No. 17-60543

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,

Petitioner,

v.

HENSEL PHELPS CONSTRUCTION CO.,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge Brian A. Duncan)

BRIEF FOR PETITIONER SECRETARY OF LABOR

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November 6, 2017

R. Alexander Acosta, Secretary of Labor v. Hensel Phelps Construction Co. (5th Cir. No. 17-60543)

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This case presents legal questions regarding the Secretary's interpretation of the Occupational Safety and Health Act, and of one of its implementing regulations, to permit enforcement citations against multiple employers at a single worksite. The Secretary respectfully submits that oral argument could assist the Court in deciding the issues before it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

MISCELLANEOUS

STATEMENT OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary of Labor before the Occupational Safety and Health Review Commission ("Commission") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c). The decision of the administrative law judge ("ALJ") became a final order of the Commission on June 1, 2017, and the Secretary filed his petition for review on July 31, 2017, within the sixty-day period prescribed by the OSH Act. *See* 29 U.S.C. § 660(a). This Court has jurisdiction over the petition for review under 29 U.S.C. § 660(b).

STATEMENT OF THE ISSUES

1. Whether the Secretary of Labor has authority to issue citations to employers such as Hensel Phelps who create or control hazards at multi-employer construction worksites, regardless of whether their own employees were exposed to the hazard, where sections 5(a)(2) and 3(8) of the OSH Act and 29 C.F.R. § 1910.12(a) require employers to comply with OSHA standards without limiting protection to an employer's own employees.

2. Whether the ALJ erred in concluding that Fifth Circuit precedent foreclosed the citation of Hensel Phelps for exposing another employer's employees to a dangerous soil excavation, where the Fifth Circuit has never addressed the

Secretary's authority to issue multi-employer citations in an OSH Act enforcement case in which the Secretary is a party.

3. Assuming Fifth Circuit precedent applies to citations issued under OSHA's multi-employer policy, whether the Court should revisit the issue in light of the Supreme Court's intervening decisions calling for deference to the Secretary's interpretation of the OSH Act and his regulations.

STATEMENT OF THE CASE

I. Procedural History

This case began with an enforcement citation issued by the Secretary of Labor to respondent Hensel Phelps Construction Company. On April 17, 2017, the ALJ issued a decision vacating the citation. The Secretary sought discretionary Commission review of the ALJ's decision, which was not granted, and the decision became a final order of the Commission on June 1, 2017. *See* 29 C.F.R. § 2200.90(b); Notice of Final Order, June 2, 2017. The Secretary then petitioned this Court for review of the ALJ's decision under 29 U.S.C. § 660(b).

II. Statement of Facts

A. Enforcement of Safety and Health Standards Under the OSH Act

The OSH Act is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). To achieve the Act's purposes, Congress

authorized the Secretary of Labor "to set mandatory occupational safety and health standards" with which employers must comply. *Id*. §§ 651(b)(3), 654(a)(2), 655. The OSH Act also contains a general duty clause, which requires an employer to provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

The Occupational Safety and Health Administration ("OSHA") enforces both the standards and the general duty clause by issuing citations to employers when violations occur.[1] *Id*. § 659(a). Violations may be characterized as "other than serious," "serious," "willful," or "repeat." *Id.* § 666(a)-(c). In appropriate cases, OSHA also proposes civil penalties against cited employers. *Id*. If the employer timely contests a citation or penalty, the Commission must "afford an opportunity for a hearing," and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." *Id*. § 659(a), (c). Hearings are presided over by a Commission ALJ. *Id*. § 661(j). A party that is dissatisfied with the decision of the ALJ may petition the Commission for discretionary review. *Id*. §§ 659(c), 661(i). If the Commission does not grant

[1] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. Secretary's Order 1-2012, 77 Fed. Reg. 3912-01 (2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

review, the ALJ's decision becomes a final order of the Commission by operation of law. 29 C.F.R. § 2200.90(d). Final orders of the Commission are reviewable in the courts of appeals. 29 U.S.C. §§ 659(c), 660(a), (b).

B. OSHA Citations at Multi-Employer Worksites

The Secretary has long enforced citations issued to multiple employers at a single worksite, including employers who create or control hazardous conditions to which another employer's employees are exposed. *See Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Cir. 1999) (describing OSHA's "multi-employer doctrine"). This situation commonly arises on construction sites or other worksites with a general contractor and one or more subcontractors. Over the past forty years, the Secretary has continually provided enforcement guidance about multi-employer citations to OSHA compliance officers in the form of field operations manuals and other directives. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 819-21 (8th Cir. 2009) (describing various guidance documents and the evolution of the multi-employer enforcement policy).

Under OSHA's current multi-employer enforcement policy, which has been in effect since 1999, an employer who causes a hazardous condition (a "creating employer") or a general contractor or other employer having control over a worksite who should have detected and prevented a violation through the reasonable exercise of its supervisory authority (a "controlling employer") may be

cited for a violation, whether or not its own employees were exposed to the hazard. *See* OSHA Instruction CPL 02-00-160, *Field Operations Manual* (Aug. 2, 2016); OSHA Instruction CPL 2-00.124, *Multi-Employer Citation Policy* (Dec. 10, 1999).

