Secretary of Labor, Complainant, v. Summit Contractors, Inc., Respondent.	OSHRC Docket No. **98-1015**

Appearances:

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For Complainant

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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Summit Contractors, Inc. (Summit), contests a serious and a repeat citation issued to it by the Secretary on June 9, 1998. The citations followed OSHA's June 2, 1998, inspection of a large apartment complex under construction in Savannah, Georgia. The Secretary alleges that Summit violated standards applicable to trenching safety, fall protection, fire prevention, and machine guarding.[1]

The Secretary asserts that Summit, as the general construction contractor, failed in its duty to oversee the safety of the jobsite. The asserted violations were created by Summits's subcontractors and only the subcontractors' employees were exposed to the violative conditions. Summit moved for summary judgment, asserting that as a matter of law the general contractor had no responsibility for the alleged violations. Finding that unresolved factual matters would bear on resolution of the issues, the undersigned denied Summit's motion for summary judgment on October 15, 1998.

[1] The Secretary withdrew Item 6 of Citation No. 1, the alleged violation of 1926.651(k)(1). She also amended the classification of item 1 of Citation No. 2 from repeat to serious and renumbered it as serious item 8 of Citation No. 1 (Stipulation No. 15).

Pursuant to Commission Rule 61, the Secretary and Summit then submitted this case to the undersigned on the record of stipulated facts and the exhibits attached to Summit's motion for summary judgment and to the Secretary's motion in opposition.[2]

Procedural Background

The case presents the issue of whether Summit, a non-creating, but controlling general contractor, violated the alleged safety standards. As the undersigned stated in denying the Motion for Summary Judgment:

> Summit argues that "[its superintendents'] normal job responsibilities did not include *continuous* inspections of the job site to ensure subcontractor compliance with OSHA" (*emphasis added*). In *Anning-Johnson Co.,* 4 BNA OSHC 1193 (No. 3694 & 4490, 1976) and *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185 (No. 1275, 1976) the Commission articulated the position that:
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> > The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors . . . Thus, we will hold the general contractors responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.
> > *Id,* 4 BNA OSHC at 1188.
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> In the long line of cases since *Anning-Johnson* and *Grossman Steel*, the Commission has not required a general contractor to conduct continuous inspections of the subcontractor's work.
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> Under this precedent, however, a general contractor may have some responsibility to seek to have worksite hazards corrected, if it was aware of the hazards or could reasonably be expected to have detected them. Many facts may bear on the issue of reasonableness. These may include the manner, frequency or extensiveness of an employer's efforts to monitor the worksite; the difficulty an employer might have had in discovering the alleged hazards; or the length of time the hazards existed. Because there are insufficient facts to weigh the application of the multi-employer worksite policy in the specific circumstances of this case, it is not possible to assess the validity of Summit's legal arguments relating to the policy.

[2] After submission of their briefs, it became clear that the parties disagreed on what each considered to be the evidentiary record. Summit was permitted to supplement its submissions with the affidavits of Jim Roberts, the jobsite superintendent, and Carroll Reynolds, his assistant, together with an aerial photograph of the jobsite. Summit rejected the suggested option of rescheduling the hearing.

The parties' respective positions remain those they argued in their summary judgment pleadings. They have presented additional facts, and the case is ready for decision. For the reasons discussed *infra*, it is determined that (1) the so-called multi-employer worksite doctrine applies to Summit, and (2) the Secretary has failed to present evidence which establishes all elements of her burden of proof.

Facts

The parties filed fifteen numbered stipulations. The following eleven paragraphs are excerpted from those stipulations or, where noted, from other evidence of record:

1. Summit was the general contractor for a large apartment complex under construction at 450 Al Henderson Boulevard, Savannah, Georgia, known as Henderson Apartments (Stips 1, 2).

2. Summit contracted the actual construction of the apartments out to independent subcontractors. These subcontractors were separate employers who hired, paid, and directed their own employees to do the actual construction work (Stip 4).

3. Summit employed two full time employees on the Henderson project: a superintendent and an assistant superintendent. The superintendent and the assistant superintendent scheduled the subcontractor's work and made sure the subcontractors were on the job when it was time to complete their part of the project. They also scheduled building inspectors and approved subcontractor draws. Their normal job responsibilities did not include inspections of the jobsite for the express purpose of determining whether subcontractors were in compliance with OSHA standards (Stip 5).

