



Best's Insurance Law Podcast

Understanding How OSHA's Multiemployer Worksite Citation Policy Impacts Construction Claims - Episode #218

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Hosted by: John Czuba, Managing Editor

Guest Expert: Dr. Janine McCartney of [HHC Safety Engineering Services](#) and [HHC Safety Consulting Services, Corporation](#)

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, manager of *Best's Insurance Professional Resources*.

We're very pleased to have with us today expert service provider Dr. Janine McCartney of [HHC Safety Engineering Services](#) and [HHC Safety Consulting Services, Corporation](#) of Wilmington, Delaware and with an office in Houston, Texas as well. The companies provide safety consulting, safety engineering consulting, and expert witness services to law firms and the insurance industry.

Dr. McCartney is a senior safety engineer and expert witness. She has a certified safety professional and a construction health and safety technician's designation with 31 years experience in safety. Her professional career has spanned over 45 years in private and government service with OSHA consultation.

Dr. McCartney has worked in the oil and gas industry and in the pipeline and construction industry as a regulatory expert. In safety, she worked her way up from safety representative to safety manager to safety officer two, to manager and then to an expert.

She has extensive OSHA policies knowledge and has technical and historical knowledge in construction, telecommunication, utilities, manufacturing, food processing, distribution, oil and gas exploration and production, and property management.

Dr. McCartney is also an editor of *Science Direct*, *Heliyon* and *Data in Brief* and an editor and reviewer of *Science of the Total Environment*. She also works as an expert and consultant on a day-to-day basis. Dr. McCartney, we're very pleased to have you with us again today.

Dr. Janine McCartney: Thank you, John, and thank you for the opportunity to provide this podcast to your audience.

John: Today's discussion centers on OSHA's Multi-employer Worksite Citation Policy and how it impacts construction cases. For our first question, what is the OSHA Multi-employer Worksite Citation Policy?

Dr. McCartney: That's a great question, John. OSHA wrote, adopted, and implemented the Multi-employer Worksite Citation Policy as an enforcement policy starting in December of 1999. This policy applies to all industries that OSHA has authority, including construction.

On a construction site, there may be multiple contractors on a single site. Generally, a contractor can be fined for the same violation if it is shown that they took part in creating the hazard, exposing their employees to their hazard, or they failed to correct the hazard.

If the general contractor failed to control the hazard, then the general contractor may be cited as well. Let me pose this simple example to explain the policy. First, there has to be a violation of an OSHA standard for OSHA to issue the citation according to the Multi-employer Worksite Citation Policy.

For example, a 66-year-old piping plumbing contractor and a 32-year-old laborer died when the trench they were working in collapsed. It buried them.

The contractor and the three employees have been working for a general contractor on a large construction site for a week to replace the sewer line. The general contractor has wide supervisory authority and is the controlling contractor. The piping plumbing contractor was the competent person on site.

To replace the sewer line, they used an excavator to dig a trench that was 26 feet long, 24 feet deep. It was 24 feet wide at the top and eight feet wide at the bottom. The sides of the trench were steep and nearly vertical.

The general contractor did not regularly inspect the job site, nor did they inspect the trench when the plumbing contractor was working. They didn't inspect the trench when it was dug, the day it rained, or the next day when the plumbing contractor was performing work.

The trench where the plumbing contractor was working was dug in an unstable soil, and the regulations call it a Type C soil, where the plumbing and piping contractor did not use protective systems such as shoring shields, trench boxes, sloping and benchings of the side.

On the day before the incident, the trench collapsed after a rainstorm. On the morning of the incident, one of the workers used a large excavator to scoop out the collapsed soil. Since the general contractor did not inspect the job site, the general contractor did not control any of the hazards.

Another worker used a small excavator to push the spoil piles back from the trench edge. The contractor and the laborer then use an extension ladder to enter the trench and dig a larger trench. The contractor located the sewer lines. He then told other workers he was going to replace a section of the old line. A few minutes later, the trench wall collapsed and both of them were buried.

Following the incident, the investigators found that there was no trench shoring. There was some shoring equipment on site, but it wasn't adequate for the contractor to use. There was no safe means of egress from the trench.

