Morgan Lewis

Multiemployer Worksite Policy and *Sasser*

Brandon Brigham

SECTION 01

THE MULTI-EMPLOYER WORKSITE POLICY

The Multi-Employer Worksite Policy

- Under the multi-employer policy, in addition to the employer that has employees exposed to the hazardous condition, OSHA may also issue citations to the employer that is responsible for creating, controlling, or correcting the hazardous condition even if that employer has no employees exposed to the hazardous condition.
- The legal justification for the multi-employer policy is 29 U.S.C. § 654(a)(2) of the Occupational Safety and Health Act (OSH Act), which states that "each employer . . . (2) shall comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. § 654(a)(2).

The Multi-Employer Worksite Policy

- Multi-Employer Worksites – A Two-Step Analysis:
  - Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer.
  - Step Two. If the employer falls into one of these four categories, the second step is to determine if the employer's actions were sufficient to meet its obligations.

The Multi-Employer Worksite Policy – The Steps in Action

- Responsibilities Under the Multi-Employer Policy:
  - "Creating Employer" who creates a violative condition is citable even if the only employees exposed are those of other employers at the site
  - "Exposing Employer" even if it did not create the hazard is citable if it (1) knew of the hazardous condition and (2) failed to take steps consistent with its authority to protect its employees
    - if exposing employer has authority to correct the hazard, it must do so
    - if exposing employer lacks the authority to correct the hazard, it is citable if it fails to (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures

The Multi-Employer Worksite Policy – The Steps in Action, cont'd.

- Responsibilities Under the Multi-Employer Policy:
  - "Correcting Employer" must exercise reasonable care in preventing and discovering violations and meet its obligations to correct the hazard
  - "Controlling Employer" must exercise reasonable care to prevent and detect violations on the site; factors affecting reasonable-care standard include:
    - the scale of the project
    - the nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses
    - how much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise
    - more frequent inspections are normally needed if the controlling employer knows that another employer has a history of non-compliance
    - less frequent inspections may be appropriate where the controlling employer sees strong indications that another employer has implemented effective safety and health efforts

Hypothetical Number 1

Evergeen Construction Co., 26 BNA OSHC 1615 (No. 12-2385, 2007)

- A subcontractor's employee was seen by an OSHA inspector working close to the perimeter edges of a building without fall protection. The employee was working on the fourth floor of a hotel under construction. The subcontractor had been on site one to three hours the day of the inspection, but had been working on the site, intermittently, for approximately a month.
- The general contractor's site superintendent typically walked the worksite a couple of times in the morning and a couple of times in the afternoon and more if required to check on the progress of the work, look for safety issues, and point out to subcontractors any safety violations he observed. He had not inspected the site yet the day of the OSHA inspection.
- Through his inspections, the GC found the sub's employees working without fall protection on several occasions, including twice the day before the OSHA inspection. Each time he took corrective action: on two to three of these occasions, the GC provided fall protection to the sub's employees, and at other times he sent the sub's employees home.
- The GC had a written safety plan in place at the worksite, conducted multiple daily safety inspections, trained its own employees in safety, held safety meetings with subcontractors, and pointed out safety issues to both its own employees and subcontractors' employees.
- Who should receive a citation? The subcontractor? The general contractor? Both? Why?

Hypothetical Number 2

***Meridian Construction and Development, LLC*, 21 BNA OSHC 1786 (No. 06-0454, 2006) (ALJ)**

- OSHA inspected a construction project where multi-family homes were being constructed. GC contracted with numerous subs to complete the project, including framing, electrical, plumbing, etc. GC conducted daily inspections of worksite. GC promptly corrected hazards it identified during its inspections. GC also required subs to comply with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.
- During the inspection, the CSHO observed two temporary electric power boxes with openings in plain view that were not closed and the conductors were subject to abrasion. The box was in this condition for two to four weeks in a place regularly traveled. Based on this, OSHA issued citations for failing to close openings around conductors entering temporary power boxes.
- While walking the site a roll of duct fell near the CSHO from the fourth floor. The CSHO walked up to the fourth floor and discovered there were no toeboards and issued a citation under 29 C.F.R. § 1926.50 1(c) for failing to prevent objects from falling from higher levels. GC had contracted with framing sub to install toeboards, but they failed to do so. The framing had been done for four weeks prior to the inspection.
- Were the citations against the GC upheld? Why or why not?

