Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **99-1713**
	:	
Homes by Bill Simms, Inc.,	:	**EZ**
Respondent.	:	

Appearances:

Patrick L. Depace, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Gary W. Auman, Esquire
Dunlevey, Mahan & Furry
Dayton, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Homes By Bill Simms, Inc. (Simms), contests a seven-item citation issued by the Secretary on September 1, 1999. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer Sam Merrick on August 23 and 24, 1999, at three of Simms' residential construction sites in Springboro, Ohio.

The Secretary alleges Simms committed serious violations of the following construction standards:

Item 1: § 1926.20(b)(1) for failure to initiate and maintain an accident prevention program;

Item 2: § 1926.20(b)(2) for failure to have a designated competent person make frequent and regular inspections of the worksite;

Item 3: § 1926.451(a)(3) for failure to erect, dismantle, or alter scaffolds under the supervision of competent persons;

Item 4: § 1926.451(g)(1) for failure to ensure that employees on scaffolds more than 10 feet above a lower level were protected from falling;

Item 5: § 1926.454(a) for failure to train employees in scaffold hazards;

Item 6: § 1926.501(b)(13) for failure to protect employees engaged in residential construction from fall hazards; and

Item 7: § 1926.503(a)(2) for failure to ensure that each employee has been trained, as necessary, by a competent person.

The Review Commission designated this case as an E-Z Trial case. Simms stipulated to jurisdiction and coverage (Stipulations 1 & 2). A hearing was held in this matter on January 14, 2000. Simms asserts that it lacked sufficient control over its subcontractors to be held liable under the multi-employer worksite doctrine. Simms also asserts that it lacked knowledge of the existence of any violations committed by its subcontractors' employees. The parties have filed post-hearing briefs. For the reasons set out below, items 1 through 7 are vacated.

Background

The parties agreed to eleven stipulations which establish the following (Stipulations 4 through 11):

Simms is a contractor in residential construction. Simms had contracted with several subcontractors to construct houses in the Stone Ridge subdivision in Springboro, Ohio. On August 22 and 23, 1999, OSHA Compliance Officer Sam Merrick inspected Simms' worksite in the Stone Ridge subdivision and observed the subcontractors' employees committing several violations of OSHA's construction standards. The subcontractors created all of the hazardous conditions observed by Merrick. The contracts between Simms and its subcontractors governing their work at the Stone Ridge subdivision do not assign responsibility for safety on the worksite.

At the hearing, more details emerged regarding Simms' business operations. Simms employed six people at the time of the inspection, four of them being family members. The president of the company is Bill Simms. One of his sons, Michael, is the vice-president and his

other son, Alex, visits jobsites when called by the subcontractors. Bill Simms' wife Elizabeth helps with the paperwork. An "office lady" helps with the payroll and office duties. Another employee, no longer with the company at the time of the hearing, "answered phones and kind of ran errands and stuff" for Simms (Tr. 81-82). None of Simms' employees engage in any of the construction work or perform any labor on the construction site (Tr. 106).

Simms builds custom homes, generally completing fifteen to twenty homes a year (Tr. 79, 83). In most instances, the customer has his or her own lot and blueprints with design specifications already complete. Occasionally, Simms will arrange for the customer to meet with an architect to design the house (Tr. 79-80).

Simms contacts the needed subcontractors, who submit bids for the project. It selects the subcontractors based on availability and price (Tr. 84, 87). Simms applies for the initial building permit. The subcontractors obtain all further permits required throughout the construction of the house. Simms supplies the materials needed for the construction of the house (Tr. 87).

On August 23, 1999, Compliance Officer Merrick was driving on Route 73 when he noticed a residential house under construction. Merrick observed a man working on the roof who was not using fall protection. He initiated an inspection during which he discovered that the man on the roof was an employee of D & R Construction, the exterior work subcontractor contracted by Simms for that house (Tr. 11-12). During his inspection, the compliance officer noticed another Simms house under construction nearby. Sam Rosengarten Construction was the subcontractor working on that house. Merrick observed Rosengarten's employees committing several violations of OSHA's scaffolding standards (Tr. 16).

