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. SUMMIT CONTRACTORS, INC., Respondent.	OSHRC Docket No. 03-1622

APPEARANCES:

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DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY RAILTON, Chairman:

At issue before the Commission is a decision of Judge Ken S. Welsch affirming a citation issued to Summit Contractors, Inc. ("Summit") for an alleged scaffolding violation under 29 C.F.R. § 1926.451(g)(1)(vii).[1] Commissioner Thompson and I join in vacating the citation in its entirety.[2]

Background

Summit is a general building contractor with its corporate office located in Jacksonville, Florida. In June 2003, Summit was the prime contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit employed only a job superintendent and three assistant superintendents at the worksite. The superintendents were responsible for coordinating the vendors, scheduling the work for the various subcontractors, and ensuring that the work of the subcontractors was performed according to contract. Summit subcontracted the project's exterior brick masonry work to All Phase Construction, Inc. ("All Phase"). All Phase workers used scaffolding to perform their work.

On June 18 and 19, 2003, an Occupational Safety and Health Administration ("OSHA") Compliance Safety and Health Officer ("CSHO") observed and photographed All Phase employees who were not protected from falls working from scaffolds at 12-18 feet above the ground. The CSHO also observed other employees working from a scaffold inside a building on June 19; these workers were also not protected against falls. None of the exposed workers were employed by Summit. Summit did not create the hazardous conditions observed by the CSHO. Some of Summit's superintendents were present at the worksite on June 18 and 19, and some of the instances were in plain view of Summit's trailer located on the worksite. Summit does not claim it lacked knowledge of the violative conditions observed by the CSHO.

The CSHO did not perform a walkaround inspection, however, until June 24, 2003, when Summit's safety officer could be present. At the time of the walkaround

[1] Section 1926.451(g)(1)(vii) states:

> For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

[2] This case was consolidated solely for purposes of oral argument before the Commission with Docket Number 05-0839, another case involving Summit.

inspection, the scaffolding violations the CSHO observed on June 18 and 19 had been corrected. According to Summit's project superintendent, Jimmy Guevara, he had previously observed All Phase employees working on scaffolds that lacked guardrails. Guevara had instructed All Phase to install guardrails two or three times prior to the OSHA inspection. Each time, All Phase would address the violation but then fall out of compliance when the scaffolding was moved to a different area.

Based on the CSHO's observations on June 18 and 19, OSHA issued Summit a citation for a violation of the construction safety standard set forth at § 1926.451(g)(1)(vii) as a "controlling" employer in accordance with the agency's multi-employer worksite doctrine extant at the time. All Phase was also cited under the doctrine as the employer who created the hazard and as the employer having employees exposed to the hazard.[3]

Before the judge, Summit argued that the multi-employer worksite doctrine is invalid as to a general contractor who neither created, nor had employees exposed to, the alleged and cited hazard. In other words, Summit challenged the Secretary's application of the doctrine to controlling contractors who have contractual authority over subcontractors. Summit argued before the judge, and also contends on review, that the doctrine as expressed in OSHA Directive CPL 2-0.124 (Multi-Employer Citation Policy) is not enforceable because it is contrary to 29 C.F.R. § 1910.12(a) which states as follows:

> *Standards.* The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

29 C.F.R. § 1910.12(a).

As the judge noted, Summit's argument focuses on the second sentence of this regulation. Specifically, Summit's position is that because it had no employees exposed to the hazard, and did not create the hazard, the regulation prohibits the issuance of a

[3] All Phase did not contest the citations and paid the penalties proposed by the Secretary.

citation to Summit for the hazard created by the subcontractor, All Phase. The judge noted that the Commission has on numerous occasions applied the doctrine to controlling employers like Summit and, therefore, rejected the argument. Among others, he cited the Commission's decision in *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1999 CCH OSHD ¶ 31,821 (No. 95-1449, 1999), and *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 2000 CCH OSHD ¶ 32,204 (No. 97-1918, 2000). As for the specific argument relating to § 1910.12(a), the judge simply noted his view that the regulation does not prohibit finding an employer responsible for the safety of employees of other employers.

Discussion

In a decision rendered almost 31 years ago, the Commission stated that "the general contractor is well situated to obtain abatement of hazards either through its own resources or through its supervisory capacity." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976). The Commission went on to say that "we will hold the general contractor responsible for violations it could reasonably have expected to prevent or abate by reason of its supervisory capacity." *Id.* This holding was characterized as "*dictum*" in a footnote. *Id.* at 1188-89 n.6, 1975-76 CCH OSHD at p. 24,791 n.6. Nevertheless, it took on a life of its own during ensuing years as the Commission and some circuit courts relied on these statements to find some general contractors in violation of construction safety standards simply by virtue of their "supervisory capacity."[4] *See, e.g., Universal Constr. Co. v.*

[4] In effect, the Commission in 1976 was stating a policy decision. At that time *some* Commissioners believed they were charged under the Act to set policy. *See, e.g., Cuyahoga Valley Ry. Co.*, 10 BNA OSHC 2156, 1982 CCH OSHD ¶ 26,296 (No. 76-1188, 1982), *aff'd*, 748 F.2d 340 (6th Cir. 1984), *rev'd*, 474 U.S. 3 (1985) (Supreme Court reversed Commission and circuit court's decision that Secretary cannot unilaterally withdraw citation without Commission approval); *Am. Cyanamid Co.*, 8 BNA OSHC 1346, 1980 CCH OSHD ¶ 24,424 (No. 77-3752, 1980), *rev'd*, 647 F.2d 383 (3d Cir. 1981) (circuit court reversed Commission decision holding that Commission had authority to determine whether abatement has occurred under a settlement agreement); *Sun Petroleum Products Co.*, 7 BNA OSHC 1306, 1979 CCH OSHD ¶ 23,502 (No. 76-3749, 1979), *aff'd on other grounds*, 622 F.2d 1176 (3d Cir. 1980) (circuit court held that Commission's role in settlement process was limited where Commissioners split on whether Commission had authority to reject settlement agreement); *IMC Chem. Group*, 6 BNA OSHC 2075, 1978 CCH OSHD ¶ 23,149 (No. 76-4761, 1978), *rev'd*, 635 F.2d 544

OSHRC, 182 F.3d 726 (10th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998); *Brennan v. OSHRC* (*Underhill Constr. Corp.*), 513 F.2d 1032 (2d Cir. 1975); *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 2000 CCH OSHD ¶ 32,204 (No. 97-1918, 2000); *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1991-93 CCH OSHD ¶ 29,854 (No. 89-1394, 1992); *Gil Haugan*, 7 BNA OSHC 2004, 2006, 1979 CCH OSHD ¶ 24,105 (Nos. 76-1512 & 76-1513, 1979). Usually in these situations, the subcontractor responsible for the creation of the hazard and who had employees exposed to the hazard was also cited for the same violation.

The Commission, however, has been told in no uncertain terms by several courts that it is not a policy setting agency. *See, e.g., Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 65 (1st Cir. 1985) (analyzing legislative history and determining that "Congress did not intend OSHRC to possess broad powers to set policy . . ."); *Marshall v. OSHRC* (*IMC Chem. Group*), 635 F.2d 544, 547 (6th Cir. 1980) ("Whatever 'policies' the Commission establishes are indirect. Only those established by the Secretary are entitled to enforcement and defense in court." (quoting *Madden Constr. Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974))). According to these decisions, that function belongs to the Secretary. *See Madden Constr.*, 502 F.2d at 280 ("[T]he Act imposes policy-making responsibility upon the Secretary, not the Commission."). The Secretary's citation policy on multi-employer construction worksites has a checkered history. Indeed, as the doctrine developed over the years, the Secretary's application and elucidation of her enforcement policy has been anything but consistent. *See IBP Inc. v. Herman* (*IBP*), 144 F.3d 861, 865 n.3 (D.C. Cir. 1998) (detailing doctrine's "checkered history"). An analysis of the Secretary's own guidelines regarding the doctrine show the myriad changes in her interpretation as to how the doctrine should be applied. *Cf. Martin v. OSHRC* (*CF & I Steel Corp.*), 499 U.S. 144, 158 (1991) (reviewing court may consult less formal means of interpreting regulations, such as the OSHA Field Operations Manual, to determine whether the Secretary has consistently applied her position, a factor in determining the reasonableness of Secretary's position (citing *Ehlert v. United States*, 402 U.S. 99, 105 (1971))).

(6th Cir. 1980) (circuit court reversed Commission's decision that, after notice of contest has been filed, Secretary may not withdraw citation without Commission approval).

In its first Field Operations Manual ("FOM") issued contemporaneously with § 1910.12(a), OSHA permitted the citation of employers who expose their own employees to hazards as well as employers who create a hazardous condition or supply hazardous equipment, *whether or not their own employees were exposed.* *See* OSHA FOM p. VII-6-8 para. 10 (May 20, 1971). The manual was revised six months later to remove the reference to employers who supply unsafe equipment. *See* OSHA Compliance Operations Manual ("COM") p. VII-7-8 para. 13 (Nov. 15, 1971). Approximately three years later, OSHA again narrowed its citation policy. In July 1974, OSHA amended the FOM, instructing compliance personnel to cite only an employer on a construction site who has *exposed his own employees* to an unsafe condition. OSHA FOM ¶ 4380.6 (July, 1974). In essence, OSHA eliminated any practice of making multiple employers, other than exposing employers, responsible for the abatement of the same hazard on construction sites. Indeed, OSHA instructed compliance personnel in this revised version of the FOM, as follows: "An employer will not be cited if his employees are not exposed or potentially exposed to an unsafe or unhealthful condition—even if that employer created the condition." *Id.* *See also* OSHA FOM ¶ 4380.6 (Jan. 1, 1979) (identical language).

Four years later, OSHA again changed its interpretation of the doctrine. In the revised 1983 version of the FOM, the Secretary announced that an employer on a multi-employer worksite could defend by showing that it did not create the hazard, could not correct the hazard, and had made an effort to persuade the controlling employer to correct the hazard, or had alerted employees to the dangers associated with the hazard. OSHA FOM ¶ 265 (Apr. 18, 1983). This version of the FOM specified that compliance personnel should cite the exposing employer(s), unless all exposing employers could establish the defense. In that case, compliance personnel should cite the employer in the best position to correct the hazard. *Id.* at ¶ 264-65. *See also* OSHA Instruction CPL 2.42B (June 15, 1989) (identical language).

Eleven years after that, OSHA again changed course and issued the multi-employer policy at issue in this case. In 1994, OSHA revised its compliance instructions and issued a new manual called the Field Inspection Reference Manual or "FIRM". There, OSHA stated that citations should be issued not only to exposing employers, but

also to creating, controlling and correcting employers "whether or not their own employees are exposed . . . ." OSHA Field Inspection Reference Manual (FIRM) § V.C.6 (Sept. 26, 1994). *See also* OSHA Instruction CPL 2-0.124 (Dec. 10, 1999) (identical language; current multi-employer worksite doctrine).

In sum, OSHA issued § 1910.12(a) in May 1971, and almost simultaneously stated a policy for issuing citations on construction sites. The employer exposing its employees to hazards was to be cited, and employers who created or supplied hazardous equipment could also be cited. OSHA altered this policy six months later to eliminate citations to suppliers of faulty equipment. Citations to hazard-creating employers were eliminated next in 1974, and it was not until 1983 that such employers were returned to the mix, but only if every exposing employer had a defense. Then, in 1994, OSHA changed its policy significantly to allow citation of essentially every employer who might have some association with the hazard, i.e., the exposing employer, the creating employer, the controlling employer, and the correcting employer—the one who could abate the hazard. The Secretary never indicated the reasons behind her multiple changes in policy. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) ("agency changing its course must supply a reasoned analysis indicating that prior policies and standards were being deliberately changed, not casually ignored"). Furthermore, at no time throughout this period of over twenty years did the Secretary ever note that § 1910.12(a) contains language which on its face is in apparent conflict with the policy.

