THE CONSTRUCTION RESOURCE

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THE TOP 250 INTERNATIONAL CONTRACTORS

Market rebounds, but local issues persist (P. 35)

THE PRICE OF BIG IRON

Global equipment surges, but tariffs and trade wars loom large (P. 18)

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Learn Before It's Too Late

There might not be a more underappreciated topic in the construction industry than the U.S. Labor Department's multiemployer citation policy. Employers often misunderstand the policy's concepts and consequences. Both are relevant during postaccident legal proceedings—and that's not the time to become acquainted with them. Remember, an employer with typical industry profit margins would suffer a significant financial setback if forced to pay a $100,000 safety penalty.

In 1990, the Washington State Supreme Court ruled that a controlling employer (general or prime contractor) can be liable for worker injuries if it violated Washington Industrial Safety and Health Act regulations. That industry-altering case, Stute v. PBMC, solidified in construction law that the controlling employer's supervisory authority constitutes control and creates a duty to optimize compliance for all employees on a jobsite. Property owners, developers and other employers can also become liable for the safety of nonemployees, depending on the degree of control exercised and whether they controlled or created a hazard.

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The issues are still controversial.

In a recent lawsuit whose final outcome still is uncertain, the U.S. Occupational Safety and Health Administration cited both a subcontractor and general contractor Hensel Phelps for exposing one of the subcontractor's employees to a potential trench cave-in on a new library in Austin, Texas. The citation against Hensel Phelps noted that it was the "controlling employer."

A federal judge dismissed the citation, citing a prior case dating to the 1980s, where safety officials cited the controlling employer. In that long-ago case, federal appeals court judges ruled unambiguously that "OSHA regulations protect only an employer's own employees."

In the current Hensel Phelps case, the OSHA Review Commission, which adjudicates disputed safety penalties before they reach civil courts, applied the precedent from the 1980s case, stating Hensel Phelps "cannot be liable for a violation of the Act based solely upon a subcontractor's employees' exposure to the condition." OSHA has appealed the case and the resolution remains in doubt.

Several states have their own multiemployer citation policy interpretations—so where an accident occurs makes a difference. Oregon, for example, is guided by Program Directive A-257, which is a three-page document outlining specific rules and regulations.

Court decisions have upheld the idea that considerations of fairness and public policy require imposing a duty on the engineer and inspector to exercise reasonable care to avoid the risk of injury. In one important case from the 1990s, an engineer on a jobsite was inspecting work and saw a worker in an unprotected sewer-line trench. The worker died in a cave-in. The engineer had the opportunity to foresee and discover the risk of harm and to exercise reasonable care to avert it. The dead worker's employer paid the entire settlement because it indemnified the homebuilder involved. In the end, however, the state Supreme Court in New Jersey ruled that an engineer has a legal duty to exercise reasonable care for the safety of workers on a construction site when it has a contractual responsibility for the progress of the work but not for safety conditions, yet is aware of working conditions on the construction site that create a risk of serious injury to workers.

Education and collaboration among team members, such as developing a safety charter, can help avoid injuries and penalties. A safety charter does not change contractual responsibilities of employers, but its spirit is essential to the outcome by which profits are optimized through the embodiment of a proactive partnership in safety.

To formulate such a partnership, it is important to understand the defined roles within the policy. A controlling employer will commonly have contractual rights to project safety. A creating employer is one who creates a hazardous condition that violates a regulatory standard. An exposing employer exposes an employee to the hazardous condition regardless of who created the condition or who controls the project. A correcting employer has contractual authority to correct the hazardous condition upon notification.

One final thought to keep in mind above all else is that no matter what category an employer falls into, operations or tasks deemed imminently dangerous to life should always be stopped and immediately reported. ■

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