UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | § | |
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| Complainant, | § | |
| | § | OSHRC DOCKET |
| v. | § | No. 05-0839 |
| | § | |
| SUMMIT CONTRACTORS, INC. | § | |
| | § | REGION III |
| Respondent. | § | |

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**SUMMIT'S REPLY BRIEF ON REVIEW**

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In its briefing notice the Commission requested briefing on the impact of *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992) on the multi-employer doctrine. The Secretary's opening brief side steps that issue. The Secretary asserts that *Darden* is "irrelevant" to the multi-employer doctrine because *Darden* only addressed how to determine whether an employment relationship exists and the multi-employer doctrine "presupposes" there is no employment relationship. Secy's Br. at 7-8.

Summit thinks the Secretary misstates the holding in *Darden*, misstates the legal foundation of the multi-employer doctrine, and avoids altogether the question of the source of authority for making one employer responsible for the safety of employees of another employer.

**The holding in *Nationwide Mutual Insurance v. Darden***

Remember, the fundamental question in *Darden* was whether Nationwide owed retirement benefits to Darden. If Darden was an employee of Nationwide then Nationwide had the legal duty, under ERISA, to cover Darden under its retirement plan. ERISA defines "employee" as "any individual employed by any employer." The Fourth Circuit acknowledged that Darden would probably not qualify as an employee under traditional principles of agency law but interpreted the term broadly enough to cover Darden because that furthered the "declared policy and purposes of ERISA." *See* 503 U.S. at 321. The Fourth Circuit relied on *United States v. Silk*, 331 U.S. 704 (1947) for the principle that the term employee in a statute should be construed "in the light of the mischief to be corrected

and the end to be attained." *Id.* at 324.

The Supreme Court reversed. The Court held that where a statute imposes a duty on an "employer" or creates a benefit for an "employee," those terms must be understood in the common law agency sense unless the statute expressly defines employer or employee otherwise. If the statute does not define those terms otherwise, then the duty and benefit created by the statute only arises when there is a common law master-servant relationship. *Id.* at 322-323. Thus the courts may not impose a duty (to pay ERISA benefits in that case) or create a benefit (to receive ERISA benefits) outside a "conventional master-servant relationship as understood by the common law agency doctrine." *Ibid.* (Citations omitted). In so holding, the Court stated that it was abandoning its prior holding in *United States v. Silk*, which means that the purpose of a statute may no longer be used to justify defining employer or employee expansively. *Id.* at 324.

Since then, as discussed in Summit's opening brief, the Review Commission itself has held that *Darden* controls the definition of employer under the OSH Act and thus necessarily impacts an employer's duties under the Act. In *Secretary v. Timothy Victory*, 18 BNA OSHC 1023 (Rev. Comm. 1997), the Commission acknowledged that it had previously subscribed to the proposition that the term "employer" should be defined broadly because of the statutory purpose, and that the duties and liabilities of an employer under the Act were therefore not limited to common law employment relationships. But after *Darden* the Commission "modified that proposition...in order to conform Commission precedent" to the

Supreme Court's decision. *Id.* at 1026. In subsequent decisions in *Secretary v. Don Davis*, 19 BNA OSHC 1477 (Rev. Comm. 2001), *Secretary v. Allstate Painting and Contracting Co.*, 21 BNA OSHC 1033 (Rev. Comm. 2005) and *Secretary v. AAA Delivery Services, Inc.*, 21 BNA OSHC 1219 (Rev. Comm. 2005) the Commission clearly relied on *Darden* in dismissing citations because the Secretary failed to prove that the respondents were the common law employers of the affected employees.

In short, the Secretary's argument that *Darden* is irrelevant is wrong. *Darden* did more than explain the criteria for establishing a common law employment relationship. *Darden* held that there *must be* such an employment relationship before an employer's duties or an employee's benefits arise under a statute. And the Commission has already applied this principle to cases under the OSH Act.

