SECRETARY OF LABOR,

Complainant,

v. OSHRC Docket No. 96-0898

DAVID WEEKLY HOMES,

Respondent.

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

On June 10, 1996, David Weekley Homes ("Weekley") was issued a willful citation stemming from the inspection of a worksite located at the Horizon Pointe development ("Horizon Pointe") in Westminster, Colorado. Weekley is a general contractor who was engaged in the construction of residential homes at Horizon Pointe. At the time of the inspection, two houses were in the process of being framed. For this part of the project, Weekley had contracted with Dave Axt Construction ("Dave Axt") to serve as the general framing contractor. Dave Axt, in turn, had contracted with Axt Construction to serve as project manager, and three subcontractors Genuine Construction, Handyman Hank, and Leon Siding to perform the actual framing work.

Under the citation, the Secretary alleged six willful violations of various construction standards relating to safety programs, hard hats, scaffolds, fall protection, and ladders. A total penalty of $221,500 was proposed. All but one of the alleged violations were created by one or more of the three framing subcontractors, none of whom had a contractual

relationship with Weekley.[1] None of Weekley's own employees were exposed to the alleged hazards.

The Secretary argued that as general contractor, Weekley was the "controlling employer" at the worksite and therefore, could be held responsible under the multi-employer worksite doctrine for the safety of all onsite employees, including those of the framing subcontractors. In response, Weekley claimed that its subcontractors were solely responsible for the safety of their own employees. Weekley also challenged the validity of the multi-employer worksite doctrine and argued that the Secretary had failed to prove the company had knowledge of the cited conditions.

Judge Sidney Goldstein affirmed all six of the alleged violations. He concluded that Weekley had "controlling authority" over the subcontractors' employees at Horizon Pointe, noting that "[t]he duty of a general contractor is not limited to the protection of its own employees from safety hazards, but...extends to the protection of all employees engaged at the work site." The judge also found that Weekley had knowledge of the cited conditions, stating that "[i]f the violations were seen by the compliance officer, they surely were in view of Weekley's representatives." However, the judge characterized the violations as serious, not willful, finding that Weekley's belief that "the various subcontractors should be the only employers concerned with [the] safety of their workers" was not, by itself, evidence of a total disregard for employee safety. In recognition of a disparity between the penalties proposed for Weekley and those assessed of the "creating" subcontractors for the same violations, the judge assessed for each serious violation a penalty of $1,500, for a total penalty of $9,000.

On review, Weekley has again disputed the validity of the multi-employer worksite doctrine, as well as the finding of knowledge on Weekley's part.[2] However, in deciding the

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[1] Weekley was considered the "creating" employer of the safety program violation set forth under the first citation item.

[2] Weekley also filed a motion for oral argument. However, upon review of the record, the judge's decision, and the briefs, we conclude that oral argument is unnecessary.

current case, we need not reconsider the applicability or validity of the doctrine. Even if we assume that under Commission precedent, the multi-employer worksite doctrine has been properly applied to Weekley, we find that the Secretary has not met her burden of proving the alleged violations, as discussed below.

SAFETY PROGRAM VIOLATION

The Secretary alleged that Weekley violated § 1926.20(b)(1) by failing to implement its safety program at Horizon Pointe.[3] Specifically, the Secretary claims that Weekley failed to "inspect the jobsite regularly to provide a safe and healthful workplace for subcontractor employees." Weekley does not deny that it never conducted safety inspections at Horizon Pointe, but maintains that it was not Weekley's responsibility to ensure the safety of its subcontractors' employees. For the following reasons, we vacate this item.

First, there is no question that Weekley had only a limited presence at Horizon Pointe. Four Weekley employees were assigned to the project: Matt Clark, Jim Wilson, and Robert Horn, all of whom worked as job site superintendents, also known as "builders;" and Mark Almquist, a project manager. None of these employees performed any construction work. In addition to managing other Weekley projects, Almquist was primarily responsible for supervising the builders assigned to Horizon Pointe.[4] He visited Weekley's trailer at the development "probably every day, usually...stopping at least a couple times," but was not required by Weekley to perform any type of inspections on these occasions.

