United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PULLMAN POWER, LLC, Respondent.	OSHRC Docket No. 07-1796

APPEARANCES:

Gregory F. Jacob, Solicitor of Labor; Michael P. Doyle, Counsel for Appellate Litigation; Deborah Greenfield, Acting Deputy Solicitor; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Charles F. James, Counsel for Appellate Litigation; Gary K. Stearman, Senior Appellate Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Ronald W. Taylor, Esq.; Venable LLP, Baltimore, MD
For the Respondent

DECISION AND REMAND

Before: ATTWOOD, Acting Chairman, and MACDOUGALL, Commissioner.

BY THE COMMISSION:

Pullman Power, LLC, a contractor on a construction project at a power plant in West Virginia, engaged a specialty subcontractor to fabricate fiberglass-reinforced plastic liners for use in the project. Following an inspection of the worksite, the Occupational Safety and Health Administration issued Pullman a serious citation alleging violations of 29 C.F.R. § 1926.55(a) and (b), which require an employer to adopt measures to prevent employees from being exposed to styrene levels above specified limits (Items 1a and 1b), and 29 C.F.R. § 1926.152(f)(3), which prohibits certain flammable liquids from being used within 50 feet of an ignition source (Item 2). The Secretary alleged under the multi-employer worksite doctrine that Pullman was a controlling employer on the project and therefore liable under all of the citation items for the exposure of an employee of the specialty subcontractor to the cited conditions. The Secretary also alleged that

Pullman's own employees were exposed to the conditions at issue under Item 2. OSHA proposed a total penalty of $8,000.

Administrative Law Judge Dennis L. Phillips granted partial summary judgment to Pullman; he dismissed Items 1a and 1b, and dismissed Item 2 only to the extent it was based on the alleged exposure of the subcontractor's employee. In so ruling, the judge properly relied on then-current Commission precedent under *Summit Contractors, Inc.*, which held that the controlling employer theory of liability when applied to an alleged violation on a multi-employer construction worksite was invalid. 21 BNA OSHC 2020, 2004-09 CCH OSHD ¶ 32,888 (No. 03-1622, 2007) ("*Summit I*"), *rev'd*, 558 F.3d 815 (8th Cir. 2009) ("*Summit II*"), *and overruled by Summit Contractors, Inc.*, 23 BNA OSHC 1196, 2009-12 CCH OSHD ¶ 33,079 (No. 05-0839, 2010) ("*Summit III*"), *aff'd*, 442 F.App'x. 570 (D.C. Cir. 2011).

The Secretary subsequently informed the judge that he no longer intended to pursue Item 2 to the extent it was based on the alleged exposure of Pullman's own employees and asked the judge to issue a final order dismissing that citation item, which the judge did. The Secretary then filed a petition seeking review of the judge's partial summary judgment order and, after the case was directed, Pullman filed a Motion for Reconsideration requesting that the Commission vacate the Direction for Review. For the reasons discussed below, we deny Pullman's motion, vacate the judge's order granting partial summary judgment, and remand for further proceedings consistent with this opinion.

DISCUSSION

I. Motion for Reconsideration of the Direction for Review

Pullman argues that the Commission should vacate the Direction for Review because, it contends, the Secretary requested a voluntary dismissal and failed to properly preserve his right to appeal. In support of its position, Pullman relies on *Prime Roofing Corp.*, in which the Commission noted that there is a "generally recognize[d]" rule that " 'a plaintiff may not appeal a voluntary dismissal because there is no involuntary or adverse judgment against him.' " 22 BNA OSHC 1892, 1895, 2009-12 CCH OSHD ¶ 33,028, p. 54,344 (No. 07-1409, 2009) (quoting *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 308-09 (1st Cir. 2002)).

