OSHA INSPECTIONS AND CITATIONS: DO THEY AFFECT ARCHITECTS AND ENGINEERS?

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I. EXPOSURE UNDER OSHA FOR ARCHITECTS AND ENGINEERS IN THE CONSTRUCTION INDUSTRY:

In today's construction world, architects and engineers are more and more often finding themselves in the position of a project manager rather than a basic preconstruction architect or engineer working on drawings and proposals. In fact, with the evolution of "design build" contracts and the popularity of this method of construction, architects and engineers involved in such contracts will find themselves potentially confronted with OSHA inspections and possible citations.

The central issue presented under the circumstances of an OSHA inspection on a job site where an architect and/or engineer performs project management or simple inspection type work is whether the work being performed rises to a level that permits OSHA to properly cite the architect or engineer under the construction standards set forth at 29 C.F.R. Part 1926. Indeed, §1910.12(a) provides that these standards apply "to every employment and place of employment of every employee engaged in construction work". It is this language in the OSHA regulations that the Occupational Safety and Health Review Commission generally looks to for guidance in determining the propriety of a citation against an architect or engineer under the construction standards.

There are basically two key elements to the Commission's analysis of this language as applied to architects and engineers in the case law.

A. Did the Architect or Engineer Maintain the Job Site as a "Place of Employment"?

When reviewing a citation against an architect or engineer, the Commission first evaluates whether the site

represents a "place of employment" for that entity. The elements considered by the Commission are such issues as the amount of time the architectural or engineering firm spends on the job site, whether or not the firm maintains a job trailer as an office on the job site, and the number employees, if any, that the architectural or engineering firm maintains or frequently maintains on the job site. The Commission has reviewed citations issued to architectural representatives who were cited when the extent of their involvement was simply to "ensure that all of the architectural drawings, plans, and specifications for the building were complied with during construction". *Secretary of Labor v. Foit-Albert Associates, Architects and Engineers, P.C.* 1995 WL 357862 (O.S.H.R.C.A.L.J.). In the Foit-Albert case, the representatives had employees on the work site on a full time basis and maintained an on site office trailer. Therefore, the Commission determined that there was no question that the site constituted a "place of employment" for the architectural representatives.

B. Was the Architect or Engineer "Engaged in Construction Work" pursuant to 29 C.F.R. §1910.12(a)?

If the work site is a "place of employment", the next question is whether the architect or engineer is "engaged in construction work". The Occupational Safety and Health Review Commission has determined that, if an engineering group is performing construction manager's duties in a manner that is "directly and vitally related to the construction being performed", such employers (architects and/or engineers) are essentially "engaged in construction work", and therefore, covered by the construction standards. *Secretary of Labor v. Kulka Constr. Management Corp.* 1990 WL 186901 (O.S.H.R.C.A.L.J.). The Commission has also made the following statement:

> "Where an employer does not engage in actual physical trade labor, the construction standards will apply only to the extent that the employer exercises "substantial supervision" over the construction work, i.e., has direct responsibility for specific working conditions at the work site and any hazards which may result from the contractor's actions. Foit-Albert (emphasis added).

In the Foit-Albert case, of significance to the Commission was the fact that this architectural inspection group was not authorized to direct or stop the work of the contractors on site. For that reason, the Commission in Foit-Albert determined that the architect "was not so intimately involved in the construction project that without its participation the work could not be done."

However, architects or engineers serving as construction managers have been found to be an integral part of the total construction system, and therefore, subject to citations under the construction standards in many OSHA cases. The key in these cases has historically been based on the "the power of the architect and/or engineer on the job site to protect its employees and other employees against OSHA violations committed by the various prime and lower tier contractors." See *Secretary of Labor v. Bechtel Power Corp.* 1976 WL 6285 (O.S.H.R.C.), *Secretary of Labor v. Bertrand Goldberg Assoc.* 1976 WL 6059 (O.S.H.R.C.).

