

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
SUMMIT CONTRACTORS, INC., :
 :
Respondent. :

OSHRC DOCKET NO. 05-0839

Appearances:

Judson H.P. Dean, Esquire
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Robert E. Rader, Jr., Esquire
Rader & Campbell
Dallas, Texas
For the Respondent.

Before: John H. Schumacher
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Summit Contractors, Inc. (“Summit”), located in Lebanon, Pennsylvania, on April 26, 2005. As a result, OSHA on May 15, 2005, issued a one-item serious citation alleging a violation of 29 C.F.R. § 1926.404(b)(1)(ii). The citation alleges that Summit, the general contractor at the construction site, failed to ensure that employees of a framing subcontractor were properly protected from electrical hazards created by the use of a portable electrical generator and

spider box that were supplying power to the site but had no ground fault circuit interrupter (“GFCI”) protection. The citation proposes a penalty of \$1,225.

Summit timely contested the citation, this case was designated as an E-Z Trial proceeding, and the hearing in this matter was held on December 21, 2005, in Harrisburg, Pennsylvania.¹ The record was held open, by joint request of the parties, until April 17, 2006, so that counsel for each side could take a post-hearing deposition and file post-hearing and reply briefs.

Summit does not dispute the existence of the violative condition as described in the citation. Summit asserts, however, that as a general contractor who neither created the hazard nor had employees exposed to the hazard, it cannot be found liable for the violation. Summit argues that the multi-employer work site doctrine is invalid and that it lacked sufficient control of the site to either prevent or abate the violation. Summit also argues it had no knowledge of the violation.

For the reasons discussed below, it is concluded that Summit was in violation of 29 C.F.R. § 1926.404(b)(1)(ii). The citation item is affirmed, and a penalty of \$1,225.00 is assessed.

Jurisdiction

Jurisdiction and coverage are stipulated. Respondent Summit admitted the following in paragraphs 8, 9, and 10, respectively, of its November 14, 2005 pre-hearing statement: (1) that the Commission has jurisdiction of this matter under section 10(c) of the Act, 29 U.S.C. § 659(c); (2) that Respondent is an employer engaged in a business affecting interstate commerce within the meaning of 29 U.S.C. § 652; and (3) that OSHA’s construction industry safety and health standards, set out in Part 1926 of Title 29, are generally applicable in this case because the work being performed at the work site falls within the definition of “construction work.”

Based on the foregoing, I find that Respondent Summit is an employer engaged in a business affecting interstate commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and the subject matter in this case.

Background

Summit was the general contractor of the subject project, which involved the construction of the Willows Senior Apartments, a 90-unit complex, in Lebanon, Pennsylvania. Summit had only

¹The Commission has revised its procedural rules, and E-Z Trial proceedings are now referred to as “Simplified Proceedings.” *See* 29 C.F.R. 2200.200 *et seq.*

two employees on the job site: General Superintendent Mark Corthals and Assistant Superintendent Garnett Cramer. Neither of these two Summit employees performed physical labor on the project. Rather, they performed overall superintendent duties, including “...to oversee the project, order materials, order in different subs in a timely fashion.” (Corthals Deposition, p. 5).

Summit subcontracted the framing work to Springhill Construction (“Springhill.” Springhill subsequently contracted with Mendoza Framing (“Mendoza”) to do the actual framing work. Springhill had only one employee, Superintendent Corey Hill, on the job site, while Mendoza had 10 to 12 employees on site, including Oscar Mendoza, the owner of Mendoza. (Tr. 16-18).

The parties agree that the cited portable generator, and the spider box that accompanied it, were owned by Cleveland Brothers Equipment Rental (“Cleveland”), an equipment leasing company located in Monaca Hill, Pennsylvania.² (Tr. 152-55; Corthals Deposition, pp. 7-9). Mr. Corthals, Summit’s superintendent, acknowledged that he contacted Cleveland’s office and ordered the generator and spider box for use at the site. Mr. Corthals also acknowledged that he did not specifically request that Cleveland supply a generator and spider box with GFCI capability; he assumed the rented equipment would come equipped with GFCI protection “[j]ust from past experience...I’ve been in construction for 20 years.” (Corthals Deposition, pp. 7-9, 35).

When it was initially delivered to the work site, Mr. Corthals did not inspect the equipment or notice whether the generator or the spider box had GFCI capability. In fact, he did not inspect the generator or spider box at any time before the date of the OSHA inspection. At his deposition, Mr. Corthals conceded that he knew how to inspect the rented equipment for the presence of GFCI protection, and he stated that one reason he did not inspect the equipment or notice whether it had GFCI capability was that he relied on his past experiences in renting such equipment from Cleveland. (Corthals Deposition, pp. 8-16, 38-39).