It is not as if this conflict has gone unnoticed by the courts or even the Commission. As early as 1995, the United States Court of Appeals for the District of Columbia Circuit noted a "marked tension" between the language of § 1910.12(a) and the Secretary's multi-employer policy. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306-07 (D.C. Cir. 1995). The court went on to say: "Here, the relevant regulation by its terms only applies to an employer's *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine." *Id.* at 1307 (emphasis in the original). The court, after noting that the issue had not been briefed and had not been addressed by any other court, left "to a later date the critical decision of whether to apply the multi-employer doctrine where an employer has been cited under . . . [§ 1910.12]." *Id.* In

1998, another panel of the same court similarly noted the tension between the regulation and the policy. *IBP*, 144 F.3d at 865-66. It too determined that it was unnecessary to decide the issue.[5] *Id.* at 866.

In a like manner, the Commission in two recent cases noted the existence of the problem but, like the D.C. Circuit, declined to address it for not having been briefed. *See Access Equip.*, 18 BNA OSHC at 1725 n.12, 1999 CCH OSHD at p. 46,780 n.12 (equipment supplier and installer was liable as such notwithstanding its defense that it was not a contractor); *McDevitt Street Bovis, Inc.*, 19 BNA OSHC at 1112-13, 2000 CCH OSHD at p. 48,782-83 (general contractor was responsible for scaffold violation as a controlling employer). As the judge pointed out here, Summit has raised the issue of the conflict or tension between § 1910.12(a) and the existing multi-employer policy in this and a number of other cases. While I firmly believe that cases should be disposed of on narrow grounds wherever possible, I do not see how the issue raised by Summit can be avoided in this case.

The problem I see is the one recognized by the court in *Anthony Crane Rental, Inc.*: that the limitation in § 1910.12(a) making the compliance obligation of employers for violations of standards applicable only to "*his employees*" precludes issuance of a citation to a general contractor having none of its employees exposed to the hazard. *See Anthony Crane Rental*, 70 F.3d at 1306-07. It seems to me that the checkered history of the multi-employer doctrine as expressed in the Secretary's ever-changing compliance guidelines—be it the FOM, COM, CPL, or FIRM—taken in contrast with a regulation which has not been amended since 1971, results in the latter trumping whatever reliance the Commission can place on the varying nature of the policy. *Cf. Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (policy statements while "entitled to respect" are not given *Chevron* deference like promulgated standards) (citing *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984)); *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1995 CCH OSHD ¶ 31,445, p. 44,470 (No. 96-0563, 1997) (in assessing reasonableness of Secretary's interpretation, Commission considers, *inter alia*, whether her interpretation

[5] In its most recent multi-employer decision, the United States Court of Appeals for the Tenth Circuit noted the D.C. Circuit's decision in *IBP* but did not address the issue of conflict between the multi-employer policy and § 1910.12(a). *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 729-30 (10th Cir. 1999).

"'sensibly conforms to the purpose and wording of the regulation[]', taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citation.'" (quoting *CF & I Steel Corp.*, 499 U.S. at 150, 157-58)).

I find unpersuasive the Secretary's argument in this litigation that the first sentence of the regulation permits or allows a broader class of employers, including those not having employees exposed to the cited hazard, to be cited under the policy.[6] While I may be sympathetic to such an argument, it simply does not explain why the Secretary has sat on her hands for ten years after being alerted twice to the problem by the D.C. Circuit in *Anthony Crane* and *IBP*. She even issued a compliance instruction in 1999 and, while iterating her policy adopted in 1994, failed to address the significant issue and tension mentioned by the court. Beyond that, the Commission has alerted her to the issue in both *Access Equipment* and *McDevitt*, yet the Secretary still did not act.

Moreover, to construe the first sentence of § 1910.12(a) as the Secretary argues in this litigation is to ignore or eliminate the language "each of his employees" used in the second sentence. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section." (citations omitted)). In other words, the Secretary improperly suggests the meaning of the regulation would not change even if the words "his employees" were missing. *See AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005) ("the court is obligated not only to construe the statute as a whole but to give meaning to each word of the statute"). In my view, her interpretation is untenable. The Commission must give effect to the plain language of the regulation, especially in the face of the Secretary's inconsistent doctrine. *See Arcadian Corp.*, 17 BNA OSHC 1345,

[6] Commissioner Rogers finds the regulation to be ambiguous. I do not agree that the regulation is ambiguous. It seems to me that both sentences are plain in their meaning. Here, I agree with the D.C. Circuit that the meaning of the regulation is "plain" and that the regulation "by its terms only applies to an employer's *own employees.*" *See Anthony Crane*, 70 F.3d at 1303, 1307 (emphasis in the original). *See also Sec'y v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4 (1st Cir. 1993) (holding that meaning of § 1910.12(a) is "plain"). The first sentence makes the construction safety standards applicable to "every employment and place of employment of every employee engaged in construction work." The second sentence makes each employer engaged in construction work responsible for "his employees." Were it otherwise, deference to the Secretary's interpretation is likely owed, as Commissioner Rogers states.

1347, 1995-97 CCH OSHD ¶ 30,856 p. 42,917 (statutory analysis ends if language is plain), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *See also FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (affording deference to agency's contemporaneous understanding of ambiguous term where understanding had been fortified by agency's consistent behavior over the following decades).[7]

Order

For these reasons, I find the Secretary's reliance on her multi-employer worksite doctrine to cite Summit in this case to be impermissible given the contrary language of her regulation at § 1910.12(a). Accordingly, based on this analysis and that set forth in Commissioner Thompson's concurring opinion, we vacate the citation.

SO ORDERED.

/s/
W. Scott Railton
Chairman

Dated: April 27, 2007

[7] The Secretary's position is also weakened by the contrast between 29 C.F.R. § 1926.16 and § 1910.12(a). Section 1926.16, which was promulgated at nearly the same time as § 1910.12(a), applies to government jobs under the Contract Work Hours and Safety Standards Act. *See* 36 Fed. Reg. 1802 (Feb. 2, 1971); 36 Fed. Reg. 7340 (Apr. 17, 1971) (adopting Part 1926). Section 1926.16, in contrast to § 1910.12(a), contains language extending an employer's liability beyond his own employees. The fact that such language is absent from § 1910.12(a) is further evidence that § 1910.12(a) should be read as limiting an employer's liability to "his employees."

THOMPSON, Commissioner, concurring:

In this case, the Secretary seeks to enforce the duty of a "controlling employer" pursuant to her current multi-employer citation policy.[1] The citation alleges a violation of a Part 1926 construction standard, 29 C.F.R. § 1926.451(g)(1)(vii), against Summit Contractors, Inc. ("Summit"), a general construction contractor who, the Secretary concedes, neither created the violative conditions nor exposed any of its own employees to these conditions. For the separate reasons I state below, I join Chairman Railton in vacating the citation because I conclude that 29 C.F.R. § 1910.12(a) prevents the Secretary from citing Summit in this case.

Discussion

My colleague Commissioner Rogers notes that Commission precedent establishes that section 5 (a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655 ("OSH Act"), grants the Secretary broad discretion to promulgate a multi-employer citation policy. *See Arcadian Corp*., 17 BNA OSHC 1345, 1352, 1995-97 CCH OSHD ¶ 30,856, p. 42,918 (No. 93-3270, 1995), *aff'd*, 110 F.2d 1192 (5th Cir. 1997). In fact, more than thirty years ago, the Secretary published, but then withdrew, a *Federal Register* notice seeking comment on a proposed multi-employer citation policy. *See* 41 Fed. Reg. 17,639, 17,640 (Apr. 27, 1976).

However, having said that precedent grants the Secretary broad statutory discretion to adopt and enforce specific standards does not *a fortiori* define the limitations the Secretary voluntarily imposed on that discretion when she adopted a specific standard or set of standards.[2] Thus, in this case, it remains to be resolved how § 1910.12(a) limits the discretion of the Secretary to issue citations for violations of 29 C.F.R. Part 1926 standards. Section 1910.12(a) states, in pertinent part:

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[1] The definition of a "controlling employer" is found in Section X.E.1 of OSHA's current multi-employer citation policy: "An employer who has general supervisory control over the worksite, including the power to correct safety violations itself or require others to correct them. Control can be established by contract, or in the absence of . . . contractual provisions, by the exercise of control in practice." OSHA Instruction CPL 2-0.124 at X.E.1 (Dec. 10, 1999). The controlling employer's "duty of reasonable care" is set forth in Sections X.E.3 and X.E.4. *Id.* at X.E.3-4.

[2] *See generally Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1091-92 (7th Cir. 1975) (Tone, J., concurring).

> The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards . . . and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

29 C.F.R. § 1910.12(a).

The Secretary issued § 1910.12(a) pursuant to section 6(a) of the OSH Act in order to adopt the Part 1926 standards originally enforced under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 ("Construction Safety Act" or "CSA").[3] *See Coughlan Constr. Co.*, 3 BNA OSHC 1636, 1638, 1975-76 CCH OSHD ¶ 20,106, p. 23,923 (Nos. 5303 & 5304, 1975). The scope and application provisions of § 1910.12(a) define the "regulatory universe" to which those construction standards apply. *See Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4-5 (1st Cir. 1993). Neither a reviewing court nor the Commission has ever before sought to resolve the "marked tension" between the Secretary's multi-employer citation policy and § 1910.12(a). *See Anthony Crane Rental Inc. v. Reich*, 70 F. 3d 1298, 1307 (D.C. Cir. 1995) (recognizing "the marked tension" between the multi-employer citation policy and "the language of § 1910.12[(a)] . . . that '[e]ach employer shall protect the employment and places of employment of each of *his employees*,'" but failing to reach the issue).[4] I agree with my colleagues that the Commission should address this "tension" herein, which has been squarely presented, thoroughly briefed, and comprehensively analyzed during oral argument.[5]

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[3] Nat'l Consensus Standards and Established Fed. Standards, 36 Fed. Reg. 10,466, 10,469 (May 29, 1971). Former Part 1518 of Title 29, C.F.R. was subsequently redesignated as Part 1926. Redesignation, 36 Fed. Reg. 25,232 (Dec. 30, 1971).

[4] On remand from the D.C. Circuit, the Commission found that Anthony Crane Rental was an exposing employer and so failed to reach any conclusion regarding the relationship between § 1910.12(a) and the multi-employer citation policy. *Anthony Crane*, 17 BNA OSHC 2107, n.1, 1995-97 CCH OSHD ¶ 31,251, p. 43,840 n.1 (No. 91-556, 1997).

[5] In two prior cases, the Commission declined to rule on the issue of whether § 1910.12(a) is consistent with, or has any affect on, the multi-employer citation policy because the issue had not been briefed. However, in doing so, the Commission made no suggestion that the issue had been foreclosed or previously decided. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1112-13, 2000 CCH OSHD ¶ 32,204 p. 48,782-83 (No.