C. The Austin Library Construction Project

Hensel Phelps entered into a contract with the City of Austin, Texas, to build a new public library. Stip. 11[2]; Ex. 1. In 2014, Hensel Phelps subcontracted with Haynes Eaglin Watters, LLC ("HEW") to perform certain work at the library construction site. Stips. 4, 29; Ex. 2. In turn, HEW subcontracted with CVI Development, LLC ("CVI") to perform demolition, excavation, and other work. Stip. 35; Ex. 3. As the general contractor, Hensel Phelps maintained control over the entire worksite through the presence of on-site management personnel, including superintendents, project engineers, and project managers. Stips. 13-21, 24, 26, 28.

The library worksite included an excavation, one side of which was a nearly vertical wall of excavated soil approximately twelve and a half feet tall and 150 feet long. Stips. 11, 78; Exs. 5-7 (photos of excavation). The excavated soil was Type C soil, the least stable type under OSHA's soil classification system, which includes gravel, sand, soil from which water is freely seeping, and other unstable soils. Stips. 1, 82; *see* 29 C.F.R. Part 1926, Subpart P, Appendix A. Excavations

[2] Citations to "Stip." are to the parties' Joint Stipulations of Fact and Procedure.

in such unstable soil require the use of protective systems, such as sloping or benching, to protect employees against cave-ins. 29 C.F.R. § 1926.652(a)(1), (b).

CVI was assigned to work on footings in the excavation at the base of the excavated wall of soil. Stips. 56-57. The wall was not properly sloped or otherwise protected from cave-in hazards, and had not been for at least the past several days. Stips. 83-84, 112. On the morning of March 4, 2015, CVI owner Karl Daniels sent his employees to work on another area of the library project, away from the excavation, while he waited for instructions from HEW and/or Hensel Phelps as to how to proceed at the excavation area. Stip. 63. An inspector from the City of Austin who was at the library site saw the CVI employees at the other location and told Mr. Daniels that his employees should only be working at the excavation. Stip. 64-66. The inspector reported to Larry Harding, Hensel Phelps's Area Superintendent, that CVI was working at the other location. By email, Mr. Harding instructed CVI to return to the excavation and not to do any other work until the excavation work was completed. Ex. 4.

At this time it was raining intermittently. Stip. 75. Mr. Daniels replied by email that "CVI is concerned about working in said area . . . . [P]lacing rebar in the mud and rain is unorthodox and very dangerous." Ex. 4. Rather than addressing Mr. Daniels's safety concerns, HEW responded with an email that said "Thank you for proceeding per the HEW, HP and City of Austin request." Ex. 4. Mr. Daniels

removed his employees from the other work area and sent them back to the excavation area to install rebar there. Stips. 72-73.

D. The OSHA Inspection and Citation

On that same day, the OSHA Area Office in Austin received a complaint of hazardous working conditions at the Austin Library excavation area. Stip. 88. OSHA Compliance Safety and Health Officer ("CSHO") Greg Halter conducted an inspection of the worksite that afternoon. Stip. 102. CSHO Halter found three CVI employees working at the base of the twelve-foot-high, unprotected wall of excavated soil. Stips. 10, 37-39, 76, 78-80; Exs. 5-7 (photographs showing employees beneath wall). Mr. Harding and Jay Herzing, Hensel Phelps's Project Superintendent, along with the HEW Project Superintendent and the City of Austin inspector, were present at the wall with a full view of the CVI employees working there. Stips. 24, 26, 76-77, 81; Exs. 5-7; Decision 6.

Following the inspection, OSHA cited both CVI and Hensel Phelps for willfully violating 29 C.F.R. § 1926.652(a)(1)[3] by exposing employees to a cave-in

[3] The standard provides: "Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in." 29 C.F.R. § 1926.652(a)(1).

hazard from an unprotected excavation at a construction site.[4] Decision 7. The citation against Hensel Phelps was issued pursuant to OSHA's multi-employer citation policy. Stip. 129; Ex. 9 at 3 (copy of policy). OSHA cited Hensel Phelps as a "controlling employer" as described in the policy because the company had "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." Decision 8; Stip. 129; Ex. 9 at 6-7.

E. The ALJ's Decision

Hensel Phelps timely contested the citation, Stip. 105, and the parties submitted Joint Stipulations of Fact and Procedure to the ALJ in lieu of an evidentiary proceeding. Decision 2. Each party filed a motion for summary judgment based on the stipulated record. *Id.* On April 17, 2017, the ALJ issued a decision vacating the citation. He found that the stipulated facts established a violation of § 1926.652(a)(1) and that Hensel Phelps had knowledge of the violation. Decision 8. He set forth the Commission's precedent establishing that the Secretary can cite controlling employers at multi-employer worksites and defining the circumstances when such employers can be held responsible:

> The Commission has held that "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'"

[4] CVI settled with OSHA; that citation is not at issue in this case.