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[3] The cited provision requires as follows:

> **§ 1926.20 General safety and health provisions.**
> (a) *Contractor requirements.*
> . . . .
> (b) *Accident prevention responsibilities.*
> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

[4] Almquist also testified that he had the authority to remove any employee engaging in unsafe work practices from the worksite and to withhold payment from Weekley's subcontractors.

The three builders were primarily responsible for scheduling and coordinating the various subcontractors, like Dave Axt, engaged in building homes for Weekley. Like Almquist, they were responsible for other Weekley projects, but one of the builders visited the Horizon Pointe worksite at least twice a day in order to open the homes in the morning, lock them up at night, and verify that the scheduled work crews and necessary materials were present. The builders were also required to inspect a house whenever payment was due to a subcontractor in order to determine whether Weekley's specifications had been met.[5]

Secondly, the record shows that Weekley expected its onsite representatives to play a role in maintaining a safe worksite for the benefit of all employees, including those of other employers, notwithstanding Weekley's claims that it was not responsible for the safety of its subcontractors' employees. In its safety program, Weekley acknowledged that its builders were not a constant presence on any of its worksites, but stated that "[w]hen a builder is on the job site he/she should be alert to observe job site hazards and to require corrective action from the appropriate subcontractor." Weekley also required builders to seek corrective action from the appropriate subcontractor for hazards about which Weekley was notified. To enable its builders to better recognize worksite hazards, Weekley provided them with training on the requirements of OSHA's construction standards, an effort which was consistent with the company's safety policy: "It is the obligation of all employees to be knowledgeable of the [safety] standards established by [federal, state and local] agencies and to implement the rules and regulations contained therein on projects under their direction."

In arguing that Weekley was responsible for conducting "regular" safety inspections at Horizon Pointe, the Secretary cites to additional language from Weekley's safety program found under a section entitled "Job Site Safety:"

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[5] At the hearing, the Secretary seemed to place significance on the fact that Weekley's framing specifications required builders to walk through a house a minimum of three times a day in order to "answer any questions and spot potential problems that can be corrected before the [framing] job is complete." However, according to the record, these walk-throughs were not necessarily done every day and could take place during the builder's morning and afternoon visits to the worksite.

> As general contractor, it is our responsibility to insure that outside subcontractors correct any job site hazards that we observe or that are called to our attention.

Relying on Weekley's stated position that it was not responsible for the safety of its subcontractor employees, the Secretary claims that Weekley failed to fulfill this "responsibility" at Horizon Pointe. But the Secretary has ignored evidence in the record which establishes that Weekley did, in fact, notify subcontractors when hazardous conditions were observed or brought to its attention, and that the subcontractors immediately complied with Weekley's requests for corrective action. For instance, Weekley's safety coordinator, Gary Bryant, testified that on one occasion when he was accompanying builder Robert Horn on a walk-through at Horizon Pointe, a subcontractor's employees were observed using a job-built ladder. According to Bryant, Horn promptly located the appropriate subcontractor and the ladder was destroyed.

Similarly, upon receiving inspection warrants from OSHA on two different occasions, each of which referenced potential fall hazards at Horizon Pointe, Weekley contacted the appropriate subcontractors to alert them to the problem. In fact, safety coordinator Bryant testified that he met with Dave Axt personally after receiving the second warrant (which ultimately led to the issuance of the subject citation) to "remind" him of his company's contractual obligation to comply with the Act.[6] In addition, Bryant specifically told Axt that OSHA had fall protection concerns.

