SECRETARY OF LABOR,

Complainant,

v. OSHRC Docket No. 97-1918

MCDEVITT STREET BOVIS, INC.

Respondent.

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

On October 6, 1997, McDevitt Street Bovis, Inc. ("McDevitt") was issued a serious citation stemming from the inspection of a construction site located in Douglas, Georgia. McDevitt was the general contractor for the project, which involved the construction of a two-story medical center. At the time of the inspection, seven employees of CPD Plastering Inc. ("CPD"), a subcontractor for McDevitt, were installing insulation from a two-stage scaffold erected on the penthouse level of the medical center's roof. According to compliance officer Ron Byrd, the scaffold which was owned, erected, and maintained by CPD was not erected under the supervision and direction of a competent person, was not properly decked, and lacked cross-bracing, guardrails, and an access ladder. It is undisputed that McDevitt did not create these conditions and none of its own employees were exposed to them.

Under the citation, the Secretary alleged five serious violations of various scaffolding standards and proposed a penalty of $1,750 for each violation.[1] Judge Ken S. Welsch affirmed all five violations and assessed the proposed penalty for each. The only issue before the Commission is whether under relevant circuit court case law, the judge erred in holding McDevitt responsible under the multi-employer worksite doctrine for the alleged violations.[2] For the following reasons, we affirm the judge's decision.[3]

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[1] The scaffolding conditions observed by compliance officer Byrd were cited, in this order, under the following standards: 29 C.F.R. § 1926.451(b)(1) (scaffold platform not fully planked); § 1926.452(c)(2) (missing sections of scaffold's cross-bracing); § 1926.451(e)(1) (unsafe scaffold access); § 1926.451(f)(7) (scaffold erection not supervised or directed by competent person); and § 1926.451(g)(1) (scaffold's lack of guardrails).

[2] Although the existence of the violations and McDevitt's knowledge of them was questioned by McDevitt in its petition for discretionary review, these issues were not included in the Commission's briefing notice. However, for the purposes of any appeal of our decision, we note that these matters were adequately addressed and resolved by the judge.

[3] Chairman Rogers would respectfully disagree with the dissent of her colleague, Commissioner Visscher. In particular, she would make four points.

First, the dissent creates the mistaken impression that the Commission has developed the multi-employer worksite doctrine out of thin air, "to simply accommodate the Secretary's citation policy." In fact, there is extensive precedent by both the Commission (see the discussion in the text below) and the Circuit Courts (see, for example, some of the cases cited in footnote 11) supporting the doctrine's application to general contractors in the construction industry by virtue of their supervisory capacity or control over the construction site. While Chairman Rogers believes the Commission must carefully analyze the extent of a particular general contractor's supervisory authority on a case by case basis, she has no doubt that in this case, McDevitt possessed sufficient supervisory authority to obtain abatement of the violations. In this case, then, the Commission has merely applied its longstanding precedent.

Second, as noted, the Commission and the Courts have previously held general contractors liable under the multi-employer worksite doctrine, notwithstanding the fact that none of their own employees were exposed and notwithstanding the fact that the standards under which the general contractors were cited did not, by their terms, impose a specific duty on the general contractor. *See, e.g., Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999) ("*Universal*"); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819-20 (6th Cir.

(continued...)

[3](...continued)
1998) ("*R.P. Carbone*"); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 1993-95 CCH OSHD ¶30,62 (No. 92-0851, 1994) ("*Centex-Rooney*"); *Gil Haugan d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004, 1979 CCH OSHD ¶ 24,105 (No. 76-1512, 1979) ("*Gil Haugan*"); *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) ("*Knutson*"). Indeed, Chairman Rogers notes that her dissenting colleague has downplayed the significance of these decisions by arguing that in several of these cases, the general contractor was nevertheless the "employer responsible for creating or controlling the particular hazard, and would thus be responsible for the violation on that basis." In so doing, he has cited *Gil Haugan* for the proposition that "citations issued to employer for exposing its own employees were affirmed on the basis that it was the general contractor on the site." In fact, while the compliance officer conducting the inspection may have believed that the exposed employees were employed by Gil Haugan, the general contractor, the judge found they were employed by the subcontractor and affirmed the violations on the basis of the multi-employer worksite doctrine. *Gil Haugan*, 7 BNA OSHC at 2005-06, 1979 CCH OSHD at p. 29,290. The Commission affirmed the judge, finding "no error in the judge's decision." *Id.* at 2006, 1979 CCH OSHC at p. 29,290. Similarly, in *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1900-01, 1991-93 CCH OSHD ¶ 29,854, pp. 40,750 & 40,752 (No. 89-1394, 1992) ("*Blount*"), two of the violations were affirmed on the basis of the multi-employer worksite doctrine even though Blount, the general contractor, was not the employer who created the hazard.

Third, Chairman Rogers notes that her dissenting colleague appears to concede that it is appropriate to hold the general contractor responsible where it is the controlling employer. Indeed, that is part of the rationale of the multi-employer worksite doctrine - the general contractor is "responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶20,691, p. 24,791 (No. 12775, 1976) ("*Grossman Steel*"). This doctrine is premised on the general contractor's control of the construction worksite and concomitant authority to obtain abatement. *See Universal*, 182 F.3d at 730-31.

Finally, Chairman Rogers takes issue with her dissenting colleague's claim that the majority "has therefore attached what appears to be strict liability for a subcontractor's violation." Indeed, a general contractor's liability is based on what violations the contractor, by virtue of its supervisory capacity, could *reasonably* have been expected to detect or abate. The use of a reasonableness standard is far from strict liability. Indeed, in *David Weekley Homes*, Docket No. 96-2898 (September 28, 2000), also decided today, the Commission unanimously vacated all citation items issued to a general contractor. Several of the items were vacated on the basis that the general contractor did not know or could not have known, with the exercise of reasonable diligence, of the existence of the cited conditions.

DISCUSSION

The Commission's position on multi-employer construction worksites is well-established. Under Commission precedent, an employer who either creates or controls the cited hazard has a duty under § 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*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶20,690, p. 24,784 (No. 3694, 1976); *Grossman Steel*, 4 BNA OSHC at 1188, 1975-76 CCH OSHD at p. 24,791. 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*, 16 BNA OSHC at 2130, 1993-95 CCH OSHD at p. 42,410. *See also Blount*, 15 BNA OSHC at 1899, 1991-93 CCH OSHD at p. 40,749-50; *Gil Haugan*, 7 BNA OSHC at 2006, 1979 CCH OSHD at p. 29,290.

