UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SUMMIT CONTRACTORS, INC., Respondent.	DOCKET NO. 01-1614

APPEARANCES:

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For the Complainant

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For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). This case arose following an OSHA inspection conducted on July 30 and 31, 2001, at the construction site of a residential condominium community in Phillipi, West Virginia. Summit was the general contractor at the site, and only employees of its carpentry contractor, Winbery, were observed allegedly exposed to hazards. Following the inspection, the Secretary issued to Summit Contractors, Inc. ("Summit") one citation for a serious violation of 29 C.F.R. § 1926.501(b)(11) and one citation for a non-serious violation of 29 C.F.R. § 1926.95(a). The

hearing in this matter was held on February 26, 2002, and both parties have submitted post-hearing briefs.

Jurisdiction

At all times relevant to this proceeding, Summit operated a general contracting business. In its Answer, Summit admits that it is an employer engaged in a business affecting commerce. I find, accordingly, that Summit is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over the subject matter and the parties in this proceeding.

Whether Summit is Responsible for the Alleged Exposure of Winbery's Employees

It is undisputed that the two alleged violations did not involve Summit employees. Citation 1, Item 1 was issued because OSHA Compliance Officer ("CO") John Johnson saw carpenters employed by Winbery in three different areas of the job site who were working 6 feet or more above a lower level without the protection of safety harnesses or another form of fall protection. (Tr. 23, 38-43). Citation 2, Item 1 was issued because the CO saw three Winbery employees wearing tennis shoes at the job site. (Tr. 44-47). It is clear that Summit did not create either of the alleged hazards. The Secretary, however, asserts that Summit is responsible for the alleged violations pursuant to the multi-employer work site doctrine, under which a general contractor may be held responsible for violations of other employers "where (the respondent) could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *See McDevitt Street Bovis, Inc.*,19 BNA OSHC 1108, 1109 (No. 97-1918, 2000), *citing Centex-Rooney*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

In *Anning-Johnson,* the Commission determined that, normally, a general contractor on a multi-employer work site "possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or take the necessary steps to assure compliance." *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (Nos. 3694 & 4409, 1976). Over the intervening years, this seemingly simple proposition has evolved into a presumption that a general contractor has sufficient control over its subcontractors to require them to comply with OSHA standards. *Gil Haugan d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004, 2006 (Nos. 76-1512 & 76-1513, 1979). Later Commission cases, however, have not expressly applied this presumption. *See, e.g., McDevitt Street Bovis, supra.* Moreover, in a non-construction case, the D.C. Circuit Court

of Appeals recently made it clear that the burden to establish that a general contractor had sufficient control of a work site rests with the Secretary. *IBP, Inc. v. Herman*, 144 F.3d 861, 866 (D.C. Cir. 1998).[1] The continued vitality of the presumption enunciated in *Gil Haugan* is therefore questionable. In any event, and for the following reasons, I find that the evidence relating to Summit's supervisory authority is not simply in equipoise, but tipped in favor of Respondent.[2]

The main issue in this case is whether Summit in fact had authority to perform the functions typically attributed to a "general contractor," notwithstanding its title. It is clear that a party's liability under the Act turns on the functions it performs and not on its title. *See Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1763 (No. 76-4754, 1980). Guidance on what factors will establish that a general contractor had sufficient supervisory authority and control is given in *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000). There, the Commission determined that there was sufficient supervisory authority and control where the general contractor had specific authority to demand a subcontractor's compliance with safety requirements, stop a contractor's work for failure to observe safety precautions, and remove a contractor from the work site. Further, the general contractor in *McDevitt* maintained 22 employees on site, walked the site two times a day to check on safety practices, and performed weekly safety inspections. *Id.*

In contrast, Summit's contract with Winbery placed sole responsibility for OSHA compliance on the subcontractor and gave no authority to Summit to control the manner in which Winbery complied with its safety obligations. Indeed, the contract did not list "safety violation" as a ground

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[1] The Fourth Circuit, the jurisdiction in which this case arises, upheld solely on regulatory grounds a Commission decision which concluded that a general contractor may not be jointly responsible with a subcontractor for the safety of the subcontractor's employees. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

[2] Because of the findings herein, I do not address whether the standards apply or whether their terms were violated. For the basic elements of the Secretary's prima facie section 5(a)(2) case, see *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-par Eng'd Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989). Likewise, although not a particularly selcouth position, I do not address Summit's argument that the Commission's multi-employer work site doctrine *per se* contravenes the Act. *See Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185,1188-1189 (No. 12775, 1975).

for Summit to expel a Winbery employee from the site, even though Summit had authority to do so for a number of other reasons, such as a worker's violent behavior. (Exh. C-5). In addition, the evidence showed that Summit managed only the scheduling of the work of the contractors and the delivery of material to the site, that it did not conduct safety inspections and inspected solely to ensure that subcontractors' work was performed in accordance with architects' specifications, and that it had only two employees on the job and did not perform construction work at the site. Thus, the only arguable recourse available to Summit, if a subcontractor ignored its safety obligations, would have been to terminate the contract. Under *IBP, supra,* that is not a sufficient basis for holding Summit responsible for alleged violations committed by a subcontractor, particularly in light of Summit's unrebutted evidence that to do so would cause unduly burdensome delays in the construction of the units and could result in an inability to complete the job. (Tr. 70, 98-111, 122, Exhs. C-5, C-8-11). Notably, the Secretary submitted no evidence relating to Summit's written or oral agreement with the owner of the complex and likewise submitted no evidence from Winbery or any other subcontractor indicating that Summit in fact took actions to enforce safety at the site.[3]

In *IBP, Inc. v. Herman,* 144 F.3d 861 (D.C. Cir. 1998), the D.C. Circuit indicated that the "most" that a general contractor could be expected to do, without express authority to do anything other than terminate a contract, would be to point out safety violations when they occurred. *Id.* at 867. In this regard, the evidence showed that Summit had a policy of notifying subcontractors of a known hazard and that Summit employees in fact undertook to follow that policy several times at this work site. Moreover, when the hazard persisted, Summit submitted a written complaint to the subcontractor.[4] (Tr. 29, 83, 89-99, 105-109, 124-126, Exhs. C-5, C-12).

The CO opined that Summit exercised supervisory authority to control safety at the site

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[3] In a field report regarding an incident where a worker was evicted from the site after he struck one of Summit's employees, there is an indication that Summit had a policy that hard hats were mandatory. (Exhs. C-9 &10). The fact that a Summit employee identified its "policy" as "mandatory" is some evidence that there was an attempt to control safety; the simple use of those terms in a report, however, does not rebut Summit's contrary proof.

[4] The CO admitted that he would not recommend issuance of a citation where there was documented proof a general contractor had asked a subcontractor to abate a safety hazard. (Tr. 70)

because: (1) it held a "safety training" seminar at the inception of the construction, (2) it delivered a "safety program" to the subcontractors at the site, (3) Summit's on-site employees had contact with subcontractors regarding safety issues, and (4) the CO was told that the two Summit employees on site were "doing safety." (Tr. 126-129, Exh. C-12). When compared to the evidence presented at the hearing, these statements appear to be exaggerations of the facts. The "safety program" was simply an information package containing general safety principles, a safety pamphlet, and a copy of an OSHA Instruction. (Exh. C-12). The "safety training seminar" consisted of a safety information meeting conducted by Charles Calloway, Summit's superintendent, and attendance was voluntary. (Tr. 126-129, Exh. C-12). There was no evidence that "doing safety" meant anything more than notifying subcontractors of open and obvious safety hazards, and, as is indicated above, Summit's contact with its subcontractors relating to safety issues was limited. I accordingly conclude that the Secretary's evidence in regard to Summit's involvement with the safety obligations of Winbery was not sufficient to rebut the evidence submitted by Respondent Summit.

In support of her argument, the Secretary relies on *Red Lobster Inns of America, supra.* In *Red Lobster*, however, the ungrounded generator which was the reason for the citation had been purchased for the site by the respondent's on-site employee, and there was evidence that that employee had actual knowledge of the hazard and, in fact, ultimately accomplished its abatement. Therefore, there was more control over the cited condition in that case than was shown here. Moreover, as noted by the D.C. Circuit Court of Appeals, the respondent in *Red Lobster* did not make it a practice to warn subcontractors of a known danger. *IBP, supra,* at 867. In this case, Summit's practice was to warn subcontractors when a hazard was known.[5]

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[5] The Secretary also relies on two cases decided by administrative law judges where the multi-employer doctrine was applied to Summit. As unreviewed Judge's decisions, these cases are not binding. *Leone Constr. Co.*, 3 BNA OSHC 1979 (No. 4090, 1976). Moreover, despite their being well reasoned, because of factual distinctions they are not highly persuasive. In *Summit Contractors, Inc.*,18 BNA OSHC 1861 (No. 98-1015, 1999)(Digest), Summit retained a safety consultant to advise it of potential safety hazards and issued fines to subcontractors for safety violations, which evidences more authority than was shown in the case before me. In *Summit Contractors, Inc.,* 17 BNA OSHC 1854 (No. 96-55, 1996)(Digest), the ALJ found sufficient authority to apply the multi-employer doctrine to Summit based largely on its right to terminate its contract with an offending

(continued...)

The Secretary also argues that Summit should be liable because it did not warn Winbery of the two cited violations. Under the developing case law, it is unclear whether a duty to warn has become an obligation imposed on a general contractor such that he may be liable for a subcontractor's alleged section 5(a)(2) violation, or whether it is simply all that can be reasonably expected where the respondent does not have express or constructive authority to inspect for safety violations and abate hazards. *See, e.g., IBP, supra*. Regardless, there was no reliable proof in this case either that the alleged hazards existed for any appreciable period of time prior to the OSHA inspection or that the alleged violations were so open and obvious such that immediate action would have been a reasonable exercise of authority. (Tr. 22-23, 41-43).

As to the wearing of tennis shoes during construction, the site was 100 by 300 to 400 yards large, there were days when there were upwards of 300 workers present, and on the day of the inspection there were three separate buildings under construction, yet the CO observed only three workers wearing tennis shoes.[6] (Tr. 22, 27, 44-45, 88-89). As to the alleged fall protection violation, the Secretary argues that Summit should have known that employees were working without appropriate fall protection because the building's trusses were installed the Thursday before the Tuesday inspection and that, therefore, workers had to have been working on the roof without fall protection for two to five days. (Tr. 55). I find, however, that this does not prove that any employees were working without fall protection on those days in the areas identified by the CO. Further, there

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[5](...continued)
subcontractor. Since then, the D.C. Circuit Court of Appeals has held that this is an insufficient basis for finding a general contractor liable under the multi-employer work site doctrine. *See IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

[6] The Secretary relies on testimony relating to a conversation Calloway had with an unidentified subcontractor, in support of her argument that Summit had knowledge of the alleged violation. (Secretary's brief, p. 19). In fact, however, the testimony shows only that Calloway told a subcontractor that Warren Knaph, a CO in Florida, had once told him that sneakers were permissible at a worksite under certain circumstances. (Tr. 46-47, 111-116). At best, this evidence demonstrates that if Summit had seen a worker wearing tennis shoes in certain circumstances it might not have complained to the worker's employer if it did not appear that the employee was in danger of a foot injury. In my opinion, this is too tenuous a link to show either actual or constructive notice of a particular violation, and is not a reasonable basis for holding Summit responsible for the alleged violation.

is no reliable evidence that the horse scaffolds on which some of the exposed carpenters were seen were in place before the inspection. (Tr. 41-42). Moreover, there was evidence that Winbery was using a controlled access zone and a monitoring system for the upper level, where other workers were observed, and the absence of such fall protection measures would not have been obvious from the ground level. (Tr. 130-131). Both citations are accordingly vacated.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970).
2. The Commission has jurisdiction over the parties and the subject matter of this case.
3. Respondent was not in violation of 29 C.F.R. § 1926.501(b)(11), as alleged in Citation 1, Item 1.
4. Respondent was not in violation of 29 C.F.R. § 1926.95(a) , as alleged in Citation 2, Item 1.

ORDER

1. Citation 1, Item 1 is VACATED.
2. Citation 2, Item 1 is VACATED.

_____/s/_____
MICHAEL H. SCHOENFELD
Administrative Law Judge

Dated: September 9, 2002
Washington, D.C