UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

SUMMIT'S OPENING BRIEF ON REVIEW

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INTRODUCTION AND OVERVIEW

This case presents the issue of the validity of the multi-employer worksite doctrine. This same issue is pending before the Commission in Docket 03-1622. In Docket 03-1622 Summit and its *amici* present arguments that each employer is only responsible for OSHA compliance as to his own employees, and that there is no statutory or regulatory authority for OSHA citations outside the employment relationship. Summit and its *amici* also present arguments that imposition of liability outside the employment relationship actually violates the OSH Act, violates Congress' intent, violates OSHA's own regulations, increases general contractors' common law tort liability and is bad policy.

The Secretary of Labor's position on the multi-employer doctrine can be distilled to the argument that, because of the Act's broad remedial purpose, the terms "employer" and "employee" in the Act should not be defined in the traditional common law sense but should be defined broadly, so that every employer on a multi-employer worksite has a duty to protect the safety of all employees on the worksite. *See e.g.* Secretary's Response Brief in Docket 03-1622 at 15-17, 22, 27. *Cf. IBP, Inc. v. Herman*, 144 F.3d 861, 865, 18 BNA OSHC 1353, 1355 (D.C. Cir. 1998)(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).

In its Briefing Notice in this case the Commission has focused on the question whether the terms "employer" and "employee" may be interpreted broadly, as the Secretary asserts, in light of the Supreme Court's decision in *Nationwide Mutual Insurance v. Darden*,

503 U.S. 316 (1992). Summit will therefore devote most of this brief to that issue. At the same time, however, Summit wants to make clear that it continues to rely on the other arguments raised in its Petition for Review in this case and in its briefs in Docket 03-1622.

STATEMENT OF FACTS

Respondent Summit Contractors, Inc., was the general contractor for an apartment complex in Lebanon, Pennsylvania known as the Willows Senior Apartments. (Tr. 15-16; Depo. 4-5).[1] Summit only had two employees at the site, superintendent Mark Corthals and assistant superintendent Garnett Cramer. (Tr. 16, 204; Depo. 5). Summit's employees did not physically do any construction work. Rather, the actual construction work was done by independent subcontractors. (Depo. 5; GX10 ¶ 2). Summit does not assume responsibility, either contractually or in actual practice, for ensuring that subcontractors comply with OSHA. Rather, Summit enters into written subcontract agreements with each subcontractor that provide that the "Subcontractor has the sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act." (GX-16, Attach. A, ¶ 4).

In April, 2005, the project was barely underway. The concrete had been poured and the framing subcontractor, Springhill Construction, was scheduled to frame in the buildings. Springhill sub-subcontracted the labor portion of the framing to Mendoza Framing. (Tr. 17, 104; Depo. 16; GX 20 ¶ 5). When Mendoza was ready to start, there was not yet any permanent power to the site and Mendoza did not have anywhere to plug in his saws. (GX

[1]"Tr" references are to the December 2, 2005 hearing transcript. "Depo" references are to the deposition of Mark Corthals taken in lieu of testimony at trial.

10 ¶ 3). Summit had previously rented a generator from Cleveland Brothers Equipment Rental for temporary power to its job trailer, so Mark Corthals already had a contact number for a rental agency. (Depo. 36, 24, 55). Therefore, as an accommodation to Springhill, Corthals telephoned Cleveland Brothers and asked them to deliver a generator and a spider box to the site for temporary power. (Depo. 7-8; GX 10 ¶ 3). A "spider box" contains multiple receptacles into which portable tools may be plugged. When connected to the generator, the spider box serves the same function as an extension cord with a multiple plug-in receptacle on one end. (Tr. 31; GX 10 ¶ 3; GX 12 E).

When Corthals ordered the generator and spider box he did not specifically request that the spider box be equipped with GFCI protection because, based on past experience, he thought that GFCI protection was automatically built into all spider boxes. (Depo. 8-9, 28). He also relied on Cleveland Brother's expertise to send what was needed—including a spider box with GFCI. (Depo. 15-16, 72, 79).

Cleveland Brothers' driver delivered the generator and spider box to the job site on April 15, 2005. (Depo. 37). April 15 was on a Friday. Saturdays and Sundays were not workdays. (GX 5 Ans. No. 12). Monday through Friday, Mark Corthals would walk the job site a "couple times a day." (Depo. 13). If Corthals observed an obvious safety hazard during these walk-throughs, he would call it to the attention of the relevant subcontractor. (Depo. 61). But Corthals did not conduct safety inspections. (Depo. 14). These walk-throughs were pretty quick—perhaps 10-15 minutes. (Depo. 15). The purpose was to check on the progress

of the work so he could put in a daily report to let the main office "know what was going on for that day." (Depo. 13-14). During these walk-throughs Corthals might have walked within 10 or 15 feet of the spider box, but he could not see from just walking by that the spider box did not have GFCI. (Depo. 14).

In fact, CSHO Stoehr and Mark Corthals both testified that the lack of GFCI was not "readily apparent." (Tr. 138; Depo. 10). To determine whether there was GFCI protection it was necessary to see if there was a "reset" button in the receptacle. (Tr. 73-74; Depo. 10). But in this case the receptacles in the spider box were covered with metal flaps. (GX 12 A, B, C). Thus, the only way to determine whether this spider box had GFCI was to get on hands and knees, lift the metal flap and bend over and look at the receptacle from up close. (Tr. 73; Depo. 9-10). This was true even when the spider box was in use—*i.e.* it was impossible to tell if there was GFCI without getting down on hands and knees and lifting the metal flaps on the receptacles. As CSHO Stoehr testified

> Q. And, to see whether there was a reset button in the receptacle, you had to lift up a flap and look at it, correct?
>
> A. Correct.
>
> Q. And, when you observed the spider box in this case, there were extension cords plugged into it, so, your view was that it was in use, right?
>
> A. Correct.
>
> Q. And, even so, you had to get down on your hands and knees to look and see if the reset button was in the

receptacle, didn't you?

A. Right. I got down on my knees. Correct.

Q. So, even though the spider box may have been in plain view, the lack of GFCI was not readily apparent, was it?

A. No, it was not on this site.

(Tr. 138; *see also* Depo. 14; GX 12 E).

It was not necessary for Corthals to look at the spider box closely to do his normal job. (Depo. 14). He could obviously check on the progress of the work without getting on hands and knees to lift the flaps and look for the reset buttons. (Depo. 11). Therefore, he did not know the spider box was not equipped with GFCI. (Depo. 17). On the other hand, the workers for Mendoza and/or Springhill had to see that there was no GFCI when they plugged their tools into the spider box, but they never informed Corthals. (Depo. 75-76).

CSHO Stoehr arrived and inspected on April 26. He could not readily determine whether there was GFCI and so he got down on his hands and knees and lifted the flaps on the receptacles to look for the reset button. (Tr. 137-138). When he saw there was no GFCI he informed Mark Corthals. (Tr. 36; Depo. 16-17). Corthals was surprised because he thought the spider box was equipped with GFCI. (Depo. 17; GX 10 ¶ 6). Corthals returned to his office and telephoned Cleveland Brothers and complained that "OSHA was on-site and we just got nailed because we didn't have ground fault circuit protection on the spider box." (Depo. 17). The Cleveland Brothers rental agent was "dumbfounded" and said he did not know how a spider box without GFCI had been sent to the jobsite. (Depo. 17-18). The agent

had another spider box delivered within an hour. (Depo. 17).

Subsequently, OSHA cited Summit for violating 29 CFR 1926.404(b)(1)(ii) because the spider box did not have GFCI. The CSHO acknowledged that Summit had no employees exposed to the hazard. (Tr. 105-106). The CSHO also acknowledged that the plain language of the standard does not require Summit to provide GFCI protection for independent subcontractors. (Tr. 106). He testified that his only basis, or authority, for citing Summit was OSHA's multi-employer citation policy set forth in OSHA Instruction CPL 2-0.124 (Tr. 106-108). The CPL goes beyond the plain language of the standard and purports to authorize citations to "creating" employers and "controlling" employers. (Tr. 107). Summit was considered the creating and controlling employer because it was the general contractor and because it had ordered the spider box. (Tr. 53).[2]

[2] OSHA also issued citations to Springhill and Mendoza for the same violation. The penalty to Mendoza—whose workers were the only ones exposed to the hazard and necessarily had to know of the violation—was $525. (Tr. 103, 105). The penalty to Springhill was also $525. (Tr. 103-104). The penalty to Summit, who was contractually twice removed, and who had no employees exposed to the violation and no knowledge of the violation, was $1,225. (Tr. 104-106, 134).

STATEMENT OF THE ISSUES

1. Does the United States Supreme Court's decision in *Nationwide v. Darden*, 503 U.S. 318 (1992) require that the terms "employer" and "employee" in the OSH Act be defined as the traditional common-law master-servant relationship?

2. Does the cited standard, 29 CFR 1926.404(b)(1)(ii), impose a duty on Summit to ensure that the employees of subcontractors are provided GFCI protection?

3. Does the fact that Summit rented the spider box as an accommodation to its subcontractor enlarge Summit's liability under the standard or under the OSH Act?