The record here contains strong evidence of McDevitt's control over the worksite. McDevitt had 22 employees onsite, including two assistant superintendents and a project manager.[4] At the hearing, assistant superintendent Scott Kopplin admitted that McDevitt had overall authority at the worksite. Both he and the second assistant superintendent assigned to the project walked the worksite twice a day to check on the work, including safety

[4] In addition to serving as general contractor for the project, McDevitt performed some of the concrete work associated with the medical center's construction.

practices, of McDevitt's subcontractors, and also performed weekly safety inspections. According to Kopplin, as assistant superintendent, he had specific authority to demand a subcontractor's compliance with safety requirements, to stop a subcontractor's work if safety violations were observed, and to remove a subcontractor from the worksite.

The judge found that McDevitt's representatives could have detected the cited conditions because the violative scaffold was in plain view and erected for a significant period of time. Taken together with the evidence of control, we find the judge reasonably concluded under Commission precedent that McDevitt could have, by virtue of its supervisory authority, obtained abatement from CPD. *See R.P. Carbone*, 166 F.3d at 819-20 (general contractor liable for subcontractor's lack of fall protection where condition was in plain view and lasted for two weeks); *Centex-Rooney*, 16 BNA OSHC at 2130, 1993-95 CCH OSHD at p. 42,410 (where conditions were in plain view and existed for a significant period of time, general contractor could have ascertained their existence through the exercise of reasonable diligence). As the Commission has observed:

> [T]he general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Grossman Steel, 4 BNA OSHC at 1188, 1975-76 CCH OSHD at p. 24,791 (footnote omitted). Accordingly, under applicable Commission precedent, the judge properly held McDevitt liable for the violations of CPD.

"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it

may clearly differ from the Commission's law." *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1926, 1997 CCH OSHD ¶ 31,267, p. 43,909 (No. 93-2529, 1997) (citation omitted), *rev'd in part on other grounds*, 160 F.3d 1239 (9th Cir. 1998). McDevitt argues that the Eleventh Circuit and the D.C. Circuit have rejected the multi-employer worksite doctrine and, therefore, the doctrine should not be applied in this case.[5] We disagree. The Eleventh Circuit has neither decided nor directly addressed the issue of multi-employer liability,[6] and the Fifth Circuit has not had an opportunity to consider the issue in the context of a Commission case since the Commission adopted the doctrine in 1976. The Fifth Circuit has, however, rejected the concept of multi-employer liability in a series of mostly tort cases.[7]

McDevitt cites specifically to the following Fifth Circuit decisions: *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 [3 BNA OSHC 1023] (1975) (per curiam) ("*Southeast Contractors*"); *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 321 (5th Cir.

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[5] McDevitt can appeal to the Eleventh Circuit because the construction site was located in Georgia. In addition, the pleadings establish that McDevitt's principal office is located in Georgia.

[6] In his decision, the judge referenced an Eleventh Circuit case in which the court affirmed *per curiam* an administrative law judge's decision to hold a general contractor responsible for the violations of its subcontractor even though it was not clear whether any of its own employees were exposed. *Pace Constr. Co.*, 840 F.2d 24 (11th Cir. 1988), *aff'g* 13 BNA OSHC 1282, 1986-87 CCH OSHD ¶ 27,889 (No. 86-517, 1987). However, both the judge and the Secretary acknowledge that *Pace*, an unpublished decision, cannot be considered binding precedent in the Eleventh Circuit. *But see Anastasoff v. U.S.*, 2000 U.S. App. LEXIS 21179 (8th Cir. 2000) (court finds portion of Eighth Circuit's rule which states that unpublished opinions are not precedent unconstitutional).

[7] The Eleventh Circuit has held that Fifth Circuit decisions issued prior to October 1, 1981 are considered binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981). Of the decisions issued by the Fifth Circuit after that date, only those issued by Unit B are binding. *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) ("Unit A...decisions [issued] after October 1, 1981, are...not binding precedent in the Eleventh Circuit," while Unit B decisions are).

1979) ("*Horn*"); and *Barrera v. E.I. duPont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. 1981) ("*Barrera*").[8] We agree with the judge that McDevitt's reliance on these cases is "misplaced."

In *Southeast Contractors*, the Fifth Circuit's initial decision on the issue of multi-employer liability, the court reversed the Commission in a one-paragraph opinion, expressing agreement with the "well-reasoned dissent of [then] Chairman Moran...and especially with the portion pertaining to the general rule that a contractor is not responsible for the acts of his subcontractors or their employees...." *Southeast Contractors*, 512 F.2d at 675. The Commission had applied § 1926.601(b)(4) which prohibits an employer from using a motor vehicle with an obstructed rear view unless it has an audible reverse signal or an observer signals that it is safe to back up to a paving company who received an asphalt shipment from a dump trailer it hired. *Southeast Contractors, Inc.*, 1 BNA OSHA 1713, 1714-15, 1973-74 CCH OSHD ¶ 17,787 p. 22,148 (No. 1445, 1974). The Commission concluded that the standard was intended to protect the "accepting" employer's employees, one of whom had directed the trailer driver and another who was fatally injured by the trailer. *Id.* Former Chairman Moran dissented, stating that an employer cannot be found in violation of § 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), if its own employees are not "affected by noncompliance with a standard" and "some other employer [is charged] with the duty of implementing the standard."[9] *Id.* at 1716, 1973-74 CCH OSHD at p. 22,149 (citations omitted).

In *Horn*, a tort case, the court relied upon its decision in *Southeast Contractors* in

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[8] Although also relied upon by McDevitt, the most recent Fifth Circuit decision on multi-employer liability, *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981), cannot be considered binding upon the Eleventh Circuit because it is a Unit A case, decided after October 1, 1981.