> *McDevitt Street Bovis*, 19 BNA OSHA 1108 (No. 97-1918, 2000) (quoting *Anning-Johnson*, 4 BNA OSHC 1192, 1199 (No. 3694, 1976)). "An employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Summit Contractors*, 23 BNA OSHC 1196 (No. 05-0839, 2010) (quoting *McDevitt* at 1109).

Id. at 8-9. The ALJ then found that Hensel Phelps met the requirements to be considered a "controlling employer" who has a duty under the OSH Act to act reasonably to prevent or detect and abate violations at the worksite even when the affected employees are those of another employer.[5] *Id.* at 10.

The ALJ went on to find, however, that the Commission's precedent did not apply in the present case because the violation took place in Texas, within the boundaries of the Fifth Circuit.[6] Decision 10. He determined that Fifth Circuit

[5] The parties stipulated to all the facts necessary to establish the OSH Act violation as well as Hensel Phelps's status as a controlling employer. It is undisputed that the excavation was not adequately protected and that Hensel Phelps knew this; Hensel Phelps supervisors were standing right next to the unprotected excavation while CVI's employees were working there. Stips. 24, 26, 76-77, 81, 83-84, 101, 112; Exs. 5-7. It is also undisputed that Hensel Phelps had management authority over the entire library project and had the specific authority to prevent the violation by correcting the hazardous conditions or by stopping CVI's employees from working. Stips. 93-94, 113-15.

[6] The ALJ cited the rule that, where it is likely that a Commission decision would be appealed to a particular circuit court of appeals, the Commission generally applies the precedent of that circuit in deciding the case, even if it differs from the Commission's own precedent. Decision 11 (citing *Kerns Bros. Tree Service*, 18 BNA OSHC 2064 (No. 96-1719, 2000)).

precedent foreclosed citation of a general contractor such as Hensel Phelps when the workers exposed to the hazard were employees of a subcontractor, even if the general contractor qualified as a "controlling employer" under Commission precedent and OSHA's multi-employer policy. Decision 10. The ALJ cited *Melerine v. Avondale Shipyards, Inc.*, in which the Fifth Circuit stated, "OSHA regulations protect only an employer's own employees." *Id.* (citing 659 F.2d 706, 711 (5th Cir. 1981)), and concluded that regardless of OSHA policy or Commission precedent, an employer within the Fifth Circuit cannot be held in violation of the Act when the employees exposed to the hazard were employees of a different employer.[7] *Id.* at 11.

The Secretary sought discretionary review of the ALJ's decision. Pet. for Disc. Review, May 22, 2017. The Commission did not grant review and the ALJ's decision became a final order of the Commission on June 1, 2017. *See* 29 C.F.R. § 2200.90(b); Notice of Final Order, June 2, 2017.

III. Standard of Review

The issues in this case are legal ones. Legal conclusions of the Commission are reviewed "for whether they are 'arbitrary, capricious, an abuse of discretion,

[7] The full Commission has not addressed the issue of Fifth Circuit precedent in detail but has observed that although the Court "has not had an opportunity to consider the issue in the context of a Commission case since the Commission adopted the doctrine in 1976[, t]he Fifth Circuit has, however, rejected the concept of multi-employer liability in a series of mostly tort cases." *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000).

or otherwise not in accordance with the law." *Austin Indus. Specialty Servs., L.P. v. OSHRC*, 765 F.3d 434, 438-39 (5th Cir. 2014) (quoting *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 427 (5th Cir. 2001)).

SUMMARY OF THE ARGUMENT

The Secretary has authority, derived from the OSH Act and consistent with an OSHA regulation, 29 C.F.R. § 1910.12(a), to issue citations to employers who control hazards at multi-employer construction worksites and expose another employer's employees to harm. The Secretary has long interpreted both the statute and § 1910.12(a) to authorize and permit such citations, and his interpretation is entitled to deference. Because all elements of the violation are already established, the Court should therefore reverse the ALJ and affirm the citation issued to Hensel Phelps.

The ALJ erred in concluding that Fifth Circuit precedent bars the Secretary from issuing multi-employer citations. The case the ALJ relied on, *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981), should not be deemed controlling precedent on the issue of OSHA's multi-employer citation policy because it does not fully address the authorizing OSH Act provisions and the Secretary was not a party to the case. The Fifth Circuit has yet to directly address OSHA's multi-employer enforcement authority in an OSH Act enforcement case with the benefit of the Secretary's participation, which is particularly relevant

because of the deference owed to the Secretary's interpretation of the OSH Act and of § 1910.12(a).

In the alternative, if this Court finds that the Fifth Circuit directly addressed the multi-employer issue in *Melerine*, the Court should nonetheless revisit the issue because of two intervening Supreme Court decisions that call for deference to the Secretary's interpretation of the OSH Act and his regulations.