Merrick contacted Simms by telephone that day and arranged to meet with the contractor. On August 24, 1999, Merrick met with Bill and Alex Simms in the Stone Ridge subdivision. During the meeting, Merrick observed a third Simms home under construction. He and Alex Simms drove over to the house and met with David Wise, of David Wise Construction, who was the subcontractor for that house. Merrick observed Wise's employees committing violations of several safety standards (Tr. 24-30).

As a result of Merrick's inspection, the Secretary issued the instant citation. The Secretary also issued citations to each of the three subcontractors encountered by Merrick during his inspection of the homes being built by Simms (Tr. 68).

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

> 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).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Simms concedes that the cited standards apply to the cited conditions and that its subcontractors committed the violations as alleged by Merrick (Stipulations 9 & 11). Simms argues that it lacked the requisite supervisory authority over its subcontractors to render it liable under the multi-employer worksite doctrine. The Secretary counters that Simms had the requisite supervisory authority over its subcontractors; Simms merely chose not to exercise its authority.

Multi-Employer Worksite Doctrine

The Review Commission first articulated the multi-employer worksite doctrine in the companion cases of *Anning-Johnson Co.*, 4 BNA OSHC 1193 (No. 3694 & 4409, 1976), and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 1275, 1976). In *Grossman Steel*, the Commission stated (4 BNA OSHC at 1188):

> 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.

Simms correctly observes in its post-hearing brief that "the application of the multi-employer worksite doctrine is still evolving" (Simms' Brief, p. 8). A jurisdictional split exists with regard to the application of the multi-employer worksite doctrine. *See IBP, Inc. v. Herman,* 144 F. 3d 861, 866, fn. 3 (D. C. Cir. 1998).

The Sixth Circuit Court of Appeals, within whose jurisdiction this case arises, held in *R.. P. Carbone v. OSHRC,* 166 F. 3d 815, 818 (6th Cir. 1998):

> There is a presumption that a general contractor has sufficient control over its subcontractors to require them to comply with safety standards. *Secretary of Labor v. Gil Haugan,* 1979 WL 8537, *2 (O.S.H.R.C.). Thus, a general contractor is liable for violations it should reasonably have detected and abated, even when its own workers were not exposed to the violations. *Secretary of Labor v. Knutson Construction Co.,* 1976 WL 61722, *3 (O.S.H.R.C.).

The Review Commission addressed the issue of "sufficient control" in *Fleming Construction Inc.,* 18 BNA OSHC 1708 (No. 91-0017, 1999).[1] In *Fleming,* the Review Commission decided that a construction manager for a building construction project was not liable for OSHA violations committed by employees of the project's steel erection subcontractor. The Commission held that Fleming was not engaged in construction work within the meaning of § 1910.12. After determining that Fleming had overall contractual authority for all aspects of the project management, the Review Commission found that Fleming lacked authority to specifically direct or control the actual performance of the construction work.

The Review Commission stated (*Fleming,* 18 BNA OSHC at 1712-1713):

> 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

[1] *Fleming* does not directly address the multi-employer worksite doctrine, but its discussion of contractor liability resulting from supervisory authority over the worksite is relevant to the application of that doctrine.

> the Commission has found the construction standards applicable . . . . [T]here 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 . . . . Moreover, Fleming was not empowered to compel compliance by contractors even in those areas for which it had contractual responsibility.

The record establishes that Simms, like Fleming, lacked "those indicia of direction or control" that would demonstrate Simms had supervisory authority over the construction of the houses. It is helpful to analyze the record within the guidelines set out in an OSHA Directive, CPL 2-0.124 ("Multi-Employer Citation Policy"), issued by the Secretary on December 12, 1999. While OSHA CPLs and other directives are not binding on the Commission, the Commission has looked to them in the past as aids in interpreting standards. *Drexel Chemical Company*, 17 BNA OSHC 1908, 1910, fn. 3 (No. 94-1460, 1997). It is noted that the Secretary issued CPL 2-0.124 after she issued the citation to Simms in September 1999. The CPL is used here only because it provides a useful framework within which to examine the extent of Simms' authority on the Stone Ridge subdivision worksites.

The CPL sets out a two-step process to determine whether an employer should be cited under the multi-employer worksite policy. The first step is to determine whether the employer in question was a creating, exposing, correcting, or controlling employer. Only if the employer falls into one of these categories can it be cited under the policy. Step two is to determine whether the employer met its obligations with respect to OSHA requirements. CPL 2-0.124, ¶ X.A.1 and 2.

The Secretary has stipulated that Simms was not a creating or exposing employer. Although the Secretary contends that Simms had the authority to correct hazards on the worksites, Simms does not fit the definition of a correcting employer within the meaning of the CPL. Paragraph X.D.1 of the CPL defines "correcting employer" as:

> An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.

Simms did not install or maintain any safety or health equipment or devices, nor perform any other physical labor on the worksites.

The CPL lists four types of control that result in a controlling employer categorization: (a) control established by contract, (b) control established by a combination of other contract rights, (c) architects and engineers, and (d) control without explicit contractual authority. CPL 2-0.123, ¶ X.E.5.a-d. Simms did not exercise any of these types of control.

Control Established by Contract

The CPL provides (Paragraph X.E.5.a, *emphasis in original*):

> In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

The Secretary stipulated that Simms had no specific contract rights to control safety (Stipulation #10).

Control Established by a Combination of Other Contract Rights

Paragraph X.E.5.b of the CPL provides:

> Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.

Simms' contracts with its subcontractors do not give Simms broad responsibility over the residential sites. When Simms accepts a subcontractor's bid for a project, the bid form is accepted as the contract to do the work. Nothing in the contracts addresses dispute resolution, schedules, or construction sequencing (Exhs. R-2 and R-3). Michael Simms testified that

Simms does not set a deadline for completion of the work "[b]ecause we don't have control over our subcontractors to give any kind of time frame on completing the house . . . ." (Tr. 80).

The CPL gives examples of different situations in illustration of its guidelines. Example 10 states (Paragraph X.E.5.b(2)):

> Employer ML's contractual authority is limited to reporting on subcontractor's contract compliance to owner/developer O and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to O, ML does not exercise any control over safety at the site.
>
> **Analysis: Step 1:** ML is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and ML did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights) constitute an exercise of control over safety.

Simms makes "progress reports," which Michael Simms described as his father or his brother going to a worksite in response to a telephone call from a subcontractor for a specific purpose (Tr. 82). When a subcontractor finishes its work on a project, Simms submits a draw request to the financial institution handling the homeowner's loan. The financial institution sends out an inspector to look at the subcontractor's work, and the homeowner must sign an affidavit stating that the work is complete (Tr. 108). Simms makes no safety inspections and does not report on safety compliance to any other entity.

Simms' contractual authority is not broad enough to encompass worksite safety. The company's contract rights are limited and do not include aspects of the worksite likely to affect safety.

<u>Architects and Engineers</u>

Paragraph. X.E.5.c provides:

> Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above [in the section regarding control established by a combination of other contract rights].

This section is essentially the same as the previous section, addressing control established by a combination of other contract rights, applied to architects and engineers. As discussed in the previous section, Simms lacks the breadth of involvement in its projects sufficient to categorize it as a controlling employer.

Control Without Explicit Contractual Authority

The final type of control considered by the CPL is that exercised without explicit contractual authority (Paragraph X.E.5.d):

> Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site[.]

The record establishes that Simms exercises limited control over its subcontractors. Subcontractors sometimes contract the work to another subcontractor without Simms' knowledge or approval (Tr. 100). Simms does not perform random inspections of its worksites and only appears at a worksite when summoned by a subcontractor. Simms has no knowledge as to which subcontractor will be on a site on any given day, or what the subcontractor will be doing (Tr. 103). Once Simms arranges for the subcontractors to build a house, its role is limited to responding to subcontractors' specific questions and submitting draw requests. When at a worksite, Simms does not check to see that the work is consistent with the design specifications (Tr. 118). Simms' approval is not required for a subcontractor to receive payment (Tr. 119-120).

Simms generally visits its worksites once or twice a week (Tr. 117). It is not a continual, or even a daily, presence on its sites, and its visits are never related to safety. Simms does not coordinate the sequencing or the progress of the work. No supervisory relationship exists between Simms and the subcontractors. Given its limited role at its worksites, Simms could not have reasonably detected and abated safety violations. Simms has rebutted the presumption that it had sufficient control over its subcontractors to require them to comply with OSHA safety standards.

The Secretary has failed to establish that Simms was liable for the safety violations committed by its subcontractors under the multi-employer worksite doctrine. All items of the

citation are vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Items 1 through 7 of Citation No. 1 are vacated, and no penalties are assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: February 17, 2000