

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 07-1796
	:	
PULLMAN POWER, LLC,	:	
AND ITS SUCCESSORS,	:	
	:	
Respondent.	:	
	:	

FINAL ORDER I. FACTS

Respondent, Pullman Power, LLC (“Pullman”), is a chimney and stack services company. Pullman was the general contractor at a power plant in St. Albans, West Virginia, on a stack construction project. Pullman contracted with Ershigs, Inc., a specialty subcontractor, to fabricate fiberglass reinforced plastic liners on the project. The Occupational Safety and Health Administration (“OSHA”) inspected the work site on May 31, 2007. As a result, OSHA issued a serious citation to Pullman. Citation 1, Items 1a and 1b, allege violations of 29 C.F.R. §§ 1926.55(a) and (b), respectively, based upon employee exposure to styrene in concentrations above the allowable limit. Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1926.152(f)(3), based upon flammable liquids being used within 50 feet of an ignition source.

The Complainant filed her complaint on February 25, 2008.

On May 6, 2008, the Court granted Respondent summary judgment as to Citation 1, Items 1a and 1b, and dismissed these items. The Court also granted Respondent summary judgment as

to Citation 1, Item 2, to the extent the Secretary alleged Pullman was the controlling employer. The Court further denied Respondent's summary judgment as to Citation 1, Item 2, to the extent the Secretary alleged Pullman employees were exposed to the cited hazard.

On July 28, 2008, Complainant filed her Request for Issuance of a Final Order (Request).¹ The Secretary of Labor has determined, pursuant to her prosecutorial discretion, not to pursue Item 2 based on the allegation that Respondent is as an exposing employer. The Complainant now agrees and stipulates that the only basis for Respondent's liability for the violation in Item 2 is the allegation that Respondent was the controlling employer. Respondent has not filed a response to Complainant's Request.

A trial is scheduled to commence on October 21, 2008 at Charleston, West Virginia.

II. DISCUSSION.

Under these circumstances, the Secretary's citation and complaint may be dismissed by the Court upon motion of the Secretary.

III. CONCLUSION

On Complainant's Request, good cause having been demonstrated and no response filed by Respondent, the Request is allowed and GRANTED to the extent indicated herein. It is just and appropriate at this time to dismiss Citation 1, Item 2, in its entirety, with prejudice.²

¹ The Court is treating Complainant's Request as a motion.

² Since Citation 1, Items 1a and 1b, were dismissed by Court Order Granting Partial Summary Judgment dated May 6, 2008, the dismissal of Citation 1, Item 2, herein results in the resolution of all issues related to the underlying Citation and Complainant's corresponding Complaint.

IV. ORDER

WHEREFORE IT IS ORDERED THAT, Complainant's Request is GRANTED as to Citation 1, Item 2, and that item is accordingly DISMISSED WITH PREJUDICE IN ITS ENTIRETY, and

FURTHER, the hearing is cancelled.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: _August 25, 2008
Washington, D.C.

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ORDER GRANTING PARTIAL SUMMARY JUDGMENT

I. FACTS

Respondent, Pullman Power, LLC (“Pullman”), is a chimney and stack services company. Pullman was the general contractor at a power plant in St. Albans, West Virginia, on a stack construction project. Pullman contracted with Ershigs, Inc., a specialty subcontractor, to fabricate fiberglass reinforced plastic liners on the project. The Occupational Safety and Health Administration (“OSHA”) inspected the work site on May 31, 2007. As a result, OSHA issued a serious citation to Pullman. Citation 1, Items 1a and 1b, allege violations of 29 C.F.R. §§ 1926.55(a) and (b), respectively, based upon employee exposure to styrene in concentrations above the

allowable limit. Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1926.152(f)(3), based upon flammable liquids being used within 50 feet of an ignition source.

The Complainant filed her complaint on February 25, 2008.

Pullman has moved to dismiss, or, in the alternative, has requested summary judgment with respect to the Secretary's complaint and citation items in this matter. The Secretary does not oppose the granting of summary judgment as to Items 1a and 1b of the citation. The Secretary does, however, oppose the granting of summary judgment as to Item 2 of the citation.

At the parties' request, by Order dated April 7, 2008, a hearing scheduled to commence on June 16, 2008 on the merits of this case was postponed *sine die*.

II. DISCUSSION.

It is undisputed that only Ershigs employees were exposed to styrene and that Items 1a and 1b were issued to Pullman pursuant to OSHA's multi-employer work site doctrine. Specifically, the basis of Items 1a and 1b is that Pullman was the controlling employer as to those items. In regard to Item 2, on the other hand, the Secretary asserts that Pullman was the controlling employer and that employees of both Pullman and Ershigs were exposed to the cited condition.

As the Secretary notes, summary judgment is appropriate only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). *See also, e.g., N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2128 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

In regard to Items 1a and 1b, the Secretary concedes summary judgment is appropriate due to Pullman being the controlling employer at the site and the Commission's decision in *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007) ("*Summit*"). In that case, the Commission reviewed its long-standing precedent regarding multi-employer work sites. The Commission concluded the Secretary may not cite a general contractor at a work site due solely to its control of the site. However, the Commission did not otherwise disturb the multi-employer work site doctrine. *Id.* at 2025. The Secretary points out that she disagrees with the Commission's decision in *Summit* and that that case is currently on appeal in the U.S. Court of Appeals for the Eighth Circuit. Regardless, she acknowledges that Commission judges are bound by Commission precedent in this instance.³ She also acknowledges that *Summit* requires summary judgment with respect to Items 1a and 1b in this matter.⁴ As the Secretary concedes that the *Summit* decision mandates dismissal of Items 1a and 1b in this case, summary judgment is granted as to those items.⁵

³ The Commission generally applies the precedent of the circuit where it is highly probable an appeal would be taken even though it may differ from the Commission's precedent. *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the Fourth Circuit would have jurisdiction over the site of the alleged violation. The Eighth Circuit would have jurisdiction due to the site of Respondent's principal office and Respondent alone may also appeal to the District of Columbia Circuit. *Id.*; 29 U.S.C. §§ 660(a) and (b). None of these three circuits has directly addressed whether the multi-employer work site doctrine is not enforceable because it is contrary to 29 C.F.R. § 1910.12(a), the gravamen of the Commission's *Summit* decision. Accordingly, the undersigned cannot and will not ignore the existing Commission *Summit* precedent.

⁴The Secretary notes that she has argued her position with respect to *Summit* and Items 1a and 1b in this case for purposes of preserving the issue for the Commission and appellate review. *See Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1285-86 (No. 91-862, 1993).

⁵ *See also Standard Building Company, Inc., and Standard Systems, Inc., Consolidated*, 2007 WL 4724128 (O.S.H.R.C.) (Secretary withdrew eight citation items based upon Commission's *Summit* decision).

In regard to Item 2, the Secretary agrees that summary judgment is also appropriate to the extent she has alleged that Pullman was the controlling employer at the work site. For all of the reasons stated above, summary judgment is granted as to Item 2 to the extent Pullman was the controlling employer at the site. Pullman contends, however, that summary judgment must also be granted with respect to the Secretary's claim that employees of Pullman were exposed to the cited hazard. It asserts that the Secretary has not met her pleadings burden. It also asserts that there are no material facts in dispute. Finally, it asserts that summary judgment as to this item is not premature due to the fact that discovery has not yet occurred. I disagree, for the following reasons.

First, I have noted that the OSHA-1B relating to Item 2 states that the "Violation [was] based on controlling employer."⁶ However, as the Secretary points out, the OSHA-1B also states, on page 2 in paragraph 25, that "Pullman Power employees working in the stack would also be exposed employees in the event of an ignition at the base of the stack where Ershigs is working."⁷ Pullman argues that this statement is "simply too vague and conclusory to support her position." I find that it is not, and I agree with the Secretary that she need not, at this point, identify in detail all the evidence relied upon in issuing the citation item. *See, e.g., Del Monte Corp.*, 4 BNA OSHC 2035, 2037 (No. 11865, 1977); *Gold Kist, Inc.*, 7 BNA OSHC 1855, 1861

⁶ The OSHA 1-B's relating to the citation items are attached to Pullman's motion.

⁷ The Complaint, at ¶ 9, alleges "One or more of Respondent's employees was present on the construction project at the worksite and was exposed to the violative conditions alleged in Item 2 at the time that these conditions existed." The Complaint, at ¶ 3, also alleges Respondent had 19 employees at the workplace.

(No. 76-2049, 1979). I find that the Secretary has met her pleading burden with respect to Item 2.

Second, I also find that there are material facts in dispute. Pullman, for example, contends that the cited standard does not apply. It notes that the standard refers to “flammable liquids” and that the citation refers to a resin described as a “flammable material.” Further, the Secretary points out that Pullman will presumably dispute that there were ignition sources within 50 feet of the flammable material and that Pullman’s employees were exposed to the cited condition. As the Secretary asserts, Pullman has not shown the absence of any genuine issues of material fact, a requirement of prevailing in a motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996).

Third, I find that the Secretary is entitled to a reasonable opportunity to obtain additional information from Pullman during the discovery process. *See Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007) (noting that if discovery is incomplete in any way material to a pending summary judgment motion, a court is justified in not granting the motion, particularly when relevant facts are under the control of the moving party). Discovery has not run its course in this case. The Secretary is therefore entitled to seek additional information from Pullman with respect to the alleged violation through the discovery process.

III. CONCLUSION

For the foregoing reasons, partial summary judgment is appropriate to the extent so ordered below.

IV. ORDER

WHEREFORE IT IS ORDERED THAT, summary judgment is GRANTED as to Citation 1, Items 1a and 1b. Those items are accordingly DISMISSED.

Summary judgment is also GRANTED as to Citation 1, Item 2, to the extent the Secretary alleges Pullman was the controlling employer.

Summary judgment is DENIED as to Citation 1, Item 2, to the extent the Secretary alleges Pullman employees were exposed to the cited hazard.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: _May 6, 2008
Washington, D.C.