ARGUMENT

Construction worksites are often busy, dangerous places where employees of multiple employers work alongside each other on interrelating projects. Often, one employer's employees complete work for another employer. These circumstances can lead to situations where one employer creates or controls a hazardous condition at a construction worksite but the only employees exposed to the hazard are those of another employer. The ability to cite employers who create or control hazards and expose another employer's employees to potential harm is therefore a vitally important enforcement tool for OSHA as it works to further the OSH Act's statutory goal of ensuring safe and healthful working conditions.

The Secretary's authority to cite employers who create or control hazards and expose another employer's employees to potential harm stems not only from the broad remedial purpose of the OSH Act, but also from the requirement in 29 U.S.C. § 654(a)(2) that employers "comply with occupational safety and health

standards . .. issued pursuant to this Act" and the accompanying definition of safety and health standards as requiring actions "reasonably necessary or appropriate to provide safe or healthful employment *and places of employment*." 29 U.S.C. § 652(8) (emphasis added). In addition, a regulation dating to 1971, 29 C.F.R. § 1910.12(a), provides that "[e]ach employer shall protect the employment *and places of employment* of each of his employees . . ." (emphasis added). That regulation confirms the Secretary's interpretation of the interrelated provisions of sections 3(8) and 5(a)(2) of the Act, and OSHA's multi-employer citation policy constitutes the Secretary's interpretation of both the Act and of § 1910.12(a) to permit citations of creating and controlling employers in order to provide safe and healthful "places of employment."

In this case, the ALJ held that the Secretary could not cite Hensel Phelps as a controlling employer under OSHA's multi-employer policy, finding that Fifth Circuit precedent – specifically, *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981) – conclusively holds that the Secretary lacks authority to cite controlling employers at multi-employer construction worksites. Decision 10-11. This was too strict a reading of *Melerine*. *Melerine* was a negligence case in which the Secretary did not participate. The Fifth Circuit has not yet decided an OSHA enforcement case that squarely presents the issue of multi-employer

liability under the OSH Act, and thus the Secretary has not had the opportunity to present his position on the issue.

Even if this Court finds that *Melerine* squarely addressed the issue of the Secretary's authority to issue multi-employer citations, this Court should revisit that decision because of two Supreme Court cases decided in the years since *Melerine*. These intervening decisions "fundamentally alter the focus of the analysis" required to resolve the question of whether the Secretary has permissibly exercised his enforcement authority by requiring deference to the Secretary's reasonable interpretations of the OSH Act and related regulations. *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 197 (5th Cir. 2016).

I. The OSH Act and 29 C.F.R. § 1910.12(a) Enable the Secretary to Issue Citations to Controlling Employers at Multi-Employer Construction Worksites.

The Secretary's authority to issue citations to controlling employers at multi-employer worksites stems from sections 5(a)(2) and (3)(8) of the OSH Act. Section 5(a)(2) requires employers to comply with OSHA standards without reference to the employer's own employees, while section (3)(8) defines such standards as requiring conditions or actions "reasonably necessary to provide safe or healthful employment *and places of employment*." 29 U.S.C. § 652(8) (emphasis added). These statutory provisions contain no language limiting protection only to an employer's employees. In addition, a regulation promulgated

during OSHA's earliest days, 29 C.F.R. § 1910.12(a), provides that "[e]ach employer shall protect the employment *and places of employment* of each of his employees . . ." (emphasis added), confirming the broader protective scope of the phrase "places of employment." OSHA therefore properly cited Hensel Phelps under its multi-employer policy, and the Court should reverse the ALJ's decision.

A. The OSH Act's Language and Purpose Support the Secretary's Authority to Issue Citations to an Employer Who Creates or Controls Hazardous Conditions at a Construction Worksite.

At the outset, the language of the OSH Act provides the Secretary with the authority to cite an employer who creates or controls a hazardous condition at a multi-employer construction worksite, even if the only employees exposed to the hazard are those of another employer. Section 5 of the Act sets forth an employer's duties as follows:

> (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 chapter.

29 U.S.C. § 654. The statute defines "occupational safety and health standards" as standards requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to

provide safe or healthful employment *and places of employment*." *Id.* § 652(8) (emphasis added).

Relying on these provisions, the Secretary has long held the position that, while section 5(a)(1) creates a general duty running only to an employer's own employees, section (5)(a)(2) creates a specific duty to comply with standards without limitation as to whom those standards are meant to protect, allowing protection for all employees on a multi-employer worksite. The Secretary "has imposed liability under the [multi-employer] doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the [OSH] Act." *Universal Constr. Co.*, 182 F.3d at 728.

Section 5(a)(2) generally requires employers to comply with the Act's safety standards. Unlike section 5(a)(1), it does not limit its compliance directive 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 employees of another employer. *See* 29 U.S.C. § 652(8) (defining standards as ensuring safe or healthful employment and places of employment); *see Summit*, 558 F.3d at 828 ("to make both terms meaningful, the use of the term 'places of employment' must provide something different than the term 'employment'"). To the extent the authorizing language in the OSH Act is ambiguous, "the omission from (a)(2) of any language expressly limiting an employer's liability only to its employees,

militate[s] in favor of the Secretary's interpretation." *Universal Constr. Co.*, 182 F.3d at 729; *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999) ("The use of the words 'his employees' in describing the duties of Section 654(a)(1), certainly indicate that a broader class was meant to be protected by [654(a)(2)]").

