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SECRETARY OF LABOR,		:
	Complainant,	:
		:
v.		:
		:
IBP, INC.,		:
	Respondent.	:
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OSHRC Docket No. 93-3059

DECISION

Before: WEISBERG, Chairman; MONTOYA, and GUTTMAN, Commissioners.

BY THE COMMISSION:

The Secretary of Labor contends that IBP, Inc., a meat processor, committed willful violations of certain lockout/tagout (“LOTO”) standards¹ by failing to ensure that its independent contractor, DCS Sanitation Management, Inc.,² followed LOTO procedures

¹The cited standards are 29 C.F.R. §§ 1910.147(d)(3) and 1910.147(c)(4)(i). Section 1910.147(d)(3) provides: “All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source[s].” 29 C.F.R. § 1910.147(c)(4)(i) provides: “Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.”

²Willful citations with maximum penalties issued to DCS based on the same events have been affirmed. *DCS Sanitation Mgmt., Inc. v. OSHRC*, 82 F.3d 812 (8th Cir. 1996).

during nightly cleanings of meat processing machinery at IBP's plant in Madison, Nebraska.³ At issue is whether IBP may be held responsible for the violations that DCS employees created⁴ and whether those violations were willful. For the reasons stated below, we find that IBP was responsible, although we also find that the violations were not willful.

I. Background

IBP's contract with DCS required DCS to "implement safe practices and procedures in order to prevent injuries to its employees" and provided that IBP could terminate the contract on one week's notice if DCS did not comply with IBP's safety policy.⁵ The contract also provided that IBP could bar entrance to DCS employees "at any time . . . in IBP's sole discretion."⁶

DCS' activities received relatively close scrutiny from IBP. IBP instructed its personnel to stop any DCS employee who was in danger and report the episode to a DCS supervisor. IBP expected DCS employees to obey stop commands and expected DCS supervisors to correct reported problems. IBP also instructed its personnel to report any unsafe DCS practices and LOTO program violations by IBP supervisors. IBP's management meetings and staff meetings regularly included discussion of DCS' LOTO practices, and

³DCS removed bone, fat, and other waste products from IBP's machines for cutting, deboning, and other operations.

⁴The citation was issued following an inspection of IBP's plant in early 1993 after a DCS employee was killed as he removed debris from the loin saddle table that was energized and running. The employee "removed a barrier guard and then failed to lock out the machine." No IBP personnel were present or exposed. In 1990, before IBP contracted out the cleaning, the same machine was involved in the death of an IBP employee.

⁵IBP Plant Manager Milton Bailey indicated that any termination "would have had to come through corporate purchasing."

⁶Despite this language, the parties have stipulated that "IBP personnel believed they had no authority to suspend DCS employees from work."

attendees were reminded to ensure that DCS LOTO violations were reported to DCS supervisors.

There were numerous instances of DCS' failure to comply with LOTO that IBP managers observed, stopped, and reported.⁷ IBP Safety Director Steve Jarchow observed DCS employees walking on moving tables while hosing them, standing or riding on a moving ham table to clean an overhead conveyor, and hand-scrubbing machinery that was only shut off, not locked out. IBP Maintenance Supervisor Ervin Brabec saw approximately two DCS LOTO violations per week in 1990-93. The employees that Brabec supervised also reported DCS LOTO violations "[p]retty much" over the whole of 1990-93. IBP Product Control Manager Doug Simmons testified that, "[e]arly in 1990, the [LOTO] violations were quite numerous, almost daily, if not several times per hour" and that he observed DCS LOTO violations "a couple times a day." "On numerous occasions, I observed DCS employees . . . reaching into tables [and] conveyors that were running, using fat augers as ladders to crawl up to the upper floors, riding on tables that were moving, [and] jumping across tables that were moving." On three occasions, he observed DCS employees get their hands caught in moving belts.

One of these hand-in-belt incidents occurred one-to-two weeks before the fatality in this case. Simmons was conducting a quality control inspection with a DCS supervisor, when a DCS employee, in obedience to the DCS supervisor's order to fix a cleaning deficiency that Simmons had pointed out, stuck his hand into the moving belt after his supervisor turned his back. Simmons reported this incident to the DCS supervisor who was standing there, to DCS Manager Tobin Schacher, and to his own superiors, including IBP Corporate Director Paul Connor at IBP's headquarters in Dakota City, Nebraska. IBP Safety

⁷However, one IBP manager testified that DCS employees had refused to stop in response to his commands (responding with "You can't tell me what to do," "I don't have to," and unspecified obscenities). Another IBP manager testified that he did not always report the violations to his own supervisors inasmuch as "[n]othing seemed to get done."

