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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 97-0017
	:	
FLEMING CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

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***DECISION***

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

This case arose following an accident on October 1, 1996, at a building under construction in Durango, Colorado, in which Howard Mitchell, an employee of the steel erection contractor, Valley Welding, Inc., (“Valley”), was seriously injured when he fell approximately 25 feet off the roof level while installing the roof decking. Respondent, Fleming Construction, Inc. (“Fleming”), which had contracted with the building owner, the Bank of Durango, (“the Bank”) to provide construction management services, was cited for two serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“OSH Act”). The citation alleged that Fleming had failed to comply with the safety and health standards in Part 1926 of Title 29, C.F.R., which are applicable only to employees “engaged in construction work.” 29 C.F.R. § 1910.12<sup>1</sup> Administrative Law Judge James H.

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<sup>1</sup>The standards set forth in Part 1926 were originally promulgated under the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333, popularly known as the Construction Safety Act (“CSA”). They were then adopted under the OSH Act as occupational safety and health standards for construction work by section 1910.12. See the discussion in *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1855-56, 1991-93 CCH OSHD ¶ 29,828, pp. 40,668-69 (No. 89-1300, 1992), *aff’d*, 3 F.3d 1 (1st (continued...))

Barkley concluded that Fleming was not engaged in construction work and accordingly vacated the citation. For the reasons that follow, we affirm.

## FACTS

### A. CONTRACTUAL AUTHORITY

In contracting for the construction of its building, the Bank chose not to use a general contractor. According to David Brown, vice-president of the Bank, Fleming was hired to oversee the erection of the building and ensure that construction would be completed at the specified price and on the specified date. Brown also stated that the Bank expected Fleming to deal with any health and safety issues, and the Bank retained an OSHA consultant, John Hardardt, to provide advice and assistance to Fleming with respect to OSHA requirements.<sup>2</sup> Since the Bank contracted directly with each construction trade contractor as well as with Fleming, there was no contractual relationship between Fleming and any of the construction trade contractors.

Fleming's contract, which was based on an American Institute of Architects ("AIA") form contract B801, entitled "Standard Form of Agreement Between Owner and Construction Manager *where the Construction Manager is NOT a Constructor*" (formatting in original), describes a number of services to be provided during various phases of the project. Fleming's tasks during the "pre-construction phase" included preparing cost estimates, reviewing design documents, developing a project schedule for approval by the owner and architect, arranging for professional services such as surveyors, developing bidding schedules and processing bids, and "provid[ing] recommendations and information to the Owner regarding the allocation of responsibilities for safety programs among the Contractors." During the construction phase, Fleming was obligated to provide overall contract administration, specifically "administrative,

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<sup>1</sup>(...continued)  
Cir. 1993).

<sup>2</sup>The Bank hired Hardardt after OSHA conducted an inspection during the initial excavation at the site and issued a citation.

management and related services to coordinate scheduled activities and responsibilities of the Contractors,” to process contractor claims for payment, and to “review the safety programs developed by each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors.” In accomplishing these tasks, Fleming was subject to other provisions which indicate that its role was to report or give advice to the Bank and the building architect. For example, as part of monitoring the construction schedule, Fleming was required to recommend corrective action to the owner and architect in the event work fell behind schedule, to make recommendations to the architect and owner regarding requests for changes and prepare change orders if the architect and owner agreed, and to assist the architect in reviewing and evaluating claims.

Other contractual language limited the interaction between Fleming and the trade contractors. Fleming was required to “endeavor to obtain satisfactory performance” but was directed to “recommend courses of action to the Owner” when a trade contractor failed to fulfill its contractual duties. Another restriction stated that “the Construction Manager’s responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors . . . .” Although Fleming was charged with responsibility for determining that the work of the trade contractors conformed to contract specifications, it could compel “additional inspection or testing of the Work” only “upon written authorization from the Owner.” Similarly, Fleming was required to consult with the architect when “reject[ing] work which did not conform to the requirements of the Contract Documents.” Finally, Fleming’s contract stipulated that it “shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors,” “shall not be responsible for a Contractor’s failure to carry out the work in accordance with the respective Contract Documents,” and “shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees.”