4. Summit hired an independent safety consultant to conduct monthly inspections of the job site and to prepare a report of potential safety hazards that the safety consultant observed. Summit forwarded copies of the report to the subcontractors and requested that they correct such hazards. In addition, if Summit's superintendent personally observed a hazard during the course of his normal duties, he would contact the responsible subcontractor and request that the subcontractor correct the problem (Stip 6).

5. Over the approximate 5 week period preceding the OSHA inspection, Summit's superintendent had contact with the subcontractors concerning safety. The contacts included the

memoranda dated April 22, 1998 ("Summit has gotten very serious about safety issues and to insure that everyone on the job site also takes it serious, Summit will . . . [notify] of fines for first and second offense and termination on the third notice"); April 29 (reminding subcontractors that OSHA could inspect and that they should be prepared); May 4 (subcontractors advised of safety violations found by Summit's safety consultant); May 13 & 14 (subcontractor advised that guardrails were missing at stairs and windows); May 22 (subcontractors not using proper fall protection); and May 28 (notifying of a housekeeping problem and coordinating use of fall protection, handrails, and guardrails). A subcontractor detailed back its corrective action to Summit by letter dated May 13, 1998. (Exh. "A," Opp. to Sum. Judgment).

6. Summit entered into written subcontract agreements with each subcontractor. The written subcontractor agreements provided that the subcontractors were responsible for compliance with OSHA and included an indemnity provision for OSHA penalties levied against Summit because of the subcontractors' violation (Stip 7).

7. Summit contracted with Lanahan Builders, Inc., to be the framing subcontractor for the Henderson Apartments complex. Summit contracted with Carolina Gypsum Floors of Charleston to be the concrete flooring subcontractor on the project. Summit also contracted with Skinner Horizontal Utilities, Inc., to be the utilities subcontractor the Henderson Apartments job. Lanahan, Carolina Gypsum Floors, and Skinner Utilities are each independent subcontractor/employers who hired, paid, and directed their own employees to perform the work specified in their contract with Summit (Stip 8).

8. The citations issued to Summit were for violations that were created by Lanahan, Carolina Gypsum Floors, and Skinner Utilities, except that serious items 2a, 2b, 3a and 3b were created by some other unknown subcontractors working on the Henderson Apartment project (Stip 9).

9. The OSHA inspection took place between 10:00 a.m. and 4:00 p.m. The conditions specified were detected throughout that time period. The parties stipulate that if Summit's superintendent had inspected these areas of the worksite for the express purpose of determining whether subcontractors were in compliance with OSHA standards, the conditions were sufficiently obvious that he would have detected such conditions (Stip 10).

10. Summit does not continuously inspect the work site to detect subcontractor violations, because Summit disputes that it has a duty under the Act to ensure subcontractor compliance (Stip 14).

11. The Henderson Apartment project extended approximately one half mile from end to end. On June 2, 1998, almost all the work that was being done was on the north end of the project. The conditions which OSHA cited on June 2 were at the south end of the project. The superintendent asserted that he had not previously observed the violative conditions (Roberts aff. ¶ 4).

Discussion

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The parties stipulate that the standards apply, thus establishing element (a) of the Secretary's proof. They also stipulate that the subcontractors did not comply with the standards, and that the subcontractors' employees were exposed to the hazards. Whether these stipulations may be a basis to establish (b) and (c) of the Secretary's proof depends upon operation of the *Anning-Johnson* multi-employer worksite doctrine.

The Multi-Employer Worksite Doctrine Applies

The undersigned is required to follow Review Commission precedent. However, "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission has generally applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.,* 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds,* 17 BNA OSHC 1680 (3rd Cir. 1996). Citing

Melerine v. Avondale Shipyards, Inc.,[3] 659 F.2d 706 (5th Cir. 1981), Summit argues that case precedent prohibits application of the multi-employer worksite doctrine in the Eleventh Circuit, where this case arose. The Review Commission's recent decision in *Access Equipment Systems, Inc.*, slip op. 17, n 12 (No. 95-1549, April 27, 1999) reviewed the holdings in *Melerine*, as well as two other cases decided by the Former Fifth Circuit, *Central of Georgia Railroad Co. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978), and *Southeast Contractors, Inc. v. Dunlop*, (per curiam), *rev'g* 1 BNA OSHC 1713 (No. 1445, 1974). *Access Equipment* concluded that although it was ambigious whether the Eleventh Circuit would consider itself bound by *Melerine*, the Eleventh Circuit had never rejected the multi-employer worksite doctrine in the context of the Act. Since the law of the circuit does not require the undersigned to ignore Commission precedent, the multi-employer worksite doctrine should be applied in this case. Summit's argument to the contrary is rejected.[4]

Both Summit and its subcontractors recognized that Summit controlled how the work was sequenced, whether the work was of acceptable quality, and whether it was being accomplished in a safe manner (Facts, ¶s 3-6). It is concluded that Summit had the requisite control of the hazardous areas of the worksite. Having this control brought Summit a degree of responsibility to employees who were exposed to the hazards. The subcontractors' failure to comply with the standards, as well as their employees' exposure, is charged to Summit. The Secretary has established elements (b) and (c) of her burden of proof.

General Contractor Knowledge

Finally, the Secretary must prove (d), that Summit had the requisite knowledge of the violations. She may show either that Summit knew or could have known, with the exercise of reasonable diligence, of the existence of the violative conditions. *E.g., Gary Concrete Products, Inc.*,15 BNA OSHC 1051, 1052 (No. 86-1087, 1991). The Secretary argues that Summit had constructive knowledge the violations. When a general contractor's supervisory authority and

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[3] *Melerine*, a private tort case (not an enforcement action of the Secretary's), was submitted to the Former Fifth Circuit Court before (but decided *after*) the October 1, 1981, division of the Circuits.

[4] Also rejected is Summit's contention that the multi-employer worksite doctrine violates § 4(b)(4) of the Act. Section 4(b)(4) supports an opposite conclusion from that which Summit suggests. Congress intended for private rights to be *unaffected* by the Act.

control over the worksite gives rise to safety responsibilities for its subcontractors, the test of knowledge is one of reasonableness. *Grossman Steel, supra* at 1185; *Summit Contractors, Inc.*, 17 BNA OSHC 1854 (No. 96-55)(ALJ). Reasonableness is fact based and takes into consideration the relative responsibility of the various actors on the multi-employer worksite. *See Flint Engineering & Constr. Co.,* 15 BNA OSHC 2052, 2054-56 (No. 90-2873, 1992) (distinguishing responsibility of an employer which created and controlled the specific hazard from a non-creating/controlling employer). Summit did not create the hazard, expose its employees, or control the discrete hazard. It controlled the overall worksite by reason of its supervisory authority.

Summit had an obligation to inspect the work area, to anticipate hazards, and to take measures to prevent the occurrence of hazardous conditions. Summit's correspondence to and from its subcontractors during the weeks before the inspection shows that, whatever its legal position now, Summit was active in fulfilling this safety role.

A general contractor's constructive knowledge is not established by the mere showing that violations occurred on the worksite. Although the parties stipulated that OSHA "detected" hazards between 10:00 a.m. and 4:00 p.m. on June 2, 1998, and that Summit could have "detected" the cited conditions "which were sufficiently obvious" "had he inspected these areas of the worksite for the express purpose of determining whether subcontractors were in compliance with OSHA standards" (Facts ¶ 9), too much remains unknown. The record does not disclose whether the violative conditions were in plain sight (although "detectable"), whether they were momentary aberrations or had existed for a period of time before being observed by the OSHA inspector, whether Summit had or should have had a forewarning of potential problems, or any like information related to the reasonableness of "detecting" the violations. The undersigned cannot speculate on the existence of such facts. Weighing the facts presented, it is determined that the Secretary failed to establish the fourth element of her proof.

The violations alleged in Citation No. 1, as amended, are vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed.R.Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that:

1. Item 1 (§ 1926.100(a)); item 2a (§ 1926.152(e)(1)); item 2b (§ 1926.152(e)(4)); item 3a (§ 1926.152(g)(9)); item 3b (§ 1926.152(g)(11)); item 4 (§ 1926.307(f)(3)); item 5 (§ 1926.651(j)(2)); item 6 (§ 1926.651(k)(1) -- withdrawn); item 7 (§ 1926.652(a)(1)); and item 8 (§ 1926.1051(a) -- classification and item number amended) are vacated.

NANCY J. SPIES
Judge

Date: May 13, 1999