Finally, in focusing solely upon Weekley's disavowal of legal responsibility for the employees of its subcontractors, the Secretary has failed to address how Weekley's actual efforts with regard to safety notwithstanding its limited presence were deficient under the terms of the standard. The Commission has stated that "[u]nder § 1926.20(b)(1), 'an employer may reasonably be expected to conform its safety program to any known duties[,]

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[6] Paragraph 11 of Weekley's contract with Dave Axt provided that Dave Axt agreed to comply with various legal and regulatory requirements, including those set forth under the Act.

and...a safety program must include those measures for detecting and correcting hazards [that] a reasonably prudent employer similarly situated would adopt.'" *Lancaster Enterp. Inc.*, 19 BNA OSHC 1033, 1034 (No. 97-0771, 2000) (citation omitted). Here, compliance officer Nelson simply testified that as general contractor, Weekley was required to do "something" under § 1926.20(b)(1) to ensure OSHA compliance on the worksite, but was unable to identify what that "something" should have been: "It would depend on the situation. Whatever it takes to verify compliance with the regulation[s] and that the employees are working safely on the job site." When asked specifically whether Weekley should have conducted safety inspections three times a day, Nelson suggested that such matters were within Weekley's own discretion: "If that's what they want to do to [e]nsure compliance, then that is their option." We find on this record that the Secretary has not shown that Weekley's conduct was insufficient, particularly in light of the combination of its limited onsite presence and actual exercise of safety responsibilities. Accordingly, we conclude that a violation of § 1926.20(b)(1) has not been established.

FALL PROTECTION TRAINING VIOLATION

Under this item, the Secretary alleged that Weekley violated § 1926.503(a)(1) by failing to "ensure" that Handyman Hank, one of the framing subcontractors working at Horizon Pointe, had developed and provided training to its employees in the recognition and avoidance of fall hazards.[7] The Secretary relies on compliance officer Nelson's testimony that Weekley builders Wilson and Horn were not familiar with the fall protection programs of any subcontractor at Horizon Pointe. According to project manager Almquist, such

[7] The cited provision requires as follows:

> **§ 1926.503 Training requirements.**
> (a) *Training Program.*
> (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

inquiries were not made because the employees of Weekley's subcontractors "were not our responsibility."

We find that the Secretary has not shown what was required of Weekley under the terms of the cited standard. Specifically, it is not clear whether the Secretary would have had Weekley simply determine whether Handyman Hank, a subcontractor with whom Weekley had no contractual relationship, had a fall protection training program, or would have required Weekley to make a more detailed inquiry in order to verify whether the subcontractor had a program that effectively covered all of the fall protection requirements set forth under Subpart M. Furthermore, the Secretary has not addressed whether "ensuring" that its subcontractor's employees had received fall protection training meant that Weekley itself was required to develop and provide such training even though such a program would not be required for its own employees, none of whom were ever exposed to fall hazards.[8] We also note that when Weekley did become aware of fall hazards, as referenced in the OSHA warrant, it addressed the problem with Dave Axt, the general framing contractor. Because the Secretary has failed to define what would have constituted compliance for Weekley under the circumstances and how Weekley's conduct was deficient, we conclude that a violation of § 1926.503(a)(1) has not been established.

SUBSTANTIVE VIOLATIONS

With regard to the remaining violations set forth under citation items 2, 3, 4a, 5a, 5b, 6a and 6b, we find that the Secretary has failed to establish knowledge on Weekley's part. The Secretary does not dispute that Weekley lacked actual knowledge of these violations,

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[8] In *Access Equipment Systems*, 18 BNA OSHC 1718, 1730, 1999 CCH OSHD ¶ 31,821, p. 46,786 (No. 95-1449, 1999), the Commission vacated a training violation cited under § 1926.21(b)(2), noting that it was unaware of any case holding a cited employer responsible under the multi-employer worksite doctrine for failing to instruct another employer's employees under § 1926.21(b)(2). However, we note that that particular citation item involved the relationship between two subcontractors on a worksite, not between a general contractor and a subcontractor as here.

but contends that Weekley could have known of the cited conditions with the exercise of reasonable diligence. However, in concluding that the violations "surely were in view" of Weekley's representatives since they were seen by compliance officer Nelson, the judge failed to consider the nature, location, and duration of these conditions. Indeed, Weekley can only be held responsible for those violations "which it could reasonably be expected to prevent or detect." *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1993-95 CCH OSHD ¶30,621, p. 42,410 (No. 92-0851, 1994); *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1899, 1991-93 CCH OSHD ¶29,854, p. 40,749-50 (No. 89-1394, 1992)*; Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1763, 1980 CCH OSHD ¶ 24,636, p.30,220 (No. 76-4754, 1980); *Gil Haugan d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004, 2006, 1979 CCH OSHD ¶ 24,105, p. 29,290 (No. 76-1512, 1979).

