UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, **UNITED STATES DEPARTMENT OF LABOR,**	:	
Complainant,	:	**OSHRC Docket No. 05-0839**
v.	:	
SUMMIT CONTRACTORS, INC.	:	
Respondent.	:	

REPLY BRIEF OF THE SECRETARY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **pages**

****Cases chiefly relied upon are marked with an asterisk***

STATUTES AND REGULATIONS:

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States Department of Labor, Complainant, v. **SUMMIT CONTRACTORS, INC.** Respondent.	**OSHRC Docket No. 05-0839**

REPLY BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

In her opening brief, the Secretary argued that the Supreme Court's decision in *Nationwide Mutual Insurance v. Darden*, which adopted the common-law test for distinguishing an employee from an independent contractor, does not impact the multi-employer worksite doctrine because the doctrine is not concerned with whether the exposed person is an employee of the cited employer. Rather, under the doctrine, an employer may be liable for exposures not only to its own employees but also to employees of other employers. The Secretary further argued on the merits that Summit is liable under the multi-employer worksite doctrine both as a creating and as a controlling employer. Summit created the hazard because it provided the generator and spider box for use by a subcontractor without ensuring that the equipment had ground-fault circuit interrupter (GCFI) protection. Summit also controlled the hazard because, as the Judge found, it had general supervisory authority and control of the worksite and failed to exercise reasonable care to prevent or detect and abate the violation to which subcontractor employees were exposed.

In its opening brief, Summit contends that the multi-employer worksite doctrine is 'based solely on an expansive definition of employer and employee on the theory that advances the

purpose of the Act," that *Darden* "set aside . . . [this] legal rationale," and consequently that only "the actual employer of the affected employee [as defined by *Darden*] may be cited." Summit Opening Br. ("SB") 12-14. Summit further (and redundantly) argues that because employers are responsible for their own employees only, it was not obligated under the cited standard, 29 C.F.R. § 1926.404 (which uses the terms employee and employer without qualification) to protect subcontractor employees. On the merits, Summit argues that Cleveland Brothers, not itself, created the hazard because Cleveland delivered equipment without GFCI protection despite knowing GFCI protection was necessary. Finally, Summit argues it did not have constructive knowledge of the hazard because the lack of GFCI protection was neither readily apparent nor discoverable with reasonable effort.

Summit's arguments should be rejected. Summit's attempt to join *Darden* to the multi-employer worksite doctrine is baseless because the questions "who is an employee" (*Darden*) and "is an employer responsible for employees of other employers" (multi-employer worksite doctrine) are analytically distinct. Summit misreads the case law in trying to connect the two issues. It oversimplifies the reasons supporting the multi-employer doctrine while overreading the meaning and holding of *Darden*. In addition, the cited section, 29 C.F.R. § 1926.404, by its unqualified use of the terms "employer" and "employee" does not limit application of the multi-employer worksite doctrine. On the merits, Summit's attempt to evade responsibility on the grounds that it did not create the hazard or did not know about it must be rejected. Although Summit did not physically bring the equipment onto the worksite, it ordered the equipment without specifying GFCI protection; it did not inspect the equipment when delivered, although it knew how to inspect for GFCI protection; and it had the equipment replaced when the violation was found. Thus, it created and controlled the hazard, and with the exercise of due diligence could have discovered, prevented, and abated the hazard.

ARGUMENT

I.

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

Summit's fundamental problem in trying to tie *Darden* to the multi-employer worksite doctrine is its failure to recognize that *Darden* involved completely different issues from the doctrine. On the one hand, *Darden* establishes a framework for determining the meaning of undefined statutory terms that carry with them "'accumulated settled meanings' under the common law." *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998) ("[*Darden*] stands for the proposition that when a statute has left a term undefined, has left no hint in the legislative history of its intended meaning for the terms, and the term has 'accumulated settled meaning' under the common law, there is a presumption that Congress meant to incorporate the common-law definition into the statute"); *compare Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (citing *Darden* and finding common law had given meaning to the term "fiduciary") *with United States v. Wells*, 519 U.S. 482, 491 (1997) (citing *Darden* and finding no settled meaning in the common law for the term "false statement").

