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3. Did the Judge correctly find Summit liable because it had general supervisory authority and control of the worksite and failed to exercise reasonable care to prevent or detect and abate the violative condition?

STATEMENT OF THE CASE

A. Statement of the Facts

Respondent Summit Contractors, Inc. was the general contractor for the construction of an apartment complex in Lebanon, Pennsylvania. Respondent subcontracted the framing work to Spring Hill Construction ("Spring Hill"), which in turn hired Mendoza Framing to do the actual framing. Tr. 15-17. Respondent had two employees at the site, Spring Hill one, and Mendoza ten to twelve. *Ibid.*

To provide temporary power at the worksite and allow multiple power tools to be used simultaneously, Summit's onsite superintendent, Mark Corthals, rented the cited portable generator and spider box from Cleveland Brothers Equipment Rental ("Cleveland"), an equipment leasing company. Tr. 152-155; Dep. 7-9.³ Mr. Corthals did not specifically request GFCI capability when he ordered the equipment from Cleveland; nor did he inspect the equipment for GFCI capability when it was delivered to the work site or at any time before the OSHA inspection. Dep. 7-9, 35. Although he knew how to inspect the equipment for GFCI protection, Mr. Corthals simply assumed the rented generator and spider box would come with GFCI protection based on his past experience with renting from Cleveland, though on prior occasions he likewise neither requested nor inspected for GFCI protection. Dep. 7-16, 35, 38-39. Larry Walter, a Cleveland employee, testified that only 6 of its approximately 18 spider boxes were equipped with GCFI protection. Tr. 154.

During an April 26, 2005 inspection of the worksite, Compliance Safety and Health Officer Ralph R. Stoehr observed the cited portable electric generator connected by a 50-ampere electrical cable to a spider box. Tr. 31. Workmen had plugged extension cords into the spider

³ A spider box is a piece of equipment that has power outlets on it; once the spider box is connected to a generator by a cable, workmen plug extension cords into the spider box outlets in order to operate electrically-powered tools. Tr. 18-19, 31; GX-12 (photographs of spider box).

box outlets to power their electrical tools. Tr. 48-49; GX-12. CSHO Stoehr examined the equipment and, in approximately one minute, determined there was no GFCI protection in place. CSHO Stoehr also determined that there was no Assured Equipment Grounding Conductor Program implemented at the worksite. Tr. 38. Summit's onsite superintendent thereafter contacted Cleveland and asked Cleveland to replace the spider box at the worksite with a spider box equipped with GFCI, which Cleveland did "within an hour." Dep. 17; GX-6A at Admission No. 23.

Nine days later, on May 5, 2005, OSHA cited Summit for violating 29 C.F.R. 1926.404(b)(1)(ii) due to the absence of ground fault circuit interrupters on either the generator or spider box. OSHA characterized the violation as "serious" and proposed a penalty of \$1,225. GX-1.

B. Decision Below.

The Judge first described the undisputed facts, namely the existence of jurisdiction, coverage, and the violative condition outlined in the citation. DO 2, 5. He then turned to the disputed issues of whether Summit, as general contractor, was properly cited under the multi-employer worksite doctrine by virtue of its creation or control of the worksite hazard and whether Summit had actual or constructive knowledge of the condition. DO 5.

The Judge determined that Summit did not "directly create" the hazard of electrical shock from the lack of GFCI protection. DO 5. In so finding, he reasoned that Summit had rented the equipment from Cleveland Brothers, which owned and delivered the equipment to the worksite. He further observed that none of Summit's employees had been exposed to the hazard. DO 5.

The Judge found, however, that Summit was a controlling employer. "[F]or purposes of multi-employer responsibility," he ruled, Summit exercised "sufficient authority and control of the work site to prevent or detect and abate the condition which exposed a subcontractor's employees to electrical hazards." DO 8. As support, the Judge relied on the testimony of Summit's own superintendent establishing his "supreme authority over, and control at the job

site," as well as on the absence of any veto authority at the site over his management decisions.
DO 8.