On April 26, 2005, OSHA Compliance Officer (“CO”) Ralph Stoehr inspected Summit’s work site, at which time he observed a portable electric generator connected by a 50-ampere cable to a spider box. The spider box had a number of outlets on it, and workmen had plugged extension

²A 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).

cords into the outlets in order to power the electrical tools they were using at the site. Upon inspecting the equipment, CO Stoehr determined that neither the generator nor the spider box had GFCI protection. (Tr. 18-19, 31).

Larry Walter is the Cleveland employee who delivered the generator and spider box to the site. He testified that when he delivered the equipment, no one inspected it or asked him if it had GFCI protection.³ Mr. Walter further testified he later learned that Summit had been cited by OSHA, as the spider box did not have a GFCI on it; he was dispatched to deliver a GFCI-equipped spider box to the site and to retrieve the spider box that did not have GFCI protection. (Tr. 155-60).

The Alleged Violation

The Secretary's citation alleges that Summit committed a serious violation of 29 C.F.R. 1926.404(b)(1)(ii), as follows:

29 CFR 1926.404(b)(1)(ii): Where an assured equipment grounding program was not utilized, receptacles were not protected with ground fault circuit interrupters when on a two-wire, single phase portable or vehicle-mounted generator rated more than 5kW, or where the circuit conductors of the generator were not insulated from the generator frame and all other grounded surfaces:

(a) 605 North 12th Street, Lebanon, Pennsylvania – The Whisperwatt electrical generator that was supplying power to the work site was rated at 14.4KW had no ground fault circuit interrupters on either generator or the spider box, on or about April 26, 2005.

The cited standard, 29 C.F.R. 1926.404(b)(1)(ii), provides:

Ground-fault circuit interrupters: All 120-volt, single-phase, 15 and 20 ampere receptacle outlets on construction sites, which are not part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground fault circuit interrupters for personnel protection. Receptacles on a two-wire, single phase portable or vehicle-mounted generator rated not more than 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground fault circuit interrupters.

The Secretary's Burden of Proof

The Secretary must prove her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary has the burden of proving: (a) the applicability of

³Mr. Walter did not remember the exact date he delivered the equipment to the work site; however, he began working for Cleveland on March 1, 2005, and he indicated that he made the delivery not long after that date. (Tr. 152, 155).

the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Discussion

As noted above, Summit does not dispute that the cited standard applied to the subject work site. The standards set out in Part 1926 of Title 29 are generally applicable in this case because the work being performed at the job site falls within the definition of "construction work." *See* Summit's November 14, 2005 pre-hearing statement, page 2, paragraph 10. Summit contends, however, that it should not have been cited for the condition because it did not create or have employees exposed to the condition. Summit also disputes it had knowledge of the condition. In particular, Summit argues the Secretary failed to show it had actual or constructive knowledge that a subcontractor's workers would use power from a generator and spider box that did not have GFCI protection.

The evidence indicates that Summit did not directly create, nor were its two on-site employees exposed to, the hazard of electrical shock from the lack of GFCI protection on the rented equipment. The equipment was leased from and owned by Cleveland and was delivered to the job site by a Cleveland employee. There is no evidence that any of Summit's own employees ever used electrical power from the rented equipment or that any of Summit's own employees ever were exposed to any electrical hazard from this same equipment. The exposed employees worked for Mendoza, a subcontractor hired by Springhill, Summit's subcontractor. (Tr. 17). CO Stoehr never testified that he observed any Summit employees exposed to an electrical hazard by using tools plugged into power supplied by the rented equipment; however, he observed Mendoza employees using electrical power supplied by the rented equipment on April 26, 2005. (Tr. 48-49).

The Secretary contends that Summit is liable for the violation pursuant to the multi-employer work site doctrine. Under that doctrine, an employer, including a general contractor who creates or controls a work site safety hazard, may be liable for violations of the Act even if the employees exposed to the hazard are solely employees of another employer. A general contractor may be held responsible on a construction site to ensure a subcontractor's compliance with safety standards if it can be shown that the general contractor could reasonably be expected to prevent or detect and

abate the violative condition by reason of its supervisory capacity and control over the work site. *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-2130 (No. 92-0851, 1994).

