

Federal Court Upholds Multi-employer Citation Over Ungrounded ‘Spider Box’ Used by Subcontractor

A federal appeals court has rejected an employer’s claim that the U.S. Occupational Safety and Health Administration’s multi-employer citation policy violates both the Administrative Procedure Act and the Occupational Safety and Health Act (*Summit Contractors Inc. v. Secretary of Labor*, D.C. Cir., No. 10-1329, Dec. 14, 2011).

The employer, Summit Contractors Inc., was cited after an OSHA inspector found that a portable generator and “spider box,” a receptacle with plugs for electrical tools, at an apartment complex where Summit was working lacked a ground fault circuit interrupter (GFCI). Summit, which had rented the unprotected equipment, was cited even though the equipment was used only by a subcontractor’s employees.

Summit was cited as the “controlling employer” because of its authority over the site and the electrical equipment and as a “creating employer” because it, not the subcontractor, obtained the equipment that was in violation. Summit was not cited as the “exposing employer” because its own employees were not exposed to the hazard (see sidebar, *OSHA Citation Policy*).

APA and OSH Act Claims

Summit argued unsuccessfully before the OSH Review Commission and the U.S. Court of Appeals for the D.C. Circuit that OSHA’s multi-employer citation policy,

stated in the 1999 enforcement directive “Multi-Employer Citation Policy” (CPL 02-00-124), violated the Administrative Procedure Act because it was not subject to notice-and-comment rulemaking. Summit also argued that multi-employer liability violates the OSH Act provision that the act shall not affect the common law duties or liabilities of employers, and that in any case, the secretary of Labor had failed to prove that Summit knew of the violation.

Writing in an unpublished opinion, the appeals court found two problems with the procedural argument. First, an agency document that merely represents an agency position with respect to how it will enforce the governing legal norm is exempt from the APA’s notice and comment requirements as a general statement of policy, the court said, citing its 1997 decision in *Syncor Int’l*

See *Summit Decision*, p. 8

OSHA Guide for Health Care Facilities

MANAGING EDITOR: **JOAN M. FLYNN**

SENIOR DESKTOP PUBLISHING SPECIALIST: **LISA CADOTTE**

The *OSHA Guide for Health Care Facilities* (ISBN 978-1-933807-35-5) (USPS 014-673) is published monthly by Thompson Publishing Group, 805 15th St., NW, 3rd Floor, Washington, DC 20005. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices.

POSTMASTER: Send address changes to: *OSHA Guide for Health Care Facilities*, Thompson Publishing Group, 5201 W. Kennedy Blvd., Suite 215, Tampa, FL 33609-1823.

This newsletter for the *OSHA Guide for Health Care Facilities* includes a looseleaf update to the Guide. For subscription service, call 800 677-3789. For editorial information, call 202 872-4000. Please allow four to six weeks for all address changes.

This information is designed to be accurate and authoritative, but the publisher is not rendering legal, accounting or other professional services. If legal or other expert advice is desired, retain the services of an appropriate professional.

Copyright ©2012 by Thompson Publishing Group

 **THOMPSON**
Insight you trust.

OSHA Citation Policy in Multi-employer Workplaces

The OSHA citation policy on multi-employer worksites states that more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited:

Step One. The first step is to determine whether the employer is a creating, exposing, correcting or controlling employer. An employer may have multiple roles. Once an OSHA compliance safety and health officer (CSHO) has determined the role of the employer, the next step is to determine if a citation is appropriate. Only exposing employers can be cited for general duty clause violations, the directive notes.

Step Two. If the employer falls into one of the categories described in Step One, it has obligations with respect to OSHA requirements, and in Step Two, the CSHO determines if the employer’s actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Generally, however, the measures that a controlling employer must take to satisfy its OSHA duties are less than those measures required of an employer protecting its own employees.

The directive can be accessed through OSHA’s Enforcement web page at <http://www.osha.gov/dep>. 