Section 2 of the OSH Act, which articulates the statute's purpose, provides additional support for the Secretary's position. The purpose of the Act is "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651. "While Section 654(a)(2) provides the statutory basis for the multi-employer doctrine, courts garner additional support for it from the underlying purpose of the Act . . . . As courts have determined, the Act's legislative history suggests that its primary focus was making places of employment, rather than specific employees, safe from work related hazards." *Pitt-Des Moines, Inc.*, 168 F.3d at 983 (7th Cir. 1999) (citations omitted). The multi-employer citation policy furthers the broad remedial purpose of the Act by holding employers such as general contractors responsible for violations they could reasonably detect and abate, even if the employees placed at risk by those violations are employed by a subcontractor.

B. 29 C.F.R. § 1910.12(a) Is in Accordance with OSHA's Multi-Employer Citation Policy.

In addition to the statute itself, an OSH Act regulation, 29 C.F.R. § 1910.12(a), confirms the Secretary's authority to enforce citations against controlling employers on multi-employer worksites. The Secretary has long interpreted this regulation to permit multi-employer citations, and his interpretation is entitled to deference. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 152 (1991) (finding that OSHA has the authority to "render authoritative interpretations of OSH Act regulations [as] a 'necessary adjunct' of the Secretary's powers to promulgate and to enforce national health and safety standards."). As long as the Secretary's interpretation is reasonable, a reviewing court should defer to it. *Id.* at 158. The Secretary's interpretation of § 1910.12(a) is reasonable because it has been consistently applied and because it furthers the purposes of the OSH Act.

1. *The Use of the Term "Places of Employment" in § 1910.12(a) Confirms the Secretary's Authority to Cite Employers Like Hensel Phelps Who Expose Other Employers' Employees to Hazardous Conditions.*

When it first passed the OSH Act, Congress authorized the Secretary to adopt certain pre-existing safety and health standards as OSHA standards without notice-and-comment rulemaking. 29 U.S.C. § 655(a). The Secretary used this authority to adopt established federal standards governing the construction industry. *See Summit*, 558 F.3d at 818-19 (describing adoption process). In doing

so, the Secretary made clear that these standards required employers to protect workplaces, not just their own employees: "The [pre-existing] standards . . . shall apply . . . 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) (May 29, 1971) (emphasis added). In a field operations manual[8] issued around the same time, OSHA established its first multi-employer worksite policy, providing for citation of an employer who "created a hazardous condition 'endangering employees (whether his own or those of another employer).'" *Summit*, 558 F.3d at 819 (quoting OSHA Field Operations Manual at VII-6-8, ¶ 10 (May 20, 1971)).

As the Eighth Circuit found in *Summit*, under § 1910.12(a), an employer "shall protect the places of employment of each of his employees." 558 F.3d at 824. Ensuring the safety of "places of employment" is not limited to only the employer's own employees. *Id.* "Therefore, the plain language [of the regulation] does not preclude an employer's duty to protect the place of employment, including others who work at the place of employment . . . ." *Id.* This is the only

[8] OSHA's field operations manual is an internal guidance document intended to promote efficiency and consistency; it does not have the force of law. *See Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275 (No. 4182, 1978).

construction of the language of the regulation that gives some independent meaning to the term "place of employment" and it requires an employer to protect others who work at that place of employment. In any event, and as explained below, to the extent the language of § 1910.12(a) is ambiguous, the Court must defer to the Secretary's reasonable and longstanding interpretation. *CF&I*, 499 U.S. at 152; *Summit*, 558 F.3d at 825-26.

2. *The Secretary Has Consistently Applied the Multi-Employer Policy and the Policy Furthers the Protective Mission of the OSH Act.*

From the early 1970s until the present day, the Secretary has cited employers on multi-employer construction sites for hazardous conditions they created or controlled, regardless of whether their own employees were exposed. *See, e.g.*, *McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000); *Martin Iron Works*, 2 BNA OSHC 1063 (No. 606, 1974); *Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (No. 504, 1973). The Secretary has also reaffirmed his authority to cite controlling employers pursuant to his multi-employer enforcement policy in several rulemakings. *See, e.g.*, Final Rule, *Safety Standards for Steel Erection*, 66 Fed. Reg. 5196, 5202 (Jan. 18, 2001); Final Rule, *Basic Program Elements for Federal Employee Occupational Safety and Health Programs*, 60 Fed. Reg. 34851 (July 5, 1995); Final Rule, *Occupational Exposure to Asbestos*, 59 Fed. Reg. 40964, 40982 (Aug. 10, 1994); *see also* Request for Public Comment, *Citation*

Guidelines in Multi-Employer Worksites, 41 Fed. Reg. 17639, 17640 (April 27, 1976).

Moreover, "[a]n interpretation that harmonizes an agency's regulations with their authorizing statute is presumptively reasonable." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991). The Secretary's interpretation of section 1910.12(a) is reasonable because controlling employer liability furthers the purposes of the OSH Act.

The reason is particularly apparent on construction worksites such as the Austin Library site. "General contractors normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite." *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir. 1977). And, "[a]s a practical matter, the general contractor may be the only on-site person with authority to compel compliance with OSHA safety standards." *Universal Constr. Co.*, 182 F.3d at 730.

This case is a good example. CVI was a sub-sub-contractor; the owner, Mr. Daniels, worked alongside his employees. Stips. 35-37. Mr. Daniels had voiced his safety concerns about working in the excavation but was ignored. Ex. 4. It is undisputed that Hensel Phelps knew of the hazardous conditions at the excavation and had the authority to protect the CVI employees from exposure by ordering

them to stop working until the excavation was rendered safe; instead of doing so, Hensel Phelps affirmatively required them to keep working in the unsafe conditions. Stips. 86, 93-94, 101; Ex. 4. Therefore, this case provides a perfect example of why holding general contractors and other controlling employers responsible for OSHA violations, even when their own employees are not exposed to the hazard, is necessary to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

II. The ALJ Erred in Concluding that Fifth Circuit Precedent Barred the Citation of Hensel Phelps for Failing to Address the Hazardous Excavation.

Seven courts of appeals have upheld the multi-employer citation policy as a proper exercise of the Secretary's statutory authority. *See Summit Contractors, Inc. v. Sec'y of Labor* ("*Summit II*"), 442 Fed. Appx. 570, 571-72 (D.C. Cir. 2011); *Summit*, 558 F.3d at 818; *Universal Constr. Co.*, 182 F.3d at 727-32; *Pitt-Des Moines, Inc.*, 168 F.3d at 982; *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803-04 (6th Cir. 1984); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *Brennan v. OSHRC*, 513 F.2d 1032, 1037-38 (2d Cir. 1975). Four circuits have not ruled on the issue.

The Fifth Circuit is the only court of appeals to have stated, in a series of personal injury cases, that an employer may not be held liable under the OSH Act when its own employees are not exposed to a hazard. *See Melerine*, 659 F.2d at

711 (stating that "OSHA regulations protect only an employer's own employees"). However, *Melerine,* a personal injury case, does not control the present case because it does not address or discuss the multi-employer policy in an OSH Act enforcement case where the Court has had the benefit of full argument by the government in support of the Secretary's position – a position to be accorded deference. Other Fifth Circuit tort and personal injury cases are not controlling for the same reason. The ALJ therefore erred in concluding that Fifth Circuit precedent barred the Secretary from citing Hensel Phelps in this case.

A. *Melerine* Does Not Control Because It Is a Negligence Case in Which the Secretary Did Not Participate and Because It Does Not Fully Discuss the Statutory Authority Underlying OSHA's Multi-Employer Policy.

The ALJ cited the Fifth Circuit's statement in *Melerine* that "OSHA regulations protect only an employer's own employees" and interpreted this statement as a definitive holding that the Secretary has no authority to cite controlling employers at multi-employer construction worksites in the Fifth Circuit. Decision 10 (quoting 659 F.2d at 706). This was too broad a reading of the Court's statement. *Melerine* should not be deemed controlling precedent on the issue of OSHA's authority to issue multi-employer citations because the panel did not fully address OSH Act statutory language that provides the Secretary with multi-employer citation authority; critically, the Secretary was not even a party to the case. *Compare Anthony Crane Rental, Inc. v. Reich,* 70 F.3d 1298, 1307 (D.C.

Cir. 1995) (declining to rule on OSHA's authority to issue multi-employer policy without briefing from parties).[9]

Melerine was a personal injury case in which plaintiff Melerine, who had been injured on the job, sued a company that was not his employer for negligence. 659 F.2d at 707. The defendant company had hired Melerine's employer as a subcontractor to perform certain work. *Id.* Melerine attempted to establish negligence per se by arguing that the defendant company had violated an OSHA standard. *Id.* at 709. The panel rejected this argument, finding that Melerine was not a member of the class the OSHA standard was intended to protect because "OSHA regulations protect only an employer's own employees." *Id.* at 710-11. Although *Melerine* discussed generally "the class protected by OSHA regulations," *id.* at 712, the panel did not discuss OSHA's multi-employer policy or OSHA's history of citations at multi-employer worksites.[10] Nor did it meaningfully discuss

[9] The D.C. Circuit later approved OSHA's use of the multi-employer policy in *Summit II*. 442 Fed. Appx. at 571-72.

[10] This Court recently described the holding of *Melerine* in terms that focused on its relevance to tort cases, citing *Melerine* to explain that "We have not endorsed a non-employee's use of OSHA regulations to sue a general contractor in negligence per se." *Martino v. Kiewit New Mexico Corp.*, 600 Fed. Appx. 908, 912 (5th Cir. 2015); *see also Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 581 (5th Cir. 1985) (explaining that in *Melerine*, "we held that OSHA regulations provide evidence of the standard of care exacted of employers, and thus may only be used to establish negligence per se when the plaintiff is an employee of the defendant.").

sections 5(a)(2) and 3(8) or 29 C.F.R. § 1910.12(a) – important sources of the Secretary's authority to issue multi-employer citations.