II. ABROGATION OF MULTI-EMPLOYER EXPOSURE FOR ARCHITECTS AND ENGINEERS:

Historically, the Secretary of Labor was not limited to citing only one employer in a situation involving multiple employers on one job site. In fact, more than one employer on a job site could be cited for the same OSHA violation on that work site. This "multi-employer" citation situation historically arose with respect to general contractors and their

subcontractors. Obviously, it would be and has historically been applicable to engineers and/or architects serving as construction managers on an overall job site. In other words, if a supervisory engineer and/or architect had the power to control the work site or correct hazardous circumstances on a work site, then that entity could be cited for the violations committed by other employers on that work site. This has always been known as the "Multi-Employer Work Site Doctrine". Under this doctrine, OSHA compliance officers have been able to drum up large numbers of citations and penalties multiplied by numerous employers on one particular job site. However, in a recent Occupational Safety and Health Review Commission decision, the Commission abrogated or vacated the Multi-Employer Doctrine and the power of compliance officers to cite under it. The case in which this occurred is *Secretary of Labor v. Summit Contractors, Inc.* O.S.R.C. Docket Number 03-1622. Basically, the Commission determined that a supervisory employer could not be cited by OSHA for the exposure of employees other than their own. The decision is currently on appeal. Most OSHA area offices are staying away from the multi-employer citations until this appeal is resolved.

Regardless of the Multi-Employer Doctrine, an architect and/or engineer who serves in a capacity as a construction manager or project supervisor, either through contract obligations or through the natural course of its inspection process, may find itself subject to citations under the OSHA construction standards if it maintains a place of employment on that job site and its inspection, supervisory, or management duties are determined to be "so directly and vitally related to the construction being performed" that the architect and/or engineer is considered to be engaged in construction work and therefore covered under the construction standards. In light of that potential exposure and the possibility that the

Summit decision terminating multi-employer citations may be reversed, it is important for architects and engineers to be aware of how to handle OSHA inspections on job sites in which they are involved and how to deal with an OSHA citation in the event one is issued against them.

III. WHAT TO DO BEFORE OSHA ARRIVES:

A. Preventive Measures to Decrease Citation Risks.

Preparation to reduce the risk of citations should begin before OSHA ever arrives. Of course, the best way to avoid inspection is to have reduced injuries and good employee morale. In fact, a good safety and health record makes sound business sense by reducing worker's compensation costs and other losses. Preparing for an actual inspection is seldom a recommended motive for operating an effective and self-supporting safety program; but there are things that can be addressed to help a company fare better in an inspection. Depending on the company's confidence in its site management and site managers, an inspection policy should be implemented. This policy should explain whether a company will require a warrant, how management will participate and document the inspection as it progresses, and when to proceed with the actual walk-through. Opening conferences, correction procedures, and closing conference information should all be addressed. The idea is to develop a method of dealing with inspection that moves smoothly throughout the process without appearing to be impersonal or deceptive to the compliance officer.

B. Anticipating an Inspection -- Always Be Prepared.

Because many OSHA inspections are triggered by employee complaints and because aggravated employees tend to complicate and deepen inspections, it is extremely

important to consistently apply safety programs and discipline for non-compliance to safety issues. In fact, companies showing effective follow-up evidence for employees who deviated from company policies, including managers, can often emerge from inspections without citations. A cooperative atmosphere with employees, sound administration of safety policies and a consistent documentation of disciplinary action will probably do more to prevent accidents and reduce injuries and citations than any other specific action. Because many of the OSHA regulations are unclear and subject to interpretation, a company should read and understand the regulations as they apply to that specific company. The company should also document its rationale behind specific compliance efforts. In the event of a discrepancy with the compliance officer, this action will enable the company to show that due diligence was taken when developing their programming for compliance.

IV. HOW TO SURVIVE AN OSHA INSPECTION:

A. Types of OSHA Inspections

It is important first to know what type of inspection is being conducted, because the permissible scope of the inspection may vary depending on the type of inspection.

1. Programmed Inspections.

   Programmed inspections are scheduled according to a national scheduling plan, using objective, neutral criteria. Work sites are randomly chosen for inspection according to OSHA's special emphasis programs to promote specific safety and health issues.

2. Unprogrammed Inspections.

Unprogrammed inspections are scheduled in response to a report of specific safety or health violations at a particular work site.

(a) Imminent Danger - any condition or practice that creates a danger which could reasonably be expected to cause death or serious physical harm.

An inspection will be scheduled the same day a report of imminent danger is received, if possible, and not later than the employer's next working day.

(b) Fatality - an employee death resulting from an accident or illness caused by a workplace hazard.

Employers are required to report the occurrence of a fatality/catastrophe within 8 hours after the occurrence.

The hospitalization of 3 or more employees as a result of an accident or illness caused by a workplace hazard is treated as a fatality.

3. Complaints or Referrals.

Complaints or referrals are notices of a hazard or violation believed to exist in a specific workplace.

A complaint may be filed by any employee of the company.

