

BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

FILED

APR 10 2023

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)

NC OSH Review Commission

COMPLAINANT,)

v.)

SDH CHARLOTTE, LLC, d/b/a)
SMITH DOUGLAS HOMES)
and its successors,)
RESPONDENT.)

OSHANC NOs: 2020-6338, 2021-6363,
2021-6389, and, 2022-6448

INSPECTION NO.: 318202660,
318211547, 318237120

CSHO ID: M3155, T8768, E2636, L1173

DECISION AND ORDER

THIS MATTER was duly noticed and came on for hearing before the undersigned on February 1, 2023 via the Lifesize video platform. The Commissioner of Labor (“Complainant”) was represented by Stacy A. Phipps, Esq., Assistant Attorney General, North Carolina Department of Justice, Labor Section. SDH Charlotte, LLC d/b/a Smith Douglas Homes (“Respondent”) was represented by Mr. J. Larry Stine, Wimberly Lawson Schneider Steckel & Stine, PC of Atlanta, GA and Mr. M. Lee Daniels, Jr. of Greenville, SC.

Prior to the instant hearing, Respondent moved, without objection, to consolidate the following matters before the Commission: Docket Nos. 2020-6338, 2021-6363, 2021-6389, and 2022-6448. However, by the parties' prior agreement, this evidentiary hearing was limited to the issue of Respondent's liability under the Complainant's Multi-Employer Citation Policy (CPL-2-0.124) in Docket No. 2021-6363.

In the matter docketed as 2021-6363, Respondent requested formal pleadings and answered the Commissioner's Complaint, in pertinent part, with the following:

With respect to Citation 01, Item 001, Respondent was not the employer of the employees allegedly involved in the violation, or the General Contractor with control over the site. Respondent was simply a Construction Manager who reviews the quality of the construction and the scheduling of contractors and had no control over safety at the site.

Therefore, the single issue presented at this hearing was whether Respondent was a Controlling Employer within the meaning of the Multi-Employer Citation Policy on January 21, 2021 for the construction site at 325 Oxbow Circle, Mount Holly, NC.¹

WITNESSES

The following witnesses testified at the hearing:

For the Respondent: Mr. Eric Mancz, Director of Construction, Charlotte
Mr. Geoff Shrewsbury, Vice-president of Operations

For the Complainant: Mr. Lee Peacock, West Bureau Chief, N.C. Dep't of Labor

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

For the Respondent: R-2 Citation and Notification of Penalty
R-4 Scope of Work Agreement
R-5 Subdivision Map
R-6 Purchase Order Inquiry
R-7 Trade Partner Agreement
R-8 Gaston County Building Permit
R-9 City of Mount Holly Zoning Permit

For the Complainant: Ex. A SDH Safety Manual
Ex. B SDH Trade Partner Agreement for CJP Construction
Ex. C SDH Scope of Work - Framing Labor
Ex. D N.C. Secretary of State documents re Respondent
Ex. E Commissioner of Labor Inspection File

COMPLAINANT'S MOTION TO RE-OPEN THE EVIDENTIARY RECORD

On February 1, 2023, following the presentation of their witnesses and the entry of exhibits into the record, Complainant and Respondent rested their respective cases. On February 14, 2023 Complainant moved this Court to re-open the evidentiary record to include additional documents which Complainant stated were "from the Gaston County Building Inspections Department." Complainant further stated that "[a]t the time of the hearing, Complainant had only one of the documents contained in the Gaston County Building Inspections Department File."

At the hearing, Complainant introduced the Residential Building Permit Application for 325 Oxbow Circle, River Park Enclaves, Lot 69 from the Gaston County Building Inspections Department as part of Complainant's Exhibit E, the Commissioner's Inspection File. In seeking

¹ Complainant's formal Complaint alleged facts suggesting that Respondent was a "Correcting Employer" under the multi-employer citation policy. Although the issue was not presented in Complainant's prehearing brief, the undersigned will nevertheless acknowledge the minimal evidence presented on this issue and address the same.

the introduction of Exhibit E, Complainant represented that the items contained therein were part of a qualified business record.

While a motion to re-open the evidentiary record is left to the discretion of the Court, deciding whether or not to exercise said discretion must be based upon the consideration of three factors: (1) the probative value of the evidence proffered, (2) why the evidence was not offered earlier, and (3) the likelihood of undue prejudice to the opposing party. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010).