Conversely, the construction trade contracts specifically reserved control over construction means and methods to the trade contractors, as well as providing that the contractors would be responsible for “initiating, maintaining, and supervising all safety precautions and programs.” Although the construction trade contracts also contained a provision recognizing that Fleming as construction manager had authority to reject nonconforming work, these contracts elsewhere provided that the trade contractors would be responsible to the owner, the Bank, for the acts and omissions of their employees. Likewise, the contract specifically reserved to the Bank, not Fleming, the right to direct that work be stopped in the event a contractor failed to perform work in conformity with the contract or failed to correct work which did not comply with the contract.

Fleming’s owner, Scott Fleming, testified that he had no authority to compel a contractor to comply with either a contract specification or a safety requirement but could only report such noncompliance to the Bank. Brown, as the Bank’s representative, was on the worksite almost every day, and Mr. Fleming had frequent contact with him. Brown corroborated Mr. Fleming’s testimony, stating that in the event a contractor refused to correct a safety hazard identified by Fleming, he would meet with both Fleming and the contractor. If the contractor continued to refuse to comply, it would be considered in violation of its contract with the Bank, and the Bank would terminate the contractor’s contract. Brown also testified that if the only employees exposed were those of a contractor who was not in a position to correct the hazard, he or the Bank would not allow that contractor to continue to work in that area until the hazard was corrected.

#### B. FLEMING’S ACTIVITIES AT THE SITE

Although Brown said that he was speaking hypothetically because there had never been an instance of a contractor refusing to comply with a contractual or safety requirement, there was one situation in which the Bank interacted with trade contractors. Fleming requested a meeting with Brown to discuss whether the drywall contractor, San Juan Insulation and Drywall (“San Juan”), should be kept on the job because Mr. Fleming had

determined that San Juan was not using the required grade of material. According to Brown, Fleming did not “undertake” to terminate the trade contract; Brown regarded their meeting as a recommendation of a course of action to the owner consistent with the provisions of Fleming’s contract. Mr. Fleming also requested a copy of San Juan’s safety program and received in response a document which did not contain any company name, making it impossible to verify whether the document was authentic. Mr. Fleming notified the Bank in writing of this discrepancy and requested the Bank to ask San Juan to provide its safety program.<sup>3</sup>

After Valley had placed decking on the second floor level, one level below the roof, the concrete contractor requested that perimeter protection be provided for its employees when they began the concrete pour. Mr. Fleming in response asked Valley to install stanchions to which Fleming attached a perimeter guard consisting of a synthetic nylon rope top rail and midrail.<sup>4</sup> Brown viewed this action as coming under Fleming’s coordination responsibility inasmuch as there were a number of trades working on the second floor at the time and it was not clear which contractor had responsibility to provide fall protection.

A week prior to the accident, on September 24, Valley employees were at the roof level erecting steel beams on which the roof decking would be laid. Mr. Fleming asked the employees whether they should be protected from falls; they replied that fall protection was not required during steel erection work. Mr. Fleming subsequently discussed fall protection requirements with Johnny Reed, owner of Valley. Reed told Mr. Fleming that it was not possible for employees to tie off while working around the sheets of decking because no anchorages were available and that in any event it was hazardous to be tied off while

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<sup>3</sup>The issues Fleming raised with respect to San Juan were the only occasion in which Brown had to intervene with a trade contractor. The record does not indicate how the matters regarding San Juan were ultimately resolved.

<sup>4</sup>29 C.F.R. § 1926.501 requires fall protection from “walking/working surfaces.” Section 1926.502(b)(15) indicates that synthetic rope is an acceptable means of fall protection under this standard.

spreading and tacking sheet steel. Mr. Fleming made no attempt to instruct or direct the roofers to provide fall protection.

### **JUDGE'S DECISION**

In concluding that Fleming was not subject to the construction standards, Judge Barkley relied in part on *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1854, 1859, 1991-93 CCH OSHD ¶ 29,828, pp. 40,667, 40,672 (No. 89-1300, 1992), *aff'd*, 3 F.3d 1 (1st Cir. 1993), which involved an engineering company having a contract with the architect to perform design and consulting services at a construction site. The Commission held that employers who are not themselves engaged in construction work cannot be subjected to the construction standards unless they substantially supervise or otherwise directly control the actual performance of construction trade labor. Judge Barkley found the record clear that Fleming had no contractual responsibility for ensuring that safe working conditions were maintained at the site. He further found no evidence to show that, beyond the provisions of the pertinent contracts, Fleming either was delegated or assumed any role in determining the hazards that might exist at the site or in prescribing the content of the safety programs of the trade contractors.

The judge also cited the Commission's more recent precedent on the applicability of the construction standards, *CH2M Hill Central, Inc.*, 17 BNA OSHC 1961, 1995-97 CCH OSHD ¶ 31,303 (No. 89-1712, 1997), *appeal dismissed for lack of jurisdiction*, 131 F.3d 1244 (7th Cir. 1997), *decision on remand*, No. 89-1712 (ALJ, 1998), *petition for review filed*, No. 98-3282 (7th Cir. Sept. 11, 1998). In *CH2M*, the Commission undertook a comprehensive review of the factors or elements on which the Commission had relied in its various cases on this issue. The Commission observed that in those cases finding the construction standards applicable to employers who did not perform trade labor, the employers in question all had general administrative and managerial responsibility for all matters pertaining to the

construction project, including safety issues.<sup>5</sup> Conversely, the Commission noted, those employers which had been held not subject to the construction standards had only limited authority at the worksite and in particular were not empowered to direct or control the performance of construction work or to prescribe safety measures.<sup>6</sup> *Id.* at 1969-70, 1972-73, 1995-97 CCH OSHD at pp. 44,079-80, 44,083. Accordingly, *CH2M* set forth a two-step test for determining whether an employer who does not provide construction trade labor nevertheless exercises sufficient supervisory authority over the work to come within the construction standards. The first element of the test is the extent to which the employer exercises what the Commission characterized as “far-reaching” or “global” authority for “diverse activities at the site.” The second element is the degree to which the employer is empowered to direct or control the actions of the trade contractors *Id.* at 1970, 1995-97 CCH OSHD at p. 44,080.<sup>7</sup>

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<sup>5</sup>In chronological order, these cases are *Bechtel Pwr. Corp.*, 4 BNA OSHC 1005, 1975-76 CCH OSHD ¶ 20,503 (No. 5064, 1976), *aff'd per curiam*, 548 F.2d 248, 4 BNA OSHC 1963 (8th Cir. 1977); *Bertrand Goldberg Assocs.*, 4 BNA OSHC 1587, 1976-77 CCH OSHD ¶ 20,995 (No. 1165, 1976); *Cauldwell-Wingate Corp.*, 6 BNA OSHC 1619, 1978 CCH OSHD ¶ 22,729 (No. 14260, 1978); and *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1991-93 CCH OSHD ¶ 29,829 (No. 88-1167, 1992).

<sup>6</sup>*Skidmore, Owings & Merrill*, 5 BNA OSHC 1762, 1977-78 CCH OSHD ¶ 22,101 (No. 2165, 1977), and *Simpson, Gumpertz*.

<sup>7</sup>In *CH2M*, the Commission concluded that the Secretary had met her burden to establish the applicability of the construction standards under these two criteria. After *CH2M* filed a petition for review, the Secretary argued to the Seventh Circuit that the petition was premature since the Commission had not as yet issued an order disposing of the citations or otherwise meeting the requirements for judicial review set forth in 29 U.S.C. § 660. While the court concurred with the Secretary and dismissed the petition for lack of jurisdiction, the court’s order appears to misconstrue the Commission’s holding. The court characterized the Commission as having held that if the specified criteria are satisfied, architects, engineers, and similar professionals “should be treated as joint employers with the firms actually carrying out the construction” and “as joint employers with the general contractors.” *CH2M Hill Central, Inc. v. Herman*, 131 F.3d 1245, 1247 (7th Cir. 1997). However, neither *CH2M* (continued...)

In applying *CH2M* here, Judge Barkley concluded that Fleming did not possess the “global” responsibilities that characterized the employer in that case. Specifically, unlike CH2M, the judge found that while Fleming was contractually responsible for coordinating safety programs, it had no authority to direct the safety programs of the trade contractors, nor did it investigate the hazards to which employees of trade contractors might be exposed or determine the content of the contractor’s safety program. The judge regarded the employment of Hardardt to be corroborative of this relationship because he found that Hardardt rather than Fleming was responsible for ascertaining whether the trade contractors were in compliance with OSHA standards and that Fleming’s role was as a “conduit” for relaying Hardardt’s concerns, on behalf of the Bank as the owner, to the responsible contractors.

While the judge found that Fleming had taken “an active part” in abatement of the fall hazard on the second floor level, he construed Fleming’s actions in response to a request by

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<sup>7</sup>(...continued)

nor any other Commission precedent to date regarding the applicability of the construction standards to non-trade employers has been predicated on a doctrine of joint employer liability. Rather, the Commission has consistently regarded such employers as separate and distinct entities, and it has evaluated the applicability of the construction standards in terms of the individual employer’s own responsibility for achieving safe working conditions at the worksite as shown on the facts of the case. See the discussion in *Simpson, Gumpertz*, 15 BNA OSHC at 1859, 1991-93 CCH OSHD at p. 40,672, regarding the allocation of supervisory authority at multi-employer construction worksites.

We also note for purposes of clarification that the Commission did not remand in *CH2M* “to determine whether Hill met [the criterion] for *de facto* control and, if so, whether it should be deemed responsible for the violations under the Commission’s approach to multi-employer worksites.” 131 F.3d at 1245. On the contrary, the Commission’s decision quite clearly resolved the question of CH2M’s *de facto* control and its accompanying responsibility for safe working conditions on the existing record. As the Commission stated, “in terms of its *de facto* actions, CH2M effectively was the nerve center through which means were developed and implemented for allowing the work to be conducted in the light of a major safety hazard for a tunneling operation, the presence of methane gas.” 17 BNA OSHC at 1973-74, 1995-97 CCH OSHD at p. 44,084. Our remand was for further proceedings on the merits of the alleged violations inasmuch as the administrative law judge had made no findings or conclusions of law on those matters.

the concrete contractor as consistent with Fleming's contractual role as a "coordinator" of safety programs. The judge also found the facts here analogous to those in a companion case to *CH2M, Foit-Albert Assocs., Architects & Engrs., P.C.*, 17 BNA OSHC 1975, 1978-79, 1995-97 CCH OSHD ¶ 31,299, p. 43,995 (No. 92-654, 1997), in which an engineering company informed trade contractors and the general contractor of safety hazards it had observed during the course of work inspections required by its contract. The Commission held that by warning contractors of safety hazards observed during the course of worksite inspections or otherwise making known its concerns about safety the engineering company "did not manifest the ability to control or direct matters of safety" and therefore concluded that its activities "did not arise to the level of supervisory responsibility for the implementation of safety measures and safety precautions at the site."

### **DISCUSSION AND ANALYSIS**

Although we agree with Judge Barkley that Fleming did not exercise sufficient supervisory authority over construction work to subject it to the construction standards, we reach this conclusion through somewhat different reasoning than he does. In particular, we disagree in part with the judge's application of our decision in *CH2M*. The facts clearly establish that Fleming had overall contractual authority for all aspects of the project management. In terms of the breadth and scope of the functions which Fleming contracted to perform, its role at the site was not appreciably different from that of the employers in the other cases discussed in *CH2M* whom the Commission found to have "broad administrative and coordination responsibility." As discussed at length in *CH2M*, involvement in the design of the project and the bidding process, administration and coordination of the construction work, inspection for conformity to contract specifications, certification of work for payment, processing of change orders, and monitoring the schedule and maintaining job progress are all indicia of what the Commission termed in that decision "far-reaching or global responsibility for diverse activities at the site." 17 BNA OSHC at 1968-70, 1995-97 CCH OSHD at pp. 44,078-80. The judge based his conclusion that Fleming did not meet this

criterion on his findings that Fleming did not have responsibility for contractor safety programs or for the implementation of safety measures at the site. In so doing, the judge misinterpreted *CH2M*. The “global” or overall authority test is not limited to authority to address safety issues. Rather, that test refers to overall managerial responsibility for a wide variety of the tasks necessary for completion of the project. In our view Fleming possessed such contractual authority and therefore satisfies the first part of the *CH2M* test.

We turn now to the second element, the extent to which Fleming had authority to specifically direct or control the actual performance of the construction work. Our prior case law, as more fully explicated in *CH2M*, sets forth a number of criteria for determining whether a non-trade employer’s authority to direct or control is sufficient to support the conclusion that it exercises supervision over construction work. We agree with Fleming that its contractual authority lacks those indicia of direction or control on which the Commission has relied in those cases in which the Commission has found the construction standards applicable. For instance, unlike the employers in *Bechtel Pwr. Corp.*, 4 BNA OSHC 1005, 1975-76 CCH OSHD ¶ 20,503 (No. 5064, 1976), *aff’d per curiam*, 548 F.2d 248, 4 BNA OSHC 1963 (8th Cir. 1977); *Bertrand Goldberg Assocs.*, 4 BNA OSHC 1587, 1976-77 CCH OSHD ¶ 20,995 (No. 1165, 1976), Fleming had no authority to stop work. Fleming’s authority with respect to both project scheduling and approval of work and changes to the work is also considerably less than that of the employer in *CH2M*. In that case, the cited engineering company had authority to reject defective work when in its judgment such rejection would be necessary to ensure compliance with contract specifications, was empowered not only to “interpret” scheduling requirements but also to “enforce” measures necessary to maintain the project schedule, could on its own volition order certain changes in the work, and had the authority to direct that questioned work be examined and corrected. Fleming’s responsibility in these areas, however, was to act solely in an advisory capacity with respect to the owner, the Bank, and the building architect. For instance, Fleming was authorized only to *document* the project schedule; if the schedule could not be met, Fleming

would simply “recommend” corrective measures to the owner and architect. Likewise, Fleming had no unilateral right to require the examination of questioned work but could only do so with the consent of the owner, and Fleming was required to consult with the architect prior to rejecting any nonconforming work.<sup>8</sup>

The facts in this case are also distinguishable from those in our precedents where we found non-trade employers subject to the construction standards based either on contractual authority to require the implementation of safety measures at a construction site or the exercise of such or similar authority in the actual course of their performance of their duties. In *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1873, 1991-93 CCH OSHD ¶ 29,829, p. 40,686 (No. 88-1167, 1992), on which the Secretary relies, the Commission found that the cited employer, a construction manager, had a “general contractual obligation to provide for the institution of safety measures and safety programs,” including the task of reviewing the substance of contractor safety programs as part of its contractual duty to coordinate those programs.<sup>9</sup> Similarly, the duties of the employer in *CH2M* included

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<sup>8</sup>We recognize, as Fleming observes in its brief, that the trade contractors had exclusive responsibility for construction means and methods and that Fleming was contractually precluded from exercising control over the acts or omissions of the contractors. However, authority over the actual methods by which the trade contractors perform their work is not the determining factor in deciding whether a non-trade employer exercises sufficient supervision over construction work to be considered subject to the construction standards. Indeed, as the Commission noted in *CH2M*, construction managers customarily do not have “means and methods” authority, and in those cases where the Commission held the construction standards applicable, the employers in question did not exercise such authority. 17 BNA OSHC at 1971, 1995-97 CCH OSHD at p. 44,081.

<sup>9</sup>In reaching this finding, the Commission relied on the testimony of Kulka’s representatives at the site as well as inferences from the record as a whole and determined that the owner of the building under construction intended Kulka to exercise direct control over both the implementation of safety measures and the content of the contractor’s safety programs. The Commission did not address whether Kulka’s contract expressly gave it responsibility for those matters.

(continued...)

investigating and identifying hazards to which employees of trade contractors might be exposed and preparing language for contract modifications incorporating safety precautions to be taken by the trade contractors as hazards were identified.<sup>10</sup> This authority included the obligation to review and approve the safety programs developed by the trade contractors as part of their compliance with the contract modifications. On the other hand, there is no evidence that Fleming would prescribe safety measures for the worksite or examine safety programs for either content or substantive adequacy in the course of performing its contractual obligations to inspect the work and to “coordinate” the safety programs of the trade contractors.<sup>11</sup> See *Foit-Albert*, 17 BNA OSHC at 1979, 1995-97 CCH OSHD at p. 43,995 (merely making known concerns about safety does not demonstrate an ability to

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<sup>9</sup>(...continued)

We make the same observation with respect to contractual responsibility for safety precautions and safety programs as we do regarding contractual authority over construction means and methods. We do not suggest that we consider the presence or absence of that responsibility in the contract to be dispositive of the question of whether the construction standards apply. In fact, the contract describing the duties of the employer in *CH2M*, whom we held subject to the construction standards, contains a provision similar to that in Fleming’s contract disavowing responsibility for safety precautions and safety programs undertaken by the trade contractors. As our decision here indicates, we rely on other indicia of lack of supervisory authority.

<sup>10</sup>The construction project involved in *CH2M* was an extremely large and complex water pollution abatement facility in which the hazards related to the generation of potentially harmful gases arising from certain geologic formations. The cited engineering company used its specialized skills and knowledge to advise the trade contractors of the incidence of these hazards and the proper safety precautions to prevent or reduce the risk of injury to employees. The facts of that case are obviously very much different from those presented here, where the issue is protection of employees from hazards commonly found on building construction sites and requiring little if any specialized expertise to detect or correct.

<sup>11</sup>The Secretary contends that Mr. Fleming brought to the Bank’s attention the “complete inadequacy” of contractor San Juan’s safety program. However, the record is clear that Mr. Fleming considered that program deficient not because of its substantive content but because the program he was given contained no information identifying it as the safety program of San Juan as opposed to the program of some other contractor.

control or direct matters of safety). Moreover, Fleming was not empowered to compel compliance by contractors even in those areas for which it had contractual responsibility. Both Mr. Fleming and Brown testified that matters of enforcement would be referred to the owner, the Bank, for it to resolve. Thus, while Valley was evidently willing to install stanchions for perimeter protection on the second floor at Fleming's request, in other situations where issues of conformity to contract specifications and safety program coordination arose with respect to a trade contractor, San Juan, the Bank was required to intercede to enforce compliance. *See CH2M*, 17 BNA OSHC at 1973, 1995-97 CCH OSHD at p. 44,084 (relying on record "which illuminates specifically how safety concerns and safety issues were resolved in actual practice on the worksite in question").

On these facts, and for the reasons stated, we agree with the judge that Fleming did not control or direct construction activities or the implementation of safety measures to an extent sufficient to support a conclusion that it substantially supervised the performance of construction work at the site. We therefore affirm his decision vacating the Secretary's citation.

/s/  
Stuart E. Weisberg  
Chairman

/s/  
Thomasina V. Rogers  
Commissioner

Dated: April 16, 1999

SECRETARY OF LABOR,

Complainant,

v.

FLEMING CONSTRUCTION, INC.,

Respondent.

OSHRC DOCKET NO. 97-0017

**APPEARANCES:**

For the Complainant:

Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Daniel A. Gregory, Attorney at Law, Durango, Colorado

Before: Administrative Law Judge: James H. Barkley

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Fleming Construction Company (Fleming), at all times relevant to this action maintained a place of business at the Bank of Durango, 128 Sawyer, Durango Colorado, where it was engaged in construction management. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 10, 1996 the Occupational Safety and Health Administration (OSHA) initiated an investigation of an October 1, 1996 accident in which a steel worker employed by Valley Welding fell more than 25 feet from an unguarded second story roof at the Bank of Durango work site (Tr. 19-22). As a result of that inspection, Fleming, the site construction manager, was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Fleming brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 9, 1997, a hearing was held in Durango, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

### **Alleged Violations**

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) At the Bank of Durango, 128 Sawyer, Durango, CO: Fleming Construction, Inc. as the controlling contractor, did not ensure sub-contractor's employees were trained in recognition and avoidance of unsafe conditions while involved in steel erection activities working at heights exceeding 25 feet.

Serious citation 1, item 2 alleges:

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds catch platforms, temporary floors, safety lines, or safety belts was impractical:

a) At the Bank of Durango, 128 Sawyer, Durango, CO: Fleming Construction, Inc. as the controlling contractor, did not ensure sub-contractor's employees were protected from falls while involved in steel erection activities and working at heights exceeding 25 feet.

### **Facts**

The steel worker involved in the October 1, 1996 accident was an employee of Valley Welding, a structural steel contractor (Tr. 75). Valley Welding had no contractual relationship with the Respondent, Fleming Construction (Tr. 75).

During the relevant period, Fleming was employed as the construction manager for the Bank of Durango project (Tr. 47, 174). Fleming's contract required that it inspect the work of the contractors for conformity with their contracts, but specifically stated that it should not have control over construction means or methods or over safety precautions or procedures (Tr. 182; Exh. R-1, 2.3.13, 2.3.15). Specifically, in regard to safety matters, the contract states:

The Construction Manager shall review the safety programs developed by each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors. The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager (Exh. R-1, 2.3.12).

Fleming had no power to enforce the contract between the owner and the owner's other contractors by stopping work (Tr. 174). However, for the most part the contractors followed his recommendations (Tr. 188). In the event a Contractor's performance was not satisfactory, Fleming's contract required it to recommend corrective courses of action to the owner (Exh. R-1, 2.3.7).

The owner, the Bank of Durango, was not directly involved in construction (Tr. 50). David Brown, vice president of the Bank of Durango, testified that Fleming Construction was hired to oversee the erection of the building and assure that construction was completed on schedule (Tr. 107). An OSHA consultant, John Hardardt, was hired to identify safety and health hazards on the work site, and to report them to Mr. Fleming, who was on site (Tr. 107-08, 191, 226-29, 234). Brown anticipated that Fleming would see to problems as they arose, by securing the cooperation of the contractor whose employees were exposed to the identified hazards (Tr. 120). If a contractor did not comply with Fleming's suggestions, Brown stated that a three way meeting between the contractor, Fleming and the bank would be arranged; the final sanction, termination of the contract, could only be taken by the bank (Tr. 121-23, 131).<sup>1</sup> Fleming had no authority to compel compliance with the contract (Tr. 201).

Scott Fleming, owner of Fleming Construction, testified that, with respect to safety, it was his job only to determine if individual contractors had developed a safety program; each contractor was responsible for the content of its own program (Tr. 177-78). Fleming testified that he was not familiar with the safety requirements of the individual trades (Tr. 177-78).

Fleming did involve itself in some safety precautions. At the suggestion of William Solecki, a concrete contractor, Fleming asked Valley Welding install stanchions for a perimeter cable which was strung around the second level deck (Tr. 153, 169). Brown testified that more than one contractor would have been exposed to fall hazards in that area, and that the responsibility for fall protection did not come under any one contractor's responsibility (Tr. 47-48, 65, 127; Exh. C-15). Fleming had the authority to coordinate the installation of the perimeter guard without clearing it with the bank (Tr. 127-28).

John Reed, the owner of Valley Welding, testified that he received construction orders from Fleming, in its capacity as construction manager, and for the most part followed them. Some orders were negotiated (Tr. 143). A week prior to the accident which led to the OSHA inspection, Fleming observed Valley Welding's steel erection crew working without fall protection as they put up the structural steel for

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<sup>1</sup> On January 28, 1997 the remedial procedures described by Brown were implemented in the case of another contractor whose work was deemed inadequate by Fleming, and who had not submitted an identifiable safety program. Fleming set up a three way meeting between the contractor, Fleming and the bank, during which the bank's representative was to determine whether the contractor should be kept on the job (Tr. 113-16, 124, 175).

the second floor (Tr. 58, 157, 185). Fleming asked why no fall protection was being used; the steel workers told him that tying off was not required during the erection of structural steel (Tr. 58, 83, 151, 193). Fleming relied on the expertise of the steel workers (Tr. 193-94); he testified that he was unaware that fall protection requirements may become applicable to steel erection where work areas are above 25 feet (Tr. 179).

### Discussion

It is clear from the record that Fleming had no contractual responsibility for ensuring the safety of Valley Welding employees. The Commission, however, has held that a non-trade employer who has no contractual responsibility over safety means and measures may nevertheless be held subject to the construction standards if, notwithstanding the restrictions of its contract, it in fact exercises control over safety programs or safety precautions. *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1991-93 CCH OSHD ¶29,828 (No. 89-1300,1992), *aff'd*, 3 F.3d 1 (1st Cir. 1993)(“*SGH*”).

In *CH2M Hill Central Inc.*, 17 BNA OSHC 1961, 1997 CCH OSHD ¶31,303 (No. 89-1712, 1997)(“*CH2M*”) the Commission found the employer, an engineering firm, was subject to the Act based on its *de facto* involvement in safety issues. The Commission specifically relied on the employer’s roll in investigating into the likelihood of a hazard arising, *i.e.* the occurrence of methane gas at the site, and its “implementation of contract specifications directed specifically toward, and with the intent of eliminating, [that] substantial safety hazard . . .” *Id.* at 1972.

In *Foit-Albert Associates*, 17 BNA OSHC 1975, \_\_ CCH OSHD ¶ \_\_ (No. 92-654, 1997), the Commission refused to extend its holdings in *SGH* and *CH2M* to non-trade employers who did not exercise substantial supervision over matters of safety. In *Foit-Albert Associates* the Commission ruled that such an employer’s mere recognition of hazards created by another contractor and expressions of concern over the implementation of safety measures did not rise to the level of supervisory responsibility.

It is clear that Fleming had nothing resembling the “global” responsibilities for determining the presence of hazards or developing and implementing safety practices that was found in *CH2M*.<sup>2</sup> The record establishes that Fleming had no responsibility for or authority to direct the safety programs of the contractors whose activities it coordinated. Fleming’s duties were limited to ascertaining that each

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<sup>2</sup> The Secretary suggests that if a construction manager, in order to avoid a general contractor’s liabilities, does not take on the responsibilities of a general contractor, no one will be responsible for overseeing the health and safety of employees on the work site (Tr. 188-89). This judge notes that the immediate employer remains responsible for assuring the safety of its employees despite the presence, or absence, of a general contractor. In this case, the victim’s employer, Valley Welding, Inc. was cited for the same violations alleged against Fleming (Exh. R-17).

contractor had a safety program, and coordinating those programs; there is no evidence that Fleming was delegated, or took on any role in investigating into the hazards to which the contractors' employees might be exposed, or in determining the content of the contractor's safety programs. The only time Fleming took an active part in directing the abatement of a hazard, was to install perimeter protection to be utilized by a number of contractors, at the request of the concrete contractor. Such action was consistent with his role as a coordinator.

The limitations of Fleming's role in safety matters is demonstrated by the bank's employment of an OSHA safety consultant, John Hardardt. Hardardt, not Fleming was responsible for ascertaining whether the banks contractors were in compliance with OSHA and with the safety provisions of their contracts. Although Hardardt reported problems to Fleming, he was not accountable to Fleming; Fleming was merely a conduit, relaying Hardhart's concerns, as a representative of the bank, to the contractors.

The evidence establishes that Fleming did not exert substantial supervision over matters of safety for Valley Welding's Bank of Durango work site, and is not, therefore, subject to the provisions of the Act cited here.

### **ORDER**

1. Citation 1, items 1 and 2, alleging violation of §§1926.21(b)(2) and 1926.105(a), respectively, are VACATED.

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James H. Barkley  
Judge, OSHRC

Dated: