BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

PUBLIC WORKS COMMISSION OF
THE CITY OF FAYETTEVILLE,
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2002-4119
OSHA INSPECTION NO. 305036949
CSHO ID NO. T6259

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 13th day of January, 2004, in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr,. Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Sonya Calloway, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

James R. Nance, Jr. of Reid, Lewis, Deese, Nance & Person LLP, Fayetteville, North Carolina for the Respondent.

ISSUES PRESENTED

1. Is there competent and substantial evidence in the record to support the Hearing Examiner's finding that the Complainant failed to prove by a preponderance of the evidence that Respondent violated 29 C.F.R. 1926.20(b)(2)?

2. Is there competent and substantial evidence in the record to support the Hearing Examiner's finding that the Complainant failed to prove by a preponderance of the evidence that Respondent violated 29 C.F.R. 1926.651(j)(2)?

3. Should the multi-employer worksite doctrine be expanded to apply to a department of a city that employs a general contractor to perform work for it and by contract retains the authority to have its designated employee "inspect the contractor's work areas to ascertain that safety procedures are in accordance with applicable regulations"?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 C.F.R. §1926.20 provides, in pertinent part, as follows:

> (b)(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (b)(2) Such programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers..

2. 1926.32(f) which provides:

> "Competent person" means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. (emphasis added).

3. 29 CFR § 1926.651 (j)(2) provides the following:

> Employees shall be protected from excavated or other material or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of the excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

4. § 5(a)(2) of the federal OSH Act provides:

> Each employer shall comply with occupational safety and health standards promulgated under this Act.

5. N.C. Gen. Stat. §95-129(2) provides, in pertinent part, as follows:

> Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article.

Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the decision of the Hearing Examiner to the extent that it is not inconsistent with this opinion and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The employer (Respondent) Public Works Commission of the City of Fayetteville is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On March 7, 2002, Safety and Health Compliance Officer Richard Teachey conducted a fatality inspection of a worksite which was located at Sussex and McArthur Road in Fayetteville, North Carolina.

6. McClam and Associates had been hired by the Public Works Commission of the City of Fayetteville to install approximately 6,000 feet of sewer lines. The work involved digging and back-filling a one hundred and twenty-nine feet eight inch long by twelve feet deep trench down the center of Sussex Street. Two trench boxes each six feet tall were stacked on top of each other in the trench to protect the employees working in the trench from cave-ins.

7. The trench caved in on February 25, 2002 while an employee of McClam and Associates was outside the trench boxes, partially burying the employee and resulting in the employee's death.

8. The walls of the trench caved in shortly after the trench boxes, which were located inside the trench, were pulled back along the trench [to allow an area some twenty-five feet in front of the trench to be filled in with dirt from the spoil pile], resulting in the fatality.

9. As a result of the inspection, one citation with several items was issued to Respondent on March 21, 2002. Items 1a and 1d are the only items at issue in this case as Items 1b, 1c, 1e, 1f and 1g were dismissed by the Complainant.

10. Citation One, Item 1a alleged a serious violation of 29 CFR § 1926.20(b)(2) for the alleged failure of the Respondent to have a competent person inspect the jobsite.

11. Citation One, Item 1d alleged a serious violation of 29 CFR § 1926.651(j)(2) for the alleged failure to keep the spoil pile two feet from the edge of the trench.

12. The Safety and Health Review Board received Respondent's Notice of Contest on April 17, 2002.

13. On or about April 25, 2002, Respondent filed its Statement of Employer/Respondent's Position in which it contested the citation in its entirety and objected to the penalty.

14. On April 11, 2003, this matter was heard before the Honorable Monique M. Peebles, Hearing Examiner, at the Old YWCA Building in Raleigh, North Carolina. At the hearing, Complainant dismissed Items 1b, 1c, 1e, 1f and 1g leaving Items 1a and 1d at issue.

15. On June 2, 2003, Hearing Examiner Peebles issued an Order dismissing both remaining items of Citation One and the order was filed with the Board on June 4, 2003.

16. Complainant filed a Petition for Review and Motion for Stay with the Board on July 2, 2003.

17. On July 8, 2003, the Chairman of the Safety and Health Review Board entered an Order granting Respondent's Petition for Review..

18. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

19. The issues on appeal were heard by the full Board on January 13, 2004.

20. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 11, 13 through 15 and 17 through 36.

21. Safety Compliance Officer Teachey held a closing conference with Holloway and as a result of his inspection, he recommended a citation be issued. On March 21, 2002, Complainant issued the following citations relevant to the hearing:

> (a) Citation 1, Item 1a alleges a serious violation of 29 C.F.R. 1926.20(b)(2), carries a proposed penalty of $6,300.00 and states: "The employer's safety and health program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person."
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> > 1. Site - On or about 2/25/02 the employer failed to ensure competent person inspections were being conducted.
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> (b) Citation 1, Item 1d alleges a serious violation of 29 C.F.R. 1926.651(j)(2), is grouped with Citation 1, Item 1a for penalty purposes and states: "Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary."
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> > (1) Site - spoil pile was not kept 2 feet from the edge of the excavation.

22. Compliance Officer Teachey used the following language in the contract between McClam and Associates and the Public Works Commission of the City of Fayetteville as the determinative factor in citing the Respondent as a General Contractor under the Multi-Employer Worksite doctrine:

> . . . The Owner's designated employee may inspect the Contractor's work areas to ascertain that safety procedures are in accordance with applicable regulations. If the contractor's personnel are observed creating a hazardous environment, corrective action must be initiated immediately to reduce the possibility of injury. Corrective action by the Owner will consist of advising the Contractor's supervisory representative, insisting on compliance with the Contract and could result in the Owner stopping the work for repeat violations or failure to take corrective measures.

(T pp 51-53). (Respondent's (labeled Defendant's) Exhibit 3, p 4 of 33).

23. Respondent was not the general contractor at the site.

24. In the area adjacent to the trench box, the spoil pile was pulled back the required two feet. (T Vol. I p 111).

25. The area where the spoil pile was within two feet of the trench was where the backfill was taking place. (T Vol II pp 159-164). (Complainant's exhibits 1-A, 1-C, 1-D, 1-E, 2-A, 2-C).

26. No employees were in the trench when backfilling was in progress and therefore no employees were being exposed. (T Vol II pp 159-164). (Complainant's exhibits 1-A, 1-C, 1-D, 1-E, 2-A, 2-C).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Complainant has failed to prove by a preponderance of the evidence that the citations alleged in this case apply to the Respondent.

4. There was insufficient evidence presented to support a finding that Respondent had the degree of supervisory control under the multi-employer worksite doctrine necessary to uphold any of the citations issued.

5. The Complainant has failed to prove by a preponderance of the evidence that the Respondent committed a serious violation of 29 CFR § 1926.20(b)(2) as alleged in Citation One, Item 1(a) in that frequent and regular inspections of the jobsite, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program.

6. The Complainant has failed to prove by a preponderance of the evidence that employees were exposed to the spoil pile being within two feet of the trench.

7. The Complainant has failed to prove by a preponderance of the evidence that the Respondent committed a serious violation of 29 C.F.R. 1926.651(j)(2) as alleged in Citation One, Item 1(d) for the failure to keep the spoil pile 2 feet from the edge of the excavation.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that "Upon review of the report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner . . . and the report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact,

conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record." "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company., 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

This case involves the expansion of the multi-employer worksite doctrine which was first set out by the Board in Romeo Guest as follows:

> Therefore, a general contractor's duty under N.C.G.S. §95-129(2) to comply with "occupational safety and health standards or regulations" runs to employees of subcontractors on the jobsite. However, that duty is a reasonable duty and although the general contractor is responsible for assuring that the contractors fulfill their obligations for employee safety that affect the whole construction site, the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." Grossman Steel, supra, at 24,791. In addition, the general contractor cannot "anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others." Id. It is only responsible for those hazards that it could reasonable [sic-reasonably] have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create.

Romeo Guest, OSHANC 96-3513, Slip Op at 6-7, (RB 1998). The issue in this case is whether the general contractor's liability cited above should be expanded to include an owner who contracts with an independent contractor to perform construction work.

A threshold question to decide in this case is whether the cited standards apply to this employer. In the early days of the Occupational Safety and Health Act, citations were enforced only against an employer who exposed his or her employees to violative conditions that it created. This has come to be known as the "creating employer". The case law evolved to include an employer who did not create the violations but allowed his employees to be exposed to violations created by another employer. This has come to be known as the "exposing employer". An employer cited under this theory could assert the affirmative defense that it took other effective steps to protect its employees from the hazard. In the construction context the general contractor, because of its ability to control the activities on a construction site, became liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." This has come to be known as the "controlling employer" as part of the multi-employer worksite doctrine which was first set out by the Board in Romeo Guest, supra. See, generally., Grossman Steel and Aluminum Corp., 1975-1976 OSHD ¶ 20,691, (RC 1976).

The Respondent in this case, the Public Works Commission of the City of Fayetteville, does not fall into any of these categories. It did not create the violations; it has only two employees and they were not exposed to the violative conditions; and it was not by name the general contractor on the site and was not the controlling employer by virtue of being the general contractor. The theory under which the Respondent was cited was that by contract it retained the authority to require the general contractor to comply with safety regulations which could result in the Respondent as the Owner requiring the General Contractor to stop the work. The theory goes that since it could stop the work of the General Contractor, it was serving the functions of a general contractor and could be cited as a general contractor.

To find this Respondent in violation of OSH standards under the facts of this case would require an expansion of the multi-employer worksite doctrine's general contractor liability to an owner who contracts with an independent contractor to perform work. The multi-employer worksite doctrine holds a general contractor liable for those safety and health violations committed by its subcontractors that the general contractor could reasonably have been expected to prevent or abate by reason of its supervisory capacity. Application of this doctrine to a new category of employer cannot be done in a vacuum but must be done in the context of the public policy reasons for the development of the doctrine.

The public policy reason behind holding a general contractor responsible for the safety of the employees of a subcontractor was stated by the federal Review Commission in Grossman Steel and Aluminum Corp., 1975-1976 OSHD ¶ 20,691 (RC 1976) as follows:

> Typically, a construction job will find a number of contractors and subcontractors on the worksite, whose employees mingle throughout the site while work is in progress. In this situation, a hazard created by one employer can foreseeably affect the safety of employees of other employers on the site. . . . it would be unduly burdensome to require particular crafts to correct violations for which they have no expertise and which have been created by other crafts.
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> [T]he general contractor normally has responsibility to assure that the contractors fulfill their obligations with respect to employee safety which affect the entire site. 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. It is, therefore, reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Grossman Steel and Aluminum Corp., 1975-1976 OSHD ¶ 20,691, at pp. 24,790-24,791 (RC 1976). (Emphasis added).

In the case sub judice, an instrumentality of a city, a public works commission, contracted with an entity to install sewer lines. There is only one contractor, McClam and Associates performing work on the site. There is no potential for hazards being created by one contractor to which employees of other contractors would be exposed. The employer that is in the best position to provide for the safety of the employees on the site is the sole employer that is doing the work. The policy reasons for holding a general contractor liable for the safety of the employees of a subcontractor do not exist in the context of an owner that hires a contractor under the facts of this case. There may be cases in the future where an owner hires several contractors to do work and assumes the role of general contractor in which the public policy reasons may be present for imposing liability on an owner. The citations that were issued against the employer just do not apply to this employer under the multi-employer worksite doctrine.

In Romeo Guest, the Board analyzed the federal cases on general contractor liability, of which Grossman Steel, supra, was one and held that the reasoning of these federal cases was "persuasive and consistent with the purpose of the North Carolina OSH Act to 'assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions'". Romeo Guest, supra. Holding the Respondent liable for OSH violations under the facts of this case does not further the public policy of protecting worker safety that was behind the passage of North Carolina's OSH Act and is set out in N.C.G.S. § 95-126(b)(2).

The Complainant's main, if not only, reason for citing the Respondent under the multi-employer worksite doctrine was the language in the contract giving the Respondent's designated employee the authority to inspect the site for safety. That language is as follows:

> The Owner's designated employee may inspect the Contractor's work area to ascertain that safety procedures are in accordance with applicable regulations. If the Contractor's personnel are observed creating a hazardous environment, corrective action must be initiated immediately to reduce the possibility of injury. Corrective action by the Owner will consist of advising the Contractor's supervisory representative, insisting on compliance with the Contract and could result in the Owner stopping work for repeat violations or failure to take corrective measures.

Complainant's exhibit #3, p. 4.

The DC Circuit Court of Appeals In IBP, Inc., rejected similar language in a contract as a basis for holding an owner liable under the multi-employer worksite doctrine in the non construction context. The language at issue in IBP, Inc. provided:

> IBP may terminate this agreement without penally [sic] upon not less than one week's notice to Contractor if Contractor violates IBP's Contractor Safety Policy (a copy of which is attached to this agreement), or if Contractor is cited for a repeat violation by OSHA or the state equivalent agency, or if Contractor's operations result in a death or amputation injury.

IBP. Inc., 1998 OSHD ¶ 31, 577, at p. 45,309, 144 F.3d 861 (D.C. Cir. 1998). The D. C. Circuit held that this language did not give the employer the requisite control over the employees of DCS to hold it liable under the multi-employer worksite doctrine.