NOTE: Section 11(c) of the OSHA Act states that "no person shall discharge or in any manner discriminate against any employee" for filing a complaint or exercising any other right afforded by the Act. An employee's

remedies under this section include rehiring or reinstatement to his former position with back pay.

Referrals are generally non-employee reports.

The 11th Circuit has limited OSHA complaint inspections to the scope of the complaint. Donovan v. Sarasota Concrete, 693 F. 3d 1061 (11th Cir. 1982).

B. <u>The Employer's Rights And Obligations Prior To An Inspection</u>

1. <u>Advance Notice of Inspection</u>

(a) Generally, the employer will not receive advance notice of an inspection, because in most cases it is a crime to give advance notice of an OSHA inspection.

(b) However, notice is permitted in limited circumstances, such as:

(1) Where there is an apparent imminent danger and the inspection would be most effective if conducted after regular working hours;

(2) Where special inspection preparation is necessary;

(3) Where notice is needed to ensure the presence of the employer, employee representative, or other personnel needed to conduct the inspection; or

(4) Whenever the OSHA Area Director determines that giving advance notice would enhance the effectiveness of an inspection.

2. <u>Warrant Requirement</u>

(a) OSHA must have a warrant to conduct an OSHA inspection, and an employer has a constitutional right to insist upon a search warrant, based upon probable cause, as a prerequisite to an OSHA inspection. Marshal v. Barlow's, Inc. 436 U.S. 307 (1978).

(b) OSHA may obtain a warrant by:

(1) Presenting specific evidence of an existing violation of the OSHA Act at the workplace, or

(2) Showing that the workplace was selected in accordance with OSHA's general scheduling plan under neutral criteria.

(c) Typically, OSHA will not obtain a warrant, but will request voluntary cooperation with its inspection.

3. Subpoena Requirements

(a) The Eleventh Circuit Court of Appeals requires OSHA to obtain a subpoena to review any employer document, including documents required to be maintained by the OSHA Act. Brock v. Emerson Electric Co., 834 F. 2d 994 (11th Cir. 1988).

(b) The subpoena must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." Id. at 997.

4. Opening Conference

(a) The OSHA inspector must identify himself and will generally

ask for voluntary cooperation with the inspection.

(b) The inspector should identify the purpose of the inspection, and whether it is a programmed or unprogrammed inspection.

(c) The employer should try to obtain as much information from the inspector before agreeing to the inspection.

(d) If the inspection is based upon an employee complaint, the employer is entitled to receive a copy of the complaint, but is not entitled to know the identity of the employee filing the complaint.

(e) The employer should ask specifically what the inspector wants to see to establish the scope of the inspection prior to its commencement.

5. Calling a Lawyer

(a) Informing the company's lawyer early in the inspection process is vital to protecting the interests of the company.

(b) After the opening conference, but before consenting to the inspection, it is a good idea to call the company's lawyer and relay as much information as possible regarding OSHA's request for the inspection. Any documents (such as a complaint or warrant) should be faxed to the lawyer immediately.

C. The Employer's Rights And Obligations During The Inspection.

1. Accompanying the Inspector

(a) The employer's representative has a legal right to accompany the inspector during a site inspection.

(b) The employer should designate a representative (preferably the site supervisor) for each work site who will accompany the OSHA inspector.

(c) All other employees at the work site should be instructed who the appropriate employer representative is and that they are not authorized to consent to an OSHA inspection on behalf of the employer. All OSHA inquiries should be directed to the designated employer representative.

2. Employee Representation

(a) The OSHA Act provides that employee representatives must be given the opportunity to also accompany the inspector.

(b) However, the Act does not require that they be compensated during the time that they are accompanying the inspector.

3. Taking Concurrent Sampling

The employer's representative has the right to duplicate the inspector's investigation, and should make it a point to do so, including taking his own photographs, measurements, and extensive notes of the investigation.

4. Inspector's Questions

(a) The employer has no legal obligation to answer OSHA's questions, but it is generally a good idea to cooperate with the

OSHA inspector.

(b) The employer's representative must be mindful that any statements or answers made by him will be binding on the company, and he should avoid any answers that might be taken as an admission of non-compliance or a violation of the OSHA Act.

(c) The representative must also be mindful that giving false information to an OSHA inspector is a federal crime.

(d) In answering questions, the employer representative should not volunteer any additional information that is not requested by the OSHA inspector.

(e) It is generally a good idea to contact the company lawyer before answering any question. Since interviews of supervisory personnel are considered interviews of the company, the company may demand to have its lawyer present.

5. Employee Interviews

(a) OSHA may interview non-supervisory employees of the company, but has no absolute right to do so on company time.

(b) The employer may request to be present, but has no right to be.

(c) The employee may request to have an attorney present during the interview.

D. The Employer's Rights And Obligations After The Inspection.

1. Closing Conference

   (a) Generally, the OSHA inspector will conclude the investigation with a closing conference, indicating the tentative results of the inspection.

   (b) The employer's representative should take careful notes of all alleged violations.

2. Challenging a Citation

   (a) If a citation is issued, the employer will have 15 working days from the receipt of the citation to notify the OSHA Area Director in writing of its intent to contest the citation.

   (b) Failure to contest in writing within 15 working days will result in the citation becoming final.

   (c) OSHA will generally request an informal conference to negotiate a settlement agreement. The company's lawyer may participate in the informal conference.

3. Defenses

   Both procedural and substantive defenses are available in contesting a citation. Procedural defenses involve the validity of the enforcement procedures of the Secretary and the Commission and the adjudication of contested cases. Substantive defenses include a challenge to the Secretary's prima facia case by disproving one of the elements such as application of the wrong standard, application of a standard

inapplicable to the employer or no employee access to the hazard. The following is a list of defenses which can be raised in a contest, if appropriate:

(a) citation of the wrong employer;

(b) res judicata;

(c) improper promulgation of the standard;

(d) vagueness of the standard;

(e) no hazard exists;

(f) allocation of responsibility by agreement;

(g) violation not within the scope of employment;

(h) unpreventable employee misconduct;

(i) concerted employee refusal to comply;

(j) impossibility / infeasibility of compliance;

(k) inconvenience;

(l) greater hazard posed by compliance;

(m) technological infeasibility;

(n) economic infeasibility;

(o) harassment or selective enforcement;

(p) estoppel;

(q) reliance;

(r) emergency;

(s) change of conditions.

4. Administrative and Judicial Process

(a) After notice of contest, the Solicitor of Labor will file a complaint with the Occupational Safety and Health Review Commission.

(b) The employer must file an answer to this complaint.

(c) Discovery is conducted similar to a regular court case with the following exceptions:

- Depositions may only be taken by consent or by permission of the administrative law judge.
- The employer is not entitled to know the identity of any non-supervisory informants.
- The employer cannot obtain information on OSHA's deliberative process.

(d) A hearing will be held before an Administrative Law Judge.

(e) The Administrative Law Judge will issue findings of fact and conclusions of law.

(f) The losing party may file written Exceptions.

(g) The Occupational Safety and Health Review Commission will review the findings of fact and conclusions of law, giving deference to the Administrative Law Judge.

(h) The losing party may petition to the appropriate federal court of appeals for judicial review.

(i) In certain circumstances, OSHA may obtain an injunction from a federal district court, without going through the foregoing

administrative procedures, where there is an imminent threat of serious injury or death.

V. MULTI-EMPLOYER WORKSITE DOCTRINE (ABROGATED – SUBJECT TO APPEAL):

A. Generally

Since the Summit decision, which vacated Multi-Employer citations, is on appeal, a discussion of that doctrine is included. Before Summit, the Secretary was not limited to citing only one employer in situations involving multiple employers, and more than one employer may be cited for a single violative condition. Multi-employer situations most often arise in general contractor and subcontractor situations. A general contractor and subcontractor situation involves exposure of employees of one employer to hazards controlled by another employer, in which case the distinctions of exposure and control do not necessarily preclude citation of one employer or both employers. This situation also raises issues of control of the hazard in either creating or having the ability to abate it, and exposure of the employee in allowing access to the zone of danger.

B. OSHA Directive On Multi-Employer Work Site Citations

In 1999, OSHA issued a clarification to help Compliance Officer's better determine liability in multi-employer work site conditions. It defined four types of employers, *creating, controlling, exposing* and *correcting*, and identified the obligations of each with respect to the multi-employer work site doctrine. The directive stated that it was not imposing any new duties on employers, but was only providing clearer and more detailed guidance to Compliance Officers.

The *creating employer* is

defined as one who has caused the hazardous condition that violates an OSHA standard. A creating employer is citable even if the only employees exposed are those of other employers at the site.

The *exposing employer* is defined as one whose own employees are exposed to the hazard. If the exposing employer created the violation, it is citable for the violation as a creating employer as well. If the exposing employer has the authority to correct the hazard it must do so. If the violation was created by another employer, the exposing employer is citable if it:

(1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition;

(2) did not ask the creating and/or controlling employer to correct the hazard;

(3) did not inform its employees of the hazard; **and**

(4) did not take reasonable alternative protective measures.

The *correcting employer* is defined as one who is responsible for correcting hazards. A subcontractor whose sole duty is the responsibility for erecting and maintaining the safety/health equipment or devise would be characterized as a "correcting employer". The correcting employer would be citable if it failed to exercise reasonable care in discovering and correcting the violations in light of the amount of activity and size of the project site.

The *controlling employer* is defined as one who has general supervisory authority over the work site, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract, as in the case of

a general contractor with control of the site, or by the exercise of control in practice as in the case of a construction manager who, although he does not have direct control over safety, does exercise control over the sequencing of work, which may affect site safety. If the employer has broad responsibility involving almost all aspects of the job and the authority to resolve such things as disputes between subcontractors, set schedules and determine sequencing, he may be considered a controlling employer. For example, a construction manager managing multiple prime contractors could be a controlling employer.

The controlling employer must exercise reasonable care to prevent and detect violations on the site. This duty of reasonable care is less than what is required of a subcontractor to its own employees, and the controlling employer is not required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards as the subcontractors that it employs. There are a number of factors given for the Compliance Officer to evaluate how often and closely the general contractor must inspect for violations. They include: the scale of the project; the nature and pace of the work, which includes the frequency with which the number or types of hazards change; the level of knowledge of the controlling employer regarding the safety history, safety practices and level of expertise of the employer that it controls. More frequent inspections may be required if the controlling employer does not know its compliance history or if the controlling employer knows that the subcontractor has a history of bad safety practices. Similarly, less frequent inspections may be appropriate if the controlling employer knows that the subcontractor has a very active safety program.

After determining the level of reasonable care, the Compliance Officer

evaluates three factors to determine whether the controlling employer has exercised reasonable care. The Compliance Officer should evaluate whether the controlling employer (1) conducted periodic inspections of appropriate frequency, (2) implemented an effective system for correcting hazards, and (3) whether it enforced the other employer's compliance with safety requirements by using an effective, graduated system of enforcement including follow-up inspections.

VI. CIVIL AND CRIMINAL PENALTIES:

Section 17(e) of the Occupational Safety and Health Act (the "Act") authorizes criminal penalties of up to $10,000 and/or six months' imprisonment for a willful violation of the Act that results in the death of an employee. Giving advance notice of a planned inspection to an employer carries a criminal penalty of up to $1000 and/or six months' imprisonment.

The Act provides for penalties of $7,000 maximum for serious and for other-than-serious violations. Willful violations carry a maximum penalty of $70,000 and a minimum of $25,000 for serious violations, and $5,000 for other-than-serious violations. OSHA may cite an employer for an egregious violation on a violation-by-violation basis for each employee exposed to the hazard resulting in penalties in the $100,000's to low millions range.

The Act provides for a maximum penalty of $70,000 for repeat violations. As a practical matter, for employers with fewer than 250 employees the penalty is doubled for the first repeat and quintupled if the employer has been cited twice or more before. For employers with greater than 250 employees, the penalty is multiplied by five for the first repeat and ten for subsequent repeats.

The following is a list of civil and criminal penalties which may be assessed as a result of an OSHA inspection.

A. **<u>Civil penalty for willful or repeated violation</u>**

1. $70,000 maximum for each violation
2. $5,000 minimum for each willful violation

B. **<u>Civil penalty for a serious violation</u>** (deemed to exist where there is a substantial probability that death or serious physical harm can result from a condition, practice, means, method, operation, or process)

- $7,000 maximum for each violation

C. **<u>Civil penalty for violations determined not serious</u>**

- $7,000 maximum for each violation

D. **<u>Civil penalty for failure to correct violation within allotted time</u>**

- $7,000 maximum per day such violation continues

E. **<u>Civil penalty for violation of posting requirement</u>**

- $7,000 maximum for each violation

F. **<u>Criminal penalty for willful violation causing death to employee</u>**

1. Upon conviction, maximum fine of $10,000
2. Or imprisonment for up to 6 months
3. Or both

G. **<u>Criminal penalty for giving advance notice of inspection</u>**

1. Upon conviction, maximum fine of $1,000
2. Or imprisonment for up to 6 months
3. Or both

H. Criminal penalty for false statements, representations or certification

1. Upon conviction, maximum fine of $10,000
2. Or imprisonment for up to 6 months
3. Or both

For more information about penalties, go to the following website and search for "Penalty Policy": www.osha.gov.