4. Even if Summit were liable under the standard or the Act, did the Secretary prove the element of knowledge?

ARGUMENTS AND AUTHORITIES

INTRODUCTION- HISTORY OF THE MULTI-EMPLOYER DOCTRINE

To understand the direct impact of *Nationwide v. Darden* on the multi-employer doctrine it is helpful to understand how the doctrine developed and the legal rationale for the doctrine.

When the Occupational Safety and Health Act became law in 1971 no one thought that the Act imposed a duty on one employer to ensure that some *other* employer protected his employees from occupational hazards. Thus, when OSHA initially adopted the construction standards at issue in this case, OSHA also promulgated the regulation at 29 CFR 1910.12(a) confirming that "[e]ach employer shall protect...each of *his* employees engaged in construction work...by complying with Part 1926 standards." (Emphasis added).

Likewise, Review Commission case decisions initially held that the Act limits an employer's responsibility to his own employees, and the Commission consistently refused to uphold citations to an employer unless the employees of that employer were exposed to the hazard. *See e.g. Secretary of Labor v. Gillis and Cotting, Inc.*, 1 BNA OSHC 1388 (Rev. Comm. 1973), (general contractor cannot be cited for subcontractor violations because Congress intended liability only in the context of an "employment relationship"), *Secretary v. Home Supply Company*, 1 BNA OSHC 1615 (Rev. Comm. 1974) (violation created by subcontractor to which only subcontractor's employees were exposed may not be charged against general contractor), *Secretary v. City Wide Tuckpointing Serv. Co.*, 1 BNA OSHC

1232 (Rev. Comm. 1973) (employer can only be liable under the Act where its employees are exposed to the hazard), *Secretary v. Hawkins Construction Co.*, 1 BNA OSHC 1761 (Rev. Comm. 1974) (Act only places responsibility for maintaining safe working conditions upon those employers who have endangered their own employees), *Secretary v. Martin Iron Works, Inc.*, 2 BNA OSHC 1063 (Rev. Comm. 1974) (an employer can only be held liable under the Act for its own employees). The Commission's initial interpretation of the Act was affirmed by the Fourth Circuit in *Brennan v. Gilles and Cotting, Inc.*, 504 F.2d 1255, 2 BNA OSHC 1243, (4th Cir. 1974) and by the Fifth Circuit in *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675, 3 BNA OSHC 1023, (5th Cir. 1975).

In these early decisions Commissioner Cleary dissented, contending that since the definitions of "employer" and "employee" in the Act "do not expressly require that ordinary employer-employee relationships be adhered to," those terms should be interpreted and applied "on the basis of the purpose and policy of the legislation in question," citing *United States v. Silk*, 331 U.S. 704 (1947). *See Secretary v. James E. Roberts Company*, 1 BNA OSHC 1684, 1685 (Rev. Comm. 1974) (Dissenting opinion of Comm. Cleary). In other words, Commissioner Cleary contended that "the employees of a subcontractor should be considered the employees of the general, or prime contractor, for purposes of the Act" because that advances "the express purpose of the Act." *See Secretary v. Hawkins Construction Co.*, 1 BNA OSHC at 1762 (Dissenting opinion of Commissioner Cleary).

In 1976, in *Secretary v. Grossman Steel & Aluminum Corp*, 4 BNA OSHC 1185 (Rev.

Comm. 1975) and *Secretary v. Anning Johnson Company*, 4 BNA OSHC 1193 (Rev. Comm. 1975), a majority of the Commission, consisting of Commissioners Cleary and Barnako, "reconsidered" the Commission's prior decisions limiting an employer's responsibility to his own employees. In *dicta* not necessary to the holdings in *Grossman* and *Anning-Johnson*, the majority held that in the future the Commission would hold general contractors responsible for compliance by subcontractors and liable for the safety of subcontractors' employees. As factual justification for this about-face, the majority stated

> Additionally, 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. 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.
>
> * * *
>
> Furthermore, we note that typically a general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or to take the necessary steps to assure compliance.

Grossman Steel & Aluminum at 4 BNA OSHC at 1188, *Anning-Johnson Company*,

4 BNA OSHC AT 1199.[3]

The legal justification for imposing these new duties on general contractors was Commissioner Cleary's long-stated view that "The duties arising under the Act are to be read in light of the social purpose of assuring 'so far as possible every working man and woman in the nation safe and healthful working conditions'." *Anning-Johnson*, 4 BNA OSHC at 1198.