The Judge further relied on numerous contractual provisions in Summit's standard subcontract, which it required all subcontractors to sign, as further evidence of Summit's control over the safety of the subcontractor employees. DO 9. First, Summit required subcontractors to be bound by and assume towards Summit all of Summit's duties, obligations, and responsibilities to the owner under the general contract. Second, Summit required subcontractors to "comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Work." Third, Summit required subcontractors to warrant and guarantee that the work would comply "with all federal, state and local codes and requirements." Fourth, the subcontract required reimbursement to Summit for fines and costs incurred as a result of subcontractor non-compliance with safety requirements (or allowed Summit to deduct these costs from the contract amount). Fifth, the subcontract gave Summit sole discretion over approval of a subcontractor's subcontract and required Summit's written consent to any sub-subcontract. Sixth, the subcontract required subcontractors to keep their work areas clean and orderly subject to Summit's approval. Seventh, Summit maintained approval authority over the subcontractors' superintendents and their assistants. Eighth, the subcontract provided that "the use of the site" fell under "the complete direction" of Summit's supervisory staff. DO 9-10. Finally, the subcontract gave Summit the ultimate authority to terminate a subcontractor for cause or convenience for failing to perform in accordance with the contract documents, for disregarding laws, codes or regulations of any public body having jurisdiction, or for violating any of the contract provisions, including those relating to compliance with OSHA regulations.
DO 11.

Together these provisions, according to the Judge, gave Summit, as general contractor and holding a "unique position" at the site, "multiple methods to enforce any subcontractor's compliance with OSHA requirements." DO 11. The Judge thus found, based on Commission

precedent, *McDevitt St. Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000), that Summit was a controlling employer under the multi-employer worksite doctrine.⁴

The Judge further ruled that Summit, despite having control and authority over the workers at the site and responsibility for safety requirements, failed to exercise reasonable care in assuring the rented equipment had GFCI protection. According to the Judge, Summit observed delivery of the equipment but made no effort whatsoever to inspect it at the time. DO 12. Additionally, the Judge found that Summit's superintendent and assistant superintendent made daily walks of the worksite, walking past the equipment "on any number of occasions," and could have easily determined the absence of GFCI capability, but failed to do so. DO 13. The Judge therefore found that Summit had constructive knowledge of the violative condition. DO 13.

The Judge accordingly affirmed the citation as serious and assessed a penalty of \$1,225.

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Nationwide Mutual Insurance v. Darden* adopted the common-law test for distinguishing an employee from an independent contractor. The multi-employer worksite doctrine does not in any way depend on this distinction. Rather, under the doctrine, an employer may be liable for exposures not only to its own employees but also to employees of other employers. Thus, *Darden* has no impact on the multi-employer worksite doctrine. On the merits, Summit is liable under the multi-employer worksite doctrine both as a creating and as a controlling employer. Summit created the hazard because it provided the generator and spider box for use by a subcontractor without ensuring that the equipment had ground-fault circuit interrupter (GCFI) protection. Summit also controlled the hazard because, as

⁴ In light of these multiple means of Summit control, the Judge found that the contract provision placing "sole responsibility" for OSHA compliance on the subcontractor did not relinquish Summit's authority or control over the worksite. He stated Summit could not contract out its overarching OSHA responsibilities for worksite safety. DO 9, citing *Pride Oil Well Serv.*, 15 BNA OSHC 1809 (No. 87-692, 1992).

the Judge found, it had general supervisory authority and control of the worksite and failed to exercise reasonable care to prevent or detect and abate the violation to which subcontractor employees were exposed.

ARGUMENT

I.

***Nationwide Mutual Insurance v. Darden* has no impact on the multi-employer worksite doctrine and Commission precedent arising under the doctrine.**

The Supreme Court's decision in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992) and the multi-employer worksite doctrine address two distinctly different issues. *Darden*, therefore, has no impact on Commission precedent establishing or applying the multi-employer worksite doctrine.

In *Darden*, the Court construed the term "employee" under the Employee Retirement Income Security Act (ERISA) in determining whether an insurance salesman was entitled as an "employee" to recover retirement benefits in a retirement plan sponsored by the insurance company whose policies the agent sold. Finding ERISA's "nominal definition of 'employee' [to be] completely circular and explain[ing] nothing," it looked elsewhere to determine whether the salesman was an "employee" or was instead an independent contractor. *Id.* at 323. First, it looked to "any provision [in ERISA] either giving specific guidance" on how to differentiate between an employee and an independent contractor or suggesting that adopting the traditional common-law test to distinguish between the two categories "would thwart the congressional design or lead to absurd results." *Ibid.* Finding neither, the Court looked to the common law and adopted the common-law master-servant test. *Ibid.* In turning to the common law, the Court explained that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to

incorporate the established meaning of those terms. . . ." *Id.* at 322, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989). *Darden* thus generally establishes a three-step framework for analyzing the meaning of the term "employee" under a federal statute: the Court first looks to the specific statutory definition; if that is unhelpful, the Court then examines other statutory provisions for specific guidance; and if no statutory guidance exists, the Court will adopt the common law definition.⁵

The *Darden* test has no impact on the multi-employer worksite doctrine because the doctrine is not concerned with the question of whether a worker is an "employee" (or independent contractor) of a particular business entity or company. Rather, the multi-employer worksite doctrine is concerned with assigning responsibility for hazards among different, potentially-liable, employers, regardless of whose employees are endangered. The multi-employer worksite doctrine provides that "on a multiple employer worksite, an employer that creates or controls a hazardous condition is responsible under the OSHA standards, *regardless whether employees exposed or having access to the condition are its own employees 'or those of other employers engaged in a common undertaking.'*" *Access Equipment Systems, Inc.*, 18 O.S.H. Cas. (BNA) 1718, 1722-23 (1999) (quoting *Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2d Cir. 1975) and listing Commission and other courts of appeals precedent) (emphasis added). Thus, the basic concern in *Darden* - the existence of an employment relationship - is irrelevant to

⁵ Summit greatly overstates the holding of *Darden* in asserting that post-*Darden*, "employee" and "employer" "must be used in the traditional common-law sense." Petition for Discretionary Review ("PDR") at 9-10. *Darden* clearly did not conclusively define those terms forever and for all purposes. See *Yates v. Hendon*, 124 S.Ct 1330, 1335, 1339 (2004) (not resorting to common law on question whether working business owner is an "employee" under ERISA where statute provided "specific guidance"); *Smith v. Castaways Family Diner*, ___ F.3d ___, 2006 WL 1985479 (7th Cir. July 18, 2006) (in determining whether business had minimum number of "employees" to establish Title VII coverage, *Darden*-derived test distinguishing employee from independent contractor did not answer question whether restaurant managers exercised sufficient authority to be considered employers and thus excluded from roster of employees).

the doctrine because a cited employer is liable for exposures to either its own employees or employees of other employers, based on the employer's relationship to the hazard – by its control or creation of it. In fact, as applied here, the doctrine *presupposes* the absence of an employment relationship between Summit and the exposed employees, because if such a relationship existed, there would be no reason to invoke the doctrine. Thus, the multi-employer doctrine concerns an employer's obligation to employees of other employers, an issue that *Darden* expressly did not consider. 503 U.S. at 320 ("Darden's ERISA claim can succeed only if he was Nationwide's employee"). It applies precisely to the situation where there are multiple *employers* on site, and so in no way turns on the distinction between "employee" and "independent contractor" that was critical to *Darden*.

Summit fundamentally misconstrues the multiemployer worksite doctrine in arguing that it is based on the same expansive definition of "employee" rejected in *Darden*. PDR at 9-10 (arguing doctrine expands definition to further purpose of statute). The doctrine makes no attempt to construe either "employer" or "employee," and consequently, *Darden's* explicit rejection of the "correction of mischief" test for construing the term "employee" is of no significance here. 503 U.S. at 324-25 (rejecting *United States v. Silk*, 331 U.S. 704, 713 (1947)). Commission precedent clearly demonstrates that the multi-employer worksite doctrine does not derive from the "correction of mischief" test or a broad construction of "employee." *E.g.*, *Access Equipment Systems, Inc.*, 18 O.S.H. Cas. (BNA) 1718, 1723-1725 (1999) (setting forth bases for multiemployer worksite doctrine, none of which include "correction of mischief" test or any variant of it). Thus, Summit is completely wrong in claiming that *Darden* "swept away" the "legal foundation for the multi-employer worksite doctrine." PDR at 10 n.2.

Indeed, post-*Darden*, the courts of appeals and this Commission have repeatedly applied the doctrine, never suggesting that *Darden* undermines it. See, e.g., *Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 818 (6th Cir. 1998); *Smoot Construction*, 2006 WL 1644881 (No. 05-0652 June 9, 2006); *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30 (No. 92-0851, 1994). Accordingly, not only is there no basis for Summit's claim (PDR at 8) that post-*Darden* Commission precedent in multiemployer settings has "emphasiz[ed] that only the employer of affected workers may be cited," but quite the opposite is true.

Summit's citation of Commission precedent applying *Darden*, like *Darden* itself, is therefore inapposite here. PDR 6-10 citing *Allstate Painting and Contracting Co., Inc.*, 21 BNA OSHC 1033 (Nos. 97-1631 & 97-1727, 2005); *AAA Delivery Services, Inc.*, 21 BNA OSHC 1219 (No. 02-0923, 2005); *Don Davis, d/b/a Davis Ditching and Davis Ditching, Inc.*, 2001 WL 856241, 19 BNA OSHC 1477 (No. 96-1378, 2001); *Timothy Victory*, 1997 WL 603003, 18 BNA OSHC 1023 (No. 93-3359, 1997). Not surprisingly given *Darden's* complete inappositeness to this issue, none of these cases addressed, or even referred to, the multi-employer worksite doctrine. Instead, these cases addressed whether individual workers were "employees" of a particular company as opposed to "independent contractors" hired by the company (or employees of another company). In resolving this issue, the Commission applied the common-law master-servant test for the straightforward purpose of establishing that "there is an employment relationship between a cited employer and the affected workers." *AAA Delivery Services*, 21 BNA OSHC at 1220. By so stating, the Commission did not intend to reverse, *sub silentio*, or even call into doubt, its longstanding adherence to the multi-employer worksite

doctrine, which in no way depends on a direct employment relationship between the cited employer and affected worker. *E.g., Smoot Constr., supra.*

Thus, the distinction between employee and independent contractor can be important because, generally speaking, somebody's employee has to be exposed to the cited hazard or condition in order for there to be a violation; sole proprietors acting as independent contractors fall outside the OSH Act and only an "employer" with one or more "employees" can be cited under it. 29 U.S.C. § 652((5)).⁶ But it is not important to the operation of the multi-employer worksite doctrine. Because the multi-employer worksite doctrine does not depend on an employment relationship between the cited employer and exposed worker, *Nationwide Mutual Insurance v. Darden* has no impact on the doctrine.

II.

Summit Contractors, Inc. created the hazard here by providing the generator and spider box for use by a subcontractor without ensuring that the equipment had ground-fault circuit interrupter (GFCI) protection.

Under the multi-employer worksite doctrine, the employer responsible for creating the hazard may be held liable for the resulting violation. *Smoot Construction*, 2006 WL 1644881 (No. 05-0652 June 9, 2006). Summit created the hazard at issue in this case by providing an unsafe generator and spider box for use by a subcontractor at the site. *Cf. Smoot Construction, supra*, (general contractor created trench by erecting formwork along one side wall of trench and creating egress ramp); OSHA Instruction CPL 2-0.124 § X.B (creating employer is "the employer that caused a hazardous condition"). In particular, Summit created the hazard by (1) assuming responsibility for providing the equipment pursuant to its contract with its subcontractors; (2) ordering the equipment without requesting GFCI protection; and (3) failing to

⁶ Even under the multi-employer worksite doctrine, the Secretary must establish that the cited company is an "employer" under the Act, and that the exposed individuals were "employees" of some employer at the worksite. These facts, however, are undisputed here. DO 2-3; PDR 2, 5.

inspect the equipment at delivery for obvious hazards such as the absence of GFCI protection.⁷

These actions and omissions are amply sufficient to make Summit a "creating employer." See *Lee Roy Westbrook Construction Company, Inc.*, 1990 WL 150358, 14 BNA OSHC 1751 (No. 88-2710, 1990) (ALJ Schwartz) (general contractor, not cited subcontractor, was creating employer where general contractor had contractual responsibility to furnish electricity and had rented violative generators). Summit's ordering of the generator and spider box caused the equipment to come to the site; its failure to specify equipment with GFCI protection allowed the rental company the freedom to deliver any kind of generator and spider box; and Summit's failure to inspect the equipment, *i.e.*, to lift up a flap, permitted the non-compliant equipment to be available for use at the site for over a week. Clearly, it was Summit, the employer responsible for providing the equipment for use by the subcontractor (which was contractually-obligated to use the electrical services provided by Summit), that created the hazard by providing non-compliant equipment. And it was Summit – as the creating employer – who abated the hazard by obtaining a new generator and spider box with GFCI protection. The other parties – Cleveland, the subcontractors – did not create the hazard, though they may have been able to take some steps to avoid or minimize the condition.⁸ However, regardless of the other contractors' responsibilities, Summit, as the creating employer, was properly cited for the violation.

The Judge erred to the extent he held that Summit did not "create" the hazard for which it was cited. The Commission, therefore, should -- if it decides to address this issue – reverse this finding as an alternative ground for affirmance.

⁷ The contract between Summit and Spring Hill expressly gave Summit the right to assume responsibility for providing temporary power at the worksite: "All parties hereby agree that Contractor may provide, in locations determined to be appropriate for the project, temporary electrical . . . services." GX-16, at 16 ("Attachment 'A'"), ¶ 6. The subcontract further *required* the subcontractor to use these services, if provided by Summit. *Ibid.* ("Subcontractor shall make use of the services as provided.").

⁸ Cleveland provided the equipment, exactly as specified by Corthals, *to Summit*. Summit, not Cleveland, provided the equipment to Spring Hill.

III.

Summit had general supervisory authority and control of the worksite and failed to exercise reasonable care to prevent or detect and abate the violation to which subcontractor employees were exposed.

Independent of whether Summit is responsible for creating the hazard, it is liable under the "control" prong of the multi-employer worksite doctrine, holding that a general contractor on a multiemployer worksite is responsible for violations that it could reasonably be expected to prevent or abate due to its supervisory authority and control over the worksite, regardless of whether the exposed employees are its own or those of another contractor. *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30 (No. 92-0851, 1994).

The record contains strong evidence of Summit's control over the worksite. First, Summit was the general contractor and had contractual authority and responsibility for the entire work area. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975) (the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site). As the Judge found, Summit's superintendent's job was "to oversee the project, order materials, order in subs in a timely fashion," and he therefore exercised "supreme authority over, and control at, the job site." DO 8. The contract documents further demonstrate in many different ways Summit's supervisory authority over safety at the worksite. Among the provisions relied on by the Judge, the subcontract provided that "the use of the site" fell under "the complete direction" of Summit's supervisory staff. GX 16, Attachment A, paragraph 5. It further required the subcontractor to comply with OSHA safety regulations, among other laws, and allowed Summit to terminate the contract for cause for non-compliance with its provisions. Finally, Summit's superintendent

inspected the subcontractor work twice daily, coming within 10-15 feet of the spider box. Dep. 13-14. Certainly, he was authorized under the above contract provisions to order correction of any safety violation he discovered. Dep. 36 (Summit superintendent's admission that Summit was responsible for subcontractors' safe use of rented equipment); see *McDevitt Street Bovis*, 19 BNA OSHC at 1110 (general contractor's control demonstrated by evidence that its supervisors regularly walked the worksite and had authority to demand subcontractors' compliance with safety requirements).

In addition to its general supervisory responsibilities over the job site, Summit exercised direct control over the specific hazard here. Summit ordered and paid for the equipment, had it delivered to the worksite, directed its placement there, made it available for its subcontractors to use, kept a daily log accounting for the equipment, Dep. 56, and demanded and obtained a replacement when the violation was discovered. Moreover, the subcontractors looked to Summit to address and resolve problems with the equipment. Prior to the inspection, Spring Hill's superintendent Corey Hill had difficulty starting the generator. Hill reported the problem to Summit's superintendent who contacted Cleveland to report the problem and ask for assistance. When Cleveland suggested a solution, the superintendent relayed this information back to Corey Hill. Dep. 54-55; GX-5, Response to Interrogatory No. 13; GX-20 at ¶ 12. In his Declaration, Corey Hill explains that it was appropriate to go through Summit's superintendent with any equipment problems because Summit "was the company at the worksite ultimately responsible for the equipment." GX-20 at ¶ 13. Under similar circumstances, the Commission has found contractor control over the hazard. *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992) (subcontractor "had considerable control over and responsibility for the work

area" by deciding "when and where to excavate . . . and when and how to slope, shore, or otherwise protect open trenches").

Summit also clearly "possessed the expertise and personnel to abate" the hazard. *Union Boiler Co.*, 11 BNA OSHC 1241, 1246 (No. 79-232, 1983). Summit's superintendent testified he had inspected a generator and spider box for GFCI protection on prior occasions, Dep. 41, could have determined in "a few minutes" whether the equipment had GFCI protection here, Dep. 40, and following the OSHA inspection, he contacted Cleveland and had it replaced "within an hour." Dep. 17.

In sum, Summit possessed pervasive authority over safety at the worksite and exercised direct control over the specific hazard as well. By virtue of its supervisory authority, it could have obtained abatement by preventing subcontractors from using the equipment and replacing it. Similarly, Summit could have abated the hazard before any employee exposure simply by conducting a cursory inspection at delivery and requesting equipment with GFCI protection. The Judge properly found Summit liable as the "controlling" employer under the multi-employer worksite doctrine.

CONCLUSION

For the reasons discussed above, the Commission should affirm the serious violation and penalty of \$1,225.

August 14, 2006
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 14, 2006, I served a copy of the foregoing Opening Brief for the Secretary of Labor upon counsel for Respondent by facsimile transmission to Rader & Campbell, and by regular mail, postage prepaid, first class mail, on:

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