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## DAILY NEWS

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# Union Backs Trump OSHA Push To Retain 'Controlling Employer' Authority

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A construction workers' union is backing the Trump OSHA's push to preserve its authority to cite controlling employers for violations affecting other companies' workers, arguing in an appeals court filing that legal precedent and industry practice support the agency's Occupational Safety and Health (OSH) Act authority to cite controlling employers.

[In a Nov. 13 amicus curiae filing with the U.S. Court of Appeals for the 5th Circuit](#), the North America's Building Trades Unions (NABTU) supports Labor Department arguments that its authorizing statutes, rules and long-standing practice support OSHA's ability to cite so-called controlling employers.

"[T]his Court should defer to the Agency's reasonable interpretation of the [OSH] Act and its regulation, which accords with public health principles, industry practice and common law notions of when it is appropriate to recognize a general contractor's duty to ensure that all of the work it controls on a multi-employer worksite is performed safely," the NABTU filing says.

Specifically, NABTU argues that 5th Circuit precedent is "no longer binding" due to intervening U.S. Supreme Court decisions in *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.* and *Martin v. Occupational Safety and Health Review Commission (CF&I)* that required courts "to defer to an agency's reasonable interpretations of ambiguous provisions in their authorizing legislation."

The brief in the case *R. Alexander Acosta, Secretary of Labor v. Hensel Phelps Construction Co.*, supports the Trump Labor Department's (DOL) appeal of an Administrative Law Judge's (ALJ) April 17 ruling that vacated an OSHA citation alleging that general contractor Hensel Phelps failed to adequately protect a subcontractor's workers from a cave-in hazard from unprotected excavation at a construction site in Austin, TX.

DOL appealed the decision July 31, arguing that the OSH Act and its implementing rules back OSHA's authority to cite controlling employers, and that the ALJ erred by citing the case *Melerine v. Avondale Shipyards, Inc.*, which found that "OSHA regulations protect only an employer's own employees" as precedent for OSHA enforcement of the multi-employer policy in the 5th Circuit.

OSHA's "multi-employer" enforcement policy states that an employer who causes a safety violation or any employer having control over a worksite who should have "detected and prevented a violation through the reasonable exercise of its supervisory authority" may be cited, whether or not its own employees were put at risk.

[In a Nov. 6 opening brief](#), OSHA argued that "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."

In the *amicus* filing, NABTU argues that OSHA's interpretation of its authority to cite controlling employers is reasonable, due deference, and appropriate given circumstances at multi-employer construction sites where NABTU members work.

"That the Secretary's interpretation of the statute and the regulation is reasonable is evident when it is viewed in context, for it reflects the realities of the construction industry, is completely consistent with public health principles and

industry practice, and finds strong analogues in common law tort principles," the filing says. -- *Rebecca Rainey* ([rainey@iwpnews.com](mailto:rainey@iwpnews.com))

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