With respect to the first factor, Complainant has only stated that the additional documents "provide a more complete picture of the position of the Respondent during the construction of the home at issue in inspection 318211547." It is impossible to determine from this statement whether the additional documents have unique probative value for the issue being considered in this hearing or whether they are merely corroborative of the document already introduced into evidence from the same file.

With respect to the second factor, Complainant only states that it did not have the additional documents prior to the hearing but offers no explanation as to why it did not obtain the documents prior to the hearing. Commission Rule .0406(a) provides in pertinent part that "on the application of any party directed to the Board" any member of the Board or the hearing examiner *shall* "issue subpoenas requiring . . . the production of any evidence" in the possession or under the control of any witness. There is no indication that the Complainant availed itself of the opportunity to procure the additional documents through subpoena prior to the hearing.

Finally, the Respondent has no opportunity to object to the documents or to cross-examine witnesses regarding the documents. Complainant makes no statement as to why the addition of these documents after the record has closed would not unduly prejudice the Respondent.

Based on a consideration of the three factors identified, Complainant has failed to present good cause for its motion to re-open the evidentiary record and the same is, therefore, DENIED.

DECISION

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, judicially noticed information pursuant to N.C. Gen. Stat. §8C-1-201 and the entire record in this proceeding, the Undersigned makes Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, biases, or any prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Based upon the foregoing, the Undersigned makes the following:

FINDINGS OF FACT

1. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina. N.C. Gen. Stat. § 95-126 et seq. ("the Act"). Stip. 2.
2. Respondent is a foreign corporation organized under the laws of the State of Georgia, doing business in North Carolina as a residential home builder. Stip. 5, 6.
3. The Review Commission has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. § 95-135. Stip. 1.
4. The evidence presented at this hearing pertained to the Inspection 318211547 which occurred on January 21, 2021 at 325 Oxbow Circle, Mount Holly, North Carolina ("Mount Holly Site") and the Citation issued to Respondent as a result of that inspection. Inspection 318211547 occurred on a residential property that was within the River Park subdivision in Mount Holly.
5. Following the January 21, 2021 inspection, on February 16, 2021 Complainant issued one Citation for a violation of 29 CFR §1926.501(b)(13) based on having found "two roofing subcontractor employees . . . installing the ridge cap shingles on the roof of a newly constructed single story residential home without the use of fall protection exposing the employees to a fall hazard up to 24'8" feet to hard ground." Resp. Ex. R-2.
6. Geoff Shrewsbury is Respondent's Vice-president of Operations. He oversees construction, trade relations and home owner warranties. At the time of the hearing, Mr. Shrewsbury had worked for Respondent for over ten years. Shrewsbury Test. 1:13:16 Mr. Shrewsbury testified that some "years back" Respondent made a deliberate decision to change its business model from that of the traditional General Contractor supervising subcontractors to one of "Construction Managers." Mr. Shrewsbury testified that, given the number of trades and the variety of construction materials involved in residential construction, Respondent did not have the expertise to monitor subcontractors regarding the subject matter of their work. *Id.*, at 1:20:00. While the selection of subcontractors is subject to a vetting process, Respondent positions itself as "construction managers" who rely on their trade partners for subject matter expertise. *Id.*
7. Eric Mancz is the Director of Construction for Respondent's "Charlotte Affiliate." Mancz testified that Respondent assigns construction managers to its home-building sites. Construction Managers' duties include meeting with homeowners, visiting the residential home construction sites to verify that the subcontractors who are scheduled to be working that day are engaged in the work for which they are contracted, that supplies are available on the site, and, when the subcontractor's work is finished, to verify that the work meets completeness standards that would entitle the subcontractor to be paid. Mancz Test. 11:22.

8. Construction managers spend approximately twenty minutes per day at each residential construction site assigned to them including both a morning and an afternoon / evening visit. Their primary responsibility is to verify that the work is completed in the manner expected and in order to approve payment for the subcontractor. Shrewsbury Test. 1:13:20.
9. As part of its agreement with subcontractors, Respondent and its subcontractors agree to terms memorialized in a document identified as the Scope of Work. Resp. Ex. #4. The scope of work document references the quality of the work; it makes no reference to the method or manner of completing the work nor does it retain any control regarding the subcontractor's adherence to safety standards or requirements.
10. Respondent also requires all of its subcontractors to enter into a more detailed Trade Partner Agreement. Resp. Ex. R-7. The agreement places the responsibility for compliance with safety laws upon the subcontractor. Respondent does not retain any rights to stop or correct the work of the subcontractors if safety violations are observed nor does Respondent retain the authority to withhold payment from subcontractors for safety violations. Shrewsbury Test. 1:25:00. Compl. Ex. B; Resp. Exs. R-4; R-7.
11. Construction managers do not conduct safety inspections, supervise employees at the site, or supervise the work of any subcontractors. Furthermore, construction managers lack the skill set to provide supervision to the subcontractors engaged by Respondent. They generally do not interact with the subcontractors except to verify completion of their work and approve their work for payment. Mancz Test. 16:44; Shrewsbury Test. 1:13:20
12. Respondent's subcontractors are responsible for conducting safety inspections, conducting safety training of their own employees, installing all safety devices and/or providing all safety equipment to employees. Approval from Respondent regarding subcontractors' training programs, inspection protocols, safety equipment purchases or installation is not required either by contract or in practice. Mancz Test. 25:12.
13. Respondent's scheduling software requires each subcontractor to remotely access the schedule and then independently execute its part of the construction project. Approximately ninety-five percent of the time, there is only one subcontractor on the worksite at a time. Mancz Test. 21:30; 1:12:30.
14. The only safety equipment provided to Respondent's construction managers are hard hats and hard soled footwear. Mancz Test. 1:02:06. Shrewsbury Test. 1:44.
15. In the River Park subdivision, Respondent entered into a contract with twenty to twenty-five subcontractors. One such subcontractor was Chad J. Pigg, d/b/a CJP Construction who was contracted to provide framing labor, including on the roof of the property located at 325 Oxbow Circle, Mount Holly, North Carolina.
16. Mr. Mancz testified that Respondent had worked with CJP Construction for at least four years. Mancz Test. 16:50.

17. Complainant introduced into evidence a safety manual purported to reflect Respondent's safety policies and supervisory role with respect to subcontractors. Compl. Ex. A.
18. Respondent's witnesses testified that the manual identified as Complainant's Exhibit "A" was abandoned approximately four years prior to the hearing date (which would have been two years prior to the inspection at issue in Docket No. 2021-6363), when Respondent's management re-organized its business to reflect a "Construction Manager" model. Mancz Test. 1:07:54; Shrewbury Test. 1:45:12.
19. No evidence introduced by Complainant refuted the testimony of Respondent's witnesses regarding the Safety Manual introduced by Complainant. More specifically, there was no evidence introduced at the hearing that the Safety Manual or the safety checklists provided therein were used by Respondent at any time relevant to the inspection conducted on January 21, 2021 at the Mount Holly site. There was no evidence that the safety manual was provided to Respondent's employees during the time relevant to the construction at the Mount Holly site.
20. Mr. Lee Peacock is the West Bureau Chief for Complainant with approximately twenty-five years prior experience in Occupational Safety and Health. Mr. Peacock was a District Supervisor in the Charlotte Field office and he supervised the inspector who conducted the inspection at the Mount Holly site. Peacock Test. 2:35:47.
21. Mr. Peacock testified regarding Complainant's analysis of the Multi-employer Citation policy as it was applied to this case in order to assign liability to the Respondent. Peacock Test. 2:36:27. Mr. Peacock testified that in deciding whether an employer was a "Controlling Employer" within the meaning of the Multi-employer Citation Policy Complainant's analysis looks both at written agreements and actual practices to determine, "from a reasonable care standpoint," who is in a position to control the subcontractors. Test. 2:48:00. Mr. Peacock also testified as to the factors that inspectors are trained to examine in General Contractor - Subcontractor agreements and the "totality" of the circumstances regarding how responsibility for safety is actually apportioned in a given worksite. The factors include the written contract, who oversees the contract, and, who controls the scheduling. Test. 3:00:20.
22. Complainant presented evidence that Respondent was identified as a "General Contractor" in various applications and other documents submitted to State and local authorities to secure its right to conduct business as a residential homebuilder in North Carolina. Peacock Test. 2:48:49. Compl. D; Compl. Ex. E, pp 19; 27, 28.
23. Complainant's Exhibit E, page 28 was a copy of the Residential Building Permit issued by Gaston County for the residential building at the Mount Holly site. The permit was completed by Respondent's employee, Andrea Randall, who signed on behalf of Respondent as "property owner." In the application Ms. Randall identified both the owner and the contractor as "SDH Charlotte LLC" and provided the State License

Number for SDH Charlotte's General Contractor's License.² Ms. Randall did not testify at the hearing.

24. Complainant presented no evidence regarding citing either statutory or contractual duties of an entity that identifies itself as a "General Contractor." Complainant's witness admitted that an employer's title, including the title of "General Contractor," was not a dispositive factor in deciding whether an employer was a "controlling employer." Complainant's witness also admitted that there was no agency requirement that a construction project have a single controlling employer. Peacock Test. 3:11:49.
25. Most of the factors identified by Complainant's witness relevant to determining whether an employer is a "controlling employer," were the contractual responsibilities of the subcontractors working at 325 Oxbow Circle, Mount Holly. Peacock Test. 3:01:20 - 3:04:02. Respondent's witnesses testified that those factors were, in fact, handled by the subcontractors as a matter of practice. See e.g., Mancz Test. 25:12; Shrewsbury Test. 1:13:20.
26. In response to questions about whether the Construction Manager had instructed the roofers to climb down from the roof on the day of Inspection # 318211547, Respondent's witness testified that this was done because "the OSHA supervisor" [inspector] instructed the construction manager to call the subcontractor employees down from the roof. Mancz Test. 33:05. A construction manager who sees an obvious safety violation would normally call the subcontractor's field manager to notify them of the alleged violation. The construction managers do not have the authority to stop work or otherwise instruct subcontractor employees regarding their work. *Id.*

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012). The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. North Carolina has adopted the Multi-Employer Citation Policy for analyzing employer liability on construction sites such as the site at 325 Oxbow Circle, Mount Holly. The policy provides that "on multi-employer work sites . . . more than one employer may be citable for a hazardous condition that violates an OSHA standard." CPL 2-00.124, Eff. 3/16/2000, p3.

² While the testimony did not definitively establish what entity was associated with the license number provided, the information is a public record and the undersigned takes judicial notice of the fact that the public record corroborates the information supplied by Ms. Randell on the form.

3. The Multi-Employer Citation Policy is an agency document that provides guidance to OSHA inspectors as to when it may be appropriate to cite a particular employer. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 737 (5th Cir. 2018).
4. The policy originates from the statutory mandate in 29 U.S.C. §654(a)(2) which provides that "each employer . . . shall comply with occupational safety and health standards promulgated under this Act." Appellate Courts interpreting this section of the Occupational Safety & Health Act agree that Congress intended that employers who are subject to the Act should be held responsible for failures to comply with safety standards that effect the employer's own employees as well as other employees who may be employed at the employer's place of employment. *Acosta*, 909 F.3d at 737; *Comm'r of Labor v. Weekly Homes LP*, 169 N.C. App. 17, 24, 609 S.E.2d 407, 413 (2005).
5. The policy has been adopted by North Carolina and our appellate courts have also found the policy to reflect a reasonable interpretation of the Occupational Safety & Health Act of North Carolina. *Comm'r of Labor v. Weekly Homes LP*, 169 N.C. App. at 23, 609 S.E.2d at 412 (finding that N.C. Gen. Stat. §95-129(2) "which imposes a specific or special duty on an employer to comply with OSHA standards, does not limit the duty of the employer only to his own employees").
6. Thus, the Multi-employer Citation Policy is not an exception to a general rule regarding employers' duties to maintain a safe workplace; it is a reasonable interpretation of the legislative mandates embodied in the respective federal and North Carolina statutes. However, the Commissioner's *application* of his own policy must reflect established guidelines. *Cape Medical Transport, Inc. v. N.C. Department of Health and Human Services*, 162 N.C. App. 14, 590 S.E.2d 8 (2004).
7. To decide whether a particular employer is citable under the policy, the Commissioner of Labor (or his designee) engages in a two-step analysis. The Commissioner must first decide whether the employer is one who is creating, exposing, correcting or controlling with respect to the worksite hazard. If the employer meets the definition for one or more of those categories, the Commissioner then determines if the employer's actions were sufficient to meet its obligations under the Act. If the employer does not meet the definition for one of those categories, the analysis stops there. CPL 2-00.124, p 3.
8. It is the Commissioner's burden to establish the applicability of the Multi-employer Citation Policy, as the question of whether an employer is responsible for a violative condition is part of the Commissioner's case in chief. Rule .0514 of the N.C. Safety and Health Review Board provides that "the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." See also, *New River Elec. Corp. v. OSHRC*, 25 F.4th 213, 219 (4th Cir. 2022) (identifying the elements of a *prima facie* case for violations to include both the noncompliance with a safety standard and the employer's actual or constructive knowledge of a violation).

9. Under the Multi-employer Citation Policy a Controlling Employer is "[a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." Control is established by contract or "by the exercise of control in practice." *Id.*, pp 6-7.
10. Complainant did not establish control by contract.
 - a) By its express terms, Respondent's Trade Partner Agreement specifically allocated the responsibility for all aspects of OSHA safety standards and compliance therewith to subcontractors. The Respondent's contract specifically states that it shall have no direct control over its subcontractors' employees for the "acts or omissions with respect to safety practices." Compl. Ex. B.
 - b) Even if the express language of a contract places responsibility for safety on its subcontractors an employer can still control the subcontractors through contractual terms that give the employer the authority to stop the work or to leverage payments as a means to gain compliance with safety standards. *Comm'r of Labor v. Weekly Homes LP*, 169 N.C. App. 17, 23-24, 609 S.E.2d 407, 413 (2005) (Weekly Homes was controlling employer where it retained controls in its contract, including, *inter alia*, the right to withhold payment or terminate the contract for failure to comply with safety standards); *Comm'r of Labor v. Lennar Carolinas, LLC*, Docket No. OSHANC 2019-6131, Wetsch, ALJ presiding, Apr. 7, 2002 (Finding Lennar was controlling employer where Respondent "retained the authority to take such action as it deemed necessary to protect the safety and health of workers including stopping the work and remedying the unsafe conditions or requiring the subcontractor to correct the unsafe condition, or terminating the agreement").
 - c) In this instance, however, Respondent also did not retain control of the worksite through mechanisms such as the withholding of payments or the right to stop work for safety violations or the failure to cure violations. Respondent's contractual relationship with its subcontractors is completely devoid of any provision which would allow it to exert control where subcontractors have failed to comply with safety regulations. In particular, all conditions of payment relate to the completeness of the work.
 - d) With respect to the work at issue in this matter, Respondent's "Scope of Work," which is expressly incorporated into its contract specifically provides that the subcontractor is "responsible for providing and using all safety rails, and personal fall arrest systems as required by OSHA." No payment forfeiture nor authority to stop work is expressly provided as a consequence of failure of the subcontractor to meet this obligation. Compl. Ex. C.
11. If control is not established by contract, then it must be established "by the exercise of control in practice." Multi-employer Citation Policy, CPL 2-00.124, Eff. 3/16/2000, pp 6-7.

12. On multi-employer construction sites, a general contractor is responsible for violations of its subcontractors when the general contractor could reasonably be expected to prevent or to detect and to abate hazards by reason of its supervisory capacity over entire work site, even when its own employees are not exposed. *Secretary of Labor v. Sparrow Constr.*, 16 O.S.H. Cas. (BNA) 1529, 1993 O.S.H. Dec. (CCH) ¶ 30202 (O.S.H.R.C.A.L.J. Sept. 2, 1993).
13. An employer may practice control through the presence of its management at the work site. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (2018) (GC maintained control over the worksite through the presence of on-site management personnel, including superintendents, project engineers, and project manager). The evidence presented at this hearing was that Respondent's construction managers visited the work sites at most twice a day for a total of approximately twenty minutes and, with respect to roofing construction in particular, construction managers remained on the ground speaking with the subcontractor's representative to determine whether work was completed. Mancz Test. 25:52. Respondent did not maintain control through the presence of on-site management.
14. An employer may practice control by furnishing materials, including safety materials or safety training. *Fama Constr. LLC v. United States DOL*, 2022 U.S. App. LEXIS 18081, 2022 WL 375708 (11th Cir. June 2022) (finding factors supporting the conclusion that Fama was controlling employer included supplying the labor and materials to the site, including, at times, providing safety equipment and conducted mandatory training meetings for subcontractors). See also *Brooks v. BCF Piping Inc.*, 109 N.C. App. 26, 33-34, 426 S.E.2d 282, 286-287 (1993) (distinguishing cases where responsibility for worksite hazards are delegable and finding that BCF Piping could not delegate responsibility for safety where it had supplied the machinery responsible for creating the worksite hazard and had a specific duty to make sure the arc welder was properly grounded). The evidence presented at this hearing was that Respondent did not supply labor, materials or machinery and that Respondent did not provide any safety equipment or training. In fact, Respondent did not retain any authority to approve of its subcontractors' safety equipment or training protocols. Respondent did not maintain control through the provision of labor, materials, safety equipment or training.
15. An employer may exert control where it supervises subcontractors performing overlapping tasks. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 735 (5th Cir. 2018). The evidence presented at this hearing was that Respondent's subcontractors typically did not overlap.
16. Where an employer does not control the methods or means by which work is accomplished, that employer is not a controlling employer within the meaning of the Multi-employer Citation Policy. *Comm'r of Labor v. Public Works Commission*, Docket No. OSHANC 2002-4119, Peebles, ALJ presiding, June 2, 2003, affirmed Apr. 29, 2004 (Finding PWC was not the controlling employer where safety was the responsibility of the subcontractor, PWC did not control the means or methods of work, and PWC had no authority to exercise control over construction work, including health and safety

precautions). The evidence presented at this hearing was that Respondent did not control the methods or means of its subcontractors' work.