The Secretary was not a party to *Melerine* and the panel, therefore, interpreted the regulation at issue in that case without the benefit of the Secretary's position on the matter. But the multi-employer policy incorporates the Secretary's interpretation of the OSH Act and its implementing regulations, and that interpretation is entitled to deference. *See CF&I*, 499 U.S. at 152, 158; *Universal Constr.*, 182 F.3d at 728-31 (granting deference to the Secretary's interpretation of the Act as providing authority for OSHA's multi-employer policy and upholding it as consistent with the language and purpose of the statute); *Knutson Constr. Co.*, 566 F.2d at 600 (same). *See also infra* pp. 30-32 (explaining that controlling weight should be given to the Secretary's reasonable interpretation of ambiguous statutory language).

B. No Other Fifth Circuit Case Controls.

The Fifth Circuit has never squarely addressed the question of OSHA's authority to issue citations at multi-employer worksites. The *Melerine* panel premised its holding on the one-paragraph decision in *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975), which approvingly cited a dissenting Commissioner's statement that "the general rule [is] that a contractor is not responsible for the acts of his subcontractors or their employees." 512 F.2d at 675.

Melerine also cited *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318 (5th Cir. 1979) and *Barrera v. E.I. DuPont de Nemours & Co., Inc.*, 653 F.2d 915 (5th Cir. Unit A 1981). 659 F.2d at 706. Both of those cases, like *Melerine* itself, were tort cases to which the Secretary was not a party and for that reason alone are not controlling.

Importantly, the *Melerine* court quoted favorably a statement by the district court in *Horn* that "no legislative history nor statutory provision has been cited by the Plaintiff to support the proposition that Congress intended to create a duty on behalf of the employer with respect to persons other than its own employees." 659 F.2d at 711 (quoting *Horn v. C.L. Osborn Contracting Co.*, 423 F.Supp. 801, 808 (M.D.Ga.1976)). But as explained above, section 5(a)(2) of the OSH Act explicitly requires each employer to comply with OSHA standards, without reference to whether noncompliance endangers that employer's employees. *See supra* pp. 15-19 (explaining interrelationship of sections 5(a)(2) and (3)(8) and focus on broad protection of "places of employment"). It is not surprising that the plaintiff in *Horn*, a private individual who had been injured on the job, did not make this argument. But his failure to do so should not forever foreclose the Secretary from implementing the OSH Act in accord with its purpose and language.

Nor should *Southeast Contractors* dictate the outcome in this case. The issue in *Southeast Contractors* was *not* whether an employer could be held liable for an admitted OSH Act violation that endangered only another employer's employees – which is the essence of the multi-employer citation policy and the issue before the Court in this case. Rather, the issue was whether the employer, Southeast, could be held to have violated the specific terms of the particular standard for which it had been cited. *Southeast Contractors, Inc.*, 1 BNA OSHC 1713, 1714-15 (No. 1445, 1974).

Southeast was a contractor at a construction site. The case arose from an incident in which an employee of a subcontractor backed up a truck that struck and killed one of Southeast's employees. Although it was the subcontractor's employee who had operated the truck, Southeast was charged with violating 29 C.F.R. § 1926.601(b)(4), which requires that "[n]o employer shall use any motor vehicle equipment having an obstructed view to the rear unless" the vehicle sounds an alarm or the driver relies on a signalman when reversing. *Id*. at 1714. The Commission found that Southeast had "used" the truck within the meaning of the standard and affirmed the violation.

One Commissioner dissented, arguing that because the operator of the truck was an employee of a subcontractor, not of Southeast, Southeast was not "using" the truck within the meaning of the standard and therefore had committed no

violation. *Id.* at 1716-17. He noted that the standard by its terms restricts "employers," and that because "an employee's use of a vehicle in a manner prohibited by the standard equates to such use by his employer . . . the critical question is whether the [truck] driver was an employee of the respondent or his subcontractor." *Id.* at 1716.

On appeal, the Fifth Circuit agreed, without analysis, with the dissenting Commissioner's conclusion that Southeast had not "used" the truck, and quoted his statement that "the general rule [is] that a contractor is not responsible for the acts of his subcontractors or their employees." 512 F.2d at 675. The best way to read this quote is as endorsing the idea that Employer A cannot be deemed to have committed misconduct actually performed by Employer B's employee. This is quite different from saying that an employer can never be held in violation of the Act if its own employees were not affected by the violation. The *Southeast Contractors* opinion is only one paragraph long and does not discuss any issues related to the larger question of multi-employer citations and OSH Act authority to issue such citations. 512 F.2d at 675. It says nothing about whether an employer who, like Hensel Phelps, controls a hazardous condition should be held liable when a subcontractor's employees are exposed to that hazard. *Southeast Contractors* is therefore not controlling in this case.