Based on this foundation, the Commission developed what is known as the multi-employer doctrine whereby general contractors are held liable for the safety of all "employees" on a jobsite. *See e.g. Secretary v. Gelco Builders*, 6 BNA OSHC 1104 (Rev. Comm. 1977), *Secretary v. Gil Haugan d/b/a Haugan Construction Co.*, 7 BNA OSHC 2004 (Rev. Comm. 1979). The Commission applied this doctrine to both construction and non-construction worksites. *See Secretary v. Harvey Workover, Inc.*, 7 BNA OSHC 1687 (Rev. Comm. 1979), *Secretary v. Red Lobster Inns*, 8 BNA OSHC 1762 (Rev. Comm. 1980). In affirming citations under the doctrine the Commission often reiterated 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

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[3]The underlying premises in this language were fabricated from whole cloth. There was nothing in the record in those cases to support the statement that general contractors dictate to subcontractors how they should do their job. Nor is there any statute or principle of law that a general contractor "normally" has a responsibility to assure that other contractors fulfill their obligations with respect to employee safety. In fact, the common law rule is that general contractors normally do *not* have this responsibility. Nor is there any basis for the hypothesis that a general contractor "possesses sufficient control" or is "well situated" to ensure compliance by other contractors. In fact, just the opposite is true.

statutory purpose..." *See e.g. Secretary v. S&S Diving Company*, 8 BNA OSHC 2041, 2042 (Rev. Comm. 1980).

In short, the multi-employer doctrine was not based on any clearly-expressed intent of Congress in the Act or in the legislative history. *Secretary v. Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1723, 1724 (Rev. Comm. 1999). The doctrine was based solely on an expansive definition of employer and employee on the theory that advances the purpose of the Act. *Ibid.*[4]

FIRST ISSUE: DOES THE UNITED STATES SUPREME COURT'S DECISION IN *NATIONWIDE V. DARDEN*, 503 U.S. 318 (1992) REQUIRE THAT THE TERMS "EMPLOYER" AND "EMPLOYEE" IN THE OSH ACT BE DEFINED AS THE TRADITIONAL COMMON-LAW MASTER-SERVANT RELATIONSHIP?

Darden was an insurance agent for Nationwide Mutual Insurance Company. Nationwide contracted to pay him commissions on his sales and to enroll him in a retirement plan for agents. The contract included a non-compete agreement and provided that Darden would forfeit his retirement plan benefits if he violated the non-compete agreement. Darden did violate the non-compete agreement and Nationwide disqualified him from receiving plan benefits. Darden then sued Nationwide under ERISA for the plan benefits, claiming that he had been an employee of Nationwide and that the benefits were non-forfeitable because they had vested under ERISA. The District Court held that Darden was an independent contractor, not an employee, and therefore had no standing under ERISA. The Fourth Circuit

[4]This is confirmed by early appellate decisions affirming citations under the multi-employer doctrine. *See e.g. Clarkson Construction Co. v. OSHARC*, 531 F.2d 451, 458, 3 BNA OSHC 1880, 1883-1884 (10th Cir. 1976).

held that while Darden was probably not an employee under common-law principles of agency law, the term "employee" should be defined more expansively to include Darden because that would further the "declared policy and purposes" of ERISA. 503 U.S. at 321. In reaching this conclusion, the Fourth Circuit relied on the Supreme Court's decision in *United States v. Silk*, 331 U.S. 704 (1947).

The Supreme Court reversed the Fourth Circuit. The Court stated that its recent decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) "signaled our abandonment of Silk's emphasis on construing that term ["employee"] 'in light of the mischief to be corrected and the end to be attained'." 503 U.S. at 325. The Court firmly held that, unless Congress has clearly specified otherwise in the statute, the term "employee" must be defined under common law agency principles. In other words, there must be a conventional master-servant relationship. *Id.* at 322-323. The Court concluded by setting forth the common law criteria for determining who is an "employee." Simply summarized, those criteria include such factors as who controls the means by which the work is accomplished, who has the right to hire and fire the workers, who controls the work hours, who withholds taxes for the workers and pays employee benefits, who provides tools and training, the duration of the work and whether the hired party also works for others, the method of payment, and so on. *Id.* at 323-324.

In short, *Nationwide v. Darden*, set aside the judicial precedent and the legal rationale upon which the multi-employer doctrine is based. It is no longer permissible to define

"employer" and "employee" expansively on the theory that advances the purpose of the Act. Instead, only the actual employer of the affected employees may be cited. To determine whether a cited respondent is the actual employer for purposes of the Act, the criteria listed in *Nationwide* must be applied to determine whether there is in fact a common law master-servant employment relationship.