[9] At the time that former Chairman Moran wrote his dissent, the Commission's position on multi-employer liability was that an employer could not be held responsible for failing to comply with OSHA standards when the only employees exposed were those of another employer. *See, e.g., Gilles & Cotting, Inc.*, 1 BNA OSHC 1388, 1389, 1973-74 CCH OSHD ¶ 16,763, p. 21,512-13 (No. 504, 1973), *aff'd in pertinent part*, 504 F.2d 1255 (4th Cir. 1974). The Commission subsequently adopted the multi-employer worksite doctrine in *Anning-Johnson* and *Grossman Steel*.

finding that § 5(a) of the Act does not impose a duty on a general contractor to provide a subcontractor's employee with a safe working environment. *Horn*, 591 F.2d at 321. Similarly, in *Barrera*, also a tort case, the court concluded that the trial court erred when it told the jury that the Act required the defendant to furnish the plaintiff, an "invitee," a place of employment which was free from recognized hazards. *Barrera*, 653 F.2d at 920. Although the court found the error to be harmless, it noted that the Act "does not create duties between employers and invitees, only between employers and their employees...." *Id.*

In *Access Equipment Systems*, 18 BNA OSHC 1718, 1999 CCH OSHD ¶ 31,821 (No. 95-1449, 1999) ("*Access*"), a recent multi-employer case which also arose in the Eleventh Circuit, the Commission reaffirmed the multi-employer doctrine and did not find that circuit precedent precluded the doctrine's application. In that case, a scaffold which Access had erected and leased to a subcontractor collapsed, killing three employees of another subcontractor. The Commission determined that Access could be held responsible for failing to determine the weight the scaffold could safely bear.[10] *Id*. at 1723-1726, 1999 CCH OSHD at p. 46,779-81.

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[10] In *Access*, the Commission relied upon *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982-83 (7th Cir. 1999) ("*Pitt-Des Moines*"), a recent Seventh Circuit decision which upheld the validity of the multi-employer worksite doctrine based upon the language and broad remedial purpose of the Act. *Access*, 18 BNA OSHC at 1723-1726, 1999 CCH OSHD at p. 46,779-81. *See also Universal* (court concluded that the language of the Act is ambiguous on the issue of multi-employer liability, but deferred to the Secretary's reasonable interpretation of the statute and held a general contractor responsible under the doctrine for violations of its subcontractor). We note, however, that both *Access* and *Pitt-Des Moines* involved determining the liability of one subcontractor for the violations of another subcontractor, rather than, as here, the liability of a general contractor for the violations of its subcontractor.

As the Commission observed in *Access*, the Fifth Circuit cases represent a minority position among the circuits, most of whom have adopted the principles associated with multi-employer liability.[11] *Access*, 18 BNA OSHC at 1725, n.12, 1999 CCH OSHD at p. 46,780, n.12. Furthermore, as the judge observed here, *Horn* and *Barrera* are tort cases whose precedential value in the context of a case before the Commission is questionable. *Id., quoting Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975) ("This is not a tort case. Rather, it is an administrative proceeding brought under remedial legislation designed to provide a safe place to work for every working man and woman in the Nation. The Act should not be given a narrow or technical construction...").

Although *Southeast Contractors* was originally a Commission proceeding, it was summarily decided and issued before the Commission even adopted the multi-employer doctrine.[12] *See Access*, 18 BNA OSHC at 1725, n.12, 1999 CCH OSHD at p. 46,780, n.12.

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[11] *See, e.g., Pitt-Des Moines* (subcontractor responsible under doctrine for violation based upon death of another subcontractor's employee); *Universal* (general contractor responsible under doctrine for violations of subcontractor); *R.P. Carbone* (general contractor responsible under doctrine for violations of subcontractor); *Teal v. E.I. duPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984) (tort case) (employer's duty to comply with the Act extends to employee of independent contractor); *New England Telephone & Telegraph Co. v. Secretary of Labor*, 589 F.2d 81 (1st Cir. 1978) (subcontractor established multi-employer affirmative defense and found not responsible for exposing its employees to violations created by general contractor); *Beatty Equip. Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978) (subcontractor responsible under doctrine for violation it created but to which another subcontractor's employees were exposed); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977) (general contractor not responsible under doctrine for subcontractor's violation because it could not have reasonably detected the condition); *Brennan v. OSHRC (Underhill Constr. Corp.*), 513 F.2d 1032 (2d Cir. 1975) (subcontractor responsible under doctrine for violations it created but to which another employer's employees were exposed).

[12] In addressing the Fifth Circuit's decision in *Southeast Contractors*, the judge relied upon *Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 622 (5th Cir. 1978), a subsequent decision in which the court "agreed...that issues of creation and control...are important in determining liability" for an OSHA violation. In *Central of Georgia*, the court held the cited railroad company responsible for a housekeeping violation related to conditions along a set of railroad tracks owned and maintained by Continental Can Corporation, but to which the railroad's employees had access pursuant to an agreement between the two companies. *Id.*

(continued...)

Indeed, as noted, the Fifth Circuit has not reviewed any Commission decisions on multi-employer liability since the Commission adopted the doctrine. *Id.* Accordingly, we find that the Fifth Circuit cases relied upon by McDevitt do not preclude us from following Commission precedent here.

The D.C. Circuit has also not expressly accepted or rejected the multi-employer worksite doctrine, but has raised doubts about its validity. In *IBP Inc.*, 144 F.3d 861, 865-66 (D.C. Cir. 1998), the court found it unnecessary to decide the doctrine's validity, but observed that it has a "checkered history": "We see tension between the Secretary's multi-employer theory and the language of the statute and regulations and we have expressed doubt about its validity before." *Id.* at 865. This previous "doubt" was expressed in *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 1306 (D.C. Cir. 1995), where, without deciding the issue, the court questioned whether "the multi-employer doctrine is consistent with the Secretary's own construction regulation, 29 C.F.R. § 1910.12(a)." Since the D.C. Circuit has yet to decide the issue of multi-employer liability, we will apply our precedent in this case.[13]

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[12](...continued)
at 621-25.

According to the Secretary, the *Central of Georgia* decision "eroded" any precedential value accorded to the Fifth Circuit's decision in *Southeast Contractors*. However, the court never actually applied the multi-employer doctrine in *Central of Georgia* because the arrangement between the companies in question did not "fit easily into the mold of a relationship between a general contractor and a subcontractor." *Central of Georgia*, 576 F.2d at 622. *See also Access*, 18 BNA OSHC at 1725, n.12, 1999 CCH OSHD at p. 46,780, n.12. Therefore, we do not consider the Fifth Circuit's decision in *Central of Georgia* to be a modification of its position on multi-employer liability.