Director Jarchow then sent a memo to DCS Manager Tobin Schacher advising him to review LOTO procedures with his employees because “[n]o employee shall expose any body part to points of operation or zones of danger during clean-up activities.” Also, IBP Plant Manager Milton Bailey, who held meetings with DCS “on an as-needed basis” and had “a couple” regarding LOTO, met with DCS Manager Schacher following this incident and obtained his assurance that DCS would comply with LOTO. Bailey also testified that IBP’s engineer and safety director “encouraged” DCS to adhere to the LOTO program.

II. Discussion

Under Commission precedent:

[A]n employer is responsible for [the] violations of other employers [to which the other employers’ employees alone are exposed] where it could be reasonably expected to prevent or detect and abate the violations *due to its supervisory authority and control over the worksite*. Liability under [this] test does not depend on whether the [cited] employer actually created the hazard or has the manpower or expertise to itself abate the hazard.

Red Lobster Inns of America, Inc., 8 BNA OSHC 1762, 1763, 1980 CCH OSHD ¶ 24,636, p. 30,220 (No. 76-4754, 1980) (emphasis added) (case cite omitted).⁸ The key to the Commission’s holding in *Red Lobster* was the recognition that “[t]he safety of all employees can best be achieved if each employer at multi-employer worksites . . . abate[s] hazardous conditions under its control” *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1689, 1979 CCH OSHD ¶ 23,830, p. 28,909 (No. 76-1408, 1979). An employer who has control over

⁸While IBP argues to the contrary, the fact that DCS was the employer of the exposed employees does not relieve IBP of responsibility as the worksite-controlling employer. Nor do the cases on which IBP relies absolve worksite-controlling employers, either explicitly or implicitly. In fact, in *MLB Indus., Inc.*, 12 BNA OSHC 1525, 1527-28 & n.5, 1984-85 CCH OSHD ¶ 27,408, p. 35,510 & n.5 (No. 83-231, 1985), where the Commission held that a company which only supplied employees to the general contractor was not the employer of the employees, the Commission stated that “a general contractor . . . by reason of its general supervisory authority, may be responsible for hazardous conditions to which a subcontractor’s employees have access.”

an entire worksite must take whatever measures are “commensurate with its degree of supervisory capacity.” *Marshall v. Knutson*, 566 F.2d 596 (8th Cir. 1977).⁹

The record in this case establishes that IBP had the supervisory authority and control over the worksite to have taken more steps toward achieving abatement of the cited hazards. *See Red Lobster*, 8 BNA OSHC at 1763, 1980 CCH OSHD at p. 30,220. As the sole owner of the plant, IBP had exclusive control over who entered and worked there, and IBP had the contractual authority to bar entry to the DCS employees who were violating LOTO requirements. IBP’s contract with DCS also required DCS to implement safe practices including IBP’s LOTO program with machine-specific LOTO procedures. In addition to retaining the ability to bar DCS employees, both the contract and the LOTO program indicated that DCS could be removed as a contractor for failure to comply with LOTO requirements.¹⁰

The analogy of worksite-controlling employers to general contractors on construction worksites is hardly “suspect,” as the dissent claims.¹¹ This is not the first time the

⁹According to the court, the “relevant factors” for determining responsibility are “(1) degree of supervisory capacity, (2) nature of the safety standard violation, (3) nature and extent of precautionary measures taken.”

¹⁰Our dissenting colleague mischaracterizes our decision as creating a form of “contractual indemnity.” The significance of the provisions of the contract in effect between IBP and DCS is that they provide strong evidence that IBP has the supervisory authority and control over the worksite to require DCS to follow safe LOTO procedures. As we discuss, however, in addition to the contract’s specific provisions, indicia of control stem from other sources -- including IBP’s expertise, its physical control over the worksite, and its de facto relationship with the DCS.

¹¹The Commission has repeatedly recognized that a general contractor and a subcontractor are both responsible for abatement of hazards on construction worksites. *See, e.g., A/C Electric Co. v. OSHRC*, 956 F.2d 530, 534-35 (6th Cir. 1991); *Lee Roy Westbrook Constr. Co.*, 13 BNA OSHC 2104, 2105-06, 1987-90 CCH OSHD ¶ 28,465, pp. 37,694-95 (No. 85-601, 1989); *Perini Corp.*, 6 BNA OSHC 1609, 1610, 1978 CCH OSHD ¶ 22,772, p. 27,493 (No. 13029, 1978); *Gelco Builders, Inc.*, 6 BNA OSHC 1104, 1105-06, 1977-78 CCH (continued...)

Commission has noted that non-construction worksite-controlling employers are responsible for safety. *See Red Lobster*, 8 BNA OSHC at 1763, 1980 CCH OSHD at p. 30,220 (restaurant chain acting as construction jobsite superintendent); *Harvey Workover*, 7 BNA OSHC at 1690, 1979 CCH OSHD at p. 28,909-10 (employer who owned barge worksite and controlled hazard owed duty to protect employee of another employer). *Cf. Rockwell Internatl. Corp.*, 17 BNA OSHC 1801, 1808, 1996 CCH OSHD ¶ 31,150, pp. 43,534-35 (No. 93-45, 1996) (multi-employer defense applied in non-construction context). Control and preventability are the keys to the applicability of the doctrine, not whether the employer is a general contractor. Furthermore, the DCS-IBP contract cannot be distinguished from a general contractor's relationship to its subcontractors on the basis that DCS has the ability to correct its own LOTO violations.¹² Indeed, in *Central of Georgia R.R. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978), on which the dissent mistakenly relies, the Fifth Circuit held that “[i]f an employer does contract with a third party to maintain safe conditions, it is to be presumed that the employer can enforce the contract.” 576 F.2d at 624. The court specifically rejected the view that the party who created and could have abated the hazards was the only logical party to hold responsible. 576 F.2d at 625 (“even if Continental might have been cited, this would not necessarily have relieved Central of its duties”).

¹¹(...continued)
OSHD ¶ 22,353, pp. 26,940-41 (No. 14505, 1977).

¹²The general contractor/subcontractor relationship is itself, by definition, a relationship between two contractors and in that sense is also a bilateral contractual arrangement. However, the question is not whether the relationship is bilateral, but the nature of the control or supervisory authority the worksite-controlling contractor has. As we discuss, in this case the worksite-controlling contractor has substantial practical, expert, and contractual means of control. Moreover, a construction subcontractor cannot avoid, by relying on the general contractor's overall responsibility, whatever obligations it might otherwise have to abide by OSHA (or other safety laws). Thus, in the construction context the imposition of responsibility on a general contractor is typically in addition to that which the subcontractor retains.

Here, IBP was not the employer of the exposed employees. However, the fact that IBP owned the hazardous equipment and required another employer's employees (instead of its own) to work on the equipment required it to do what was "reasonably expected" to abate violations. *Red Lobster*, 8 BNA OSHC at 1763, 1980 CCH OSHD at p. 30,220. Specifically, IBP was required to exercise all of its control as a plant owner and as a contracting party to ensure that those employees were not exposed to known hazards. As the *Central of Georgia* court held, "An employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he had made." 576 F.2d at 625.

This is not a case where an employer hired a contractor on a one-time basis to execute a project either outside of its normal operations or requiring expertise that the employer did not possess. IBP hired DCS to perform a daily recurring task, integral to the plant's operations, that was formerly done by IBP employees, under a contract apparently intended to continue as long as IBP was satisfied with DCS' services. IBP's relationship with DCS was a close one. In order to monitor service quality and ensure plant compliance with USDA cleanliness specifications, IBP was in constant contact with DCS. By the time of the early 1993 fatality and the inspection in this case, IBP and DCS management personnel had been discussing DCS LOTO infractions periodically, possibly even daily, for three years.

