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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For the Complainant

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For the Respondent

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For Amici National Association of Home Builders; Contractors' Association of Greater New York; Texas Association of Builders; and Greater Houston Builders Association

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For Amicus Building and Construction Trades Department, AFL-CIO

DECISION

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

This case is before the Commission on remand from the United States Court of Appeals for the Eighth Circuit. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009). In its

initial decision, a Commission majority held that 29 C.F.R. § 1910.12(a)[1]—a regulation that describes the reach of the Occupational Safety and Health Administration ("OSHA") construction standards—precluded the Secretary from citing a "controlling employer" under her multi-employer citation policy for a violation it did not create and to which none of its own employees were exposed. The Commission, therefore, vacated a citation alleging that general contractor Summit Contractors, Inc. ("Summit") violated 29 C.F.R. § 1926.451(g)(1)(vii)[2] because the cited conditions were created by a subcontractor whose employees were the only ones exposed. *Summit Contractors, Inc.*, 21 BNA OSHC 2020, 2025, 2007 CCH OSHD ¶ 32,888, p. 53,264 (No. 03-1622, 2007).

On appeal by the Secretary, the court vacated the Commission's decision and remanded the case, holding that the plain language of § 1910.12(a) "is unambiguous in that it does not preclude OSHA from issuing citations to employers for violations when their own employees are not exposed to any hazards related to the violations."[3] *Summit*, 558 F.3d at 825. For the following reasons, we affirm the citation.

ISSUES

The primary issue before the Commission on remand is whether Summit exercised sufficient control over the worksite to prevent or detect and abate a hazardous condition created by its subcontractor, All Phase Construction, Inc. ("All Phase"), to which none of its own

[1] Section 1910.12(a) provides in pertinent part:

> 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.

[2] Section 1926.451(g)(1)(vii) provides in pertinent part:

> (g) *Fall protection.* (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.
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> * * *
>
> (vii) For all scaffolds not otherwise specified . . . , 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.

[3] Summit subsequently petitioned for rehearing by the panel as well as by the Eighth Circuit *en banc*. The court denied both petitions. Order, *Solis v. Summit Contractors, Inc.*, No. 07-2191 (8th Cir. May 6, 2009).

employees were exposed. If so, Summit can be properly cited as a "controlling employer" under the Secretary's multi-employer citation policy for the violation in question.

As a threshold matter, we also address Summit's contention before the Commission that the Secretary could not lawfully apply the multi-employer citation policy "without first adopting it through the informal rulemaking process of" the Administrative Procedure Act (the "APA").[4] *Summit*, 558 F.3d at 826 n.6 (internal citations omitted).

FINDINGS OF FACT

In June 2003, OSHA conducted an inspection of a college dormitory construction site in Little Rock, Arkansas, for which Summit was the general contractor. On June 18 and 19, an OSHA compliance officer ("CO") observed and photographed employees of subcontractor All Phase working on scaffolds from elevations over ten feet above a lower level without fall protection. At approximately ten o'clock in the morning of June 18, the CO took photographs of the cited conditions from the street, but did not enter the worksite until the next day, when he returned around nine o'clock in the morning. On both days, the CO observed that All Phase employees were working on the same scaffold without fall protection. On the second day, the CO also observed All Phase employees working on a second scaffold, again without fall protection. At Summit's request, the CO agreed to hold an opening conference several days later to discuss the violative conditions he observed, but by then the scaffolds were no longer standing.

Summit had four employees present at the site on both June 18 and 19: project superintendent Jimmy D. Guevara and three assistant superintendents, all of whom were responsible for overseeing the work of all subcontractors on the dormitory project. Guevara, who had attended an OSHA thirty-hour training course and was designated Summit's competent person onsite, inspected the worksite once or twice a day. According to Guevara, he had "walked the jobsite prior to" the CO's arrival on the second day but had not observed the cited conditions. Prior to the inspection, whenever Guevara had observed All Phase employees at the site working on scaffolds without the required fall protection, he informed the subcontractor and the violative conditions were abated.

[4] Because it was raised before the court by the amici and not by Summit, the Eighth Circuit declined to consider this argument. *Summit*, 558 F.3d at 826 n.6.

Summit's contract with the owner's representative for the dormitory project assigned the company "exclusive authority to manage, direct and control" the construction. The contract also assigned Summit the responsibility to comply with applicable laws, supervise all safety precautions, and "take reasonable precautions for safety" of employees on the project. Additionally, Summit's subcontract with All Phase indicated that "control of the Work Schedule, use of the site and coordination of all on-site personnel will be performed under the complete direction of" Summit's staff. The subcontract permitted Summit to terminate and remove All Phase if it disregarded OSHA regulations, temporarily or permanently bar specific All Phase personnel from the site, and withhold payment "until the subcontractor has satisfied all of its obligations."

PROCEDURAL HISTORY

Following the inspection, the Secretary issued a serious citation to Summit for violating § 1926.451(g)(1)(vii) and proposed a penalty of $4,000.[5] Summit contested the citation, arguing primarily that the Secretary's multi-employer citation policy was invalid and, even if applicable, the company lacked sufficient control of the worksite for it to be cited. Summit disputed none of the elements required to establish a violation and stipulated to having knowledge of the cited conditions.[6] After a hearing, the judge issued a decision rejecting Summit's arguments, finding that the company had conceded the elements needed to prove the violation, affirming the citation

[5] The Secretary also issued a serious citation to All Phase for the same violation. All Phase did not contest the citation and paid the proposed $2,500 penalty. *Summit*, 21 BNA OSHC at 2021 n.3, 2007 CCH OSHD at p. 53,261 n.3.

[6] To prove a violation of an OSHA standard, the Secretary "must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions." *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶ 32,198, p. 48,746 (No. 98-1748, 2000), *aff'd*, 277 F.3d 1374 (5th Cir. 2001) (unpublished). With regard to the knowledge stipulation, Summit's counsel confirmed at the hearing that it was stipulating to having "knowledge of the violations at issue." At oral argument before the Commission, Summit's counsel suggested the judge may have misinterpreted this stipulation, which, according to counsel, only indicated that "in the past when [Summit] had observed the violation we called it to [All Phase's] attention." However, he conceded Summit "knew that [All Phase] had a chronic problem that they continuously did not follow the scaffolding regulations." Based on the plain statements of Summit's counsel at the hearing, we agree with the judge that Summit stipulated to its knowledge of the specific violative conditions at issue.

as serious, and assessing a penalty of $2,000 based on his finding that Summit was entitled to credit for good faith.

On review, a Commission majority held that the language of § 1910.12(a), as well as the Secretary's interpretation and enforcement of that regulation, precluded the Secretary from citing a general contractor as a controlling employer for a violation created by another employer to which the controlling employer's employees were not exposed. *Summit*, 21 BNA OSHC at 2024, 2007 CCH OSHD at p. 53,264. The Eighth Circuit rejected this conclusion and remanded the case to the Commission for "further proceedings."[7] *Summit*, 558 F.3d at 829.

DISCUSSION

I. RULEMAKING

PRINCIPLES OF LAW

Pursuant to the APA, an agency generally must engage in "informal" (also known as "notice-and-comment") rulemaking when promulgating, amending, or repealing a rule. 5 U.S.C. § 553. However, the APA exempts from these procedures certain types of agency statements, including "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(A).

ANALYSIS

Summit argued before the Commission that the Secretary's multi-employer citation policy was not exempt from the APA's notice-and-comment rulemaking procedures or, alternatively, that previous changes in the policy now required the Secretary to engage in rulemaking. It is true that the "[e]xceptions to the notice and comment provisions of section 553 are to be recognized 'only reluctantly.'" *Nat'l Assoc. of Home Health Agencies v. Schweiker* 690

[7] The court rejected several other arguments presented by Summit, including the contention that the multi-employer citation policy is at odds with the Supreme Court's direction in *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 322-25 (1992), to define "employee" based on the common law. The court disposed of Summit's challenge to the Secretary's legal authority for citing a controlling employer, the claim that § 5(a)(2) of the Occupational Safety and Health Act (the "Act") "limits an employer's duty to provide a safe workplace for only his employees," and its contention that citing a controlling employer violates § 4(b)(4) of the Act—preventing federal preemption of state tort law and workmen's compensation claims—by increasing an employer's liability at common law. *Summit*, 558 F.3d at 828-29; 29 U.S.C. §§ 653(b)(4), 654(a)(2). Finally, the court viewed Summit's claim that citing both the general contractor and subcontractor was "counterproductive to the goals of" the Act as a "policy concern[]" to be addressed to Congress and the Secretary. *Summit*, 558 F.3d at 829.