Likewise, the language in Respondent's contract cited above does not, by itself, give the Respondent sufficient supervisory authority over the worksite so as to hold it liable for OSH violations committed by its contractor, McClam and Associates. In this case if the Respondent had left out that language, it would not have been cited for violating any OSH regulations. (T, Vol. 1, p 117). It also would not have been able to force compliance with safety regulations which could result in the contractor's workers being exposed to unsafe hazards. Allowing an owner to require a contractor to comply with safety regulations by retaining the authority to inspect for safety violations and to stop the work if violations are not corrected furthers the purpose of the North Carolina OSH Act of providing safe workplaces. Just because an owner puts language in a contract requiring a contractor to comply with safety regulations, this language, by itself, is not sufficient proof that the principal is acting as a general contractor. If that were to become the law in North Carolina, an owner would protect itself by just leaving that language out to the detriment to worker safety. There may be situations in which an owner takes on the overall responsibilities of a general contractor and can be held liable under the multi-employer worksite doctrine but this case is not one of them.

In the general contractor context, under the multi-employer worksite doctrine, the general contractor is already responsible for the safety of all employees on the worksite and the inclusion of language in the general contractor's contracts with its subcontractors requiring compliance with safety regulations, helps protect the general contractor by giving it leverage to force a subcontractor to comply with safety regulations. In this case there was a general contractor already responsible under OSH regulations for the safety of all employees on the construction site. Allowing an owner to require the general contractor to live up to its requirements under the Occupational Safety and Health Act without holding it liable for the OSH violations of the general contractor gives an added layer of worker safety. It also has the effect of extending compliance far beyond the reach of the few percentage of employers that the Occupational Safety and Health Division is able to inspect on a yearly basis.

Under a traditional analysis of general contractor liability, the Respondent did not exercise sufficient control over the worksite to be found in violation. The Hearing Examiner below held in Conclusions of Law Number 6 that "There was insufficient evidence presented to support a finding that Respondent had the degree of supervisory control necessary to uphold any of the citations issued." The Complainant in its Petition for Review challenged this Conclusion of Law as well as others. The Board has adopted this Conclusion of Law as its own and finds that it is supported by substantial evidence and a preponderance of the evidence in the record. The Complainant also challenged certain enumerated findings of fact. The Board has adopted each of these challenged findings of fact after examining each of them and finding that they are supported by substantial evidence and a preponderance of evidence in the record. The Board has made some of its own findings of fact which are supported by substantial evidence and a preponderance of the evidence in the record. The Board has also made its own conclusions of law which are supported by the findings of fact. The Board has made the necessary conclusions of law to support its order and any additional challenges of the Hearing Examiner's Conclusions of Law made by Complainant are therefore moot.

Even if we were to hold that the multi-employer worksite doctrine applies and that the Respondent had the requisite supervisory control over the worksite and we do not, the Complainant has failed to prove by a preponderance of the evidence that the Respondent violated the provisions of 29 CFR § 1926.651 (j)(2) for failure to have the spoil pile pulled back two feet. The testimony of the Compliance Officer was that in the area adjacent to the trench box, the spoil pile was pulled back the required two feet. (T Vol. I p 111). The testimony of Mr. Neal, Respondent's superintendent, was that the area where the spoil pile was within two feet of the trench was where the backfill was taking place and no employees were in the trench when backfilling was in progress and, therefore, no employees were being exposed. (T Vol II pp 159-164). (Complainant's exhibits 1-A, 1-C, 1-D, 1-E, 2-A, 2-C). See, Weekley Homes, LP dba David Weekley Homes, OSHANC 99-3806, Slip Op., (RB 2002), (holding that employee exposure is one of the elements that the Complainant has to prove in order to prove a serious violation of an OSH standard).

In conclusion, the citations at issue in this case just do not apply to this Employer in that it is not the general contractor in name and it has not assumed the traditional duties of a general contractor to be held liable under the multi-employer worksite doctrine. The Respondent does not have the requisite supervisory authority over the worksite to be responsible for the safety of the employees of the general contractor that it hired to install the sewer lines. Contract language giving an owner the authority to inspect to ensure that safety regulations are being followed and the authority to take steps to ensure that any unsafe conditions are corrected does not, by itself, turn an owner into a general contractor liable under the multi-employer worksite doctrine. Inclusion of contract language allowing an owner to inspect for and to take steps to correct safety violations without liability under the multi-employer worksite doctrine furthers the purpose of the OSH Act of providing safe workplaces.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's June 2, 2003 Order in this cause be, and hereby is, **AFFIRMED,** to the extent that it is not inconsistent with this opinion, and Citation One, Item 1a and Item 1d are hereby dismissed.

This the 29th day of April, 2004

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OSCAR A. KELLER, JR., CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER