


Who is responsible for safety?

By **DANIEL J. NELSON**



OSHA's multi-employer citation policy has evolved in response to serious workplace accidents involving multiple-employer worksites. It first arose in the construction industry, where the presence of several contractors/subcontractors on one site often made it difficult to determine exactly who was responsible for safety violations. Often, general contractors and subcontractors simply failed to coordinate their responsibilities for worker safety. In response, OSHA began citing host employers for safety violations committed by independent contractors and their employees.

In OSHA's view, the host employer has an obligation to provide safe working conditions to anyone working at its facility—even the employees of another company. According to the agency, this responsibility is imposed on any employer who has control of the site; in most cases, OSHA defines this as that employer with the most "economic and process control."

However, the rule continues to be challenged in courts across the country, and recent rulings have supported "individual employer-employee responsibility." Under the case law, the liability of general contractors is not absolute; instead, it depends on the circumstances of the case.

BACKGROUND ON THE NEED FOR THE RULE

At some point in their careers, safety professionals will be asked to analyze and define contractor safety requirements. Some facilities provide safety direction and contractor supervision, while others provide neither. The resulting legal relationships are complex.

Contractor actions can have a profound impact on the hir-

ing company's loss experience (in both dollars and injuries). Such actions can lead to injury to host employees, other contractors and the general public, as well as property damage. Questions continually arise over responsibility and process ownership. If an employee creates a hazard while working with other employers/employees, who is responsible? What if others ignore the hazard and continue to work or contribute to the situation? How should a compliance safety and health officer handle the audit and/or citation?

Initially, OSHA attempted to clarify these issues with a one-standard-fits-all approach. Under the OSH Act of 1970, employers are required to provide employees with a safe workplace. The original multi-employer doctrine is based on the following language from the act itself.

a) Each employer:

1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

2) shall comply with occupational safety and health standards promulgated under this act (OSH Act 1970, Section 5, Duties—29 U.S.C. 654(a)).

In OSHA's view, these two statements impose two distinct duties. The first requires employers to protect their own employees from hazards; thus, the employer's duty under this statement flows only to its own employees, via the language "his employees."

The second statement requires employers to comply with the act's safety standards. Unlike (a)(1), it does not limit its compliance directives to the employer's own employees, but requires employers to implement the act's safety standards for the benefit of *all employees* in a given workplace, even those of another employer. OSHA issues multi-employer citations under this provision (*Universal Construction Co. Inc. v. OSHRC*).

DOCTRINE HISTORY

OSHA's enforcement policy regarding multi-employer worksites was first featured in the *Field Operations Manual (FOM)* in 1974. Under this policy, an employer could be cited for exposing its employees to hazards.

Over the years, the policy has evolved to provide for the citing of "controlling" employers. OSHA defines a "controlling employer" as one who has "general supervisory authority of the worksite, including

the power to correct safety violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice."

In 1981, OSHA issued directive CPL 2.49, Multi-Employer Citation Policy, which was incorporated into the *FOM* (which was revised in 1983). During this time, courts accepted this interpretation in one form or another (e.g., *Marshall v. Knutson Construction Co.*; *Brennan v. OSHRC*).

Eventually, OSHA's policy evolved to provide for citing of correcting *and* creating employers. According to OSHA, a "correcting employer" is one "engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard." This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety and health equipment or devices. A "creating employer" is the employer that caused a hazardous condition which violates an OSHA standard. This revised policy appeared in the *FOM* in 1989.

In 1994, OSHA replaced the *FOM* with the *Field Inspection Reference Manual (FIRM)*. It contains the multi-employer doctrine as Section 7, Chapter III (6). As currently interpreted, this doctrine applies not only to construction sites, but also to temporary employees and professional contractors within the workplace.

As noted, the policy has faced many legal challenges since its inception. Today's changing workplace and legal opinions prompted yet another change in 1999, with the issuance of CPL 2-0.124. This revised policy reflects court opinions recognizing the role of individual company and employee behavior on multi-employer worksites (e.g., *IBP Inc. v. Herman*).

