Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **97-1946**
	:	
Universal Construction Company, Inc.,	:	**(EZ)**
Respondent.	:	

Appearances:

Rachel Parsons, Esquire
Office of the Solicitor
U. S. Department of Labor
Kansas City, Missouri
For Complainant

Roy Bash, Esquire
Shughart, Thomson & Kilroy
Kansas City, Missouri
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Universal Construction Company, Inc. (Universal), contests a citation issued to it by the Secretary on October 16, 1997. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer David Maloney on October 6, 1997. Item 1a of the citation alleges a serious violation of § 1926.453(b)(2)(iv) for failure to ensure that employees stand firmly on the floor of the basket of an aerial lift. Item 1b of the citation alleges a serious violation of § 1926.453(b)(2)(v) for failure to ensure that employees wear a body belt and attached lanyard when working from an aerial lift.

The Secretary and Universal submitted this case to the undersigned on stipulated facts and exhibits.[1] The issue that is the crux of this case is whether Universal, as a general contractor, is responsible for safety violations created by a subcontractor under the multi-employer worksite doctrine.

Stipulated Facts

The Secretary and Universal stipulated to a series of facts regarding this case. The following is developed from the pertinent stipulated facts.

[1] Joint exhibit Nos. 1 through 11 are admitted and made part of the record.

Universal is a general contractor engaged in the construction business. In December 1996 Universal contracted with UMB Bank to act as the general contractor for the construction of a branch bank facility in Independence, Missouri. Ray Jeffries acted as Universal's field manager and Ken Sparks as its foreman on the project. Both men were present at the construction site on October 6, 1997.

Universal entered into a subcontract with A. Zahner Sheet Metal Company (Zahner) to perform specified portions of the work on the project. Jay Jay Yaws acted as foreman for Zahner. He was present at the worksite on October 6, 1997.

Zahner's employees used an aerial lift to perform their work. The lift was on the construction site from September 25, 1997, through October 6, 1997. On October 6, 1997, Compliance Officer Maloney observed and videotaped a Zahner employee working from an aerial lift. The employee was not attached to the aerial lift with a body belt and lanyard, in violation of § 1926.453(b)(2)(v). The employee climbed from the basket of the aerial lift onto the roof of a nearby structure, in violation of § 1926.453(b)(2)(iv). This violative conduct could have been observed by both Jeffries, Universal's field manager, and Yaws, Zahner's foreman.

No Universal employee was exposed to hazards created by the violative conduct. Zahner created the hazards as the result of its employee's violative conduct, and only its employee was exposed to the hazards.

Universal supervised the quality and quantity of work performed by the subcontractors on the construction site. Universal's safety manual states (Exh. C-11, p. 58):

> Employees shall always stand firmly on the floor of the work platform, and shall not sit or climb on the edge of the basket or guardrails as a work position.
> . . .
> A safety belt and lanyard shall be worn and attached to the basket while working from an extendable or articulating boom lift.

Universal's field manager Jeffries and foreman Sparks had the authority to correct or direct the subcontractors to correct any safety hazards or violations. Jeffries was in a position to observe the actions of Zahner's employees. Jeffries had the authority to direct Zahner's foreman Yaws to correct the hazards of working in the lift without a belt and lanyard and climbing out of the lift onto the roof area.

The Citation

The Secretary alleges that Universal committed serious violations of §§ 1926.453(b)(2)(iv) and (v), which are designated as items 1a and 1b, respectively, in the citation. The cited standards provide:

> (iv) Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.
>
> (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

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 stipulated that the cited standards apply to the cited conditions, that Zahner was in noncompliance with the standards' terms, that Zahner's employees had access to the violative conditions, and that both Universal and Zahner knew or, with the exercise of reasonable diligence, could have known of the violative conditions. The Secretary contends that, under the multi-employer worksite doctrine, she has established that Universal was in serious violation of §§ 1926.453(b)(2)(iv) and (v).

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:

> 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.

In a long line of cases since *Anning-Johnson* and *Grossman Steel*, the Commission has reaffirmed and expanded the multi-employer worksite doctrine. The doctrine has been the controlling legal precedent in OSHA cases for over twenty years. It has been adopted by the Eighth Circuit, in which the present case arises. *See Marshall v. Knutson*, 566 F.2d 596 (8th Cir. 1977).

Universal argues that the multi-employer worksite doctrine is "an unreasonable, arbitrary and capricious interpretation of the Act," and that the charges against Universal should be dropped for this reason (Universal's Brief, p. 1). The gist of Universal's argument is that the Commission strayed from the dictates of the Act, as promulgated, and ignored the Act's legislative history. Nothing in the legislative history or in the plain language of the Act supports the imposition of liability on employers who did not create the violative conditions and whose employees are not exposed to the violative conditions.

Universal concludes that (Universal's Brief, pp. 11-12):

> The primary purpose of the Act is to require employers to provide their own employees with safe working conditions . . . [T]he Review Commission's change in position on the doctrine without justification demonstrates that the Secretary's current interpretation of the statute as imposing such liability is arbitrary and capricious.

The undersigned could not ignore Commission and court precedent even if she were so inclined, which she is not. The multi-employer worksite doctrine applies to this case.

Universal argues that, if the multi-employer worksite doctrine is not rejected, then it does not apply in the specific circumstances of this case. This is so, it contends, because the doctrine should not be imposed on the basis of who controls the worksite.

Universal is again at odds with the current state of OSHA law. Control is precisely the factor that determines liability under the doctrine.

> An employer is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.

Centenex-Rooney Construction Co., 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

Since Universal stipulated that Zahner knew or, with the exercise of reasonable diligence, could have known of the violative conditions, it must be presumed that Universal would reasonably be expected to detect the violations. This being said, "control and preventability are the keys to the applicability of the doctrine." *IBP, Inc.*, 17 BNA OSHC 2073, 2075 (No. 93-3059, 1997). "Hazardous conduct by another employer's employee clearly is not beyond the reasonable control of all but the actual employer." *Id.*, 17 BNA at 2076.

The Commission in *IBP* directly addresses the issue of control raised by Universal (*Id.* at 2074-2075) (footnote omitted):

> Under Commission precedent:
>
> > [A]n employer is responsible for [the] violations of other employers [to which the other employers' employees alone are exposed] where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. Liability under [this] test does not depend on whether the [cited] employer actually created the hazard or has the manpower or expertise to itself abate the hazard.
>
> *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1763, 1980 CCH OSHD ¶ 24,636, p. 30,220 (No. 76-4754, 1980) (emphasis added) (case cite omitted). The key to the Commission's holding in *Red Lobster* was the recognition that "[t]he safety of all employees can best be achieved if each employer at multi-employer worksites . . . abate[s] hazardous conditions under its control . . . ." *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1689, 1979 CCH OSHD ¶ 23,830, p. 28,909 (No. 76-1408, 1979). An employer who has control over an entire worksite must take whatever measures are "commensurate with its degree of supervisory capacity." *Marshall v. Knutson*, 566 F.2d 596 (8th Cir. 1977).

Universal stipulated that it had control over the construction site and had the authority to direct its subcontractors to abate safety hazards and violations. The Secretary has established serious violations of §§ 1926.453(b)(2)(iv) and (v).

Universal stipulated that it was found liable for the alleged violations, the Secretary's proposed penalty was appropriate. Accordingly, the Secretary's proposed penalty of $1,500 is assessed.

FINDINGS OF FACT AND 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 that:

Items 1a and 1b are affirmed and a total penalty of $1,500 is assessed.

NANCY J. SPIES
Judge

Date: March 18, 1998