Hypothetical Number 3

Ryder Trans. Services, 21 BNA OSHC 1786 (No. 10-0551, 2011) (ALJ)

- A company rebuilt starters and alternators for its vehicles at its facility. An employee working for an electrical contractor at the facility fell from the roof through an unguarded skylight and sustained fatal injuries. The owner of the facility had asked the contractor to install conduit and a switch for two exhaust fans located in the ceiling of the facility. The exhaust fans had not worked since the owner had taken over the facility in 1985.
- After the contractor installed the conduit and switch, the exhaust fans still did not work. The contractor decided it needed to examine the exhaust fans to determine why they were not working. The exhaust fans extended through the ceiling to the outside of the building. The contractor concluded one of its employees needed to go up on the roof to examine the exhaust fans. During this inspection, an employee of the contractor fell through the unguarded skylight.
- OSHA alleged the owner of the facility violated former 29 C. F. R. § 1910.23(a)(4) by failing to guard its facility's skylights with standard skylight screens or fixed standard railings.
- Were the citations against the owner of the facility upheld? Why or why not?

The Multi-Employer Worksite Policy – Recent Cases

- *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129 (OSHRC Feb. 1, 2019)
  - Held that owner of refinery, which was a "controlling" employer, was not liable for violations of contractors working on site.
  - Secretary alleged "controlling" employer violated section 1926.451(g)(1) because the company "did not ensure that the [contractor's] employees were protected from falling while working on a tubular welded system scaffold."
  - Section 1926.451(g)(1) states in relevant part: "Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level."
  - The Review Commission reasoned that a controlling employer's duty to exercise reasonable care "is *less than* what is required of an employer with respect to protecting its own employees."
  - Still, a controlling employer must take reasonable steps to prevent violations.
  - The Review Commission found important that the controlling employer hired "safety-conscious" subs.
  - Less frequent inspections by a controlling employer may be appropriate if its contractor has a demonstrated history of compliance and sound safety practices.

The Multi-Employer Worksite Policy – Recent Cases, cont'd.

- *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 743 (5th Cir. 2018)
  - Held that the Secretary of Labor has the authority under section 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), to issue citations to controlling employers at multi-employer worksites for violations of the Act's standards
  - Previously, the Fifth Circuit was the only jurisdiction in the nation that did not recognize MEP

SECTION 02

THE *SASSER* DEFENSE

Sasser – What is it?

– Generally, under OSHA's multiemployer citation policy, an employer has a duty to protect its own employees from exposure to a hazard created by another company.

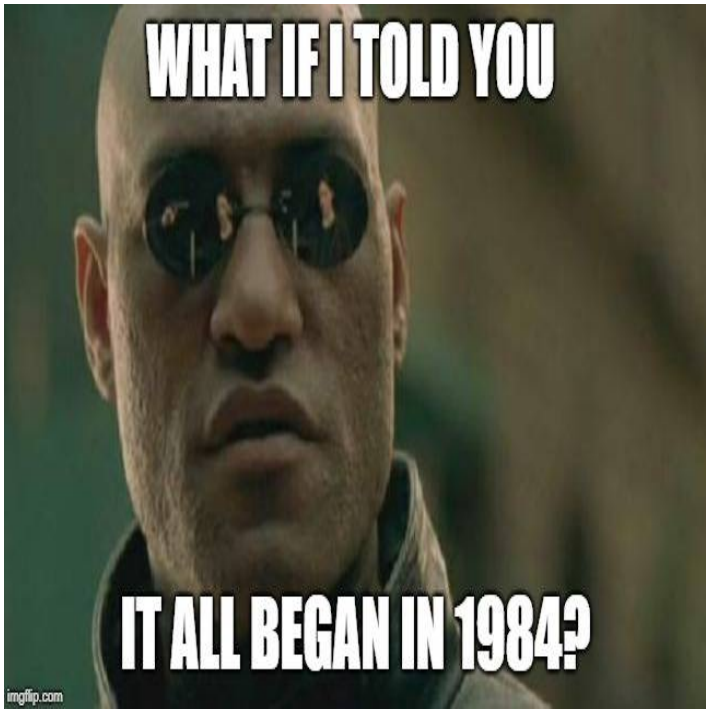
– S*asser* is an exception to this general rule: it allows employers to hire and rely upon expert contractors for specialized work.

– Reliance must be "reasonable" based on reputation and history.

– Hazard cannot be obvious.

Sasser – The Relevant Facts

- *Sasser Elec. & Mfg. Co.*, 11 O.S.H. Cas. (BNA) ¶ 2133 (O.S.H.R.C. July 20, 1984)
- Sasser fabricated, installed, and serviced diesel generators at a worksite in West Virginia.
- Sasser employed mechanics and electricians at the worksite.
- Sasser hired a crane operator, Mountain Trucking, to load a generator onto the bed of a trailer.
- Mountain Trucking had 15 years of experience and had performed crane operations for Sasser at the specific worksite several times before without incident.



Sasser – The Job

- Sasser employees:
  - Cautioned the crane operator to watch out for overhead power lines and identified where those power lines were.
  - Attached the generator to the crane's cable with choker cables.
  - Provided directions and hand signals to the crane operator when it was time to center the generator over the truck.
- Sasser's employees did not provide any assistance to the crane operator when he navigated the generator to the area where the trailer was located.

Sasser – The Job

- The crane operator successfully placed the generator on the bed of the trailer.
- The cable at its closest point was approximately 15 feet from the power lines.
- Sasser employees removed the choker cables from the generator and prepared to disconnect the choker cables from the crane's cable.
- The crane suddenly swung back in the direction it had come, with two Sasser employees still holding the choker cables.
- The crane's boom or cable contacted a power line and caused an arc flash,
- The two Sasser employees were seriously injured.
- The crane operator was the only person in the cab of the crane at the time of the accident.
- The entire operation lasted just several minutes.

Sasser – The Citation and Litigation

- OSHA cited Sasser under a crane standard for failing to maintain a sufficient 10-foot clearance from the power pursuant to 1910.180(j)(1)(i).
- The ALJ found that Sasser did not have contructive knowledge of the violation.
- The Secretary appealed, arguing that Sasser could have reasonably foreseen the violation because of the proximity of the power lines, poor visibility at the time of the job, the crane operator's lack of familiarity with the specific crane involved, and because Sasser's employees assisted the crane operator at the worksite.
- On review, the Commission agreed that Sasser had a duty to protect its employees from hazards that are under the control of a separate company, but held that "***an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely***."

Sasser – The Commission's Findings

- The Commission relied upon several facts in affirming the ALJ's decision:
  - Sasser never operated cranes.
  - Whenever a crane was needed, Sasser hired a crane company such as Mountain Trucking.
  - Mountain Trucking was a separate company contracted to perform the specific task of moving the generator onto the trailer of a truck.
  - The cited hazard fell squarely within the expertise of the crane operator.
  - Only the crane operator had direct control over the cited hazard and could assure that the crane maintained sufficient clearance from the power lines.
  - Maintaining sufficient clearance in accordance with the standard was a requirement that the crane operator reasonably could be expected to know and comply with.

Sasser – The Commission's Findings Con't

- The Commission found that Sasser had no reason to foresee that the violation would occur because:
  - The crane operator had performed work for Sasser at the jobsite three to four times before without incident.
  - Sasser's employees pointed out the power lines to the crane operator.
  - The crane operator raised and lowered the generator onto the trailer without any difficulty.
  - It was reasonable for Sasser to assume the return path of the boom would be the same.
  - Sasser's employees' assistance in the task had no impact on the crane operator's ability to comply with the standard.

Successful *Sasser* Defenses: Hazard Not Obvious

- *Mustang Eng'g Holdings, Inc.*, 2009 O.S.H. Dec. (CCH) ¶ 32984 (O.S.H.R.C.A.L.J. May 26, 2008)
  - Vacating a trenching violation for slope degree requirement where the record demonstrated that the hazard was not obvious because the trench was sloped to a degree just shy of the required 1:1 ratio, the CSHO requested that Mustang's employees remain in the trench to assist in taking measurements, and the contractor allowed its own employees to work in the trench.

