GENERAL CONTRACTORS AND THEIR LEGAL SAFETY LIABILITY OF SUBCONTRACTORS

By Steven V. Lowry

Editor's note: *This article was written by the author for the spring 2019 Eastern Kentucky University class "OSH 225 Legal Aspects of Occupational Safety."*

ABSTRACT

This paper delves into complex area of general contractor liability regarding their subcontractors' unsafe acts. The general contractor, as the controlling contractor, certainly has a responsibility for overall safety of a job site, but what if there is an adequate safety plan that the subcontractor failed to follow? Is the general contractor still responsible? What if the subcontractor provided false documentation regarding their safety program or certifications? Does responsibility of safety translate into liability for unsafe acts in these instances? Although the Occupational Safety and Health Administration (OSHA) does provide some direction, OSHA will still hold the general contractor accountable for unsafe acts on a project. Some actions to help limit liability and transfer accountability back to the offending party are detailed. However, ensuring a safe worksite and an adequate safety plan are always best practices.

Recent headlines assert a trend of OSHA holding general contractors accountable for subcontractor safety violations: "OSHA Fines Local General Contractor for Subcontractor Violations" (Carr, 2014); "Appeals Court Rules Contractors Can Be Cited for Hazardous Conditions at Multi-employer Worksites" (Safety + Health, 2018); "Court Upholds OSHA Citation Against a General Contractor for Safety Violations by a Subcontractor" (Bogue, 2018); and "Virginia Cites Contractor for Safety and Health Violations" (OSHA Quicktakes, 2019). In each case, a general contractor was cited and fined for unsafe acts committed by their subcontractor. Why issue citations to the general contractor and hold them liable in these cases? What justification can be made to cite both the general contractor and the subcontractor that is the entity that actually employed the worker committing the unsafe act? This paper delves into the legal issues that support OSHA's position and how a general contractor can establish some safeguards in their organization.

Prior to 1999, OSHA penalties were mainly assessed against the specific employer of the worker committing the unsafe act (i.e., the subcontractor). These cases point back to a landmark 1981 decision where the Fifth Circuit Court ruled that "OSHA regulations protect only an employer's own employees" in *Melerine v. Avondale* Shipyards Inc. (Safety and Health, 2018). Unfortunately, worker injuries and fatalities were on the rise in the construction sector, yet sharp reductions were recorded in most other sectors with an 8% decline overall. In fact, 1998 marked a year where construction-related fatalities accounted for one-fifth of all U.S. fatalities and accounted for the largest number of fatal work injuries of any industry per the U.S. Bureau of Labor Statistics census for 1998 (see Table 1). Because of trending data, there was much concern on the federal government's part about what approach general contractors were taking to reducing these incidents.

In fact, the Occupational Safety and Health Act was amended to add language to support this position on Dec. 10, 1999, under OSHA's Multi-Employer Citation Policy, CPL 02-00-124 (OSHA, 1999). According to this new policy, "employers on multi-employer worksites fall into four basic categories: controlling, acting, creating, correcting employer" (Carr, 2014). A controlling employer is an employer who, by contract or actual practice, has the responsibility and authority for ensuring that hazardous work conditions are corrected. In most cases, this would be a general contractor. Acting general contractors are typically deemed the controlling employer and responsible for the safety and health of each and every worker at the job site. A creating employer is the employer whose activities have created a hazardous condition at the job site. A correcting employer is the employer who is responsible for correcting or fixing a hazardous condition. Lastly, an exposing employer is any employer whose workers are exposed to the hazardous condition (OSHA, 1999).

The U.S. Department of Labor, Occupational Safety and Health Administration Construction Standard, (2016) 29 CFR 1926 Subpart B. 1926.16 also supports this position with language that now defines this policy as:

"What justification can be made to cite both the general contractor and the subcontractor that is the entity that actually employed the worker committing the unsafe act?"