In *Prime Roofing*, the Secretary voluntarily dismissed his entire complaint in order to seek Commission review of the judge's interlocutory determination that the respondent's notice of contest was valid. *Id.* at 1893, 2009-12 CCH OSHD at p. 54,343. Although the Commission acknowledged that a plaintiff generally may not file an appeal after voluntarily dismissing its complaint, the Commission determined that, under the circumstances, it was proper to consider the Secretary's petition. In reaching its decision, the Commission discussed a First Circuit opinion, *Scanlon v. M.V. SUPER SERVANT 3,* as that circuit would have had jurisdiction over an appeal. 429 F.3d 6 (1st Cir. 2005). In *Scanlon,* the plaintiffs voluntarily dismissed their complaint after the lower court issued an order requiring the parties to arbitrate, and then sought appellate review of the judge's interlocutory order. *Id.* at 8. The First Circuit held that an appeal is permissible under such circumstances only if the plaintiff sought dismissal "without delay," "made explicit" its intent to appeal in the dismissal motion, and requested a dismissal with prejudice.[1] *Id.* at 9-10. In *Prime Roofing*, the Commission noted the presence of all three factors as grounds weighing in favor of its decision to consider the Secretary's petition. 22 BNA OSHC at 1895, 2009-12 CCH OSHD at p. 54,344.

We find that Pullman's reliance on *Prime Roofing*, and its discussion of the *Scanlon* opinion, is misplaced. The Commission addressed *Scanlon* because *Prime Roofing* arose in the First Circuit. *See* 29 U.S.C. § 660(a), (b); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (Commission generally applies law

[1] The First Circuit ultimately held that the plaintiffs could not appeal the interlocutory order after voluntarily dismissing their complaint because they did not request the dismissal without delay and make their intent to appeal explicit in their dismissal motion. *Scanlon*, 429 F.3d at 9-10.

of the circuit where it is probable a case will be appealed). Here, the relevant circuits are the Fourth, Eighth, and D.C. Circuits,[2] none of which impose any of the special requirements discussed by the First Circuit in *Scanlon*. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 591 n. 9 (4th Cir. 2004); *Helm Fin. Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076, 1080 (8th Cir. 2000); *Blue v. D.C. Pub. Schs.*, 764 F.3d 11, 17 (D.C. Cir. 2014). While the Commission did consider the *Scanlon* requirements in *Prime Roofing* and found that they had been met, it did not adopt them as precedent.

Moreover, the circumstances at issue in both *Prime Roofing* and *Scanlon* are very different from those in the instant matter. Those cases addressed situations in which the plaintiff voluntarily dismissed its *entire* complaint and then sought to appeal an interlocutory order that had not resolved the merits of the claims at issue. Here, in contrast, after the judge ruled against the Secretary by granting Pullman partial summary judgment, the only issue that remained was, as the Secretary later stipulated, the allegation under Item 2 that Pullman's own employees were exposed to the cited condition. Once the Secretary voluntarily withdrew this remaining allegation, all issues in the citation and complaint were resolved.[3]

All federal circuits allow a plaintiff to appeal a partial summary judgment or partial dismissal order after voluntarily dismissing any remaining claims. *See, e.g.*, *Blue*, 764 F.3d at 17 ("Every circuit permits a plaintiff, in at least some circumstances, voluntarily to dismiss remaining claims or remaining parties from an action as a way to conclude the whole case in the district court and ready it for appeal.") (and cases cited therein); *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 89 (2d Cir. 2013) ("A party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected claims, invite a final judgment, and thereby secure review of the adverse ruling.") (internal citation and quotation marks omitted); *Helm Fin. Corp.*, 212 F.3d at 1080 ("[W]hen a party voluntarily dismisses its claims with prejudice in order to expedite appellate review, the dismissal is a final judgment which can be immediately

[2] The cited worksite was located in West Virginia, and Pullman's principal office is in Missouri. *See* 29 U.S.C. § 660(a), (b).

[3] Before the judge granted Pullman partial summary judgment, the Secretary filed oppositions to both of the motions Pullman had filed seeking dismissal. In those filings, the Secretary expressly opposed dismissal. The Secretary's Request for Issuance of a Final Order also made clear that the Secretary did not withdraw his claim that Pullman was liable as a controlling employer for the exposure of the subcontractor's employee as alleged under Items 1a, 1b and 2.

appealed."); *Volvo Constr. Equip. N. Am., Inc.*, 386 F.3d at 591 n. 9. Indeed, as the Third Circuit has explained:

> When a plaintiff has had all but one of her claims dismissed and is willing to abandon the remaining claim, a stipulation agreeing to the dismissal of the remaining claim promotes judicial economy by eliminating unnecessary proceedings at the trial level without posing any danger of piecemeal litigation. Although the entry of the final order in such a situation is in one sense invited, the reality of the matter is that the plaintiff has suffered an adverse judgment.

Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990). When a plaintiff withdraws its remaining claim with prejudice, as the Secretary did here, there is "universal consensus" that the appeal is permissible. *Blue*, 764 F.3d at 17.

Accordingly, we find that it was permissible for the Secretary to seek review of the judge's partial summary judgment order after voluntarily withdrawing his remaining claim with prejudice and, therefore, we deny Pullman's motion.

II. Decision Granting Partial Summary Judgment

In his Petition for Discretionary Review, the Secretary argues that the Commission should vacate the judge's partial summary judgment order because the *Summit I* precedent on which it relied was wrongly decided and should be reversed by the Commission. At the time the judge granted Pullman partial summary judgment, the Commission's *Summit I* decision was pending on appeal to the Eighth Circuit. Specifically at issue before the court was whether the Secretary's policy of citing a controlling employer on a multi-employer construction worksite for the exposure of another employer's employee violated 29 C.F.R. § 1910.12(a).

After the judge issued a final order dismissing the present case and the matter was directed for review, the Eighth Circuit issued a decision reversing *Summit I* and holding that the Secretary's policy does not violate § 1910.12(a). *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 829 (8th Cir. 2009) ("*Summit II*"). Following the Eighth Circuit's decision, the Commission considered another case in which the Secretary again cited Summit based on its status as the controlling employer at a multi-employer construction worksite and exposure of a subcontractor's employee to an alleged hazard. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 2009-12 CCH OSHD ¶ 33,079 (No. 05-0839, 2010) ("*Summit III*"), *aff'd*, 442 F.App'x. 570 (D.C. Cir. 2011). In *Summit III*, the Commission stated that it was persuaded by the Eighth Circuit's analysis in *Summit II*, and overruled *Summit I*, holding that § 1910.12(a) does not

prevent the Secretary from citing a "non-exposing, controlling employer" at a multi-employer construction worksite. *Id.* at 1202-03, 2009-12 CCH OSHD at pp. 54,692-93.

Because the *Summit I* decision has now been overruled by the Commission and the Eighth Circuit, we vacate the judge's order granting partial summary judgment for Pullman and remand for further proceedings with regard to Items 1a and 1b in their entirety, and Item 2 to the extent it is based solely on the Secretary's allegation that Pullman was a controlling employer liable for the exposure of the subcontractor's employee. The Secretary's allegation in Item 2 that Pullman's own employees were exposed to the cited condition remains dismissed.

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: June 24, 2015

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PULLMAN POWER, LLC, AND ITS SUCCESSORS, Respondent.	:	OSHRC DOCKET NO. 07-1796

FINAL ORDER

I. FACTS

Respondent, Pullman Power, LLC ("Pullman"), is a chimney and stack services company. Pullman was the general contractor at a power plant in St. Albans, West Virginia, on a stack construction project. Pullman contracted with Ershigs, Inc., a specialty subcontrator, to fabricate fiberglass reinforced plastic liners on the project. The Occupational Safety and Health Administration ("OSHA") inspected the work site on May 31, 2007. As a result, OSHA issued a serious citation to Pullman. Citation 1, Items 1a and 1b, allege violations of 29 C.F.R. §§ 1926.55(a) and (b), respectively, based upon employee exposure to styrene in concentrations above the allowable limit. Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1926.152(f)(3), based upon flammable liquids being used within 50 feet of an ignition source.

The Complainant filed her complaint on February 25, 2008.

On May 6, 2008, the Court granted Respondent summary judgment as to Citation 1, Items 1a and 1b, and dismissed these items. The Court also granted Respondent summary judgment as

to Citation 1, Item 2, to the extent the Secretary alleged Pullman was the controlling employer. The Court further denied Respondent's summary judgment as to Citation 1, Item 2, to the extent the Secretary alleged Pullman employees were exposed to the cited hazard.

On July 28, 2008, Complainant filed her Request for Issuance of a Final Order (Request).[1] The Secretary of Labor has determined, pursuant to her prosecutorial discretion, not to pursue Item 2 based on the allegation that Respondent is as an exposing employer. The Complainant now agrees and stipulates that the only basis for Respondent's liability for the violation in Item 2 is the allegation that Respondent was the controlling employer. Respondent has not filed a response to Complainant's Request.