[13] Chairman Rogers notes that the multi-employer doctrine can be applied in different factual contexts. For example, under the doctrine, liability can be based on either a contractor's creation or a contractor's control of a hazard at a multi-employer construction site. In one typical context, a subcontractor on a construction site has created a hazard to which employees of another subcontractor on the site are exposed. Under the multi-employer doctrine, the first subcontractor can be liable for the hazard it has created even though none of its own employees may be exposed. This was the factual situation in *Access*.

(continued...)

In response to our dissenting colleague's challenge to the legal basis for the Commission's multi-employer worksite doctrine, a policy which has existed and been precedent for almost 25 years, we reiterate that this case was directed for review on the very narrow question of whether adverse circuit law precludes application of Commission precedent. As we conclude that it does not, a point that Commissioner Visscher apparently does not dispute, we affirm the judge's decision.

As a final matter, we note that in its brief, McDevitt has cited to the discussion in *Anthony Crane* regarding the relationship between § 1910.12(a) and the multi-employer worksite doctrine. *Anthony Crane*, 70 F.3d at 1306-07. Relying on this portion of the court's decision, as well as the fact that the scaffolding standards cited here are construction standards, McDevitt argues that the cited standards "apply only to the employer [CPD], not to the general contractor for a subcontractor's employees."

The D.C. Circuit did not resolve this question in *Anthony Crane* because "the parties have not briefed this issue, nor has any court that has adopted the multi-employer doctrine explicitly considered it." *Id.* at 1307. For the same reasons, we decline to resolve this argument here. Neither party has concretely addressed the relationship between § 1910.12(a) and the doctrine in their briefs before the Commission. McDevitt merely quotes to the relevant language from *Anthony Crane* without any supporting analysis, while the Secretary does not address the argument at all. Under these circumstances, we do not decide this issue here.

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[13](...continued)

In another typical context, a subcontractor on a construction site has created a hazard which the general contractor could reasonably have been expected to prevent or abate by reason of its supervisory capacity or control over the construction site. Under the multi-employer doctrine, the general contractor can be liable for the hazard created by the subcontractor even though none of its own employees may be exposed. This is the situation here and in cases such as *Universal* and *R.P. Carbone*.

While the Commission has applied the doctrine in both contexts and various Circuit Courts have upheld the doctrine in both contexts, Chairman Rogers believes it is important to keep in mind the different factual scenarios in which the doctrine is applied. In her view, the rationale for applying the doctrine, as well as the factual and legal analysis, would differ depending upon the factual context of the case.

PENALTIES

The Secretary proposed a penalty of $1,750 for each violation. The judge assessed the proposed penalty amount for each violation, taking into account McDevitt's size, lack of prior history, and good faith. He also considered the gravity of the violations to be high since there were seven employees working on the unsafe scaffolding and they were exposed to a fall of twelve feet. On review, neither party has addressed the issue of penalties and we see no reason to disturb the judge's findings on this matter. Therefore, we affirm the penalties as assessed by the judge.

ORDER

Accordingly, we affirm the violations alleged under Items 1 through 5 of Serious Citation 1, and assess a penalty of $1,750 for each violation.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: September 28, 2000

VISSCHER, Commissioner, dissenting:

The issue in this case is whether McDevitt Street Bovis, Inc. ("MSB"), as the general contractor for the construction of a two-story medical center, is liable for violations involving the condition of scaffolding that was owned, erected, and maintained by subcontractor CPD Plastering ("CPD"), and was accessed solely by CPD's employees. As discussed below, I can find no legal duty in the cited scaffolding standards requiring MSB to supervise CPD's employees to ensure compliance with the standards. I further disagree with the majority that the "multi-employer worksite doctrine" can be invoked to provide any such duty. I would therefore vacate the citations.

The validity of citations issued under the multi-employer worksite doctrine has often been based on whether or not section 5(a)(2) of the OSH Act allows the duty to comply with standards to be imposed on an employer beyond the immediate employer-employee relationship. *See, e.g. Universal Construction Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999). On that question the Commission's long-standing answer has been that section 5(a)(2) does not limit an employer's duty to comply with standards only to exposures to the employer's own employees. *Access Equipment Systems*, 18 BNA OSHC 1718, 1723, 1999 CCH OSHD ¶ 31,821, p. 46,778 (No. 95-1449, 1999).

In *Anthony Crane Rental v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995), however, the D.C. Circuit distinguished the question of how section 5(a)(2) should be interpreted from the further question of whether the alleged multi-employer duty was consistent with the cited standards and regulations. The court noted that it had twice upheld OSH Act violations against chemical manufacturers charged with violating standards that imposed a duty to warn downstream employees of hazards. But the court was unwilling to assume multi-employer liability where the standards and regulations had not given notice to the employer of the obligations and duties the Secretary sought to enforce. *Id. See also IBP, Inc. v. Secretary of Labor*, 144 F.3d 861, 865 (D.C. Cir. 1998)(further noting the court's misgivings based on "tension between the Secretary's multi-employer theory and the language of the statute and regulations").

I share the D.C. Circuit's concern as to the legal basis for multi-employer liability.[1] While § 5(a)(2) may not necessarily limit the employer's duty to comply with standards to the employer-employee relationship, the cited standards must actually impose the duty which the employer allegedly violated. Following this inspection, the Secretary cited CPD with five violations of the scaffolding standards at 29 C.F.R. §§ 1926.451 *et. seq*., as CPD was directly responsible for the scaffolding and for the employees exposed to the hazards. MSB was cited because, in the Secretary's view, it failed to adequately supervise CPD.[2] However, my review of the scaffolding standards under which MSB was cited reveals nothing about a general contractor's duty to supervise other employers on the worksite.

This case thus presents a very different issue from the one resolved in the *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,790 (No. 12775, 1976) and *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976). In those jointly-issued cases, the Commission's concern was to assess liability against the employer best positioned to abate the hazard.[3] In *Grossman*

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[1]MSB may appeal this case to either the D.C. Circuit or to the Eleventh Circuit. The D.C. Circuit, as indicated above, has expressed doubt about the validity of the multi-employer liability doctrine. The Eleventh Circuit has not decided or directly addressed the multi-employer liability doctrine.