Summit challenges the multi-employer work site doctrine and has moved for declaratory relief, asserting that there is no basis in the Act and regulations for the doctrine.⁴ However, since the doctrine is based on Commission precedent, it is not appropriate for a Commission judge to engage in such declaratory relief. In addition, the Commission has discussed the basis for the doctrine and has already rejected many of the arguments raised by Summit. *See, e.g., Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1723-1724 (No. 95-1449, 1999).

As applied by the Commission, the multi-employer work site doctrine has been accepted in one form or another in at least six circuits and rejected outright in only one. *See U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815 (6th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977); *Brennan v. OSHRC*, 513 F.2d 1032 (2d Cir. 1975); and *Universal Constr. Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999). *But see Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975).

In this case, Summit's home office is located in Jacksonville, Florida, and the work site at issue was in Pennsylvania. These states are located in the Eleventh and Third Circuits, respectively,

⁴Summit has had various cases before Commission judges on the issue of the multi-employer work site doctrine; in most of these cases, the citations were vacated due to lack of knowledge and, in one case, lack of control. *See* 20 BNA OSHC 1118 (No. 01-1891, 2003) (Judge Spies) (after rejecting arguments that doctrine contravenes Act and that Summit lacked sufficient control, citation vacated due to Summit's lack of knowledge of the unsafe condition); 19 BNA OSHC 2089 (No. 01-1614, 2002) (Judge Schoenfeld) (citation vacated due to Summit's lack of authority to control subcontractor's compliance with safety requirements and on finding that authority to terminate subcontract was insufficient basis to hold general contractor liable for subcontractor's violations); 19 BNA OSHC 1270 (No. 00-0838, 2000) (Judge Spies) (as general contractor and controlling employer with two employees exposed, Summit was responsible for complying with fire extinguisher standard); 18 BNA OSHC 1861 (No. 98-1015, 1999) (Judge Spies) (citation vacated because while Summit was general contractor with overall authority at site, Secretary did not establish requisite knowledge of safety violations); 17 BNA OSHC 1854 (No. 96-55, 1996) (Judge Welsch) (citation vacated because, although Summit was the general contractor, it lacked knowledge of cited hazard).

where this case could be appealed.⁵ The Third and the Eleventh Circuits have not had an opportunity to rule on the doctrine. While several employers have argued the Eleventh Circuit has rejected the multi-employer work site doctrine based on earlier Fifth Circuit case law, the Commission has ruled otherwise. *McDevitt St. Bovis, Inc.*, 19 BNA OSHC 1108, 1111-1112 (No. 97-1918, 2000) (former Fifth Circuit precedent rejecting the multi-employer work site doctrine does not preclude application of the Commission's precedent regarding the doctrine in the Eleventh Circuit). Additionally, Summit could appeal to the D. C. Circuit, which, although it has questioned the doctrine's validity in a manufacturing plant, has not specifically rejected the doctrine. *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).⁶ Thus, the multi-employer work site doctrine is still viable before the Commission and the relevant circuit courts. *McDevitt St. Bovis, Inc.*, 19 BNA OSHC at 1111-1112.

Summit further asserts that OSHA's Directive CPL 2-0.124, relating to the doctrine and issued by the Secretary on December 10, 1999, is not enforceable because it is contrary to OSHA's published regulation at 29 C.F.R. § 1910.12. Section 1910.12(a) provides, in pertinent part, that "[e]ach employer shall protect the employment and places of employment of each of *his employees* engaged in construction work by complying with the appropriate standards prescribed in this paragraph." (Emphasis added). Summit argues that because section 1910.12(a) places safety responsibility on the employer for its own employees engaged in construction work, the above directive, which permits citing a non-exposing and non-creating employer, is unenforceable.

⁵"Where it is highly probable a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case – even though it may differ from the Commission's precedent." See *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000), and cases cited therein.

⁶In *IBP, Inc.*, 17 BNA OSHC 2073 (No. 93-3059, 1997), the Commission held IBP liable for lockout/tagout violations of an independent contractor that was cleaning the meat processing machinery at IBP. The Commission found that IBP had supervisory authority over the work site; IBP had contractual authority to bar entry to the independent contractor and, although its own employees were not exposed, its ownership of the machinery gave IBP the responsibility to do what was reasonably expected to abate the violations. The D.C. Circuit reversed, finding that the contract provision that allowed IBP to terminate the contract was insufficient to show control.