A review of the record reveals that most of the substantive conditions for which Weekley was cited were of brief or indeterminate duration. For instance, compliance officer Nelson observed two Handyman Hank employees working without hard hats and fall protection on the second floor of one of the houses being framed (citation items 2 and 4a), but gave no indication of how long the employees were working without these safeguards.[9]

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[9] These conditions were cited under § 1926.100(a) and § 1926.501(b)(13), respectively:

> **§ 1926.100 Head Protection**
> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.
> . . . .
> **§ 1926.501 Duty to have fall protection.**
> (a) *General.*
> . . . .
> (b)(1) *Unprotected sides and edges.*
> . . . .
> (13) *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an

(continued...)

Four additional instances of insufficient fall protection were observed by Nelson at both of the houses in question (citation item 4a), but one instance lasted no more than five minutes and the duration of the others was not clear. It is also not apparent from the record how long guardrails placed around a stairway opening[10] and a window opening at one of the houses existed in their non-compliant conditions (citation items 5a and 5b).[11] Finally, Nelson observed a damaged ladder (citation item 6b) chained to a pump jack scaffold located at the back of one of the houses, but failed to state how long the ladder had remained in this

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[9](...continued)

> alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

[10] We note that compliance officer Nelson agreed at the hearing that the condition of the guardrail in this location could be considered "latent [in] that you would have to look for [it] in order to find [it]."

[11] These conditions were cited under § 1926.502(b)(1) and (b)(2), respectively:

> **§ 1926.502 Fall protection systems criteria and practices.**
> (a) *General.*
> . . . .
> (b) *Guardrail systems.* Guardrail systems and their use shall comply with the following provisions:
> (1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.
> . . . .
> (2) Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches (53 cm) high.

location.[12] Even if Weekley had maintained a constant presence at Horizon Pointe, the Secretary has failed to show that these conditions were present for a sufficient amount of time such that, with the exercise of reasonable diligence, Weekley could have discovered their existence. *Cf. R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819-20 (6th Cir. 1998) (general contractor liable for subcontractor's lack of fall protection where condition was in plain view and lasted for two weeks); *Centex-Rooney*, 16 BNA OSHC at 2130, 1994 CCH OSHD at p. 42,410 (where conditions were in plain view and existed for a significant period of time, general contractor could have ascertained their existence through the exercise of reasonable diligence).

The two remaining conditions, set forth under citation items 3 and 6a, were of some duration, but were not obvious or in plain view such that Weekley's representatives could have known of their existence during their visits to the worksite. Compliance officer Nelson observed two employees of Leon Siding working on a pump jack scaffold without "mud sills," a type of footing which prevents the scaffold's poles from shifting in loose or wet soil (citation item 3).[13] According to Nelson, the scaffold was in place for over a day at the back

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[12] This condition was cited under § 1926.1053(b)(16), which requires as follows:

> **§ 1926.1053 Ladders**
> (a) *General.*
> . . . .
> (b) *Use.*
> . . . .
> (16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

[13] This condition was cited under § 1926.451(y)(5) which requires as follows:

> **§ 1926.451 Scaffolding.**
> (a) *General requirements.*
> . . . .

(continued...)

of one of the houses in question and was visible from Weekley's trailer, as well as from the street running along the front and side of the corner-lot house. However, based upon photographs of the scaffold which show the inconspicuous location of the missing mud sills, we are not persuaded that a Weekley representative could have readily detected this condition even if he had walked directly past the scaffold on the day in question.

