SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 97-0594
CENTEX CONSTRUCTION COMPANY, INC.,	:	
Respondent.	:	

ORDER

The Secretary's Notice of Withdrawal of Citation Item was received in the Executive Secretary's Office on May 19, 1999. The Notice of Withdrawal of Citation Item is construed as a motion to vacate the citation and proposed penalty and is granted pursuant to the delegation of authority to the Executive Secretary. 41 Fed. Reg. 37,173 (1976); 44 Fed. Reg. 7,255 (1979).

/s/
Date: May 25, 1999 Ray H. Darling, Jr.
Executive Secretary

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor, Complainant,	
v.	OSHRC Docket No. **97-0594**
Centex Construction Company, Inc., Respondent.	

Appearances:

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U. S. Department of Labor
Atlanta, Georgia
For Complainant

W. Scott Railton, Esquire
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McLean, Virginia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Centex Construction Co., Inc. (Centex), is the prime contractor on a project to construct a large medical center at Fort Bragg, North Carolina. On November 11, 1996, an employee for L. R. Willson, the steel erection subcontractor on the site, fell approximately 80 feet to his death from a skeletal steel structure on the project. The Occupational Safety and Health Review Administration (OSHA) investigated the accident beginning on November 12, 1996.

On April 15, 1997, the Secretary issued a citation to Centex alleging a serious violation of § 1926.750(b)(2)(i) for failure to maintain a "tightly planked and substantial floor" within two stories or 30 feet below work being performed. The Secretary also cited L. R. Willson and the U.S. Army Corps of Engineers (who had contracted Centex to oversee the project) for violating § 1926.750(b)(2)(i).

Centex contests the citation and proposed penalty. Centex acknowledges coverage and the Review Commission's jurisdiction. A hearing was held in this matter on January 7 and 8, 1998. The parties have submitted post-hearing briefs. Centex argues that the multi-employer worksite doctrine, by which the Secretary would hold Centex liable for the alleged violation, should not apply in this case. Centex also asserts the affirmative defense of unpreventable employee misconduct.

For the reasons set out below, the court finds that Centex violated § 1926.750(b)(2)(i).

Background

The U. S. Army Corps of Engineers (COE) contracted with Centex to build the Womack Army

Medical Center (Center) at Fort Bragg, North Carolina. Construction on the project began in February 1995 and is scheduled for completion in 1999. The Center, which will comprise three buildings, is budgeted at $300,000,000.00 and covers over 2,000,000 square feet (Exh. C-1; Tr. 37-38, 295-296).

The COE required that a job hazard analysis (JHA) be prepared for each major phase of the project. The Center is constructed of structural steel. Installation of the structural steel, which took approximately 14 months to complete, constituted a major phase requiring a JHA (Tr. 39). Centex hired SMI-Owen as the steel fabrication and erection subcontractor on the project (Tr. 203, 319). SMI-Owen hired L. R. Willson to perform the actual steel erection work. Centex does not have a contract with L. R. Willson (Tr. 323-324).

L. R. Willson prepared the JHA for the steel erection (Tr. 413). Discussions of the JHA's contents were held among Centex, the COE, SMI-Owen, and L. R. Willson. During these discussions, Robert Rowe, the COE's administrative contracting officer, stated that § 1926.750(b)(2)(i) applied to the steel erection on the project and that temporary floors would be required (Tr. 311-312). These requirements were not included in the JHA (Exh. R-3).

The COE, Centex, SMI-Owen, and L. R. Willson adopted and signed off on the JHA for steel erection. The JHA required that all employees working 6 feet or more above ground must be tied off 100 % of the time. The JHA also required that ladders be used by the ironworkers to reach their work locations on the steel (Exh. R-3).

All employees hired on the Center project were required to attend a safety orientation presented by Centex. The presentation included a 15-minute segment that focused on the 100 % tie off rule (Tr. 409, 413). The ironworkers were each provided with two lanyards, a body harness, and a pin cable for fall protection (Tr. 67-68, 74). Centex employed two full-time safety professionals, Cecil Smith and Jim Sanderford, on the Center project. They walked the project on a daily basis looking for safety hazards (Tr. 424-426).

On November 11, 1996, L. R. Willson employees Bobby Anderson and Wallace Pittman were working together, connecting steel beams to columns at approximately the fifth floor level on the north side of the nursing tower (Tr. 50, 63-64, 66-67). A crane operator was using his crane to lift a steel column to the fifth floor. Anderson and Pittman could not disengage the pin cable that held the cable of the crane to the steel column. Anderson attempted to climb a column in order to disconnect the pin cable. Anderson was unable to climb the column while wearing his fall protection, which consisted of a safety harness and lanyard attached to the column with a pin cable. He unhooked his lanyard and climbed the column (Tr. 278-279). Anderson fell approximately 80 feet to the interior decking on the second floor. There was no

decking on the third and fourth floors (Tr. 185-187). Anderson subsequently died of the injuries he sustained in the fall.

Alleged Serious Violation of § 1926.750(b)(2)(i)

The Secretary charged Centex, as well as L. R. Willson and the COE, with a serious violation of § 1926.750(b)(2)(i). That section provides in pertinent part:

> Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed, except when gathering and stacking temporary floor planks on a lower floor, in preparation for transferring such planks for use on an upper floor.

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).

Applicability

Section 1926.750(b)(2)(i) is part of subpart R of 29 C.F.R. Part 1926, which specifically applies to steel erection. Centex argues that either § 1926.105(a) or subpart M (Fall Protection), each of which permits employees to tie off as a form of fall protection, should have been cited instead. This argument is rejected.

Section 1926.500(a)(2)(iii), the scope, application, and definition section of subpart M, provides: "Requirements relating to fall protection for employees performing steel erection work are provided in § 1926.105 and in subpart R of this part."[1] It is undisputed that L. R. Willson's employees were performing steel erection work.

The Review Commission holds that hazards of falling to the interior of a building during steel erection are regulated by Subpart R, while hazards of falling to the exterior of a building during steel erection are regulated by § 1926.105(a). *Peterson Brothers Steel Erection Co.,* 16 BNA OSHC 1196, 1198

[1] Section 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

(No. 90-2304, 1993). Centex acknowledges this distinction but argues that Bobby Anderson could have fallen to the exterior of the building; he just happened to fall to the interior. In arguing this, Centex loses sight of the fact that Bobby Anderson's accident is not what is being litigated in this proceeding. Noncompliance with a standard constitutes a violation regardless of whether or not an employee was injured or killed because of the noncompliance. Section 1926.750(b)(2)(i), requiring temporary flooring during skeleton steel erection, applies to L. R. Willson's work at the Center, where it was engaged in skeleton steel erection.

Noncompliance

It is undisputed that temporary flooring was not maintained within two stories or 30 feet below where employees were working.

Exposure

It is undisputed that L. R. Willson's employees had access to the elevations that were not protected by the temporary flooring.

Knowledge

Centex knew that no temporary flooring was in place within two stories or 30 feet of the 5th floor of the nursing tower. The absence of temporary flooring was plainly visible from almost any vantage point on the site (Exh. C-4). Furthermore, it was Centex's decision not to use temporary flooring as fall protection, but to require employees to tie off instead. James Sprague, Centex's director of loss control, testified regarding temporary flooring (Tr. 508): "We don't do that at Centex. We don't think a 30-foot fall is acceptable, even though it's permitted by a connector."

Multi-employer worksite doctrine

Even though none of Centex's employees was exposed to the fall hazard, Centex was the general contractor on the project and it knew that the requirements of § 1926.750(b)(2)(i) had not been met. The Secretary contends that, under the multi-employer worksite doctrine, she has established that Centex was in serious violation of § 1926.750(b)(2)(i). The Review Commission first set out the multi-employer worksite doctrine in *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 1275, 1976), in which it 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.

The multi-employer worksite doctrine has generated much commentary since the Review

Commission first explicated it over 20 years ago. The Court of Appeals for the D.C. Circuit recently found that a non-construction employer was not responsible for exposing a subcontractor's employees to hazardous conditions when the subcontractor controlled those conditions. *IBP., Inc. v. Herman,* 144 F.3d 861 (D. C. Cir. 1998). In a footnote to that decision, the court gave this overview of the multi-employer worksite doctrine (*Id. at* 866, footnote 3):

> The doctrine has somewhat of a checkered history. The first time the Secretary cited an employer for exposing only another employer's employees to danger, the Commission rejected the citation as beyond his authority under the Act. *Brennan v. Giles & Cotting, Inc.,* 504 F.2d 1255 (4th Cir. 1974). There, the Secretary tried to hold a general contractor responsible when two employees of its subcontractor were killed in a scaffolding collapse. The Commission vacated the citation because the general contractor was not the "employer" of the deceased employees. On review, the Fourth Circuit reached the same result on regulatory grounds. Focusing on 29 C.F.R. §1910.5, the court held that the word "employees" was ambiguous and the Commission's interpretation reasonable. . . . The Second Circuit was far more receptive to the Secretary's theory. In *Brennan v. OSHRC,* 513 F.2d 1032 (2d Cir. 1975), the Secretary cited a subcontractor for failing to install perimeter guards and allowing material stored on upper floors to hang over the edge. The Commission refused to sanction the liability because none of the subcontractor's own employees was exposed to the danger. The court, vacating the order, appeared to hold not only that multi-employer liability was permissible, but that the Act actually required it. *Id. at* 1038. After *Brennan v. OSHRC,* the Commission changed its position and began endorsing the Secretary's efforts to impose multi-employer liability. Most circuits have accepted multi-employer liability, at least in the construction context. *See Teal v. E. I. DuPont de Nemours & Co.,* 728 F. 2d 799 (6th Cir. 1984); *Beatty Equip. Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir. 1977). The Seventh Circuit has implicitly accepted multi-employer liability under § 654(a)(2), but has held that a "multi-employer defense" exists under § 654(a)(1). Thus the employer is not liable under the general duty clause when its own employees are exposed to hazards beyond its reasonable control. *Anning Johnson Co. v. OSHRC,* 516 F.2d 1061 (7th Cir. 1975). Only the Fifth Circuit has squarely rejected multi-employer liability, holding that the § 654(a)(2) duty to comply with OSHA standards runs from employer only to his own employees. *Melerine v. Avondale Shipyards, Inc.,* 659 F.2d 706 (5th Cir. 1981).

Centex argues that the multi-employer worksite doctrine should not be applied to it in this proceeding because it has not been adopted in any of the courts of appeal to which this decision could be appealed. This case arose in North Carolina, which is within the jurisdiction of the United States Court

of Appeals for the Fourth Circuit. The headquarters for Centex are in Dallas, which would enable Centex to appeal to the Court of Appeals for the Fifth Circuit or the D.C. Circuit under § 11 of the Occupational Safety and Health Act of 1970 (Act). The issue must be decided following Commission precedent and the law of the circuit where the case arose, which in this instance is the Fourth Circuit. *See Farrens Tree Surgery, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992); *Atlantic Battery Co.*,16 BNA OSHC 2131, 2153 (No. 90-1747, 1994). The Fourth Circuit has not, as Centex argues, rejected the multi-employer worksite doctrine. *Brennan v. Giles & Cotting*, which Centex cites, was decided before the Review Commission formulated the *Anning-Johnson/Grossman* rule in 1976. No subsequent decision by the Fourth Circuit has rejected the Commission's approach. The multi-employer worksite doctrine applies to Centex.

Centex argues that it did not create the violative condition and had no employees exposed to the condition. First, it is arguable that Centex did not create the hazard. It was Centex's decision to use the 100% tie off rule in lieu of installing temporary flooring in the skeleton steel structure. Centex's director of loss control testified that it was Centex's policy not to use temporary flooring.

Even assuming that Centex did not create the violative condition, that fact is not determinative under the multi-employer worksite doctrine. A general contractor who does not have employees exposed and did not create the violative condition is responsible nevertheless for violations of other employers where the general contractor could reasonably be expected to prevent or detect and abate the violation. *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762 (No. 76-4754, 1980). Considering the economic and contractual relationships on construction worksites, there is a presumption that the general contractor has sufficient control over its subcontractors to require them to comply with the safety standards and to abate the violations that the general contractor reasonably knew existed. *Gil Haugan d/b/a Haugan Construction Co*., 7 BNA OSHC 2004, 2006 (Nos. 76-1512 & 76-1513, 1979).

In the instant case, Centex had the authority to require that temporary flooring be used. Sprague conceded that compliance with § 1926.750(b)(2)(i) was possible (Tr. 509-510). In fact, bundles of decking were already stored on each level of the structure, and Anderson first struck one of these bundles 20 feet into his fall. The decking was to be used as the foundation under the concrete of the permanent floor. Centex could have changed the sequence of the work schedule and required that the floor be laid earlier in the process. The decking would have created the temporary floor required by the standard (Exh. C-4; Tr. 62).

Centex also contends that the multi-employer worksite doctrine is invalid as a matter of law because it impermissibly extends the reach of the Act to a class of persons (controlling employers) who

would not otherwise be liable. This argument is rejected. The doctrine is a well-established Review Commission precedent, and, as stated, has withstood examination of its application under the Act.

Finally, Centex argues that it had in place a work rule requiring 100 % tie off, providing employees with superior protection from fall hazards. The only reason its policy did not protect Bobby Anderson, Centex asserts, is that Anderson engaged in unpreventable employee misconduct by unhooking his lanyard and climbing the column.[2]

The Review Commission rejected a similar argument in *Carabetta Enterprises, Inc.*, 15 BNA OSHC 1429 (No. 98-2007, 1991), a case involving the same standard, § 1926.750(b)(2)(i), that is at issue here. In *Carabetta*, the respondent chose not to install temporary floors within the required distance because its particular method of steel erection progressed in three-story increments.

The Review Commission held that the respondent's arguments against the citation:

> reflect a fundamental disagreement with the standard's requirements as applied to the mode of steel erection being employed. . . An employer who disagrees with a standard, on the basis that its particular requirements are arbitrary or inappropriate, has two options. The employer may apply for a variance. . . . The employer may also seek to have the Secretary alter her standard through rule-making proceedings.

(*Id.* at 1432)(citations omitted).

Centex availed itself of neither of these choices. Rather, it ignored the requirements of § 1926.750(b)(2)(i) and instituted another form of fall protection. The undersigned does not disagree that Centex's policy of tying off 100% of the time, if effectively enforced, will usually provide greater protection to employees than that provided by compliance with § 1926.750(b)(2)(i). However, after much consideration, the Secretary adopted § 1926.750(b)(2)(i) as the proper method of fall protection for steel erectors. The Secretary believed that steel erectors could not always effectively use safety belts and she concluded that temporary flooring was the overall safest method to follow.

Centex is to be commended for seeking additional voluntary safety protection on its jobsite. However, it was not free to substitute an alternative safety rule for an existing OSHA regulation. Nor is the undersigned free to ignore the requirements of a clearly applicable safety standard. "Such alterations to OSHA's safety standards cannot, however, be obtained in adjudicatory proceedings before the

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[2] Centex does not argue that Anderson's alleged unpreventable conduct goes to the cited standard. Rather, the unpreventable conduct was in relation to the 100% tie off rule. The affirmative defense of unpreventable employee misconduct requires that the employer have a work rule in place designed to prevent the alleged violation. The defense will not prevail where, as here, the work rule does not correlate to the cited standard. *Power Plant Division, Brown & Root, Inc.*, 10 BNA OSHC 1837 (No. 77-2253, 1983).

Commission, which only concerns itself with the employer's alleged violation of the existing standard. In these proceedings, employers cannot question a standard's wisdom." *Id*.

If Centex felt that compliance with § 1926.750(b)(2)(i) was inadequate to protect the employees on the Center project, it could have implemented the 100% tie off rule and complied with the standard (Tr. 509-510).

The Secretary has established a serious violation of § 1926.750(b)(2)(i).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Centex employed approximately 725 employees at the time of the OSHA inspection (Tr. 510). It had been cited for OSHA violations within the three years prior to the citation at issue (Tr. 230). The gravity of the violation is high. Had temporary flooring been in place at the time of Anderson's accident, he would have fallen only 20 feet instead of 80 feet, perhaps enhancing his chances for survival.

Centex's good faith weighs heavily as a factor in this penalty determination. Centex had a good safety program, one which OSHA compliance officer Joe Parker considered "above average" (Tr. 263). Centex's violation of the cited standard did not result from its indifference to safety. Rather, Centex instituted what it considered a better form of fall protection. Centex believed that a fall of up to 30 feet was not acceptable. Its 100% tie off rule, if followed, would allow for falls of no more than 6 feet (the length of a lanyard). This action, while insufficient to comply with § 1926.750(b)(2)(i), deserves consideration in assessing an appropriate penalty. The Secretary proposed a penalty of $5000.00. Given Centex's demonstrated safety efforts, the proposed penalty is deemed excessive. A penalty of $500.00 is assessed.

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 that:

Item 1 of Citation No. 1, alleging a serious violation of § 1926.750(b)(2)(i), is affirmed and a penalty of $500.00 is assessed.

NANCY J. SPIES
Judge

Date: January 19, 1999