A trial is scheduled to commence on October 21, 2008 at Charleston, West Virginia.

II. DISCUSSION.

Under these circumstances, the Secretary's citation and complaint may be dismissed by the Court upon motion of the Secretary.

III. CONCLUSION

On Complainant's Request, good cause having been demonstrated and no response filed by Respondent, the Request is allowed and GRANTED to the extent indicated herein. It is just and appropriate at this time to dismiss Citation 1, Item 2, in its entirety, with prejudice.[2]

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[1] The Court is treating Complainant's Request as a motion.

[2] Since Citation 1, Items 1a and 1b, were dismissed by Court Order Granting Partial Summary Judgment dated May 6, 2008, the dismissal of Citation 1, Item 2, herein results in the resolution of all issues related to the underlying Citation and Complainant's corresponding Complaint.

IV. ORDER

WHEREFORE IT IS ORDERED THAT, Complainant's Request is GRANTED as to Citation 1, Item 2, and that item is accordingly DISMISSED WITH PREJUDICE IN ITS ENTIRETY, and

FURTHER, the hearing is cancelled.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: _August 25, 2008
Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PULLMAN POWER, LLC, AND ITS SUCCESSORS, Respondent.	OSHRC DOCKET NO. 07-1796

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

I. FACTS

Respondent, Pullman Power, LLC ("Pullman"), is a chimney and stack services company. Pullman was the general contractor at a power plant in St. Albans, West Virginia, on a stack construction project. Pullman contracted with Ershigs, Inc., a specialty subcontrator, to fabricate fiberglass reinforced plastic liners on the project. The Occupational Safety and Health Administration ("OSHA") inspected the work site on May 31, 2007. As a result, OSHA issued a serious citation to Pullman. Citation 1, Items 1a and 1b, allege violations of 29 C.F.R. §§ 1926.55(a) and (b), respectively, based upon employee exposure to styrene in concentrations above the

allowable limit. Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1926.152(f)(3), based upon flammable liquids being used within 50 feet of an ignition source.

The Complainant filed her complaint on February 25, 2008.

Pullman has moved to dismiss, or, in the alternative, has requested summary judgment with respect to the Secretary's complaint and citation items in this matter. The Secretary does not oppose the granting of summary judgment as to Items 1a and 1b of the citation. The Secretary does, however, oppose the granting of summary judgment as to Item 2 of the citation.

At the parties' request, by Order dated April 7, 2008, a hearing scheduled to commence on June 16, 2008 on the merits of this case was postponed *sine die*.

II. DISCUSSION.

It is undisputed that only Ershigs employees were exposed to styrene and that Items 1a and 1b were issued to Pullman pursuant to OSHA's multi-employer work site doctrine. Specifically, the basis of Items 1a and 1b is that Pullman was the controlling employer as to those items. In regard to Item 2, on the other hand, the Secretary asserts that Pullman was the controlling employer and that employees of both Pullman and Ershigs were exposed to the cited condition.

As the Secretary notes, summary judgment is appropriate only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). *See also, e.g., N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2128 (No. 96 0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

In regard to Items 1a and 1b, the Secretary concedes summary judgment is appropriate due to Pullman being the controlling employer at the site and the Commission's decision in *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007) ("*Summit*"). In that case, the Commission reviewed its long-standing precedent regarding multi-employer work sites. The Commission concluded the Secretary may not cite a general contractor at a work site due solely to its control of the site. However, the Commission did not otherwise disturb the multi-employer work site doctrine. *Id*. at 2025. The Secretary points out that she disagrees with the Commission's decision in *Summit* and that that case is currently on appeal in the U.S. Court of Appeals for the Eighth Circuit. Regardless, she acknowledges that Commission judges are bound by Commission precedent in this instance.[3] She also acknowledges that *Summit* requires summary judgment with respect to Items 1a and 1b in this matter.[4] As the Secretary concedes that the *Summit* decision mandates dismissal of Items 1a and 1b in this case, summary judgment is granted as to those items.[5]

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[3] The Commission generally applies the precedent of the circuit where it is highly probable an appeal would be taken even though it may differ from the Commission's precedent. *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the Fourth Circuit would have jurisdiction over the site of the alleged violation. The Eighth Circuit would have jurisdiction due to the site of Respondent's principal office and Respondent alone may also appeal to the District of Columbia Circuit. *Id;* 29 U.S.C. §§ 660(a) and (b). None of these three circuits has directly addressed whether the multi-employer work site doctrine is not enforceable because it is contrary to 29 C.F.R. § 1910.12(a), the gravamen of the Commission's *Summit* decision. Accordingly, the undersigned cannot and will not ignore the existing Commission *Summit* precedent.