Similarly, Nelson testified that a ladder which did not extend the required three feet above the second floor of one of the houses (citation item 6a) was placed just inside the front entry on two consecutive days.[14] Since only the first floor of the house was fully framed, the ladder extended above the second floor and was visible, according to Nelson, from about a block away. However, we find that the photographs submitted in support of this violation simply do not support Nelson's claims regarding the ladder's visibility, let alone the

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[13](...continued)

(y) *Pump jack scaffolds.*

. . . .

(5) All poles shall bear on mud sills or other adequate firm foundations.

In 1996, two months after the subject citation was issued, § 1926.451 was revised and subsection (y)(5) was deleted. *See* 61 Fed. Reg. 46,026, 46,078 (August 30, 1996). This requirement is currently set forth at § 1926.451(c)(2).

[14] This condition was cited under § 1926.1053(b)(1) which requires as follows:

§ 1926.1053 Ladders

(a) *General.*

. . . .

(b) *Use.* The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:

(1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

visibility of its violative condition. Accordingly, we conclude that Weekley lacked knowledge of all of the substantive conditions for which it was cited.

ORDER

For the foregoing reasons, we reverse the judge's decision to affirm Items 1 through 6 of Citation 1 and vacate the citation in its entirety.

/s/

Thomasina V. Rogers
Chairman

/s/

Stuart E. Weisberg
Commissioner

Dated: September 28, 2000

VISSCHER, Commissioner, concurring:

I join the majority in vacating the citations issued against David Weekley Homes ("Weekley") at issue in this case. I would vacate the citation alleging violation of 29 C.F.R. § 1926.20(b)(1) for the reasons given in the majority opinion. As to the other citations, while I agree with the majority that the Secretary has not proven that Weekley had knowledge of the violative conditions, I would not have reached the knowledge issue, but would hold that the cited standards do not apply.

In my dissent today in *McDevitt Street Bovis, Inc.*, Docket No. 97-1918 (September 28, 2000), I explain why, in my view, a general contractor cannot be held liable for a subcontractor's violations simply because it failed to supervise the subcontractor to ensure compliance. Unless the cited standard imposes such a duty to supervise, I do not believe the Secretary can impose the duty by invoking the so called multi-employer worksite doctrine. The standards under which Weekley was cited do not impose any such duty to supervise on the general contractor. On that basis I would vacate the citations against Weekley for its subcontractors' alleged violations of 29 C.F.R. § 1926.503(a)(1)(fall protection training), § 1926.100(a) (head protection), § 1926.501 (fall protection), § 1926.1053 (ladders), and § 1926.451 (scaffolding).

While the Commission is properly vacating the citations against Weekley, I make special note of the method of enforcement employed by the Secretary in this case. Weekley is a large national developer of residential subdivisions which maintained only a minimal presence at the cited development in Westminster, Colorado. With respect to this particular development, Weekley contracted with Dave Axt Construction to be the general framing contractor. Dave Axt Construction in turn contracted with Axt Construction to serve as project manager, and with subcontractors Genuine Construction, Handyman Hank, and Leon Siding to actually perform the framing and siding work. Following the inspection, the Secretary issued all citations in quadruplicate: one set to the subcontractor which created the alleged violative conditions and whose employees were exposed to the alleged hazards, another set to Axt Construction, still another set to Dave Axt Construction, and the contested

set to Weekley. Not only did the Secretary claim that all four employers were responsible for each violative condition, but the penalties proposed against Weekley indicate that the Secretary considers a general contractor's responsibility for a violative condition to be far greater than that of the employer who is directly responsible for the condition and whose employees are exposed to the hazard. For instance, for the failure of Handyman Hank employees to wear hardhats, Weekley was issued a proposed penalty of $49,500, while Handyman Hank received a proposed penalty of $225. For Handyman Hank's failure to install proper guardrails on an interior stairway, the proposed penalty against Weekley was $49,500, while the proposed penalty against Handyman Hank was $300. For employees of Handyman Hank using a ladder that did not extend 3 feet beyond the upper landing, Weekley's proposed penalty was $24,750, while Handyman Hank's was $300. While Leon Siding was issued a proposed penalty of $300 for using a damaged ladder, the Secretary proposed a penalty of $24,750 against Weekley for the same violation. As there is no basis in any of these standards for a general contractor's duty to supervise, there is certainly no basis for the Secretary to place far greater weight on the general contractor's duty to supervise than on the direct employer's unqualified duty to comply.

