SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 95-1449
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ACCESS EQUIPMENT SYSTEMS, INC.,	:	
	:	
Respondent.	:	
	:	

DECISION

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION

Access Equipment Systems, Inc. ("Access") leases, sells, and erects scaffolds. It leased three mast-climbing scaffolds to SPD Contracting, Inc. ("SPD") for a 34-story condominium under construction in Miami, Florida. SPD had a contract with JJW Construction, Inc.("JJW") , the general contractor, to provide exterior plastering work on the building. To accomplish this, SPD put together a package of scaffolding, materials, and labor, but it subcontracted the actual performance of the work to others, like LBJ Plastering Co. ("LBJ"), which had a contract with SPD to provide exterior stucco work at that site. There was no contract between Access and LBJ.

On March 4, 1995, one of the scaffolds (no. 78) collapsed and killed three LBJ employees who were working on it at the eleventh floor level. As a result of OSHA's investigation, Access was issued citations for a willful violation of 29 C.F.R. § 1926.451(a)(7) and serious violations of 29 C.F.R. §§ 1926.20(b)(3) and 1926.21(b)(2).

Review Commission Administrative Law Judge Ken S. Welsch vacated all three items. Briefs were requested on whether Access can be found in violation of the Occupational Safety and Health Act of 1970 ("the Act") "for the exposure of the employees of LBJ," and whether the judge erred in vacating each of the three citation items. For the reasons that follow, we conclude that Access violated 29 C.F.R. § 1926.451(a)(7) and characterize that violation as serious. We agree with the judge and vacate the remaining two citation items.

I. *Background*

Scaffold no. 78 was a type of platform called a "mast-climbing platform," which consists of a vertical mast that is attached to the exterior of the building. Attached to the mast, there is a 20-foot long horizontal main deck, or platform, that travels up and down the mast at the push of a button. The diagrams on the manufacturer's load chart show that one, two, or three extensions of five feet each may be added symmetrically to the right and left sides of the main deck. *No more than three extensions on each side are shown in the diagrams on this load chart.* The chart gives maximum weight limits for loads uniformly distributed across the platform and its evenly-balanced extensions; it sets forth lower maximum weight limits for "eccentric" loads, which are loads concentrated on one end of the platform or the farthest extension from the mast. For example, where the platform has three extensions on each side and the load is concentrated on the third extension (farthest from the mast) on one side, the maximum load is 750 pounds. *The chart provides no maximum load information for more than three platform extensions* (nor for cantilevers off of any extensions).

Access erected three mast-climbing scaffolds at the site in November of 1994. Access' general manager for its Florida division, Dave O'Bryan, was onsite supervising the crew of five to seven employees for 20 days of the first month of the initial setup. He was there once a week in December of 1994, but after that he visited the site "very rarely."

With ninety percent of the stuccoing and plastering work complete, the left side of the west face of the building had a large vertical recessed area ("the hole") that still needed to

have stucco applied to it. At that time Access general manager O'Bryan was called to the job site to meet with Tom Walsh, vice president of JJW, and Perry Weidenbenner, vice president of SPD, who specifically asked O'Brien whether he could add a fourth deck extension from which cantilevers would be added to the left side. This would allow the stucco workers access to "the hole" without having to dismantle and move the mast to the left, which would take five or six days. O'Bryan testified that he told them "absolutely not" "[b]ecause it was impossible . . . with that equipment," noting that he had no engineering support for it.[1] O'Bryan then left the site and did not return until after the accident. The record is silent as to whether O'Bryan told anyone else about this request.

Michael Hall was the Access employee who, following the initial setup of the three scaffolds, had the authority and control over the moving, dismantling and erecting of those scaffolds. He also was responsible for fixing electrical problems with the scaffolds. After the scaffolds were first erected, Hall was not at the site on a regular basis. Rather, he came only when SPD requested him, which was every three to five weeks. According to Hall and his supervisor O'Bryan, Hall was "in charge of or like the lead person for" the one or two Access employees who would accompany him to the site.

After O'Bryan was asked by SPD and JJW about adding a fourth extension, Hall was at the site to dismantle another scaffold. At that time, Hall was asked by Jackie Brogno, the president of LBJ, (whom Hall testified he thought was an employee of SPD) to add a fourth extension to the left of scaffold no. 78. Hall added the fourth extension. Neither general

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[1]O'Bryan testified that, when he bid this project, he suggested installing the mast in the hole and placing on it a cut-down version of the main platform. But, when all the stucco work but that hole had been done, O'Bryan stated to SPD that he could not guarantee that such a platform could go up and down properly because the building was "so out of plumb" and beams ran across at the twenty-fifth floor level. As a result, SPD rejected the idea. Other options that Access presented for SPD's consideration were hiring another company to install swing stages or using the crane and manbasket on the site. According to O'Bryan, because "this job was under some enormous pressure," to bring in other companies then "didn't make any sense for the time frame."

manager O'Bryan nor Robert Reese, Access' president, were at the site then. Hall never told O'Bryan, his supervisor, about putting on the fourth extension.

Several days later, at the time it collapsed, scaffold no. 78 had four five-foot platform extensions to the left of the mast. To the right of the mast were one five-foot extension and one two-foot six-inch extension. Three I-beams ("aluma" beams), each 14 feet 8 inches long, were attached at a right angle to the fourth platform extension and part of the third extension, and plywood was placed over the beams to form a cantilevered work platform, which together with the main platform formed an "L." At the time that it collapsed, five LBJ employees were on the scaffold. Three of them were on the cantilevered section, along with the materials needed to do the work, such as buckets of stucco.[2]

As a result of investigating the accident, OSHA issued citations to Access for a willful and serious violations, and it issued citations to LBJ for serious violations, which LBJ did not contest. The record does not reflect whether SPD was cited.

II. *Citation 2, Item 1, Alleging Willful Violation of 29 C.F.R. § 1926.451(a)(7)*

The Secretary alleged that Access violated 29 C.F.R. § 1926.451(a)(7), which provided:[3]

> Scaffolds and their components shall be capable of supporting without failure at least 4 times the maximum intended load.

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[2]Mohammed Ayub, Chief of OSHA's Office of Construction and Engineering, testified as an expert structural engineer. He stated at the hearing that he estimated the total weight that was on the scaffold as 2,800 pounds (not counting the dead weight of the platform itself), based on statements of eyewitnesses who were interviewed, but he could not confirm that weight. Access takes issue with this assessment but does not offer its own calculation of the weight.

[3]When section 1926.451 was revised in August of 1996 (as part of the revisions to the scaffolding standards), section 1926.451(a)(7) was eliminated, but the text of it was incorporated into revised section 1926.451(a)(1). *See* 61 Fed. Reg. 46,104 (1996); *see also* 61 Fed. Reg. 59,831 (1996).

