SIGNIFICANT DECISIONS

Moderator

Heather L. MacDougall, Esq.
The Law Office of Heather L. MacDougall, Esq.
Carmel, IN

Panelists

Catherine Trafton, Esq.
United Auto Workers
Detroit, MI

Dennis J. Morikawa, Esq.
Morgan, Lewis & Bockius, LLP
Philadelphia, PA

Joseph M. Woodward, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, DC
I. **SUMMIT CONTRACTORS AND THE VALIDITY OF THE MULTI-EMPLOYER CITATION POLICY.**¹

Any dialogue about recent significant decisions in Occupational Safety and Health law would not be complete without first discussing a case that has been closely followed by representatives of employers, labor unions and the Secretary alike – *Summit Contractors*. Indeed, the *Summit Contractors* case, which began with a citation issued by the Occupational Safety and Health Administration (“OSHA”) nearly seven years ago, is still in active litigation, and, whether or not the Court of Appeals for the Eighth Circuit ultimately affirms, modifies or reverses it, OSHA will continue to inspect construction industry employers under what has come to be known as the OSHA Multi-Employer Citation Policy.

Under OSHA’s Multi-Employer Citation Policy, more than one employer on a multi-employer worksite (in all industry sectors) may be cited for hazardous conditions at the worksite. CPL 02-00-124. The relevant inquiry is whether such an employer was a creating, exposing, correcting, and/or controlling employer. Per the Policy, a “creating employer” is an employer that creates a hazardous condition that violates an OSHA standard. An “exposing employer” is an employer whose own employees are exposed to a hazard. A “correcting employer” is an employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting the hazard. Finally, a “controlling employer” is an employer who has general supervisory authority over the worksite (such as a general contractor), including the power, by contract or by practice, to correct safety and health violations itself or require others to correct them. Only OSHA’s ability to cite controlling employers is at issue in *Summit Contractors*.

The case originally began in June 2003, when Summit Contractors, Inc. (“Summit Contractors” or “Summit”) was serving as a general contractor for a dormitory construction project in Little Rock, Arkansas. Summit subcontracted all of the exterior brick masonry work for the project to All Phase Construction, Inc. (“All Phase”), whose employees used scaffolding to perform the work. Following an inspection at the worksite, OSHA issued a citation to Summit on August 25, 2003 for a violation of OSHA’s Construction Standard – 29 C.F.R. § 1926.451(g)(1)(vii) – after OSHA observed employees of All Phase working on scaffolding at

---

¹ Special thanks to Victoria L. Bor, Esq. and Allen H. Bean, Esq. for their contributions to this paper.
without adequate fall protection.\(^2\) Summit Contractors, who had only four of its own employees at the worksite (none of whom were actually exposed to the hazard), was cited as the “controlling employer” for the scaffolding violations committed by All Phase under the Multi-Employer Citation Policy.

Summit contested the citation arguing before the Administrative Law Judge that: (1) the regulation establishing OSHA’s Part 1926 Construction Standards, 29 C.F.R. § 1910.12(a), invalidated the Secretary’s Multi-Employer Citation Policy as to controlling employers; and (2) even if the Multi-Employer Citation Policy was valid, Summit lacked sufficient control over the worksite to be cited as a controlling employer. The Judge rejected Summit’s arguments and upheld the citation. On appeal, the Occupational Safety and Health Review Commission (the “Review Commission”), issuing three separate opinions, held that Section 1910.12(a) required an employer to protect only its own employees, and thus, prohibited OSHA from issuing citations to a purported controlling employer who – like Summit Contractors – neither created a hazard nor had its own employees exposed to a hazard. *Summit Contractors, Inc.*, 21 OSHC (BNA) 2020, 2007 WL 2265137 (O.S.H.R.C. Apr. 27, 2007) (“Summit I”). Accordingly, the Review Commission dismissed the citation against Summit Contractors. The Secretary appealed to the U.S. Court of Appeals for the Eighth Circuit.

On February 26, 2009, a majority of the Eighth Circuit vacated and remanded the Review Commission’s decision in *Summit I. Secretary of Labor v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009) (“Summit II”). In *Summit II*, the Eighth Circuit first considered Summit’s argument that Section 1910.12(a) prohibited OSHA from citing “controlling employers.” Undertaking a grammatical analysis of Section 1910.12(a),\(^3\) the court found that the regulation mandated that employers provide two distinct protections to employees. First, an employer must protect the “employment” of each of his employees. *Id.* at 824. In other words, the employer

---

\(^2\) All Phase was issued a similar citation but it did not file a notice of contest.

\(^3\) Section 1910.12(a) 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) (emphasis added).
must protect his own employees. Second, an employer must protect the “places of employment” of each of his employees. Id. Thus, an employer has a duty to protect other individuals who work at his place of employment, as long as the employer’s own employees are also working at that place of employment. Based on this analysis, the court found that the plain language of Section 1910.12(a) did not preclude OSHA from citing controlling employers.

The court also rejected the alternative arguments raised by Summit. For example, Summit also argued that the Multi-Employer Citation Policy violated Nationwide Mutual Insurance v. Darden, 503 U.S. 318 (1992), where the Supreme Court held that courts should construe the term “employee” pursuant to common law whenever Congress leaves the term insufficiently clear. Thus, Summit argued that the broad definitions of “employer” and “employee” that the Policy was premised upon were atypical of the narrower common law understanding of an employer-employee relationship. The court found this argument unpersuasive. The court similarly rejected Summit Contractor’s arguments that: (1) the Secretary had no legal authority for the Controlling Employer Citation Policy (finding that 29 U.S.C. § 653(a)(2) provided such authority); (2) that the Policy violated 29 U.S.C. § 653(b)(4) by increasing an employer’s liability at common law (finding that the Policy did not create a private cause of action or preempt state law, and thus, did not violate the statute); and (3) that the Policy was ill-conceived and counterproductive to the goals of the Occupational Safety and Health Act (the “OSH Act”) (finding that Policy concerns should be addressed to Congress and not the courts). Thus, the Eighth Circuit vacated Summit I and remanded the case to the Review Commission for further proceedings.

On remand from the Eighth Circuit, the Review Commission considered the following two legal issues in Summit Contractors, Inc., No. 03-1622, 22 OSHC (BNA) 1777, 2009 WL 2857148 (O.S.H.R.C. July 27, 2009) (“Summit III”). First, the Review Commission considered the threshold issue of whether the Secretary had authority to apply the Multi-Employer Citation Policy without first adopting it through the informal (notice-and-comment) rulemaking process of the Administrative Procedure Act (“APA”). Second, the Review Commission considered whether Summit Contractors had sufficient supervisory authority over the worksite to be properly cited as a “controlling employer.”

With respect to the APA argument, a regulatory agency, such as OSHA, must generally participate in informal rulemaking prior to promulgating a new rule. See 5 U.S.C. § 553.
However, interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice are exempt from this procedure. 5 U.S.C. § 553(b)(A). In *Summit III*, the Review Commission held that the Secretary was not required to engage in notice-and-comment rulemaking before applying the Multi-Employer Citation Policy because the Policy did not impose new duties or detract from existing duties, i.e., it was not a “substantive” rule subject to the APA’s informal rulemaking mandate. *Id.* at *3. In reaching this conclusion, the Review Commission relied on its decision in *Limbach Co.*, 6 OSHC (BNA) 1244, 1246 (O.S.H.R.C. 1977), where it held that a prior version of the Multi-Employer Citation Policy was neither a “standard” nor a “substantive rule,” and thus, was exempt from the APA’s procedural requirements.

Additionally, with respect to the issue of Summit Contractor’s control over the worksite, the Review Commission had little trouble finding that Summit did have sufficient supervisory authority over the worksite to be cited as a controlling employer. Specifically, the Review Commission found Summit Contractor’s contract with the owner of the worksite persuasive as it gave Summit Contractors the “exclusive authority to manage, direct and control” the construction at the worksite and placed the responsibility on Summit to comply with safety laws and take safety precautions for all employees at the worksite. Further substantiating Summit’s control, Summit’s contract with All Phase granted Summit Contractors “complete direction” of the subcontractor’s use of the worksite and permitted Summit to terminate or remove All Phase for disregarding safety standards. Therefore, the Review Commission concluded that Summit was properly cited as the “controlling employer.” *Id.* at *5. Finally, because Summit Contractors stipulated that it had knowledge of All Phase’s violation of the cited standard, the Review Commission upheld the citation against Summit Contractors on the basis that it had failed to inform the subcontractor of the cited condition and failed to take reasonable steps to obtain abatement. *Id.*

On September 14, 2009, Summit Contractors filed a petition for review of the *Summit III* decision, but this time, Summit appealed the case to the U.S. Court of Appeals for the District of Columbia Circuit, Docket No. 09-1241.4 On November 2, 2009, the Secretary filed a motion to

---

4 Pursuant to 29 U.S.C. § 660(a):
Any person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order in any United States court of appeals for the
transfer the case to the Eighth Circuit arguing that the transfer would be in the interests of justice and sound judicial administration because the Eighth Circuit already had considerable familiarity with the facts and issues of the case and because Summit intended to raise some of the same arguments already decided by the Eighth Circuit. On February 17, 2010, the D.C. Circuit granted the Secretary’s motion to transfer.

With the case now pending before the Eighth Circuit it remains to be seen whether the court will reverse its previous holding. However, even if the Eighth Circuit does affirm its prior decision, questions will still remain over the breadth of *Summit III*. For example, did the Review Commission in *Summit III* overrule its prior decision in *Summit I*? Will the Review Commission apply *Summit I* or *Summit III* in cases outside of the Eighth Circuit? Does *Summit III* apply to multi-employer citations outside of OSHA’s Construction Industry Standard? If the past history of this case is any indication, it may be some time before these issues are resolved. In the meantime, OSHA has enforced, and will continue to enforce, the Multi-Employer Citation Policy in its current form.

II. **RECENT CASES APPLYING GADE PREEMPTION PRINCIPLES**

In *Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992), the Supreme Court held that the OSH Act preempts non-state plan states from regulating occupational safety and health issues which are already the subject of OSHA’s federal standards. *Id.* at 102, 108-109 (holding that Illinois state licensing act was preempted to the extent that it regulated training for employees working with hazardous wastes). With OSHA current legislative agenda, which includes potential new rules in a variety of subject areas (e.g., combustible dust, diacetyl), the prevalence of *Gade* preemption issues may also be on the rise. In the past year, two noteworthy circuit court opinions considered *Gade* preemption in the context of guns at work laws and laws regulation wind loads for cranes and hoisting equipment.

First, in *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), the Tenth Circuit considered the validity of an Oklahoma law that held employers criminally liable for maintaining policies which prohibited employees from storing firearms in locked vehicles on company property. The U.S. District Court for the District of Tennessee held that the law was preempted,
on conflict preemption grounds, finding that gun-related workplace violence was a “recognized hazard” under the General Duty Clause, and thus, the law impermissible conflicted with employers’ ability to comply with the General Duty Clause.

On appeal, the Tenth Circuit first noted that its analysis was guided by the assumption that Congress did not intend the OSH Act to preempt a law – such as the one at issue – that implicated a state’s police powers (an area of traditional state control). The court next explained that, while OSHA had issued voluntary guidance and recommendations to employers regarding the risk of workplace violence, it had not enacted a specific standard regarding the issue. Thus, the only possible basis for preemption was under the General Duty Clause. The court also found it relevant that the only Administrative Law Judge to have considered workplace violence in the context of a General Duty Clause violation found that potential violent behavior did not constitute a workplace hazard.

In reversing the district court’s decision, the court explained that OSHA had never indicated that employers should prohibit guns from company parking lots and had affirmatively declined to promulgate a standard that banned firearms from the workplace. Thus, adherence to the law did not “materially impede or thwart” adherence to the OSH Act, as required for conflict preemption, and was not preempted under Gade.

Second, in Associated Builder and Contractors Florida East Coast Chapter v. Miami-Dade County, Case No. 08-13549, 09-10678, --- F.3d. ---, 2010 WL 276669 (11th Cir. Jan. 26, 2010), the Eleventh Circuit considered the validity of a county ordinance that set mandatory standards for tower cranes and hoists. The U.S. District Court for the Southern District of Florida concluded below that several provisions in the ordinance were preempted by the OSH Act. The district court concluded that while aimed in part at public safety, the ordinance also regulated occupational safety by mandating how workers could use equipment in the course of their employment, and further found that OSHA’s crane standard governed the same issue. The county appealed, but only with respect to the ordinance’s mandatory hurricane wind load standards.

On appeal, the Eleventh Circuit first rejected the County’s argument that the purpose of the wind load standards was to protect the public – both workers and non-workers alike – from falling cranes. In doing so, the court reasoned that construction sites were closed to the public, there was not a single crane accident during a hurricane that injured a member of the public, and
to the extent that the ordinance provided a public benefit, it was a dual purpose law. This did not, however, “render it any less of an occupational standard.” *Id.* at *2. Next, the court concluded that the OSH Act did have a federal standard that regulated wind loads, and thus, preempted the ordinance. Specifically, the court cited to 29 C.F.R. § 1926.550, which requires employers operating cranes or hoists to comply with either manufacturer’s specifications or limitations set by an expert in the field. The Eleventh Circuit found it “immaterial” that the OSH Act did not set a uniform wind load standard. *Id.*

### III. JUDICIAL SUPPORT FOR OSHA INTERPRETATION AND REVISION ABSENT NOTICE AND COMMENT RULEMAKING

In two recent decisions, the circuit courts showed their support, for the most part, for OSHA’s ability to interpret and revise its standards without resort to notice and comment rulemaking authority. First, in *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009), the court considered whether MetWest, Inc. (“Met West”) could be held liable for violating a provision of OSHA’s Bloodborne Pathogen Standard, 29 C.F.R. § 1910.1030(d)(2)(vii), governing the removal of needles from equipment used to extract blood.5 MetWest claimed that OSHA, through guidance documents and interpretations, originally declined to enforce the provision against employers who supplied their employees with reusable blood tube holders, but some years later reversed its position. Thus, MetWest relied on *Alaska Professional Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), and other decisions of D.C. Circuit, to argue that OSHA improperly altered its interpretation of the standard without engaging in notice and comment rulemaking, and thus, MetWest could not be held liable for violating the provision. The Administrative Law Judge and the Review Commission both disagreed and held in the Secretary’s favor.

In affirming these decisions, the D.C. Circuit first noted that MetWest incorrectly interpreted OSHA’s guidance documents, which did not affirmatively permit the use of reusable blood tube holders in all instances. Instead, the documents merely indicated what “may” be permissible in certain circumstances. Further, the court explained that as long as new guidance documents can “reasonably be interpreted” as consistent with prior documents, they do not

---

5 The standard provides: “[c]ontaminated needles and other contaminated sharps shall not be bent, recapped or removed unless the employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure.” 29 C.F.R. § 1910.1030(d)(2)(vii)(A).
significantly revise a previous interpretation by OSHA. Id. at 510. Applying this principle, the Court found that the only meaningful difference between OSHA’s early guidance documents and its later ones was that the later ones explicitly required a compliance officer to determine if there are feasible alternatives to removing needles from reusable blood tube holders.

Moreover, even if OSHA had previously interpreted the standard to permit the use of reusable blood tube holders in all circumstances, the court found that the case would still not fit within the framework of *Alaska Professional Hunters*. In *Alaska Professional Hunters*, the affected parties’ substantially and justifiably relied on a well-established agency interpretation that had been in place for thirty years. Here, by comparison, OSHA never established an authoritative interpretation of a standard and there was no evidence of detrimental reliance by *MetWest*. Thus, OSHA was free to interpret the provision without engaging in notice and comment rulemaking.

In *Public Citizen Health Research Group, et al. v. DOL*, 557 F.3d 165 (3d Cir. 2009), the U.S. Court of Appeals for the Third Circuit upheld a majority of OSHA’s revisions to a standard that regulated employee exposure to hexavalent chromium, 29 C.F.R. § 1910.1026. In 2004, OSHA proposed a new Hexavalent Chromium Standard which considered reducing the Permissible Exposure Limit (“PEL”) for hexavalent chromium from 52 micrograms per cubic meter ("µg/m³") to 1 µg/m³ and proceeded with notice-and-comment rulemaking. After receiving comments and holding hearings on the issue, OSHA issued its final rule on February 28, 2006. However, upon further examination of the health risks to workers and the feasibility of the standard, OSHA revised the final rule on June 23, 2006, to reflect a PEL for hexavalent chromium at 5 µg/m³ for all industries.

The Public Citizen Health Research Group and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Worker’s International Union (collectively “HRG”) filed a petition for review of the standard arguing that the 5 µg/m³ limit was not low enough to protect workers. Specifically, HRG challenged OSHA’s determination: (1) that a 1 µg/m³ limit was infeasible; (2) that a uniform 5 µg/m³ limit should be implemented for all industries; (3) that the monitoring “action level” should be set at one half of the PEL; and (4) that employee notification would only be required for detected exposures exceeding the established PEL.

9
The Third Circuit upheld OSHA’s decisions as reasonable and justified based on the record with respect to each issue except for the employee notification element. The Third Circuit explained that OSHA’s final rule regarding employee notification was a significant departure from the notification requirement in the proposed rule, which required employers to notify employees of all monitoring results, regardless of whether they exceeded the PEL. Reviewing the record, the court found that OSHA failed to provide sufficient reasoning to justify its decision to alter the notification requirement. Accordingly, the court granted HRG’s petition on this ground and remanded the matter to OSHA for further consideration and explanation, without actually disturbing the rule. Separately, the Edison Electric Institute (“EEI”) petitioned for review of the standard arguing that it was over-inclusive with respect to coal and nuclear electric power generation plants. Finding support in the record for OSHA’s decision, the Third Circuit denied the EEI’s petition in its entirety.

IV. REVIEW COMMISSION UPHOLDS PER-EMPLOYEE TRAINING CITATIONS

In a case that could have far reaching consequences for employers, the Review Commission, in E. Smalis Painting Co., 22 OSHC (BNA) 1553, 2009 WL 1067815 (O.S.H.R.C. Apr. 10, 2009), held that the training provisions of OSHA’s Lead Construction Standard support individual citations for each employee an employer fails to train. In doing so, the Review Commission overruled its decision in Eric K. Ho, 20 OSHC (BNA) 1361 (2003), aff’d, 401 F.3d 355 (5th Cir. 2005), in which it held that substantially identical language in the asbestos construction standard did not support “per employee” citations.

In reviewing “per instance” citations, the Review Commission had previously held that the issue is whether the cited Standard prohibits “individual acts” or “a single course of conduct.” Under that analysis, the Review Commission had found that the training requirements in some standards support “per employee” citations while others – particularly, the asbestos standard analyzed in Ho – do not. Compare Andrew Catapano Enters., Inc., 17 OSHC (BNA) 1776 (O.S.H.R.C. 1996) (finding training standard language that required employers to “instruct each employee” permits separate violations) and Gen. Motors Corp., 22 OSHC (BNA) 1019 (O.S.H.R.C. 2007) (finding training standard language that stated “[e]ach authorized employee shall receive training” supported separate violations) with Ho (finding that “training program for all employees” language supported only one violation). Considering this case law in Smalis, the Review Commission noted that “[a]lthough the disparate results in these cases might be
reconciled based on the differences among the cited training provisions’ precise wording, we are nonetheless troubled by the appearance of inconsistency and the possibility,” and thus, concluded that its previous approach had proved “unworkable.”  Id. at 1579.

Finding that its prior approach “elevate[d] form over substance by emphasizing the coincidental placement of particular wording and ignor[ing] the basic principle . . . that regulations should be read as a consistent whole,” the Review Commission held that the asbestos standard in Ho, and the lead standard before it, “when read in [their] entirety and in context, . . . impose[] a duty that runs to each employee,” and therefore support “per employee” citations.  Id. at 1580-81.

V. SEVENTH CIRCUIT REVERSES CRIMINAL OSH ACT CONVICTION BASED ON IMPROPER JURY INSTRUCTIONS

The Seventh Circuit, in United States v. L.E. Myers Company, 562 F.3d 845 (7th Cir. 2009), reversed the district court’s judgment upholding L.E. Myers’s conviction under 29 U.S.C. § 666(e) for a willful violation of the OSH Act causing the death of an employee and remanded the case for retrial.  The case involved an apprentice linesman who was killed while working on a repair assignment atop a transmission tower.  L.E. Myers appealed the conviction under Section 666(e) on several grounds, including that the jury instructions regarding willfulness and corporate knowledge were improper and not “harmless error.”  The Seventh Circuit agreed.

The first issue for the Seventh Circuit was the trial judge’s instruction to the jury regarding corporate knowledge.  Specifically, the trial judge instructed the jury that the corporation’s knowledge was that of its employees acting within the scope of their employment concerning a matter within the scope of their employment.  L.E. Myers objected to this instruction, arguing that under United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir. 1998) an employee must also have a duty to report information about a condition to superiors, or to ameliorate the condition, before the employee’s knowledge of the condition can be attributed to that of the corporation.  The Seventh Circuit agreed and found that the district court’s error was not harmless.

The Seventh Circuit also took issue with the fact that the trial judge had given the jury the so-called “ostrich” or “conscious avoidance” instruction regarding willfulness.  That instruction is only appropriate where the evidence supports a finding that the only way that a defendant could not have known of the illegal activity at issue was by affirmatively avoiding knowledge of
it. The Seventh Circuit concluded that there was insufficient record evidence to support the instruction and again concluded that this error was not harmless.