[4]The Secretary notes that she has argued her position with respect to *Summit* and Items 1a and 1b in this case for purposes of preserving the issue for the Commission and appellate review. *See Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1285-86 (No. 91-862, 1993).

[5] *See also Standard Building Company, Inc., and Standard Systems, Inc., Consolidated*, 2007 WL 4724128 (O.S.H.R.C.)(Secretary withdrew eight citation items based upon Commission's *Summit* decision).

In regard to Item 2, the Secretary agrees that summary judgment is also appropriate to the extent she has alleged that Pullman was the controlling employer at the work site. For all of the reasons stated above, summary judgment is granted as to Item 2 to the extent Pullman was the controlling employer at the site. Pullman contends, however, that summary judgment must also be granted with respect to the Secretary's claim that employees of Pullman were exposed to the cited hazard. It asserts that the Secretary has not met her pleadings burden. It also asserts that there are no material facts in dispute. Finally, it asserts that summary judgment as to this item is not premature due to the fact that discovery has not yet occurred. I disagree, for the following reasons.

First, I have noted that the OSHA-1B relating to Item 2 states that the "Violation [was] based on controlling employer."[6] However, as the Secretary points out, the OSHA-1B also states, on page 2 in paragraph 25, that "Pullman Power employees working in the stack would also be exposed employees in the event of an ignition at the base of the stack where Ershigs is working."[7] Pullman argues that this statement is "simply too vague and conclusory to support her position." I find that it is not, and I agree with the Secretary that she need not, at this point, identify in detail all the evidence relied upon in issuing the citation item. *See, e.g., Del Monte Corp.*, 4 BNA OSHC 2035, 2037 (No. 11865, 1977); *Gold Kist, Inc.*, 7 BNA OSHC 1855, 1861

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[6] The OSHA 1-B's relating to the citation items are attached to Pullman's motion.

[7] The Complaint, at ¶ 9, alleges "One or more of Respondent's employees was present on the construction project at the worksite and was exposed to the violative conditions alleged in Item 2 at the time that these conditions existed." The Complaint, at ¶ 3, also alleges Respondent had 19 employees at the workplace.

(No. 76-2049, 1979). I find that the Secretary has met her pleading burden with respect to Item 2.

Second, I also find that there are material facts in dispute. Pullman, for example, contends that the cited standard does not apply. It notes that the standard refers to "flammable liquids" and that the citation refers to a resin described as a "flammable material." Further, the Secretary points out that Pullman will presumably dispute that there were ignition sources within 50 feet of the flammable material and that Pullman's employees were exposed to the cited condition. As the Secretary asserts, Pullman has not shown the absence of any genuine issues of material fact, a requirement of prevailing in a motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996).

Third, I find that the Secretary is entitled to a reasonable opportunity to obtain additional information from Pullman during the discovery process. *See Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007) (noting that if discovery is incomplete in any way material to a pending summary judgment motion, a court is justified in not granting the motion, particularly when relevant facts are under the control of the moving party). Discovery has not run its course in this case. The Secretary is therefore entitled to seek additional information from Pullman with respect to the alleged violation through the discovery process.

III. CONCLUSION

For the foregoing reasons, partial summary judgment is appropriate to the extent so ordered below.

IV. ORDER

WHEREFORE IT IS ORDERED THAT, summary judgment is GRANTED as to Citation 1, Items 1a and 1b. Those items are accordingly DISMISSED.

Summary judgment is also GRANTED as to Citation 1, Item 2, to the extent the Secretary alleges Pullman was the controlling employer.

Summary judgment is DENIED as to Citation 1, Item 2, to the extent the Secretary alleges Pullman employees were exposed to the cited hazard.

SO ORDERED.

/s/

The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: _May 6, 2008
Washington, D.C.