/s/
Gary L. Visscher
Commissioner

Date: September 28, 2000

SECRETARY OF LABOR,
Complainant,

v.

OSHRC DOCKET NO. 96-0898

DAVID WEEKLEY HOMES,

Respondent.

APPEARANCES:

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Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm a "Willful" citation issued to the Respondent by the Occupational Safety and Health Administration for alleged violations of a series of safety regulations relating to the construction industry. The matter arose after a compliance officer for the Administration inspected two work sites of the Respondent, concluded that it violated the safety regulations, and recommended that the citation be issued. The Respondent disagreed with the citation and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

The citation alleged (1) that the employer did not initiate and maintain a safety and health program for residential construction; (2) that employees were not protected by helmets while working where there was danger of head injury; (3) that poles of pump jack scaffold(s) were not bearing on mud sills or other adequate firm foundations; (4) that employees engaged in residential construction activities six feet or more above the lower levels were not protected from fall hazards; (5) that the employer did not provide a training program which enabled employees to recognize and minimize the hazards of falls; (6) that guardrails did not have a vertical height of 42 inches; (7) that midrails or equivalent were not provided between the top edge of the guardrail system and the walking working surface; (8) that the portable ladder's length did not extend at least three feet above the upper landing surface; and (9) that portable ladders with structural defects were not withdrawn from service, all in violation of the regulations found in 29 C.F.R. ¶1926.20(b)(1); ¶1926.100(a); ¶1926.451(y)(5); ¶1926.501(b)(13); ¶1926.503(a)(1); ¶1926.502(b)(1); ¶1926.502(b)(2); ¶1926.1053(b)(1); ¶1926.1053(b)(16), respectfully.

The material facts are not in substantial dispute and may be briefly summarized. At the time of the inspection the Respondent was engaged in the construction of two homes in the Denver, Colorado area. It acted as a general contractor subcontracting construction activity to other employing units. Framing was subcontracted to Dave Axt Construction who, in turn, selected Axt Construction as project manager, Genuine Construction and Handyman Hank as framing subcontractors, and Leon Siding as siding subcontractor. No Respondent employee was engaged in construction work.

At the hearing the compliance officer testified that he observed infractions of the regulations at the work sites and took photographs of the houses under construction. As a result of his inspections the subcontractors were issued "Serious" citations for these violations with recommended penalties in the $4,000.00 to $5,000.00 range, all of which citations were settled for substantially lesser amounts.

The Respondent received a "Willful" citation with a penalty of $221,500.00 because its representative understood that his company was not responsible for the misdeeds of other employers.

Documents in the record include the Respondent's safety rules and policies, recognizing its responsibility to insure that outside subcontractors correct any job hazards that are observed or called to its attention. In its safety program, employees are admonished that safety is the result of careful attention to all company operations by those who are directly or indirectly involved, and company builders are to be alert to observe jobsite hazards and to require corrective action.

On these factors, the Complainant's position is that the Respondent was in violation of the safety regulations despite the fact that its employees were not working at the jobsite. The Respondent disclaims responsibility for the safety infractions on the grounds that the workers were not its employees; and that the violations were created by the subcontractor whose workers were the only individuals exposed to any danger.

The question whether a contractor may be held in violation of a safety regulation although it had no employees at the jobsite has been before the Commission in the past. On this point the Commission rejected the idea that liability under the Occupational Safety and Health Act of 1970 should be based solely on the employment relationship. And in the case of *Brennan v. Occupational Safety and Health Review Commission (Underhill Construction Corporation),* 513 F.2d 1032, the court held that an employer's specific duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard. It is a duty over and above his general duty to his own employees.

General contractors normally have the responsibility and means to assure that other contractors fulfill their obligations with respect to employee safety. The Commission has stated that it will hold a general contractor responsible for safety standard violations which it could have reasonably have been expected to prevent or

abate by reason of supervisory capacity. The duty of a general contractor is not limited to the protection of its own employees from safety hazards, but it extends to the protection of all employees engaged at the work site.

While the subcontractors had authority to control their employees, the Respondent also had controlling authority over these workers. Admittedly, the violations were not created by the Respondent, and none of its workers were exposed to the dangers. However, both the Commission and the courts have held that overall responsibility for the safety of all workers on the project is in the general contractor's province.

The Respondent asserts that there was no admissible evidence of actual knowledge of the violations. However, the inspector observed and photographed the work sites and spoke with company representatives. The evidence also discloses that the builders visited each work site a minimum of twice daily. Also under company rules they were required to look for safety infractions. If the violations were seen by the compliance officer, they surely were in view of Respondent's representatives.

With respect to the individual items of the citation, the compliance officer was informed that some of the subcontractors did not initiate or maintain a safety program. Their employees were not protected by helmets where there was danger of head injury. Poles of jump jack scaffolding did not have an adequate firm foundation, and employees working six feet or more above floor levels were not protected from fall hazards. The inspector learned there was no program enabling employees to recognize fall hazards; that guardrails did not have the required height; that midrails or their equivalent were not provided; that portable ladders did not extend at least three feet above the landing surface; and that those with defects were not withdrawn from service.

The Respondent contends that it is irrelevant whether Weekley's builders knew or could have known of the alleged violations, citing *Southeast Contractors, Inc. v. Dunlop,* 512 F.2d 675 (5th Cir. 1975). In a one paragraph *per curium* opinion the court decided that it was in agreement with a dissenting opinion of Chairman Moran

that a contractor is not responsible for the acts of his subcontractors or their employees, and that it was unnecessary to decide the constitutionality of the Occupational Safety and Health Act of 1970 and its enforcement procedures, a matter also pending and under submission before another panel of the court in *Atlas Roofing Company, Inc.* A few months after the *Southeast Contractors* case was decided, Chief Judge John R. Brown of the same circuit, in a detailed decision, upheld the constitutionality of the Act, including enforcement. *Atlas Roofing Company v Secretary of Labor*, 518 F.2d 990 (5th Cir. 1975).

In sum, I find that the Respondent was in violation of the various items of the citation.

Willful Violation

The term "willful violation" has been defined as follows:

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. E.g., *Williams Enterprises, Inc*., 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p.36,589 (No. 85-355, 1987).
> It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Id*.

*Calan*g *Corp.,* 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶29,531 (No. 85-319, 1990).

As noted, the compliance officer recommended and the Administration adopted his conclusion that the infractions were willful in nature, resulting in a suggested penalty of $221.500.00. The classification of willful was the result of the Respondent's builder's opinion that the company was not responsible for the safety of the employees of the subcontractor. He believed that the various subcontractors should be the only employers concerned with safety of their workers. The builder's remarks should not be equated with a total disregard of employee safety. This is especially true where documents in the record disclose Respondent's concern for employee safety.

While the Respondent's failure to comply with the regulations under consideration was not willful, it does come within the definition of "serious" which is defined in Section 17(k) of the Occupational Safety and Health Act of 1970, as follows:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

I also conclude that serious injuries could occur if employees did not wear hard hats, if scaffolding was not provided with mud sills in water, mud and snow, if workers worked on roofs without fall protection, if guardrails were not of proper height, and if ladders did not extend three feet above the landing.

There remains the question of penalties. The Administration settled the cases in which the subcontractors who created the hazards and who had employees subject to the dangers with substantially reduced penalties. I believe that the penalties assigned to the Respondent should be in the same range as those charged to the subcontractors. Accordingly, the penalties in this case should be in the amount of $1,500.00 for each of the six items in the citation for a total of $9,000.00.

In summary, I find that the Respondent was in violation of the regulations as charged in the citation; and that the citation should be reclassified as "serious" with a penalty of $9,000.00.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: December 1, 1997