The citation alleges that Access violated the standard when its lead person Hall "added a fourth five-foot platform extension not authorized by the load chart" and therefore had no idea how much of a load the platform with four extensions could bear.[4]

To make a prima facie showing of a violation, the Secretary must prove that: the standard applies; the employer failed to comply with the terms of the standard; employees had access to the violative condition; and the employer had actual or constructive knowledge of the violation. *E.g., Gary Concrete Products* , 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39, 449 (No. 86-1087, 1991). The cited employer may rebut one or more of these elements of the Secretary's case.

A. *Applicability*

[4]The citation also asserts that, "[i]n addition [to adding the fourth platform extension], and without the approval of a competent engineer, Access constructed a 14 foot 9 inch cantilevered extension at 90 degrees from the side of the unauthorized fourth extension." The judge noted that there was conflicting testimony from the only two witnesses with personal knowledge as to who erected the cantilevered I-beams. Leonard Jackson, a laborer working for LBJ who sometimes assisted Hall, and Access' lead employee Hall each testified that the other did it. Finding "[n]either . . . markedly more credible than the other on this point," the judge determined that the Secretary, who has the burden, failed to establish that Access erected the cantilevered I-beams off the third and fourth extensions. The Commission usually defers to a judge's credibility determination, for the judge has seen the witnesses and observed their demeanor. *See, e.g., C. Kaufman*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). The Secretary contends that the judge erred in not discussing other testimony, including that by the compliance officer (based on his interview with Hall after the accident) and by Perry Weidenbenner, SPD's vice president, that Hall had placed the I-beams on the scaffold. The judge indicated that they did not have personal knowledge, and he had found that Weidenbenner was not a credible witness on another issue, receipt of load charts. The other testimony of Jackson that the Secretary mentions on review does not appear to provide dispositive support for her position. We conclude that we need not address this issue further in light of our finding that there was a violation on other grounds. *See, e.g., Regina Construction Co.*, 15 BNA OSHC 1044, 1049 n. 8, 1991-93 CCH OSHD ¶ 29,354, p. 39,469 n.8 (No. 87-1309, 1991).

Access argues that, contrary to the judge's findings, the cited construction safety standard does not apply because it was not an "employer" within the meaning of the Act, and the worksite was not a "place of employment" of its employees.

Section 3(5) of the Act, 29 U.S.C. § 652(5), defines an "employer" as "a person engaged in a business affecting commerce who has employees . . . ." It is clear that Access meets this definition, therefore it is an "employer" under the Act.

Access also contends that it is not an employer required to protect the worksite because the site is not a "place of employment" of its employees. It relies on 29 C.F.R. § 1910.12(a), which provides:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. *Each employer shall protect the employment and places of employment of each of his employees engaged in construction work* by complying with the appropriate standard prescribed in this paragraph.

(Access' emphasis) Access also relies on *Reich v. Simpson, Gumpertz & Heger*, 3 F.3d 1, 4-5 (1st Cir. 1993), *aff'g on other grounds* 15 BNA OSHC 1851, 1991-93 CCH OSHD ¶ 29,828 (No. 89-1300, 1992), in which the First Circuit vacated a citation alleging a construction-standard violation because, under section 1910.12(a), there was no "place of employment" at the site that Simpson, Gumpertz & Heger ("Simpson"), a design engineering consulting firm, had a duty to protect under the Act. In that case, the general contractor's superintendent telephoned Simpson's project manager at his office in another town seeking advice about the deflection of some metal decking after the first layer of concrete was poured. Simpson's project manager told him that the deflection was normal and there was no problem with the superintendent's plan to pour a second layer of concrete that day. After the second layer was poured, some of the metal decking collapsed, injuring five workers. The court found that there was no "place of employment" that Simpson had a duty to protect because: (1) Simpson's employees were not on the jobsite on a daily or weekly basis, rather they visited on a periodic basis to conduct inspections and attend meetings; (2) Simpson had

no office or trailer at the site; (3) it had no employees at the site on the day of the accident; and, (4) when the critical conversation took place between the general contractor's superintendent and Simpson's project manager, the latter was in his office in another town.[5] 3 F.3d at 3 n.3, 5.

Judge Welsch correctly stated in his decision that the First Circuit's decisions are not controlling precedent in this case.[6] We also agree with the judge that, even if those decisions were controlling, the worksite in this case was a "place[] of employment" that Access had a duty to protect. Important facts about Access' role at the worksite distinguish it from Simpson. Access' employees worked at the site erecting and reconfiguring the mast climbing platforms it leased to SPD. This work involved a crew of at least five employees on the site during the first month of the exterior plastering work. According to O'Bryan, Access' general manager, he was at the site for 20 of the first 30 days, and for the next month he was there once a week. Access had a three-man crew (Hall and two laborers)

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[5]In *Simpson*, the First Circuit stated in dicta that to accept the Secretary's broad interpretation of "place of employment" would mean that, if a construction equipment leasing company sent an employee to a site to perform maintenance work and "the employee gives gratuitous advice to the user of the equipment which allegedly causes an on-site accident," that company would be liable. 3 F.3d at 5. As the Commission noted in *Anthony Crane Rental, Inc.*, 16 BNA OSHC 2107, 2109, 1993-95 CCH OSHD ¶ 30,620, pp. 42,406-07 (No. 91-556, 1994), *aff'd in pertinent part*, 70 F.3d 1298 (D.C. Cir. 1995), besides being *dicta*, the example given by the First Circuit does not categorically state that all equipment suppliers must be excluded from the construction standards, and the example is distinguishable based on the facts.

[6]Final decisions of the Review Commission can be appealed by an aggrieved party to the United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office. Section 11(a) and (b) of the Act; 29 U.S.C. § 660(a) and (b). An adversely affected party other than the Secretary of Labor may also appeal the decision to the Court of Appeals for the District of Columbia Circuit. Section 11(a) of the Act; 29 U.S. C. § 660(a).