On the other hand, however, the multi-employer worksite doctrine concerns whether an employer is responsible for exposures of employees of other employers, not whether those workers are the cited employer's employees under an expanded definition. *Brennan v. OSHRC*, 513 F.2d 1032, 1036 (2d Cir. 1975) ("We turn then to the important question whether a violation of the Act requires in addition to proof the existence of a hazard, evidence of direct exposure to the hazard by the employees *of the employer* who is responsible for the hazard.") (emphasis in original). Consequently, the doctrine applies "*regardless whether employees exposed or having access to the condition are its own employees 'or those of other employers engaged in a common*

undertaking.'" *Access Equipment Systems, Inc.*, 18 O.S.H. Cas. (BNA) 1718, 1722-23 (1999) (quoting *Brennan*, 513 F.2d at 1038 and listing Commission and other courts of appeals precedent) (emphasis added).

Summit asserts that the multi-employer worksite doctrine depends on expansively defining "employer" or "employee." SB 12. But the determination whether a worker is an "employee" of a cited employer provides little, if any, guidance on whether the cited employer is also responsible for employees of other employers. *Darden* expressly did not consider this latter question. 503 U.S. 318, 320 (1992) ("Darden's ERISA claim can succeed only if he was Nationwide's employee").

Moreover, contrary to Summit's claim (SB 11), the multi-employer worksite is not based solely on the remedial purpose of the OSH Act; nor does it rely on the "correction of mischief test" set forth in *United States v. Silk*, 331 U.S. 704, 713 (1947). Although the OSH Act's statutory purpose of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), provides clear support for the multi-employer worksite doctrine, this Commission and the courts have also relied on four additional bases for the doctrine: first, the OSH Act's statutory text, namely the absence of any limiting language in section 5(a)(2), *e.g., Access Equipment*, 18 OSHC at 1724; *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999); *Brennan*, 513 F.2d at 1038; second, the legislative history emphasizing preventability, *e.g., Access Equipment*, 18 OSHC at 1724; *Pitt-Des Moines*, 168 F.3d at 983; and third, "the peculiar needs of preventing hazards at construction sites, which 'often entail different employees being exposed to hazards created by more than one employer;'" *Access Equipment*, 18 OSHC at 1724 (quoting *Pitt-Des Moines*); *Brennan*, 513 F.2d at 1038; *Universal Const. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); and fourth, the well-

established principle that deference is afforded to an agency's interpretation of its own enabling statute, *Universal*, 182 F.3d at 729. Thus, *Darden's* explicit rejection of the "correction of mischief" test for construing the term "employee" by no means "set aside" (SB 13) the legal pillars supporting the doctrine. It is well-grounded in the methodology of statutory construction.[1]

Summit's contention that the facts of this case "are exactly like" those in *AAA Delivery Services, Inc.*, 21 BNA OSHC 1219 (No. 02-0923, 2005), SB 18 n.5, is likewise incorrect. In *AAA*, the only workers exposed to the hazard (newspaper vendors) were found to be independent contractors, requiring dismissal of the citation. Here, by contrast, the workers exposed to the hazard were employees, albeit of a subcontractor. Summit's reliance on *Don Davis, d/b/a Davis Ditching and Davis Ditching, Inc.*, 2001 WL 856241, 19 BNA OSHC 1477 (No. 96-1378, 2001) and *Timothy Victory*, 1997 WL 603003, 18 BNA OSHC 1023 (No. 93-3359, 1997) is similarly misplaced. In those cases, the citations were dismissed because the workers exposed to the hazard were not employees and the cited employer had no employees. In *Allstate Painting and Contracting Co., Inc.*, 21 BNA OSHC 1033 (Nos. 97-1631 & 97-1727, 2005), the Commission determined that the exposed workers were not the employees of the cited company. No issue regarding the multi-employer worksite doctrine was raised inasmuch as the cited company

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[1] Nor did *Darden* suggest that a statute's purpose may never be considered in statutory construction. *See, e.g., Dolan v. USPS*, 126 S.Ct. 1252, 1257 (2006) ("The definition of words in isolation, however, 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."); *Yates v. Hendon*, 124 S.Ct 1330, 1335, 1341 (2004) (finding that "Congress' aim" supported Court's reading of statutory text). Because the multi-employer worksite doctrine does not depend on the definition of "employee" or any other term having a different, settled common-law meaning other than the one they adopted, it was altogether appropriate for this Commission and the courts to have relied on the OSH Act's purpose in support for the doctrine.

maintained no presence at the worksite. In *Vergona Crane Co.*, 15 BNA OSHC 1782 (No. 88-01745 1992), the Commission upheld the citation, finding the workers were employees of the cited employer.

The Secretary, by correctly interpreting the cases Summit's relies on, is not suggesting that *Darden* plays no role under the OSH Act. Indeed, the just-discussed cases demonstrate its validity as well as its limits. The distinction between employee and independent contractor can be important because, generally speaking, somebody's employee has to be exposed to the cited hazard or condition in order for there to be a violation; sole proprietors acting as independent contractors fall outside the OSH Act and only an "employer" with one or more "employees" can be cited under it. 29 U.S.C. § 652(5). But the distinction it is not important to the operation of the multi-employer worksite doctrine because the multi-employer worksite doctrine does not depend on an employment relationship between the cited employer and exposed worker.

In sum, because *Darden* and the multi-employer worksite doctrine address separate and distinct issues, it is not surprising that the cases establishing the multi-employer worksite doctrine do not mention *Darden* or *Silk* and that the Commission case law applying *Darden* fail to discuss the multi-employer worksite doctrine cases.[2] The two lines of cases concern distinct issues, and Summit's attempt to link them is wrong.

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[2] Although Summit cites *Clarkson v. OSHRC*, 531 F.2d 451 (10th Cir. 1976), as a multi-employer worksite case relying on *Silk*, SB 12 n.4, *Clarkson* did not address or mention the doctrine, and that same court, in expressly adopting the doctrine on grounds other than *Silk*, said only that *Clarkson* "implicitly endorsed" the doctrine. *Universal*, 182 F.3d at 731.

II.

The multi-employer worksite doctrine applies to violations of § 29 C.F.R. 1926.404(b).

Building on its contention that the multi-employer worksite is invalid,[3] Summit next argues that it cannot be liable under section 1926.404(b), the cited standard, because that section imposes a duty on "employers" to provide ground fault protection to "employees." SB 18-19. This contention simply has no merit. In pertinent part, section 1926.404(b)(1) provides that "[t]he employer shall use either ground fault circuit interrupters . . . or an assured equipment grounding conductor program . . . to protect employees on construction sites." The section thus does not qualify either "employer" or "employee," and the critical possessive interlineations Summit seeks to impose, namely that the employer must protect its own employees only, simply are not found in the section. In fact, the section's coverage, without limitation, of "employees at construction sites," where employees of many different employers are typically present, suggests an employer's responsibility to all employees at the site. Moreover, the Commission has previously affirmed a section 1926.404(b)(1) citation under the multi-employer worksite doctrine. *Blount International Ltd.*, 15 BNA OSHC 1897 (No. 89-1394 1992); *see also Universal*, *supra* (violation of standard requiring "employee" to stand firmly on floor of boom baskets upheld under multi-employer worksite doctrine). Thus, there is no merit to the contention that the particular language of section 1926.404(b)(1) cannot support liability under the multi-employer workplace doctrine.

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[3] A fair portion of Summit's brief is devoted to attacking the validity of the multi-employer worksite doctrine. SB 8-12. The Secretary has already responded to these arguments in *Summit Contractors, Inc.*, No. 03-1622 and will not reiterate her response here because the two cases have been consolidated for oral argument. *See* August 9, 2006 order granting oral argument. The Commission's briefing order here also did not identify the validity of the multi-employer worksite doctrine as an issue.

III.

Summit incorrectly blames the rental company for creating the hazard.

Summit also contends that it did not create the hazard "simply by placing a telephone order for the delivery" of the equipment and attempts to shift the blame on the rental company, Cleveland Brothers. SB 21. Summit, however, ignores its own role in making the violative equipment available for use by the subcontractor employees. Summit was responsible for ordering the generator and spider box and caused the equipment to come to the site. Its failure to specify equipment with GFCI protection allowed the rental company the freedom to deliver any kind of generator and spider box; and Summit's failure to inspect the equipment, *i.e.,* to lift up a flap, permitted the non-compliant equipment to be available for use at the site for over a week. Clearly, Summit was far more responsible than any other entity for making the non-compliant equipment available for use by the subcontractor (which was contractually-obligated to use the electrical services provided by Summit). And it was Summit – as the creating employer – who abated the hazard by obtaining a new generator and spider box with GFCI protection.[4]

Summit's attempt to shift the focus and blame onto Cleveland Brothers is unpersuasive. First, Cleveland Brothers simply followed Summit's instruction and delivered the equipment Summit ordered. If Summit needed a particular type of equipment, *i.e.,* a generator and spiderbox with GFCI protection, it needed to request it. Nor may Summit reasonably claim reliance on Cleveland Brothers' supposed expertise because Summit was required to first "apprise itself as to what safety efforts the subcontractor has made." *R.P. Carbone Const. Co. v. OSHRC*, 166 F.3d 815, 820 (6th Cir. 1998) (citing *Blount International Ltd., supra)*; *see also, e.g., Sasser Electric & Manufacturing Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984) ("n employer is justified in relying upon the specialist to protect against hazards related to the

[4] Although Summit describes its rental of the generator and spider box as an "accommodation," its contract with Spring Hill expressly gave Summit the right to assume responsibility for providing temporary power at the worksite and *required* the subcontractor to use these services. GX-16, at 16 ("Attachment 'A'") ¶ 6. In any event, Summit is liable for creating the hazard, regardless of its underlying reasons for doing so.

specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely." This Summit did not do. It did not ask whether Cleveland Brothers rented only generators and spiderboxes equipped with GFCI or inquire into Cleveland Brothers' knowledge of electrical systems. Moreover, Summit's superintendent (Corthals) apparently had rented equipment from Cleveland Brothers only once before. Dep. 25, 35-36 (job was Corthals' first for Summit, and Corthals contacted Cleveland Brothers because he had rented a portable generator from them for this job and had their telephone number). Thus, he had no or little past experience with the company. Without first determining the extent of Cleveland Brothers' safety efforts or the nature of the equipment it offered to rent, Summit's alleged reliance on Cleveland Brothers was unjustified and unreasonable.

Summit also engages in speculation in asserting "the leasing agent clearly knew GFCI was required" when Summit rented the equipment. SB 21. Although Corthals testified that "the man" at Cleveland was "dumbfounded" upon learning the equipment was not GFCI protected, Dep. 17, there is no evidence that this unidentified "man" was the "leasing agent" Corthals spoke with when he ordered the equipment. In fact the record suggests Corthals spoke with two different people at Cleveland, one when he rented the equipment and another when he replaced it. *Compare* Tr. 155 (testimony of Larry Walter, employee at Cleveland Brothers, indicating that his rental coordinator was a woman who would specify equipment by identification number); Tr. 159 (testimony of Walter indicating that his "big boss," a man, told him to go replace the equipment); Dep. 8 (Corthals' testimony failing to identify the person at Cleveland Brothers from whom he ordered equipment, and referring to person as "they"). Moreover, Cleveland's delivery of the equipment that Summit ordered can hardly be called a "mistake." SB 20. It was Summit's order and Corthals' assumption about the equipment that were mistaken, not the delivery, which merely carried out Summit's instruction. The fact that only 6 of Cleveland's 18 spider boxes came equipped with GFCI protection underscores not only the unreasonableness of Corthal's assumption and Summit's reliance on Cleveland's supposed expertise but also

demonstrates the likelihood that Summit would receive equipment without GFCI protection, unless specified otherwise.

It is important to recognize that the Commission has accepted an employer's reliance on a subcontractor's expertise only in situations where: (1) an employer hires a subcontractor to perform specialized work at the worksite; (2) the violation occurs within the specialist's area of expertise; and (3) the employer did not create the hazard. *See, e.g., Sasser, supra.* This principle has never been, and should not now for the first time be, extended to situations in which: (1) an employer at a worksite rents equipment from a non-specialized equipment rental company; (2) the rental company does not provide employees to operate the equipment and does not perform any work of any kind at the worksite; and (3) the employer, not the rental company, controls and is responsible for the equipment while it is used at the worksite.[5]

Finally, Summit suggests that this case is just like one in which a general contractor orders materials that are delivered by a truck with faulty brakes or no back-up alarm. SB 21. Among many other reasons distinguishing the two situations, in Summit's hypothetical, the defective machinery (the lumberyard's truck) was not the item that the general contractor ordered, and accordingly, the lumber yard was not simply following the general contractor's instruction in using a defective truck. Nor was the general contractor making the truck available for use by its subcontractor's employees.

A more relevant hypothetical is one in which the general contractor provides its own generator and spiderbox without GFCI protection for its subcontractor use. If the general contractor is the creating employer when it provides its own defective equipment, it should also

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[5] Summit's contention (SB 20) that the subcontractor Mendoza, which was also cited and paid an assessed penalty without contest, was in a better position to know of the violation because it actually used the equipment is irrelevant. The issue here is Summit's duties, actions, and knowledge. That other employers may also be liable for violating the standard does not relieve Summit of its responsibilities. In any event, the subcontractors looked to Summit to address and resolve problems with the equipment. GX 20.

be a creating employer by ordering the same equipment without specifying or inspecting for GFCI protection and making it available for use by subcontractor employees at the jobsite.

IV.

Summit had constructive knowledge of the violative condition because it failed to act with reasonable diligence.

Summit contends in its opening brief that the Secretary failed to establish that it knew of the violative condition. SB 22-27. Although Summit lacked actual knowledge of the condition, it wrongly contends it did not have constructive knowledge of it. Constructive knowledge exists when the employer, with the exercise of reasonable diligence, could have known of the violative condition. *See, e.g., Blount*, 15 BNA OSHC at 1899; *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).[6] "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (Nos. 00-1268 and 00-1637, 2003) (citing *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-707, 2001)). Reasonable diligence also involves an employer's obligation to inspect the work area. *See, e.g., Pride Oil*, 15 BNA OSHC at 1814 (citing *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981)); *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001) ("Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known."). This constructive knowledge, in turn, may be imputed to Respondent because of Corthals' position as the onsite superintendent. *See, e.g., Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91- 862, 1993) ("when a supervisory employee has actual

[6] The Secretary's opening brief similarly argues that Summit as a "controlling employer" under the multi-employer worksite doctrine failed to exercise reasonable care to prevent or detect or abate the violation. Op. Br. 12-14.

or constructive knowledge of the violative conditions, that knowledge is imputed to the employer").

Here, Summit failed to act with reasonable diligence when it authorized onsite superintendent Corthals to rent a temporary power system, but failed to implement any work rules or provide any training or instruction related to the hazards associated with temporary power systems or GFCI. Dep. 42-43, 45. As a result, Corthals was not specifically instructed that generators and spiderboxes may not be equipped with GFCI, and he was not trained about GFCI, the safe use of generators or spiderboxes, or even to take any steps to ensure that temporary power systems rented by Summit have GFCI protection. Dep. 46, 52-53. Nor did Summit require its superintendent to demonstrate any degree of knowledge about GFCI, generators, or spiderboxes. Dep. 47. In short, Summit took absolutely no steps to address the hazard that exists when a temporary power system does not include any GFCI protection. Such a hazard should have been anticipated by Summit since its subcontract with Spring Hill gave Summit the right to rent temporary power systems for use by the subcontractor (GX-16, at 16 ("Attachment 'A'"), ¶ 6), and because Summit's superintendent was authorized to rent such equipment for use at the worksite. Moreover, it would have required minimal effort for Summit to provide instruction to Corthals regarding the need to inspect generators and spiderboxes to ensure that they are equipped with GFCI, as demonstrated by the fact that, after the OSHA inspection, Summit did, in fact, instruct Corthals to make sure such equipment is equipped with GFCI in the future. Dep. 47.

Had Summit acted with reasonable diligence, it would have anticipated the possibility of a hazard at the worksite related to temporary power systems rented by Summit, and would have not only implemented appropriate work rules, but also provided relevant training and instruction. Its superintendent would have known that not all generators and spiderboxes are equipped with GFCI, and he would have inspected the equipment and immediately discovered the absence of GFCI. Because Summit's superintendent could have known of the violative conditions if

Summit had acted with reasonable diligence, Summit should be charged with constructive knowledge of the violative conditions.

Corthals likewise failed to act with reasonable diligence because he never requested that the equipment have GFCI, and never inspected the equipment for obvious hazards at any time during the 11 days when the equipment was at the worksite. Although Summit argues inspecting for GFCI protection was difficult and its absence not "readily apparent," SB 23-24, the evidence demonstrates otherwise. The compliance officer detected the problem in a minute, Tr. 38, and Corthals admitted it would have taken only a few minutes. Dep. 40. Indeed, the photograph of the spiderbox at the site, DX 12, illustrates how easy it would be to inspect – either bend down or pick the spider box up and lift up a flap. Dep. 9-10. Certainly, the Commission has required far more than this of a general contractor under these circumstances. In *Blount*, the Commission found the general contractor liable under the multi-employer worksite doctrine and section 1926.404(b)(1) for the subcontractor's failure to equip a panel distribution box with GFCI protection where some receptacle outlets had the protection while others did not and testing was required to make this determination. 15 BNA OSHC at 1989-199. If it was reasonable to require the general contractor to conduct that inquiry or testing there, surely it would be reasonable to require Summit to simply bend over and lift up a flap. *Cf. Centex-Rooney Construction Co.*, 16 BNA OSHC at 2128-2129 (general contractor that daily checked different circuit breakers and required subcontractors to check GFCI protection on a weekly basis not liable under section 1926.404(b)(1)).[7]

Rather than touting it efforts to inspect or protect, Summit attempts to avoid liability based on its complete failure to inspect. SB 24 (duty to inspect commensurate with degree of supervision); Dep. 14 (Corthals conducted no safety inspections at the job). Commission case

[7] By contrast the violations in *David Weekly Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898 2000) (relied on by Summit) were of "brief or indeterminate duration" and not readily detectable even if walking directly by. Here, Summit was responsible for bringing the equipment to the jobsite and all it needed to do was lift up a flap to detect the violation.

law, however, again demands more of the general contractor. *See, e.g., Pride Oil*, 15 BNA OSHC at 1814 (reasonable diligence also involves an employer's obligation to inspect the work area). Simply put, that Summit did not take seriously its duty to inspect does not mean it had no such duty.

The simple truth is that Corthals did not inspect the spider box because he thought GFCI protection was not required for the equipment, *infra*, n. 8, or he assumed without adequate basis that the spider box would come equipped with GFCI protection, not because inspection was difficult or beyond a general contractor's supervisory authority.[8] But neither of Corthal's actual excuses is legally sufficient. Certainly, ignorance of the standard's requirements is indefensible here, and his alleged incorrect assumption was objectively and subjectively unreasonable. Objectively, the evidence showed that this equipment often comes without GFCI protection. Larry Walter, the Cleveland Brothers employee who delivered the equipment, testified that approximately only 1 in 3 of its spiderboxes comes equipped with GFCI protection. Tr. 154. Moreover, the National Electric Code 2005 permits using a "pigtail" to implement GFCI in a temporary wiring system, suggesting the need to supplement the system with such devices. R-1 at 892-93; Dep. 49-51. Subjectively, Corthal's assumption was premised on faulty reasoning and limited information. Although he stated he had rented this equipment about twenty times, he could not state how many times he had actually checked or verified that the equipment came with GFCI protection. Dep. 41-42. Thus, there may have been any number of times in which he rented non-compliant equipment. In any event, even if an assumption that the equipment usually comes with GFCI protected were well-founded, a reasonably diligent superintendent would still

[8] Corthals' explanation for not ordering or inspecting for GFCI protection is not credible. The compliance officer testified that when he identified the absence of GFCI during the inspection, Corthals stated that he was not aware that the equipment was required to have GFCI. Tr. 37. In addition, there are significant inconsistencies between Corthals' testimony and his own Declaration. For example, in his Declaration, Corthals states: "It is my understanding and belief that all such generators and spider boxes *are required by the electrical code* to have GFCIs." GX-10 at ¶ 4 (emphasis added).) However, when asked whether he had even a general familiarity with the National Electric Code, Mr. Corthals testified, "No, sir. I'm not an electrician." Dep. 50.

have inspected the equipment for GFCI because of the gravity of the potential hazard involved and because of the ease of such an inspection, which would have taken no more than a few minutes.

CONCLUSION

For the reasons discussed above, the Commission should affirm the serious violation and penalty of $1,225.[9]

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Respectfully submitted,

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[9] Although Summit notes that OSHA assessed the subcontractors a penalty of $525, SB 6 n.2, it has not contested the amount of the assessed penalty against it.

CERTIFICATE OF SERVICE

I certify that on August 31, 2006, I served a copy of the foregoing Opening Brief for the Secretary of Labor upon counsel for Respondent by facsimile transmission to Rader & Campbell, and by regular mail, postage prepaid, first class mail, on:

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