Summit's argument is rejected. In deciding this case, it is applicable Commission precedent, not an internal OSHA guideline, that determines whether Summit, as the general contractor, is responsible for the alleged violation. The Commission does not consider an OSHA CPL or other internal directive as binding on the Commission and looks to such documents only as an aid in resolving interpretations under the Act. The directive set out above does not confer procedural or substantive rights on employers and does not have the force and effect of law. *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1910, n.3 (No. 94-1460, 1997). In any case, Summit's reading of section 1910.12 is too narrow, and I conclude that that section does not prohibit application of an employer's safety responsibility to employees of other employers.

Turning to Summit's control of the work site, Summit's own general superintendent, Mark Corthals, conceded that as superintendent, his job was "...to oversee the project, order materials, order in different subs in a timely fashion." (Corthals Deposition, p. 5). Thus, Mr. Corthals, on behalf of Summit, appears to have exercised supreme authority over, and control at, the job site. The record does not disclose any other person on the site who exercised veto authority over the management decisions of Mr. Corthals.

A related issue is whether Summit had sufficient supervisory authority and control of the work site to prevent or detect and abate the condition which exposed a subcontractor's employees to electrical hazards. As discussed *supra*, to determine whether a general contractor is a controlling employer for purposes of multi-employer responsibility, the general contractor must be in a position to prevent or correct a violation or to require another employer to prevent or correct the violation. Such control may be in the form of an explicit or implicit contract right to require another employer to adhere to safety requirements and to correct violations the controlling employer discovers.

Summit maintains that it is company policy not to be responsible for the safety of a subcontractor's employees or for any OSHA requirements placed on subcontractors. This policy is reflected in Summit's contractual agreement with Springhill. (GX-16, Attach. A, ¶ 4). Summit's subcontract with Springhill provides that:

All parties hereby agree that SUBCONTRACTOR has sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act of 1970 and agrees to indemnify and hold harmless CONTRACTOR against any legal liability or loss including personal injuries which CONTRACTOR may incur due to SUBCONTRACTOR's failure to comply with the above referenced act. In the

event any fines or legal costs are assessed against CONTRACTOR by any governmental agency due to noncompliance of safety codes or regulations by SUBCONTRACTOR, such cost will be deducted, by change order, from SUBCONTRACTOR's Subcontract amount. *Id.*

Regardless of its stated company policy or its written agreements with subcontractors, however, Summit cannot contract out its overarching responsibility for work site safety; the Commission has specifically held, in fact, that an employer cannot contract away its responsibilities under the Act. *Pride Oil Well Serv.*, 15 BNA OSHC 1809 (No. 87-692, 1992).

As noted, Summit contracted with subcontractor Springhill to perform the framing work on the apartment complex site. In so doing, Summit used its standard subcontract agreement form, which it required all subcontractors to sign. (GX-16). The contract with Springhill, GX-16, establishes Summit's control over the safety of the subcontractor's employees. In Article 6 of the contract with Springhill, the pertinent language includes the following:

SUBCONTRACTOR agrees to be bound to CONTRACTOR by the terms and conditions of the General Contract between CONTRACTOR and OWNER as well as this Subcontract Agreement and hereby assumes towards the CONTRACTOR all of the duties, obligations and responsibilities applicable to SUBCONTRACTOR's work which the CONTRACTOR owes towards the Owner under the General Contract.

In addition to the above, Summit required the subcontractor to "comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work." (GX-16, Art. 9). The contract also required Springhill to warrant and guarantee that all of its work would be "in compliance with all federal, state and local codes and requirements." (GX-16, Art. 15). Although the contract attempts to place responsibility for compliance with the Act on the subcontractor, the subcontractor is required to hold Summit harmless against any liability, including the assessment of OSHA fines and legal costs. (GX-16, Art. 13; Attach. A, ¶ 4). Under the contract, Summit was to be reimbursed for fines assessed and costs incurred due to the subcontractor's failure to comply with safety requirements, and Summit had the authority to deduct OSHA fines and costs from the contract amount by change order. *Id.*

Further, other provisions of the contract show Summit's control over the safety of the subcontractor's employees. Specifically, GX-16 provided that the subcontractor could not itself subcontract without the prior written consent of Summit, and Summit had sole discretion on whether

to approve a subcontractor's subcontractor. Also, subcontractors were required to keep their work areas clean and orderly subject to Summit's approval. The contract required Springhill to have on site at all times a "competent superintendent and necessary assistants all approved by Summit," one of which had to be able to speak English. (GX-16, Art. 7-8, 22; Attach. A, ¶¶ 17, 33, 45).