F.2d 932, 949 (D.C. Cir. 1982) (citing *Humana of South Carolina v. Califano*, 590 F.2d 1070, 1082) (D.C. Cir. 1978)). However, the Commission has held that the Secretary's multi-employer citation policy is not a standard or substantive rule and thus falls within the APA's exemptions. *Limbach Co.*, 6 BNA OSHC 1244, 1246, 1977-78 CCH OSHD ¶ 22,467, p. 27,081 (No. 14302, 1977); *see also Univ. Constr. Co. v. OSHRC*, 182 F.3d 726, 728 n.2 (10th Cir. 1999) (rejecting employer's contention that rulemaking was necessary for applying the multi-employer citation policy). Although the version of the policy at issue in *Limbach* precedes the version at issue here, *Limbach* establishes the general principle that the multi-employer citation policy does not "in fact or law[] create liability on an employer." *Limbach*, 6 BNA OSHC at 1245-46, 1977-78 CCH OSHD at p. 27,081. As the Secretary has noted in her 1999 Instruction, the policy "neither imposes new duties on employers nor detracts from their existing duties under the OSH Act."[8] Multi-Employer Citation Policy, OSHA Instruction CPL 2-0.124 § IX.B. (Dec. 10, 1999) ("CPL"). Because the policy is not a substantive rule, the changes made by the Secretary to her policy to which Summit takes exception would not require notice-and-comment rulemaking. *Id*; *Brown Express, Inc. v. United States*, 607 F.2d 695, 700-02 (5th Cir. 1979). Accordingly, we reject Summit's contentions that the Secretary had to engage in notice-and-comment rulemaking before applying her multi-employer citation policy.

II. FALL PROTECTION VIOLATION

PRINCIPLES OF LAW

Under the Eighth Circuit's plain reading of § 1910.12(a), the Secretary "may issue citations to general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority regardless of whether the general contractor created the hazard . . . or whether the general contractor's own employees were exposed to the hazard."[9] *Summit*, 558 F.3d at 818. In

[8] The Secretary's policies are not binding on the Secretary or on the Commission, "however we have relied on [them] to support an interpretation of a standard in the past." *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1910 n.3, 1997 CCH OSHD ¶ 31,260, p. 43,873 n.3 (No. 94-1460, 1997); *Hackensack Steel*, 20 BNA OSHC at 1392-93, 2002-2004 CCH OSHD at p. 51,558 (finding the Secretary's field manuals not binding on either OSHA or the Commission).

[9] The court also read § 1910.12(a) as imposing a duty on controlling employers to protect all employees at the worksite "so long as the employer also has employees at that place of employment." *Summit*, 558 F.2d at 824. Here, there is no dispute that Summit had employees present at the worksite.

determining the liability of a general contractor for safety violations of its subcontractors, the Eighth Circuit has considered factors such as the "degree of supervisory capacity" and the "nature and extent of precautionary measures taken." *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 601 (8th Cir. 1977).

Prior to the Commission's decision in *Summit*, our test of liability for a controlling employer on a multi-employer worksite was similar to that articulated by the court. "[A]n 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.'" *McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108, 1109, 2000 CCH OSHD ¶ 32,204, p. 48,780 (No. 97-1918, 2000) (quoting *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-0851, 1994)); *see Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1396, 2002-2004 CCH OSHD ¶ 32,690, p. 51,561 (No. 97-0755, 2003) (providing that subcontractor seeking to establish multi-employer worksite defense must prove that it took "all reasonable alternative measures," also described as "reasonable precautions," to protect its employees); *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1709, 2001 CCH OSHD ¶ 32,504, p. 50,402 (No. 96-1330, 2001) (consolidated cases) (noting that general contractor at multi-employer worksite "was responsible for taking reasonable steps to protect the exposed employees of subcontractors"); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976) (holding general contractor "responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity").

The Secretary's multi-employer citation policy is to the same effect: a controlling employer is one who "has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." CPL § X.E.1. (Dec. 10, 1999). Under this policy, a controlling employer "must exercise reasonable care to prevent and detect violations on the site," although the extent of measures a controlling employer must implement to satisfy the duty of reasonable care "is less than what is required of an employer with respect to protecting its own employees." *Id.* § X.E.2.

ANALYSIS

The record demonstrates that Summit had the supervisory authority on this worksite to detect and obtain abatement of the violation created by All Phase.[10] Summit's contract to serve as the general contractor on this project assigned it the "exclusive authority to manage, direct and control" the construction, as well as the responsibility to comply with safety laws and take safety precautions for all employees onsite. Contrary to Summit's claim that it lacked authority over All Phase, their subcontract granted Summit "complete direction" of the subcontractor's use of the site and permitted Summit to, among other things, terminate or remove All Phase for disregarding safety regulations, temporarily or permanently bar specific All Phase personnel from the site, as well as withhold payments. *McDevitt*, 19 BNA OSHC at 1109-10, 2000 CCH OSHD at p. 48,780 (finding evidence of control where general contractor had "overall authority at the worksite," including authority to demand compliance with safety requirements, stop a subcontractor's work, and remove a subcontractor from the site); *see IBP, Inc. v. Herman*, 144 F.3d 861, 867 (D.C. Cir. 1998) (finding control lacking where contract did not reserve for plant owner the right to suspend or otherwise discipline the subcontractor's employees). In fact, the record shows that although Guevara maintained he would only "suggest or recommend" that All Phase correct its fall protection violations, he never had to do more than request abatement for the subcontractor to comply. On those occasions when he observed All Phase employees working on scaffolds without fall protection, he would, without exception, inform the subcontractor of the hazardous condition and, without exception, All Phase would abate the condition. Accordingly, we find Summit exercised sufficient control at the worksite such that it is a controlling employer.

Based on its stipulation of knowledge, Summit knew that All Phase employees violated the fall protection standard as alleged in the citation. Therefore, with respect to Summit's efforts to obtain abatement, the record establishes that Summit failed to inform All Phase of the violative conditions at issue in the citation. Given that Summit had previously succeeded in obtaining abatement by informing All Phase of the fall protection violations it had detected, we find Summit failed to take reasonable precautionary measures to obtain abatement by not doing

[10] We do not consider acknowledgements by Summit's counsel at the hearing that the "standard was violated" and the company was "not contesting that the violation existed on the day of the inspection[,]" sufficient to establish that the company had supervisory authority to obtain All Phase's abatement of the violation.

the same with regard to the cited conditions.[11] *See Knutson Constr.*, 566 F.2d at 601 (noting that a controlling employer's liability depends on the "nature and extent of precautionary measures taken"); *Am. Wrecking*, 19 BNA OSHC at 1709, 2001 CCH OSHD at p. 50,402 (holding general contractor responsible for "taking reasonable steps to protect" subcontractors' employees); *McDevitt*, 19 BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (finding general contractor could have reasonably detected and obtained abatement of the violative conditions); *see also Hackensack Steel*, 20 BNA OSHC at 1396, 2002-2004 CCH OSHD at p. 51,561 (finding subcontractor failed to prove, in attempting to establish the multi-employer defense, that it took "all reasonable alternative measures" or "reasonable precautions" to protect its employees); *cf.* CPL § X.E.2. (permitting the citation of a controlling employer that fails to "exercise reasonable care to prevent and detect violations on the site").

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude Summit was a controlling employer properly cited under the multi-employer citation policy for violative conditions it did not create and to which none of its employees was exposed. Additionally, we find Summit stipulated that All Phase employees were not in compliance with the fall protection standard and it had knowledge of the cited conditions. By not informing All Phase of the violative conditions, Summit failed to take the reasonable steps and measures necessary to obtain abatement. Thus, we conclude the Secretary established a serious violation of § 1926.451(g)(1)(vii).[12]

[11] Because of the circumstances of this case, we need not reach the issue of whether at some point and if so, at what point, Summit could be cited for failing to move beyond mere requests for abatement, such as temporarily or permanently barring from the premises specific individuals who, after warning, repeatedly violate fall protection requirements, suspending the subcontractor's work, withholding progress payments, or terminating the contract.

[12] On review before the Commission, Summit did not contest the serious characterization of the violation. Additionally, Summit raised no arguments regarding penalty. The Secretary urged the Commission to affirm the $2,000 penalty assessed by the judge, seemingly abandoning any arguments in favor of the proposed $4,000 penalty. *See Nat'l Eng'g & Contracting Co.*, 16 BNA OSHC 1778, 1780, 1993-95 CCH OSHD ¶ 30,438, p. 42,018 (No. 92-73, 1994) (approving an assessed penalty where judge reduced proposed penalty and neither party objected). Accordingly, we affirm the judge's characterization of the violation as serious and his penalty assessment. *See KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2008 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming judge's serious characterization and judge's assessed penalty amount where parties did not dispute these findings).

ORDER

We affirm Citation 1, Item 1, and assess a penalty of $2,000.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Horace A. Thompson III
Commissioner

Dated: July 27, 2009