In this case, the alleged violations occurred in Florida, and Access has its principal office in Georgia. These states are in the Eleventh Circuit.

periodically on the site in the few months before the accident. As the judge noted, although not on the site daily or weekly, Access' employees "had an ongoing responsibility to safely move and reconfigure the scaffolds." When called by SPD, Hall worked at the site moving, reconfiguring, or looking into electrical problems with the scaffolding. O'Bryan testified that Hall had the authority and control over moving, dismantling, and erecting the scaffolds on the job site. When Access' crew was at the site the week prior to the accident, Hall and his crew had finished dismantling a nearby scaffold when Brogno asked Hall to add an extension to scaffold no. 78, which Hall did. As the judge noted, Access' "hands-on construction work" in erecting and reconfiguring the scaffolds went beyond the "consultation type services" that Simpson provided remotely from the site, and the site was therefore a "place of employment" for Access employees that Access had a duty to protect.[7]

Further supporting this conclusion is a decision in a case with similar facts where the D.C. Circuit (to which Access can appeal this case, see note 6 *supra)* found that the construction site where a repairman worked for the cited employer, which leased and repaired cranes, was a "place of employment" that the crane rental company had a duty to

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[7]The judge also concluded that the construction standards apply to Access under the Commission's "substantial supervision" test used in *Simpson*, 15 BNA OSHC at 1867, 1991-93 CCH OSHD at p. 40,680. That test is applied to "employers who perform no physical trade labor" in the context of determining whether the employers were engaged in "construction work" under 29 C.F.R. § 1910.12(b) and Part 1926.

In the instant case, Access does not contend that it was not engaged in "construction work" under those regulations. The record shows that Access employees performed actual physical labor at the site by erecting, reconfiguring, and dismantling the scaffolds. Moreover, its employees provided maintenance and repair services. The Commission has found, and the D.C. Circuit upheld that finding, that an employer that provided equipment was engaged in "construction work" where it provided mechanic services for that equipment on an ongoing and regular basis because such activities were "inextricably linked" to the construction work at the site. *Anthony Crane Rental, Inc.*, 16 BNA OSHC at 2109, 1993-95 CCH OSHD at pp. 42,406-07; *see Beatty Equipment Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534, 537 (9th Cir. 1978). Under those cases, Access would have been doing "construction work" within the meaning of the Act by having its employees erect, configure, dismantle, and repair the scaffolds that were necessary for the stucco appliers to do their work.

protect. *Anthony Crane Rental, Inc. v. Secretary of Labor*, 70 F.3d 1298 (D.C. Cir. 1995), *aff'g in pertinent part* 16 BNA OSHC 2107, 1993-95 CCH OSHD ¶ 30,620 (No. 91-556, 1994). In that case, Anthony Crane Rental ("ACR") had a "bare rental" agreement with a subcontractor (Mid-West Conveyor Construction Services) on a construction site for the lease of a truck crane. The subcontractor supplied the operator and oiler, and it hired ACR to do the maintenance and repair work. Anthony's field mechanics would respond to requests by the subcontractor for maintenance or repairs. An Anthony mechanic was at the site the day of the accident; none of the citations issued to ACR related to the accident. See 70 F.3d at 1301. The D.C. Circuit stated that

> the *Simpson* decision was based principally on the fact that the engineering firm had no "employees at the actual construction site.". . . Therefore, *Simpson* does not suggest to us any cause to depart from the plain language of 29 C.F.R. § 1910.12(a)--namely, that the place where an employee works is a "place of employment." The fact that Mid-West's employees also worked (or even predominated) at the construction site makes it no less a place of employment for ACR's repairman.

70 F.3d at 1303. Although it performed these activities on the crane, the evidence does not establish that ACR "prepared and configured" the crane for Mid-West. 16 BNA OSHC at 2109 n. 5.

In comparison to the facts in *ACR*, the construction site here was a "place of employment" for Access' employees. The record shows that, besides doing hands-on maintenance and repair, Access' employees erected, dismantled, and configured the scaffold, which included moving, getting up on, and operating the scaffold. Although Access' employees were present on the site only on an "as needed" basis, the same is true for most if not all contractors' employees. For these reasons, we conclude that Access is an employer under the Act that had a duty to protect the site because it was a "place of employment" of its employees.

B. *Failure to Comply with the Terms of the Standard*

The Secretary presented evidence showing that Access failed to comply with the standard's requirement that scaffolds be capable of supporting at least 4 times the maximum

intended load because Hall, who acted as a leadman according to his supervisor O'Bryan, added the fourth extension without knowing what load it could bear. The manufacturer's load chart does not address more than three extensions. Hall's supervisor O'Bryan testified that he did not have any load chart for four platform extensions.

Robert Reese, Access' president, acknowledged at the hearing that the manufacturer's load chart did not provide for a fourth extension to be added. However, he sought to rebut the charge by testifying that Access had "[a]n evaluation of the effect of the loading on a fourth platform" that was "done by Pretzer"engineering firm before the accident. (Presumably this is the "qualified engineering support for the use of four extension decks" that Access refers to in its brief on review.) When the judge asked further about this engineering report, Access' two counsels stated that they thought it was in evidence. However, the only report in evidence by C.A. Pretzer Associates, Inc., an engineering firm, is Exhibit C-14, which consists of a two-page cover letter dated "14 February 1991" on "Clamps for Aluma Beams" and three pages (dated September 28, 1990) of calculations of allowable loads for aluminum beams used as cantilevers. Access admits in its brief on review that this document, referred to by the parties and the judge as the "Pretzer Report," is limited to situations in which the cantilevered I-beams are added to no more than three extension decks. Possibly what Reese and Access' counsel were referring to in claiming engineering support for using a fourth extension is another report by Pretzer, identified by the Secretary's counsel at the hearing as "the Pretzer report, dated October 17, 1991," which was marked for identification as Exhibit C-11 and referred to on direct examination of the Secretary's expert. When later questioned by the judge, the Secretary's counsel stated at the hearing that the exhibit was not offered into evidence, and she withdrew it. The exhibit is thus not present in the record. Therefore, we conclude that, without any evidence in the

record to corroborate Reese's testimony, Access has failed to rebut the Secretary's evidence that it failed to comply with the terms of the standard.[8]

C. *Employee Exposure*

The record indicates that Access' own employees were not working at the site between the time that the fourth extension was added and the time of the accident. However, employees of LBJ were exposed to the hazardous condition. Access' employees were engaged in a common endeavor with LBJ's employees; they erected and moved the scaffolding without which the plasterers could not be positioned to do their jobs. Access argues that it has no responsibility under the Act regarding LBJ's employees working on or near the hazardous condition of the scaffold. This contention concerns what has become known as the "multiple employer worksite doctrine," which provides that, on a multiple employer worksite, an employer that creates or controls a hazardous condition is responsible under the OSHA standards, regardless whether employees exposed or having access to the condition are its own employees "or those of other employers engaged in a common undertaking." *E.g.*, *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1038 (2d Cir. 1975). The Second Circuit in *Brennan* was the first judicial body to discuss and apply

[8]Access argues on review that the judge's decision that the standard was violated was "based solely upon the fact that the work platform failed." As noted above, the basis for the violation of section 1926.451(a)(7) is that Access added the fourth extension without knowing what load it could bear. Therefore, the alleged violation is not dependent upon whether the platform failed or not.