TABLE 1: CONSTRUCTION RELATED FATALITIES ON THE RISE FROM 1993-1998

Industry	SIC Code (1)	1993-97 average	1997 (revised) Number	Number	Percent	Number	Percent
Total		6,335	6,238	6,026	100	132,684	100
Private industry		5,662	5,616	5,428	90	113,066	85
Construction		1,034	1,107	1,171	19	8,044	6
General building contractors	15	180	194	212	4	-	-
Heavy construction, except building	16	249	252	271	4	-	-
Special trades contractors	17	597	648	679	11	-	-

Note: Adapted from U.S. Department of Labor, Bureau of Labor Statistics' National Census of Fatal Occupational Injuries, 1998. Report: USDL 99-208

1926.16(a) allows for negotion between responsibility of safety arrangments between a general contractor (i.e., prime contractor) and their subcontractor. An example is provided on what this may look like in regard to first aid or sanitation. However, 1926.16(a) expressly states that these negotiated arrangments do not relieve the general contractor from legal liability; "but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract" (OSHA, 2019, para. 1).

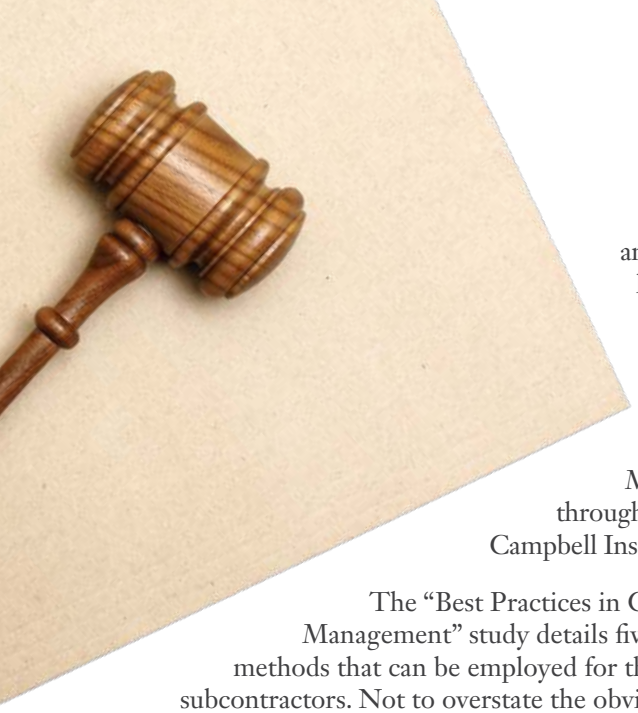
1926.16(b) further clarifies this point by stating that the general contractor has full obligation of performance of a contract under 107 of the OSH Act: "the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work" (OSHA, 2019, para. 2).

1926.16(c) is applied evenly to both the general contractor and subcontractor. Per this portion of the regulation, both parties would be held equally responsible for any safety violation: "With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility" (OSHA, 2019, para. 3).

1926.16(d) very clearly provides OSHA the ability of full enforcement across all parties that may be involved in a safety violation whether they are the general contractor, subcontractor or even a subcontractor of the subcontractor: "regardless of tier, shall be considered subject to the enforcement provisions of the Act" (OSHA, 2019, para 4).

A recent Nov. 26, 2018, ruling from on *Acosta v. Hensel Phelps Construction Company* has solidified the landscape for the construction industry (Safety + Health, 2018). In this case, the U.S. Fifth District Court of Appeals, in what may be another landmark ruling, upheld the original citation and invalidated any use of the "Chevron deference," which based its argument on the 1981 *Melernie v. Avondale* ruling. The "Chevron deference" stems from the 1984 U.S. Supreme Court case, *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, in which the U.S. Supreme Court ruled that courts should defer to an agency's interpretations of its own statutes if that interpretation is reasonable, and Congress has not addressed the issue clearly (Kim, 2017). This decision, coupled with the clear regulatory language of OSHA, a government agency, has essentially laid to rest any question on whether a general contractor is liable for unsafe acts of subcontractors on the general contractor's worksite.