**The legal foundation of the multi-employer doctrine**

The Secretary also argues that *Darden's* "rejection of the 'correction of mischief' test for construing the term 'employee' is of no significance [because] the multi-employer worksite doctrine does not derive from the 'correction of mischief' test or a broad construction of 'employee'." Secy's Br. at 8. This argument ignores contrary statements in numerous Commission and court decisions and in the Secretary's own briefs. For example, in *Secretary v. S&S Diving Company*, 8 BNA OSHC 2041, 2042 (Rev. Comm. 1980) the Commission held S&S responsible for the safety of divers who were independent contractors on the basis that "the term 'employer' [or 'employee'] under the Act is not limited to

employment relationships as defined under common law principles but rather is to be broadly construed in light of the statutory purpose."[1]

*S&S Diving* cited the Commission's earlier decision in *Secretary v. Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1703, 1705 (Rev. Comm. 1978) wherein the Commission recognized there was a contractor-independent contractor relationship but nonetheless held the contractor responsible as the employer because "the term 'employer' is one of art in remedial legislation that is to be defined according to the statutory [purpose]." *Griffin & Brand*, in turn, cited *Clarkson Construction Co. v. OSAHRC*, 531 F.2d 451, 3 BNA OSHC 1880, 1883-1884 (10th Cir. 1976) which adopted Commissioner Cleary's view in *Secretary v. James E. Roberts Co.*, 1 BNA OSHC 1684 (Rev. Comm. 1974) (Dissenting opinion of Commissioner Cleary) that employer and employee under the Act should not be defined in the common law sense, but should be defined broadly in order to accomplish the remedial purpose of the Act.

Even in decisions where the Commission did not specifically repeat that multi-employer liability was based on a broad definition of employer or employee, that is implicit in the Commission's rulings. Indeed, in *Secretary v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718 (Rev. Comm. 1999), cited by the Secretary, the Commission acknowledged there is no specific authorization in the Act for imposing multi-employer

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[1]In *Timothy Victory*, decided after *Darden*, the Commission held under almost identical circumstances that the divers were independent contractors rather than employees. Thus there cannot be any doubt that the multi-employer liability imposed in *S&S Diving* was based on a broad definition of employee.

liability but nonetheless held one employer responsible for the safety of employees of another employer based on the "broad, remedial purpose of the Act." *Id.* at 1723-1724. This is the "correction of mischief" test. And this is precisely what *Darden* forecloses—*i.e.* imposition of a statutory duty outside the common law employment relationship on the theory that advances the purpose of the statute. *Darden* at 322-323.

Other multi-employer decisions have imposed liability on employers who "control" the worksite. *See e.g. Secretary v. Gil Haugan d/b/a Haugan Construction Co.*, 7 BNA OSHC 2004 (Rev. Comm. 1979). These decisions, too, simply interpret the term employer broadly in order to make one employer responsible for the safety of employees of another employer. In *Secretary v. Don Davis* the Commission recognized that *Darden* invalidates this control theory. The Commission held that now, under *Darden*, for an employer to be liable under the OSH Act it is not enough that he controls the overall work, he must control the *workers*. And to prove control over the workers, the Secretary must show the employer can hire, discipline, or fire the workers, can assign them additional projects, and sets the workers' pay and work hours. *Don Davis* at 1482. *See also Secretary v. Timothy Victory*, 18 BNA OSHC at 1027. (Emphasizing that the Secretary bears the burden of establishing that the respondent

exercised an *employer's* control over the workers).[2]

The Secretary's argument that the multi-employer doctrine is not based on an expansive definition of employer and employee or on the purpose of the Act is also belied by the Secretary's own briefs on this issue. For instance, in her briefs to the United States Court of Appeals in *IBP, Inc., v. Herman*, 144 F.3d 861, 18 BNA OSHC 1353 (D.C. Cir. 1998) the Secretary argued that the term employer in § 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), should be interpreted broadly to make "those employers who are 'best able' to prevent and abate hazards responsible for doing so even if their own employees are not exposed to the hazards" because that "effectuates the statutory purpose." Secy's Opening Br. to Ct. of Appeals at 28, 30. The Court of Appeals summarized these arguments by stating that "the Secretary's view" is that the terms employer and employee should not be interpreted in the common law sense because of the "remedial" purpose of the Act. 144 F.3d at 865, 18 BNA OSHC at 1355.

Similarly, in her brief in Docket 03-1622 the Secretary devotes several pages to

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[2]It should be noted that the Secretary relies on *Haugan's* outdated control theory here. She does not argue that Summit exercised a common law employer's control over the workers. In fact, the CSHO admitted he did not know anything about these employment factors. (Tr. 108). Instead, the Secretary argues, and Judge Schumacher erroneously held, that the subcontract provisions giving Summit authority necessary to ensure the project was built accordingly to the owner's and lender's requirements likewise empowered Summit to compel the subcontractor to comply with OSHA. This argument reflects the fundamental fallacy of the Secretary's position because it skips the issue of whether there is a statutory duty. As discussed in Summit's Opening Brief at 25-26, the "control" necessary to enforce a private contract does not create a statutory duty. Thus the issue is not whether Summit *could* have compelled the subcontractor to comply with OSHA, the issue is whether Summit had a *statutory duty* to do so.

arguing that the term "employer" in the Act must be interpreted more broadly than the common law employer-employee relationship because such an "interpretation" advances the purpose of the Act. Secy's Response Brief, Dkt. 03-1622 at 13-14, 16-17, 22. Her argument now that the multi-employer doctrine is not based on a broad definition of employer and the purpose of the Act is a transparent attempt to dodge the effect of the holding in *Darden.*

**The Secretary avoids the fundamental issue**

What is the source of authority for holding one employer liable for the safety of employees of another employer? That is the fundamental issue. There are only three possible sources of authority—the standard itself, a validly promulgated regulation, or the OSH Act.

The cited standard clearly does not provide such authority. Even the CSHO acknowledged that the plain language of the standard only imposes a duty on an employer toward his own employees, it does not require a general contractor to protect employees of a subcontractor. (Tr. 106).

Nor is there any validly promulgated regulation that provides authority to cite Summit here. The CSHO testified that the citation to Summit was based solely on OSHA's multi-employer citation policy set forth in OSHA Instruction CPL 2-0.124, and that only the CPL provides authority for citing a "creating" or "controlling" employer. (Tr. 106-108). However, the CPL has not been promulgated as a regulation, it is only part of OSHA's Field Inspection Reference Manual (FIRM). *See* BNA Occup. Safety and Health Rptr. Vol I p.

21:9791. It is well settled that the FIRM does not have the force or effect of law. *See e.g. Secretary v. D.M. Sabia Co.*, 17 BNA OSHC 1413, 1415 n. 6 (Rev. Comm. 1995). Therefore, the CPL cannot independently confer authority to cite Summit.

The only validly promulgated regulation on this issue, 29 CFR 1910.12(a), specifically *limits* a construction employer's duties under the construction standards *to his own employees.* Thus, there is no regulation that provides authority to cite Summit here.[3]

That leaves the Act itself as the only possible source of authority. As discussed above and in Summit's Opening Brief, whether the Act provides authority for citing Summit for a hazard to which only the sub-subcontractor's employees were exposed depends on how the term "employer" in the Act is defined. If that term is defined in the common law agency sense, as *Darden, Timothy Victory, Don Davis, Allstate Painting and Contracting*, and *AAA Delivery Services* require, then the Act itself does not provide such authority.