the doctrine.[9] Several other circuits subsequently accepted the doctrine,[10] and the Commission first adopted it in *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (consolidated) and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24, 791 (No. 13775, 1976). *See, e.g., Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055, 1991-93 CCH OSHD ¶ 29,923, p. 40,853 (No. 90-2873, 1992); *F.L. Heughes and Co.*, 11 BNA OSHC 1391, 1983-84 CCH OSHD ¶ 26,520 (No. 14519, 1983); *H.B. Zachry Co.*, 8 BNA OSHC 1669, 1980 CCH OSHD ¶ 24,588 (No. 76-2617, 1980), *Beatty Equipment Leasing, Inc.*, 4

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[9]In *Brennan*, the Second Circuit rejected what was then the Commission's position that an employer cannot be found responsible for failing to comply with OSHA standards when the only employees exposed to the violative condition were those of another employer. *See, e.g., Martin Iron Works, Inc.*, 2 BNA OSHC 1063, 1973-74 CCH OSHD ¶ 18,164 (No. 606, 1974); *Hawkins Construction Co.*, 1 BNA OSHC 1761, 1762, 1973-74 CCH OSHD ¶ 16,418, pp. 22,196-97 (No. 949, 1974); *City Wide Tuckpointing Service Co.*, 1 BNA OSHC 1232, 1233, 1971-73 CCH OSHD ¶ 15,769, p. 21,051 (No. 247, 1973); *see also 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, 1260-62, 1267 (4th Cir. 1974) (on issue of *joint* liability of employers, court deferred to Commission ruling based on courts' "narrow scope of review").

[10]*See United States v. Pitt-Des Moines Inc.*, 168 F.3d 976 (7th Cir. 1999) (applying the doctrine discussed but not adopted in its earlier decision, *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975)); *A/C Electric Co. v. OSHRC*, 956 F.2d 530 (6th Cir. 1991); *Beatty Equipment Leasing v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *see also Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804-05 (6th Cir. 1984) (tort case); *New England Telephone & Telegraph Co. v. Secretary of Labor*, 589 F.2d 81(1st Cir. 1978) (applying Commission law); *Central of Georgia Railroad Co. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978) (although not applying doctrine due to companies' bilateral arrangement, court "agree[s] with *Anning-Johnson* that issues of creation and control of a violation are important in determining liability"); *cf. Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333 (10th Cir. 1982) (steps needed to protect own employees on construction site). *But see Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981) (tort case). The D.C. Circuit, to which Access can appeal this case (see note 6 *supra*), has discussed the doctrine but has not adopted it. *See, e.g., Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995). Precedent in the Eleventh Circuit is discussed in note 12 *infra*.

BNA OSHC 1211, 1212, 1975-76 CCH OSHD ¶ 20,694 , p. 24,802 (No. 3901, 1976), *aff'd* 577 F.2d 534 (9th Cir. 1978).

Bases for the Doctrine

Support for this doctrine has been found in the purpose and language of the Occupational Safety and Health Act of 1970 ("the Act"), the legislative history (or lack thereof), and the special circumstances at a multiple employer worksite, especially in the construction industry.

The Occupational Safety and Health Act of 1970 ("the Act") does not specifically address the issue of an employer's responsibility for violations of OSHA standards on a multiple employer worksite. "Congress apparently gave little thought to the unique relationship which arises when employees of a number of different employers work in and around the same job site and are subject to the hazards which may exist at that site." *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1087 n. 14 (7th Cir. 1975). Lacking specific guidance, the courts and the Commission have tried to resolve this issue in a manner which best fulfills the "stated congressional purpose in an equitable manner." *Id.*; *see United States v. Pitt-Des Moines*, 168 F.3d 976 (7th Cir. 1999).

Courts have found support for the doctrine in the broad, remedial purpose of the Act, set forth in section 2(a) of the Act, 29 U.S.C. § 651(a), "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." *Pitt-Des Moines*, 168 F.3d at 983 ; *Beatty Equipment Leasing v. Secretary of Labor*, 577 F.2d 524 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *Brennan*, 513 F.2d at 1038. Another declared purpose in the Act, to encourage reduction of safety hazards to employees "at their places of employment," section 2(b)(1) of the Act, 29 U.S.C. § 651(b)(1), indicates that the focus is on making "places of employment," instead of specific employees, safe from worksite hazards. *See Pitt-Des Moines*, 168 F.3d at 983; *Brennan*, 513 F.2d at 1038. This means that "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace." *Teal*, 728 F.2d at 805; *see Pitt-Des Moines*, 168 F.3d at 983. This is consistent with the

Act's emphasis on the hazards at worksites, such as in 29 U.S.C. §§ 657(f)(1) (inspections for imminent danger), 662 (injunction for imminent danger), and 666(j) (gravity of the violation). *See Brennan*, 513 F.2d at 1039.

Further support has been found in analyzing another part of the Act, section 5(a)(1) and (2) of the Act, 29 U.S.C. § 654(a)(1) and (2), which provides:

> Each employer--
> (1) shall furnish to each of *his* employees employment and a place of employment which are free from recognized hazards . . .
> (2) shall comply with occupational safety and health standards promulgated under this Act.

(Emphasis added.) Section 5(a)(1) imposes a general duty on an employer to protect "his employees" from all kinds of recognized hazards not addressed in OSHA standards. *See, e.g.*, *Pitt-Des Moines*, 168 F.3d at 982; *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804-05 (6th Cir. 1984); *Brennan*, 513 F.2d at 1038. On the other hand, section 5(a)(2) imposes a specific duty on an employer to comply with OSHA standards but is not limited to exposure of the employer's own employees. *See Brennan*, 513 F.2d at 1038. The "conspicuous absence of any limiting language" (like "his employees") in section 5(a)(2) can be viewed as indicating that a broader class was intended to be protected by that section. *See Pitt-Des Moines*, 168 F.3d at 983, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Because each subsection has a different focus and purpose, we agree with the Seventh Circuit that "[t]here is no reason to conclude that the specific protection Section 654(a)(2) affords--freedom from safety violations--is limited to an employer's own employees" particularly "when employees of different employers work in close proximity and all are subject to the risk those violations create." *Pitt-Des Moines*, 168 F.3d at 983.

In *Pitt-Des Moines*, the government action against the employer was criminal in nature and brought by the United States Department of Justice, based on section 17(e) of the

Act, 29 U.S.C. § 666(e), which provides that "[a]ny employer who willfully violates any [OSHA] standard . . . and that violation caused death to *any* employee" shall, upon conviction, be punished by a fine and/or imprisonment. As the Seventh Circuit noted, "[t]he use of the term 'any' [before 'employee'] is significant" because, if the statute is read as a whole, Congress clearly distinguished between "his employees" in section 5(a)(1) and "any employee," indicating that "the class of employees whose deaths will trigger it is broader than those of the violator." *Id*. at 984. To read the statute as a whole and find, as one circuit court suggests, that section 5(a)(1) and (2) require an employer to protect only its own employees, would mean that Congress established the basis for criminal liability far beyond that for civil liability. *See Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981).