Summit argues that the "his employees" phrase of the second sentence of § 1910.12(a) describes a construction employer's duty that is limited to his own employees. The Secretary argues that the first sentence describes a duty that is as broad as the working conditions of all employees on the construction site, effectively ignoring the "his employees" clause of the second sentence. To avoid the dilemma described in the Hindu parable of the blind observers disagreeing about the shape of an elephant after each grasped only his trunk, tusk or leg, I would not limit my perception of possible reasonable interpretations of the scope and application of § 1910.12(a) by focusing on only one clause or sentence. Read together, the two sentences of the regulation require an employer to "protect the employment and places of employment of each of his employees . . . by complying with [Part 1926 standards]" applicable to "every employment and place of employment of every employee engaged in construction work." *See* 29 C.F.R. § 1910.12(a). Reading the provision in a manner consistent with the universal interpretation of the general duty clause,[6] it is clear and unambiguous on the face of the regulation that the duty of a construction employer under § 1910.12(a) is owed to protect only "his employees", permitting only an employment-based enforcement

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97-1918, 2000) (declining to address issue because Commission directed reconsideration on the "very narrow question of whether adverse circuit law precludes application of Commission precedent"; Commissioner Visscher dissented because he "share[d] the D.C. Circuit's concern as to the legal basis for multi-employer liability."); *Access Equip. Sys. Inc.*, 18 BNA OSHC 1718, 1725-26 n.12, 1999 CCH OSHD ¶ 31,821, p. 46,780 n.12 (No. 95-1449, 1999) (declining to address issue because it was neither argued nor briefed by the parties, nor ever considered by any court that adopted the multi-employer citation policy). *Cf., e.g., Underhill Constr. Corp. v. OSHRC*, 526 F. 2d 53, 54 n.3 (2d Cir. 1975) (interpretation of the "effective date" issue raised under § 1910.12(d) not precluded by prior decision of the instant court enforcing identical standard against same employer where the parties previously "neither briefed nor argued the [effective date] issue."). The reluctance of the courts and the Commission in the past to attempt to unravel the perplexing legal maelstrom surrounding this issue may suggest that resolution of the issue may ultimately depend on rulemaking by the Secretary.

[6] The Secretary concedes that citation under the language of section 5(a)(1), semantically identical to the second sentence of § 1910.12(a), is limited to exposing employers. *See* OSHA Field Inspection Reference Manual § III.C.2.c.(2)(a)2 (Sept. 26, 1994) stating: "The employees exposed to the Section 5(a)(1) hazard must be the employees of the cited employer." *See also* Letter to James H. Brown from OSHA Director of Construction Russell B. Swanson (July 25, 2003) (relying upon 1999 Multi-Employer Citation Policy: "[O]nly exposing employers can be cited for General Duty Clause violations."). *See, e.g., Access Equipment*, 18 BNA OSHC at 1724; 1999 CCH OSHD at p. 46,778.

scheme. What remains to be determined is whether a "controlling employer" theory of liability, defined by the Secretary as an enforcement scheme grounded in contract or quasi-contract, fits within the full scope and application of this "employment-based" duty under § 1910.12(a) of a construction employer to "protect . . . his employees" by complying with the Part 1926 standards.

The full scope and application of the construction employer's § 1910.12(a) employment-based duty can be determined by analyzing the agency's original intent when it drafted and began enforcement of the regulation. *See Am. Waterways Operators, Inc. v. United States*, 386 F. Supp. 799, 803-04 (D.D.C. 1974) (construction of act by the agency charged with its administration is accorded great weight if reasonable, but "of higher significance" is the construction of the act by those who participated in the act's drafting and who directly made their views known to Congress), *aff'd*, 421 U.S. 1006 (1975). The first construction of a new act by the body charged with enforcing it is "entitled to more than usual deference accorded an agency's interpretation" of an act or regulation. *See Power Reactor Dev. Co. v. Int'l Union of Elec. Workers*, 367 U.S. 396, 408 (1961) (contemporaneous construction "by the men charged with the responsibility of setting its machinery in motion" is entitled to particular respect); *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1081 (D.C. Cir. 1982) (affording "more than the usual deference due an agency's interpretation of its enabling act" to Copyright Royalty Tribunal's reading of the Copyright Act because it "was the first construction of a new act by the body charged with the responsibility for setting its machinery in motion."). The regulation's preamble says nothing about the Secretary's original intent. *See* 36 Fed. Reg. 10,466 (May 29, 1971). However, the Secretary did indicate her original intent to limit enforcement of Part 1926 standards, through promulgation of § 1910.12(a), against a class of employers similar to non-creating non-exposing "controlling employers" as defined in the Secretary's current multi-employer citation policy. Her intent is evident in two distinct actions: First, the Secretary excluded the Construction Safety Act duties of the prime (general) contractor, which are parallel to "controlling employer" duties, when she adopted the Construction Safety Act standards as OSH Act standards. Second, the Secretary precluded enforcement of any duties against the general contractor parallel to "controlling employer" duties when she issued

the original enforcement guidelines directing citations at multi-employer construction sites.

The first demonstration of the Secretary's original intent is the striking contrast between the language of the second sentence of § 1910.12(a), which imposes an OSH Act duty on construction employers to protect their own employees through compliance with Part 1926 standards, and the language of § 1926.16, which imposed a Construction Safety Act duty on prime (general) contractors to protect the employees of subcontractors through assuring their compliance with the same standards. Indeed, contrary to the assertion of my colleague Commissioner Rogers at footnote 4, § 1910.12(a) was plainly intended as a limit. It was intended to limit the Secretary's discretion to impose under the OSH Act the duty under the CSA of prime (general) contractors at construction sites. The Secretary's intent to limit her discretion to enforce the adopted standards is clear from the dramatic distinction between what the Secretary had written as CSA regulations and standards, and the limited parts she adopted through § 1910.12(a). On May 29, 1971, in accordance with section 6(a) of the OSH Act, the Secretary promulgated § 1910.12. Section 1910.12 adopted as occupational safety and health standards those standards that had been issued under the Construction Safety Act in 29 C.F.R. Part 1518 (now 29 C.F.R. Part 1926).[7] Through § 1910.12, the Secretary made "the standards (substantive rules)" published in Subpart C of Part 1926 applicable to construction employers in general, but left Subparts A and B of Part 1926 applicable only to federal contractors. Notably, § 1926.16 in Subpart B, expressly imposes liability on the prime (general) contractor for violations by subcontractors. The failure of the Secretary to adopt § 1926.16 through § 1910.12,[8] or to use similar language when describing an employer's duties under the

[7] Former Part 1518 of Title 29, C.F.R. was subsequently redesignated as Part 1926. 36 Fed. Reg. 25,232 (1971). In addition, on February 17, 1972, the Secretary published a *Federal Register* notice clarifying "which regulations had been adopted under OSHA by the May 29, 1972 promulgation[.] [T]he Secretary added a new paragraph to the OSHA regulations entitled 'Construction Safety Act distinguished.'" *Underhill*, 526 F.2d at 56. Specifically, the Secretary added § 1910.12(c).

[8] For a period of two years after the effective date of the OSH Act, the Secretary had the authority to "promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health . . . ." 29 U.S.C. § 655. The definition of "standard" and the phrase "established Federal

OSH Act in § 1910.12(a), is indication that she intended the duties of an employer (in this case, a prime (general) contractor) under the OSH Act to be more limited than the duties of a prime (general) contractor under the Construction Safety Act. Commissioner Rogers' footnote 4 is correct to the extent she concedes the text of § 1910.12(c) is a clear statement of the reason for the Secretary's failure to incorporate Subparts A and B of 1926, *i.e.*, the contractually-based enforcement scheme of the CSA was inconsistent with the Secretary's construction of an employment-based enforcement scheme under the OSH Act. This concedes the point that if the Secretary had originally intended to exercise discretion under section 5(a)(2) of the OSH Act to cite general contractors at multi-employer construction sites on a contractually-based[9] "controlling employer" theory, she could have done so by adopting the enforcement scheme of § 1926.16, absent the federal contractor predicate, pursuant to section 6(a) of the OSH Act.

The second demonstration of the Secretary's original intent is the exclusion of a "controlling employer" basis for citations from the Secretary's original multi-employer citation policy. Almost simultaneously with the promulgation of § 1910.12(a), the Secretary adopted her first Field Operations Manual ("FOM"), originally called the "Compliance Operations Manual".[10] The FOM published guidelines for OSHA's field officers charged with conducting workplace inspections to enforce, *inter alia*, Part 1926 standards. According to the original FOM, an employer may be cited at a multi-employer construction worksite for exposing its own employees to a hazard, even if it did not create the hazard, p.VII-7 ¶ 10c; or by creating a hazard, even if it did not expose its own employees to that hazard, p.VII-7 ¶ 10b. The simultaneous production by OSHA of two separate documents (the FOM and § 1910.12(a)), both limiting the Secretary's

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standards" "make clear that the Secretary intended to adopt, indeed had the statutory authority to adopt, only those provisions in the CSA regulations which require 'conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'" *See Underhill*, 526 F.2d at 57.

[9] "Control [constituting an employer as a "controlling employer"] can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice." OSHA Instruction CPL 2-0.124 at X.E.1. In short, control can be established by contract or quasi-contract.

[10] The FOM was published on May 20, 1971, and § 1910.12(a) appeared in the *Federal Register* nine days later on May 29, 1971.

enforcement of Part 1926 standards, cannot be dismissed as a mere unrelated "coincidence." The May 1971 FOM is an indicator of the original intent of the drafters of § 1910.12(a) because: (1) the Secretary contemporaneously drafted both § 1910.12(a) and the FOM guidelines for enforcement of the safety and health standards that were adopted by § 1910.12(a); (2) the enforcement guidelines in the FOM could not yet have been influenced by interpretations of the Secretary's citation authority by the newly-formed Occupational Safety and Health Review Commission; and (3) the FOM explicitly included guidelines for citations, *inter alia*, at multi-employer construction sites under the very standards adopted by § 1910.12(a). The original FOM, as well as the amendment to the FOM six months later, both set forth the two duties of an employer at a multi-employer construction worksite: (1) to not expose its employees to a hazard; and (2) to not create violative conditions.

I find it dispositive to a determination of the scope and application of the employer's duty to "protect … his employees" under § 1910.12(a) that not only did the Secretary fail to adopt the "controlling employer" concept from the CSA when she adopted its body of standards, neither did she in her original enforcement guidelines direct field personnel to cite non-creating, non-exposing, controlling employers at a multi-employer construction worksite. In fact, during the next dozen years of enforcement of the OSH Act—one-third of OSHA's statutory life—official agency guidelines made it clear that the Secretary's power to cite an employer at a multi-employer worksite extended only to creating or exposing employers; controlling employers were never mentioned. *See* OSHA Compliance Operations Manual ("COM") p. VII-7-8 para. 13 (Nov. 15, 1971) (citation of creating or exposing employers); OSHA FOM ¶ 4380.6 (July, 1974) (citation of exposing employers only); OSHA FOM ¶ 4380.6 (Jan. 1, 1979) (same). It was not until 1983, twelve years after the Act's effective date, that OSHA for the first time directed its compliance officers to consider citation of a controlling employer. *See* OSHA FOM ¶ 265 (Apr. 18, 1983). That expansion then was limited to the narrow circumstances where a general contractor is informed of, but fails to abate, a hazard that cannot be abated by any exposing employer.[11]

[11] Significantly, beginning in 1983 and for years after that, OSHA continued to proscribe citations against non-exposing employers except in those limited circumstances when

The Commission will normally defer to the Secretary's reasonable interpretation of a regulation. *See Martin* 499 U.S. at 150. I find the Secretary's original multi-employer citation policy, allowing citation of creating as well as exposing employers, is consistent with § 1910.12(a)'s requirement that an employer must "protect the employment and places of employment of his employees". It also comports with the purpose of the Act.[12] The creation of violative employment conditions puts all employees at risk. Here I agree with the statement made at oral argument by Summit's amicus that the Secretary recognized when she drafted § 1910.12(a) and the original FOM that reasonably predictable exposure generally runs with creation of a hazard.[13] On the other hand, as Chairman Railton adequately explains, deference to OSHA's "checkered history" of reinterpretation of the multi-employer citation policy after 1971 would yield an inconsistent, and therefore unreasonable interpretation of § 1910.12(a). Moreover, the Secretary cannot in this case simply ignore a regulatory limitation on her discretion, albeit that it was voluntarily imposed. As the regulation now exists, the agency has *ab initio* limited its discretion to expand the duties of employers beyond those duties originally intended when the Secretary adopted the Part 1926 standards. Unless and until

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"the exposing employer . . . did not create the hazard; . . . did not have the authority or ability to correct the hazard; made an effort to persuade the controlling employer to correct the hazard; [and] . . . has taken alternative means of protecting employees from the hazard . . . ." *See* OSHA FOM ¶ 265 (April 18, 1983).

[12] That is, an employer owes a duty to "his employees" to refrain from creating hazardous working conditions and to prevent "his employees" from being exposed to hazardous conditions to assure that "every working man and woman in the Nation has safe and healthful working conditions." 29 U.S.C. § 651(b).

[13] *See* Transcript of Oral Argument, Argument of Arthur G. Sapper, Esq., on behalf of National Association of Home Builders, Contractor's Association of Greater New York; Texas Association of Builders; and Greater Houston Builders Association, Amici at 17:1 – 23. Mr. Sapper is correct that while it is possible under current Commission case law for a creating employer to create a hazard without exposing any of its own employees to the created hazard, as in the case of excavating an unshored trench, that would appear to be the rare case. *See Smoot Construction*, 21 BNA OSHC 1555, 1557, 2005 CCH OSHD ¶ 32,829, p. 52,723 (No. 05-0652, 2006); *Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2055, 1993 CCH OSHD ¶ 29,923, p. 40,853 (No. 90-2873, 1992). Indeed, the Commission has affirmed citations against so-called "non-exposing" creating employers when, on closer review, the employees of the creating employer, originally found to have been unexposed, were in fact exposed to the hazard. *See, e.g.*, *Anthony Crane Rental*, 17 BNA OSHC 2107, 1995-97 CCH OSHD ¶ 31,251 (No. 91-556, 1997).

the agency modifies or repeals the employment-based limitations imposed by the regulation, it may not by simple policy directive remove the substantive limitations on official discretion that now exist. In *Vitarelli v. Seaton*, the Supreme Court held that even agencies with broad discretion must adhere to internally promulgated regulations limiting the exercise of that discretion. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959). *See also Graham vs. Ashcroft*, 358 F.3d 931, 932 (D.C. Cir 2004) ("It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion." (citing *Padula vs. Webster*, 822 F.2d 97, 10 (D.C. Cir. 1987))).[14]

In this case, it is undisputed that Summit is a non-creating, non-exposing employer. In other words, the only basis for issuing the citation to Summit is that Summit is a "controlling employer" under the Secretary's current multi-employer citation policy. As explained above, however, I find § 1910.12(a) cannot be interpreted to permit citation for a violation of a Part 1926 standard of a controlling employer who neither created the violative conditions nor exposed his employees to the hazard.

Conclusion

For the foregoing reasons, I concur with the Chairman's conclusion that § 1910.12(a) prevents the Secretary from enforcing her current multi-employer citation policy to cite a non-exposing non-creating employer such as Summit, for violation of § 1926.451(g)(1)(vii). Therefore, I join Chairman Railton in vacating the citation.

/s/
Horace A. Thompson, III
Commissioner

Dated: April 27, 2007

[14] My colleague Commissioner Rogers suggests interpretation of § 1910.12(a) as requiring employment-related enforcement leads to numerous situations where *no one* on a construction site will have *both* the practical ability and legal obligation to ensure safety compliance. This suggestion fails to explain why the exposing construction subcontractor cannot avail itself of contractual remedies to ensure non-violative working conditions for its employees.

ROGERS, Commissioner, dissenting:

By their decision today, my colleagues have reversed over thirty years of Commission precedent that has had the effect of enhancing worker safety on construction worksites with multiple employers. In voting as they have to eliminate the Secretary's ability to cite general contractors under her multi-employer enforcement policy, my colleagues have deprived the Secretary of a very important tool to hold accountable those often in the best position to ensure safety on construction worksites.

The rejection of the multi-employer precedent has at least three additional undesirable results. First, it usurps for the Review Commission the Secretary's policy-making role under the Occupational Safety and Health Act ("the Act"). Second, it trivializes the Secretary's prosecutorial discretion and ability to develop and refine enforcement policies consistent with the Act. Finally, it de-stabilizes a body of law that, while not perfect or totally comprehensive, offers rationality and predictability.

I would uphold the long-standing precedent and continue to recognize the Secretary's authority to cite general contractors under her multi-employer enforcement policy.

Overview - The Multi-employer Construction Worksite Doctrine

For over thirty years, the Commission has affirmed the validity of the multi-employer construction worksite doctrine. As described by the Commission, this doctrine, rooted in the Act, the principles of the common law, and the realities of the construction workplace, provides that:

> [A]n employer who either creates or controls the cited hazard has a duty under [section] 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own employees, but those of other employers "engaged in the common undertaking." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶ 20,690, p. 24,784 (No. 3694, 1976); *Grossman Steel* [*& Aluminum Corp.*], 4 BNA OSHC [1185], 1188, 1975-76 CCH OSHD [¶ 20,691], p. 24,791 [(No. 12775, 1976)]. Specifically, the Commission has concluded that an employer may be held responsible for the violations of other employers "where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Centex-Rooney* [*Constr. Co.*], 16 BNA OSHC [2127], 2130, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 [(No. 92-0851, 1994)].

McDevitt Street Bovis, Inc., 19 BNA OSHC 1108, 1109, 2000 CCH OSHD ¶ 32,204, p.

48,780 (No. 97-1918, 2000) (*McDevitt*).

A. The Act, Commission Precedent, and Circuit Court Precedent All Support the Secretary's Authority to Apply the Multi-employer Worksite Doctrine.

Respondent would have the Commission believe that there is simply no legal authority for the Secretary's use of the multi-employer doctrine and that it was invented out of whole cloth. Notwithstanding Respondent's view of what the law should look like, over the last thirty years, this Commission and most of the circuit courts that have considered the doctrine have repeatedly affirmed the validity of the Secretary's authority and discretion to apply the multi-employer doctrine at construction worksites. *See McDevitt*, 19 BNA OSHC at 1111-12, 2000 CCH OSHD at p. 48,782. The Secretary's authority to apply the doctrine under the Act has been repeatedly affirmed with respect to at least three classes of employers: exposing employers, *see, e.g.*, *Bratton Corp.*, 6 BNA OSHC 1327, 1978 CCH OSHD ¶ 22,504 (No. 12255, 1978), *aff'd*, 590 F.2d 273 (8th Cir. 1979); *Grossman Steel*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976); *Anning-Johnson*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (consolidated); creating employers, *see, e.g.*, *Beatty Equip. Leasing, Inc.*, 4 BNA OSHC 1211, 1975-76 CCH OSHD ¶ 20,694 (No. 3901, 1976), *aff'd*, 577 F.2d 534 (9th Cir. 1978); and, at issue here, controlling employers (usually general contractors), *see Knutson Constr. Co.*, 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶ 21,185 (No. 765, 1976), *aff'd*, 566 F.2d 596 (8th Cir. 1977).[1]

The doctrine reflects a valid use of the Secretary's enforcement authority under the Act. An employer's duties under the Act stem from section 5(a). *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1084 (7th Cir. 1975) (employer's duty flows from section 5(a)(1) and (2)). In particular, section 5(a)(2) states broadly that an employer

[1] The Chairman states that the Commission and, by implication, the various Circuit Courts, were effectively creating "policy" in upholding the multi-employer doctrine as applied to general contractors. While the discussion in *Grossman Steel* was characterized as *dictum*, the context was the adjudication of the Secretary's citation where the Commission was explaining the contours of the Secretary's permissible authority to hold employers liable under the multi-employer doctrine. *Grossman Steel*, 4 BNA OSHC at 1188-89 n.6, 1975-76 CCH OSHD at p. 24,791 n.6. It is the Secretary—the policy maker—who chooses whether to cite an employer under the doctrine, not the Commission.

"shall comply with . . . standards," thus indicating a duty to comply with specific OSHA standards for the benefit of *all* employees on a worksite. *See* 29 U.S.C. § 654(a)(2); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982-83 (7th Cir. 1999).

In contrast, under section 5(a)(1), the general duty clause, an employer is required to "furnish to each of *his employees* employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to *his employees.*" 29 U.S.C. § 654(a)(1) (emphasis added). The use of the phrase "his employees" delineates that the general duty imposed by section 5(a)(1) is specifically limited to an employer's own employees. *See Pitt-Des Moines,* 168 F.3d at 982. *See also* S. Rep. No. 1282, 91st Cong., 2d Sess. 9 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 149; H.R. Rep. No. 1291, 91st Cong., 2d Sess. 21 (1970), Leg. Hist., at 851. *See also Pitt-Des Moines*, 168 F.3d at 983 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *Marshall v Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir. 1977) (*per curiam*) (*Knutson*); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (*Teal*); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978) (*Beatty*).

Moreover, the Secretary's authority under the doctrine is supported by the Act's broad purpose, set forth at section 2(b) of the Act, 29 U.S.C. § 651(b), "to assure so far as possible *every* working man and woman in the Nation safe and healthful working conditions" (emphasis added). *See Pitt-Des Moines*, 168 F.3d at 983; *Knutson*, 566 F.2d at 600 n.7; *Teal*, 728 F.2d at 803; *Beatty*, 577 F.2d at 537; *Brennan v. OSHRC (Underhill Constr. Co.)*, 513 F.2d 1032, 1038 (2d Cir. 1975) (*Underhill*). In addition, section 2(b)(1), 29 U.S.C. § 651(b)(1), states that an additional purpose of the Act is to encourage the reduction of hazards to employees "at their places of employment," indicating the Act's focus was on making places of employment safe from work related hazards. *See Pitt-Des Moines*, 168 F.3d at 983; *Underhill*, 513 F.2d at 1038. Thus, "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect

every employee who works in its workplace." *See Pitt-Des Moines*, 168 F.3d at 983 (quoting *Teal*, 728 F.2d at 805 (emphasis added)).

More specifically, both the Commission and the courts have upheld the Secretary's use of her authority under the Act to hold a general contractor liable under the doctrine "for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity," because of the general contractor's unique position of control over the construction site and authority to obtain abatement. *See Grossman Steel*, 4 BNA OSHC at 1188, 1975-76 CCH OSHD at p. 24,791. Three circuits have specifically applied the doctrine to cases involving such controlling employers. *See Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 727-32 (10th Cir. 1999) (*Universal*); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 817-19 (6th Cir. 1998) (*Carbone*); *Knutson*, 566 F.2d at 597-98 (8th Cir. 1977) (Commission's decision that general contractor had duty with respect to subcontractor's safety violations but that, in this case, general contractor lacked sufficient control to be held liable was "reasonable and . . . consistent with the purpose of the Act."). *See also Bratton Corp. v. OSHRC*, 590 F.2d 273, 276 (8th Cir. 1979) (discussing circuit's previous approval of application of multi-employer doctrine to general contractor in *Knutson*).

Indeed, it is the unique position of the general contractor—whose main function is to supervise the work of subcontractors—that gives it the control to ensure hazard abatement. *See Knutson*, 566 F.2d at 599 (general contractors have "the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite"); *Universal*, 182 F.3d at 730 (as practical matter, general contractor may be only on-site person with authority to compel OSHA compliance); *Carbone*, 166 F.3d at 818 (6th Cir. 1998) (it is presumed that general contractor has enough control over subcontractors to require that they comply with OSHA standards). *See also* Recent Case, *Administrative Law – Occupational Safety & Health Act – On Multiemployer Jobsite, When Employees of any Employer are Affected by Noncompliance with a Safety Standard, Employer in Control of Work Area Violates Act; Employer Not in Control of Work Area Does Not Violate Act, Even If His Own Employees Are Affected, Provided the Hazard is "Nonserious,"* 89 Harv. L. Rev. 793, 797 (1976) (person controlling work area in best position to prevent

hazards). As noted in *Universal*, at times it is *only* the general contractor who can ensure that compliance takes place. *Universal*, 182 F.3d at 730. As such, the congressional command in section 5(a)(2) of the Act would be a dead letter unless it also ran to a general contractor with supervisory control over the worksite. It is important to emphasize, however, as I previously pointed out in *McDevitt*, that the general contractor's liability under the doctrine is not without limits. *See McDevitt*, 19 BNA OSHC at 1109 n.3, 2000 CCH OSHD at p. 48,779 n.3 (Rogers, Commissioner, noting that liability of general contractor is based on reasonableness standard and is "far from strict liability"). *See also Knutson*, 566 F.2d at 601 (general contractor's duty depends on what measures are commensurate with its degree of supervisory capacity).[2]

B. Section 1910.12(a) Does Not Limit the Secretary's Authority to Cite Controlling Employers Under the Act

Notwithstanding this long-standing precedent, my colleagues—like Respondent—now seek to turn back the clock and rewrite history more to their liking. Although the Commission has apparently never viewed it as such over the thirty years it has applied the doctrine, my colleagues now seem to separately suggest that 29 C.F.R. § 1910.12(a) should be viewed as a self-imposed limit on the Secretary's authority under section

[2] The multi-employer worksite doctrine is also consistent with the common law. The doctrine's focus on control is echoed in the rule set forth at § 414 of the Restatement (Second) of Torts (1965) which states that an employer is liable for the negligence of its contractor where the employer retains control of any part of the work performed by the contractor and fails to exercise that control with reasonable care. *See* Restatement (Second) of Torts § 414 cmt. a (1965).

This view also finds support in the cases, under which general contractors may be subject to various types of direct and vicarious liability. *See, e.g., Ghaffari v. Turner Constr. Co*., 699 N.W.2d 687, 694 (Mich. 2005) (as overall coordinator of construction activity, general contractor is "best situated to ensure workplace safety at the least cost"); *Shannon v. Howard S. Wright Constr. Co.*, 593 P.2d 438, 441-45 (Mont. 1979) (general contractor had duty to provide employees of subcontractors a safe place to work because it retained control over working conditions at site); *Kelley v. Howard S. Wright Constr. Co.*, 582 P.2d 500, 505-06 (Wash. 1978) (general contractor had duty, within scope of control over work, to provide safe place of work); *Funk v. Gen. Motors Corp*., 220 N.W.2d 641, 646 (Mich. 1974) (holding general contractors liable for worksite safety makes it more likely that subcontractors or general contractor will implement safety precautions; often general contractor is only entity in position to provide expensive safety measures that will protect employees of multiple subcontractors, and subcontractors may be unable to rectify situations).

5(a)(2) of the Act to utilize the multi-employer policy.[3]

The rather sparse preamble gives no indication that § 1910.12(a) was at all intended to address multi-employer situations. *See* 36 Fed. Reg. 10,466 (May 29, 1971). Indeed, other than my colleagues' pure speculation, based on a coincidence in timing, there is no evidence that § 1910.12(a) was intended as a limit on an employer's duty to comply with construction standards, a duty which derives directly from section 5(a)(2) of the Act.[4] *See Universal*, 182 F.3d at 728-30. The Commission should not effectively

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[3] Section 1910.12(a) provides:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

[4] My colleague Commissioner Thompson suggests that § 1910.12(c) supports his view that § 1910.12(a) was intended as a limit on an employer's duty to comply with construction standards. In that regard, he contends that is why the Secretary did not incorporate Subparts A and B of Part 1926 (including the provisions of § 1926.16 with respect to the responsibilities of a "prime contractor") as OSHA standards. Rather, my colleague seems to prefer his own speculative reason for the Secretary's action, instead of the reason the Secretary actually articulated in the text of § 1910.12(c) itself: "Subparts A and B have pertinence only to the application of section 107 of the Contract Work Hours and Safety Standards Act (the Construction Safety Act). . . . [because certain Construction Safety Act terms and concepts, such as the interpretation of the statutory term 'subcontractor' in § 1926.13 have] no significance in the application of the [Occupational Safety and Health] Act, which was enacted under the Commerce Clause and which establishes duties for 'employers' which are not dependent for their application upon any contractual relationship with the Federal Government or upon any form of Federal financial assistance."

My colleague also mischaracterizes the Secretary's explanation of the distinction between the two statutory schemes. Contrary to Commissioner Thompson, the Secretary was not foreswearing consideration of *private* contractual relationships between general contractors and subcontractors for Occupational Safety and Health Act enforcement purposes by the language of § 1910.12(c). Rather, she was indicating that the nexus of jurisdiction under the Occupational Safety and Health Act (unlike with the Construction Safety Act) was not predicated upon a contract *involving the Federal government*. Furthermore, as my colleague concedes by citing the language of CPL 2-0.124 in n.9 the Secretary does not rely solely on a contract to show control in multi-employer situations.

reverse over thirty years of precedent and rewrite history based on rank speculation. Similarly, there is no indication that the multi-employer policy was intended as an interpretation of § 1910.12(a), as my colleagues separately seem to suggest. Rather, as the Commission and the courts have continuously held, the multi-employer policy represents the Secretary's expression of how she intends to exercise her permissible prosecutorial discretion within the parameters allowed by the Act itself. *Limbach Co.*, 6 BNA OSHC 1244, 1245, 1977-78 CCH OSHD ¶ 22,467, pp. 27,080-81 (No. 14302, 1977) (multi-employer policy represents general statement of policy for guidance of inspectors). *See Universal*, 182 F.3d at 730 (Secretary's interpretation of section 5(a)(2) consistent with Act).

Contrary to the suggestion by my colleagues, it is for this same reason that rulemaking was not required here because the multi-employer worksite doctrine is not a substantive rule, but merely an interpretation of the OSH Act and recognition of the obligations already contained therein. *See Universal*, 182 F.3d at 728 n.2 (employer's position that rulemaking was required before applying multi-employer worksite doctrine "clearly is incorrect"); *Limbach Co.*, 6 BNA OSHC 1245, 1977-78 CCH OSHD at pp. 27,080-1 (multi-employer worksite doctrine is not substantive rule). Accordingly, given the case law, there was no need for the Secretary to initiate a rulemaking merely to respond to *dicta* in court and Commission decisions. Furthermore, Summit was on ample notice of its possible liability because the doctrine is well-established and has been in existence for many years. *See Universal*, 182 F.3d at 728 n.2 (noting doctrine's long history).

To the extent the Secretary has clarified the details of the policy over the years, those clarifications merely reflect adjustments in how the Secretary has chosen to exercise her permissible prosecutorial discretion, within the bounds of the Act and informed by her experiences in enforcing the Act. After all, such policy guidelines

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Thus the Secretary's failure to incorporate § 1926.16 as an Occupational Safety and Health Act standard is of no moment, contrary to the suggestions by both of my colleagues. As the Secretary explained, the unincorporated provisions were necessary to address terms and concepts from the Construction Safety Act in light of the fact that the jurisdictional predicate of the Construction Safety Act was a contractual relationship involving the Federal government, but they had no "pertinence" to the Occupational Safety and Health Act, which had a different jurisdictional predicate.

"'merely announce[] [the Secretary's] tentative intentions for the future, leaving himself free to exercise his informed discretion.'" *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006) (citation omitted) (*Twentymile*). As the Secretary correctly points out, to some extent, the Secretary has even altered the application of her policy in response to decisions of the Commission. Resp. Br. for the Sec'y of Labor, Summit Contractors, Inc., Docket No. 03-1622, at p. 26 n.14. *See also* 41 Fed. Reg. 17,639 (Apr. 27, 1976) (Secretary discusses evolution of multi-employer case law); Recent Case, *Administrative Law – Occupational Safety & Health Act – On Multiemployer Jobsite, When Employees of any Employer are Affected by Noncompliance with a Safety Standard, Employer in Control of Work Area Violates Act; Employer Not in Control of Work Area Does Not Violate Act, Even If His Own Employees Are Affected, Provided the Hazard is "Nonserious,"* 89 Harv. L. Rev. 793, 797 n.34 (1976) (discussing possible changes in Secretary's multi-employer policy in response to Commission and court decisions). It is highly ironic for my colleagues to use those Commission-driven changes against her.

In claiming that the Secretary has been inconsistent because her policy has evolved over the years, my colleagues have a fundamental misunderstanding of enforcement guidelines and seek to impose on the Secretary an inappropriate straitjacket that would deprive her of the ability to make adjustments in her enforcement policies. My colleagues even suggest that the Secretary recognized she lacked the authority to cite controlling employers because she did not seek to cite them in her first enforcement policy. There is a significant difference between an agency not exercising the full scope of its statutory authority for reasons of enforcement discretion and an agency explicitly recognizing that it lacks statutory authority. I am not aware that the Secretary has ever taken the position that she lacked the authority to cite controlling employers. *See Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1131 (D.C. Cir. 2001) (Secretary had never taken position that she lacked authority to issue per-instance penalties).

In any event, courts have recognized the danger of "transmogrify[ing]" written guidelines that aid an agency's exercise of discretion into binding norms, as my colleagues inappropriately seek to do here. *See Comty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987). Unfortunately, this "pernicious" practice of denying the

Secretary her lawful prosecutorial discretion, second guessing her legitimate policy choices, and "substitut[ing] its views of enforcement policy for those of the Secretary" is becoming all too common.[5] *See Twentymile*, 456 F.3d at 158. Indeed, were my colleagues to have their way, the Secretary would be required to embark on a series of never-ending rulemakings merely to maintain her statutory authority.

Even assuming, *arguendo*, that my colleagues are right about § 1910.12(a) as having some relevance to the Secretary's multi-employer citation authority under section 5(a)(2) of the Act, I would read paragraph (a), taken as a whole, as ambiguous. The first sentence makes clear that the construction standards apply to the "place of employment of every" construction employee and is similar in breadth to section 5(a)(2) of the Act. Thus, to the extent a general contractor exercises control over such a place of employment (and recognizing in some cases that *only* the general contractor can ensure safety compliance), it is reasonable to read the regulation as imposing on that controlling general contractor a duty to comply with the specific construction standards which apply to that place of employment. Read in this context, the second sentence merely emphasizes the primary responsibility of the direct employer to comply with the appropriate standards, but it is not drafted as a limitation, does not by its terms impose the duty exclusively on the direct employer (i.e., it does not say "[e]ach employer shall protect the employment and places of employment of *only* each of his employees . . ."), and is not inconsistent with the more generalized duty imposed by the first sentence and its statutory analog, section 5(a)(2) of the Act.[6]

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[5] *See Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1688, 2006 CCH OSHD ¶ 32,845, pp. 52,838-39 (No. 04-1091, 2006) (consolidated) (Rogers, Commissioner, partial concurrence and dissent), *appeal docketed*, No. 06-4810 (3d Cir. Nov. 17, 2006); *Cagle's Inc.*, 21 BNA OSHC 1738, 1746, 2006 CCH OSHD ¶ 32,846, p. 52,849 (No. 98-0485, 2006) (Rogers, Commissioner, partial concurrence and dissent), *appeal docketed*, No. 06-16172 (11th Cir. Nov. 28, 2006); *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1776 (No. 04-0316, 2006) (Rogers, Commissioner, dissent).

[6] My colleague, Commissioner Thompson, cites *Vitarelli v. Seaton*, 359 U.S. 535 (1959), to support his argument that the Secretary somehow violated a self-imposed limitation by applying her multi-employer policy to controlling contractors. The *Vitarelli* case is easily distinguishable. In *Vitarelli*, the Department of Interior specifically bound itself to certain procedural requirements for the dismissal of employees on security grounds and relied upon those requirements as authority in its actual dismissal notice of Vitarelli. *Id.* at 538-40. The Court, not surprisingly, found the agency was bound by its own internal

My colleagues suggest that § 1910.12(a) should be interpreted in a manner similar to section 5(a)(1) of the Act, in light of the reference in the second sentence of the regulation to "each of his employees." But they appear to overlook the fact that section 5(a)(1) of the Act lacks the broad first sentence—similar in breadth to section 5(a)(2)—which appears in § 1910.12(a) of the regulation. Indeed, in that respect, § 1910.12(a) is more akin to sections 5(a)(1) and 5(a)(2) of the Act *combined*. Accordingly, the two sentences of § 1910.12(a) must be read together and in the context of the duty imposed by section 5(a)(2) of the Act.

