September 2018

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Lane Farley

We believe always in the promise and greatness of America because nothing is inevitable here. Americans never quit, we never surrender, we never hide from history. We make history. - Sen. John McCain

I think I may be violating several unwritten rules by even obliquely approaching anything political or patriotic in a law firm newsletter. But, regardless of your politics, Senator McCain's final letter to America struck me as appropriate for further reflection. We are truly blessed to live in America, with all its faults and all its privileges. So as we launch into the busy fall season, with all its school carpools, don't-lead-with-your-head football, 24-hour news cycles, and hopefully cooler weather, take a moment to join me in being thankful for what we do have. We are thankful for you, our clients and friends, and thankful to live in a country where we can pursue what is just. We at Fletcher Farley join you in never quitting, never surrendering, and hopefully working to make some history we can all be proud of.

You're Not the Boss of Me...(Maybe)

Scott Mayo

Whether the Department of Labor likes it or not, the Occupational Safety and Health Administration ("OSHA") definition of "employer" may be narrowing. The OSH Act defines "employer" as "a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." A common sense reading of this definition in conjunction with the OSH Act would lead most people to the conclusion that an "employer" is responsible for the safety of its own employees. In fact, Section 5(a) of the OSH Act reads as follows:

> "Each ***employer shall furnish to each of his employees*** employment and a place of

In This Issue

Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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> employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to ***his employees*** . . . ."

29 U.S.C. § 654(a) (emphasis added). However, for years, OSHA has systematically expanded the scope of its authority under the OSH Act by issuing "directives" to expand the otherwise plain meaning of "employer".

OSHA's current interpretation of the term "employer" under their Multi-Employer Worksite Policy

Under OSHA's Multi-Employer Worksite Policy (currently interpreted according to OSHA's Directive Number CPL 2-0.124), OSHA takes the position that "on multi-employer worksites, more than one employer may be citable for a hazardous condition that violates an OSHA standard." *See* OSHA Directive CPL 2-0.124: Multi-Employer Citation Policy (Dec.10, 1999). OSHA identifies four categories of potential "employers" that could be cited for a hazardous condition:

> (1) Creating Employer: The employer that caused a hazardous condition that violates an OSHA standard;
>
> (2) Exposing Employer: This is an employer whose own employees are exposed to the hazard. This is the definition that most closely fits with the definition contained within the OSH Act and referenced above;
>
> (3) Correcting Employer: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. OSHA provides the example of an employer that is given the responsibility of installing and/or maintaining particular safety/health equipment or devices such as guardrails on scaffolding; and
>
> (4) Controlling Employer: An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. This is typically a general contractor on a job site.

See id. Note that under OSHA's Multi-Employer Worksite Policy, the employee(s) exposed to a hazard do not have to work for the creating, correcting or controlling employer(s) for those employers to be cited. However, there is currently a case awaiting a decision from the United States Court of Appeals for the Fifth Circuit that may change OSHA's expanded definition of "employer".

Secretary of Labor v. Hensel Phelps Construction Co.

This case arises from OSHA's issuance of a citation to a subcontractor on a jobsite whose employees were exposed to a cave-in hazard. The general contractor on the jobsite, Hensel Phelps Construction Co. ("HPCC"), received the exact same citation as the subcontractor. The citation was designated as a "willful" violation. HPCC contested the citation, arguing to an administrative law judge ("ALJ") that the OSH Act definition of "employer" was not so broad as to include the "controlling employer" as defined within OSHA's Multi-employer Worksite Policy. It should be noted that the stipulated facts presented to the ALJ acknowledged that:

NEW LOCATION! We are hosting this year's TLU at the Hilton Chicago.

For more information and to register for this event, please click here.

Congrats Doug Fletcher and Steven Springer on their selection to the 2018 Texas Super Lawyers list!

We're proud to announce the selection of Doug Fletcher and Steven Springer to the 2018 Texas Super Lawyers list!

This is an exclusive list, recognizing no more than five percent of attorneys in Texas. To read more, please click here.

Congrats to Craig Reese

We're proud to announce that Craig Reese has been recently recertified by the

1. HPCC had a contractual right to stop construction work by the subcontractor when hazardous conditions were identified;
2. HPCC had exercised actual control over jobsite safety at the involved jobsite;
3. HPCC was aware of the cave-in hazard; and
4. HPCC supervisors were actually watching the work proceed at the time of the violations.

Despite all of these facts, the ALJ determined that HPCC "cannot be liable for a violation of the Act based solely upon a subcontractor's employee's exposure to the condition." *Secretary of Labor v. Hensel Phelps Construction Co.*, OSHC Docket No. 15-1638 (2017). The underlying citation was vacated and the Review Commission declined the Secretary of Labor's request that the decision be reviewed by a Commission panel, thus making the ALJ's decision final.

The Secretary of Labor appealed the decision to the United States Court of Appeals for the 5th Circuit, seeking to reverse the decision of the ALJ. The Secretary of Labor asserts that OSHA's interpretations and policies related to the OSH Act should be given deference by the courts. Oral arguments were presented to the 5th Circuit on August 8, 2018. If the decision of the ALJ is affirmed, OSHA Multi-Employer Worksite Policy will no longer be applicable (at least in the 5th Circuit). We will provide an update on this issue as soon as the 5th Circuit issues its decision.

Conflicts Resolved

Missed it by That Much

Scott Mayo and Lorin Subar successfully navigated their way through a recent case by having not 1 but 4 clients dismissed as a result of procedural missteps by Plaintiff's counsel. Our clients (an apartment complex, 2 management entities, and one of the owners) were sued by a tenant alleging premises defects resulting in personal injuries and continuing health issues. The Plaintiff originally sued the wrong management entity without naming the proper management entity, the complex or the owner. Scott Mayo convinced Plaintiff's counsel to voluntarily dismiss the wrongfully named management group because those claims had no merit. At the same time, Plaintiff's counsel attempted to seek leave of court to add the correct management group, the apartment complex and one of the owners to the litigation. However, by the time the Plaintiff sought leave of court to add the new parties, the statute of limitations and the court-imposed deadline for adding new parties had passed. By filing a Motion for Summary Judgment and Plea to the Jurisdiction authored by Lorin Subar, these issues were presented to the Court. The Judge agreed that the deadlines had been missed and that the Plaintiff could show no good cause. Accordingly, the Judge entered a Judgment in favor of the Defendants and dismissed all of the Plaintiff's claims with prejudice.

Texas Board of Legal Specialization in Civil Appellate Law.

Upcoming Speaking Engagements

Craig Reese will be speaking on "What the Trial Lawyer Needs to Know About the Jury Charge" at the Texas Association of Defense Counsel 2018 Annual Meeting in Santa Fe, New Mexico on Friday September 21, 2018.

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