The employer, the plumbing and the pipe fitting contractor had previous safety violation, including having workers in an unprotected trench with no ladder as a means of access and egress. That is the unfortunate scenario.

Looking at the Multi-employer Worksite Citation Policy, there has to be one OSHA regulation that was violated for any employer to receive an OSHA citation. You saw from the incident that there were several causation factors. At least one of those violations by the plumbing and the piping contractor is 29 CFR 1926 652 (a)(1), where each employee and an excavation shall be protected from cave ins by an adequate protective system.

At the same time, the plumbing piping contractor receives a citation for this violation, it also comes to light that the general contractor did not inspect any of the contractors on a regular basis on that job site, and they were also not regularly available for any contractor interaction.

In this scenario, the general contractor is the controlling contractor. They did not control the job site hazards adequately. Due to the OSHA Multi employer Worksite Citation Policy, the general contractor may be cited for that same violation as the pipe fitter plumber, which is the 29 CFR 1926 652 (a)(1).

The general contractor did not meet the OSHA reasonable standard of regular job site inspections nor did the general contractor vet the contractor safety program, their safety training program, or their injury rate to discover their pattern and practice of non-compliant safety practices.

With respect to the Multi-employer Worksite Citation policies, there are four roles of contractors, controlling, creating, exposing, and correcting employers. If you quote from the OSHA Multi employer Worksite Citation Policy, it applies to construction and non-construction work sites.

"On multi-employer worksites, citations normally will be issued to employers who employees are exposed to the hazards, so that's your exposing employer. However, the following employers may also be cited whether or not their own employees are exposed.

"The employee who actually creates the hazard, the creating employer, the employer who was responsible by contract or through actual practice for safety and health conditions on the worksite. The employer has the authority for ensuring that the hazard condition is corrected and that is the controlling employer.

"The third employer is the employer who has responsibility for actually correcting the hazard and that's the affecting employer" (OSHA Multi-employer Worksite Citation Policy). That is from an OSHA Standard Interpretation on the Multi-Employer Worksite by Peter G. Chaney, 7/8/1997. Again, quoting from a letter of interpretation.

"When determining if an employer should be cited for a hazardous condition, the first step is to determine if the employer has responsibilities with respect to the OSHA requirements. This is evaluated based on the employer's role at the worksite.

"There are four employer role categories: exposing an employer whose own employees are exposed to the hazard, creating an employer that creates the hazard to which a different employer's employees are exposed, correcting an employer that has been brought in specifically to correct hazards.

"Four, controlling, an employer with general supervisory authority over the worksite with the purpose to have safety and health violations corrected." It also states that a lesser degree of care is required for a controlling employer than that of the other categories to prevent and discover hazards" (OSHA Multi employer Worksite Citation Policy, 12/1999, OSHA Standard Interpretation on the Multi-Employer Worksite by Peter G. Chaney, 7/8/199).

It's important to understand that the controlling contractor's defense to the OSHA Multi-employer Worksite Citation Policy is meeting OSHA's reasonable care standard. A controlling contractor or general contractor is not expected to be a babysitter with respect to safety.

The controlling contractor must exercise reasonable care to detect violations of a standard on the construction site and make regular job site inspections. Each contractor and subcontractor is generally expected to have their own safety staff to monitor their employees. Generally, the general contractor does not have an employment duty to other contractors and subcontractors.

OSHA states the following, "A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that are controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees" (OSHA Multi employer Worksite Citation Policy, 12/1999).

This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

John: Dr. McCartney, why is the Multi-employer Worksite Citation Policy important to construction claims?

Dr. McCartney: With respect to construction claims, it's my experience, right or wrong, in court cases, liability has almost been attached to complaints and petitions of general contractors and assess that they are the controlling contractor, as well as the creating contractor, the contractor that created the hazard, the exposing contractor, the contractor who exposed their own employees to the hazard, and the correcting contractor.

In other words, OSHA's policy has been used as a standard of care to bring construction suits. Liability is assessed to those who are identified as one of the four categories in the Multi-employer Worksite Citation Policy.

John: Who does the Multi-employer Worksite Citation Policy apply to?