17. The determination as to whether an employer is a controlling employer depends on the employer's activities with respect to the work, not on "the terminology generally used to describe their business . . ." *Foit-Albert Assocs. Architects & Eng'r P.C.*, 1997 OSHAHC LEXIS 35 at*9-10, 17 OSHC (BNA) 1975, 1997 OSHD (CCH), P31, 299 (finding no control where the employer's role "was to review the contract documents and project specifications, to prepare change orders as necessary, and to inspect the work of the trade contractors to ensure that it conformed to the contracts and specifications.") The fact that Respondent identifies itself as a "General Contractor" to state and local authorities is not determinative with respect to whether Respondent is a Controlling Employer within the meaning of the Multi-employer Citation policy.
18. Respondent's responsibility was to oversee construction for the purpose of determining whether work was completed which does not meet the definition of a controlling employer under the Multi-employer Citation Policy. *In Re:Fleming Constr. Inc.*, 1999 OSAHRC LEXIS 36, Apr. 20, 1999, 18 OSHC (BNA) 1708, Docket No. 97-0017 (Fleming did not control or direct construction activities or the implementation of safety measures to an extent sufficient to support a conclusion that it substantially supervised the performance of construction work at the site where it was hired to oversee construction, did not have contractual obligations that went beyond assuring the work was completed, could not direct the method and means of work, could not stop work in order to force compliance with safety standards)
19. The evidence presented at this hearing was insufficient to establish that there was "control in practice." Respondent was not regularly on the site, did not perform safety inspections, conduct safety training, purchase safety equipment or install safety devices. Respondent did not reserve for itself the right to approve said training, inspections, purchases or installations executed by subcontractors. Shrewsbury Test. 1:25:00.
20. Complainant's application of the Multi-employer Citation Policy in this case did not meet its own standards for determining whether there was control by contract or by practice, looking at the circumstances "from a reasonable care standpoint" to determine whether Respondent was in a position to control the subcontractors.
21. A decision is arbitrary and capricious if the decision is made without reference to guidelines or guiding principle. *Cape Medical Transport, Inc. v. N.C. Department of Health and Human Services*, 162 N.C. App. 14, 590 S.E.2d 8 (2004) (where the trial court properly rejected the agency's decision stating it was not based on established agency guidelines and was, therefore, arbitrary and capricious). In this instance, by failing to follow the standards identified in the Commissioner's rules and the guidelines provided in the training of its inspectors, the Commissioner was arbitrary and capricious when it cited Respondent for violations of 29 CFR §1926.501(b)(13) following Inspection 318211547.

22. A Correcting Employer is one who "is engaged in a common undertaking, on the same worksite, as the exposing employer and *is responsible for correcting a hazard.*" CPL 2-00.124, Eff. 3/16/2000, p 6. The evidence presented at the hearing was insufficient to establish that Respondent was a Correcting Employer.
23. The foregoing analysis is based upon the evidence presented at the hearing with respect to the residential construction site at 325 Oxbow Circle, Mount Holly, North Carolina which was inspected on January 21, 2021. The evidence presented at this hearing is insufficient to establish whether the business model, the contractual agreements between Respondent and its subcontractors, and, Respondent's practices with respect to its subcontractors were applicable to the matters identified in Docket Nos. 2020-6338, 2021-6389, and 2022-6448.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Complainant's Citation 01, Items #1, in Docket No. 2021-6363 is **DISMISSED. This Order does NOT dispose of all matters between these parties consolidated herewith.**

This the 10th day of April 2023.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

M. LEE DANIELS JR
ATTORNEY AT LAW
OF COUNSEL TO WIMBELY LAWSON
SCHNEIDER STECKEL & STINE
1200 WOODRUFF RD STE A-3
GREENVILLE NC 39607

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101
carla.rose@labor.nc.gov

via email.

THIS THE 12 DAY OF April 2023.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
NCOSHRC@labor.nc.gov