Under the revised policy, OSHA can continue to issue citations on multi-employer worksites. However, it offers clearer guidance, including new examples that explain when citations should or should not be imposed based on an employer's role as exposing, creating, correcting or controlling employer. It also states that the decision to issue citations must be based on all relevant facts as revealed by the inspection. An employer's responsibilities remain the same under the new directive; it neither imposes new duties nor does it relieve the employer of the responsibility to maintain a safe workplace.

COURT OPINION

Before determining that a company has no responsibility to maintain a safe workplace for contractors, one should examine the courts' interpretations of the multi-employer doctrine. As noted, the doctrine is particularly applicable to construction worksites due to their nature. On most construction projects, subcontractors work in close proximity with one another and with employees of the general contractor. In such situations, a hazard created by one employer could reasonably affect the safety of another company's workers (*Bratton Corp. v. OSHRC*). In addition, specific areas of expertise or job area responsibilities may limit a subcontractor's ability to abate hazards posed by another subcontractor, general contractor (GC) or host employer (*IBP Inc. v. Herman*).

For example, in *Universal Construction Co. Inc. v. OSHRC*, Universal argued that if the multi-employer doctrine is a valid, enforceable practice, it should not be applied in situations where the GC only has contractual control of the worksite. The 10th Circuit Appeals Court upheld the doctrine in the context of its intent related to 654 (a)(2) [shall comply with occupational safety and health standards promulgated under this chapter] and noted its disagreement with Universal by stating:

"The multi-employer doctrine did not unfairly burden general contractors. A subcontractor whose employees are threatened by a hazard created and controlled by another subcontractor has only two options: request the offending subcontractor to abate the hazard, or request the general contractor to correct or direct correction of the condition. As a practical matter, the general contractor may be the only onsite person with authority to compel compliance with OSHA safety standards." (Also see *Anning-Johnson Co. v. OSHRC*.)

To support its stance, Universal had cited *IBP Inc. v. Herman*. That case involved a subcontractor, three company employees, product control manager and two inspectors who remained on a site while a contractor performed cleaning duties as outlined in its contract. During the course of quality control inspections, company employees observed contractors violating lockout procedures, and a manager observed contract employees reaching into moving conveyors, using fat augers as ladders and riding on moving tables.

Although company officials repeated-

Experience modification ratings are measured by percentage and can range from 0.5 to 2.5. A rating of 1 represents the average loss experience for all industries and would be considered normal. The rating is then used to calculate insurance premiums. For example, a rating of 1.11 would justify an 11-percent increase in premium rates over like industries; a rating of 0.90 would justify a 10-percent discount.

This system equitably applies to industries with low and high risk rates. For example, an above-average EMR could be expected for a company that experiences high WC losses. The insurance company would then multiply the base coverage rate by the EMR, which, in this case, would result in a higher WC premium ("The Basics Of").

ment—safety practices and written procedures—is crucial to determining an organization's safety record and attitude. Companies that hold project managers accountable for accidents along with productivity, schedules and quality typically have the best safety records. An effective program should include:

- management commitment;
- written safety program;
- hazard assessments;
- training programs and employee qualifications;
- emergency plans and procedures;
- accident reporting protocol;
- regular safety meetings/inspections;
- HazCom program and MSDS.

Once a prospective contractor qualifies, a written contract must be developed. At a minimum, it should state the host company's safety expectations and include a statement extending these expectations to the contractor. For example:

- Contract employees must adhere to all applicable federal and state occupational safety and health laws as they apply to this contract.

ly asked the contractors to cease this behavior and reminded them of their responsibility to follow lockout procedures as outlined in their contract, the contract employees ignored the warnings. In 1993, a contract employee was killed while attempting to remove debris from a running machine.

OSHA cited both IBP (host employer) and the contractor for willfully failing to enforce lockout procedures. The basis for the IBP citation was the definitions of host and controlling employer. OSHA argued that the contractual control held by the host employer was reason enough to warrant citation. According to OSHA, IBP had the ability to immediately abate the hazard by terminating the labor contract.

The court disagreed, ruling that requiring the host contractor to exercise its contractual authority would effectively expand the liability of host employers for contractor violations, and vacated IBP's citations. The court found that IBP's right to terminate the contract did not mean it was in control of the contract employees' behavior. Through its repeated warnings and communications, the court also stated that "IBP had done the most it could be expected to do."

Of more-fundamental significance, the court also questioned the validity of OSHA's multi-employer liability theory (although this court declined to rule on the broad issue). This decision will likely affect future cases regarding the relationship between host employers and subcontractors. In fact, the November 1999 revision of the doctrine itself suggests that OSHA expects further challenges.

Future arguments will likely hinge on the employer's ability to prove that it:

- 1) did not create the hazard;
- 2) did not have the responsibility or authority to have the hazard corrected;
- 3) did not have the ability to remove or correct the hazard;
- 4) can demonstrate that the contractor was appropriately notified and/or aware of the hazard;
- 5) took appropriate steps to protect its employees from the hazard.

Efforts to clarify the law continue in the legislature as well. For example, in late 1997, Cass Ballenger (R-NC) introduced H.R. 2879, a bill which would have prevented OSHA from issuing citations against a GC that 1) did not create the condition which caused an OSHA violation; 2) had no employees exposed to the

violation; and 3) had not assumed responsibility for ensuring compliance by other employers on the worksite. The bill was not voted on during the 105th Congress and has not been reintroduced.

Thus, the question becomes: What should employers do in the meantime? Any employer which uses outside contractors on its site(s) must ensure that its contracts clearly establish a contractor's safety responsibilities. It is also a good idea to adopt a specific outside contractor safety program.

CONTRACTOR QUALIFICATIONS & PROGRAMS

In general, contractor safety programs are administered in one of two ways: hands-on or hands-off. Both methods incorporate varying degrees of the following recommendations. Regardless of the approach, an employer must be consistent and must document everything pertaining to the program. Each approach takes an equal amount of initial paperwork.

The first step is to review the prospective contractor's qualifications. To evaluate the probable safety performance of a contractor, an employer should review its:

- experience modification rate (EMR) used to determine workers' compensation (WC) insurance premiums;
- OSHA incidence rates (recordable injuries and illnesses);
- safety and health practices and written procedures.

Experience-rating systems were developed to provide an equitable means of determining premiums for WC insurance. These systems consider the average WC losses for a given firm's type of work and the amount of payroll, and predict the dollar amount of expected losses to be paid by that employer in a designated rating period (usually three years). A firm's rating is based on comparison to companies doing similar work and in each work classification. Losses incurred by the employer for the rating period are then compared to the expected losses to develop the ratio factor.

The second analysis involves a contractor's OSHA recordables rate. OSHA requires firms to document occupational injuries and illnesses on the OSHA 200 Log. This log includes 1) number of fatalities and injuries; and 2) number of days involving lost or restricted time. Incident rates based on an employer's annual hours-worked can also be calculated.

The third performance measure-

Construction Managers

Without relieving the contractor of full responsibility to comply with all appropriate safety requirements, the host employer should ensure that a project manager is assigned. This individual must keep management apprised of all activity and work progress. Here's what OSHA had to say about "construction managers" in a 1993 letter of interpretation:

To the extent that a construction manager has a role in directing the manner or timing of the work, it may be cited as a "creating" employer if a violation occurs as a result of its direction. Depending on the circumstances, including contractual responsibility or the assumption of a safety-monitoring role, a construction manager may also be a "controlling" employer. A controlling employer is one having the responsibility or authority to have violative conditions corrected. General (or prime) contractors are controlling employers for many types of violations that occur on construction sites, but they may choose to carry out their safety role in whole or in part through a construction manager.

- Contract employer shall enforce the host company's safety rules and practices as applied to contractors in addition to its own safety rules and procedures.

- Contractor shall provide all subcontractors with copies of all safe working procedures and shall ensure their enforcement.

Contractor safety orientation is another critical step in ensuring that contract employees understand job-specific hazards; follow site safety practices and rules; and are familiar with emergency response procedures.