[2]The Secretary's counsel made this clear during her opening statement at the trial: "Although there were no McDevitt Street Bovis employees working on the scaffolding at the time of the inspection, McDevitt Street Bovis was cited for the violations because as a general contractor, it had the overall site supervision and authority to direct and ensure that the conditions were corrected."

[3]Prior to those decisions, the Commission had held that "a respondent cannot be held liable for violations of [section 5(a)(2)] when none of its own employees were exposed to the noncompliant conditions." *Martin Iron Works, Inc,* 2 BNA OSHC 1063, 1063,1973-74 CCH OSHD ¶ 18,164, p. 22,341 (No. 606, 1974) (company that failed to guard an open stairway platform not responsible for violation where none of its own employees exposed). *But see Robert E. Lee Plumbers*, 3 BNA OSHC 1150, 1974-75 CCH OSHD ¶ 19,594 (No. 2431, 1975)(affirming violations of a guardrail standard against subcontractor whose employees were exposed, even though the employer had no responsibility for installing or maintaining the guardrails).

Steel and *Anning Johnson*, the Commission announced that, as an exception to the general rule that an employer is liable only when its own employees have access to the violative condition, an employer who either creates or controls a citable hazard on a multi-employer construction worksite could be liable for the violation regardless of whether its own employees were exposed to it.

It is true that dicta in *Grossman Steel*, *supra*, made broad reference to "hold[ing] the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." *Grossman Steel*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD at p. 24,791; *accord Anning-Johnson*, 4 BNA OSHC at 1199, 1975-76 CCH OSHD at p. 24,783-84. But in both cases, the general contractor created or controlled the particular violative conditions. Furthermore the Commission seems to have been concerned that, in recognizing an exception to the previous rule that liability always followed employee exposure, situations might arise in which it was unclear which employer was most responsible for a particular violative condition. In such a case, the Commission could find liability based on the general contractor's overall responsibility for the worksite. In neither case did the Commission indicate that it was stating a new and separate duty of supervision for general contractors that would parallel the responsibility of the employer that created or controlled the particular violative condition. The Commission expressed no interest in a rule that would allow for multiple layers of liability for a single violative condition. Indeed, both decisions were in response to the remand of *Anning-Johnson* to the Commission, in which the Seventh Circuit Court of Appeals observed:

> We fail to see how requiring several different employers to [correct the same conditions] fulfills the purposes of the Act any more effectively than requiring only one employer to do so. The Secretary's position is premised on the theory that the more people responsible for correcting any violation, the more likely it will get done. This is, of course, not necessarily true. Placing responsibility in more than one place is at least as likely to cause confusion and disruption in normal working relationships on a construction site. Such a policy might in effect prove to be counterproductive.

Anning-Johnson Company v. OSAHRC, 516 F.2d 1081, 1089 (7th Cir. 1975).

That being said, I recognize that previous Commission decisions have found the sort of "supervisory employer" liability the Secretary argues for here. But in several of these cases, notwithstanding the Commission's reference to liability on the basis of its supervisory role, the general contractor was the employer responsible for creating or controlling the particular hazard, and would thus be responsible for the violation on that basis. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 1994 CCH OSHD ¶ 30,621(No. 92-851, 1994)(general contractor on the project was also the employer in charge of the guardrails, and therefore created and controlled the violative conditions); *Blount International Ltd.*, 15 BNA OSHC 1897, 1991-93 CCH OSHD ¶ 29,854 (No. 89-1394, 1992)(the general contractor was the creating or controlling employer as to three of four violations affirmed against it); *Gil Haugan, d/b/a Haugan Constr. Co*., 7 BNA OSHC 2004, 1979 CCH OSHD ¶ 24,105 (No. 76-1512,1979) (consolidated cases)(citations issued to employer for exposing its own employees were affirmed on the basis that it was the general contractor on the site); *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)(affirming a scaffolding violation against a general contractor both on the grounds of the general contractor's supervisory role and on the fact that its own employees were exposed to the hazard). Where the Commission has previously found liability for general contractors based upon their failure to supervise the subcontractors that were directly responsible for violations, the Commission has yet to examine or explain the source of this purported duty to supervise. Unfortunately the majority fails to do so in this case as well. Instead the Commission has avoided any meaningful critical analysis of this issue, choosing instead to simply accommodate the Secretary's citation policy. *See also Knutson Constr. Co*., 4 BNA OSHC at 1762-63, 1976-77 CCH OSHD at pp. 25,482-83 (Moran, Commissioner, dissenting in part).

The employer's duty under § 5(a)(2) of the Act is to "comply with occupational safety and health standards promulgated under this Act." A general contractor's duty to supervise, however, cannot be found in any of the standards thus far promulgated by the Secretary. On the contrary, the Secretary has chosen *not* to impose this duty on general contractors. In

establishing her initial body of construction safety standards as permitted under OSH Act section 6(a), 29 U.S.C. § 655(a), the Secretary adopted the standards that had been previously promulgated under the Contract Work Hours and Safety Standards Act (Construction Safety Act), 40 U.S.C. § 333. The regulations under the Construction Safety Act include a provision that does establish a broad duty for the "prime contractor" to assure safety compliance throughout the job. *See* 29 C.F.R. § 1518.16. But when the Secretary adopted Construction Safety Act standards as OSH Act standards, she chose not to include that provision, nor has she since proposed any such standard of her own.