Dr. McCartney: McCartney: That's a great question, John. The Multi-employer Worksite Citation Policy applies to every contractor and subcontractor on a construction site. It should be known, not every contractor will receive the label of creating, correcting, controlling, or exposing contractor. There are some guardrails around who actually will receive the citation.

Looking at the OSHA standard interpretation dated 7/20/2012 and under the Multi-employer Worksite Citation Policy, more than one employer may be citable for a hazardous condition that violates an OSHA standard. Any employer that exposes one of its own employees to the hazards created by an unsafe condition, is subject to the OSHA citation.

In situations where an employer's own employees are not exposed to the hazard, that employer may still be subject to OSHA coverage if it qualifies as creating or correcting employer. A two-step process is used whether more than one employer may be cited for a hazardous condition.

Step one, the first step is to determine whether the employer is creating, exposing, correcting, or controlling employer. Once you determine the role of the employer, step two is used to determine whether the citation is appropriate.

Step two, if an employer falls into one of the categories, it has its obligations with respect to OSHA requirements. Step two is to determine if the employer's actions were sufficient to meet those obligation. The extent of the actions required of an employer varies based upon the category.

John: How and when does the Multi-employer Worksite Citation Policy apply?

Dr. McCartney: Again, a great question, John. To look at how the Multi-employer Worksite Citation applies to contractors, it will depend upon if the contractor employer fits into one of the categories. The National Association of Homebuilders has a really succinct cut sheet which explains the four categories. They are as follows:

"A citable creating employer causes the hazardous condition that violates the OSHA standard, such as failing to cover drums of chemicals that expose either their own employees or other employees at the worksite to a hazard. A citable exposing employer knows of or failed to exercise reasonable diligence to discover a hazardous condition and failed to take steps to protect its employees from the condition.

To avoid a citation, an exposing employer must either correct the hazard, if it has authority, or if it does not have the authority, ask the creating or controlling employer to correct the hazard. It must inform its employees of the hazard, take reasonable alternative protective measures, which can include removing its employees from the job.



A citable-correcting employer is engaged in a common undertaking on the same worksite as the exposing employer and fails to exercise reasonable care to prevent or discover a hazard when it has a duty to do so.

This usually occurs when the correcting employer is responsible for installing or maintaining safety and health equipment or devices, such as carpenters erecting a guardrail on another employer's property.

The last category, a citable controlling employer fails to exercise reasonable care and has general supervisory authority over a worksite including to correct safety and health violations itself or require others to correct them, such as a general contractor who has hired and has full contract authority over an electrical subcontractor (NAHB).

Reasonable care generally requires periodic inspections of the worksite and can be demonstrated by implementing a system for correcting hazards and enforcing a safety and health compliance program.

John: Dr. McCartney, what types of construction cases have you seen in Multi-Employer Worksite Citation Policy applied by OSHA?

Dr. McCartney: John, I've worked on many, many cases in construction, where the OSHA Multi employer Worksite Citation Policy was used to attach liability.

Some of the cases I have worked on include construction cases of large office buildings, construction cases of large school campuses being renovated, construction cases where manufacturing plants were being constructed, construction cases where refineries were being constructed.

Other cases include: wind turbine generators and wind farms being constructed, cases where landfills were renovated, cases involving home builders and their subcontractors, and a construction case involving a stream and wetland restoration project.

John: Dr. McCartney, one final question today. How are the general contractors of a project affected in a suit brought under the premise of OSHA's Multi employer Worksite Citation Policy?

Dr. McCartney: John, in my experience, the general contractor is the most affected company in a suit, where the OSHA Multi employer Worksite Citation applies.

I've seen lawsuits where there's an immediate assumption that the general contractor is the controlling contractor, assumes the liability, and regardless of their defense of reasonable care, the liability has been attached to the general contractor to discover all hazards at all times rather than the reasonable care that OSHA expects.

John: Dr. McCartney, thank you so much for joining us today.

Dr. McCartney: Thank you, John, for this opportunity.



John: You're listening to Dr. Janine McCartney of [HHC Safety Engineering Services and HHC Safety Consulting Services, Corporation](#) in Wilmington, Delaware. Special thanks to today's producer, Frank Vowinkle.

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