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:

Gary Stearman, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Howard M. Radzely, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

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For the Respondent

DECISION

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA") issued a citation to Summit Contractors, Inc. ("Summit"), alleging that Summit failed to provide ground-fault circuit interrupter ("GFCI") protection on two pieces of equipment it ordered for use at a multi-employer construction worksite located in Lebanon, Pennsylvania. Summit was the general contractor at the worksite, and the Secretary alleged that Summit was liable for the exposure of a subcontractor's employees to the deficient equipment as both a controlling and creating employer. Administrative Law Judge John H. Schumacher affirmed the citation against Summit as a controlling employer, and Summit's subsequent petition for review was granted. While this case has been pending review, the Commission reviewed another multi-employer case involving

Summit in which it issued a split decision holding that the Secretary's theory of controlling employer liability was invalid. *Summit Contractors, Inc.*, 21 BNA OSHC 2020, 2004-2009 CCH OSHD ¶ 32,888 (No. 03-1622, 2007) ("*Summit I*"). That holding has since been overturned by the Eighth Circuit Court of Appeals. *Solis v. Summit Contracs., Inc.*, 558 F.3d 815, 827 (8th Cir. 2009) ("*Summit II*"). For the following reasons, we now overrule the Commission's decision in *Summit I*, and affirm the citation at issue here.

BACKGROUND

Summit was the general contractor for the construction of a 90-unit apartment complex and had only two employees onsite throughout the project—Superintendent Corthals and Assistant Superintendent Cramer. Summit subcontracted the project's framing work to Springhill Construction ("Springhill"), which further subcontracted the actual framing labor to Mendoza Framing ("Mendoza"). Summit's contract with Springhill established that Summit "may provide, in locations determined to be appropriate for the project, temporary electrical . . . services" which Springhill "shall make use of . . . as provided."

In fact, Summit did provide temporary electrical services to the worksite. It rented two pieces of electrical equipment—a 14.4 kW portable electric generator and a "spider box"[1]—to supply power for Springhill and Mendoza. Summit Superintendent Corthals ordered this equipment from Cleveland Brothers Equipment Rental ("Cleveland Brothers"), but he did not request that it have GFCI protection, nor did he inspect the equipment for GFCI protection when Cleveland Brothers delivered it to the worksite. Several days later, when the generator was first put to use, Springhill's superintendent sought Corthals's assistance because he could not start the generator. Corthals, in turn, called Cleveland Brothers and subsequently informed Springhill's superintendent of the rental company's instructions for starting the generator. After starting the generator, which powered the spider box, Mendoza employees were able to use the portable electric tools they had plugged into the spider box.

During an April 26, 2005 OSHA inspection, the compliance officer ("CO") discovered that neither the generator nor the spider box were equipped with GFCI protection. The CO also determined that Summit lacked an assured equipment grounding conductor program ("AEGCP")—an alternative form of ground-fault protection permitted under the OSHA

[1] A "spider box" is a piece of electrical equipment containing multiple receptacles into which portable tools can be plugged.

electrical standard.[2] When the CO pointed out to Corthals that the equipment lacked ground-fault protection, Corthals immediately contacted Cleveland Brothers and requested that they replace the spider box with a GFCI-equipped version.

Following the inspection, OSHA issued Summit a citation under the Occupational Safety and Health Act of 1970 ("the Act" or "OSH Act"), 29 U.S.C. §§ 651-78, alleging a serious violation of 29 C.F.R. § 1926.404(b)(1)(ii), for its failure to provide GFCI protection on either of the two pieces of equipment.[3] Due to Summit's role at the worksite as a general contractor whose own employees did not use the equipment, OSHA issued the citation to Summit under its multi-employer citation policy set forth in OSHA Instruction CPL 2-0.124 (Dec. 10, 1999). Summit timely contested the citation and, following a hearing, the judge affirmed the citation and assessed the proposed penalty of $1,225.

Upon Summit's petition, the case was directed for review, and the Commission subsequently held oral argument.[4] On review, Summit continues to pursue two threshold challenges to the Secretary's multi-employer citation policy.[5] First, Summit alleges that

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[2] Section 1926.404(b)(1) mandates that employers use either GFCI or an AEGCP "to protect employees on construction sites." To use an AEGCP, an employer must have a written program pursuant to which a competent person visually inspects electrical equipment for external defects before each day's use, regularly tests the equipment, records the results of these tests, and removes any defective equipment. 29 C.F.R. § 1926.404(b)(1)(iii).

[3] This section provides, in relevant part:

> 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.

[4] This case was consolidated with *Summit I* solely for purposes of oral argument before the Commission.

[5] In its Petition for Discretionary Review, Summit raised two additional challenges to multi-employer liability. First, Summit maintained that the Secretary's multi-employer citation policy must be promulgated as a rule under the Administrative Procedure Act's notice-and-comment rulemaking procedures. The Commission considered and rejected this argument when Summit previously made it in *Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1779-80, 2004-2009 CCH OSHD ¶ 33,010, pp. 54,258-59 (No. 03-1622, 2009) ("*Summit III*"), *appeal dismissed*, No. 10-1345 (8th Cir. May 6, 2010). There, we concluded that the Secretary need not engage in notice-and-comment rulemaking to apply the multi-employer citation policy because the policy imposes no new duties on employers and is, therefore, not a standard or substantive rule. *Id.*; *cf. Kaspar Wire Works, Inc. v. Sec'y*, 268 F.3d 1123, 1131-32 (D.C. Cir. 2001) (holding Secretary's per

issuance of a citation to an employer whose own employees are not exposed to the cited condition is precluded by the Secretary's regulation establishing applicability of the OSHA

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instance citation policy "reflects an enforcement tool within her authority" and is exempt from notice and comment requirements).

Second, Summit argues that the multi-employer citation policy improperly expands the common law duties of a general contractor by imposing on it responsibility for subcontractors' noncompliance with OSHA standards which, it contends, "*creates* a common law duty of care to employees of subcontractors that the general contractor does not otherwise have, and makes the general contractor liable in a civil tort action for injuries resulting from the subcontractor's failure to comply with OSHA." As a result, Summit claims that the policy violates § 4(b)(4) of the Act, 29 U.S.C. § 653(b)(4), which provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

The Eighth Circuit disposed of this argument when Summit made it in *Summit II*. As the court noted, "[t]he federal courts have held that this provision does not create a private cause of action and [it] prevents federal preemption of state tort law and worker's compensation schemes," and therefore "the policy does not violate § 653(b)(4) by increasing an employer's liability at common law." *Summit II*, 558 F.3d at 828-29 (citations omitted).

In contrast to our dissenting colleague, we agree with the majority view as enunciated by the Eighth Circuit. There simply is no authority for the proposition that OSHA violations constitute a private cause of action. *See, e.g.*, *Am. Fed'n of Gov't Emps. v. Rumsfeld*, 321 F.3d 139, 144 (D.C. Cir. 2003) (finding that "it is now well established that 'OSHA violations do not themselves constitute a private cause of action for breach'" (citation omitted)). Additionally, the District of Columbia Circuit, which characterized § 4(b)(4) as "vague and ambiguous," has interpreted the provision to mean that the OSH Act "cannot *legally* preempt state compensation law, even if it practically preempts it in some situations." *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980); *see also Gen'l Motors Corp.*, 14 BNA OSHC 2064, 2065, 2066 n.6 (No. 82-630, 1991) (consolidated) (noting that § 4(b)(4) "means only that the Act and OSHA regulations are not to be interpreted to alter the terms of any [workers compensation] law"); *Ellis v. Chase Commc'ns, Inc.*, 63 F.3d 473, 478 (6th Cir. 1995) (holding that "even if an OSHA violation is evidence of Chase's negligence . . . Chase must owe a duty to Ellis under a theory of liability independent of OSHA, as OSHA does not create a private right of action. OSHA regulations can never provide a basis for liability."); *Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1162 n.5 (3d Cir. 1992) (noting that "[e]vidence of an OSHA violation, in and of itself, does not 'affect' liability"). Just as with any other enforcement action under the OSH Act, neither the Secretary's prosecution of employers under the multi-employer citation policy nor the Commission's decisions upholding multi-employer liability create private rights of action or preempt state compensation law, and therefore neither violates § 4(b)(4). *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (holding that § 4(b)(4) precludes preemption of state tort law and worker's compensation laws).

construction standards, 29 C.F.R. § 1910.12(a). And second, Summit alleges that the Supreme Court's decision in *Nationwide Mutual Insurance Company v. Darden* also precludes imposition of OSH Act liability in these circumstances. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 316 (1992) ("*Darden*") (setting forth test for determining the existence of an employer/employee relationship). Also at issue before the Commission is whether the Secretary established that Summit controlled and/or created the cited condition and had the requisite knowledge of its existence.[6]

DISCUSSION

I. THRESHOLD CHALLENGES

A. Effect of 29 C.F.R. § 1910.12(a) on Multi-Employer Liability

Summit contends that the only "validly promulgated regulation" addressing multi-employer liability for employers engaged in construction work is 29 C.F.R. § 1910.12(a)—the applicability provision for the construction standards—and that it "specifically *limits* a construction employer's duties under the construction standards *to his own employees*." For the following reasons, we disagree.

In the OSH Act, Congress authorized the Secretary to promulgate previously existing national consensus and federal occupational safety or health standards as OSHA standards. Section 6(a) of the Act, 29 U.S.C. § 655(a); *Summit II*, 558 F.3d at 818-19. Pursuant to this authorization, the Secretary promulgated § 1910.12(a), in which she adopted such preexisting federal construction work standards as OSHA standards. *See* National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10,466, 10,466 (May 29, 1971); *Summit II*, 558 F.3d at 818-19. Section 1910.12(a) states, in relevant part: "Each 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."

At nearly the same time as she promulgated this regulation, the Secretary published her first Compliance Operations Manual ("COM"), which established the multi-employer citation

[6] The Secretary alleged that this violation was serious and proposed a $1,225 penalty. The judge affirmed this characterization and assessed the proposed penalty. Summit challenges neither the characterization nor the penalty and, therefore, we do not disturb these findings. *See, e.g.*, *KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-2009 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming the alleged characterization and assessing the proposed penalty where neither issue was in dispute).

policy for construction worksites. OSHA, Compliance Operations Manual ¶ 10 at VII-6 to -8 (May 20, 1971) ("1971 COM"); *Summit II*, 558 F.3d at 819. In this initial version of the policy, the Secretary announced that OSHA would cite employers for "creating a hazard endangering employees (whether his own or those of another employer)." Thus, she determined that where a construction employer created the cited hazard, its duties under the Act were not limited to its own employees. 1971 COM ¶ 10 at VII-6. Indeed, the COM stated that a general contractor would be cited in the precise situation at issue here—where it "provides an item of equipment (e.g., scaffolding) which is used by employees of other employers, whether or not the general contractor has employees of his own using the equipment." 1971 COM ¶ 10 at VII-7.

The earliest Commission decisions initially rejected imposition of multi-employer liability, vacating citations issued to construction employers for violations to which their own employees were not exposed. *See Gilles & Cotting, Inc.*, 1 BNA OSHC 1388, 1389, 1973-1974 CCH OSHC ¶ 16,763, p. 21,513 (No. 504, 1973) (finding Congress did not intend for a general contractor that controls a worksite to be held responsible for employees on that worksite other than its own), *vacated and remanded on other grounds*, 504 F.2d 1255 (4th Cir. 1974); *City Wide Tuckpointing Serv. Co.*, 1 BNA OSHC 1232, 1233, 1971-1973 CCH OSHD ¶ 15,769, p. 21,051 (No. 247, 1973) ("Only where employees of a cited employer are affected by noncompliance with an occupational safety and health standard can such employer be in violation of section 5(a)(2) of [the] Act."). Specifically in response to these decisions, the Secretary revised her policy to exclude issuance of a citation to a creating employer for violations to which its own employees were not exposed. *Summit II*, 558 F.3d at 820-21 (citing OSHA, Field Operations Manual X-14 (Jan. 22, 1974)).

However, in 1975, two circuit courts of appeals cast doubt on the Commission's determination that the Act excluded all forms of non-exposing employer liability. *Brennan v. OSHRC* (*Underhill Constr. Corp.*), 513 F.2d 1032, 1038 (2d Cir. 1975) ("This specific duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard."); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1091 n.21 (7th Cir. 1975) (questioning whether "a general contractor, who has no employees of his own exposed to a cited violation is necessarily excused from liability under the Act"). Soon thereafter, two new cases came before the Commission that again presented the question of multi-employer liability. In those cases, the Commission noted that it was persuaded

by the reasoning of the intervening circuit court decisions to revisit the issue. Accordingly, it held that an employer "that has either created a hazard or controls a hazardous condition" can be held liable for violations of the Act when the only employees exposed to the hazard are those of other employers on a multi-employer construction worksite. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197-99, 1975-1976 CCH OSHD ¶ 20,690, pp. 24,782-84 (No. 3694, 1976) (consolidated) (noting that Commission finds itself "in general agreement with the principles enunciated in the cogent opinions of the Second and Seventh Circuit Courts of Appeals"); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-1976 CCH OSHD ¶ 20,691 (No. 12775, 1976).[7]

Beginning with these two decisions in 1976, and continuing until the *Summit I* decision in 2007, the Commission invariably upheld the validity of multi-employer liability on construction sites. The Commission's test of employer liability, which grew out of the reasoning in these early cases, held an employer "responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109, 2000 CCH OSHD ¶ 32,204, p. 48,780 (No. 97-1918, 2000) (citation omitted); *Grossman Steel*, 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 24,791 (noting that general contractors are "well situated to obtain abatement of hazards," and thus it is "reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected"). In holding non-exposing employers responsible for noncompliance with the Act at multi-employer construction worksites, the Commission's test also reflected the Act's remedial purpose—"to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651(b); *see Access Equip.*, 18 BNA OSHC at 1723, 1999 CCH OSHD at p. 46,779 (noting that courts of appeals "have found support for the [multi-employer citation policy] in the broad, remedial purpose of the Act").

[7] We note that following the decisions of the two courts of appeals, the Secretary proposed a regulation that would have codified the application of the multi-employer citation policy to controlling and creating employers. Citation Guidelines in Multi-Employer Worksites, 41 Fed. Reg. 17,639, 17,639-40 (Apr. 27, 1976). When, during the comment period, the Commission issued its consecutive decisions in *Anning-Johnson* and *Grossman Steel*, the Secretary "discontinued his efforts" to codify the policy. *Summit II*, 558 F.3d at 821.