In the absence of a standard setting forth MSB's duty to supervise, the majority opinion cites two possible "sources" for MSB's duty to supervise. First, the majority says that MSB is "responsible for the violations under the multi-employer liability doctrine." But that simply begs the question, for the doctrine cannot impose a duty that is not imposed by a standard. Second, the majority appears to base MSB's duty to supervise on the presence of MSB employees on the workplace, as well as contract provisions that allowed MSB to demand that CPD comply with safety requirements. But the majority can point to no standard as a source for the proposition that a general contractor who is present on the worksite has a legal duty under the OSH Act to supervise and enforce standards against the subcontractors. Indeed the notion that a general contractor's duty under the Act depends on what role the general contractor assumes on the worksite and in contract provisions runs directly contrary to the principle that an employer's duties are set by the Act, not by contract, and therefore an employer may not contract away its duties and responsibilities under the OSH Act. *See, e.g.*, *Baker Tank Company/Altech*, 17 BNA OSHC 1177, 1180, 1995 CCH OSHD 30,734, p. 42,684 (No. 90-1786-S 1995). Furthermore, if we are to apply the rule stated by the majority, a general contractor that is present on the worksite and assumes a role in health and safety of its subcontractor's employees becomes equally liable with that subcontractor for the subcontractor's violations, while the general contractor which avoids any role also avoids OSH Act liability. As a leading commentary on occupational safety and health law has pointed out, it is unlikely that such a rule promotes the purposes of the Act. *See* M. Rothstein, Occupational

Safety and Health Law 169 at 233 (4th ed. 1998).

The "duty to supervise" for which MSB is held liable here not only lacks any discernible legal basis, it also lacks any definition as to its scope. The majority never indicates what MSB was required to do under its duty to supervise CPD. Were they to walk the worksite more frequently? Hire separate safety inspectors? Train CPD employees on how to erect scaffolding? Assume permanent responsibility for CPD's OSHA compliance? Nor do they state what other general contractors must do in order to avoid liability. In the absence of a any standard or regulation defining the extent of the general contractor's obligations, the majority has therefore attached what appears to be strict liability for a subcontractor's violations: MSB is liable for CPD's scaffolding violations simply because it failed to prevent them.

In short, MSB was cited under standards which do not apply because they do not impose the duty for which MSB was cited. I would therefore vacate these citations.

/s/
Gary L. Visscher
Commissioner

Dated: September 28, 2000

Secretary of Labor,
Complainant,
v
McDevitt Street Bovis, Inc.,
Respondent.

OSHRC Docket No. **97-1918**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

McDevitt Street Bovis, Inc. (MSB), is a general construction contractor. On September 12, 1997, the Occupational Safety and Health Administration (OSHA) inspected a hospital construction project in Douglas, Georgia. As a result of the inspection, MSB received a citation for scaffolding erected by a subcontractor. MSB timely contested the citation.

The citation alleges serious violations of § 1926.451(b)(1) (item 1) for failing to fully plank or deck the working platform of the scaffolding; § 1926.452(c)(2) (item 2) for failing to properly brace the scaffolding; § 1926.451(e)(1) (item 3) for failing to provide proper access for the scaffolding; § 1926.451(f)(7) (item 4) for failing to ensure the scaffolding was erected by a competent person; and § 1926.451(g)(1) (item 5) for failing to provide standard guardrails throughout the scaffolding. The citation proposes a penalty of $1,750 for each alleged violation.

The hearing was held on May 5, 1998, in Atlanta, Georgia. The parties were represented by counsel and post-hearing briefs were filed. MSB acknowledges that it is an employer engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act (Act) (Tr. 4-5).

Although not admitting the violative conditions, MSB principally argues that as general contractor it was not responsible for the scaffolding erected and maintained by a subcontractor. It is undisputed that MSB did not erect the scaffolding and MSB's employees were not exposed to the hazards created by the scaffolding (Tr. 7-8). For the reasons stated, the violations are affirmed against MSB.

The Inspection

In September, 1997, MSB, as general contractor, was constructing a new hospital, Coffee Regional Medical Center, in Douglas, Georgia. The hospital, 125,000 (250,000) square feet, was designed as two stories with a penthouse area on the roof to house the mechanical equipment. The penthouse was approximately 200 feet by 110 feet (Tr. 13, 100, 113).

In addition to its general contractor responsibilities, MSB's employees performed some of the concrete work. MSB had approximately 22 employees on the project, including two assistant superintendents and a project manager. The assistant superintendents' office was a job trailer within 75 yards of the hospital construction (Tr. 100-101).

As part of his duties, assistant superintendent Scott Kopplin walked the construction site twice a day to check on subcontractors' work and progress, including safety. Assistant superintendent Mitchell Surrency performed similar walk-around inspections. MSB also conducted weekly safety inspections of the project each Monday and prepared a report (Tr. 113-115). As described by Kopplin, the purpose of the Monday inspections was "[T]o make sure they were tied off, make sure we didn't have any bad contractors on the job. Basically, just safety walk-through" (Tr. 115).

On September 12, 1997, Safety and Health Compliance Officer Ronald Byrd initiated a planned, programed OSHA inspection of the hospital project. Byrd arrived at 11:00 a.m. and started his closing conference at 2:15 p.m. (Tr. 12, 16-17, 100). There were three subcontractors working at the project, including CPD Plastering, Inc. (CPD), the insulation contractor (Tr. 106). CPD was on the

roof area penthouse installing Styrofoam insulation around the penthouse. To install the insulation, seven of CPD's employees were working from two-stage tubular welded scaffolding approximately 12 feet above the roof (Exh. C-3; Tr. 22, 102-103, 109).

The scaffolding was owned, erected and maintained by CPD (Tr. 94, 117). In inspecting the scaffolding, compliance officer Byrd noted that the scaffolding had no cross-bracing on the side next to the penthouse. Also, cross-bracing members were missing in various other locations in front of the bracing (Exhs. C-4, C-6; Tr. 26-27, 39-40). The working platform on the scaffolding was not fully decked, leaving gaps between the guardrails and the uprights (Exh. C-3; Tr. 20). Also, there were guardrails missing and the scaffolding was not equipped with access ladders. Employees were observed climbing down the cross-bracing (Exhs. C-5, R-1; Tr. 40-41, 47-48).

According to compliance officer Byrd, assistant superintendent Kopplin stated that the scaffolding was erected a week prior to the inspection (Tr. 52, 79). However, at the hearing, Kopplin testified that the scaffolding was erected the day preceding the inspection (Tr. 116). He stated that CPD was just beginning work on the penthouse the prior day (September 11, 1997) by pulling scaffolding to the roof. Kopplin testified that he was not on the roof on September 11 and had not left MSB's trailer on the day of OSHA's inspection (Tr. 103, 106).

As a result of the inspection, MSB received a serious citation on October 6, 1997, for the scaffolding violations created by CPD. CPD also received a citation for the same scaffolding violations as MSB (Exh. R-2; Tr. 92). There were no OSHA citations issued relative to the safety of MSB's employees (Tr. 85).

Discussion

Alleged Violations

The Secretary has the burden of proving a violation.

> 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Violations of the Scaffolding Standards

MSB was cited because the scaffolding used by CPD failed to have full planking, in violation of § 1926.451(b)(1); failed to have proper cross-bracing, in violation of § 1926.452(c)(2); failed to have proper access, in violation of § 1926.451(e)(1); failed to be erected under the supervision of a competent person, in violation of § 1926.451(f)(7); and failed to have guardrails at all locations, in violation of § 1926.451(g)(1).

There is no dispute that the scaffolding used by CPD lacked the required guardrails, cross-bracing, planking and means of access (Tr. 20, 23, 26-27, 34-35, 39-41, 47-49). The photographic evidence and observations by compliance officer Bryd show the violations. The nature and extent of the violations observed establishes that the scaffolding was not erected by a competent person. Also, it is undisputed that CPD's employees working on the scaffolding were exposed to the hazards caused by the missing guardrails, bracing, access ladders, and planking. The scaffolding did not comply with the requirments of the standards (Exh. C-3 - C-5).

Although it does not admit the scaffolding violations, MSB does not offer any contrary evidence or dispute the observations of compliance officer Byrd. Assistant superintendent Kopplin agreed that the "scaffolding was not up to par" (Tr. 103). He acknowledges that the scaffolding was missing guardrails, cross bracing, decking and lacked a means of access (Tr. 109-110).

Thus, the record supports the application of the scaffolding standards, CPD employees' exposure to the conditions and noncompliance with the terms of §§ 1926.451(b)(1), 1926.452(c)(2), 1926.451(e)(1), 1926.451(f)(7) and 1926.451(g)(1).

General Contractor Responsibility

MSB argues that as general contractor, it was not responsible for a subcontractor's (CPD) failure to comply with the scaffolding standards. MSB asserts the multi-employer worksite defense. MSB argues that CPD was responsible for the health and safety of its employees (Tr. 118). CPD indemnified MSB for any violations and was responsible for promptly correcting any violations (Tr. 116-119). The Secretary concedes that MSB did not create the scaffolding violations nor were MSB's employees exposed to the violative conditions (Tr. Tr. 7-8).

Under Review Commission precedent, a general contractor, however, who, as in this case, does

not have employees exposed and did not create the violative condition is still considered responsible for violations of a subcontractor where the general contractor could reasonably be expected to prevent or detect and abate the violation. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994). A general contractor's responsibility does not depend on whether the general contractor acutally created the hazard or has the manpower and expertise to abate the hazard itself. *Red Lobster Inns of America Inc.*, 8 BNA OSHC 1762 (No. 76-4754, 1980). A general contractor at a construction project is presumed to have sufficient control over its subcontractors to require them to comply with the safety standards and to abate violations. Its "supervision over the entire worksite [provided] sufficient control over its subcontractors to require them to comply with occupational safety and health standards and to abate violations." *Gil Haugan d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006 (Nos. 76-1512 & 1513, 1979). Also *see Lewis & Lambert Metal Contract, Inc.*, 12 BNA OSHC 1026, 1030 (No. 80-5295, 1984).

For example, in *Knutson Construction Co*., 4 BNA OSHC 1759, 1761 (No. 765, 1976), *aff'd* 566 F.2d 596 (8th Cir. 1977), the Review Commission relieved a general contractor of liability for failing to detect a one-inch crack on the underside of a scaffolding platform before it collapsed. It concluded that it was unreasonable to expect a general contractor to detect such a crack. However, in *Blount International Ltd.*, 15 BNA OSHC 1897, 1899 (No. 89-1394, 1992), the Commission found it reasonable to expect a general contractor to detect a GFCI problem even though the condition was by nature latent and hidden from view. In exercising reasonable diligence, a general contractor may rely in part upon the assurances of a subcontractor, so long as it has no reason to believe that the work is being performed unsafely. *See Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133 (No. 82-178, 1994).

In this case, MSB failed to exercise reasonable diligence in preventing and detecting the unsafe scaffolding. MSB exercised and maintained overall authority over the hospital project (Tr. 111). Its responsibility extended to the work performed by its subcontractors, including CPD. MSB selected CPD to do the insulation work. It oversaw the subcontractor's work and safety (Tr. 110-111, 119). Based on the subcontract, MSB had the authority to demand CPD's compliance or ultimately to terminate the subcontractor for noncompliance (Tr. 119; MSB post-hearing brief, p. 4).

CPD's scaffolding was in plain view. The lack of planking, cross bracing, access and guardrails was clearly visible throughout the project. Compliance officer Byrd testified that he observed the

problems with the scaffolding from the ground (Exh. C-7; Tr. 41, 52, 67). On the morning of the inspection, some of MSB's employees were also working on the roof area (Tr. 84). It is clear that MSB was not as diligent as it could have been in preventing and detecting the scaffolding violations. MSB's personnel should have noticed the lack of guardrails, planking, bracing and an access ladder. MSB's supervisors were knowledgeable of the scaffolding requirements and made regular inspections of subcontractors' work. Although Kopplin denied inspecting the scaffolding prior to the OSHA inspection, there is no evidence that the other assistant superintendent had not inspected the area. According to Kopplin, the entire worksite was inspected twice a day by the assistant superintendents.

Kopplin's testimony that the scaffold was erected the day prior to the OSHA inspection is not supported by the record. During the inspection, Kopplin told Byrd that the scaffolding had been erected for a week. The court accepts Kopplin's statement to the compliance officer. Admission statements by a supervisor are permitted. Fed. Rules of Evid. 801(d)(2). Weight is given to the statement because the it was made contemporaneous with the inspection, and Kopplin did not deny making the statement or offer an explanation. His testimony at the hearing six months later lacked confirmation by a record or other witness testimony. MSB referred to daily progress reports showing that scaffolding equipment was delivered on Monday, September 8, 1997 (Tr. 116). However, the reports were not offered into evidence and the delivery of some equipment does not necessarily show when the scaffolding in question was erected. Also, the amount of erected scaffolding at the time of the inspection appears extensive and required more than a few hours to erect (Exhs. C-3, C-4, C-6). The scaffolding was erected around the penthouse, 200 feet by 110 feet (Tr. 81). It is reasonable to conclude that the unsafe scaffolding existed for several days prior to the inspection.

MSB had the ability to prevent the violations (Tr. 110-111). Under the subcontract, CPD was required by MSB to comply with safety and health regulations and promptly correct any violations (Tr. 117-118). However, merely requiring CPD's compliance with safety standards does not relieve the MSB of its responsibility to prevent or detect unsafe conditions. MSB could stop CPD's work if it observed safety violations (Tr. 119). MSB's supervisors had the authority to have safety problems by subcontractors corrected immediately (Tr. 110). MSB made sure that CPD corrected the scaffolding violations (Tr. 49, 110-111). MSB's two assistant superintendents walked the worksite twice a day

specifically checking on subcontractors' work (Tr. 114-115). MSB's job trailer was within 75 yards and within view of the hospital construction (Tr. 100-101). Each Monday, the assistant superintendents made a safety inspection of the hospital construction with subcontractors (Tr. 113-114). On a daily basis, MSB exercised its authority to inspect CPD's compliance with safety regulations and accept or reject its work performance.

MSB was familiar with the scaffolding requirements. Assistant superintendent Kopplin acknowledges that he knew OSHA's scaffolding requirements and the proper procedures for erecting scaffolding (Tr. 107). Also, MSB maintained a written site safety plan and safety manual, including rules for its own scaffolding program which the compliance officer reviewed and considered acceptable (Tr. 92-93). MSB was responsible to ensure that CPD complied with the scaffolding standards and MSB should have known with reasonable diligence of CPD's noncompliance.

Fifth Circuit Precedent

MSB argues that as a matter of law a general contractor "should not be subject to vicarious liability for alleged violations of standards committed by other employers on a multi-employer worksite" (MSB post-hearing brief, p. 6-7). Based on former Fifth Circuit decisions which are binding on the Eleventh Circuit,[4] MSB argues that the cases hold that as a matter of law a general contractor can not be held responsible for the safety violations of a subcontractor. MSB cites *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Southeast Contractors, Inc., v. Dunlop*, 512 F.2d 675 (5th Cir. 1975); *Barrera v. E.I. DuPont De Nemours & Co.*, 653 F.2d 915 (5th Cir. 1981); and *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318 (5th Cir. 1979) (MSB post-hearing brief, p. 2).

"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 17 BNA OSHC 1680 (3rd Cir. 1996). Here, the violations occurred and MSB has offices in the Atlanta, Georgia, area. Accordingly, this case could be appealed to the Eleventh Circuit.

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

MSB's reliance on Fifth Circuit case law is misplaced. *Southeast Contractors* enunciates a "general rule that a contractor is not responsible for the acts of his subcontractors or their employees." 512 F.2d at 675. However, in a subsequent case, the Fifth Circuit in *Central of Georgia Railroad Company v. OSHRC*, 576 F.2d 620, 622 (5th Cir. 1978), "agreed with the *Anning-Johnson*[5] decision that issues of creation and control of a violation are important in determining liability." The court further stated that "the degree to which the party charged does control the alleged hazard and the degree of his ability actually to abate that hazard" is important in determining liability. 576 F.2d at 623. In *Central of Georgia*, the court considered several factors in assessing a general contractor's liability, including the general contractor's technical expertise to abate the hazard, its contractual bargaining power, and its ability to enforce the contract. 576 F.2d at 623-624.

Similarly, the decisions in the *Horn*, *E.I. Dupont* and *Melerine* cases do not support MSB's position. *Horn* and *E.I. Dupont* involve private causes of action, not an OSHA enforcement action. *Melerine* was decided after the split of the Fifth Circuit into the Fifth and Eleventh Circuits and is not binding on the Eleventh Circuit.

Therefore, there is no showing that the Eleventh Circuit, as a matter of law, rejects the general contractor responsibility principle. Although not a precedent, the Eleventh Circuit affirmed per curiam the decision of the Review Commission finding a general contractor in violation even if it did not have employees exposed to the hazard. *Pace Constr. Corp. v. Secretary*, 840 F.2d 24 (11th Cir. 1988).

Accordingly, MSB's violations of the scaffolding standards are affirmed.

Classification of Violations

In determining whether the scaffolding violations are serious within § 17(k) of the Act, the Secretary must show that MSB knew or should have known, with the exercise of reasonable diligence, of the presence of the violations and that there was a substantial probability that death or serious physical harm could result from the condition.

As discussed, the record establishes that MSB should have known of the unsafe scaffolding with the exercise of reasonable diligence. MSB has "an obligation to inspect the work area to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence." *Frank*

[5] *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975) recognizes that a general contractor is responsible for violations where a subcontractor's employees are exposed if it creates or controls the conditions.

Swidzinski Co., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). The scaffolding used by CPD was open and clearly observable. As for the expected injury, the issue is whether the resulting injury would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 91-862, 1993). The failure to utilize adequate scaffolding at heights of 12 feet can reasonably be expected to cause serious injury or death to employees. Therefore, a serious violation is established.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

MSB is a large employer with over 250 employees. There were 22 employees at the hospital site. Credit is given to MSB for history and good faith because it had received no citations within the last three years and it maintained good safety programs (Tr. 54-55). With regard to gravity, probability and severity is considered high in that employees were exposed to a fall of 12 feet to a concrete surface. There were seven employees exposed to the hazards posed by the unsafe scaffolding.

Accordingly, for the serious scaffolding violations a penalty of $1,750 for each violation is appropriate.

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 that serious Citation:

1. Item 1, violation of § 1926.451(b)(1), is affirmed and a penalty of $1,750 is assessed.

2. Item 2, violation of § 1926.452(c)(2), is affirmed and a penalty of $1,750 is assessed.

3. Item 3, violation of § 1926.451(e)(1), is affirmed and a penalty of $1,750 is assessed.

4. Item 4, violation of § 1926.451(f)(7), is affirmed and a penalty of $1,750 is assessed.

5. Item 5, violation of § 1926.451(g)(1), is affirmed and a penalty of $1,750 is assessed.

KEN S. WELSCH
Judge

Date: December 2, 1998