Moreover, Summit's control over Springhill's work site is addressed in paragraph 5 of Attachment A to the contract, which provides:

All parties hereby agree that control of the Work Schedule, use of the site and coordination of all on-site personnel will be performed under the complete direction of CONTRACTOR's supervisory staff. CONTRACTOR may enforce upon SUBCONTRACTOR any of the following actions in order to expedite or coordinate the work. However, CONTRACTOR does not assume any liability for delays to SUBCONTRACTOR or third parties in connection with coordination of on-site personnel. These actions include, but are not limited to, the following:

- A) Designated storage, designated unloading and parking areas.
- B) Require unacceptable materials, equipment or vehicles to be removed from the project.
- C) Limit the use of the site by SUBCONTRACTOR's equipment, vehicles, personnel or stored materials.
- D) Temporarily or permanently bar specific personnel from the site.
 - Listed below is a partial list of reasons to deny a person access to the project.
 - 1) Drug or alcohol use
 - 2) Fighting, possession of weapons
 - 3) Theft
 - 4) Harassment of anyone on or off the project
 - 5) Personal use of the areas near the project limits for parking, eating, sleeping, etc.
 - 6) Failure to cooperate with CONTRACTOR's supervisory personnel or comply with project documents.

Summit's authority, explicitly granted by a combination of contract provisions, is broad enough to necessarily involve subcontractor employees' safety. Summit had authority over the subcontractor's actions as well as authority over conditions affecting general safety on the work site. The authority granted Summit mirrored how Summit actually controlled the project. In considering the plain language found within the four corners of the Springhill contract, it is abundantly clear that Summit retained sufficient authority and control over the work site and the safety of all employees working at the site to be held responsible for the alleged violation. In this regard, the Commission considers supervisory authority and control sufficient where the general contractor has specific authority to demand a subcontractor's compliance with safety requirements, to stop a contractor's

work for failure to observe safety precautions, and to remove a contractor from the work site. *McDevitt St. Bovis, Inc.*, 19 BNA OSHC at 1110. Summit held this control over Springhill and, by the contract terms, any of Springhill's subcontractors.

Summit's claim that it had only a limited ability to require a subcontractor to correct safety violations is disingenuous. Ten to twelve Mendoza employees were working on the project on April 26, 2005, and Mark Corthals, Summit's project superintendent, was present on the site. (Tr. 17). Mr. Corthals inspected the site daily to ensure progress and quality of work, and he kept his superiors informed of the construction progress; Summit thus kept track of the subcontractors' activities on the site. Through Mr. Corthals, Summit had the power to hire and fire subcontractors, to control the sequencing of the work, and to tell subcontractors when to start and finish their work. (GX-16, Art. 11-12, 14-15). The subcontract form which Summit drafted, and required subcontractors to sign, retained Summit's authority to terminate, suspend or withhold contract payments from any subcontractor who failed to abide by its directions. (GX-16, Art. 14). Summit, not the subcontractors, dictated the terms of the subcontract and what occurred on the work site.

As a general contractor, Summit held a unique position at the site. The subcontract agreement provided Summit multiple methods to enforce any subcontractor's compliance with OSHA requirements. Summit chose its own subcontractors, and approved the sub-subcontractors, for the project; it also controlled scheduling of the work, and Summit could enforce penalties or ultimately terminate the subcontract if the subcontractor failed to meet its schedule. *Id.* Summit had the right to terminate the Springhill contract for convenience or for cause if Springhill failed to "perform the Work in Accordance with the Contract Documents," disregarded "Laws, Codes or Regulations of any public body having jurisdiction," or "otherwise violates in any way provisions of the Contract Documents." *Id.* This included the power to fire a subcontractor for violations of OSHA regulations. (GX-16, Art. 14b-2). Although termination of a subcontractor could cause serious problems with the project's scheduling, Summit nevertheless had the contractual right to exercise that authority when necessary. Summit also had the right to exclude any subcontractor from the job and to take possession of the work (GX-16, Art. 14; Attach. A, ¶ 5). Summit could temporarily or permanently bar specific personnel of any subcontractor from the site for failure to cooperate with Summit's supervisors; it also retained the authority to suspend the subcontractor for not more than 90 days without cause. *Id.* The contract set out other methods to enforce a

subcontractor's compliance with OSHA regulations; for example, Summit had the right to retain 10 percent of the contract amount until a subcontractor satisfied all of its contractual obligations. (GX-16, Art. 3(d)).

