

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR

Complainant,

v.

SUMMIT CONTRACTORS, INC.

Respondent.

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OSHRC DOCKET
No. 05-0839

REGION III

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

³The 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

⁴This 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).