Thus, to the extent that § 1910.12(a) might be viewed as having some relevance to the Secretary's multi-employer citation authority under the Act, I would defer to the Secretary's reasonable and longstanding interpretation of § 1910.12(a) as permitting her to cite controlling contractors under the multi-employer doctrine. *See Martin v. OSHRC*, 499 U.S. 144 (1991).[7]

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procedural requirements for the dismissal of an employee on security grounds. *Id.* Here, in contrast, despite my colleague's speculation, there is no evidence that the Secretary intended § 1910.12(a) to have relevance to the multi-employer question before us; even if § 1910.12(a) did have relevance, it does not operate as a limit on her authority under section 5(a)(2) of the Act to cite controlling contractors; and, in any event, in citing employers under the multi-employer policy, the Secretary does not rely on § 1910.12(a) as her authority.

[7] To be sure, the D.C. Circuit has questioned the validity of the multi-employer worksite doctrine, although it has scrupulously avoided reaching the issue. *See IBP, Inc. v. Herman*, 144 F.3d 861, 865-66 (D.C. Cir. 1998) (non-construction case). That circuit has observed that the doctrine has a "checkered history", and that it "see[s] tension" between the doctrine and the language of the statute and regulations." *Id.* at 865 & n.3. *See also Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306 (D.C. Cir. 1995) (noting that "it is not clear to us that the multi-employer doctrine is consistent with the Secretary's own construction industry regulation, 29 C.F.R. § 1910.12(a)" because "the language of § 1910.12, which says that '[e]ach employer shall protect the employment and places of employment of each of *his employees*' . . . is in marked tension with the multi-employer doctrine we are asked to apply here." (emphasis in original)). However, since the D.C. Circuit has never reached the validity of the doctrine, there is no legal basis to overturn over thirty years of our own precedent based on concerns expressed in *dicta* with respect to issues the court did not address. Furthermore, in *Universal*, the Tenth Circuit considered the concerns expressed by the D.C. Circuit in *Anthony Crane* and *IBP*, but did not view them as sufficient to cast aside the Secretary's interpretation. *Universal*, 182 F.3d at 731. Thus, it appears that the Tenth Circuit did not view § 1910.12(a) as a bar to the Secretary's exercise of the multi-employer policy.

Conclusion – We Should Uphold Long-standing Precedent

As discussed above, and as recognized by many courts, it is often *only* the general contractor who can ensure safety and OSHA compliance at a construction site populated by an array of subcontractors, particularly in the context of a dispute among subcontractors. By freeing the general contractor of any safety compliance obligations as the controlling employer, my colleagues have ensured that there will be numerous situations where *no one* on a construction site will have *both* the practical ability and legal obligation to ensure safety compliance. With respect to those situations, they are reading section 5(a)(2) out of the Act and are creating a dangerous "no-man's land" of safety non-compliance.

For the reasons stated, I would not rewrite thirty years of history. I would maintain our long-standing precedent and continue to hold that the Secretary has the

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The Chairman suggests that both the D.C. Circuit, in *Anthony Crane Rental*, and the First Circuit, in *Secretary v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1 (1st Cir. 1993), had found the meaning of § 1910.12 "plain" with respect to its effect on the Secretary's multi-employer policy. In fact, both circuits were addressing a *different issue* - the meaning of "places of employment" for the purpose of determining whether the worksites were "places of employment" for the respective respondents' employees which the respondents had a duty to protect based on their employees' presence on the site. *See Anthony Crane Rental*, 70 F.3d at 1303, *Simpson, Gumpertz & Heger*, 3 F.3d at 5. Of course, despite the Chairman's implication, the D.C. Circuit did not address the validity of the multi-employer policy in *Anthony Crane Rental*.

The Fifth Circuit alone has seemingly rejected the theory of multi-employer liability, although it has not reviewed a relevant Commission decision since the Commission accepted the doctrine. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 712 (5th Cir. Unit A 1981) (tort case). *See also Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (1975) (per curiam); *McDevitt*, 19 BNA OSHC at 1110, 2000 CCH OSHD at p. 48,781 (No. 97-1918, 2000). But that is the clear minority view. *See Universal*, 182 F.3d at 731 (no Fifth Circuit case "persuasively explain[s] the basis for rejection of the [multi-employer] doctrine."); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999) ("*Melerine* . . . does not persuade us that the doctrine is an inappropriate by-product of the Act's language or purpose.").

While the Fourth Circuit had affirmed an early Commission decision rejecting the Secretary's use of the multi-employer doctrine, *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974), it did so based on deference to the Commission. As the D.C. Circuit has pointed out, *IBP, Inc.*, 144 F.3d at 865-66 n.3, that decision has effectively been overruled by the Supreme Court's subsequent decision in *Martin v. OSHRC*, 499 U.S. 144 (1991).

lawful authority to apply the multi-employer doctrine to general contractors at construction worksites. In the context of over thirty years of precedent, I cannot join those who would reverse that precedent and further straitjacket the Secretary's lawful exercise of prosecutorial discretion in protecting worker safety.

I respectfully dissent.

/s/
Thomasina V. Rogers
Commissioner

Dated: April 27, 2007

Secretary of Labor, Complainant, v. Summit Contractors, Inc., Repsondent.	OSHRC Docket No. 03-1622

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Robert E. Rader, Esquire
Rader &Campbell
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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Summit Contractors, Inc. (Summit), contests a serious citation for violation of 29 C.F.R. § 1926.451(g)(1)(vii) issued on August 25, 2003, by the Occupational Safety and Health Administration (OSHA). The citation alleges that Summit, as the general contractor for the construction of a college dormitory in Little Rock, Arkansas, failed to ensure that employees of a masonry subcontractor were utilizing fall protection while working on scaffolds in excess of 12 feet above the ground. The citation proposes a penalty of $4,000.

The hearing was held in Little Rock, Arkansas, on January 27, 2004, and the record remained opened until March 1, 2004, for the inclusion of two trial depositions. Jurisdiction and coverage are stipulated (Tr. 4).

Summit does not dispute the existence of the violative conditions as described in the citation. Summit asserts, however, that as general contractor who neither created nor had employees exposed

to the fall hazard, it cannot be cited for the violation. Summit argues that the multi-employer worksite doctrine is invalid, and that it lacked sufficient control of the jobsite as general contractor to prevent or abate the violation.

For the reasons discussed, Summit's arguments are rejected. The serious citation is affirmed and a penalty of $2,000 is assessed.

Background

Summit is in business as a general contractor overseeing construction projects. Its corporate office is located in Jacksonville, Florida. Summit employs approximately 180 employees. It employs no construction trade employees (Tr. 258-259).

In December 2002, Summit and Collegiate Development Services, LP, the developer for the property owner, entered into a construction contract to build new student housing for Philander Smith College in Little Rock, Arkansas. Summit contracted to serve as general contractor and assumed the construction responsibilities for the project (Exhs. C-7, JT -2, pp. 5-6). The proposed dormitory consisted of a three-story building with 134 units comprising approximately 90,000 square feet (Exh. Jt-1, p. 42; Tr. 142, 192).

To perform the construction work, Summit contracted approximately fifteen subcontractors and nine vendors[1] (Exh. C-6; Tr. 104). Summit's project superintendent, Jimmy Guevara, and three assistant project superintendents worked at the project coordinating the vendors, scheduling the work of the various subcontractors, and ensuring that a subcontractor's work was performed in accordance with the subcontract agreement (Tr. 101-102, 110-111). Summit's project manager Jon Lee visited the site twice a month to check on the progress and schedules (Exh. Jt-1, p. 5; Tr. 102-103).

The site clearing and foundation preparation work began in January 2003. The framing work commenced on April 28, 2003 (Exh. Jt-1, p. 19; Tr. 103, 193). Summit's contract with the developer required Summit to complete the project in 150 days. Otherwise, Summit was subject to paying liquidated damages (Exh. Jt-1, p. 19). The dormitory was completed on schedule

[1] Superintendent Guevara testified that thirty to forty subcontractors worked on the project (Tr. 104). However, Summit's list of subcontractors shows only fifteen subcontractors and nine vendors (Exh. C-6).

on August 15, 2003 (Tr. 193).

Summit subcontracted All Phase Construction, Inc. (All Phase), to complete the exterior brick masonry work for the new building (Exh. Jt-1, p. 20, C-8; Tr. 104). All Phase started the brick work on May 23, 2003 (Exh. C-9). To access the building's exterior, All Phase leased scaffolds which it installed and moved as its brick work progressed around the building (Tr. 202).

Summit's project superintendent Guevara testified that prior to OSHA's inspection, he had observed All Phase employees on the scaffold without using personal fall protection. The scaffold also lacked guardrails. Guevara stated that he told the All Phase superintendent of the lack of fall protection and advised them to correct it (Tr. 116, 119-120). According to Guevara, All Phase would implement fall protection until the scaffold was moved to another location when employees again would work without fall protection. Guevara explained that this occurred two or three times prior to the OSHA inspection (Tr. 129).

On June 18, 2003, OSHA Compliance Officer (CO) Richard Watson, while driving to another inspection site, observed and photographed employees on a scaffold at the student housing project laying bricks approximately 12 feet above the ground without fall protection (Exh. C-1; Tr. 33). After receiving permission from his office to conduct an inspection, CO Watson returned to the project on June 19, 2003. He again observed and photographed employees on a scaffold laying bricks without fall protection (Exhs. C-2, C-3; Tr. 37). Upon entering the project, CO Watson was informed by project superintendent Guevara that the masonry contractor was All Phase (Exh. C-9; Tr. 169). However, Summit would not permit CO Watson to conduct a walkaround inspection until its safety officer who lived in Jacksonville, Florida, was present (Tr. 38, 40). OSHA agreed to wait, and the walkaround inspection was performed on June 24, 2003. However, All Phase was not on site (Exh. C-9; Tr. 38-40, 233-234).

As a result of CO Watson's observations on June 18 through19, 2003, Summit received a serious citation for violation of 29 C.F.R. § 1926.451(g)(1)(vii). All Phase also received a citation which included an alleged violation of § 1926.451(g)(1)(vii) and a proposed penalty of $2,500 (Tr. 79, 81).

Discussion

It is undisputed that Summit did not create, nor was its employees exposed to, the lack of fall protection on the scaffold (Tr. 27). The scaffold was leased and erected by All Phase. There is no evidence that Summit or other subcontractors ever used the scaffold or that their employees were exposed to a fall hazard. The exposed employees were employed by All Phase, a subcontractor hired by Summit (Tr. 79, 83, 202-203). CO Watson observed All Phase employees on the scaffold without fall protection on two successive days (June 18 and 19, 2003).

Summit does not dispute that the cited standard, § 1926.451(g)(1)(vii), applies to the scaffolding conditions existing at the construction site or that All Phase's employees[2] were exposed to a fall hazard of 12 feet and 18 feet without personal fall protection or a guardrail system on the scaffold (Tr. 26, 37). Section 1926.450(g)(1)(vii) applies to all scaffolds used in workplaces covered by the construction industry standards. See 29 C.F.R. § 1926.450(a).

Summit stipulates that it was aware that All Phase's employees were not utilizing personal fall protection and that the scaffold lacked guardrails (Tr. 24, 48, 116). The lack of fall protection was open and obvious and in plain view from the street and Summit's jobsite trailer (Exhs. C-1, C-2; Tr. 33, 36-37, 46). Summit's superintendent inspected the jobsite once or twice each day, and his three assistants were on site overseeing the subcontractors' work. They were on the jobsite on June 18 and 19, 2003, at the time of the alleged violations (Tr. 137-138, 140, 200). On June 19, the superintendent had walked the jobsite prior to CO Watson's arrival (Tr. 140).

Summit's superintendent had observed the same violations several times earlier by All Phase and had asked All Phase to correct the violations (Tr. 119-120, 122). Also, there is no dispute that the superintendent knew the scaffolding fall protection requirements since he had previously received OSHA training (Tr. 123).

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[2] During the hearing, Summit speculated that the exposed employees were independent contractors hired by All Phase (Tr. 26, 79). However, this was not established or argued in its posthearing brief. Therefore, the exposed employees are considered employed by All Phase. This was CO Watson's understanding during his inspection (Tr.47). Also, the subcontract agreement requires Summit to approve in writing the hiring of contractors by subcontractors (Exh. C-8, Art. 8). Summit offered no written approvals.

Based on these undisputed stipulations, if Summit is found to have sufficient authority and control to prevent or abate the scaffold violation under the multi-employer worksite doctrine, a serious violation of § 1926.451(g)(1)(viii) is supported by the record.[3]

Multi-Employer Worksite Doctrine

Under the multi-employer worksite doctrine, an employer, including a general contractor who controls or creates a worksite safety hazard, may be liable for violations of the Occupational Safety and Health Act (Act) even if the employees exposed to the hazard are solely employees of another employer. A general contractor may be held responsible on a construction site to ensure a subcontractor's compliance with safety standards, such as fall protection requirements, if it can be shown that the general contractor could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2129-2130 (No. 92-0851, 1994).

As it has argued in earlier cases,[4] Summit challenges the multi-employer worksite doctrine. In this case, Summit has moved for declaratory relief asserting that there is no basis in the Act and regulations for the multi-employer worksite doctrine. However, since the doctrine is based on

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In its answer, Summit asserts an infeasibility defense. Other than its lack of control argument, Summit does not argue, and the record does not support, that fall protection for employees on the scaffold was technically or economically infeasible. Also, there is no showing that the effect of implementing measures against All Phase to assure compliance would adversely affect Summit's financial condition. Summit's affirmative defense of infeasibility is rejected.

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Summit has a history of cases before Commission judges on the issue of the multi-employer worksite doctrine. Summit's alleged violations for the most part were vacated on the basis of lack of knowledge and, in one case, lack of control. *See Summit Contractors, Inc.*, 20 BNA OSHC 1118 (No. 01-1891, 2003) (ALJ Spies) (after rejecting arguments that the multi-employer worksite doctrine contravenes the Act and that Summit lacked sufficient control, the citation was vacated because of Summit's lack of knowledge of the unsafe condition); *Summit Contractors, Inc.*, 19 BNA OSHC 2089 (No. 01-1614, 2002) (ALJ Schoenfeld) (vacated citation based on Summit's lack of sufficient authority to control the manner a subcontractor complied with the safety requirements and finding that the authority to terminate a subcontract is not a sufficient basis to hold the general contractor responsible for the subcontractor's violations); *Summit Contractors, Inc.*, 19 BNA OSHC 1270 (No. 00-0838, 2000) (ALJ Spies) (as general contractor and controlling employer who had two employees exposed, Summit had the responsibility to comply with the fire extinguishing standard); *Summit Contractors, Inc.*, 18 BNA OSHC 1861 (No. 98-1015, 1999) (ALJ Spies) (the citation was affirmed because Summit retained a safety consultant to advise it of potential safety hazards and issued fines to subcontractors for safety violations); and *Summit Contractors, Inc.*, 17 BNA OSHC 1854 (No. 96-55, 1996) (ALJ Welsch) (the citation was vacated because Summit as general contractor lacked knowledge of the hazard).

Review Commission precedent, it is not appropriate for a Commission judge to engage in such declaratory relief. Also, the Commission has already rejected many of the arguments raised by Summit and discussed the basis for the doctrine. *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1723-1724 (No. 95-1449, 1999).

The multi-employer worksite doctrine, as applied by the Review Commission, has been accepted in one form or another in at least six circuits and rejected outright in only one. See *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *Brennan v. OSHRC* 513 F.2d 1032 (2d Cir. 1975); and *Universal Construction Company Inc v. OSHRC*, 182 F.3d 726 (10th Cir. 1999). But *see Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975).

In this case, Summit's office is located in Jacksonville, Florida, and the worksite at issue was in Arkansas. These states are located in the Eleventh and Eighth Circuits where this case could be appealed.[5] The Eight and Eleventh circuits have not rejected the multi-employer worksite doctrine. The Eighth Circuit has accepted the doctrine. *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977) (an employer who has control over an entire worksite must take whatever measures are "commensurate with its degree of supervisory capacity"). The Eleventh Circuit has not had an opportunity to rule on the doctrine. Although several employers have argued that the Eleventh Circuit has rejected the multi-employer worksite doctrine based on earlier Fifth Circuit case law, the Review Commission has ruled otherwise. *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1111-1112 (No. 97-1918, 2000)(case law decided by the former Fifth Circuit rejecting the multi-employer worksite doctrine does not preclude application of the Review Commission's precedent regarding the doctrine in the Eleventh Circuit). Additionally, Summit could appeal to the D. C. Circuit. Although the D.C. Circuit has questioned the doctrine's validity in a manufacturing

[5]"Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case-even though it may differ from the Commission's precedent." *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

plant in *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998),[6] it did not specifically reject the doctrine. The multi-employer worksite doctrine is still viable before the Review Commission. *McDevitt Street Bovis, Inc., Id.*

Thus, Commission precedent and the applicable Circuit court precedent do not reject the multi-employer worksite doctrine.

In this case, Summit asserts that OSHA's Directive CPL 2-0.124 ("Multi-Employer Citation Policy") issued by the Secretary on December 10, 1999, is not enforceable because it is contrary to the OSHA's published regulation at 29 C.F.R. §1910.12.

Section 1910.12(a) provides in part that "[e]ach employer shall protect the employment and places of employment of each of *his employees* engaged in construction work by complying with the appropriate standards prescribed in this paragraph" (emphasis added). Summit argues that because § 1910.12(a) places safety responsibility on the employer for its own employees engaged in construction work, OSHA's multi-employer worksite citation policy in OSHA Directive CPL 2-0.124 ("Multi-Employer Citation Policy") which permits citing a non-exposing and non-creating employer, is unenforceable.

Summit's argument regarding OSHA's multi-employer citation policy is rejected. The citation at issue alleges Summit violated § 1926.451(g)(1)(vii). In deciding this case, it is the applicable Review Commission precedent which determines if Summit, as a general contractor, is responsible for the alleged scaffold violation and not an internal guideline used by an OSHA compliance officer. The Review Commission does not consider an OSHA CPL or other internal directives as binding on the Commission, and may only look to them as an aid in resolving interpretations under the Act. The CPL does not confer procedural or substantive rights on employers and does not have the force and effect of law. *Drexel Chemical Company*, 17 BNA OSHC 1908,

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In *IBP, Inc.*,17 BNA OSHC 2073 (No. 93-3059, 1997), the Review Commission held the owner of a plant responsible for LOTO violations of an independent contractor while cleaning meat processing machinery. The Commission found that the plant owner had supervisory authority over the worksite; it had contractual authority to bar entry to the independent contractor and, although its employees were not exposed, it owned the machinery which gave it responsibility to do what was reasonably expected to abate violations. The D.C. Court of Appeals reversed the Commission finding that the Secretary had not shown sufficient control. A contract provision allowing the owner to terminate the contract was not sufficient to show control. Control and preventability are the keys to the applicability of the doctrine, not whether the employer is a general contractor.

1910, n. 3 (No. 94-1460, 1997). Also, Summit's reading of § 1910.12 is too narrow. The standard does not prohibit application of an employer's safety responsibility to employees of other employers.

Summit's Control of the Worksite

Summit concedes that it knew of All Phase's repeated failure to provide fall protection or require employees to utilize personal fall protection while on a scaffold more than 10 feet above the ground (Tr. 24, 26, 48, 116). The Secretary concedes that Summit was not a creating or exposing employer (Tr. 27, 79).

The issue in dispute is whether Summit had sufficient supervisory authority and control of the student housing worksite to prevent and abate the violative condition which exposed All Phase's employees to a fall hazard.[7] As discussed, to determine whether a general contractor such as Summit is a controlling employer for purposes of multi-employer responsibility, the general contractor must be in a position to prevent or correct a violation or to require another employer to prevent or correct the violation. Such control may be in the form of an explicit or implicit contract right to require another employer to adhere to safety requirements and to correct violations the controlling employer discovers.

Summit maintains that it is company policy not to be responsible for the safety of a subcontractor's employees or for any OSHA requirements placed on subcontractors (Exh. Jt-2, pp. 4-5; Tr. 42). This policy is reflected in Summit's subcontract agreements and its safety manual. Summit's subcontract with All Phase, as well as with its other subcontractors, provides that:

> All parties hereby agree that SUBCONTRACTOR has sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act of 1970 and agrees to indemnify and hold harmless CONTRACTOR against any legal liability or loss including personal injuries which CONTRACTOR may incur due to SUBCONTRACTOR's failure to comply with the above referenced act. In the event any fines or legal costs are assessed against

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[7] Summit's argument that Judge Shoenfeld's decision involving Summit, 19 BNA OSHC 2089 (No. 01-1614, 2002), finding a lack of control is *res judicata* is rejected. Judge Shoenfeld's decision is a non-binding, unreviewed decision of a Commission judge based on the facts in his case. Judge Shoenfeld's decision is not a final adjudication on all issues. *Leone Construction Co.*, 3 BNA OSHC 1979 (No. 4090, 1976). Also, since *res judicata* was not pled until Summit's posthearing brief, the affirmative defense was waived. 29 C.F.R. 2200.34(b)(4).

> CONTRACTOR by any governmental agency due to noncompliance of safety codes or regulations by SUBCONTRACTOR, such cost will be deducted, by change order, from SUBCONTRACTOR's Subcontract amount. (Exh. C-8, Attach A, section 4).

Summit's safety manual provides that:

> [b]ecause the subcontractors and sub-subcontractors are each separate employers, Summit is not legally responsible for their compliance with OSHA. Nor would it be feasible or reasonable for Summit to assume responsibility for any subcontractor's compliance with OSHA because Summit has no control over a subcontractor's hiring, training or disciplinary practices. (Exh. C-5, p. DOL 18).

If a subcontractor's safety violations are observed, the safety manual provides that:

> If, during the normal course of operations, an open and obvious hazard is observed, Summit will contact the appropriate trade supervisor/foreman and ask that they correct the hazard. Summit encourages all trades to emphasize safety while they are on the project. In cases where questions arise regarding some safety or health issue, Summit's Director of Safety will, if asked, act as a resource in an attempt to assist a subcontractor with their question by providing copies of relevant standards or other helpful information (Exh. C-5, p. DOL 19).

Regardless of its stated company policy,[8] Summit, pursuant to the contract with the owner's representative in this case, agreed to be responsible for the safety of subcontractors' employees. In its contract with Collegiate Development, the owner's representative, Summit, agreed to "indemnify and hold harmless the Design-Builder, the Owner and their respective agents, servants and employees from and against claims, damages, losses and expenses, including but not limited to, attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to . . . .

> (e) liability imposed upon any Indemnified party directly or indirectly by Contractor's failure or the failure of any of Contractor's or a Subcontractor's employees to comply with any Occupational Safety and Health Administration (or related statutes) violations and any

[8]It is noted that an employer cannot contract away its responsibilities under the Act. *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992).

penalties including enhancements, resulting in whole or in part from Contractor's acts or omissions . . . ." (Exh. C-7, Section XII).

Summit also accepted responsibility "for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract" and to "take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: a. employees on the Work and other persons who may be affected thereby" (Exh. C-7, Section XIII, para. A.1 and para. B.1). Summit agreed to "comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on the safety of persons or property or their protection from damage, injury or loss (Exh. C-7, Section XIII, para. B.2). Summit acknowledged responsibility "for all general conditions work such as, but not by way of limitation, hoists, safety equipment, and portable toilets" (Exh. C-7, Section I, para. F).