Regarding the legislative history, while there is "no explicit authorization in the legislative history for the imposition of liability under the multi-employer doctrine" there is "none precluding it." *Pitt-Des Moines*, 168 F.3d at 983. The Second Circuit in *Brennan* points out legislative history supporting the proposition that the Act is preventive in nature. 513 F.2d at 1039, citing H.R. Rep. No. 1291, 91st Cong., 2d Sess. 22 (1970), *reprinted in* Senate Comm. On Labor and Public Welfare, 92d Cong, 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 853 (1971) ("Death and disability prevention is the primary intent of this bill . . . . [therefore] [I]t is essential that we guarantee adequate warning of possible hazards.") This is consistent with the view of the courts that the keystone of the Act is preventability. *E.g., Brennan v. Southern Contractors Service*, 492 F.2d 498, 501 (5th Cir. 1974); *National Realty and Construction Corp. v. OSHRC*, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973). This preventability emphasis supports finding liability where an employer created or controlled a hazardous condition, especially in the context of a multiple employer construction worksite. *Brennan*, 513 at 1039.

Courts have also recognized that the doctrine addresses the peculiar needs of preventing hazards at construction sites, which "often entail different employees being exposed to hazards created by more than one employer." *Pitt-Des Moines*, 168 F.3d at 985;

see Grossman Steel, 4 BNA OSHC at 1188, 1975-76 CCH OSHD at p. 24,791 (noting that the doctrine is "required by the unique nature of the multi-employer worksite common to the construction industry"); *Beatty Equipment Leasing, Inc.*, 4 BNA OSHC at 1212, 1975-76 CCH OSHD at p. 24,802 (doctrine "accommodate[s] the unique nature of such workplaces"). Also, the doctrine is supported by the Act's preventive purpose in light of the construction industry's historically very high injury rate. *See Brennan*, 513 F.2d at 1038-39.

Application of the Doctrine to This Case

Access argues on review that the doctrine does not apply to it because it "was not a subcontractor on this jobsite" but rather "a lessor of equipment."[11] Soon after the Commission adopted the multiple employer worksite doctrine in *Anning-Johnson* and *Grossman Steel*, it specifically addressed this issue in a case involving an employer that provided and erected safe tubular welded scaffolding for a three-story building under construction, and that created a hazard by failing to install midrails on the scaffold upon which lathing and plastering subcontractors were observed. *Beatty Equipment Leasing*, 4 BNA OSHC at 1212, 1975-76 CCH OSHD at p. 24,802, *aff'd*, 577 F.2d 534 (9th Cir. 1978). The Commission held:

> Respondent's status as a materialman does not warrant the application of a rule different from that applied to subcontractors. Materialmen no less than subcontractors are capable of creating hazards or controlling hazards which endanger the employees of other employers. We will, therefore, adopt a rule in which a materialman will be liable for violative conditions which it created or had control over and to which employees of contractors are exposed, even though no employees of its own are exposed to the hazard. We conclude that, as with our rule regarding subcontractors, such a rule will better serve the interest of employee safety on such sites than would our former rule and that our rule will not place an unreasonable or unachievable duty on materialmen. We stress again that our rule is limited in applicability to multi-employer sites in the construction industry.

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[11]While there may be circumstances where a lessor has such a limited connection to the activities on a particular construction project such that it would not be engaged in "construction work," that is not the case here.

Id. Therefore, we reject Access' claim that the doctrine does not apply to it because it is not a contractor.[12]

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[12]Although Access does not raise it on review, there is the issue of whether the doctrine applies in the Eleventh Circuit, to which this case can be appealed. See note 6 *supra*. The Eleventh Circuit has not in its own right adopted or rejected the doctrine. However, soon after that circuit was created, it declared that it considered cases decided by the Fifth Circuit *before* October 1, 1981, to be Eleventh Circuit precedent. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This would include as precedent *Central of Georgia Railroad Co. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978), in which the Fifth Circuit did not apply the doctrine due to the relationship of the companies involved but did note that it "agree[s] with *Anning-Johnson* that issues of creation and control of a violation are important in determining liability" for an OSHA violation. The Fifth Circuit has not reviewed a Commission decision on the liability of an employer at a multiple employer worksite since the Commission adopted the doctrine.

Southeast Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975) (per curiam), *rev'g* 1 BNA OSHC 1713, 1714-16, 1973-74 CCH OSHD ¶ 17,787, pp. 22,148-50 (No. 1445, 1974), would also be precedent in the Eleventh Circuit. It was issued *before* the Commission adopted the multiple employer worksite doctrine. The Commission majority below ruled that the standard applied to a paving company because that employer "used" the dump trailer, within the meaning of the cited standard, by unloading an asphalt shipment from the trailer that it had hired, noting that one of its employees directed the trailer driver and another was fatally injured by the trailer. Former Chairman Moran dissented, based on what was then Commission precedent--*Gilles & Cotting* and *City Wide Tuckpointing* (see note 9 *supra*)--and the general rule of agency law that a contractor is not responsible for the acts of his subcontractors or their employees. On appeal, the Fifth Circuit summarily agreed with the dissent.

In a negligence case under maritime law decided by the Fifth Circuit, *Melerine v. Avondale Shipyards*, 659 F.2d 706 (5th Cir. Unit A Oct. 23, 1981), the Fifth Circuit declined the request of an injured ship repairman to find an employer of a crane operator (not the employer of the repairman) liable for negligence *per se* based on violation of OSHA maritime standards. This decision, which relies heavily on *Southeast Contractors*, would appear not to be controlling precedent in the Eleventh Circuit because it was issued *after* October 1, 1981 and by Unit A, not Unit B. *See, e.g., Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) ("Unit A . . . decisions after October 1, 1981, are . . . not binding precedent in the Eleventh Circuit," while Unit B decisions are). Also, *Melerine* was a tort case, which at least one court has distinguished from a case before the Commission.

(continued...)

Access' only other contention on review regarding this issue is that, even if the doctrine were to apply, the Secretary has not shown that it created or controlled the hazardous condition. We conclude that the evidence establishes that Access created the hazard because its employee Hall, who was (according to his supervisor O'Bryan) "in charge of or like the lead person for" the one or two Access employees who accompanied him, placed the fourth extension on the platform without knowing what weight it could bear. As discussed above, O'Bryan testified that there was no load chart for a fourth extension, and

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[12](...continued)
See Frohlick Crane Service, Inc. v. OSHRC, 521 F.2d 628, 631 (10th Cir. 1975) ("This is a 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 . . ."). If *Melerine* were precedent in the Eleventh Circuit, we agree with the Seventh Circuit in *Pitt-Des Moines* (and the other circuits reaching the same conclusion) and respectfully disagree with the Fifth Circuit's reading of "his employees" in section 5(a)(1) of the Act into section 5(a)(2) of the Act. *See generally* Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 Law & Contemp. Prob. 612, 636 (1974) ("[a]rguments that the general duty clause (which limits an employer's duty to his own employees) was intended also to limit the scope of the duty prescribed in section 5(a)(2) find no support in the Act or in its legislative history"); *cf. Melerine*, 659 F.2d at 710 n. 12 (citing article). We note that the *Melerine* court relied on passages from the Seventh Circuit's decision in *Anning-Johnson*, 659 F.2d at 711 n.17, in which the Seventh Circuit reflected, in dicta, that holding several employers responsible for one employee's health and safety could "cause confusion and disruption" and "prove to be counterproductive." We note, however, that the Seventh Circuit has since adopted the multiple employer worksite doctrine in *Pitt-Des Moines*, discussed above.

Moreover, as mentioned in note 6 *supra*, this case can be appealed to the D.C. Circuit, which has not yet either adopted or rejected the doctrine. *See Anthony Crane Rental*; *cf. IBP, Inc. v. Secretary of Labor*, 144 F.3 861 (D.C. Cir. 1998) (non-construction site setting; language of contract as well as evidence showed lack of control). An issue identified by that circuit in *Anthony Crane*, 70 F.3d at 1306-07, is the relationship between the language in 29 C.F.R. § 1910.12(a) (discussed by Access regarding another issue) and the multiple employer worksite doctrine. The parties in this case have not argued or briefed this issue. Therefore, like the D.C. Circuit in *Anthony Crane*, we do not decide that issue here.

the record did not establish that Access had any other basis for determining what the fourth extension could bear.

Based on the discussion above, we conclude that Access is responsible under the OSHA standards for creating a hazard--adding a fourth extension without knowing what weight it could bear--to which LBJ's employees were exposed, regardless of the fact that Access' own employees were not exposed.[13]

D. *Knowledge*

Actual or constructive knowledge can be imputed to the cited employer through its supervisory employee. *E.g., A.P. O'Horo*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991); *see Georgia Electric Co.*, 5 BNA OSHC 1112, 1115, 1977-78 CCH OSHD ¶ 21,613 (No. 9339, 1977) , *aff'd*, 595 F.2d 309 (5th Cir. 1979). It is well-settled that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *E.g., A.P. O'Horo*, 14 BNA OSHC at 2007, 1991-93 CCH OSHD at p. 39,128 (laborer designated as working foreman); *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381-82, 1981 CCH OSHD ¶ 25,219, p. 31,150 (No. 76-4271, 1981) (plasterer functioned as a supervisor). "It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). The judge concluded that the Secretary failed to establish that Access had the requisite knowledge that the scaffold was unable to support its maximum intended load because Access could not have known "[t]he irrationality of LBJ's behavior" in putting five employees and their materials on the extended scaffold. In deciding the knowledge issue against the Secretary, the judge considered the cited condition to be the

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[13]Access does not argue the affirmative defense (and the record does not establish) that it took all reasonable measures to protect LBJ's employees. *See, e.g., Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2054-56, 1991-93 CCH OSHD ¶ 29,923, pp. 40,853-54 (No. 90-2873, 1992).

platform that collapsed, whereas, as we note above, the violative condition is the addition of the fourth extension without knowing what it could bear. For the reasons stated below, we conclude that the Secretary established that Access had knowledge of the hazardous condition.

The Secretary established that Hall, who added the fourth extension, was, at least temporarily, a leadman or supervisor. Both O'Bryan and Hall testified that Hall was "in charge of" the two Access employees that he brought with him to the site "to change any of the configurations on the work platforms." O'Bryan considered Hall to be "like the lead person for those two" employees. Because Hall was "in charge of" or "like the lead person for" the Access employees who came with him to the site, he can be considered a supervisor. He himself added the fourth extension. He either knew or should have known with the exercise of reasonable diligence that the fourth extension was not on the load chart even for symmetrical loads. We conclude that Hall's knowledge can be imputed to Access. Therefore, the Secretary has established a prima facie showing of knowledge.

Access did not present any evidence to rebut this showing. On review, it contends that to consider Hall a supervisor and impute his knowledge to Access would be inconsistent with the Secretary's position in issuing the citations and presenting its case at the hearing. Access refers to the compliance officer's testimony that his worksheet for the citation showed employer knowledge based in part on what O'Bryan observed generally. However, as we discuss above, at the hearing there was sufficient evidence of Hall's supervisory status. Access also relies on objections that it made at the hearing to certain testimony based on its assertion that the Secretary did not deem Hall to be part of Access' management, which the Secretary did not refute. We note that these are characterizations of the Secretary's case made by Access, not the Secretary herself. Moreover, Access asserts that O'Bryan, not Hall, was the sole Access employee responsible for making decisions about the configurations of the platforms and how many platforms Access should send to the site. While Hall agreed at the hearing that those decisions are O'Bryan's to make, nevertheless Hall added the fourth

extension, and Access does not argue that his action was unpreventable.[14] Access notes that Hall came to the site only every three to five weeks. But, as the cases like *Dover*, 16 BNA OSHC at 1286, 1993-95 CCH OSHD at p. 41,480, point out, a supervisor does not lose that status even if the delegation of authority is only temporary. Anyway, in the time period more closely preceding the accident, O'Bryan was at the site less frequently, and Hall was the contact person. Moreover, the evidence does not show, as it did in *Daniel Int'l v. OSHRC*, 683 F.2d 361 (11th Cir. 1982), that the leadman's supervisor (here, O'Bryan) was the one who really directed the work at the time in question.[15]

Based on the discussions of the elements of proof above, we conclude that the Secretary has made a prima facie showing of a violation of section 1926.451(a)(7).

E. *Willfulness*

A violation is willful if it is committed with intentional, knowing, or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. *E.g.*, *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (consolidated). To find willfulness under the first prong

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[14]An employer can be excused from the acts of its supervisory employee if it demonstrates that such acts were contrary to a work rule that was adequately communicated and effectively enforced. *E.g.*, *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815 (No. 87-692, 1992). In this case, Access does not argue that Hall's action of adding the fourth extension was unpreventable employee misconduct. Indeed, Access contends in its brief on review that "it was not uncommon for Access to use four extension decks on a platform."

[15]We note that critical information was not conveyed to the appropriate LBJ employees. The Commission has found that an employer failed to exercise reasonable diligence and thus should have known that the crane might be overloaded where it "did not clearly and unambiguously relay to the crane operator the precise, critical information" on the load and it had no reliable means of unambiguously relaying that critical information. *Towne Construction*, 12 BNA OSHC 2185, 2190 (No. 83-1262, 1986), *aff'd*, 847 F.2d 1187 (6th Cir. 1988) (standard at issue there was 29 C.F.R. § 1926.550(a)(1) requiring compliance with crane manufacturer's specifications; Towne exceeded the manufacturer's load limitations). As noted above, there was no load chart sticker on the scaffold at the location where it should have been. Also, LBJ employee Jackson, who operated the crane, testified that he had not been instructed in maximum loads and did not know what a load chart was.

involves determining that the employer had a "heightened awareness," rather than simple knowledge, of the violative conditions. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-35, 1987). Where that state of mind is shown by the actions of supervisory employees, it is imputed to the employer like a supervisor's knowledge. *Tampa*, 15 BNA OSHC at 1539, 1991-93 CCH OSHD at p. 40,101.

Access was well aware of OSHA standards in general, for its advertising pamphlet in evidence asserts that its equipment "[m]eets or exceeds OSHA requirements." Access was aware of the standard cited here, section 1926.451(a)(7), because it had been cited for violating it before. The Secretary asserts that the violation is willful due to Access' "deliberate disregard of the need to maintain a four-to-one capability-to-load ratio," "plain indifference to the safety of the employees who would be using the scaffold," and also its routine installation of cantilevers. This demonstrates that the Secretary is to some degree basing its willfulness charge on Access' use of cantilevers. (The compliance officer testified that it was because of the cantilevered I-beams that the violation was willful.)

In 1991, Access was cited for a serious violation of section 1926.451(a)(7) because at a worksite in Atlanta in September of 1990 "[c]omponents of scaffolding did not support the intended load . . . ." There is little in the record about this 1991 citation. Access' president Reese testified that it concerned failure to tighten up a clamp that was holding up one of the beams supporting a cantilevered section, resulting in the beam tilting down. It did not concern overloading of the cantilevered section. Along with its answer to the OSHA complaint for the 1991 citation, Access submitted a copy of the load calculations done by Pretzer and dated September 28, 1990 (which are included in Exhibit C-14 behind the two-page letter dated February 14, 1991) to support its position that it met the four-to-one ratio. Then, a somewhat friendly, ongoing relationship seemed to develop between OSHA and Access: Reese met with Bill Bice of the Atlanta East Area Office and Leslie Bermudez of the Regional Office Technical Support Division in April of 1992, which is memorialized in

OSHA's letter to Reese concerning such matters as square tubing supports for platform extensions and brackets apparently used for beams supporting cantilevers. Thus, Access took measures to prevent a recurrence of the cantilever bracket problem that caused the 1990 incident resulting in the 1991 citation. Moreover, the letter from OSHA suggests, as Reese testified at the hearing, that the Secretary had communicated with Access before about brackets for cantilever beams, and OSHA had not indicated that cantilevers were inappropriate. Therefore, even were we to reach the issue of cantilevers here (see note 4 *supra*), this evidence tends to show that the violation was not willful. *Cf. Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892-93 & n.8, 1997 CCH OSHD ¶ 31,228, p. 43,790 (No. 92-3684, 1997), *aff'd*, 131 F.3d 1254 (8th Cir., 1997) (willfulness shown where no steps were taken to prevent recurrences of prior violations).

Furthermore, Access' showed good faith in its response to the citation at issue. *See Anderson*, 17 BNA OSHC at 1894, *citing Brock v. Morello Bros. Constr. Co.*, 809 F.2d 161 (1st Cir. 1987) (although post-citation conduct may not prove much, it can be an additional factor to take into account in determining willfulness). Following the issuance of the citation here, Access ordered all operations using cantilevers to cease until each situation had been evaluated, which involved a loss of $10,000 to $15,000 in credits. (There is no indication whether any of those sites involved a fourth extension to the platform.)

However, although Access was aware of the standard, there is no evidence that Access properly informed or trained Hall in how to comply with it. While Hall testified that he added the fourth extension, there is no evidence on whether he appreciated the impropriety of doing so without knowing what weight it could bear or of failing to inform his supervisor that he added the fourth extension. Hall acknowledged in his testimony that he lacked a "certificate of competence" in erecting scaffolds. Nevertheless, the lack of evidence that Hall was trained should not be relied upon to support a willful characterization. Access had no need to introduce such evidence since it did not raise the unpreventable employee misconduct defense nor was it cited under a failure to train standard. Arguably, it is the Secretary who should have elicited testimony on what, if any, training Hall was given and

whether in the past Hall ever showed a lack of knowledge or competence to do scaffold configuration work. We do not know how or when he communicated with his supervisor. This lack of development of the record cuts against a finding of willfulness. *See George Campbell Painting Co.*, 17 BNA OSHC 1979, 1983, 1997 CCH OSHD ¶ 31,293, p. 43,980 (No. 93-984, 1997) ("[w]e are concerned that the record in this case is poorly developed regarding the communication between" the general superintendent and the foreman; violation found not willful).[16]

Based on the totality of the factors discussed above, we conclude that the violation was not willful. In light of the evidence that the hazardous condition created by Access resulted in the deaths of several LBJ employees and in serious physical harm to others, we characterize the violation as serious.

F. *Penalty*

The Secretary proposed the maximum penalty of $70,000 in charging Access with a willful violation. Because we have found that the violation is not willful and have characterized it as serious, the maximum penalty that we can assess is $7,000. *See* section 17(b) of the Act, 29 U.S.C. § 666(b), as amended by the Omnibus Budget Reconciliation Act of 1990.

In determining what penalty to assess, the Commission must consider the factors set forth in section 17(j) of the Act, 29 U.S.C. § 666(j): the cited employer's size, the gravity of the violation, the good faith of the employer, and the employer's history of violations.

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[16]The Secretary relies repeatedly on the assertions of Access in its brief on review that it is "not uncommon" for it to add four extensions, when no load chart or other materials (in the record) gave it the calculated load for that configuration, as showing plain indifference to the standards' load safety requirements. The evidence in the record does not support this claim. If the claim were supported in the record, it would be an important factor for establishing willfulness. *See National Engineering and Contracting Co.*, 18 BNA OSHC 1075, 1081, 1997 CCH OSHD ¶ 31,433, p. 44,457 (No. 94-2787, 1997) ("[d]espite the prohibitions in the manual and warning posted on the crane . . . National's policy was to perform lifts regardless of whether the outriggers or stabilizers could be extended").

The record shows that Access is a small employer with fourteen employees at the time of the accident. As we noted in discussing the willful issue above, Access demonstrated some good faith by halting all work involving cantilevers after the accident here until the configurations could be evaluated by Access. However, there is no evidence that Access halted the use of four extensions (and unevenly configured extensions), which were problems here as well. Indeed, Access' counsel asserts on review that Access adds fourth extensions all the time. Concerning Access' history of violations, as we mentioned in the willful discussion above, Access was cited for violating section 1926.451(a)(7) in 1991 for a faulty clamp, which resulted in a settlement.

However, the gravity of the violation is very high as illustrated by the severe injuries that resulted in the deaths of three LBJ employees. In such a case, the principal factor in assessing a penalty would be the gravity of the violation. *See, e.g., Nacirema Operating Company, Inc.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, p. 20,044 (No. 4, 1972). Because of the very high gravity of the violation, we assess a penalty of $7,000 for the serious violation of section 1926.451(a)(7).

III. *Citation 1, Item 1, Alleging Serious Violation of 29 C.F.R. § 1926.20(b)(3)*

The Secretary charged that Access violated 29 C.F.R. § 1926.20(b)(3)[17] because it did

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[17]Section 1926.20(b)(3) provides:

> The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such

(continued...)

not lock out or tag out, on or before the date of the accident, the mast climbing elevated work platform involved in the accident.[18]

The judge summarily vacated this item after stating that "[a]s the previous section [of his opinion, which concerned the section 1926.451(a)(7) item] makes clear, the Secretary failed to establish that Access had the requisite knowledge that the scaffold was unable to support its maximum intended load" because Access could not have known "[t]he irrationality of LBJ's behavior" in putting five employees and their materials on the extended scaffold. On review, the Secretary argues that she proved a violation because: the scaffold was configured in a manner that exceeded the manufacturer's load charts in that it had a fourth extension (and a cantilevered platform); the scaffold was in use prior to the accident; the scaffold presented a hazard of serious physical injury or death; and Access "had abundant knowledge that the scaffolds did not meet required safety parameters." Access contends on review that this item is based solely on the section 1926.451(a)(7) item, which it argues was not established, and therefore it must fail.

Our review of Commission precedent reveals no case law on this standard. The hazard that the standard addresses here is use of an overloaded scaffold. This is essentially

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[17](...continued)

> machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable.

[18]Access was cited for violating this standard regarding the scaffold that collapsed (no. 78) and a nearby scaffold (no. 45). The judge found that "[n]o convincing evidence was adduced" to show that scaffold no. 45 could not support four times its intended load. The briefing notice limited arguments on this item to scaffold no. 78. Nevertheless, the Secretary contends on review (which she did not in her petition for discretionary review) that the judge erred in not finding a violation regarding scaffold no. 45, as well as scaffold no. 78. We do not address this item as to scaffold no. 45. Ordinarily, the Commission does not address issues that are not included in the briefing notice when there is a general direction for review. *See, e.g., Tampa Shipyards, Inc.*, 15 BNA OSHC at 1535 n.4, 1992 CCH OSHD at ¶ 29,617, p. 40,097 n.4. Moreover, the Secretary bases her assertion of a violation at scaffold no. 45 on the use of cantilevers alone (no fourth extension added). As noted above, we do not address the cantilevers because it is unclear who added them.

the issue that the judge (mis)identified as applying to section 1926.451(a)(7). For purposes of this item, we agree with the judge that the Secretary has not established that Access knew or could have known that the scaffold would be so overloaded by LBJ. For this reason, we vacate this item.

IV. *Citation 1, Item 2, Alleging Serious Violation of 29 C.F.R. § 1926.21(b)(2)*

The Secretary cited Access for violating 29 C.F.R. § 1926.21(b)(2)[19] because it failed to instruct LBJ employees "in the recognition and avoidance of unsafe conditions such as using cantilevered I-beams on the mast climbing work platform, and exceeding the manufacturers load capacities for the elevated work platform."[20] The judge vacated this item, concluding that "Access did not have a duty to instruct employees of whom it had no knowledge and limited contact. This is not a situation where an employer has an ongoing presence on a site and is continually in contact with the employees of other subcontractors." The judge noted that Access had no contractual relationship with LBJ, and both O'Bryan and Hall testified that they were not aware that LBJ was a subcontractor on the worksite. O'Bryan testified that he did not know that Brogno was with LBJ, and Hall identified Brogno and Jackson as employees of SPD.

The Secretary argues that the judge erred in vacating this item. She contends that Access is a creating employer under the multiple employer worksite doctrine, and privity of contract is not an element of that analysis, citing *Central of Georgia Railroad v. OSHRC*, 576 F.2d 620 (5th Cir. 1978); *Frohlick Crane Service v. OSHRC*, 521 F.2d 628 (10th Cir. 1975); and *C. Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126 n.2, 1993-95 CCH

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[19]Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to this work environment to control or eliminate any hazards or other exposure to illness or injury.

[20]As discussed above, Access did not introduce any evidence showing that it properly trained its own employee Hall, but he is not the subject of this citation.

OSHD ¶ 30,615, p. 42,399 n.2 (No. 91-2929, 1994). Therefore, she argues, it does not matter that there was no contract between Access and LBJ. She asserts that Access knew from the start that employees other than its own would be operating and using the scaffold; and she especially notes O'Bryan's testimony that, because SPD intended to purchase the scaffold, Access was training the users. She maintains that "Access' mistake of fact as to the identity of the employer of the stuccoing employees is immaterial to its duty to instruct them fully in the characteristics and hazards of the machinery they were being entrusted to operate." According to the Secretary, Access left the stucco workers with "only cursory instructions on how to operate the scaffold, and with *no* instructions how to ensure its safe use."

We conclude that the judge correctly vacated this item. The Secretary does not cite, and we have not found, any case that holds a cited employer responsible under the multiple employer worksite doctrine for not instructing another employer's employees *under section 1926.21(b)*. Access had no contractual relationship with LBJ; indeed, O'Brien and Hall were not aware LBJ was a subcontractor on the worksite. SPD, with whom Access dealt, had no employees exposed to the hazard, although Hall apparently thought that Jackson, whom he trained to operate the scaffold, was an SPD employee. Lastly, the evidence does not establish that Access ever knew or reasonably could have known of the cantilevers or the overloading by LBJ. We have found Access in violation for improperly adding the fourth extension and we think that is the extent of Access' responsibility on this record.

For these reasons, we agree with the judge and vacate item 2.

V. *Conclusion*

Based on the reasons discussed above, we affirm Citation 2, Item 1, alleging a violation of section 1926.451(a)(7), and we characterize that violation as serious. We assess a penalty of $7,000 therefor. We vacate Citation 1, Items 1 and 2, alleging respectively, serious violations of sections 1926.20(b)(3) and 1926.21(b)(2).

/s/
Stuart E. Weisberg
Chairman

/s/
Thomasina V. Rogers
Commissioner

Date: April 27, 1999