At first glance, it seems like the general contractor is stuck between the proverbial "rock and a hard place." They cannot reprimand or terminate the offending worker since said worker is the employee of the subcontractor. If they terminate the contract of the subcontractor, the general contractor then risks the project falling behind schedule, which may result in loss of revenue and profit margin. So, what is a general contractor to do? Well, there are options, and certainly some precautions a prudent general contractor may employ,



and much of this has been captured in the details of Inyoue's 2015 study, "Best Practices in Contractor Management," through the Campbell Institute.

The "Best Practices in Contractor Management" study details five very simple methods that can be employed for the vetting of subcontractors. Not to overstate the obvious, but vetting should start well before the subcontractor ever steps foot on a general contractor's project site. Vetting begins with prequalification, then moves to pre-job task and risk assessment, contractor training and orientation, monitoring of job, and ends with post-job evaluation (Inouye, 2015). These five steps are summarized in more detail below:

Prequalification includes items that assess subcontractors on their safety statistics. These statistics should include evaluating exopereince modification rate (EMR); total recordable incident rate (TRIR); fatality rate; and days away, restircted or transferred (DART). It is also wise to verify worker's compensation polices are in force and adequate limits are in place. These statistics are well understood across industries and organizations of all sizes, therefore making them a standard for data collection. A rating system could be applied based on a standard set of set of metrics, and potential candidates would have to receive a passing grade to be considered.

Pre-job task and risk assessments should be performed at the outset of any project. A risk matrix or initial risk assessment should be conducted based on the scope of work and on the subcontractor's work procedure. This could be compared to the ranking of the subcontractor per the prequalification assessment to properly place a subcontractor in a predetermined risk category. Verify a safety compliance program is in place and addresses subcontractor activities. It should enhance your safety program. It is important to note that high-risk activity should have its own written safety program.

Contractor training and orientation should be conducted for all subcontractors and workers for them to be approved to work on a project. Items to be included are at a minimum an introduction to the general contractor's safety program, safety expectations, site safety plan, emergency action plan (EAP), incident reporting procedures, in-house citations and consequences. Site and task-specific training by a "competent person," as defined by OSHA, should be conducted. Any specialized permitting or certifications should be reviewed and evaluated.

Monitoring of a job is an essential method that is necessary to evaluate subcontractor competency and compliance. Periodic assessments could include a range of tools from daily checklists or toolbox talks to weekly walk-arounds and formalized monthly and yearly safety inspections.

Finally, **post-job evaluations** should be conducted. This is a major area where many general contractors fall short, even when the general contractor may have all the previous methods in place. Joy Inouye acknowledges this point in "Best Practices in Contractor Management" by stating, "The extensive vetting process plus numerous and varied methods for assessing a contractor during the period of the contract term make it all the more surprising that so few of the participants in the study had a method of evaluating contractors once work is finished, nor specific guidelines for contractor requalification" (Inouye, 2015). Post-job evaluations should include guidelines such as record-keeping, number of claims or "near misses," participation in safety orientation and training, turning in of required reports or inspections, and number of in-house citations. These items, although not all inclusive, can be managed through a mandatory safety assessment post-project completion to be considered for future work.

The approach detailed above is not without investment in dollars, effort or commitment. In fact, most companies in Inyoue's study recognize that the subcontractor vetting process is very rigorous. It is also worthy to note that many of these same companies have moved beyond simply looking at numbers such as EMR, DART and TRIR and now consider a subcontractor's use of leading indicators, the quality of their safety program and the presence of a continuous improvement plan as well. In fact, these same companies often employ the use of third-party pre-qualifying agencies to help subcontractors bridge gaps in their safety management systems so that the subcontractors may increase eligibility for bidding on projects. This is a very progressive approach since many subcontractors do not have the means or administrative personnel on staff to maintain compliance with the many regulations, certifications and requirements the demanding construction marketplace often calls for. Although heavily focused on managing risk and insurance to reduce costs, the five-step method does bring focus back to the importance of safety (Inyoue, 2015). Vetting subcontractors through the screening of high incident rates is an effective way to determine which

subcontractors are high risk. In turn, a general contractor that does not take on the high-risk subcontractor may see reduction in liability and insurance claims, create a safer work environment and a potential increase in profits. As is often heard in the environmental, health and safety industry, "Safety is good business!"

