general contractor does not direct the means, methods and techniques in completing the work. That is left to the expertise, discretion and authority of the subcontractor. Indeed, in this case, Summit's general superintendent testified he did not *care* how the subcontractor's employees actually did the work so long as it met the plans and specifications when completed. (Tr. 188-189).

IV. Private Contracts Do Not Create Statutory Duties

It is important to distill the Secretary's policy arguments and understand what she is really saying here. In essence, the Secretary says that where a general contractor contracts for a subcontractor to perform work in a timely manner in accordance with the plans and specifications, and that contract naturally and necessarily contains procedures for enforcing the contract, *those private, contractual remedies give rise to a statutory duty* to compel the subcontractor to comply with OSHA standards.

This argument is flatly contrary to law. It has long been established that a private contract cannot enlarge or diminish a party's duty under a given statute. *See e.g. Cartier v. Doyle*, 277 F. 150, 153 (5th Cir. 1921) (private contract cannot change the affect of a statute), *McQueen v. Salida Coca Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (private contract cannot affect the statutory scheme drafted by Congress). This principle has even been applied under OSHA. *See Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631, 3 BNA OSHC 1432, 1433 (10th Cir. 1975) (language in private crane lease agreement stating which party would be responsible for actions of the operator cannot control the statutory liability for the operator's conduct under OSHA), *Secretary v. Vergona Crane Co*, 15 BNA OSHC at 1785-1786 (language in private crane lease agreement stating which party would be considered the employer of the crane operator cannot control