Successful *Sasser* Defenses: Relevance of Historical Evidence

- *Martin Constr., Inc.*, 21 O.S.H. Cas. (BNA) ¶ 2187 (O.S.H.R.C.A.L.J. Mar. 5, 2007)
  - Trenching contractor had performed work for Martin for 10 years without incident, and the contractor had no history of OSHA violations.
- *Manhattan Constr. Fla., Inc.*, 24 O.S.H. Cas. (BNA) ¶ 1919 (O.S.H.R.C.A.L.J. Sept. 3, 2013)
  - Testimony that the accident was "freakish" and that during witnesses' long careers in concrete industry, they had never experienced, heard of or seen a similar accident.
  - ***"An employer is responsible for hazards normally and reasonably anticipated based on knowledge, experience and expertise of the work being performed."***

Rejected *Sasser* Defenses

- *Summit Contractors, Inc.*, 23 O.S.H. Cas. (BNA) ¶ 1196 (O.S.H.R.C. Aug. 19, 2010)
  - Summit brought noncompliance electrical equipment onto the construction worksite, which created the hazardous condition, and the lack of GFCI protection was a readily discernible condition, and its discovery required no specialized expertise.
- *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1083 (D.C. Cir. 2007)
  - Unlike Sasser, the employer was an experienced concrete contractor that ***shared*** control over the hazardous work.
  - ***"Sharing control is not relinquishing control."***
  - Unlike the few minutes in *Sasser*, the hazard took place over the span of several weeks at the direction of the employer's management and by the hands of its employees.
- *R.P. Carbone Constr. Co.*, 18 O.S.H. Cas. (BNA) ¶ 1056 (O.S.H.R.C.A.L.J. Mar. 3, 1997) (Welsch, J.)
  - Steel erection subcontractor failed to use fall protection while installing bridging and detailing.
  - ALJ found that the employer ***"has a responsibility to know its subcontractor's fall protection plan to assure its adequacy and compliance with safety standards."***
  - No evidence that the employer reviewed the subcontractor's fall protection plan, or even discussed the method and scope of it with the subcontractor.
  - Reliance on a subcontractor's compliance with its subcontract agreement does not relieve the general contractor of its responsibility to prevent or detect the lack of fall protection.

Sasser Defense Upheld and Rejected Depending on Specific Citation

- *Archer-W. Contractors, Ltd. and Gilbert Corp., Joint Venture*, 15 O.S.H. Cas. (BNA) ¶ 1013 (O.S.H.R.C. Apr. 30, 1991)
  - *Sasser* defense rejected for operational citation in case involving collapse of tower crane at construction site, but upheld for defense of training citation.
    - Employer was liable for pressuring crane operator to exceed the lifting capacity of the crane.
      - **"The evidence establishes that [the employer] was fully aware that the lift was unsafe and that it actually insisted that the lift be made despite the hazard. Given these facts, the allocation of responsibility under the contract has no real relevance."**
    - Employer was not liable for failing to train its employees to recognize and avoid unsafe crane conditions.
      - Record demonstrated that employer relied upon crane operators to determine the load capacities of the cranes.
      - **"We cannot fault [the employer] for failing to instruct its employees in matters that fall within the expertise of [its contractor specialists] when it reasonably relies on that expertise."**

Sasser – Takeaways

- Very fact-sensitive inquiry.
- If a hazard would be known to you based on your experience (even if your within your expertise), you are responsible for it.
- Written contracts matter, but you cannot stick your head in the sand.
- Make sure you actually rely on the contractor's expertise in all matters relevant to performance of the work.

Presenter

Brandon J. Brigham
Philadelphia
T +1.215.963.4780
F +1.215.963.5001

Brandon J. Brigham represents employers in discrimination, whistleblower, retaliation, and ERISA claims. He has particular experience litigating unfair competition matters on behalf of pharmaceutical, retail and financial services clients. Brandon also provides counsel to manufacturing, construction, retail, and refining companies on matters arising under OSHA, including advice regarding worksite investigations, compliance, and safety and health plans. He counsels on US federal and state employment laws such as the ADA, FMLA, and the New Jersey Law Against Discrimination.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington

Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU