Secretary of Labor, Complainant, v. Summit Contractors, Inc., Respondent.	OSHRC Docket No. 01-1891

Appearances:

Leslie J. Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Robert E. Rader, Jr., Esq., Rader & Campbell, Dallas, Texas
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Summit Contractors, Inc., contests a citation issued by the Secretary on October 25, 2001, alleging serious violations of five construction standards under the Occupational Safety and Health Act of 1970 (Act). The citation resulted from a random programmed inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Luis Ramirez on October 15, 2001. Summit was the general contractor for the construction of an apartment complex in Statesboro, Georgia.

Item 1 alleges a serious violation of § 1926.20(b)(2) for failure to initiate and maintain a program of frequent and regular inspections of the job site, materials, and equipment. Item 2 alleges a serious violation of § 1926.451(g)(1) for allowing employees to work on a scaffold more than 10 feet above a lower level without fall protection. Item 3a alleges a serious violation of § 1926.501(b)(1) for allowing employees to work on a walking/working surface with an unprotected side or edge 6 feet or more above the lower level without fall protection. Item 3b alleges a serious violation of § 1926.1052(c)(12) for failure to provide a guardrail system for the unprotected sides and edges of stairway landings. Item 4 alleges a serious violation of § 1926.501(b)(13) for failure to provide fall protection to employees engaged in residential construction activities 6 feet or more above the lower level.

A hearing was held in this matter on April 3 and 4, 2002, in Savannah, Georgia. The parties have submitted post-hearing briefs.

The Secretary cited Summit under the multi-employer worksite doctrine. She asserts that Summit had the requisite supervisory authority over its subcontractors, but that it chose not to exercise that

authority in terms of safety. Summit argues that the multi-employer worksite doctrine is invalid and should not be enforced. Summit also argues that it lacked the knowledge to make it responsible for the alleged violations. While Summit's argument regarding the invalidity of the multi-employer worksite doctrine is rejected, the undersigned finds that the Secretary failed to establish that Summit had knowledge of the hazardous conditions present at the site.[1]

For reasons more fully discussed below, items 1, 2, 3a, 3b, and 4 are vacated.

Background

Summit was the general contractor for a large multi-building apartment complex under construction in Statesboro, Georgia. The apartment complex, known as Campus Club Apartments, covers more than 20 acres and includes 21 separate buildings. The project began about 4 months before the October 15, 2001, OSHA inspection and had an expected completion date of June 1, 2002 (Tr. 57-58, 64, 69-70).

Typically, a project such as the Campus Club Apartments could require the services of 30 to 40 subcontractors. The subcontractors themselves hire other subcontractors. The day of the inspection approximately170 workers from various subcontractors were on the construction site (Tr. 57, 64, 277).

Summit had only three employees at the site: project superintendent James G. (Gus) Pike, and assistant superintendents (and cousins) Christopher Roberts and Jeremie Roberts (Tr. 13, 59). These three Summit employees performed no actual construction work or manual labor but were responsible to keep the overall project on track. They scheduled, inspected, and approved the work for payment. Pike described the process (Tr. 61):

> The schedule is an ongoing process. So like a judgment, you schedule this guy to do this and there's eight behind him. If he gets the material in and he gets done on time, the

[1] On October 10, 2002, Summit sent a letter to the undersigned (followed by a motion) asserting that the Secretary is collaterally estopped from contending that the degree of control exercised by Summit is sufficient to make Summit liable for subcontractor violations in the present case. Summit bases this assertion on an unreviewed administrative law judge decision that became a final order on October 10, 2002. In that decision, *Summit Contractors, Inc.*, (No. 01-1614, 2002), Judge Schoenfeld found that Summit did not have the authority typically attributed to general contractors over the worksite in question. Therefore, Judge Schoenfeld held, the multi-employer worksite doctrine did not apply in that case. The motion for collateral estoppel is denied. The material facts of the two cases are different, as are the alleged violations. The application of the multi-employer worksite doctrine requires a case-by-case analysis. *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000). A determination of the Summit's authority as a general contractor will be made independently in this case.

> weather doesn't bother him and the inspection goes good, then the next guy is scheduled right in behind him, but it all plays a part.

On October 15, compliance officer Ramirez arrived at Summit's construction site at approximately 1:00 p.m. (Tr. 124). Before entering the site's premises, Ramirez drove to the campus of Georgia Southern University, located on the north (back) side of the construction site. From there Ramirez observed a number of subcontractors' employees exposed to various fall hazards. Employees worked on top of a roof without fall protection (Exhs. C-22, C-23, C-24; Tr. 126, 134, 185-187, 256, 267). Employees working from a scaffold without guardrails were performing siding work without fall protection (Tr. 126, 133). Employees were exposed to falls on stairway landing areas that were missing guardrails (Exhs. C-3, C-19; Tr. 126, 141-144). Employees were exposed to falls while working on unguarded balconies on the second and third floors (Exh. C-3; Tr. 141-144, 167). These observations were made from the back of the worksite in relation to the entrance of the complex and to Summit's job trailer.

After taking photographs, Ramirez drove to Summit's trailer and met with Christopher Roberts and Jeremie Roberts (Tr. 31, 43, 126). Ramirez conducted a walk-around inspection with Christopher Roberts. At the end of the walk-around inspection, they were joined by project supervisor Pike (Tr. 42).

As a result of Ramirez's inspection, the Secretary issued citations to Summit, as well as to several subcontractors and sub-subcontractors (Exhs. R-3, R-4, R-6, R-7, R-9, R-10).

Discussion

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Summit does not dispute that the cited standards apply to the conditions which existed or that the subcontractors' employees were exposed to conditions which violated the terms of the standards. Summit challenges the applicability of the multi-employer worksite doctrine, which could give it liability for the violations.

Multi-Employer Worksite Doctrine

Summit argues, as it has done in previous cases, that the multi-employer worksite doctrine contravenes the Act and is unenforceable. This argument is rejected.[2]

For over 25 years, the Review Commission has held that a general contractor on a worksite with multiple employers possesses sufficient control over the entire worksite "to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors." *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185, 1185 (No. 1275, 1976). The Review Commission has held that a general contractor is responsible for 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 Construction Co.,* 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). This duty applies to an employer even if its own employees are not exposed to the hazard. *Flint Engineering & Construction Co.,* 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992).

Summit's office is located in Jacksonville, Florida, and the worksite at issue in this case was located in Georgia. Both states are located in the Eleventh Circuit, to which this case could be appealed. "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). Although several employers have argued that the Eleventh Circuit has rejected the multi-employer worksite doctrine and held that a general contractor is not responsible for the safety violations of a subcontractor, the Review Commission has ruled otherwise. In *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000), the Commission held that 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.[3] Noting in *McDevitt* that the Eleventh Circuit never rejected the multi-employer worksite doctrine in the context of the Act, the Commission concluded that it was ambiguous whether or not the Eleventh Circuit would consider itself bound by the noted

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[2] Also rejected is Summit's contention that the multi-employer worksite doctrine violates § 4(b)(4) of the Act. Section 4(b)(4) supports the opposite conclusion from Summit's. Congress intended for private rights to be *unaffected* by the Act.

[3] Decisions of the former Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama,* 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

decisions in the former Fifth Circuit. *See also Access Equipment Systems*, 18 BNA OSHC 1718 (No. 95-1449, 1999) (Upon review of Eleventh Circuit decisions, Commission determines that it is not precluded from following its precedent relating to multi-employer worksites.) Conceivably, the case also could be appealed to the D.C. Circuit which, like the Eleventh Circuit, has not expressly adopted or rejected the doctrine, although raising questions about its validity.

This case will be analyzed under the multi-employer worksite doctrine as developed under Commission precedent.

It is helpful to analyze the record within the guidelines set out in an OSHA Directive, CPL 2-0.124 ("Multi-Employer Citation Policy"), issued by the Secretary on December 12, 1999. While OSHA CPLs and other directives are not binding on the Commission, the Commission has looked to them in the past as aids in resolving interpretations under the Act. *Drexel Chemical Company*, 17 BNA OSHC 1908, 1910, footnote 3 (No. 94-1460, 1997). The CPL is used here only because it provides a useful framework within which to examine the extent of Summit's authority on the Campus Club Apartments worksite.