The Secretary's arguments seem to assume that the Commission and courts can judicially create authority to make one contractor liable for the safety of another contractor's employees. But that is not so. The Commission and courts can only interpret the law passed by the legislative branch. The Commission and courts have often stated that the Act itself does not address the issue of multi-employer liability *See e.g. Access Equipment Systems* at 1723, *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1087 n. 14, 3 BNA OSHC 1166, 1170

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[3]The Secretary concedes that the words "his employees" in § 5(a)(1) of the Act limit an employer's duties to his *own* employees. How, then, can the Secretary credibly argue, or Judge Schumacher reasonably hold, that the *same words* "his employees" in § 1910.12(a) do not likewise limit an employer's duty to his own employees?

n. 14 (7th Cir. 1975), and have sought to "remedy" Congress' supposed oversight by interpreting § 5(a)(2), 29 U.S.C. § 654(a)(2), to impose the duty on one employer to protect the employees of another employer. Since *Darden*, however, such an interpretation is not permissible.

## Conclusion

Prior to *Darden* the multi-employer doctrine was applied because it was thought that employer and employee could be interpreted broadly in order to advance the purpose of the Act. When the doctrine was challenged, the courts deferred to the Secretary's interpretation because *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) required such deference.

But the law has changed. *Darden*, of course, precludes broad interpretations of employer and employee based solely on the remedial purpose of the Act. Equally important, *Chevron* has been superseded by the holdings in *Christensen v. Harris County*, 529 U.S. 576 (2000) and *United States v. Mead Corp*, 533 U.S. 218 (2001). Under *Christensen* and *Mead* no deference is owed the Secretary's interpretation because it has not been formally promulgated as a rule and is, in fact, contrary to § 1910.12(a) which *is* a formally promulgated rule. *Cf. Chao, Secretary of Labor v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219, 227-228 (2d Cir. 2002).[4]

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[4]*Christensen* and *Mead* arguably require deference to the interpretation expressed in § 1910.12(a) because it *was* formally promulgated, thereby invalidating the multi-employer doctrine even without the holding in *Darden*.

It is true that since *Darden* some cases have affirmed citations under the multi-employer doctrine. But these cases have no precedential value because none considered or discussed the legal rationale upon which the multi-employer doctrine is based and none even mention *Darden*, *Christensen*, or *Mead*.[5]

In her brief and testimony in this case the Secretary judicially admits that the multi-employer doctrine is the sole authority for holding Summit liable for the safety of the employees of another employer. Secy's Opening Br. at 8. She argues that under that doctrine Summit can be cited as the "creating" and the "controlling" employer. Administrative Law Judge Schumacher held that Summit did not create the hazard but affirmed the citation because Summit was the "controlling" employer.

But the OSH Act does not define an employer as one who creates a hazard or controls a hazard. Therefore, under *Darden*, the term "employer" must be understood in the conventional common law sense. Following *Darden*, the Commission has held in five separate cases that the OSH Act does *not* define employer as anything other than a conventional common law employer and, therefore, only the employer of affected employees may be cited. In short, *Darden* negates the multi-employer doctrine and thus negates the only basis for citing Summit.

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[5]The only case to specifically consider *Darden* is *IBP, Inc. v. Herman*. There, the court observed that *Darden* contradicted the Secretary's view that, because of the Act's broad "remedial" purpose, the statute's references to the employer and employee "were not intended to be...interpreted in the common law sense." 144 F.3d at 865, 18 BNA OSHC at 1355.

Respectfully submitted,

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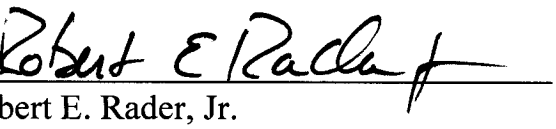

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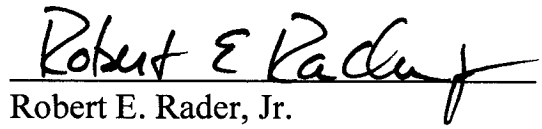
**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via Federal Express to Mr. Gary K. Stearman, Counsel for the Secretary of Labor, Office of the Solicitor, United States Department of Labor, Room S4004, 200 Constitution Avenue, N.W., Washington, D.C. 20210 on this 30th day of August, 2006.



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