Despite IBP's frequent contacts with DCS, DCS's employees flagrantly violated IBP's LOTO program and the OSHA standard. IBP was aware of these violations and of the serious safety hazards they posed to DCS's employees, but it did not exercise all means available to it under the contract to stop the violation. The contract held DCS responsible for LOTO compliance and gave IBP specific remedies for DCS' failure to comply. Ultimately, IBP could have suspended or terminated the contract. However, the dissent is mistaken in assuming that our decision compels IBP to resort immediately to contract termination. As an initial matter, IBP could have announced to DCS that it would begin to expel those DCS

employees who were observed repeatedly creating LOTO violations. If DCS' performance did not improve, IBP could have expelled recalcitrant DCS employees. The record shows that an independent contractor's employee was expelled at another IBP plant for violating IBP's LOTO program. IBP did not attempt to establish that any of the contract remedies such as barring employees or giving notice that the contract would be terminated if safety requirements were not achieved would have been economically infeasible or otherwise unrealistic.¹³ We therefore find that IBP neglected to implement all of the control measures that it had available under the contract to obtain compliance by DCS.

Commission precedent on this point is not, as IBP claims, limited to violative conditions over which the cited employers had control because their own employees could abate the hazards.¹⁴ Hazardous conduct by another employer's employees clearly is not beyond the reasonable control of all but the actual employer. For example, in *Knutson* the employees of Knutson's subcontractor had failed to equip their own scaffold with toeboards and guardrails and would have been expected to change their conduct when Knutson "communicate[d] the unsafe condition" to their employer, as the Commission required Knutson to do. 4 BNA OSHC 1759, 1760, 1762, 1976-77 CCH OSHD ¶ 21,185, pp. 25,479, 25,481 (No. 765, 1976) (Commission decision). In *Gil Haugan d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004, 1979 CCH OSHD ¶ 24,105 (No. 76-1512, 1979), the Commission required general contractor Haugan to exert its "supervisory capacity" to compel its subcontractor to install guardrails, an access ladder, and proper planks on a defective

¹³Furthermore, IBP could have asked DCS for reports concerning how it was carrying out its supervisory and disciplinary responsibilities for LOTO compliance. *Compare Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1900, 1991-93 CCH OSHD ¶ 29,854, p. 40,750 (No. 89-1394, 1992) (general contractor not "reasonably entitled to rely on" subcontractor because general contractor did not ask subcontractor for data regarding its inspections to ensure use of proper electrical equipment).

¹⁴IBP argues that multi-employer responsibility is only "applied in circumstances where the cited employer controls *a specific physical condition* at the site which poses a hazard to another employer's employees" (emphasis in the original).

scaffold. The subcontractor's employees would have to do the installation work — conduct that was the direct responsibility of their own employer, not Haugan. 7 BNA OSHC at 2005-06, 1979 CCH OSHD at pp. 29,289-90. *See also Camden Drilling Co.*, 6 BNA OSHC 1560, 1561, 1978 CCH OSHD ¶ 22, 687, p. 27,382 (No. 14306, 1978) (barge owner responsible for compelling subcontractor to have its employees stop using their own defective fan and either repair it or remove it); *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1900, 1991-93 CCH OSHD ¶ 29,854, p. 40,750 (No. 89-1394, 1992) (general contractor must check on whether subcontractor is ensuring that its employees install proper electrical equipment). In sum, our case law requires an employer in IBP's position to take reasonable steps to induce another employer to alter the conduct of its employees and achieve abatement of hazards. Accordingly, we find that IBP had sufficient supervisory capacity to be legally responsible for the two citation items on review, which the judge affirmed on the basis of the parties' stipulation.

III. Willfulness

Still in dispute on review is whether the violations are properly characterized as willful. A willful violation¹⁵ is characterized by intentional disregard or plain indifference to the Act's requirements. *Donovan v. Mica Constr. Co.*, 699 F.2d 431 (8th Cir. 1983). The Secretary made an initial showing of intentional disregard or plain indifference by establishing that the IBP plant managers who were aware of the DCS' LOTO infractions¹⁶ did not take appropriate actions consistent with the IBP-DCS contract to stop the infractions.

¹⁵The Secretary's assertions in its review brief that the "violation was repeated" are apparently inadvertent. Judge Barkley did not make initial findings on willfulness (inasmuch as he vacated the citation items), but neither party seeks a remand, and one is unnecessary. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1283 n.3, 1993-95 CCH OSHD ¶ 30,148, p. 41,477 n.3 (No. 91-862, 1993) (Commission authority to review evidence independently and make initial findings on disputed factual issues).

¹⁶Prior LOTO citation items that prompted IBP to implement a comprehensive LOTO program gave IBP an awareness of LOTO requirements.

See Morrison-Knudsen Co./Yonkers Contrac. Co., 16 BNA OSHC 1105, 1126-27, 1993-95 CCH OSHD ¶ 30,048, pp. 41,284-85 (No. 88-572, 1993) (employer who knew of hazardous exposure failed to implement abatement measures stated in safety program, which evidenced awareness of applicable OSHA requirements). However, IBP demonstrated a good faith belief that it was complying with the law by consistently stopping unsafe DCS employees and reporting their LOTO violations to DCS supervisors. Moreover, although IBP “tolerated slipshod and hazardous LOTO practices by DCS,” as the Secretary contends, the record does not show that “IBP *ceased* its efforts” to correct DCS, as the Secretary also contends (emphasis in original). We therefore find that IBP’s measures, though not entirely effective or complete, demonstrate sufficient good faith to negate intentional disregard and plain indifference. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209-12, 1991-93 CCH OSHD ¶ 29,964, p. 41,029-31 (No. 87-2059, 1993); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-3831, 1984).¹⁷

IV. Penalties

In assessing penalties, the Commission gives due consideration to the size of the employer’s business, the employer’s prior history and good faith, and the gravity of the cited violations. *J.A. Jones*, 15 BNA OSHC at 2214, 1991-93 CCH OSHD at 41,033. Here, we have a large employer with a history of several serious citation items affirmed within the last three years. IBP demonstrated some good faith by consistently informing DCS of the

¹⁷Unlike the Secretary (SRB 27-28), we do not rely on the record in the case against DCS because it is not in evidence here.

dangerous situation, yet IBP permitted it to go on for three years. The gravity of the LOTO violations cited in this case was high in view of the strong potential for serious physical harm or death. We assess two \$7,000 penalties for serious violations.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: April 18, 1997

MONTOYA, Commissioner, dissenting:

By this decision, the majority has found IBP responsible, under the lockout/tagout (“LOTO”) standard, for exposing the employees of its subcontractor DCS to conditions created and controlled entirely by DCS. The majority has thus created a form of contractual indemnity that significantly expands the Commission’s case law on multi-employer liability. *See Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976). Such an expansion is entirely unwarranted here. Though IBP had no direct authority to supervise the working conditions of DCS’s employees, IBP did take appropriate and reasonable measures to ensure that their working conditions were safe. The majority’s conclusion that IBP should nonetheless have suspended the DCS contract in order to comply with the OSH Act by is unsupported by the facts and without precedent in Commission case law.

This case does not involve machinery which was defective or unsafe through design, construction, or installation. Rather, it concerns the conduct of DCS’s employees, who removed a guard and then failed to lock the machine out in contravention of the LOTO standard; in other words, it involves a hazard created through the unsafe acts of DCS’s employees. It is well-established, however, that an employer is not an insurer of safe work practices by employees and is responsible only for conduct which it could reasonably prevent through the implementation, communication, and enforcement of work rules conforming to the requirements of the relevant OSHA standards. *Forging Indus. Assn. v. Secretary of Labor*, 773 F.2d 1436, 1450 (4th Cir. 1985) (en banc); *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1868-69, 1981 CCH OSHD ¶ 25,358, p. 31,500 (No. 16147, 1981). The elements of an effective safety program include work rules adequate to prevent the violative condition, communication of those rules to employees, a system for monitoring and discovering infractions of the rules, and effective enforcement when infractions occur. *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578, 1993-95 CCH OSHD ¶ 30,345, p. 41,841 (No. 91-237, 1994); *H.E. Wiese, Inc.*, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD

¶ 25,985, p. 32,614 (No. 78-204, 1982), *aff'd without published opinion*, 705 F.2d 449 (5th Cir. 1983).

There is no dispute that IBP maintained a written LOTO policy that was specifically applicable to independent contractors and that, in accordance with its provisions, was disseminated to DCS. The policy required that contractors such as DCS establish a safety program and enforce compliance by their employees with IBP's requirements. There is also no dispute that IBP's policy was consistent with the Secretary's LOTO standard at issue here. Put another way, the facts establish that IBP furnished DCS with sufficient guidance to allow DCS to come into compliance with the cited OSHA standard. Moreover, as the majority indicates, IBP regularly monitored DCS's compliance, brought all observed violations to the attention of DCS's management, and had conferred with DCS regarding infractions of IBP's LOTO policy as recently as ten days prior to this accident. Despite IBP's ongoing efforts to ensure that the required safety program was implemented, the majority complains that "it did not exercise all means available to it under the contract to stop the violation."

Indeed, the only criterion of an effective safety program that IBP failed to implement is the element of enforcement through disciplinary measures sufficient to ensure compliance. In this case, however, the only exposed employees were those of DCS. The Secretary does not contend, nor does the majority conclude, that DCS was empowered to levy disciplinary action directly against DCS's employees, and, as noted above, IBP mandated that DCS take appropriate steps to enforce compliance by its employees. Rather, the majority concludes that IBP should have exercised its rights to rescind or suspend its contract with DCS. Thus, as the majority decision recognizes, terminating its contract was the only means by which IBP could have effectively exerted control over the actions of DCS or its employees.

In imposing this obligation on IBP, the majority refers to the principles the Commission originally established for apportioning liability on multi-employer worksites in the construction industry. A general contractor is responsible for violative conditions it

could reasonably have prevented or corrected through its overall supervisory authority over the worksite, whereas subcontractors who cannot directly abate hazardous conditions to which their employees are exposed must take other reasonable measures to protect their employees. *Grossman Steel & Aluminum*. While the Commission has generally held that these principles are equally applicable to multi-employer worksites in non-construction contexts, such as this case, *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1688-89, 1979 CCH OSHD ¶ 23,830, pp. 28,908-09 (No. 76-1408, 1979), the Administrative Law Judge here, James H. Barkley, properly concluded that the Commission has never found liability under the Act based solely on the ground that the cited employer should have terminated its contract with an independent contractor.

Indeed, Commission precedent on this issue is contrary to the majority's decision. In *Grossman* itself, the Commission observed that "as a general rule," it would not require the employer having exposed employees to remove its employees from the vicinity of the hazard, characterizing this as "an unrealistic alternative." 4 BNA OSHC at 1189 n.7, 1975-76 CCH OSHD at p. 24,791 n.7. See *Lee Roy Westbrook Constr. Co.*, 13 BNA OSHC 2101, 2104, 1987-90 CCH OSHD ¶ 28,464, p. 37,692 (No. 84-9, 1989) ("Commission precedent does not require . . . a stoppage of work"). Even assuming, as the majority suggests, that IBP as the owner of the facility is analogous to a general contractor on a construction site because it had overall authority over the worksite, IBP still would not be compelled to terminate the contract under Commission case law. In *Flint Engg. & Constr. Co.*, 15 BNA OSHC 2052, 2056, 1991-93 CCH OSHD ¶ 29,923, p. 40,854 (No. 90-2873, 1992), the Commission held that a construction contractor responsible for a work area, but whose own employees were not exposed, "would not be expected to . . . demand that other employer's employees clear the worksite altogether." The Commission reached the same conclusion in *Willamette Iron & Steel Co.*, 5 BNA OSHC 1478, 1977-78 CCH OSHD ¶ 21,839 (No. 12516, 1977) a case involving the converse of the situation presented here but otherwise factually similar. In *Willamette* an employer that had contracted with the Navy to refurbish a vessel was cited for

poor housekeeping conditions created by naval personnel. The Commission concluded that the employer's repeated complaints to the Navy were sufficient to discharge its duty to its employees and specifically concluded that a work stoppage or slowdown would have been "generally inappropriate." *Id.* at 1480, 1977-78 CCH OSHD at p. 26,291.

Moreover, the majority's analogy to the duty conferred on general contractors through their overall supervisory authority over the worksite to correct or obtain correction of hazards created by subcontractors is itself suspect.¹ As the Fifth Circuit observed in *Central of Georgia R.R. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978), "[a] bilateral arrangement [between a manufacturing facility and a contractor hired to perform work in that facility] does not fit easily into the mold of the relationship between a general contractor and a subcontractor." *Id.* at 622. One distinction the court noted is that construction worksites having a number of contractors present issues of skill and expertise as well as jurisdictional limitations that realistically may prevent contractors other than the general contractor from correcting hazards to which their employees are exposed. *Id.* at 623. In this case, however, DCS was clearly capable of correcting or preventing occurrences of the hazard and repeatedly assured IBP it would do so. Indeed, rather than construing IBP's position as analogous to that of a general contractor simply because it happens to be the owner of the facility where the violations occurred, I find it equally appropriate to consider IBP in effect as an equivalent independent contractor having no greater duty than simply bringing the hazardous conditions

¹The cases the majority cites in support of this conclusion are distinguishable. In *Camden Drilling Co.*, 6 BNA OSHC 1560, 1978 CCH OSHD ¶ 22,687 (No. 14306, 1978), the cited employer's employee was exposed to a hazard created by an independent contractor, and the case was decided based on an employer's duty to its own employees. Although *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1979 CCH OSHD ¶ 23,830 (No. 76-1408, 1979) acknowledged the principle that an employer who has overall authority over the worksite is responsible for the exposure of employees of other contractors, the cited employer's employees also were exposed in that case as well. *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,636 (No. 76-4754, 1980) is itself a construction worksite and therefore does not directly support the extension of the principles established for construction projects to other worksites on which more than one employer is present.

to DCS's attention and insisting that they be corrected. *See Lewis & Lambert Metal Contrac., Inc.*, 12 BNA OSHC 1026, 1984-85 CCH OSHD ¶ 27,073 (No. 80-5295-S, 1984) (cited employer's repeated oral and written communications to the contractor having the capability to correct the hazardous conditions are sufficient to satisfy the goals of the Act); *Willamette Iron & Steel*.²

Ultimately, the result reached by the majority in this case stands on its head the principle that liability on a multi-employer worksite should be placed on the employer in the best position to correct hazardous conditions. *See Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273 (9th Cir. 1982). Rather than treating suspension of a contract as a tool to be used to obtain compliance by an employer whose employees are exposed to hazards created by a different employer, as did the court in *Central of Georgia*,³ the majority converts it into a means of imposing liability on an employer such as IBP that has not only demonstrated a strong commitment to safety in general but has implemented a safety program designed to protect against the hazards at issue here. Not only is the majority's disposition unsupported by the case law, but the result it reaches here is counterproductive to employee safety as well. By requiring IBP to terminate its contract with DCS after its extensive efforts to compel compliance by DCS were unsuccessful, the majority effectively removes any incentive for IBP to undertake such measures in the first place. Under the rule announced by the majority, an employer in IBP's position would be more likely simply to cease doing

²Emphasizing that "the Act does not make employers the insurers of employee safety," the Commission found it "ludicrous for [the Secretary] to contend that the daily attempts by [the employer] to obtain the cooperation of the Navy were not sufficiently persistent." 5 BNA OSHC at 1479-80, 1977-78 CCH at p. 26,291-92.

³The employer cited in *Central of Georgia* was a railroad whose employees were working on tracks located within a manufacturing facility owned by Continental Can Corporation. The railroad's contract with Continental Can permitted it to suspend operations in the event Continental Can did not maintain the tracks in a safe condition. The court concluded that the railroad was required to exercise this contractual provision as a means of protecting *its own* employees.

business with a contractor who violates a plant safety rule rather than make any efforts whatever to apprise that contractor of the OSHA standard and how compliance may be achieved.

The result in this case is particularly inexplicable in view of the fact that DCS was cited as well and was found by Judge Barkley to have committed two willful violations of the OSHA LOTO standard for which the judge assessed the maximum penalty of \$70,000 each. *DCS Sanitation Management, Inc.*, Docket No. 93-3023 (May 15, 1995), *aff'd*, 82 F.3d 812 (8th Cir. 1996). Accordingly, DCS is under a judicially-enforceable order to abate violations of the LOTO standard at IBP's facility, and failure to comply with that order or subsequent violations by DCS can be the basis for further enhanced penalties under the Act. In these circumstances, imposing liability on IBP as well for failing to terminate DCS's contract as a means for obtaining compliance by DCS in my view is unwarranted and unjustified, and I cannot join in such a decision.

/s/

Velma Montoya
Commissioner

Dated: April 18, 1997