Summit maintains that the ultimate responsibility for electrical safety at its work site, with respect to the generator and spider box, rested with Cleveland. Summit asserts that "the leasing agent clearly knew GFCI was required." (Resp. Brief, p. 14). Alternatively, Summit believes that the standard imposed a duty upon Mendoza, Springhill's subcontractor, to inspect the generator and spider box that Summit's superintendent rented from Cleveland. (Resp. Brief, pp. 6-7). However, whatever the responsibility that Cleveland and Mendoza may have had with respect to assuring that equipment with GFCI protection was provided at the site, such responsibility does not absolve Summit of its own responsibility for safety at the site. Despite its control and authority over all of the workers on the job site, and notwithstanding its responsibility for the safety of those workers, Summit failed to exercise reasonable care in assuring that the rented generator and spider box had GFCI protection. Mr. Corthals, Summit's on-site superintendent, observed the delivery of the generator and spider box, but he made no effort to inspect the equipment; rather, he simply assumed it was GFCI-equipped. (Corthals Deposition, pp. 8, 12, 38-39).

As noted *supra*, the Commission considers supervisory authority and control sufficient where the general contractor has specific authority to demand a subcontractor's compliance with safety requirements, to stop a contractor's work for failure to observe safety precautions, and to remove a contractor from the work site. *McDevitt Street Bovis, Inc.*, 19 BNA OSHC at 1110. Summit held this control over Springhill, and, by privity of contract, over any of Springhill's subcontractors. Based on Commission precedent and the evidence of record, I find that the Secretary's citing of Summit in this matter was appropriate.

I further find that the Secretary has established that Summit had knowledge of the cited condition. It is clear that Summit did not have actual knowledge of the violative condition, and Mr. Corthals specifically testified that he did not; he also testified that it is not readily apparent whether spider boxes have GFCI protection and that the way to determine if they do is to lift up the outlet covers and see if GFCI's are present. (Tr. 9-12,16-17, 39). Constructive knowledge, however, can be established by showing that the employer could have known of the violative condition with the exercise of reasonable diligence. The constructive knowledge of a supervisor of the employer can

be imputed to the employer. *See, e.g., Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992), and cases cited therein.

The Secretary contends that with the exercise of reasonable diligence, Summit could have known that the rented equipment did not have GFCI protection. I agree, and in this regard I note the Commission's holding that an employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work."⁷ *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). In my view, reasonable diligence in this case would have been for Mr. Corthals to have conducted a cursory inspection of the rented generator and spider box upon the delivery of the equipment to the site or later on that day. (Tr.12, 38-39). In addition, Mr. Corthals and his assistant superintendent were responsible for making daily walks of the site to inspect the progress of the construction work; they apparently walked past the generator and spider box on any number of occasions, at which time it could easily have been determined whether the equipment had GFCI capability.⁸ (Tr. 12-15, 39-40). They did not do so, and, in light of the record and the Commission precedent set out *supra*, Summit was in violation of the cited standard. Item 1 of Serious Citation 1 is accordingly affirmed.

Serious Classification

In order to establish that a violation is "serious" under section 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition and that the employer knew or should have known of the violation. The Secretary need not establish the likelihood of an accident occurring. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Summit's violation of section 1926.404(b)(1)(ii) is properly classified as serious. Summit's on-site superintendent, Mark Corthals, admitted that he had over 20 years in the construction industry. Further, Summit admits that its on-site superintendent did not inspect the generator or the spider box, both of which he rented from Cleveland.(GX-5, Interrog. No. 6, pp. 3-4; Interrog. No.

⁷As applied to this case, I interpret the phrase "its employees" as any employees on the Summit site, including those of a subcontractor, as long as it could reasonably be foreseen that those employees would be using electrical power from the generator that Summit rented.

⁸The equipment was at the site for several weeks before the CO arrived. (Tr. 152-55).

13, pp. 6-7; Interrog. No. 15, p. 7). Employees of Mendoza were clearly exposed to the hazard of electrical shock due to the lack of GFCI protection as they operated their power tools, and such a hazard could cause serious physical harm or possibly death.

Penalty Determination

I have carefully considered the Secretary's penalty calculations and adjustment factors. In determining an appropriate penalty, the Commission must consider the size of the employer's business, the history of the employer's previous violations, the employer's good faith, and the gravity of the violation. Taking all of these factors into account, I find that the Secretary's proposed penalty of \$1,225.00 is appropriate. The proposed penalty is therefore assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.404(b)(1)(ii), is AFFIRMED, and a penalty of \$1,225.00 is assessed.

/s/

JOHN H. SCHUMACHER
Judge, OSHRC

Dated: May 30, 2006
Washington, D.C.