Moreover, a majority of the circuit courts of appeals has consistently affirmed the Commission's imposition of multi-employer liability on controlling and creating employers. *See, e.g.*, *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 727-32 (10th Cir. 1999) (controlling employers); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 817-19 (6th Cir. 1998) (same); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596 (8th Cir. 1977) (same); *U.S. v. Pitt-Des Moines*, 168 F.3d 976, 982-83 (7th Cir. 1999) (creating employers); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534 (9th Cir. 1978) (same); *New England Tel. & Tel. Co. v. Sec'y of Labor*, 589 F.2d 81, 81-82 (1st Cir. 1978) (analyzing whether a subcontractor on a multi-employer worksite was either a controlling or creating employer under Commission precedent).[8]

Against the backdrop of this longstanding precedent, in 2007, a Commission majority held in a case of first impression that § 1910.12(a) prevents the Secretary from citing a controlling employer on a multi-employer construction worksite when "his employees" are not exposed to the cited condition. *Summit I*, 21 BNA OSHC at 2025, 2004-2009 CCH OSHD at pp. 53,264-65. On appeal, the Eighth Circuit disagreed. It vacated that decision and remanded the case to the Commission, finding that "the plain language of § 1910.12(a) does not preclude" the citation of a controlling employer under the Secretary's multi-employer citation policy. *Summit II*, 558 F.3d at 827. On remand, the Commission applied the law of the case, determined that Summit was a controlling employer under the facts of that case, and affirmed the citation. *See Summit III*, 22 BNA OSHC at 1780-81, 2004-2009 CCH OSHD at pp. 54,259-60.

[8] Of the circuits that have directly addressed the issue, the Fifth Circuit stands alone in finding, in a single one-paragraph decision, that a "contractor is not responsible for the acts of his subcontractors or their employees." *Se. Contracs., Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975) (per curiam). Subsequent Fifth Circuit cases that favorably cited *Southeast Contractors* were tort actions where OSH Act liability was not at issue. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981); *Barrera v. E.I. du Pont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. Unit A 1981); *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 321 (5th Cir. 1979). Indeed, "the Fifth Circuit has not reviewed any Commission decisions on multi-employer liability" since the Commission first upheld the Secretary's multi-employer citation policy in *Anning-Johnson* and *Grossman Steel*. *McDevitt Street Bovis*, 19 BNA OSHC at 1112, 2000 CCH OSHD at p. 48,782. The District of Columbia Circuit has questioned, without deciding, the validity of the Secretary's policy. *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998) (finding "tension" in the application of the multi-employer citation policy); *Anthony Crane Rental v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995) (questioning without deciding whether holding controlling employers liable is consistent with § 1910.12(a), but acknowledging earlier "duty to warn" cases that "upheld OSH Act violations where the employees 'exposed' were not those of the violating employer." (citations omitted)).

The instant case presents the Commission with its first opportunity to reconsider the *Summit I* decision following its reversal on appeal. In light of *Summit I*'s effect on well-settled Commission precedent and the Eighth Circuit's rejection of that decision, we find that reexamination of whether § 1910.12(a) precludes multi-employer liability is warranted. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1579, 2009 CCH OSHD ¶ 33,030, p. 54,368 (No. 94-1979, 2009) (overruling recent decision in light of disparate views, including "well reasoned dissents," at both the Commission and circuit court); *Kenny Niles*, 17 BNA OSHC 1940, 1941-42, 1995-1997 CCH OSHD ¶ 31,300, p. 43,997 (No. 94-1406, 1997) (emphasizing that although the Commission "normally considers itself bound to follow its own precedent," it will overrule that precedent "when further deliberations have led it to conclude that an earlier case was wrongly decided, particularly when the federal appellate courts have expressly rejected the Commission's initial position"); *Joel Yandell*, 18 BNA OSHC 1623, 1626-27, 1999 CCH OSHD ¶ 31,782, pp. 46,540-41 (No. 94-3080, 1999) (same).

We have carefully reconsidered this issue and conclude that the plain meaning of § 1910.12(a) does not invalidate the Secretary's multi-employer citation policy as it applies to a controlling employer on a construction site. In reaching this conclusion, we are persuaded by the Eighth Circuit's analysis and the well-supported authority of our pre-*Summit I* case law. Moreover, as we noted above, this reading of the Secretary's regulation is consistent with, and effectuates, the remedial purposes of the Act. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10 (1980) (finding regulation "conforms to the fundamental objective of the Act [] to prevent occupational deaths and serious injuries"); *Pitt-Des Moines*, 168 F.3d at 982-83 (finding the broad remedial purpose of the Act "implies that 'once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace'" (citation omitted)).

First and foremost, we agree with the Eighth Circuit's plain meaning analysis of § 1910.12(a) in *Summit II*. 558 F.3d at 823. As noted above, the language at issue in § 1910.12(a) states: "Each employer shall protect the employment and places of employment of each of his employees . . . ." Applying principles of regulatory interpretation to § 1910.12(a)—which give effect to all words and phrases—and basic grammatical principles, the court deconstructed the sentence into its constituent parts and concluded that the provision requires an employer to protect *both* "the employment of each of his employees" and "the places of

employment of each of his employees." *Id.* at 824. As the court stated, "to give some independent meaning to the term 'place[] of employment' would require the employer to protect others who work at that place of employment so long as the employer also has employees at that place of employment." *Id.* at 825. In other words, the plain language of § 1910.12(a) imposes liability on employers who permit known hazards on multi-employer construction worksites, regardless of their own employees' exposure.

Indeed, the Eighth Circuit's decision is a wholesale rejection of the *Summit I* majority's myopic plain language analysis. In *Summit I*, the opinions comprising the Commission's majority decision considered the phrase "each of his employees" to be the linchpin for finding that § 1910.12(a) only applies to an employer with an exposed employee. 21 BNA OSHC at 2024-25, 2004-2009 CCH OSHD at pp. 53,263-64 (declaring that "the Commission must give effect to the plain language of the regulation" and relying on the phrase "his employees" in § 1910.12(a) to preclude citation of a non-exposing employer); 21 BNA OSHC at 2026-27, 2004-2009 CCH OSHD at pp. 53,265-66 (Thompson, Comm'r, concurring) (reading the sentences of § 1910.12(a) together to conclude that a construction employer must protect only "his employees"). But this reading of the regulation effectively eliminates the phrase "places of employment" from § 1910.12(a), a phrase the Eighth Circuit logically read in conjunction with the phrase "each of his employees" to impose a duty that runs to all employees so long as employees of the cited employer are also present. By giving effect to the entire provision and not abridging the inquiry by unduly focusing on any single phrase, we are persuaded that the Eighth Circuit's analysis yields the correct reading of § 1910.12(a). *See* 2A Sutherland Statutory Construction § 46:6 ("'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.'" (citation omitted)).

Moreover, as the court noted, an employer's dual obligation under § 1910.12(a) also appears in § 5(a)(2) of the Act, upon which the Secretary's multi-employer citation policy rests. *Summit II*, 558 F.3d at 828; 29 U.S.C. § 654(a)(2) (requiring that each employer "shall comply with occupational safety and health standards promulgated under this Act"); section 3(8) of the Act, 29 U.S.C. § 652(8) (defining "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices . . . to provide safe or healthful employment *and* places of employment" (emphasis added)). The grounding of the multi-employer citation policy in § 5(a)(2) of the Act has long been recognized by both the

courts and the Commission. *See Pitt-Des Moines*, 168 F.3d at 983 (stating that there is "no reason to conclude that the specific protection [§ 5](a)(2) affords—freedom from safety violations—is limited to an employer's own employees"); *Underhill*, 513 F.2d at 1037-38 (emphasizing that an employer's duty under § 5(a)(2) "is in no way limited to situations where a violation of a standard is linked to exposure of *his* employees to the hazard"); *Anning-Johnson*, 4 BNA OSHC at 1199, 1975-1976 CCH OSHD at p. 24,784 (announcing that the Commission will hold a controlling or creating employer liable for the exposure of other employers' employees under § 5(a)(2)); *Grossman Steel*, 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 24,791 (following the holding in *Underhill* to impose liability on employers for creating hazards to any employees on a construction worksite).[9]

[9] In his dissenting opinion, our colleague cites a variety of statements found in a wide array of cases that he contends support the proposition that the Act does not authorize the Secretary to cite an employer if its own employees are not exposed to the hazard it created or controlled. In our view, none of the precedent upon which he relies supports such a conclusion. As noted above, § 5(a)(2) states that "[e]ach employer shall comply with occupational safety and health standards promulgated under this Act." Although § 3(5) of the Act defines the term "employer" as "a person . . . who has employees," § 5(a)(2) is silent as to whether the compliance obligation it imposes is limited to the exposure of an employer's own employees. In contrast, the immediately preceding provision, § 5(a)(1), specifies that the duty it imposes on "[e]ach employer" runs to "his employees." 29 U.S.C. § 654(a)(1) ("Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm *to his employees*." (emphasis added)). *See Pitt-Des Moines*, 168 F.3d at 983 ("The use of the words 'his employees' in describing the duties of [§ 5](a)(1) and the conspicuous absence of any limiting language in [§ 5](a)(2), certainly indicate that a broader class was meant to be protected by the latter." (*citing Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."))).

Accordingly, we agree with the Secretary that the OSH Act is most reasonably read to incorporate a compliance duty under § 5(a)(2) that is not limited to an employer's own employees. *See Whirlpool Corp.*, 445 U.S. at 11 (upholding Secretary's regulation where "[n]othing in the Act" precludes its effect or provides otherwise, "particularly when it is remembered that safety legislation is to be liberally construed"); *see also Nat'l Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 468 (D.C. Cir. 2010) (according deference to Secretary's interpretation of the Act). And here the Secretary permissibly exercised her prosecutorial discretion when she issued a citation to Summit for its noncompliance with a duty encompassed within the Act. *Nat'l Ass'n of Home Builders*, 602 F.3d at 468 (holding Congress accorded Secretary authority to determine units of prosecution, which she permissibly exercised in issuing regulation that prescribed per-instance citations).

For all of these reasons, we hold that § 1910.12(a) does not prevent the Secretary from citing a non-exposing, controlling employer under the multi-employer citation policy. Accordingly, we overrule *Summit I* and restore the Commission's well-settled precedent on multi-employer liability.

B. Effect of *Darden* on Multi-Employer Liability

Turning to the second threshold challenge, Summit contends that the Supreme Court's decision in *Darden* "set aside the judicial precedent and the legal rationale upon which" the Secretary's multi-employer citation policy is based and therefore compels the Commission to squarely reject the policy.[10] At issue in *Darden* was whether an insurance salesman was an "employee" of the insurance company, such that he could recover retirement benefits under the Employee Retirement Income Security Act ("ERISA"). 503 U.S. at 320. The *Darden* Court held that when Congress uses terms that have a settled common law meaning, unless the statute states otherwise, courts must infer that Congress intended to adopt the common law definitions. 503 U.S. at 322-23. Because the Court found that ERISA's definition of "employee" ("any individual employed by an employer") was circular, and therefore essentially undefined, the Court looked to the common law master-servant test to determine whether the salesman was a covered employee. *Id.* at 323-24.

Summit argues that, in holding an employer responsible for employees other than its own under the multi-employer citation policy, the Commission must have relied on a definition of "employer" that was more expansive than the common law definition. Because the Commission now follows *Darden* when it must determine whether a cited entity is an employer under the Act or whether a particular employment relationship exists, Summit reasons that the Commission has effectively invalidated its own multi-employer precedent. In rejecting this argument, the Eighth Circuit found that Summit had "misconstrue[d]" the Commission's precedent regarding the multi-employer citation policy, and we agree. *See Summit II*, 558 F.3d at 827-28.

The *Darden* test is applicable to two inquiries under the OSH Act. The first is whether a cited entity has any employees, when that must be determined as a predicate to establishing

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[10]Although Summit raised this argument to the judge in its post-hearing briefs, the judge did not specifically address *Darden* in his decision. Summit also raised the *Darden* issue before the Commission in the *Summit I* case, but none of the opinions that comprise that decision reached the issue.

statutory coverage. Section 3(5) of the Act, 29 U.S.C. § 652(5); *see, e.g.*, *Don Davis*, 19 BNA OSHC 1477, 1479-81, 2001 CCH OSHD ¶ 32,402, pp. 49,896-97 (No. 96-1378, 2001). The second is whether a particular statutory employer has an employment relationship with a particular worker. *See, e.g.*, *Froedtert Mem'l Lutheran Hosp. Inc.*, 20 BNA OSHC 1500, 1505-08, 2002-2004 CCH OSHD ¶ 32,730, pp. 51,906-09 (No. 97-1839, 2004). Neither of these inquiries is necessarily relevant to a multi-employer construction worksite case in which the lack of an employment relationship between the cited controlling or creating employer and the exposed employee is presumed. *See Access Equip.*, 18 BNA OSHC at 1724, 1999 CCH OSHD at p. 46,780 (multi-employer citation policy addresses "the peculiar needs of preventing hazards at construction sites, which 'often entail different employees being exposed to hazards created by more than one employer'" (citation omitted)); *see also Sec'y v. Trinity Indus., Inc.*, 504 F.3d 397, 402 (3d Cir. 2007) (noting that *Darden* "has no impact" on the question whether the OSH Act covers workers who are not common law employees of a cited employer, and "courts have frequently ruled that the OSH Act . . . sweep[s] broadly enough so as to allow the Secretary to impose duties on employers [that run] to persons other than their employees" (citations omitted)).[11]

Indeed, as the Eighth Circuit explained, the statutory authority underlying the Commission's imposition of multi-employer liability derives from § 5(a)(2) of the Act, which imposes duties on an employer that, unlike those imposed under § 5(a)(1), need not benefit its own employees. *Summit II*, 558 F.3d at 828 (noting that § 5(a)(2), unlike its counterpart § 5(a)(1), "does not base an employer's liability on the existence of an employer-employee relationship"). *Compare* 29 U.S.C. § 654(a)(1) (providing that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized

[11] As our dissenting colleague points out, the Commission in *Don Davis* rejected the Secretary's contention that unpaid laborers who "were free to come and go as they pleased" were employees of the cited company because the company, which controlled the manner and means of accomplishing the work, exercised no control over the workers themselves. 19 BNA OSHC at 1482, 2001 CCH OSHD at p. 49.898. We emphasize however, that the sole question in *Don Davis* was whether Mr. Davis was a statutory employer under § 3(5) of the Act. As the Secretary did not claim that Davis had other employees, the Commission was required to determine whether Davis had an employment relationship with any of the individuals who performed work at the site. But this holding has no bearing on the question whether a cited entity, who has at least one employee and therefore is a statutory employer under § 3(5), owes a duty under § 5(a)(2) to another employer's employees.

hazards that are causing or are likely to cause death or serious physical harm *to his employees*" (emphasis added)) *with* 29 U.S.C. § 654(a)(2) (providing that each employer "shall comply with occupational safety and health standards promulgated under this Act") *and* 29 U.S.C. § 652(8) (defining the standards described in § 5(a)(2) as providing "safe or healthful employment and places of employment"). Moreover, under the Act, the focus of the compliance duty imposed on an employer is the employer's workplace, not any specific employee. *See Pitt-Des Moines*, 168 F.3d at 983 (recounting that the Act's legislative history "suggests that its primary focus was making places of employment, rather than specific employees, safe from work related hazards"); *Teal v. E.I. DuPont De Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984) ("[O]nce an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace."). This principle supports the Commission's determination, in upholding multi-employer liability, that an employer owes a duty under § 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition. *See Pitt-Des Moines*, 168 F.3d at 982-83.

Accordingly, we hold that Summit erroneously reasons that the Court's holding in *Darden* invalidates multi-employer liability, and reject this challenge to the validity of our precedent. Moreover, because Summit concedes that it is an "employer" as that term is defined under § 3(5) of the Act, we need not undertake an analysis of whether it employs employees to reach our conclusion that OSH Act applicability is established.

II. ALLEGED VIOLATION OF 29 C.F.R. § 1926.404(b)(1)(ii)

Finally, we turn to an analysis of the merits of this case under the established principles of the Commission's restored pre-*Summit I* precedent.[12] As noted above, "an employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'"

[12] It is undisputed that the cited electrical standard applies, that the equipment in question lacked the required protection, and that Mendoza's employees were exposed to injury when they plugged their portable tools into the non-GFCI-protected circuit created by that equipment. *See, e.g., Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 n.3, 2002-2004 CCH OSHD ¶ 32,646, p. 51,218 n.3 (No. 00-1268, 2003) (consolidated) (requiring, to establish a violation of a standard, the Secretary prove that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence).

McDevitt Street Bovis, 19 BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability, "an employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Id.* (citation omitted); *Grossman Steel*, 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 24,791. With respect to creating employer liability, the Commission "has long held that the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard." *Smoot Constr.*, 21 BNA OSHC at 1557, 2004-2009 CCH OSHD at p. 52,723. We find the evidence here establishes that Summit was both a controlling and a creating employer. [13]

A. Controlling Employer Liability

The record shows that Summit maintained significant control over the worksite in general and over the cited condition in particular such that it was liable for this violation. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30, 1993-1995 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-0851, 1994) (controlling employer liable if it could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite). Indeed, Summit Superintendent Corthals exercised overall authority regarding safety-related matters at the worksite. Corthals observed the progress of the project and worksite conditions by walking the worksite twice each day. He also testified that Summit directed him to point out obvious hazards to the subcontractors, which he accomplished at weekly meetings with the foremen by identifying such safety issues as hard hats, safety glasses, and damaged electrical cords. *See Knutson Constr.*, 566 F.2d at 601 (finding general contractor's duty to detect violations depends on what measures are "commensurate with its degree of supervisory capacity"); *Lee Roy Westbrook Constr. Co.*, 13 BNA OSHC 2104, 2106, 1987-1990 CCH OSHD ¶ 28,465, p. 37,695 (No. 85-601, 1989) ("'Control is established when it is shown that an employer possessed the expertise and personnel to abate a hazard'" (citation omitted)).

[13] Following oral argument, the Commission issued a supplemental briefing notice asking the parties to address the "impact" of two OSHA interpretation letters that discuss the application of § 1926.404(b)(1). The parties had not previously addressed the letters either before the judge or on review. We have carefully considered these letters and the parties' supplemental briefs, and find that the letters are inapposite to the issue before us, as they address the liability of an on-site electrical subcontractor, not that of a creating and/or controlling general contractor like Summit. Accordingly, these letters did not factor into our analysis of this case.

With respect to the cited condition in particular, under Summit's contract with Springhill, Summit retained the right to provide electrical service that subcontractors would be required to use and, according to Corthals, his decision to exercise that right was within the scope of his authority as Summit's superintendent. And Corthals could have prevented the hazardous condition from occurring in the first place, had he exercised his authority in compliance with OSHA requirements by ordering GFCI-protected equipment. Moreover, after obtaining the generator and spider box that supplied the electrical service, Corthals, not Springhill, contacted Cleveland Brothers to resolve Springhill's initial inability to start the generator. Although Corthals testified that Summit rented the equipment as an accommodation to Springhill, only Summit undertook to secure the equipment, have it brought onsite, and pay the rental fee to Cleveland Brothers. Additionally, after the CO pointed out the lack of GFCI protection, Corthals himself contacted Cleveland Brothers to request a new spider box, single-handedly abating the hazard. Under these circumstances, we find Summit's control over the worksite as a whole, in conjunction with its control over the cited condition, sufficient to establish it was a controlling employer.

B. Creating Employer Liability

It is indisputable that Summit alone was responsible for obtaining the generator and spider box. And Summit admits that it (1) ordered this equipment without requesting that it be outfitted with GFCI protection, (2) did not check for GFCI protection upon delivery of the equipment, and (3) required that the subcontractors use the equipment as provided. *See Access Equip.*, 18 BNA OSHC at 1725, 1999 CCH OSHD at p. 46,781 (finding employer liable for creating hazardous condition by bringing scaffolding onsite and adding platform extensions without knowing what weight it could bear); *see also Beatty Equip. Leasing Co.*, 4 BNA OSHC 1211, 1212, 1975-1976 CCH OSHD ¶ 20,694, p. 24,802 (No. 3901, 1976) (finding materialman who erected improperly guarded scaffold was creating employer), *aff'd*, 577 F.2d 534; *Dun-Par Eng'd Form Co. v. Marshall*, 676 F.2d 1333, 1335-36 (10th Cir. 1982) (finding employer created hazard by failing to install guardrails). By causing the noncompliant equipment to be brought onto the construction worksite, Summit created the hazardous condition.

Corthals's claim that he relied on Cleveland Brothers's expertise to provide the proper equipment and was "dumbfounded" when they did not, does not relieve Summit of its

responsibility for the equipment's condition. *See, e.g.*, *Froedtert*, 20 BNA OSHC at 1508, 2002-2004 CCH OSHD at p. 51,909 (emphasizing that an employer cannot "'contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them'" (citation omitted)); *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 624-25 (5th Cir. 1978) (noting that Commission precedent establishes that "an employer may not contract out of its duties under" the OSH Act). Summit never provided an explanation or justification for its claim that it should have been able to rely exclusively on Cleveland Brothers to deliver compliant equipment. And the circumstances here do not warrant a finding that any such justification exists. The lack of GFCI protection was a readily discernible condition, and its discovery required no specialized expertise. *See Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1899-900, 1991-1993 CCH OSHD ¶ 29,854, pp. 40,749-50 (No. 89-1394, 1992) (finding general contractor liable for electrical standard violation even though it had an electrical subcontractor onsite); *cf. Sasser Elec. & Manuf. Co.*, 11 BNA OSHC 2133, 2135-36, 1984-1985 CCH OSHD ¶ 26,982, pp. 34,684-86 (No. 82-178, 1984) (vacating citation to diesel generator manufacturer concerning electrocution hazard where it hired independent crane company with specialized expertise in crane operation and attendant power line hazards that cited employer lacked), *aff'd per curiam*, 12 BNA OSHC 1445 (4th Cir. 1985) (unpublished). We also note there is no evidence from which to conclude that Cleveland Brothers, which entered the worksite only to deliver equipment, was engaged in construction and, therefore, subject to the cited OSHA standard. Under these circumstances, we find that Summit created the hazardous condition and is therefore liable as a creating employer.

C. Knowledge

Under Commission precedent, "the Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *A.P. O'Horo Co., Inc.*, 14 BNA OSHC 2004, 2007, 1991-1993 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991). "Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees." *N & N Contracs., Inc.*, 18 BNA OSHC 2121, 2123, 2000 CCH OSHD ¶ 32,101, p. 48,239 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

Here, Summit had no work rules and provided no training to its supervisors or employees to ensure that electrical equipment it provided contained GFCI protection. Moreover,

Superintendent Corthals did not request that the equipment he ordered from Cleveland Brothers contain GFCI protection, and did not check the equipment himself for compliance with the standard. *Id*. ("Reasonable diligence also requires an employer to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations."). In these circumstances, we find that Corthals's failure to take steps to verify the safe condition of the equipment—either when he ordered it or upon its delivery to the worksite—shows that he did not exercise reasonable diligence to discover the hazard. *See Blount*, 15 BNA OSHC at 1899-900, 1991-1993 CCH OSHD at pp. 40,749-50 (finding constructive knowledge where, "with the exercise of reasonable diligence, [employer] could have known of the violative condition"). Accordingly, we find Corthals had constructive knowledge of the violation, which may be imputed to Summit based on his position as superintendent. *N & N Contracs.*, 18 BNA OSHC at 2123, 2000 CCH OSHD at p. 48,239 ("The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer."). We conclude, therefore, that Summit had constructive knowledge of its failure to provide GFCI-protected equipment in violation of the cited standard.

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that § 1910.12(a) does not preclude the imposition of OSH Act liability on a non-exposing, controlling employer on a multi-employer construction worksite. In so holding, we overrule the Commission's decision in *Summit I*. We also reject Summit's argument that the Supreme Court's *Darden* opinion invalidates the multi-employer citation policy. Finally, we conclude that Summit was both a controlling and creating employer with knowledge of the violative condition. Thus, the Secretary established a serious violation of § 1926.404(b)(1).

ORDER

We affirm Citation 1, Item 1, and assess a penalty of $1,225.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Cynthia L. Attwood
Commissioner

Dated: 8/19/2010

THOMPSON, Commissioner, dissenting:

Unlike my colleagues, I would vacate the citation. Summit Contractors, Inc. ("Summit") cannot be cited in this case for a violation of 29 C.F.R. § 1926.404(b)(1)(ii) (2009) under either the "creating employer" or "controlling employer" doctrines of OSHA's multi-employer citation policy ("MEP"). The D.C. Circuit, the likely applicable circuit court of appeals, sees tension between OSHA's MEP and language in the Occupational Safety and Health Act ("OSH Act" or "Act") focusing on employment. *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C. Cir. 1998). Furthermore, the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden* ("*Darden*") reinforced the "well-established principle" that Congress is presumed to use "employee" in the common law master-servant sense. 503 U.S. 318, 322-25 (1992). The *Darden* Court rejected the premise that the word "employee" in a statute should be expansively interpreted to achieve the statute's remedial objective, a purpose said to justify enforcement of controlling and creating employer duties under the MEP. *Id.* Another bar to the citation is that this Occupational Safety and Health Review Commission ("Review Commission" or "Commission") and the D.C. Circuit have both observed that 29 C.F.R. § 1910.12(a) (2009) limits the scope and application of Part 1926 standards so that duties run from employers to only their employees. *Summit Contractors, Inc.*, 21 BNA OSHC 2020, 2024, 2004-2009 CCH OSHD ¶ 33,010, p. 54,260 (No. 03-1622, 2007) ("*Summit I*"); *IBP, Inc.*, 144 F.3d at 865; *Anthony Crane Rental v. Reich*, 70 F.3d 1298 (D.C. Cir. 1995). In any event, the obligation imposed by 29 U.S.C. § 654(a)(2) (2009) ("§ 5(a)(2)") to comply with the cited standard is the duty to select among ground-fault circuit interruption ("GFCI") options to protect employees from the risk of electrical shock while using power tools. 29 C.F.R. § 1926.404(b)(1)(ii) (2009). If the Secretary is allowed to prosecute this case under her MEP, the specific duty defined by the cited standard will be imposed on the employer who merely provides a temporary electrical source, not on the employer who actually uses the electrical circuits and whose employees are exposed to the violative condition.

ISSUE

Since there is no question that Summit employed no employee exposed to the hazard of electrical shock addressed by the cited standard, the issue here is simply whether or not the statute, regulation, or cited standard authorizes OSHA to enforce a "controlling employer"

citation policy grounded in contract or a "creating employer" citation policy grounded in tort, where Summit has violated no duty to protect its own employees.

ANALYSIS

A. OSH ACT DOES NOT AUTHORIZE MEP

1. Language of Statute

Where it is clear the case can be appealed to a particular circuit, the Review Commission will apply the law of that circuit. *Am. Wrecking*, 19 BNA OSHC 1703, 1710 n.7, 2001 CCH OSHD ¶ 32,504, p. 50,402 n.7 (No. 96-1330, 2001) (consolidated). In the instant case Summit's office is located in Jacksonville, Florida and the worksite at issue was in Lebanon, Pennsylvania, located respectively in the Eleventh and Third Circuit courts of appeals. Neither circuit has addressed conflicts of the MEP with both the OSH Act and § 1910.12(a). Additionally, Summit could appeal to the D.C. Circuit. 29 U.S.C. § 660(a) (2009). The D.C. Circuit has in *dicta* addressed both dispositive issues.

In its most recent decision on the issue, the D.C. Circuit in *dicta* observed it had previously expressed doubt about the validity of the MEP, and continues to see "tension between the Secretary's multi-employer theory and the language of the statute . . . ." *IBP, Inc.*, 144 F.3d at 865. The court pointed to language of the statute militating against any interpretation imposing multi-employer liability:

> [Section 3 of] the Act defines the term "occupational safety and health standard" as one "reasonably necessary or appropriate to provide safe or healthful *employment* and places of *employment*," 29 U.S.C. § 652(8) (1994).

Id. at 865 (emphasis added by the D.C. Cir.). The D.C. Circuit also pointed out that § 3(6) of the Act, 29 U.S.C. § 652(6), defines "employer" as "a person engaged in a business affecting commerce *who has employees.*" *Id*. (citation omitted).

Putting these definitions together, the Act contemplates compliance obligations of an "employer" in reference to the employment of his employees, not those of another employer. This purpose is carried out by § 5 of the Act, 29 U.S.C. § 654. When read in its entirety, § 5 fulfills the statutory purpose stated in § 2(b)(2) of the Act, to provide that "employers and employees have separate but *dependent* responsibilities and rights with respect to achieving safe and healthful working conditions." 29 U.S.C. § 651(b)(2) (2009) (emphasis added). It follows that § 5(a)(1) and (2) together establish both general and specific employer duties, and § 5(b) establishes employee duties, reflecting Congress's intended correlation between employer and

employee duties. Congress intended to read in harmony the clauses of § 5 that create reciprocal employer and employee duties so that employer duties run to their employees and vice versa. *Cf. Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 710-12, nn.12, 17 (5th Cir. Unit A 1981) ("*Avondale Shipyards*"). As one state supreme court observed:

> A law that defines the rights and duties of husbands and wives has reference to the obligations of each husband to his own wife, not the wife of another. Similarly, the duty of an employer to employees clearly means to his own employees and not those of some other employer, unless the language permits no other conclusion.

Horn v. Shirley, 441 S.W.2d 468, 471 (Ark. 1969).

Congress adopted language throughout the Act confirming protection from risk running exclusively to the employees of a covered employer. Sections 6(b)(6)(A) and 6(d) of the Act, which respectively permit an employer to obtain temporary and permanent variances from occupational safety and health standards, require the employer to show that he will provide safe workplaces "to *his* employees" or "safeguard *his* employees." 29 U.S.C. §§ 655(b)(6)(A), (d) (2009) (emphasis added). That only an employer whose own employees are exposed can obtain a variance is a plain indication that only an exposing employer would need a variance. *Avondale Shipyards*, 659 F.2d at 711 n.17 (reasoning that the Act's variance requirements for the standards imply that "OSHA regulations protect only an employer's own employees"). Similarly, § 6(b)(4) of the Act requires that the delay in a standard's effective date be sufficient to permit employers to familiarize themselves "and *their* employees" with the new standard. 29 U.S.C. § 655(b)(4) (2009) (emphasis added). Likewise, § 8(e) of the Act requires OSHA to afford to representatives of the employer and "*his* employees" a right to accompany the inspector. 29 U.S.C. § 657(e) (2009) (emphasis added).

Finally, § 4(b)(4) of the Act makes it clear that Congress did not intend the OSH Act to be enforced expansively so as to enlarge contractual or tort obligations and by so doing "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (2009). Expansion of enforcement pursuant to OSHA's MEP in order to require an employer to protect the employees of others necessarily requires a general contractor to compel subcontractors to comply with OSHA standards as the subcontractor's employees perform their work. Thus, although "every court faced with the issue has held that OSHA creates no private right of action"

and although the majority of courts consider OSHA standards as some but not conclusive evidence of a standard of care under common law negligence principles, enforcement of the MEP thwarts the limits of liability expressed by Congress through inclusion of § 4(b)(4) in the OSH Act. *Anderson v. Airco, Inc*., No. C.A. 03-123-SLR, 2003 WL 21842085, 2003 CCH Prod. Liab. Rep. ¶ 16,702 (D. Del. July 28, 2003). The MEP necessarily enlarges liabilities of general contractors in that they are required to control the means, methods and techniques used by subcontractors to comply with applicable OSHA standards. Under the instant application of the MEP, the general contractor must dictate to subcontractors the means of ensuring the safe use of power tools that the general contractor's employees will never use and oversee the manner of performance of tasks in which they do not participate. *Cf., e.g., McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1108-09 (majority opinion) and 1113 (dissenting opinion), 1997-1998 CCH OSHD ¶ 32,204, p. 48,778 (majority opinion) and p. 48,783 (dissenting opinion) (No. 97-1918, 2000). This responsibility imposed by the MEP expands the general contractor's common law tort liability for injuries suffered by subcontractor employees. A basic element of any tort negligence case is whether a duty of care is owed, and in the context of the MEP, the relevant element is whether the general contractor owes a duty of care to the injured subcontractor employee. Restatement (Third) of Torts § 6 (2005). If the general contractor has not assumed responsibility for making sure the subcontractor uses safe means, methods, and techniques in performing the subcontractor's work, then the general contractor owes no common law duty to the subcontractor's employees and the case is dismissed on summary judgment. *See, e.g., Schreiber v. Idea Eng'g* & *Fabricating,* 117 Fed. App'x 467 (7th Cir. 2004); *Davis v. Sanders*, 891 S.W.2d 779 (Tex. App. 1995); *Evans v. Lockwood-Greene Eng'rs, Inc.*, 13 BNA OSHC 1984 (N.D. Ga. 1988) (Summ. J. Order). But if the general contractor *has* assumed that responsibility, or in fact controls the subcontractors' means or methods of performance, then the general contractor has created a common law duty of care to the subcontractor's employees, *i.e*., a duty to ensure that their working conditions are safe. *See, e.g., Lawson-Avila Constr., Inc. v. Stoutamire*, 791 S.W.2d 584 (Tex. App. 1990) (citing Restatement (Second) of Torts § 414 (1965)). Thus compliance with the MEP thwarts the limits of liability provided in § 4(b)(4).

In sum, the D.C. Circuit's observation in *IBP, Inc.* of continuing tension between the MEP and the statute is supported by "the particular statutory language at issue, as well as the

language and design of the statute [read harmoniously] as a whole." *See K Mart Corp. v. Cartier, Inc*., 486 U.S. 281, 291 (1988) (citation omitted).

2. Manifest Intent of Congress

Legislative history further confirms Congress's intent to make employers responsible only for "the health and safety of *their* employees." S. Rpt. No. 91-1282, p. 9, October 5, 1970; H. Rpt. No. 91-1291, p. 21, July 9, 1970 *reprinted in* Subcommittee on Labor, Committee on Labor and Public Welfare, U.S. Senate, *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. (Comm. Print 1971) ("Leg. Hist."); *see Avondale Shipyards*, 659 F.2d at 711 and n.17; *Horn v. C. L. Osborn Contracting Co.*, 423 F. Supp. 801, 808 (M.D. Ga. 1976) ("No legislative history nor statutory provision has been cited by the Plaintiff to support the proposition that Congress intended to create a duty on behalf of the employer with respect to persons other than its own employees"), *aff'd in relevant part, rev'd on other grounds*, 591 F.2d 318, 321 (5th Cir. 1979). When the Senate committee drafted § 5, later to be codified at 29 U.S.C. § 654(b), which imposes a duty on *employees* to comply with safety and health standards, the committee cautioned that this did not diminish "the employer's . . . responsibility to assure compliance [with those specific standards] *by his own* employees." S. Rpt. No. 91-1282 at 10-11, Leg. Hist. at 150-51 (emphasis added). Co-sponsor Representative Steiger described the OSH Act, which by then had been passed by the House, as ensuring effectiveness and equity to employees "and to those by whom they are employed." Congressional Record, Nov. 24, 1970 (Statement of Rep. Steiger), *reprinted in* Leg. Hist. at 1060; *see also* S. Rpt. 91-1282 at 8, Leg. Hist. at 148 ("his employees"); S. Rpt. 91-1282 at 10, Leg. Hist. at 150 ("affected employees . . . their employers"), S. Rpt. at 11, Leg. Hist. at 151 ("employees . . . their own places of employment"); H. Rpt. No. 1291 at 19, Leg. Hist. at 831, 849.

Congressional intent is further confirmed by contrasting the OSH Act with the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (2009) (the "Coal Act"), another workplace safety act which was marked up concurrently with the OSH Act by the same congressional committees. Congress simultaneously differentiated between on the one hand, the enforcement scheme of the Coal Act where duties run to all mining employees from the one who "owns" or "operates" a mine, *see, e.g.*, 30 U.S.C. §§ 802(d) and 814(a) (1976), and on the other

hand, the enforcement scheme of the OSH Act where duties run to employees from their employers, 29 U.S.C. § 654(a)(2) (2009).

Congress could have defined "employee" and "employer" in the OSH Act differently to create more expansive enforcement options, such as provided in the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 151 *et seq*. (2009) ("NLRA"), wherein Congress declared: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer" unless specifically stated otherwise. 29 U.S.C. § 152 (2009).[1]

Moreover, over the course of a two-year legislative process, the drafters of the OSH Act retained the employment-based liability predicate after hearing testimony that imposition of contract-based responsibilities could provide enhanced hazard abatement responsibilities at multi-employer worksites. Representative O'Hara, sponsor of an early occupational safety and health bill proposed in 1968, was also a sponsor of the then-concurrently considered Construction Safety Act ("CSA"), which specifically provided for contract-based multi-employer liability of general contractors and their subcontractors. In an exchange during hearings regarding the CSA with Congressman O'Hara, Maj. Gen. Carroll H. Dunn of the Department of the Army supported extension of the contract-based predicate of the CSA to the OSH legislation, because "accidents do not limit themselves to Federal and federally assisted construction." *Construction Safety: Hearings Before the Select Subcomm. on Labor of the Comm. on Educ. and Labor of the House of Rep*., 90th Cong., 1st and 2d. Sess. pp. 80-81 (1967, 1968) ("*Construction*

[1] Commissioner Cleary's dissent in *Martin Iron Works, Inc.* sought to justify multi-employer enforcement by theorizing the term "employer" in § 9(a) of the Act is as broad as the NLRA's definition. 2 BNA OSHC 1063, 1064-65, 1973-1974 CCH OSHD ¶ 18,164, p. 21,513 (No. 606, 1974). This, however, broadened the common law definition he and the unanimous Commission in *Gilles & Cotting, Inc.* had recognized Congress intended to apply to § 5(a)(2). 1 BNA OSHC 1388, 1389, 1973-1974 CCH OSHD ¶ 16,793, p. 21,513 (No. 504, 1973), *rev'd on other grounds*, 504 F.2d 1255 (1974). Commissioner Cleary opined the term "employer" does not necessarily have "the same dimensions in each section," applying the reasoning that since § 9(a) authorizes issuance of a citation for violations of § 5(a), or "of any standard . . . promulgated pursuant to section 6," "[i]t permits a citation for a violation . . . even when there is no violation of section 5(a)." *Martin Iron Works, Inc.*, 2 BNA OSHC at 1064, 1973-1974 CCH OSHD at p. 22,342. He reasoned, "[i]f this were not so the use of the word 'standard' . . . would be redundant. . . ." *Id.* This reasoning is flawed because § 5(a) encompasses both obligations under § 5(a)(1) ("General Duty Clause"), which contemplates violations where no promulgated standard is applicable, as well as obligations under § 5(a)(2), which contemplates violations of standards promulgated under § 6. 29 U.S.C. § 655 (2009).

Safety Hearings") (remarks by Maj. Gen. Carroll H. Dunn).[2] Notwithstanding consideration of such proposals to include contract-based enforcement in comprehensive occupational safety and health legislation, Congress retained a provision defining duties on the basis of a master-servant predicate, the framework of which had been integral to the original comprehensive safety and health bills, H.R. 14816 and S. 2864, which had been introduced in the 90th Congress in January 1968 by recommendation of President Johnson.[3] The focus was narrowed in the final OSH Act regarding the scope of the hazards to be abated under the introductory General Duty Clause, but the employment-based predicate of the original § 3(a) of the 1968 bills remained and was codified into the final Act.[4]

The most recent indication that Congress has never intended an expansion of employment-based liability is the death in committee of S. 575, proposed in 1993 by Senators Kennedy and Metzenbaum, in which they sought to amend the OSH Act to make general contractors responsible for subcontractor violations on a construction site. Comprehensive Occupational Safety and Reform Act, S. 575, 103d Congress (1993).

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[2] The hearing included the following discussion:

> Mr. O'Hara. You have mentioned the occupational safety bill of which I am also a sponsor, and you suggested that you feel the bills ought to be considered together. In your analysis of that bill and this bill, is there any feature of this construction safety bill that you feel gives better protection to construction workers than to be given them under the broader coverage of the occupational safety bill?
>
> General Dunn. . . . We have, as I believe the chairman is aware, submitted a paper in opposition to the original bill and that opposition is basically because we feel very strongly that we want to maintain [within the OSH Act] the contractual requirement [within the CSA] on the part of the contractor . . . .

See also Construction Safety Hearings at 128 (testimony of Building and Construction Trades Department and of M.A. Hutchenson, then-General President of the United Brotherhood of Carpenters and Joiners of America).

[3] "An employer (1) shall furnish employment and a place of employment which are safe and healthful and (2) shall comply with the standards prescribed by the Secretary." S. 2864 & H.R. 14816, 90th Cong., 2d Sess. § 3(a) (Introduced version 1968).

[4] "Each employer – (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees, and (2) shall comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. § 654(a)(1) (2009).

3. Commission Recognition of Congressional Intent

The Review Commission's earliest interpretations of the OSH Act recognized that enforcement of § 5(a)(2) to create employer responsibility beyond his employees would be "an expansion of the intent and purpose of the Act . . . . [O]nly where employees of a cited employer are affected by noncompliance . . . can such an employer be in violation of section 5(a)(2) of this Act." *City Wide Tuckpointing Serv. Co.*, 1 BNA OSHC 1232, 1232-33, 1971-1973 CCH OSHD ¶ 15,769, p. 21,951 (No. 247, 1973). Less than six months later, Commissioners Van Namee, Moran, and Cleary unanimously recognized Congressional intent that the duties arising from the Act run from an employer to his own employees:

> The difficulty with [the Secretary's] position is that it imposes liability *outside the employment relationship*. That is, it makes any employer who subcontracts while retaining control of the job site responsible for the safety and health of working men and women who do not work for him, who are not subject to his direction and control, who are not on his payroll and who cannot be discharged by him. We do not think Congress intended the Act to go so far.

Gilles and Cotting, 1 BNA OSHC at 1389, 1973-1974 CCH OSHD at p. 21,513 (footnote omitted); *see also James E. Roberts Co. & Soule Steel Co.*, 1 BNA OSHC 1684, 1685, 1973-1974 CCH OSHD ¶ 17,659, p. 22,067 (No. 103, 1974) (consolidated) (Cleary, Comm'r, concurring in part and dissenting in part); *Humphreys & Harding*, 1 BNA OSHC 1700, 1701, 1973-1974 CCH OSHD ¶ 17,784, p. 22,141 (No. 621, 1974).

After these decisions, Commissioner Cleary, in a series of dissents, disregarded without explanation his earlier recognition of contrary Congressional intent. Commissioner Cleary introduced several theories seeking to expand liability beyond the traditional employment relationship: (1) on the basis of contractual control, *see Hawkins Constr. Co.*, 1 BNA OSHC 1761, 1762, 1973-1974 CCH OSHD ¶ 17,851, p. 22,197 (No. 949, 1974) (stating "employees of a subcontractor should be considered the employees of the general, or prime contractor, for purposes of the Act . . . .") (Cleary, Comm'r, dissenting); and (2) on the basis of "possible tort liability," *see Martin Iron Works, Inc.*, 2 BNA OSHC at 1064-65, 1973-1974 CCH OSHD at p. 22,342 (Cleary, Comm'r, dissenting). Both theories were offered by Commissioner Cleary to develop a MEP because, in order to accomplish the remedial purpose of the Act, "the term 'employee' cannot be construed solely according to common law concepts of master and servant." *J. E. Roupp & Co. & Denver Dry Wall Co.*, 1 BNA OSHC 1680, 1681, 1973-1974 CCH OSHD ¶ 17,660, p. 22,068 (No. 146, 1974) (consolidated) (Cleary, Comm'r,

dissenting). These theories eventually became the foundation of "controlling employer" and "creating employer" doctrines of the current MEP.

The origin of such doctrines in *dicta* and through an unauthorized Commission foray into setting policy, as well as the "checkered history" of the doctrine, is extensively discussed by the Review Commission in *Summit I*, 21 BNA OSHC at 2024, 2004-2009 CCH OSHD at p. 54,260, and by the D. C. Circuit in *Anthony Crane Rental*, 70 F.3d at 1306-07. Also, the history of the doctrine at the Commission and in the courts is reviewed by the Eighth Circuit in *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 819-21 (8th Cir. 2009) ("*Summit II*"). These summaries demonstrate that each case which expanded the common law master-servant doctrine did so in order to achieve the broad remedial purposes of the OSH Act. *Brennan v. OSHRC* (*Dic-Underhill*), 513 F.2d 1032 (2d Cir. 1975); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984); *U.S. v. Pitt-Des Moines, Inc.*, 169 F.3d 976 (7th Cir. 1999); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534 (9th Cir. 1978); *Universal Constr. Co, Inc. v. OSHRC*, 182 F.3d 726, 731 (10th Cir. 1999).[5] This approach has been superseded by the

[5] The Second, Sixth, Seventh, and Ninth Circuits' broadened definitions of employer liability under § 5(a)(2) are weak support for citation herein of a non-exposing general contractor for failure to ensure compliance by a creating and exposing subcontractor-employer. Not only are those courts inapplicable for potential appeal in this case, in those cases, unlike the instant case, the creating employer held liable was the sole employer in a position to comply with the standard. *E.g., Dic-Underhill*, 513 F.2d at 1037, 1039 (affirming an OSHA citation against a subcontractor joint venture which "created the hazards and maintained the area in which they were located," on the basis of a "broader duty [under § 5(a)(2)] to keep a work area safe for any employees having access to that area"); *Teal*, 728 F.2d at 804-05 (finding premises owner was strictly liable for its failure to warn all persons on premises, including business visitors, of a violation of an OSHA standard that constituted latent dangers on premises); *Pitt-Des Moines*, 169 F.3d at 983 (holding steel erection subcontractor respondent criminally liable for the killing of two ironworkers struck by the collapse of a steel structure the respondent was raising, where respondent "was the only entity on the site that could reasonably have remedied it"); *Beatty Equip.*, 577 F.2d at 537 (in reference to § 5(a)(2) stating, "If anything at all can be gleaned from the words of the subsection, it is that one who is to be charged with absolute liability be realistically in a position to comply with the promulgated standards"). Only the Eighth Circuit in *Summit II*, 558 F.3d 815, discussed *infra* at Section D, and the Tenth Circuit in *Universal Construction Co., Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999), have found a non-exposing general contractor liable for failing to ensure compliance by a subcontractor. The *Universal* court found "it is plausible that Congress would have chosen more direct phrasing to implement such a scheme" and "conced[ed] the multi-employer doctrine and the language of the Act are not perfectly harmonious." *Id.* Yet the Tenth Circuit in *Universal* accorded *Chevron*-style deference to the Secretary's MEP pinning statutory authorization upon expansive interpretation of

Supreme Court's decision in *Darden* and by the Commission's own decisions in *Timothy Victory* and *Allstate Painting.* *Darden*, 503 U.S. 318; *Timothy Victory*, 18 BNA OSHC 1023, 1995-1997 CCH OSHD ¶ 31,431 (No. 93-3359, 1997); *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 2004-2009 CCH OSHD ¶ 32,804 (No. 97-1631, 2005) (consolidated).

4. The Mandate of the Supreme Court

In 1998, the D.C. Circuit noted in *IBP, Inc.* that *Darden* contradicts "the Secretary's view" justifying the MEP. The Secretary's view, rejected by the D.C. Circuit, was that "references to employment relationship were not intended to be restrictive or interpreted in the common law sense" because of the "remedial" purpose of the Act. 144 F.3d at 865. Subsequently, the Review Commission acknowledged that the Supreme Court's opinion in *Darden* mandates reconsideration of its prior broad interpretations of the term "employer" which had permitted OSHA to treat independent subcontractors and their employees as employees of the general contractor for purposes of liability under the OSH Act. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1991-1993 CCH OSHD ¶ 29,775 (No. 88-1745, 1992). Accordingly, the Commission declared it would no longer follow its prior assumption that "[t]he 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 and the economic realities of the relationship at issue." *Timothy Victory*, 18 BNA OSHC at 1026, 1995-1997 CCH OSHD at p. 44,448 (citation omitted); *see also Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 2004-2009 CCH OSHD ¶ 32,804; *AAA Delivery Servs., Inc.*, 21 BNA OSHC 1219, 2004-2009 CCH OSHD ¶ 32,796 (No. 02-0923, 2005).

In *Don Davis*, the Commission held that under *Darden*, for an employer to be held liable under the OSH Act, it is not enough that he controls the overall work; he must control the workers. 19 BNA OSHC 1477, 1482, 2001 CCH OSHD ¶ 32,402, pp. 49,897-98 (No. 96-1378, 2001); *see also Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 612 S.E.2d 239 (Va.

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§ 5(a)(2). The MEP was expressed in agency manuals and enforcement guidelines. This deferral preceded the holding by the Supreme Court that "interpretations . . . in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). The D.C. Circuit has recognized post-*Christensen* limitations on *Chevron*-style deference toward informal agency promulgations that do not have the force of law. *See D.C. Hosp. Ass'n v. D.C.*, 224 F.3d 776, 780 (D.C. Cir. 2000); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007).

App. 2005) (holding Virginia state plan's multi-employer citation policy may not be implemented absent specific statutory or regulatory authorization, where both the Virginia statute and its MEP track the federal language). Third Circuit Court of Appeals Judge Tashima in *Secretary of Labor v. Trinity Industries, Inc.*, persuasively reasoned that the rationale of the Supreme Court's decision in *Darden* proscribed OSHA's jurisdiction to cite an employer for failure to protect its subcontractor's employees. 504 F.3d 397, 403-04 (3d Cir. 2007) (Tashima, J., dissenting).

> The OSH Act establishes workplace safety duties of "employers" with respect to "employees." 29 U.S.C. § 654. The Supreme Court has clearly declared that, unless a statute sets forth a broader definition, Congress intended the term "employee" to connote traditional agency law criteria for master-servant relationships. *Nationwide Ins. Co. v. Darden,* 503 U.S. 318, 322-24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (describing this principle as "well established"). Under *Darden,* Trinity is an "employer" for OSH Act purposes only with respect to its own employees . . . . [A] failure to safeguard non-employees . . . is simply outside the scope of the Act . . . .
>
> Although, as the majority correctly notes, *Darden* was an ERISA case, its reach is clearly not so limited. *Darden* announced a general rule of statutory construction in broad language, which the Court has never attempted to limit to ERISA. *See id.; see also, e.g., Neder v. United States,* 527 U.S. 1, 21-22, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Indeed, the Court reached its conclusion in *Darden* by examining two previous attempts by the Supreme Court to impose a broader definition of "employee" in the context of other laws, both of which resulted in congressional amendment of the statutes to reflect the common-law definition of "employee." *See Darden,* 503 U.S. at 324-25, 112 S.Ct. 1344 (discussing the National Labor Relations Act and the Social Security Act). The Supreme Court and courts of this circuit have consistently applied *Darden* to other statutes that include definitions of "employer" or "employee" similar to ERISA's. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells,* 538 U.S. 440, 444-51, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (Americans with Disabilities Act); *Walters v. Metro. Educ. Enters.,* 519 U.S. 202, 211, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (Title VII); *Sempier v. Johnson & Higgins,* 45 F.3d 724, 728 n. 4 (3d Cir.1995) (Age Discrimination in Employment Act); *Shapiro v. Sutherland,* 835 F.Supp. 836, 837-38 (E.D.Pa.1993) (False Claims Act).
>
> ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). That definition is essentially identical to the definition of "employee" in the OSH Act. *See id.* § 652(6) ("The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce."). Other courts of appeals, as well as the Occupational Safety and Health Review Commission itself, have already applied *Darden* to the Act. *See e.g., Slingluff v. OSHRC,* 425 F.3d 861, 867-69 (10th Cir.2005); *IBP, Inc. v. Herman,* 144 F.3d 861, 865 (D.C.Cir.1998); *Loomis Cabinet Co. v. OSHRC,* 20

> F.3d 938, 941-42 (9th Cir. 1994); *Sec'y of Labor v. Vergona Crane Co., Inc.*, 15 BNA OSHC 1782 (O.S.H.R.C.1992). The majority's refusal to apply traditional agency law principles to this case is therefore contrary to the reasoning of *Darden* and is out of step with subsequent decisions of the Supreme Court, this circuit, and other courts of appeals.

Id.

Indeed, the foundations of the "controlling employer" and "creating employer" doctrines of the MEP starkly contrast with the rationale of *Darden*. The theory underlying the doctrines was designed in persistent dissents by Commissioner Cleary opining that "the employees of a subcontractor should be considered the employees of the general, or prime contractor" in order to fulfill "the express purpose of the Act, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." *Hawkins Constr.*, 1 BNA OSHC at 1763, 1973-1974 CCH OSHD at p. 22,197 (dissenting opinion of Commissioner Cleary that "employer" and "employee" under the Act should not be defined in the common law sense but instead should be defined broadly to accomplish the remedial purpose of the Act); *see also James E. Roberts Co*., 1 BNA OSHC 1684, 1973-1974 CCH OSHD ¶ 17,659 (same). Then in 1975, the Review Commission adopted Commissioner Cleary's doctrine, expressly holding that the terms "employer" and "employee" in the Act should not be limited to employment relationships defined under common law principles but rather should be broadly construed to achieve the statutory purpose of workplace safety. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-1976 CCH OSHD ¶ 20,691 (No. 12775, 1975). A few years later, the Commission held a contractor responsible for the violations of an acknowledged independent contractor because "the term 'employer' is one of art in remedial legislation that is to be defined according to the statutory [purpose]." *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1703, 1705, 1978 CCH OSHD ¶ 22,829, p. 27,602 (No. 14801, 1978). Then in 1980, relying on its analysis in *Griffin & Brand*, the Review Commission held S&S Diving Co. responsible for the safety of divers who were independent contractors on the basis that "the term 'employer' under the Act is not limited to employment relationships as defined under common law principles but rather is broadly construed in light of the statutory purpose . . . ." *S&S Diving Co.*, 8 BNA OSHC 2041, 2042, 1980 CCH OSHD ¶ 24,742, p. 30,465 (No. 77-4234, 1980).

There is no dispute that none of the common law indicia of employment set forth in *Darden* suggests that Summit controlled any of the subcontractors' employees, including the employee exposed to the hazard addressed by the cited standard.

B. SECTION 1910.12(a) DEFINES APPLICATION OF PART 1926 STANDARDS

Moreover, § 1910.12(a) remains in tension with the MEP. The section of the OSH Act authorizing specific employer duties unambiguously requires OSHA to exercise delegated rulemaking authority under § 6 to promulgate standards defining specific employer duties. 29 U.S.C. §§ 654(a)(2), 656 (2009). It follows that § 5(a)(2) itself is an inchoate mandate, requiring each employer to "comply with occupational safety and health standards promulgated under this chapter." *Id.* Delineation of the scope and application of specific duties requires promulgation of standards under § 6 of the Act, 29 U.S.C. § 655 (2009). The regulation at issue, § 1910.12(a), defines the scope and the application of the entire set of Part 1926 construction safety and health standards promulgated pursuant to § 6:

> The first sentence makes the construction safety standards applicable to "every employment and place of employment of every employee engaged in construction work." The second sentence makes each employer engaged in construction work responsible for "his employees."

Summit I, 21 BNA OSHC at 2024 n.6, 2004-2009 CCH OSHD at p. 53,263 n.6 (citations omitted).

Thus, § 1910.12(a) defines the scope (who is obligated) and application (what duties are owed to whom) of Part 1926 standards. *See, e.g., CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 717-18 n.1 (7th Cir. 1999); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 n.8 (1st Cir. 1993) ("*Simpson*"); *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373, 376-80 (6th Cir. 1987). Notwithstanding, the Secretary has posited in the *Summit* cases (consolidated for argument before this Commission) that § 1910.12(a) is a mere "adopting regulation," intended by the Secretary to adopt the Part 1926 standards pursuant to § 6 but not to govern enforceability of Part 1926 standards. However, in *Summit II* the Eighth Circuit majority held that interpretation of § 1910.12(a) determines the enforceability of any Part 1926 standard against a non-exposing employer:

> Because the creating employer, correcting employer and controlling employer citation policies [of OSHA's MEP] permit OSHA to issue citations to employers when their own employees are not exposed to the hazard, [any] reading [that] § 1910.12(a) [requires the employer to protect only "his employees"] effectively precludes these policies and only permits the exposing employer citation policy.

Summit II, 558 F.3d at 824-25 (citation omitted). In his dissent, Judge Beam concurred in the majority's analysis "that 29 U.S.C. § 654(a)(2) incorporates the requirements of 29 C.F.R. § 1910.12(a) within the governance imposed by the [OSH Act]." *Id.* at 829-30 (Beam, J.,

dissenting). Thus, there appears to remain no question that whether or not § 1910.12(a) is a mere "adopting regulation," it governs the scope and application of Part 1926 standards.

C. SECTION 1910.12(a) CONFLICTS WITH OSHA'S MEP

The Review Commission has determined that the "controlling employer" doctrine of the MEP irreconcilably conflicts with § 1910.12(a). *Summit I*, 21 BNA OSHC at 2029, 2004-2009 CCH OSHD at p. 53,263. The case was appealed, and the Eighth Circuit reversed and remanded. *Summit II*, 558 F.3d at 829. Upon remand, the Commission applied to the facts of that case its reading of the Eighth Circuit's mandate "that the plain language of § 1910.12(a) 'is unambiguous in that it does not prelude OSHA from issuing citations to employers for violations when their own employees are not exposed to any hazards related to the violations.'" *Summit Contractors Inc.*, 22 BNA OSHC 1777, 1777-78, 2004-2009 CCH OSHD ¶ 33,010, p. 54,259 (No. 03-1622, 2009) ("*Summit III*") (citation omitted), *appeal dismissed*, No. 10-1345 (8th Cir. May 6, 2010). Although I examine below the persuasiveness of the Eighth Circuit's reasoning in its reversal and remand, the Commission is not bound by the Eighth Circuit's interpretation of § 1910.12(a); but persuasive *dicta* of the applicable D.C. Circuit is apposite.

The D.C. Circuit has twice noted in *dicta* that § 1910.12(a) appears to conflict with the Secretary's MEP. In *Anthony Crane*, the D.C. Circuit unanimously read § 1910.12(a) as having "plain language." 70 F.3d at 1303. The court noted a "marked tension" between the language of § 1910.12(a) and the Secretary's multi-employer policy, emphasizing: "Here, the relevant regulation by its terms only applies to an employer's *own employees*, seemingly leaving little room for invocation of the [multi-employer] doctrine." *Id.* at 1307. The court, after noting that the issue had not been briefed and had not been addressed by any other court, left "to a later date the critical decision of whether to apply the multi-employer doctrine where an employer has been cited under . . . § 1910.12." *Id.* In *IBP, Inc.*, another panel of the D.C. Circuit similarly noted the tension between the regulation and the policy: "We see tension between the Secretary's multi-employer theory and the language of the statute and regulations, and we have expressed doubt about its validity before." *IBP, Inc.*, 144 F.3d at 865-66. Not needing to decide the issue, the D.C. Circuit again vacated the citation on other grounds.

Therefore, in this case, Commission precedent regarding consideration of the law in the applicable circuit instructs the Commission to apply to the facts of this case the probable

interpretation by the D.C. Circuit, the circuit court to which Summit is likely to appeal. *Am. Wrecking*, 19 BNA OSHC at 1710 n.7.

D. DECONSTRUCTION OF § 1910.12(a) DISTORTS INTENT

1. Expressed Intent

Prosecution of employers on a contract-based theory ignores the intent of the redactors of § 1910.12(a) to reject contract-based enforcement. The regulatory history of both § 1910.12(a) and the predecessor CSA standards has been extensively discussed. *See Summit I*, 21 BNA OSHC at 2026-28, 2004-2009 CCH OSHD at p. 53,263; *Simpson*, 3 F.3d at 4; *Underhill Constr. Corp. v. Sec'y of Labor*, 526 F.2d 53, 55-56 (2d Cir. 1975). In sum, the Secretary had included in the CSA standards a regulation which expressly imposed contract-based liability outside the employment relationship, § 1518.16, now § 1926.16. Yet, only a few weeks later, the Secretary then adopted as OSHA standards the CSA's safety and health standards, but expressly deleted all provisions directed toward "contractors," "subcontractors," "laborers," "mechanics," and "contracts," those necessary only to contract-based enforcement, *see* § 107(a) of the CSA (now codified at 40 U.S.C. § 3704 (2009)) and 29 C.F.R. § 1910.12 (2009). This process demonstrates the Secretary found an inconsistency between the OSH Act's repeated and prominent references to "employer," "employee," "employment," and "places of employment," and contract-based enforcement. Thus the Secretary drafted § 1910.12 to make that distinction clear. Later, the drafters reemphasized this distinction by adopting paragraph (c) of § 1910.12, stating "[t]his section does not incorporate subparts A and B of part 1926 of this chapter. Subparts A and B have pertinence only to the application of the CSA." 29 C.F.R. § 1910.12(c) (2009). Thus § 1910.12(a) limited the scope and application of the Part 1926 standards promulgated through the § 1910.12 regulations. It defined "the regulatory universe to which these [Part 1926] construction standards apply." *Simpson*, 3 F.3d at 4.

The Secretary asserts that when she enacted § 1910.12(a), she fully intended to reserve prosecutorial discretion to impose the § 5(a)(2) duty on the basis of voluntary contractual relationships in addition to employment relationships. If the Secretary's assertion were correct, she logically would have retained the CSA's regulation establishing an effective date for coverage of contractual relationships. However, the Second Circuit in *Underhill* held that when the Secretary adopted the CSA standards as OSHA standards, she discarded the effective date for coverage of contractual relationships because:

> [T]he Secretary's publication of that new regulation [§ 1910.12] indicated his intent to adopt only the CSA substantive rules and to discard under OSHA the CSA provisions which were important only to CSA because of the *contractual basis* of that earlier act.

Underhill, 526 F.2d at 56 (emphasis added).[6]

Thus, the *Underhill* court read § 1910.12(c) as a clarification of the Secretary's intent that the contractually-based enforcement scheme of the CSA would not be incorporated into the employment-based enforcement scheme of the OSH Act. *See Davenport*, 45 Va. App. 526, 612 S.E.2d 239. If the Secretary had intended by § 1910.12(a) to apply Part 1926 standards to general contractors on a contract-based theory, she would have done so pursuant to § 6(a) of the OSH Act by simply adopting the enforcement scheme defined by the last sentence of § 1926.16(b), and deleting only those provisions directly related to the federal contract predicate of § 1926.10(a).[7]

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[6] The *Underhill* court's finding that the Secretary intended to "discard under OSHA" enforcement of the adopted standards on a "contractual basis" is consistent with the Secretary's explanatory provision in § 1910.12(c). *Id.* That explanatory provision enumerated only the distinction between Commerce Clause jurisdiction under the OSH Act and federal contract jurisdiction under the CSA as one example of provisions of Subparts A and B having pertinence only to the application of section § 107 of the CSA. Another provision that was similarly discarded but was not specifically described in § 1910.12(c) was 29 C.F.R. § 1926.13(b). This discarded provision applied the protection of CSA standards to "any laborer or mechanic working in performance of the contract," not limited to "laborers and mechanics 'employed directly' upon the 'site of the work.'" 29 C.F.R. § 1926.13(b) (2009). Such a provision if retained would have been consistent with contract-based enforcement as well as with either federal contract or commerce clause jurisdiction. Still another such omitted provision, 29 C.F.R. § 1926.16(b), states that "the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work." 29 C.F.R. § 1926.16(b) (2009).

[7] The contract-based "controlling employer" doctrine of the MEP conflicts with the well-established principle that a private contract cannot enlarge or diminish a duty the redactor has intended. *See, e.g.*, *Cartier v. Doyle*, 277 F. 150, 153 (5th Cir. 1921) (stating private contract cannot change the affect of a statute); *McQueen v. Salida Coca Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (stating private contract cannot affect the statutory scheme devised by Congress). This principle has been applied to the OSH Act. *See Frohlick Crane Serv., Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975) (holding 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); *Vergona Crane Co.*, 15 BNA OSHC at 1785-86, 1992 CCH OSHD at pp. 40,497-98 (holding 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).

2. How To Protect

If further analysis were necessary, any such analysis of § 1910.12(a) must not ignore the explicit mandate of the adverbial phrase requiring protection from risk "by complying with appropriate standards." 29 C.F.R. § 1910.12(a) (2009). This adverbial phrase gives meaning to the regulation when read as a whole. That is, the way an employer protects his employees engaged in construction is by complying with appropriate Part 1926 standards. Yet, the Secretary's "controlling employer" theory imposes an obligation that differs from that imposed by the Act or by § 1910.12(a). It is one thing to protect employees by complying with appropriate standards; it is quite another to protect employees by requiring others to comply. That is, the Secretary's MEP would have "controlling employers" assume OSHA's statutorily delegated responsibility to regularly inspect entire construction sites to enforce subcontractor compliance with the standards but without the protection provided to federal inspectors from lawsuits by injured workers alleging the inadequacy of inspections.[8] Specifically, the MEP states, "[a] controlling employer must exercise reasonable care to prevent and detect violations on the site." OSHA Instruction CPL 2-0.124 at X.E.2. (Dec. 10, 1999).

3. Whom to Protect

Language specifying to whom the duty to protect is owed is common to both § 5(a)(1), the General Duty Clause, and § 1910.12(a). The Secretary has consistently conceded the language derived from § 5(a)(1) and adapted to § 1910.12(a) describes the range of hazards from which an employer must protect *his employees*. *See* OSHA Field Inspection Reference Manual § III.C.2.c.(2)(a)2 (Sept. 26, 1994) ("FIRM") ("The employees exposed to the Section 5(a)(1) hazard must be the employees of the cited employer."); *see, e.g., Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1724, 1999 CCH OSHD ¶ 31,821, p. 46,780 (No. 95-1449, 1999).

Moreover, in addition to § 1910.12(a), other such regulations drafted by the Secretary to adopt pre-existing federal standards pursuant to § 6(a) of the Act use identical phraseology to identify to whom the duty to protect is owed:

[8] The theory that the MEP is enforceable only at worksites where a general contractor periodically employs an employee in no way justifies relegation to general contractors of responsibilities entrusted by Congress to the Secretary, but without the insulation from liability afforded federal inspectors.

Ship repairing.

> (a) *Adoption and extension of established safety and health standards for ship repairing* . . . Each employer shall protect the employment and places of employment of each of his employees engaged in ship repair or a related employment, by complying with the appropriate standards prescribed by this paragraph.

29 C.F.R. § 1910.13(a) (1981).[9] This language has been read as explicitly limiting an employer's duty to protect only "his employees." *Avondale Shipyards*, 659 F.2d at 712.

The Eighth Circuit grammatically reconstructed the language of § 1910.12(a) as follows: "(1) that an employer shall protect the employment of each of his employees . . . and (2) that an employer shall protect the places of employment of each of his employees . . . ." *Summit II*, 558 F.3d at 824. The Eighth Circuit also gave the prepositional phrase "of his employees" its natural meaning as "of *only* his employees." *Id.* at 824 n.4; *id.* at 830 (Beam, J., dissenting) (stating dissenting opinion's accord with "court's fundamental grammatical interpretation of § 1910.12(a)").

In sum, § 1910.12(a) requires an employer to protect his employees and only his employees.

4. <u>What to Protect Against</u>

The straightforward mandate of § 1910.12(a) is that the duty owed by any employer to only his employees is the duty to protect them from all hazards addressed by an appropriate Part 1926 standard. 29 C.F.R. § 1910.12(a) (2009). The Eighth Circuit further sought to draw a line between hazards arising from "employment" and those arising from "places of employment." The Eighth Circuit majority first acknowledged "our inquiry begins with the regulation's plain language," but then immediately began a process of deconstruction. *Summit II*, 558 F.3d at 823. The Eighth Circuit's deconstruction seeks to find redundancy in the objects of risk prevention: "The court will avoid an interpretation of a [regulation] that renders some words [in the phrase 'employment and places of employment'] altogether redundant." *Id.* (citation and quotations omitted and second alteration added). This process defeats its own goal. No deconstruction is necessary to determine "whether the language at issue has a plain and unambiguous meaning . . . ." *Id.* (citation omitted). The literal interpretation of the regulation when read as a whole is

[9] In 1993, § 1910.13 was removed and replaced with § 1910.15; however, § 1910.15 is essentially identical to § 1910.13. Safety Standards for General Industry and Construction, 58 Fed. Reg. 35,306, 35,308 (June 30, 1993).

not ambiguous. But even if further analysis were necessary, the Supreme Court warned, "literalness" in statutory construction "may strangle meaning." *Lynch v. Overholser*, 369 U.S. 705, 710 (1962). "[T]he meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 860-61 (1984). Instead, the Eighth Circuit's deconstruction interprets terms in isolation from their common idea. "Courts should avoid slicing a single word from a sentence, mounting it on a definitional slide, and putting it under a microscope in an attempt to discern the meaning of an entire statutory provision." *Wachovia Bank v. U.S.*, 455 F.3d 1261, 1267 (11th Cir. 2006). The Supreme Court explained:

> The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006).

Therefore, the meaning of the phrase "employment and places of employment" from § 1910.12(a) is best understood as an entity in terms of its peculiar and appropriate use in the context of implementation of the OSH Act. Indeed the phrase is directly drawn from the context and thrust of the OSH Act. Provisions of the Act are consistently directed toward protection of employees from exposure to or being affected by hazards in their employment or places of employment. *Cf.* §§ 6(a), 6(b)(5), 6(b)(7), 6(c)(l), 6(d), 8(c)(1), 10(c), 13(c), 16, 20(a)(3), 20(a)(5)-(7) of the Act, 29 U.S.C. §§ 651-678 (2009). In a grammatical sense, the subject/verb clause "each employer shall protect," modified by the adverbial phrase "by complying with appropriate standards," is directed toward the object of elimination of risk. Read in its entirety, protection of "employment and places of employment of his employees engaged in construction" encompasses the full array of risk to an employer's employees. Risk is prevented by complying with the Part 1926 construction standards.

> Congress did not define the term "hazard" in the Act. Nevertheless, it would appear that when it is employed within an Occupational Safety and Health Standard, relating to providing safe or healthful working conditions in employment and places of employment, hazard is risk incident to the nature of the work performed and to the nature of the place of employment . . . .

Raven Indus., Inc, 4 OSAHRC 897, 907, 1973 WL 4186 at *5 (No. 2542, 1973) (ALJ).

This analysis adapts well here. Thus, in *Raven* the administrative law judge recognized the correlation in the OSH Act between prevention of exposure to hazards and the associated terms "employment and places of employment." Hazards arising from "employment" are "risk incident to the nature of the work performed," *i.e.*, work methods or processes. *Id.* Hazards arising from "places of employment" are risk incident to "the nature of the place of employment," *i.e.*, condition or structure of workplace or facilities. *Id.* The Second Circuit in *Underhill* recognized such a correlation in specific reference to § 1910.12:

> [The provisions of the OSH Act] make clear that the Secretary intended to adopt, indeed had the statutory authority to adopt, only those provisions in the CSA regulations which require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

Underhill, 526 F.2d at 57 (discussing the OSH Act's definition of the word "standard").

Section 3(8) of the Act makes the same correlation. It defines an "occupational safety and health standard" as a "standard which requires conditions [risk incident to the nature of the place of employment], or the adoption or use of one or more practices, means, methods, operations or processes [risks incident to the nature of the work performed], reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (2009).

Furthermore, the variance procedure described in § 6(d) establishes an equivalence between on the one hand, the employer duty described by § 1910.12(a) to comply with standards to protect "the employment and places of employment of his employees," and on the other hand, substituted identical protection to protect his employees by providing safe and healthful "conditions, practices, means, methods, operations, or processes." 29 C.F.R. § 1910.12(a) (2009); 29 U.S.C. § 655(d) (2009). Pursuant to § 6(d), an employer may apply for a variance to prevent the risk addressed by a standard so long as the alternative method provides safe and healthful "employment and places of employment to his employees . . . ." 29 U.S.C. § 655(d) (2009). The variance procedure must provide just as safe and healthful "conditions, practices, means, methods, operations, or processes." *Id.*

Replacement within § 1910.12(a) of functionally equivalent alternatives for the terms "employment" and "places of employment" demonstrates a flaw in the logic underpinning the Eighth Circuit majority's analysis. This analysis logically proceeds through the following deductive categorical syllogism:

> **Major premise**: Separate provisions in an enactment cannot mandate the same thing.[10]
>
> **Minor premise**: If both employer duties in § 1910.12(a) are construed to be limited to protection of only his employees, then the duty to protect "the employment of his employees" and the duty to protect "the places of employment of his employees" are identical mandates.[11]
>
> **Conclusion**: "To give independent meaning to the term 'place[s] of employment' would require the employer to protect others who work at that place of employment so long as the employer also has employees at that place of employment."

Summit II, 558 F.3d at 825; *cf. Clinton v. City of New York*, 524 U.S. 417, 474 (1998) (Breyer, J., dissenting).

To the contrary, even if it were appropriate to separate and interpret in isolation associated words given meaning by the Act as a unit, the hazards arising respectively from "employment" and from "places of employment" can be read as entirely distinct categories in perfect harmony with the employment-based enforcement scheme of the Act. Consistent with the express purpose stated in § 2(b)(2) of the Act that interdependent duties to protect run from employers to their employees, the hazards protected against by application of the Part 1926 standards are sorted by the phrase "employment and places of employment of his employees" into two mutually exclusive classes which taken together encompass the entire universe of construction industry hazards. Thus, the problem with the Minor Premise is that the hazards arising from "employment" need not overlap the hazards arising from "places of employment." In short, the conditional proposition of the minor premise is false.

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[10] To be precise, the assertion that serves as the Major Premise is the following statement:

> Summit's reading of § 1910.12(a) effectively precludes [the MEP] and only permits the exposing employer citation policy. Although Part (1) ["an employer shall protect the employment of his employees"] may support this interpretation, part (2) ["an employer shall protect the places of employment of his employees"] must provide something different to avoid being superfluous to part (1).

Summit II, 558 F.3d at 824.

[11] The conditional proposition that serves as the Minor Premise is the statement by the majority that they could not "envision a situation where the protection of a 'place of employment' will not be directly related to or encompassed by the protection of 'employment.'" *Summit II*, 558 F.3d at 825.

Risk incident to the nature of the work performed arises from the practices, means, methods, operations, or processes used in the "employment of his employees." An employer protects his employee from risk incident to employment by complying, for example, with the mechanical equipment standard, § 1926.952(a)(3), which proscribes unsafe operations of mechanical equipment without the use of backup lights or a spotter.[12]

Risk incident to the nature of the place of employment arises from the conditions that exist in the places of employment of his employees. An employer protects his employee from risk incident to a place of employment by complying, for example, with the "Housekeeping" standard, § 1926.25(a), which proscribes unsafe physical conditions like protruding nails or other debris.[13]

In sum, it is not true, as the Eighth Circuit's Minor Premise argues, that one could not "envision a situation where the protection of a 'place of employment' will not be directly related to or encompassed by the protection of 'employment.'" *Summit II*, 558 F.3d at 825. The syllogism is unconvincing "because its Minor Premise is faulty." *See Clinton*, 524 U.S. at 474 (Breyer, J., dissenting). Also unconvincing, then, is the Eighth Circuit's ultimate conclusion, dependent on the validity of this syllogism, that deconstruction of § 1910.12(a) removes the plain conflict between the MEP and the regulation.

E. ENFORCEMENT OF MEP CONFLICTS WITH CITED STANDARD

Even assuming *arguendo* that the OSH Act and § 1910.12(a) both permit citation of non-exposing employers, the plain language of the cited standard imposes a duty on "employers" to provide ground-fault protection to "employees." Section 1926.404(b)(1)(i) establishes general applicability of the standard and states that the employer shall use either ground-fault interrupters as specified in paragraph (b)(1)(ii) or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii). 29 C.F.R. § 1926.404(b)(1) (2009). Subsection

[12] "(3) No employer shall use any motor vehicle equipment having an obstructed view of the rear unless: (i) The vehicle has a reverse signal alarm audible above the surrounding noise level or: (ii) The vehicle is backed up only when an observer signals it is safe to do so." 29 C.F.R. § 1926.952(a)(3) (2009).

[13] "(a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures." 29 C.F.R. § 1926.25(a) (2009).

1926.404(b)(1)(ii) requires GFCI protection for employees. The cited standard assigns no responsibility to the provider of electrical service to monitor users to ensure GFCI protection of all circuits. Neither did the contract in this case:

> ¶ 6. All parties hereby agree that Contractor may provide, in locations determined to be appropriate for the project, temporary electrical, temporary water and temporary toilet services. Further, Subcontractor shall make use of the services as provided.

An even more specific mandate to the subcontractor who makes use of provided services is the contract's assignment to the subcontractor of the responsibility "to acquire at its own expense any additional utilities or services it may require to perform its scope of work . . . ." Included within the subcontractor's scope of work in the contract was compliance with applicable OSHA standards:

> ¶ 4. All parties hereby agree that SUBCONTRACTOR has the sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act of 1970.

The employer in the best position and obligated under both the contract and the standard to select among GFCI protection options and periodically test GFCI functionality was the employer who assigned and supervised employees who used the electrical service, in this case Springhill and its subcontractor Mendoza. To comply with its obligation to use the temporary electrical service in compliance with § 1926.404(b)(1), Springhill's Superintendent Hill acknowledged he had authority under the contract with Summit to have the multiple outlet spider box replaced with a GFCI-equipped spider box. Alternatively, Summit's subcontractors could have required their own employees using the electrical service to plug power tool cords into GFCI-equipped portable pigtails. OSHA's Compliance Officer ("CO") recommended the most convenient and inexpensive option for complying with the standard would be for each user of the electrical service to plug the cord of the tool being used into a portable GFCI-equipped "pigtail."

> A pigtail would be plugged into the spider box, into the 120 outlet, like a short extension cord. And, then, the extension cord plugged into that. And, then, between the extension cord and the 120 outlet, you would have a GFCI in there, a portable GFCI.

The CO testified these GFCI pigtails could be purchased "from Lowe's," estimating the cost at no more than ten to twelve dollars each. *Cf. Lewis & Lambert Metal Contractors, Inc*., 12 BNA OSHC 1026, 1027, 1980 CCH OSHD ¶ 27,073, p. 34,897 (No. 80-5295-S, 1980) (holding sheet

metal subcontractor whose employees used electric tools to perform work was responsible for installing "portable, commercially available ground-fault circuit interrupters," *i.e.*, pigtails).

The CO never suggested that protection of the subcontractors' exposed employees depended upon Summit leasing from Cleveland Brothers Equipment Rental ("Cleveland Brothers") temporary electrical service internally wired with GFCI circuit breakers. To the contrary, the CO recommended that the employees who used the tools be provided with portable pigtails. It is self-evident that an employee operating a power tool can more easily reset a tripped breaker on a portable pigtail connected to his own tool than reset a tripped circuit breaker at the power source, which would require him to trace his individual electrical circuit to a truck-mounted generator. In addition, it is possibly far less technically intimidating and certainly more convenient to press a test button on a pigtail to ensure functionality of ground fault interruption than to test an internal circuit breaker within the control panel of a 14.4 kW generator or even inside a spider box. The clear preference under this standard for allowing the exposing employer to choose the most appropriate among alternative compliance methods illustrates one of the reasons why in one of its earliest decisions regarding OSHA's MEP, the Review Commission rejected OSHA's position that "a general contractor is responsible jointly with his subcontractors for compliance purposes." *Gilles & Cotting*, 1 BNA OSHC at 1389, 1973-1974 CCH OSHD at p. 21,512. The Review Commission described the dichotomy caused by a MEP which imposes identical abatement obligations on both a non-exposing general contractor like Summit and exposing subcontractors like Springhill and Mendoza:

> Since the [abatement] duty is the same each would have an equal right to abate by any available method and a right to use any available resource to achieve abatement. . . . Oftentimes the available resource is the employees affected by the hazardous conditions of the violation. Usually those employees are employed by the subcontractor. Moreover, the subcontractor's employees may be the only workers on the job site who have the skills necessary to achieve abatement . . . . It is hornbook law that the right to direct and control the activities of the employees is vested in the employer. Accordingly, [OSHA's rejected] position would *create* a limited employment relationship for the purposes of this Act.

Id.[14]

[14] The Eighth Circuit majority in *Summit II* conceded that the controlling employer citation policy may be

> counterproductive to the goals of the OSH Act . . . . Although a general contractor plays a role in setting safety standards at worksites, OSHA is an intricate and function-specific regulatory regime such that each employer on a worksite may be

In this case, subcontractors Springhill and Mendoza had both the practical ability and the legal obligation pursuant to uncontested OSHA citations to select the GFCI option appropriate for their employees' use of the electrical service. Certainly in this case, imposing abatement obligations on multiple parties could lead not only to deprival of the exposing employer of his opportunity to choose the appropriate abatement method; it could lead also to confusion of continuing abatement obligations by both prime and subordinate contractors. The Secretary's own reading of the cited standard, elucidated in the preamble, as well as in two OSHA interpretation letters, confirm that the agency itself recommends the choice between GFCI options be made by the employer with exposed employees. The preamble to Subpart K "Electrical" includes a discussion of which option an individual employer might choose to satisfy its obligation under the standard to protect its employees:

> [A]n employer may choose one method of protection or the other on the basis of several factors. The individual employer may choose on the basis of cost; if his jurisdiction already requires GFCI's, he may choose GFCI's; if he is one employer of many on a construction site, the availability of alternatives gives him flexibility to coordinate compliance. Another factor considered by an employer could be the size of his operation – a smaller employer may opt for the purchase of one or more portable GFCI's while a larger employer might pick the assured grounding conductor program.

Ground-Fault Protection, 41 Fed. Reg. 55,696, 55,702 (Dec. 21, 1976); *see Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (holding preamble to regulation may be consulted in determining administrative construction and meaning of regulation); *Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444, 1983-1984 CCH OSHD ¶ 26,552, p. 33,920 (No. 80-3203, 1983) (stating standard's "preamble is the best and most authoritative statement of the Secretary's legislative intent"), *aff'd*, 725 F.2d 1237 (9th Cir. 1984).

OSHA's position that the exposing employer chooses between GFCI options is further confirmed by two letters of interpretation issued by OSHA. *See Martin v. OSHRC* (*CF&I*), 499 U.S. 144, 150 (1991) (courts may consider informal interpretations, such as interpretive rules and guidelines, to determine reasonableness of interpretation). In letters of interpretation dated

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> uniquely situated to know of the very specific regulatory requirements affecting its particular trade. Therefore, the controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite.

558 F.3d at 829.

February 7, 2005, and March 22, 2005, issued just months before the May 5, 2005 citation at issue here, OSHA explained that the preamble "reflects an intent that the term 'employer' as used in § 1926.404(b)(1), when applied at a construction site with multiple employers," means that "each employer/subcontractor on the site that has exposed employees" is obligated to ensure "that one of the options in § 1926.404(b)(1) is in 'use.'" *See* OSHA Interpretation Letters to Jeffrey P. Scarpello (February 7, 2005) and John P. Masarick (March 3, 2005).

The Secretary argues in her opening brief that "the existence of an employment relationship . . . is irrelevant" under the MEP. But there is no logic to establishing a policy that makes the existence of an employment relationship irrelevant at contra-purpose to a standard designed to have the choice of GFCI protection made by the exposing employer. In such cases, the D.C. Circuit in *IBP, Inc.* found it "unclear what the Secretary hoped to accomplish" where:

> [T]he employer who could easily control its own employees' disciplinary infractions, had already been held liable for the same violation. The majority's decision, moreover, seems to reduce general contractors' incentive to advance workplace safety – rather than cracking down on safety through contract termination, they would respond to it simply by eliminating any reference to safety in subcontracts.

144 F.3d at 867.

The Secretary concedes "the National Electrical Code 2005 ('NEC') permits using a portable pigtail to implement GFCI in a temporary wiring system," and does not require the circuits of temporary power generators to be equipped with GFCI circuit breakers. Somewhat inconsistently with this position, considering the parallel between the language of the NEC and the language of the cited standard, the Secretary cites *Lee Roy Westbrook Construction Co., Inc*., for the proposition that a general contractor supplying a generator without internal GFCI circuit breakers creates a violation of the cited standard. 14 BNA OSHC 1751, 1990 CCH OSHD ¶ 29,205 (No. 88-2710, 1990) (ALJ). But *Lee Roy Westbrook* is not binding because it is an unreviewed decision of an OSHRC administrative law judge. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-1976 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976) (finding that unreviewed administrative law judge decision does not constitute binding precedent for the Commission). Further, the case is inapposite because there OSHA issued the citation to the subcontractor who failed to use pigtails, not to the general contractor. What is relevant herein about the circumstances in that case, however, is that Westbrook employees were more reliably able to check the functionality of portable GFCI pigtails connected to their tools than to check

internal ground-fault circuit interrupters in a generator circuit. *Lee Roy Westbrook*, 14 BNA OSHC at 1752.

But even if the standard were somehow contorted to require temporary electrical service at a construction site be incorporated with internal GFCI circuit breakers at the source of power, Summit would not be a creating employer. The employer at the site in the better position than Summit to comply with such a technically sophisticated requirement would be the specialized electrical equipment leasing contractor, Cleveland Brothers, who delivered and on call maintained the generator providing a source of power.

> In many situations in the workplace, it is natural for an employer to rely upon the specialist to perform work related to that specialty safely in accordance with OSHA standards . . . . [S]o long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely.

Sasser Elec. & Mfg Co., 11 BNA OSHC 2133, 1984-1985 CCH OSHD ¶ 26,982 (No. 82-178, 1984), *aff'd per curiam*, 12 BNA OSHC 1445 (4th Cir. 1985) (unpublished).

In sum, "there can be no violation of the Act by a respondent for failure to comply with a standard which charges some other employer with the duty of implementing the standard." *Se. Contractors*, 1 BNA OSHC 1713, 1716, 1973-1974 CCH OSHC ¶ 17,787, p. 22,149 (No. 1445, 1974) (dissent by Chairman Moran adopted on appeal, 512 F. 2d 675 (5th Cir. 1975)); *see Avondale Shipyards*, 659 F.2d at 711 (citation omitted).

F. <u>NO DEFERENCE IS OWED TO OSHA'S INTERPRETATION</u>

Because the statute, § 1910.12(a), and the cited standard unambiguously assign duties to run from employers to their employees, "we owe no deference to a contrary construction even if formally adopted by the Secretary." *Cf. D.C. Hosp. Ass'n*, 224 F.3d 776; *see CF&I*, 499 U.S. at 156-57. Rather, the Review Commission is required to give effect to plain language. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1347, 1995-1997 CCH OSHD ¶ 30,856, p. 42,917 (No. 93-3270, 1995) (statutory analysis ends if language is plain), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . [W]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Even if an isolated phrase were susceptible to expansive interpretation, the enforcement scheme intended by Congress, the language of § 1910.12(a), and the intended application of the standard are plain. To the contrary, "[t]he doctrine [of the MEP] has

somewhat of a checkered history." *IBP, Inc*., 144 F.3d at 866 n.3. "[T]he Secretary's ever-changing compliance guidelines – be it the FOM, COM, CPL, or FIRM – taken in contrast with a regulation which has not been amended since 1971, results in the latter trumping whatever reliance the Commission can place on the varying nature of the policy." *Summit I*, 21 BNA OSHC at 2024. In assessing the authority of the Secretary's interpretation of an enactment, including one of her own regulations such as § 1910.12(a), the Commission considers whether her interpretation "'sensibly conforms to the purpose and wording of the regulation[]', taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citation,' . . . and 'the quality of the Secretary's elaboration of pertinent policy considerations.'" *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1995-1997 CCH OSHD ¶ 31,445, p. 44,470 (No. 96-0563, 1997) (quoting *CF&I*, 499 U.S. at 151, 157-58).

Here, the Secretary's pronouncements concerning her MEP were published in a set of enforcement guidelines, most recently revised in 1999, directed toward OSHA's field compliance inspectors: OSHA's Compliance Operations Manual at VII-6 to -8 (May 1971) ("OSHA COM (May 1971)"). The Secretary's only "elaboration of pertinent policy considerations" for her first set of construction industry multi-employer citation guidelines stated: "because of the nature of the construction industry and the complex employer relationships involved, difficult issues as to which employer should be cited will often arise." *Id.* at VII-7 ¶ 10(e). OSHA's initial MEP authorized citation of employers who create a hazard "endangering employees (whether his own or those of another employer)," *id.* at VII-6 ¶ 10(b), or whose employees "have used . . . unsafe equipment." *Id.* at VII-7 ¶ 10(c); *cf. Summit I*, 21 BNA OSHC at 2020.

> The manual was revised six months later to remove the reference to employers who supply unsafe equipment. See OSHA Compliance Operations Manual ("COM") p. VII-8 para. 13 (Nov. 5, 1971). Approximately three years later, OSHA again narrowed its citation policy [eliminating citations to hazard-creating employers]. In July 1974, OSHA amended the FOM, instructing compliance personnel to cite only an employer on a construction site who has exposed his own employees to an unsafe condition. OSHA FOM ¶ 4380.6 (July, 1974).

Summit I, 21 BNA OSHC at 2023, 2004-2009 CCH OSHD at p. 53,262. The Eighth Circuit majority summarized the additional alterations of the MEP after 1976:

> In 1981, the correcting employer citation policy was added. It allowed OSHA to issue citations to the employer responsible for correcting the hazard even if its own employees were not exposed to the hazard. OSHA, Field Operations Manual

> OSHA Instruction CPL 2.49 (Dec. 23, 1981). In 1994, the multi-employer worksite policy was amended to add the creating employer and the controlling employer citation policies. OSHA, Field Inspection Reference Manual OSHA § V.C.6 (Sept. 26, 1994). The current OSHA manual was published in 1999, and its multi-employer worksite policy contains the same four citation policies – exposing employer, correcting employer, creating employer and controlling employer – as the 1994 version. See OSHA, Field OSHA, Field Inspection Reference Manual OSHA Instruction CPL 2.103 (Dec. 10, 1999).

Summit II, 558 F.3d at 821.

The Secretary never supplied any analysis whatsoever of the legal authority supporting the original MEP, let alone the multiple changes of course in her guidelines. *Summit I*, 21 BNA OSHC 2020, 2004-2009 CCH OSHD ¶ 32,888; *see Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) (agency changing its course must supply a reasoned analysis indicating that prior policies and standards were being deliberately changed, not casually ignored). More specifically, as the Secretary changed course, she offered no explanation of how she reconciled the "marked tension" between the language of § 1910.12(a) and her varied multi-employer citation policies. *Anthony Crane Rental*, 70 F.3d at 1306-07. "[A]t no time throughout this period of over twenty years did the Secretary ever note that § 1910.12(a) contains language which on its face is in apparent conflict with the policy." *Summit I*, 21 BNA OSHC at 2023-24, 2004-2009 CCH OSHD at pp. 53,262-63.

The Secretary cannot claim her promulgation of the MEP repealed or amended § 1910.12(a). Announcing and then revising multi-employer citation enforcement guidelines directed toward field personnel through publication of the FOM, COM, CPL, or FIRM, is an exercise of prosecutorial discretion, not an exercise of delegated legislative powers. An exercise of prosecutorial discretion cannot amend the governance of § 1910.12(a), and certainly it cannot amend the OSH Act itself. It is well-settled that an agency cannot exercise prosecutorial discretion to remove a substantive limitation on enforcement discretion, even one imposed by its own governance, and certainly not one imposed by Congress within the Act itself. In *Vitarelli v. Seaton*, the Supreme Court held that even agencies with broad discretion must adhere to internally promulgated regulations limiting the exercise of that discretion. 359 U.S. 535, 539-40 (1959) (holding that limitation on agency discretion voluntarily adopted by Department of the Interior restricted that agency's discretion even after removal of the underlying statutory or judicial purpose); *see also Graham v. Ashcroft*, 358 F.3d 931, 932 (D.C. Cir. 2004) (explaining that "[i]t is well settled that an agency, even one that enjoys broad discretion, must adhere to

voluntarily adopted, binding policies that limit its discretion" (citing *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987)); *U.S. v. Nixon*, 418 U.S. 683 (1974) (stating that "[s]o long as this regulation is extant it has the force of law").

The Secretary's position is that her most recent change of course on the MEP is merely an exercise of reserved prosecutorial discretion consistent with her broad authority under § 5(a)(2) of the Act. She also asserts her multi-employer citation guidelines implement her interpretation that § 5(a)(2) requires employers to comply with occupational safety and health standards, and that this requirement is not limited to compliance with standards that protect an employer's own employees. Accordingly, the Eighth Circuit ruled that notwithstanding the changes in course of the Secretary's policy for enforcement of Part 1926 standards pursuant to § 1910.12(a), "[w]e defer to the Secretary's interpretation of her regulation [§ 1910.12(a)], not the Secretary's interpretation of her multi-employer worksite policy." *Summit II*, 558 F.3d at 825-26. Thus, rather than examining the reasonableness and consistency of the Secretary's wavering enforcement policy, the Eighth Circuit in *Summit II* construes as the Secretary's interpretation of § 1910.12(a) – and then defers to – an interpretation which the court determined had been signaled by the Secretary's exercise of prosecutorial discretion in her initial MEP. That version of the MEP proscribed enforcement against non-exposing employers but permitted citation of employers who provide hazardous equipment, "endangering employees (whether his own or those of another employer) . . . ." *See* OSHA COM at VII-6 ¶ 10(b), (c) (May 1971). The Eighth Circuit found the Secretary's application of the multi-employer worksite policy is only relevant to the extent that it sheds light on the Secretary's interpretation of § 1910.12(a). The court inferred from this 1971 policy directive (enforced from May 20, 1971 until retracted in pertinent part on November 15, 1971) and from a citation issued by OSHA to a general contractor eight months after the promulgation of § 1910.12(a), that OSHA intended to preserve authority to cite non-exposing general contractors on a contractual basis. *Summit II*, 558 F.3d at 829. Deference to this inferred interpretation of § 1910.12(a) is inappropriate for four reasons:

(1) The Eighth Circuit deferred to an inference regarding OSHA's interpretation of a specific phrase of a specific sentence in § 1910.12(a), *i.e.*, that the phrase "places of employment of his employees" in the second sentence of the regulation permits OSHA to impose a duty on contractors to ensure subcontractors comply with Part 1926 standards. But that interpretation is inconsistent with the Secretary's litigation position in the *Summit* cases combined for argument

before the Commission. *Summit I*, 21 BNA OSHC at 2024 (majority opinion) (expressing disagreement with the Secretary's position that a broad reading of "the first sentence of the regulation permits or allows a broader class of employers, including those not having employees exposed to the cited hazard to be cited under the policy"); *id.* at 2034-35 (Rogers, Comm'r, dissenting) (supporting the Secretary's citation on the basis of "a more generalized duty imposed by the first sentence [on the controlling general contractor]; "the second sentence merely emphasizes the primary responsibility of the direct employer to comply with the appropriate standards").

(2) The enforcement guideline from which the inference is derived, published in the initial May 1971 COM, is entirely consistent with another inference premised not on a contractual predicate, but on a master-servant predicate, *i.e.*, that the Secretary assumed an employer "creating a hazard endangering employees (whether his own or those of another employer)" at a frequently changing multi-employer construction site at which his employee is regularly employed, necessarily puts his own employees at risk, even if that exposure is not imminent. In the earliest case in which multi-employer liability was rejected by the Commission – the 1974 case *Humphreys & Harding* – Commissioner Cleary in his dissent asserted as a basis for multi-employer liability that "the potential as well as the actual exposure of respondent's employees should be considered in ascertaining [multi-employer] duties under the Act . . . . The Act expressly contemplates that potential exposure of an employer's workers will make him responsible for a hazard's abatement." 1 BNA OSHC at 1703, 1973-1974 CCH OSHD at p. 22,143 (citing §§ 8(f)(1), 13(a), and 17(k) of the Act); *see also Gilles & Cotting*, 1 BNA OSHC at 1390 (dissent by Commissioner Cleary from majority's rejection of citation of non-exposing employer noting that the majority had not refuted the trial judge's finding that "employees of this respondent were affected" by the cited hazard). Indeed, the Commission has reversed its position to affirm citations against so-called "non-exposing creating employers" when on closer review an employee of the employer would potentially be exposed to the created hazard. *See, e.g.*, *Anthony Crane Rental*, 17 BNA OSHC 2107, 1995-1997 CCH OSHD ¶ 31,251. "The creation of violative employment conditions [at a multi-employer site] puts all employees at risk." *Summit I*, 21 BNA OSHC at 2029 (Thompson, Comm'r, concurring); *cf. Grossman Steel*, 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 12,775. Consistent with this alternative inference, the only example given within the initial May 1971 COM of "non-

exposing employer" liability was in fact an exposing employer. Specifically, the example stated in the COM was a welding employer whose "unsafe welding operations may adversely affect the employee of the welding employer as well as those of other employers." OSHA COM at VII-6 ¶ 10(b) (May 1971). However, OSHA's rethinking of the fragile assumption that necessarily a creating employer is an exposing employer was demonstrated by the circumstance that six months after publishing the initial 1971 MEP the Secretary withdrew authority to cite non-exposing employers who provide unsafe equipment, *see* OSHA COM pp. VII-7 to -8 (Nov. 15, 1971), and withdrew authority to cite "non-exposing creating" employers less than three years later. OSHA FOM ¶ 4380.6 (July, 1974); *see Summit I*, 21 BNA OSHC 2020, 2004-2009 CCH OSHD ¶ 32,888.

(3) The May 20, 1971 announcement did not confirm OSHA's intent to preserve discretion to prosecute controlling employers on a contractual basis. *See Summit II*, 558 F.3d at 821 (concluding "the manual's initial multi-employer worksite policy adopted the creating employer and the exposing employer citation policies, but not the controlling employer citation policy").

(4) Any inference regarding the Secretary's interpretation of § 1910.12(a) that may be extrapolated from the informal agency procedures involved in developing the MEP is entitled to deference only to the extent the inferred interpretation "'sensibly conforms to the purpose and wording of the regulation[]', taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citation,' . . . and 'the quality of the Secretary's elaboration of pertinent policy considerations.'" *Union Tank Car Co.*, 18 BNA OSHC at 1069, 1995-1997 CCH OSHD at p. 44,470 (quoting *CF&I*, 499 U.S. at 151, 157-58); *cf. Citizens Exposing Truth*, 492 F.3d 460. Applying that test, it defies logic to reconstruct the plain meaning of § 1910.12(a) on the basis of the definition of an isolated phrase in the Secretary's regulation when that definition has never been suggested by the Secretary; when that interpretation is based entirely on an unwarranted inference; when any inference regarding "controlling employer" doctrine must necessarily be derived from non-binding "controlling employer" internal guidelines first developed twelve years after enactment of the OSH Act; and especially when that

inference is out of harmony with the OSH Act, in tension with the plain language of § 1910.12(a), and at contra-purposes with the cited standard.

For all the reasons stated above I respectfully dissent.

/s/_____
Horace A. Thompson III
Commissioner

Dated: 8/19/2010

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.	:	OSHRC DOCKET NO. 05-0839
	:	
SUMMIT CONTRACTORS, INC.,	:	
	:	
Respondent.	:	

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 the 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 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.

[1]The 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*.

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 Monada 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 cords into the outlets in order to power the electrical tools they were using at the site. Upon

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

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 the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access

[3]Mr. 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).

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, where this case could be appealed.[5] The Third and the Eleventh Circuits have not had an opportunity

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[4]Summit 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).

[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

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.

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

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BNA OSHC 2064, 2067 (No. 96-1719, 2000), and cases cited therein.

[6]In *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.

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 to 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.

[7]As 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.

[8]The 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.