In conclusion, it is imperative for a general contractor to be aware of current regulations, case law and interpretation. Considering today's ever-changing legal environment, what may have been allowable in decades past might not be a defensible position today. General contractors still operating under the assumptions of protections under old, pre-1999 case law, and interpretations may be in for a rude awakening when they are cited and fined for a subcontractor's unsafe act. Once, the general contractor may have had protection under the *Melerine v. Avondale* ruling. Today, this is just not the case. General contractors must institute a program whereby subcontractors are vetted and evaluated before, during and after contract term. If not, general contractors are subjecting themselves to a huge exposure that may culminate in citations and heavy penalties. Worse yet, workers may be put at risk. As stated previously, ensuring a safe worksite and an adequate safety program are always the best practices. To quote the old Benjamin Franklin adage, "An ounce of prevention is worth a pound of cure." RIA

> "Although heavily focused on managing risk and insurance to reduce costs, the five-step method does bring focus back to the importance of safety."

Steven V. Lowry *is the director of contents, cleaning and safety at Jenkins Restorations. Lowry has more than 24 years in the property restoration industry, 19 of which are in the mitigation/remediation. Lowry is currently a board member of RIA, the chair of the Restorations Council and is also actively involved with the Property Insurance and Restoration Conference (PIRC).*

REFERENCES

Bogue, S. (2009). Court upholds OSHA citation against a general contractor for safety violations by a subcontractor. McGrath North Publications. Retrieved from https://www.mcgrathnorth.com/publications/court-upholds-osha-citation-against-a-general-contractor-for-safety-violations-by-a-subcontractor/

Carr, R. (2014). OSHA fines local general contractor for subcontractor violations. Good to Know. Retrieved from https://bes-corp.com/osha-fines-local-general-contractor-for-subcontractor-violations/

Inouye, J. (2015). Best practices in contractor management. Campbell Institute Library Online. Retrieved from www.thecampbelinstitute.org/library

Kim, J. (2017, December). Legal Information Institute: Chevron Defense. Cornell Law School Online Library. Retrieved from https://www.law.cornell.edu/wex/chevron_deference#

National Safety Council (2018, December). Appeals court rules contractors can be cited for hazardous conditions at multi-employer worksites. Safety and Health Magazine. Retrieved from https://www.safetyandhealthmagazine.com/articles/17780-appeals-court-rules-contractors-can-be-cited-for-hazardous-conditions-at-multi-employer-worksites

Macon, J. (1983, May). Research summaries: Number of occupational deaths remained essentially unchanged in 1981. Monthly Labor Review. Retrieved from https://www.google.com/url?q=https://www.bls.gov/opub/mlr/1983/05/rpt4full.pdf&sa=U&ved=0ahUKEwj3r_nw3uvgAhUv2FkKHUbICngQFggEMAA&client=internal-uds-cse&cx=013738036195919377644:6ih0hfrgl50&usg=AOvVaw2WfnFMTM_zoFz7EnNhIpkv

U.S. Department of Labor, Bureau of Labor Statistics (1999). National census of fatal occupational injuries, 1998. Report: USDL 99-208. Retrieved from https://www.bls.gov/news.release/history/cfoi_08121999.txt

U.S. Department of Labor, Occupational Safety and Health Administration (2002, January). Standard interpretations clarification of "Controlling Contractor" duties under the steel erection standard 1926 Subpart R. Retrieved from https://www.osha.gov/laws-regs/standardinterpretations/2002-01-30

U.S. Department of Labor, Occupational Safety and Health Administration (1999). Multi-employer citation policy, CPL 02-00-124. Retrieved from https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES

U.S. Department of Labor, Occupational Safety and Health Administration (2019). Subpart B, General Interpretations 29 CFR 1926.16. Retrieved from https://www.osha.gov/laws-regs/regulations/standardnumber/1926/1926.16

U.S. Department of Labor, Occupational Safety and Health Administration (2019, March). Virginia cites contractor for safety and health violations. Quicktakes. 18(4).