The CPL sets out a two step process to determine whether an employer should be cited under the multi-employer worksite policy. The first step is to determine whether the employer in question was a creating, exposing, correcting, or controlling employer. Only if the employer falls into one of these categories can it be cited under the policy. Step two is to determine whether the employer met its obligations with respect to OSHA requirements. CPL 2-0.124, ¶ X.A.1 and 2.

The Secretary concedes that Summit was not a creating or exposing employer (Secretary's brief, p. 26). Although the Secretary contends that Summit had the authority to correct hazards on the worksites, Summit does not fit the definition of a correcting employer within the meaning of the CPL. Paragraph X.D.1 of the CPL defines "correcting employer" as:

> An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.

Although Summit supplied some safety devices (such as guardrails) and contracted with a framer subcontractor to install them, Summit did not itself install or maintain any safety or health equipment or devices, nor perform any other physical labor on the worksites.

Controlling Employer

To determine whether a general contractor is a controlling employer for purposes of multi-employer liability, OSHA's CPL suggests looking to the authority contained in explicit provisions of the contract; or (if not found there) to the authority granted through in a combination of less explicit provisions of the contract; or to the authority inherent in a general contractor's actual exercise of control. CPL 2-0.123, ¶ X.E.5.

No Control Established by Explicit Provisions of Contract

The CPL provides (Paragraph X.E.5.a, emphasis in original):

> In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Exhibit C-7 is a copy of the contract between Summit and States Property Co., the owner of Campus Club Apartments. The Secretary finds contractual control in Article 10 of the contract, which provides in pertinent part:

> **10.1 SAFETY PRECAUTIONS AND PROGRAMS**
> **10.1.1** The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.
> **10.2 SAFETY OF PERSONS AND PROPERTY**
> **10.2.1** The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
> **.1** employees on the Work and other persons who may be affected thereby[.]

These provisions are part of a standard AIA contract. In line with its theory on multi-employer responsibilities, however, Summit negotiated to delete Article 10.1.l (but not any other portion of Article 10). It substituted:

> The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions for its employees . . .. The Contractor shall require that any and all Subcontractors and Sub-Subcontractors affect the same responsibility for their employees.

Further, OSHA's CPL does not look primarily to the contract between the owner and the general contractor to determine whether the general contractor is a controlling employer. Paragraph X.E.5.a states

that the general contractor's explicit contractual authority "can take the form of a specific contract right *to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers*" (emphasis added). It is the contract between the general contractor and the subcontractor that one looks to for explicit contractual authority.

The only contract between Summit and one of its subcontractors in the record is Exhibit C-8, the contract between Summit and Paul's Drywall. The only section of that contract to which the Secretary refers is paragraph 5 of Attachment A, which provides:

> All parties hereby agree 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 **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.

Absent from this paragraph is any mention of safety and health, or the correction of safety and health violations. More apposite to the issue at hand is the paragraph immediately preceding the one highlighted by the Secretary. Paragraph 4 of Attachment A of the subcontractor's contract provides in pertinent part:

> All parties hereby agree that **SUBCONTRACTOR** has the sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act of 1970

> and agree to indemnify and hold harmless **CONTRACTOR** against any legal liability or loss including person injuries which **CONTRACTOR** may incur due to **SUBCONTRACTOR'S** failure to comply with the above referenced act.

No reference is made to Summit's ability to enforce compliance with the Act. The subcontractor is given "sole responsibility" for compliance; no provision is made for Summit to require correction of any safety violation. No explicit contractual right exists for Summit to require a subcontractor to correct violations.

Control of Safety Established Through a Combination of Contract Rights and Exercise of Authority

Combined Rights: Paragraph X.E.5.b of the CPL provides:

> Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.

As stated, by contract Summit had total control of scheduling and could exact penalties if the subcontractor failed to meet its schedule. Summit retained the authority to bar the subcontractor's employees from the site for failure to cooperate with Summit's supervisors. Summit could terminate a subcontractor's contract for cause or for convenience. Subcontractors could not subcontract without the prior written consent of Summit, and Summit had sole discretion on whether to approve a subcontractor's subcontractor. The subcontractors had to keep their work areas clean and orderly, subject to Summit's approval. The subcontractors were required to file MSDSs in Summit's office. Summit required subcontractors to repay any OSHA fines it incurred because of a subcontractor's OSHA violation (Exh. C-8). Combined, these contract provisions demonstrates broad authority over the subcontractor's actions, as well as authority over conditions affecting general safety on the jobsite.[4] The authority explicitly granted by a combination of contract provisions is broad enough to necessarily involve safety.

[4] Summit also took the responsibility to provide orange chain guardrails to be used throughout the project and to have the framers install them (Tr. 354).

In addition, the final type of control considered by the CPL is that exercised without explicit contractual authority. The authority the contract granted Summit mirrored how Summit actually controlled the project.

Control Without Explicit Contractual Authority: Paragraph X.E.5.d of the CPL provides:

> Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site[.]

Summit notes that on a project that typically required a daily presence of 150 to 200 employees, Summit employed three men (Tr. 13, 59). Summit's employees coordinated 30 to 40 subcontractors over the course of the project (Tr. 277). Frequently, the subcontractors would hire other subcontractors. In many cases the subcontractors' employees spoke Spanish and not English (Tr. 72, 131, 285).

Pike testified regarding his involvement with the subcontractors: "I'm involved with the scheduling of the project to keep it going forward and in a timely manner, and do quality work. I deal with change orders, submittals, owner problems or concerns, and just basically subcontractors in the movement of the job" (Tr. 68). Pike generated a project diary and daily report at the end of each day or by the following morning, which detailed who completed what, when, and at which building (Exh. C-1). Chris Roberts testified that although he made rounds once a month of the whole site, "I try every day to go out there and walk a building or walk a slab and just look at the work that has been done that day if we can. That's pretty much a quality check" (Tr. 328-329).

Summit kept abreast of the subcontractors' actions on the jobsite. For example, as Ramirez and the Roberts began walking towards building 3, Ramirez pointed to employees on the roof and asked to speak with the roofer. The Roberts replied (Tr. 127-128):

> And, they told me, "No, that's not the roofer. It's the framer."
> And I said, "Okay, let's talk to them."
> And they said, "Well, I guess you need to talk to another company because these people work for Parrish Construction, and their foreman is not on site. He went to lunch, and he left another foreman from another company in charge of them.

Despite Summit's frequent inspections for quality and scheduling purposes, Superintendent Pike testified that he had only a limited ability to require a subcontractor to correct safety violations (Tr. 72):

> Well, if we see somebody that's not safe, we tell the foreman – most of these guys don't understand what I'm saying, but the foreman does and we tell him, you know, "Hey, you need to change the way they're doing this." Yes, we do that if we see it during that day.

Hypothetically, Summit's attorney posed the scenario where a subcontractor would tell Pike "to go jump in the lake," if he should request the subcontractor's abatement of an ongoing safety concern (Tr. 73). Pike stated that although he could ask a subcontractor to abate a hazardous condition, "I don't have the authority to do anything. All I can do is warn him. . . . [W]e do not punish the subcontractors" (Tr. 73). The assertion is disingenuous. As stated, Pike had authority in the contract to terminate any subcontractor which failed to abide by his directions. Summit, not the subcontractors, dictated what occurred on the jobsite. At the hearing Pike showed himself to be a forceful, no-nonsense supervisor, capable of ramrodding the large, fast paced project. One who, according to Christopher Roberts, "wouldn't take too kindly to [being told to jump in the lake]" (Tr. 333). Christopher Roberts testified that subcontractors had not refused any request concerning safety, and "usually, they were pretty good about responding. It's just that, you know, like everybody else, they may get lax from time to time" (Tr. 333). Summit "always had safety in the back of our minds" (Tr. 335). Summit acknowledged general safety oversight. Its safety director Charles Calloway wrote in response to Ramirez's request (Exh. C-6):

> Safety inspections. Visual checks are accomplished periodically throughout a given week by Summit employees. All open and obvious violations are brought to the attention of the respective contractor and followed by discussion and additional reminders at weekly production meetings. The Director of Safety makes periodic reviews as time and travel permit. Likewise, violations are reviewed with subcontractors when issued by written report through the superintendent. Subs are then responsible to abate accordingly. Further, the general superintendent reviews open and obvious violations during his periodic production reviews as well.

Summit was concerned with the severe impact on the project that a delay by one subcontractor could have for those scheduled to come after. Pike stated that if he had to terminate a subcontractor, "Well, it's devastating, as we had that happen on this job with a painter, and it costs me about six weeks to actually get straightened back out and get another subcontractor in there and get everybody back in line and get the job going working" (Tr. 88-90). Although termination of a subcontractor could cause serious problems with the scheduling, nevertheless, he and Summit did exercise that ultimate control when necessary.

Summit walked the work areas and had authority to detect safety hazards and to require the subcontractors to abate them. Summit exercised such broad control over the work of the subcontractors that it had inherent control over whether they performed it safely. Thus, under the multi-employer worksite doctrine Summit can be held liable for the subcontractors' violations, if the Secretary establishes that Summit knew or should have known of the violative conditions.

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that Summit violated § 1926.20(b)(2), which provides:

> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The citation states, "The employer failed to initiate and maintain a program of frequent and regular inspections of the job site, on or about 10/15/2001." In its post-hearing brief, the company states, "Summit freely admits that it does not conduct frequent and regular safety inspections of the subcontractors" (Summit's brief, p. 42). The undersigned agrees with Summit that § 1926.20(b)(2) does not apply to it, as the general contractor, to make it responsible for frequent and regular inspections of the individual job sites of the numerous subcontractors. A responsibility to make reasonable inspections of the work areas for safety hazards is not based on this standard, which addresses safety on the jobsite in relation to the employer's own employees. The subcontractors themselves were required to conduct these inspections for their employees. The Secretary did not show that the Summit failed to inspect the workplace of its three employees or that they were exposed to the same violative conditions cited for the subcontractors' employees. It is determined that Summit was not in violation of § 1926.20(b)(2).

Items 2, 3a, 3b, and 4

The remaining items allege instances where employees of various subcontractors were exposed to fall hazards. The cited standards, along with the citation description of the alleged violations, are as follows:

Item 2

Section 1926.451(g)(2) provides in pertinent part:

> 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.

The citation alleges: "A- Construction site, building # 16 - Employees working from scaffolds in excess of 10 feet above the ground without fall protection, on or about 10/15/2001."

Item 3a

Section 1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The citation alleges: "A - Construction site, building #17 - Guardrails, safety nets or personal fall arrest systems were not provided for employees working close to the edges of the balconies which were 9'-1" and 18'-2" above the ground below, on or about 10/15/2001."

Item 3b

Section 1926.1052(c)(12) provides:

> Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part.

The citation alleges: "A - Construction site, building #17 - Guardrail systems were not provided for employees working close to the edges of the stairway landings which were 9'-1" and 18'-2" above the ground below, on or about 10/15/2001."

Item 4

Section 1926.501(b)(13) provides in pertinent part:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

The citation alleges: "A - Construction site, building #16 - Guard rails, safety nets or personal fall arrest systems were not provided for employees working close to the edges of the roof, which was approximately 28ft. above the ground below, on or about 10/15/2001."

As noted above, Summit does not dispute that the cited standards were violated by the subcontractors on the day of Ramirez's inspection, and that the subcontractors' employees were exposed

to hazardous conditions. Summit argues, however, that its three employees on the site had no knowledge of the cited violations.

General Contractor's Knowledge of Subcontractors' Violations

The Secretary argues that Summit had both actual and constructive knowledge of the violations.

Gus Pike and Christopher Roberts testified at the hearing. Pike stated that the day of the Ramirez's inspection, he spent all morning in Summit's job trailer on the site. When asked if he could see Buildings 16 and 17 (where the alleged violations occurred) from the trailer, Pike stated, "No, not really. If I'm in the office, I'm working, you know, and I couldn't see 17 from my office trailer. I could see the front side of Building 3 if I walked to the other end of the trailer and looked out the window" (Tr. 77). Roberts stated that he and Jeremie worked most of the morning at Building 7/11, and that they could not see Buildings 16 and 17 from where they were (Tr. 282). Both Pike and Roberts were emphatic that they had no prior knowledge of the violative conditions (Tr. 74, 297).

The primary evidence presented by the Secretary regarding actual knowledge was the testimony of Ramirez, who stated that Roberts told him he was aware of the violations during the walk-around inspection. Roberts explained that he was acknowledging his awareness of the violations *as Ramirez pointed them out.* Until that moment, Roberts stated that he did not have knowledge of the violations (Tr. 290-291). Pike had a similar experience with Ramirez. During the walk-around Ramirez pointed out a scaffold that did not have guardrails on it. When asked if he told Ramirez that he was aware of this violation, Pike stated, "When he pointed them out to me, yes, and then he pointed them out to me and brought them to my attention, correct" (Tr. 51).

In its post-hearing brief, Summit states, "The trial transcript reflects that it was difficult to communicate with the CSHO because he frequently attached a meaning to statements that was not always accurate (*Cf.* Tr. 201-202, 203-206, 208, 214-215)." Observing Ramirez's demeanor and testimony, the undersigned agrees that the responses Ramirez elicited from Summit's employees during his inspection are ambiguous. Pike and Roberts stated that Ramirez phrased his questions in the present tense, so that they acknowledged what was pointed out to them at that moment.

The parties' witnesses disagreed over the substance of various statements made during the inspection. A miscommunication between Roberts and Ramirez was not improbable. At the hearing they spoke quite rapidly and with distinctive inflections increasing the likelihood that their statements might

be misconstrued. For example, confusion was evident as to an alleged admission that guardrails were missing from areas where even the Secretary's photographs showed orange chain guardrails in place (Exh. C-12, C-14). Ramirez imparted too much weight to his interpretation of one or two words. Standing alone, Ramirez's testimony that Pike and the Robertses acknowledged awareness of the violations is insufficient to establish their actual knowledge of the violations.

The Secretary also asserts that Summit had constructive knowledge of the violations because Summit could have known of the hazards if it inspected the worksite. Summit had an obligation to inspect the work area, to anticipate hazards, and to take measures to have hazardous conditions abated on the worksite it controlled. However, the Secretary does not prove that Summit, as a general contractor, had knowledge of a specific violation simply because Summit admits that it did not inspect for safety. As the Secretary acknowledges, Summit is not required to make continuous inspections of the worksite to fulfill its duty as a general contractor. The Secretary must show that Summit would have known of the violations had it reasonably inspected the worksite for safety.

The Secretary failed to offer evidence of how long the violations may have existed before Ramirez observed them.[5] The Secretary did not show that any of the violative conditions existed longer than the 30 minutes involved in the inspection. She did not offer the testimony of any of the subcontractors or their employees. Summit's interaction with the subcontractors relative to the cited hazards is unknown.

Summit's witnesses testified that the pump jack scaffold was very quickly erected, used, and dismantled and that missing guardrails from their perspective could have meant that the scaffold was being dismantled or erected (item 2). Although Summit provided the orange chain guardrails for the project and directed the framer subcontractor to install them, the missing guardrails could have been removed by other subcontractors to gain access or to do trim work. Roberts stated that he had earlier seen the guardrails in place (items 3a & b). Roberts also testified that previously the roofers were "real good" about tying off while on the roof (Tr. 283). He was unaware that roofers were not tying off the safety harnesses they wore on the roof at the time of the inspection (item 4).

[5] Unsupported hearsay evidence to the effect that a violation existed for a specified period of time is not credited, especially given the previously discussed miscommunications.

Given the size of the worksite, the location of the exposed subcontractors' employees, and the of testimony Summit's employees, the Secretary failed to show that Summit reasonably should have known of the existence of the violations. Items 2, 3a, 3b, and 4 are vacated.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Items 1, 2, 3a, 3b, and 4 are vacated, and no penalties are assessed.

/s/
NANCY J. SPIES
Judge

Date: December 23, 2002