

Understanding OSHA's "Multi-employer Citation Policy" on Construction Projects

Whether you're an owner purchasing construction, a construction manager, a general contractor or the kind of specialty sub-contractor whose question inspired this month's column, "doing the right thing" for safety on multi-employer construction sites poses challenges for all parties concerned. Understanding the roles, responsibilities and rights of the various players is key.

An electrical contractor asks: "When OSHA visits a construction project, which contractor(s) face(s) OSHA citations and penalties for defective temporary electrical services? It's difficult for me to control other contractors who modify the services I install and work cooperatively with owners/general contractors who are reluctant to pay for ongoing maintenance."

S+H asked Phil Collieran, a thirty-year veteran of construction safety, to answer:

Your dilemma is classic to multi-employer projects where a variety of specialty trade contractors are performing specific types of work, most of them with little, if any, "purse-strings" (i.e. contractual) authority over each other. These specialty trades, electricians, plumbers, masons, ironworkers to name a few, work either cooperatively or at odds with each other in performing the work safely, based at least in part on the level of commitment to safety demonstrated by an owner, construction manager or general contractor. The roles and responsibilities of the different entities in a project's hierarchy factor greatly in understanding the constraints under which the different entities operate and pointing to the most logical respondent(s) to OSHA Citations. You can apply the principles discussed in this article to a variety of multi-employer site conditions.

OSHA frequently cites deficiencies in temporary electrical services on construction projects because, just like the ever-changing nature of construction, they are "of a class less than permanent" - subject to damage and subjecting workers to accidental contact with dangerous current. Temporary receptacles, into which a variety of crafts plug their tools, must be moved as the project advances. Similarly, lighting stringers that may serve well during one phase, must often be re-strung to serve another. A common problem that emerges on construction projects when a temporary service isn't maintained is damage and/or modification to the service by non-electricians. Obviously, electrical work is best left to the experts: "qualified persons" in OSHA vernacular. Unfortunately electricians can't be at all places at all times and certainly can't be expected to perform work which hasn't been contracted or for which they won't be paid. Further complicating this issue is that technically any contractor whose workers are plugged into a defective temporary electrical service or otherwise exposed to hazards associated with dangerous electrical current, is potentially in violation of OSHA on the basis of three criteria:

- A hazard exists, is accessible, and workers are potentially exposed;
- The hazard can be directly or constructively determined to exist; and
- The hazard can be eliminated.

The problem with using these criteria alone is that they often leave unanswered the fairest assignment of responsibility for the control and correction of hazards. For example,

Is it reasonable for a drywall contractor, acting on faith that a qualified electrician has provided a safe electrical service, to plug his tools into a temporary receptacle that from all outward appearances seems safe? What should the drywall contractor, or any other contractor using the receptacle for that matter, do in verifying the safety of the receptacle? Should they all be testing it for an open ground or other deficiencies?

This begs a further set of questions, all of which might be considered by OSHA in determining which entity, if any, is in violation in your kind of situation:

- Has the bid solicitation to the electrical contractor requested a proposal not only for installation of a temporary electrical system but its *on-going maintenance* and has the money for that work been obligated under the contract's scope of work?
- Absent a request for such a proposal (and because an electrical contractor is presumed to understand that a temporary service will require on-going modification and maintenance), did the electrical contractor suggest it?
- If the electrician proposed on-going maintenance and the expanded scope was refused, is it reasonable that an electrical contractor do the work for free?
- If the money has been obligated and the electrician installs and periodically maintains the system, is the frequency of the inspection and maintenance appropriate and reasonable?

After answering all of the above-questions, an electrical contractor may justifiably ask: "*Why did I get into this business?*"

The answer to many, if not all, of the above questions is that the mere existence of a hazard or exposure to a hazard does not establish an OSHA violation.

Recognizing the many entities involved and the economic forces at work on construction projects - that issuing citations to employers simply because their workers may be exposed to a hazard doesn't always get to the heart of the problem - OSHA has advanced a doctrine, based on a body of case law, that is frequently referred to as the "multi-employer citation policy"¹. The Agency determines which entities on multi-employer construction projects are in violation of its standards in part based on:

¹ OSHA Instruction CPL 2-0.124

- Which entity created (or caused) the hazard (a creating employer)?
- Which entity(s) employees are exposed to the hazard (an exposing employer)?
- Which entity, is *responsible* (most frequently because of work scope) for correction of the hazard (a correcting employer)?
- Which entity has general supervisory authority over the worksite and has the power to correct or require the correction of a hazard (a controlling employer)?

An employer may be one or all of the above.

On construction projects, most contractors rely on “qualified persons” (an electrical contractor) to provide a safe temporary electrical service. In construction, the contract rules, if for no other reason than because each subcontractor has bid the work based on a limited scope. You have very likely submitted a bid that estimates labor and materials to the penny because the construction industry is fiercely competitive. While you probably wish to have a reputation for working cooperatively with other contractors, your business is not a charitable enterprise.

Here is your best course of action:

Often referred to as the "Anning-Johnson/Grossman Steel defense²", citations and penalties have been successfully avoided because an employer can demonstrate all of the following:

- The employer did not cause the hazard to exist;
- The employer did not directly control conditions causing the hazard;
- The employer has taken reasonable steps to notify the party(s) charged with cause and control of the problem; and
- The employer has taken reasonable steps to keep his/her employees away from the hazard, (*short of walking off the job*).

Anning-Johnson’s workers were exposed to falls because of inadequate guardrail protection at floor edges, even though installing guardrails wasn’t within their scope of work. They raised the above “defense” and successfully prevailed when they were issued citations by OSHA for such hazards.

Remember, in using this “affirmative defense”, an employer's on-site representative must be prepared to prove that all of the above elements have been met.

General contractors or other “controlling” entities, by virtue of their purse strings authority on projects, often have difficulty arguing that they have no control of hazards, especially when it comes to general site conditions. However, their diligence in monitoring subcontractors' activities and records showing a systematic effort in ordering abatement of hazards go far in OSHA's evaluation of a contractor’s overall safety effort.

² 515 F.2d. 1081, 1087 n. 14 (3 OSHC 1166) (7th Cir. 1975)

A common concern of subcontractors is formally notifying generals, construction managers or owners of conditions which, although technical violations of the OSH Act, may not present an immediate threat. Contractors, after all, want to maintain good business relationships with others from whom they might get future work. On the other hand, "Avoid Verbal Orders" notices and similar communications speak to a subcontractor's professionalism and thoroughness. Although written notification is always desirable, verbal communications, which can be corroborated, are effective in meeting the test as well.

OSHA considers simple access to a hazard as the basis for establishing employee exposure. The more your site representative inspects the work environment, (including general conditions such as access – even though they're outside your work scope), attempts to get hazards corrected, develops and communicates specific work rules to so your workers can avoid them to a reasonable extent, the better your chances of raising a multi-employer defense.

About the author:

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