The Commission has already followed the principle enunciated in *Nationwide*. In *Secretary v. Vergona Crane Co.*, 15 BNA OSHC 1782 (Rev. Comm. 1992) the issue was whether a crane operator was the employee of Vergona, the crane owner, or of Polites, the crane lessor. The Commission applied the common law test in *Nationwide* and determined that the operator was Vergona's employee because Vergona retained control over the operator, determined the operator's wages, and had the authority to fire, hire or modify the employment conditions of the operator. *Id.* at 1785-1786.

In *Secretary v. Timothy Victory*, 18 BNA OSHC at 1023 (Rev. Comm. 1997) the Commission elaborated on its holding in *Vergona* in language that directly applies to the multi-employer doctrine. The Commission acknowledged that it had previously subscribed to the legal proposition that "the term 'employer' 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" of advancing workplace safety. *Id.* at 1026. But, the Commission continued,

> [T]he Commission modified that proposition in *Vergona Crane Co.*, 15 BNA OSHC 1782, 1991-93 CCH OSHD ¶ 29,775 (No. 88-1745, 1992), in order to conform Commission precedent to an intervening Supreme Court decision, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). In *Vergona*, the Commission noted *Darden's* holding "that the term 'employee' in a federal statute should be interpreted under common law principles, unless the particular statute specifically states otherwise." 15 BNA OSHC at 1784, 1991-93 CCH OSHD at p. 40,496. *Vergona* found no indication in the OSH Act that common law principles should not control the definition of "employee."

Id. at 1026. The Commission went on to state that because of the holdings in *Nationwide* and *Vergona*, the Secretary must establish that the cited respondent "exercised an *employer's* control" (emphasis in original) over the affected workers in order for the citation to be valid. *Id.* at 1027.

In *Secretary v. Don Davis*, 19 BNA OSHC 1477 (Rev. Comm. 2001) the Commission reaffirmed that only an "employer" may be cited for a violation of the Act, and reiterated that the Commission will apply the criteria in *Nationwide* to determine whether a common law employment relationship exists between affected employees and the alleged employer. In that case the Secretary argued that since Don Davis controlled the overall excavation project, he should be considered the employer for purposes of OSHA because he controlled the "manner and means of accomplishing the work." The Commission disagreed and emphasized that

> Control over the "manner and means of accomplishing the work" must include control over the *workers* and not just the results of their work. One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker.

Id. at 1482. (Emphasis in original).

In *Secretary v. Allstate Painting and Contracting Co.*, 21 BNA OSHC 1033 (Rev. Comm. 2005) the Commission restated that

> Only an "employer" may be cited for a violation of the Act, see 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site. *Timothy Victory*, 18 BNA OSHC 1023, 1995-1997 CCH OSHD ¶ 31,431 (No. 93-3359, 1997). In determining whether the Secretary has satisfied that burden, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992).

Id. at 1035. The Commission held that Allstate was not the employer in that case because it did not control the hiring, firing, or disciplining of the workers at the site, did not supervise their work, did not control their work hours, did not handle their training, did not supply their safety gear, and had no right to assign additional projects to them. *Ibid.*

The Commission's most recent statement on this issue is in *Secretary v. AAA Delivery Services, Inc.*, 21 BNA OSHC 1219 (Rev. Comm. 2005). The citation in that case charged AAA with failing to provide reflective vests to newspaper vendors. Applying the common law criteria set forth in *Nationwide*, the Commission found that the Secretary failed to prove that AAA controlled the manner or the means by which the vendors performed their work,

failed to prove that AAA withheld income or social security taxes, that AAA provided leave and retirement benefits, that AAA paid worker's compensation on the vendors, that AAA had authority to assign additional projects to the vendors, that AAA controlled the work hours of the vendors, or that AAA could prevent the vendors from selling papers for other distributors. The Commission therefore concluded that the Secretary had failed to prove that AAA was the employer of the vendors and vacated the citation. *Id.* at 1220-1221.

In its Briefing Notice the Commission asks the parties to brief the impact of *Nationwide v. Darden* on the multi-employer worksite doctrine and on Commission precedent arising under the doctrine. Summit respectfully submits that the Commission has already determined that impact in its decisions in *Vergona Crane, Timothy Victory, Don Davis, Allstate* and *AAA Delivery Services*. Those cases recognize that *Nationwide* changed the law. The language in those cases cannot be reconciled with the multi-employer doctrine espoused in *Grossman* and its progeny. The Commission should now, in this case, squarely hold that, regardless of the validity of the multi-employer doctrine prior to *Nationwide*, that doctrine is invalid now. It is invalid because the Supreme Court precedent upon which the theory of multi-employer liability was based—*i.e. U.S. v. Silk*—is no longer the law. The Commission should also dismiss the citation in this case because Summit was not the

employer of the affected employees, as required by *Nationwide*.[5]

SECOND ISSUE: DOES THE CITED STANDARD, 29 CFR 1926.404(b)(1)(ii), IMPOSE A DUTY ON SUMMIT TO ENSURE THAT THE EMPLOYEES OF SUBCONTRACTORS ARE PROVIDED GFCI PROTECTION?

The plain language of 1926.404 imposes a duty on "employers" to provide ground fault protection to "employees." Section 404(b)(1)(i) covers general applicability and states that the *employer* shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) or an assured equipment grounding program as specified in paragraph (b)(1)(iii) to protect *employees* on construction sites. Subsection (b)(1)(ii) requires GFCI protection for *employees*. Subsection (b)(1)(iii) restates that the *employer* shall alternatively implement an assured equipment grounding program for cord sets and equipment which are used by *employees*. The standard also states the *employer* must adopt procedures for carrying out the program, and the *employer* shall not permit *employees* to use equipment that does not have ground fault protection. *See* subsection (b)(1)(iii)(A), (F).

Obviously, if "employer" and "employee" are defined as the common law master-

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[5]The facts in this case are exactly like the facts that warranted dismissal in *AAA Delivery Services*. In that case, AAA was charged with failing to provide safety equipment in the form of reflective vests. Here, Summit was charged with failing to provide safety equipment in the form of GFCI. There, there was a written contract between AAA and the vendors identifying the vendors as independent contractors responsible for their own taxes and licenses. Here, there was a written contract between Summit and Springhill Construction identifying Springhill as an independent contractor and requiring Springhill to be responsible for its own taxes and licenses. There, the vendors could sell papers for other distributors as well as for AAA. Here, Springhill could do framing work for other general contractors. There, the Secretary failed to prove the factors necessary to establish a common law employment relationship. Here, the Secretary likewise failed to present evidence as to any of these factors. Indeed, the CSHO admitted *he did not know anything about these employment factors*. (Tr. 108).

servant relationship, as required by *Nationwide*, then the standard itself only imposes a duty on the employer of affected employees. The CSHO acknowledged that in this case the employer of the affected employees was Mendoza Framing, a subcontractor twice removed from Summit. (Tr. 102, 104-105). The CSHO also acknowledged that nothing in the language of the standard says that Summit, as general contractor, must provide or ensure GFCI protection to a subcontractor. (Tr. 106). The standard itself therefore provides no authority for citing Summit in this case.

THIRD ISSUE: DOES THE FACT THAT SUMMIT RENTED THE SPIDER BOX AS AN ACCOMMODATION TO ITS SUBCONTRACTOR ENLARGE SUMMIT'S LIABILITY UNDER THE STANDARD OR UNDER THE OSH ACT?

When the framing subcontractor needed temporary power for his saws, Summit's superintendent, Mark Corthals, could have told the framer to get the generator himself because, under the Subcontract Agreement, the subcontractor is ultimately responsible for providing temporary power when necessary. (GX 16 p. 16 ¶6; Tr. 23,34). In this case, however, Corthals had previously rented a generator for temporary power for his job trailer from a local rental agency named Cleveland Brothers. Since he already had a local name and telephone number, Corthals said that he would call and order a generator as an accommodation to the framer. (Depo. 7-8, 36, 24, 55).[6]

[6]The framing subcontractor, Springhill Construction was from Lafaette, New York. (GX 16 p. 1). Springhill's subcontractor, Mendoza Framing, was from Houston, Texas. They did not know or have any previous working relationship with any local rental agency in Lebanon, Pennsylvania. Since Corthals had already located and used a local rental agency it was a natural courtesy to offer to place the call at the framer's request. (Tr. 24).

When Corthals ordered the generator and spider box he did not specifically request that the spider box be equipped with GFCI protection because, based on past experience, he thought that GFCI protection was automatically built into all spider boxes. (Depo. 8-9, 28). He also relied on Cleveland Brother's expertise to send what was needed—including a spider box with GFCI. (Depo. 15-16, 72, 79). As it turned out, Cleveland Brothers mistakenly delivered a spider box that was not equipped with GFCI. The fact that the spider box did not have GFCI was not readily apparent and Corthals did not know or suspect that the spider box did not have GFCI. (Tr. 134, 138; Depo. 14, 17; GX 10).

In its Briefing Notice the Commission asks the parties to address whether Summit "created" the hazard when Corthals ordered the spider box without specifying or otherwise ensuring that it had GFCI. There are several points to be made on this issue. The first point, of course, is that under the Act and the cited standard Summit only had a duty to provide GFCI protection for its own employees and Summit did not violate that duty here. By making a telephone call and ordering the generator and spider box as an accommodation to the framer, Corthals did not enlarge Summit's liability under the standard or under the Act.

The second point is that the principle that an employer's duties under the Act are limited to his own employees makes absolute sense here because the employer of the affected employees was in a better position than Corthals to know there was no GFCI. Every time Mendoza or one of his workers lifted the flap on the spider box to plug in a saw they could see there was no reset button and thus no GFCI. In contrast, the lack of GFCI was not readily

apparent to Corthals.

The third point is that it was Cleveland Brothers who created the hazard, not Summit. Cleveland Brothers created the hazard by delivering a spider box that lacked GFCI. Cleveland Brothers was obviously in the best position to ensure that a spider box with GFCI was delivered. The leasing agent also clearly knew GFCI was required. He knew he was providing the temporary power source and what the power would be used for. (Depo. 8). The agent's subsequent surprise, and his statement that he did not know how a spider box without GFCI was delivered, confirms that he knew GFCI was required. (Depo. 17-18). And Cleveland Brothers was obviously in the best position to correct the hazard, as evidenced by the fact that they delivered another spider box with GFCI within an hour. (Depo. 17).

The fourth point is that simply placing a telephone order for delivery of materials or equipment does not legally "create" a hazard. To reason that Summit created the hazard here because Corthals ordered the generator and spider box is to take the meaning of "create" to an "unacceptably high level of abstraction." *Cf. IBP, Inc. v. Herman*, 144 F.3d at 867, 18 BNA OSHC at 1357. Suppose a contractor orders a load of lumber or sheet rock or roofing to be delivered to the jobsite and the lumberyard's delivery truck has faulty brakes or a broken back up alarm. Can the contractor be cited for creating that hazard? No. The contractor may be cited for allowing his employees to be exposed to the hazard if he knows about it. But no one would reasonably argue that the contractor "created" the hazard by

placing a telephone order for the delivery. To hold otherwise would mean that every contractor who orders materials delivered to the jobsite must inspect the supplier's delivery truck at the gate in order to avoid liability under OSHA.[7]

If Summit's superintendent Corthals were to physically remove a guardrail from a second story landing then it would be fair to say that Corthals "created" a fall hazard. If that happened then the Commission might have to deal with the question of whether there can be liability under the Act for simply creating a hazard. But that is not the issue here because Corthals did not create a hazard or commit a violation by merely ordering the generator and spider box.

FOURTH ISSUE: EVEN IF SUMMIT WERE LIABLE UNDER THE STANDARD OR THE ACT, DID THE SECRETARY PROVE THE ELEMENT OF KNOWLEDGE?

Knowledge is a fundamental element of the Secretary's burden of proof. *Trinity Industries, Inc., v. OSHRC*, 206 F.3d 539, 542, 18 BNA OSHC 2057, 2058 (5th Cir. 2000). This is true even under the multi-employer doctrine. *See e.g. Secretary v. David Weekley Homes*, 19 BNA OSHC 1116, 1119 (Rev. Comm. 2000). This means that the citation to Summit cannot be affirmed in any event unless the Secretary proved that Summit had knowledge of the violative condition—*i.e.* that the spider box did not have GFCI.

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[7]The Secretary may argue that by renting the generator and spider box Corthals did more than simply place an order for materials or equipment. But this is a distinction without a difference. A contractor who orders delivery of materials normally signs a delivery ticket and pays an invoice that contains similar contractual terms, promises to pay, warranties and disclaimers as the rental agreement in this case.

It is undisputed that Summit did not have actual knowledge that the spider box lacked GFCI. CSHO Stoehr admitted there was no evidence that Mark Corthals had actual knowledge prior to the inspection. (Tr. 134). Corthals confirmed that he did not know the spider box lacked GFCI until it was detected by the CSHO. (Depo. 14, 17). Judge Schumacher found there was no actual knowledge. Thus, the issue is whether Summit should be deemed to have constructive knowledge that the spider box lacked GFCI.

It is also undisputed that the lack of GFCI was not readily apparent. (Tr. 138; Depo. 10). Therefore, to prove constructive knowledge—*i.e.* that Summit should have known the spider box lacked GFCI—the Secretary had the burden of proving that Corthals had the duty to inspect more closely than he did. Specifically, the Secretary had the burden of proving that Corthals had the duty to get on his hands and knees and lift the flaps and look closely at the receptacles.

Judge Schumacher found constructive knowledge on the theory that Corthals *could* have discovered that GFCI was missing if he had just gotten on his hands and knees and lifted the flap and looked closely at the receptacles on the spider box. But that is not the test. The test is not what was physically possible. Even under previous Commission cases upholding multi-employer liability, the general contractor is not required to detect every violation. The test is not whether a violation *could* be discovered. Rather, a general contractor is only required to make a reasonable effort to discover hazards, and what is reasonable turns on the degree of supervision that the general contractor actually exercises

over the job. *Marshall v. Knutson Construction Co., and OSAHRC*, 566 F.2d 596, 6 BNA OSHC 1077, 1081 (8th Cir. 1977) (general contractor's duty not necessarily to detect all violations but depends on what measures "are commensurate with its degree of supervisory capacity.") *Cf. Secretary v. McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (Rev. Comm. 2000) (extent of supervision must be analyzed in each case to determine whether general contractor should have known of violation; citation affirmed in that case because general contractor conducted regular safety inspections and the violation was in plain view); *Secretary v. David Weekley Homes*, 19 BNA OSHC 1116, 1118-1119 (Rev. Comm. 2000) (where Weekley only maintained a "limited presence" on the jobsite, Weekley would not be deemed to have constructive knowledge simply because it *could* have inspected more frequently.)

The test in this case, then, is whether Corthals should reasonably have detected that the spider box lacked GFCI in view of the degree of supervision that he actually exercised over the jobsite. *See Knutson* at 1081. The answer is that he obviously could not. His quick walk-throughs were only intended to check on the progress of the job so he could report to the home office. (Depo. 13-14). Although he would point out an obvious hazard if he saw it, the lack of GFCI was not readily apparent. (Tr. 138; Depo. 10). *Cf. Secretary v. CB&I Constructors, Inc.*, 20 BNA OSHC 1310 (Welsch, J. 2003), (citation to general contractor under the same standard dismissed because the lack of GFCI was not "readily apparent.") The present case is very similar to the *David Weekley Homes* case. Like Weekley, Summit,

through Corthals, only had a limited presence on the jobsite. The fact that the spider box lacked GFCI was not readily apparent. It was not something that could be reasonably observed during Corthals' quick walk-throughs. Nor was Corthals on notice of a potential problem because his understanding, buttressed by his personal experience, was that all spider boxes had GFCI built in. Under these circumstances, Summit cannot be charged with constructive knowledge.

CONCLUSION

Administrative Law Judge Schumacher did not even consider the Supreme Court's decision in *Nationwide* that the term "employee" must be defined in the common-law master-servant sense. Instead, he interpreted the term "employees" in the standard as "any employees on the Summit site, including those of a subcontractor." Decision and Order at 13, n.7. This flies in the face of the Commission's decision in *Vergona, Timothy Victory, Don Davis, Allstate* or *AAA Delivery Services* and was clear error.

Judge Schumacher essentially held Summit liable because of Summit's contractual "control" over Springhill Construction. *Id.* at 10. This was also clear error. The terms of a private contract cannot enlarge or diminish a party's duty under a given statute. *See e.g. Cartier v. Doyle*, 277 F. 150, 153 (5th Cir. 1921) (private contract cannot change the effect of a statute), *McQueen v. Salida Coca Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (private contract cannot affect the statutory scheme drafted by Congress). This principle has been specifically applied under OSHA. *See Frohlick Crane Service, Inc. v.*

OSHRC, 521 F.2d 628, 631, 3 BNA OSHC 1432, 1433 (10th Cir. 1975) (language in private crane lease agreement stating which party would be responsible for actions of the operator cannot control the statutory liability for the operator's conduct under OSHA)[8], *Secretary v. Vergona Crane Co*, 15 BNA OSHC at 1785-1786 (language in private crane lease agreement stating which party would be considered the employer of the crane operator cannot control the statutory liability for the operator's conduct).

Finally, Judge Schumacher trivialized Summit's contention that 29 CFR 1910.12(a) limits a construction employer's responsibility to his own employees. Although 1910.12(a) specifically *says* that each construction employer shall protect "each of *his* employees engaged in construction work...by complying with Part 1926 standards," Judge Schumacher dismissively stated in a single sentence, without citation to any authority, that the regulation "does not prohibit application of an employer's safety responsibility to employees of other employers." Decision and Order at 8. This, too, was error. The regulation clearly does limit an employer's duty to his own employees. *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 1306-1307, 17 BNA OSHC 1447, 1453 (D.C. Cir. 1995). The Secretary is bound by her own regulation and that regulation only authorizes a citation to an employer who has failed to protect "his" employees.

Judge Schumacher's decision is infected with legal error throughout. It should

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[8]In its own decision in *Frohlick* the Commission observed that although a private contract may have significance in any action between the parties it has no significance in determining liability under the OSH Act. 2 BNA OSHC 1011, 1012 (Rev. Comm. 1974).