CONCLUSION

Employers at a multi-employer worksite fall into four basic categories—controlling, creating, correcting or exposing. The controlling employer is one who, by contract or actual practice, has the responsibility and authority to ensure that hazardous work conditions are corrected. This employer is typically the GC. When a company is the GC for a construction project, it would be considered

the controlling employer and would be responsible for the safety and health of all workers onsite.

The creating employer is that employer whose activities create a hazardous condition, while the correcting employer is that responsible for correcting the hazardous condition. An exposing employer is one whose workers are exposed to the hazard.

Depending on the situation, any employer at a construction site could receive an OSHA citation. Therefore, employers must consider the multi-employer rules whenever their personnel are interacting with other workers or are serving as project manager for such an activity. If the host company is the GC, the responsibility for providing a safe worksite rests with the project manager and each of its supervisors.

However, even on those projects where an outside contractor is the GC, subcontractors or departments are still responsible for their own workers' safety. Any hazardous condition should be reported to the GC and/or host employer. If the condition is so hazardous as to be imminently dangerous, supervisors should remove workers from the site and contact their assigned safety representative and/or management.

In all cases, a contractor should support the same level of safety and compliance as the host employer. All safety expectations and responsibilities should be outlined in the scope of work and contract documentation.

The host employer should also remember that a contractor's responsibility (liability) only relates to the extent to which the contractor has control of—or can reasonably be expected to have control of—the site. Those actions by a host employer that may create or expose employees to hazards remain the responsibility of that employer.

Regardless of legalities, all onsite contractors must work together to make multi-employer worksites safe. To ensure the safety and health of all employees—those of the GC and all subcontractors—no party's responsibility should be limited. Pre-contract agreements and shared site safety eliminate the need to find fault while facilitating communication, which leads to safe project completion. ■

REFERENCES

Anning-Johnson Co. v. Occupational Safety and Health Review Commission (OSHR).

516 F.2d 1081 (7th Cir. 1975). Docket No. 74-1382.

Bratton Corp. v. OSHRC and Ray Marshall, Secretary of Labor. 590 F.2d 273 (8th Cir. 1979). Docket No. 78-1204.

Brennan v. OSHRC & Underhill Construction Corp. 513 F.2d 1032 (2nd Cir. 1975). Docket Nos. 74-1579, 74-1568, 357, 417.

IBP Inc. v. Alexis M. Herman and DOL. 144 F.3d 861 (DC Cir. 1998). Docket No. 97-1389 consolidated with No. 97-1461.

Marshall v. Knutson Construction Co. and OSHRC. 566 F.2d 596 (8th Cir. 1977). Docket No. 76-1979.

OSHA. "Duties of a 'Construction Manager' on a Multi-Employer Worksite." Letter of Interpretation. Washington, DC: U.S. Dept. of Labor, OSHA, Aug. 5, 1999.

OSHA. "Information on Temporary Workers." Letter of Interpretation. Washington, DC: U.S. Dept. of Labor, OSHA, March 26, 1996.

OSHA. "Multi-Employer Citation Policy." Compliance Directive CPL 2-0.124. Washington, DC: U.S. Dept. of Labor, OSHA, Dec. 10, 1999.

OSHA. *Field Inspection Reference Manual.* Instruction CPL 2.103. Washington, DC: U.S. Dept. of Labor, OSHA, Sept. 26, 1994.

Universal Construction Co. Inc. v. OSHRC. 182 F.3d 726 (10th Cir. 1999) Docket No.98-9519.

U.S. v. Pitt-Des Moines Inc. 168 F.3d 976 (7th Cir. 1999). Docket No. 98-1767.

Daniel J. Nelson, OHST, is manager of safety services for Texas-New Mexico Power Co. He has been with the firm since 1981. Nelson holds a B.S. in Management Technology from Amber University and is pursuing an M.S. in Occupational Safety at East Carolina University. He is a member of ASSE's Fort Worth Chapter.

This article is the basis for the "Construction Safety" chapter in Fundamentals of Occupational Safety and Health, 2nd ed., by Mark A. Friend and James P. Kohn, which was published by Government Institutes in December 2000.

READER FEEDBACK

Did you find this article interesting and useful? Circle the corresponding number on the reader service card.

YES	25
SOMEWHAT	26
NO	27