C. In the Alternative, This Court Should Revisit *Melerine* Because Intervening Supreme Court Decisions Have Fundamentally Altered the Analysis Required to Assess the Secretary's Multi-Employer Enforcement Authority.

Even if the Court believes that *Melerine* should control its analysis of an OSH Act enforcement case, two Supreme Court cases decided in the years since *Melerine* have changed the legal landscape sufficiently to warrant revisiting the *Melerine* decision. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts must defer to an agency's reasonable interpretation of an ambiguous statutory provision. 467 U.S. 837, 843-44 (1984). And in *CF&I*, 499 U.S. at 144, the Supreme Court specifically affirmed OSHA's authority to issue authoritative interpretations of OSH Act regulations such as 29 C.F.R. § 1910.12(a), which OSHA has interpreted to permit citation of controlling employers.

This Court will revisit an earlier panel decision that would otherwise be binding if the Supreme Court (or the en banc court) has issued an intervening decision that "fundamentally changed the focus of the analysis" required to resolve the issue in question. *Robinson*, 817 F.3d at 197; *see Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775 (5th Cir. 2003). In *Hoskins*, a panel of this Court revisited an earlier panel decision after the Supreme Court overruled the method of analysis used by the prior panel. The question in the case was whether the Carmack Amendment to the federal Interstate Commerce Act, 49 U.S.C. § 14706,

preempted the plaintiff's state law tort claims. The prior panel had analyzed whether the Carmack Amendment manifested a clear Congressional intent to make claims removable to federal court. 343 F.3d at 774. The intervening Supreme Court decision, however, held that the proper analysis was whether there was a clear Congressional intent to make the federal cause of action exclusive, not whether there was an intent to make the claims removable. *Id.* at 775-76. The *Hoskins* panel held that this decision "shifted" "the legal landscape surrounding" the relevant issue and that, therefore, it was no longer bound by the prior panel decision. *Id.* at 775.

Here, there are two intervening Supreme Court decisions that have "shifted the legal landscape" surrounding the question of the Secretary's authority to issue citations to controlling employers at multi-employer construction worksites. *Chevron* calls for deference to an agency's reasonable interpretation of an ambiguous statutory provision. 467 U.S. at 843-44; *see also Universal*, 182 F.3d at 729 (applying *Chevron* and finding that "[a]n agency's interpretation of a specific statutory provision is entitled to deference and will be upheld if it is reasonable and consistently applied and does not frustrate the policy sought to be implemented by Congress").

The relevant statutory provisions here are 29 U.S.C. § 654(a)(2), which obligates employers to comply with safety and health standards without reference

to the employers' employees, and § 652(8), which defines such standards as requiring conditions or actions "reasonably necessary or appropriate to provide safe or healthful employment *and places of employment*." (emphasis added). And in its multi-employer policy, OSHA Instruction CPL 2-00.124, and in 29 C.F.R. § 1910.12(a), the Secretary reasonably interpreted these provisions to require employers to comply with standards necessary to protect "places of employment," regardless of whether their own employees were exposed to a hazard. *See supra* pp. 15-22 (describing Secretary's longstanding interpretations of the statute and § 1910.12(a) as allowing for the citation of multiple employers at construction worksites).

Under *Chevron,* the Court must defer to the Secretary's permissible construction of a statute which it administers. 467 U.S. at 844. This is true even if the Court previously construed the statute in a different way. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In other words, "*Brand X* demands that we reexamine pre-*Chevron* precedents through a *Chevron* lens." *Dominion Energy Brayton Pt., LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006).

Additionally, *CF&I* specifically confirms the Secretary's authority to issue authoritative interpretations of OSH Act regulations. "The power to render authoritative interpretations of OSH Act regulations is a 'necessary adjunct' of the Secretary's powers to promulgate and to enforce national health and safety standards." 499 U.S. at 152. As long as the Secretary's interpretation is reasonable, a reviewing court must defer to it. *Id.* at 158. The Secretary has reasonably interpreted § 1910.12(a), which expressly references safety at "places of employment," to allow citation of controlling employers at multi-employer worksites. *See supra* pp. 17-21.

The *Melerine* panel did not apply deference to the Secretary's interpretations. Indeed, as discussed above, the panel was never even presented with the Secretary's interpretation of the Act or the relevant OSHA regulation. In subsequently making clear that deference is required, the Supreme Court has "fundamentally changed the focus of the analysis" required to resolve the question of the Secretary's authority to enforce multi-employer citations. *Robinson*, 817 F.3d at 197. Therefore, it is appropriate for this court to revisit *Melerine* – and, because the Secretary's interpretation is reasonable, to uphold it.

CONCLUSION

For the foregoing reasons, the Court should reverse the ALJ's decision and affirm the citation against Hensel Phelps.

Respectfully submitted this 6th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of November, 2017, a copy of the foregoing brief was filed electronically via the Court's CM/ECF Electronic Filing System, providing service on counsel for Respondent, below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner Secretary of Labor's brief contains 7,552 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Times New Roman 14-point proportional spaced type. The brief was prepared using Microsoft Word 2010.

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