Based on these contractual obligations with the property owner's representative, Summit explicitly agreed to protect the safety of subcontractors' employees. The plain, unambiguous language of the agreement provides that Summit had to protect all "employees on the Work" and "other persons who may be affected thereby." Summit's former vice-president defined the term "Work" to include any type of construction work performed by any worker of a subcontractor (Exh. Jt-2, p. 16).[9] If Summit failed to comply with these safety obligations, the owner had the right to terminate the agreement or to pursue other remedies (Exh. C-7, Section XXVII, para. A and C).

When Summit attempts to avoid responsibility for the safety of subcontractors' employees on a given construction project, it attaches an addendum to the general contract with the owner. Summit normally uses a standard American Institute of Architects (AIA) contract form which holds the general contractor responsible. To the general contract, Summit attaches an addendum that expressly negates the responsibility for the safety of a subcontractor's employees (Tr. 247, 266-267).

However, for the Philander Smith College construction project, Summit did not avoid such responsibility and no addendum was attached to the general contract. Summit admits that the agreement with the owner's representative was different from Summit's typical agreement (Tr. 247). The agreement for this project was based on a form provided by the owner's representative. Summit did not write the contract or negotiate any changes (Exh. Jt-2, p. 5-6, 13).

[9]Despite Summit's former vice-president's testimony that he did not see anything in the contract regarding Summit's responsibility for subcontractor safety and, if he had, he would have tried to negotiate changes, the clear language of the contract provides otherwise (Exh. Jt-2, p. 7).

Based on its agreement with the owner's representative, Summit contracted with various subcontractors, including All Phase, to perform the actual construction work for the new student

housing. Summit used its standard subcontract agreement form which it required all subcontractors to sign (Exh. Jt-1, pp. 49-50).

The subcontract with All Phase also establishes Summit's requisite control over the safety of All Phase's workers. In Article 6 of the subcontract with All Phase, the

> SUBCONTRACTOR agrees to be bound to CONTRACTOR by the terms and conditions of the General Contract between CONTRACTOR and OWNER as well as this Subcontract Agreement and hereby assumes towards the CONTRACTOR all of the duties, obligations and responsibilities applicable to SUBCONTRACTOR's work which the CONTRACTOR owes towards the Owner under the General Contract. (Exh. C-8)

Summit also required the subcontractor to "comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work" (Exh. C-8, Art. 9). The subcontract required All Phase to warrant and guarantee that all of its work would be "in compliance with all federal, state and local codes and requirements (Exh. C-8, Art. 15). Although the subcontract attempts to place responsibility for compliance with the Occupational Safety and Health Act (Act) on the subcontractor, the subcontractor is required to hold Summit harmless against any liability, including the assessment of OSHA fines and legal costs. Summit is reimbursed for fines assessed and legal costs incurred as a result of the subcontractor's failure to comply with safety requirements. Summit retained the authority to deduct the OSHA fines and legal costs from the subcontract amount by change order.

Additionally, other provisions of the subcontract shows Summit's control over the safety of All Phase's employees. All Phase's subcontract provided that the subcontractor could not subcontract without the prior written consent of Summit, and Summit had sole discretion on whether to approve a subcontractor's subcontractor. Also, subcontractors were required to keep their work areas clean and orderly subject to Summit's approval. The subcontract required All Phase to have on site at all times a "competent superintendent and necessary assistants all approved by" Summit, one of which had to be able to speak English (Exh. C-8, Attachment A, para. 17, 33, 45). All Phase

agreed that "any scaffolding installed by SUBCONTRACTOR to install this scope of work shall be OSHA approved"-- meaning that it would comply with OSHA regulations (Exh. C-8, Attachment B, para. 20). Summit required that All Phase comply with all governing laws imposed by all Federal governing authorities, including the Occupational Safety and Health Act (Exh. C-8, Attachment A, para. 42 and Attachment B, preamble).

Moreover, Summit's control over All Phase's worksite is addressed in paragraph 5 of Attachment A to the subcontract (Exh. C-8) which provides that:

> All parties hereby agree that control of the Work Schedule, use of the site and coordination of all on-site personnel will be perform under the complete direction of CONTRACTOR's supervisory staff. CONTRACTOR may enforce upon SUBCONTRACTOR
>
> any of the following actions in order to expedite or coordinate the work. However, CONTRACTOR does not assume any liability for delays to SUBCONTRACTOR or third parties in connection with coordination of on-site personnel. These actions include, but are not limited to, the following:
>
> A) Designated storage, designated unloading and parking areas.
>
> B) Require unacceptable materials, equipment or vehicles to be removed from the project.
>
> C) Limit the use of the site by SUBCONTRACTOR's equipment, vehicles, personnel or stored materials.
>
> D) Temporarily or permanently bar specific personnel from the site. Listed below is a partial list of reasons to deny a person access to the project.
>
> 1) Drug or alcohol use
> 2) Fighting, possession of weapons
> 3) Theft
> 4) Harassment of anyone on or off the project
> 5) Personal use of the areas near the project limits for parking, eating, sleeping, etc.
> 6) Failure to cooperate with CONTRACTOR's supervisory personnel or comply with project documents.

Summit's authority explicitly granted by a combination of contract provisions is broad enough to necessarily involve subcontractor employees' safety. Summit held authority over the subcontractor's actions, as well as authority over conditions affecting general safety on the worksite. The authority granted Summit mirrored how Summit actually controlled the project. In addition to accepting responsibility for compliance with OSHA's safety requirements in its contract with the owner, and by requiring its subcontractors to hold Summit harmless for a failure to comply, Summit held sufficient authority and control over the worksite and the safety of the employees.

The Review Commission considers supervisory authority and control sufficient where the general contractor has specific authority to demand a subcontractor's compliance with safety requirements, stop a contractor's work for failure to observe safety precautions, and remove a contractor from the worksite. *McDevitt Street Bovis, Inc., supra.* Summit held this control over All Phase.

Thirty-eight employees of four subcontractors including All Phase were working on the student housing project on June 18 and 19, 2003 (Exh. C-9). Summit's project superintendent and his three assistants were also present on site. The assistants were assigned to particular locations in the building where the subcontractors performed their jobs, and the project superintendent inspected the site twice daily to ensure progress and quality of work. Summit kept track of the subcontractor's activities on the worksite. Guevara, as project superintendent, prepared a project diary and daily report at the end of the day which detailed the activities performed by the subcontractors and the occurrence of any problems (Exh. C-9).

Respondent held the power to hire and fire subcontractors (Tr. 104, 109, 149-150). Summit controlled the sequencing of work, telling subcontractors when to start and finish their work (Tr. 109, 144). Summit controlled the quality of work, ensuring through inspections that subcontractors performed their work in accordance with the contract specifications and blueprints (Tr. 109-111). Summit had authority to correct deficiencies in the work of the subcontractors (Tr. 144). Summit conducted injury investigations for employees of subcontractors who were injured at the worksite (Exh. C-9, entry April 16, 2003; Tr. 163-167). At the preconstruction meeting, Summit

conducted a safety presentation which included fall protection and invited subcontractors to attend (Tr. 213-214).

If, during the normal course of his activities, Summit's superintendent observed an obvious safety concern, the superintendent requested the subcontractor to rectify the hazard immediately (Tr.

222, 244). This is what superintendent Guevara advised several times prior to the OSHA inspection. He mentioned to All Phase at least twice that its employees were not using fall protection while laying bricks from the scaffold (Tr. 120, 129, 205). As recognized by superintendent Guevara, subcontractors generally complied with his safety warnings (Tr. 129).

Summit's claim that it has only a limited ability to require a subcontractor to correct safety violations is disingenuous. The subcontract which Summit drafted and required subcontractors to sign in order to work on the student housing project retained Summit's authority to terminate, suspend or withhold contract payments from any subcontractor who failed to abide by its directions. Summit, not the subcontractors, dictated the terms of the subcontract and what occurred on the worksite. Guevara testified that subcontractors never refused any of its requests concerning safety (Tr. 113, 129). This shows a recognition by the subcontractors of Summit's control and authority over the worksite.

As a general contractor, Summit held a unique position on the construction project. The subcontract agreement provided Summit multiple methods to enforce All Phase's compliance with OSHA requirements. Summit chose the subcontractors for the work, controlled the scheduling of their work, and could enforce penalties or ultimately terminate the subcontract if the subcontractor failed to meet its schedule. Summit had the right to terminate All Phase for convenience or for cause if the subcontractor failed to "perform the Work in Accordance with the Contract Documents," disregarded "Laws, Codes or Regulations of any public body having jurisdiction, or "otherwise violates in any way provisions of the Contract Documents" (Exh. C-8, Art. 14(b)). This right included the power to fire a subcontractor for the violation of OSHA regulations (Exh. Jt-1, pp. 14-15). Although termination of a subcontractor could cause serious problems with the scheduling;

nevertheless, Summit has exercised that ultimate control when necessary.

Summit also had the right to exclude All Phase from the jobsite and to take possession of the Work (Exh. C-8, Art. 14). Summit could temporarily or permanently bar specific personnel of All Phase from the jobsite for failure to cooperate with Summit's supervisors (Exh. C-8, Attachment A, para 5). In fact, Summit's safety and health manual contemplated that a partial or total work stoppage might be required until corrective action is taken (Exh. C-5, p. 72). In Article 14 of the subcontract

agreement, Summit retained the authority to suspend the subcontractor for not more than 90 days without cause.

If termination or suspension were too harsh a remedy, the subcontract provided other methods by which to enforce All Phase's compliance with OSHA. Summit had the right to retain 10 percent of the contract amount until All Phase satisfied all of its contractual obligations (Exh. C-8, Art. 3(d); Tr. 114-115). Summit's safety policy also provides that the project superintendent could solicit

assistance from Summit's safety director or the project manager (Tr. 222, 229-230). In fact, the project superintendent testified that when he had encountered a problem with a roofing subcontractor during a rain, he took the problem to his project manager who corrected it by dealing directly with the subcontractor's officers (Tr. 169-171). This was not done, however, when All Phase repeatedly failed to require fall protection for employees (Tr. 231).

Within its control and authority over the safety of All Phase employees, Summit failed to exercise reasonable care. Summit had observed scaffolding violations several times by All Phase prior to the OSHA inspection. On each occasion, Summit did no more than ask All Phase to correct the violation. Despite having knowledge of the June 18 and 19 violations at issue, Summit did not request All Phase to correct the violations (Tr. 121-122). Instead Summit rescheduled the OSHA inspection to June 24, 2003, when All Phase was not onsite. There is no showing that Summit took any corrective action such as inspecting All Phase for fall protection requirements, conducting worksite safety meetings or training, and enforcing compliance with a graduated system of enforcement.

Summit's violation of § 1926.451(g)(1)(vii) is established.

Serious Classification

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known of the violation. Showing the likelihood of an accident is not required. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Summit's violation of § 1926.451(g)(1)(vii) is properly classified as serious. Summit stipulates that it knew of the lack of fall protection by All Phase employees. Its employees were exposed to falls of 12 feet or 18 feet from a scaffold to the ground. Such a fall could cause serious physical harm or possibly death.

Penalty Consideration

In determining an appropriate penalty, consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation is required. Gravity is the principal factor.

Having 148 employees and a history of past serious citations, Summit is not entitled to credit for size or history. However, Summit is entitled to credit for good faith. There is no showing that Summit's safety program is inadequate in protecting its employees. Although its company's policy is to avoid safety responsibilities for subcontractors' employees, Summit does attempt to advise subcontractors of known safety hazards.

A penalty of $2,000 is reasonable for Summit's violation of § 1926.451(g)(1)(vii). Summit was the general contractor and had no employees exposed to the lack of fall protection. Summit did not create the unsafe condition. The subcontractor who caused the violation and had employees exposed received a $2,500 penalty from OSHA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

Serious violation of § 1926.451(g)(1)(vii), is affirmed and penalty of $2,000 is assessed.

/s/ Ken S. Welsch
KEN S. WELSCH
Judge

Date: June 14, 2004