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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	**DOCKET NO: 2021-6369**
	)	**INSPECTION NO: 318204252**
COMPLAINANT,	)	**CSHO ID: D9370**
v.	)	
INDUSTRIAL SERVICES GROUP, INC., d/b/a UNIVERSAL BLASTCO, ***and its successors,***	)	FILED APR 4 2025 NC OSH Review Commission
RESPONDENT.	)	

DECISION AND FINAL ORDER

THIS MATTER was duly noticed and came on for hearing before the undersigned on August 26, 27, 28 and September 3, 2025, via the Lifesize video platform. The Complainant, Commissioner of Labor of the State of North Carolina ("Complainant"), was represented by Special Deputy Attorneys General Stacey A. Phipps and Rory Agan. Respondent Industrial Services Group, Inc., d/b/a Universal Blastco was represented by Attorney Travis W. Vance and Attorney Alex West, Fisher & Phillips, LLC.

PROCEDURAL HISTORY

On March 16, 2021 Complainant issued one Willful Serious citation with one item, a second Serious citation with nine items and one Nonserious citation with three items. Stip. #25. Respondent submitted a timely Notice of Contest dated April 15, 2021. Stip. #29. On or around May 3, 2021 Respondent submitted a timely Statement of Employer's Position which requested formal pleadings. Stip. #30. The Complaint and Answer were timely filed on July 28, 2021 and August 13, 2021, respectively. Stip. #31.

With its Answer, Respondent filed a Motion to Dismiss which was fully briefed by both parties and resolved pursuant to an Order issued by the previous Hearing Examiner, Laura

Wetsch, on December 15, 2021. Following a prehearing conference on January 11, 2024 with the undersigned the parties submitted various pre-hearing motions.

Complainant's July 19, 2024 *Motion-in-Limine* to limit or exclude certain testimony was allowed in part and denied in part by Order entered August 5, 2024. Respondent's July 19, 2024 *Motion-in-Limine* to exclude testimony based on privilege was allowed by Order entered August 5, 2024. Respondent's July 19, 2024 Motion for a Jury Trial was denied by Order entered August 12, 2024. On August 8, 2024 Respondent moved the Court for reconsideration of the August 5, 2024 Order entered on Complainant's *Motion-in-Limine*. This motion was denied by Order entered August 19, 2024.

On August 15, 2024 Respondent filed a Motion to Dismiss or For an Adverse Inference and on August 22, 2024 Respondent filed a Motion to Suppress Evidence. These motions were denied without prejudice for the Respondent to renew its motions following the enforcement hearing. Prior to the enforcement hearing the parties submitted stipulations which are attached as Exhibit A to this Order. At or near the start of the enforcement hearing, Respondent's counsel requested that non-testifying witnesses, other than party representatives, be sequestered prior to testifying. This motion was allowed.

WITNESSESS

The following witnesses testified at the enforcement hearing:

For the Complainant:

Ms. Robin Ewart, N.C. Department of Labor, Compliance Safety & Health Officer

Ms. Kristie Hall, N.C. Department of Labor, Compliance Safety & Health Officer

Mr. Michael Greer, Former N.C. Department of Labor Compliance Safety & Health Officer

Mr. Grant Quiller, N.C. Department of Labor, Compliance Safety & Health Officer

Ms. Griselle Negron, N.C. Department of Labor, Compliance Safety & Health Officer

For the Respondent:

Mr. Reginald Epps, Universal Blastco Corporate Safety Director

Ms. Cynthia Knezevich, N.C. Department of Labor, Safety & Health Compliance Supervisor

Ms. Anne Weaver, N.C. Department of Labor, Bureau Chief of Planning Statistics and Information Management

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

For the Complainant:

Exhibit #1 Certified Copy of Unredacted Investigative File with Appendices, Bates Numbered 0001 - 0513 and Photo Disk, with photos 1.png - 7.png; 8.jpg - 9.jpg; 11.jpg - 14.jpg; b1.jpg; b2.png; b.3.jpg-b.5.jpg; bucket1.jpg; bucket2.jpg; hg1.jpg - hg9.jpg; m1.jpg - m6.jpg; p1.jpg - p14.jpg; rt1.jpg; rt2.jpg; uf1.jpg - uf6.jpg.

For the Respondent:

Exhibit #7 September 20, 2020 Confined Space Entry Permit
Exhibit #21 Declaration of Kevin Marcial dated October 28, 2020
Exhibit #22 Declaration of Jonathan Velez Santana dated October 28, 2020
Exhibit #23 Declaration of Franklin Sanchez Almandares dated October 28, 2020
Exhibit #24 Declaration of Yasser Morales dated October 28, 2020
Exhibit #25 Declaration of Jose Antonio Torres Caraballo dated October 28, 2020
Exhibit #26 Declaration of Gustavo Rivera dated October 28, 2020
Exhibit #27 Declaration of Jack Roa dated October 2020
Exhibit #28 September 19, 2020 Confined Space Entry Permit
Exhibit #31 Field Officer Certification (Redacted)
Exhibit #32 NC DOL Public Records Request
Exhibit #33 Certification of Anne Weaver dated August 19, 2024
Exhibit #34 Request for Unredacted File dated August 15, 2024

POST-HEARING MOTIONS

Respondent's Motion to Suppress Evidence

Following the enforcement hearing, Respondent renewed its earlier motion to suppress evidence obtained during the inspection. The issue was fully briefed by both parties in post-hearing submissions.

The evidence presented at the enforcement hearing regarding Complainant's inspection procedures showed the following: At approximately 9:00 a.m. on September 21, 2020 when NC OSH investigators arrived at the scene of the industrial accident that is the subject of this case, a fire was still actively burning and emergency medical personnel were attempting to recover the bodies of two deceased employees. T., Day 1, p 29. The site was the Evergreen Packaging pulp mill ("Evergreen"), which was shut down for repairs. T., Day 1, pp 31; 65-66; Compl. Ex. #1, pp 50-51.

Representatives from Evergreen met the investigators and directed them to a conference room. Lead investigator Robin Ewart presented her credentials to Evergreen managers and received Evergreen's consent to conduct an inspection. Ewart held an opening conference with Evergreen managers. Evergreen's management informed Ewart that two contractors had been conducting repairs at the site of the fire, one of which was the Respondent. Evergreen's Environmental Health & Safety Director also informed Ewart that no one from Respondent's company was on the site. T., Day 1, pp 30-31; 33. Compl. Ex. #1, pp 48; 51.

After first responders cleared the scene, Ewart conducted a walk-around inspection with Evergreen personnel. The inspection included the area where the accident had occurred as well as any "plain sight" hazards. The walk-around did not include the inside of the structures where the fire had burned. It also did not include Respondent's worksite trailer. When Ewart returned

to Evergreen's conference room she was then introduced to Respondent's representatives. Ewart asked if Respondent's representatives wanted to conduct an opening conference with her; they declined to do so, stating that they were waiting for legal counsel to arrive. T., Day 1, pp 33-36;160; 162; T., Day 2, p 75:10-18; 77:19-21; 108-109. Compl. Ex. #1, pp 48-49.

At the enforcement hearing Respondent offered testimony that its representatives were at the site prior to Ewart's arrival. T., Day 3, p 49:8-13. In particular, Respondent's Safety Director Reginald Epps testified that he was in the vicinity of Respondent's work trailer and near the tank and "its surroundings" where the fire had taken place. T., Day 3, p 85. Mr. Epps stated that he had spent time inspecting Respondent's trailer which he said was "not far" from where the tank was situated. T., Day 3, pp 86-87. There was no information presented at the hearing explaining how Mr. Epps alerted anyone controlling the scene to his presence, or, what would have accounted for his inability to see or be seen by the group of individuals accompanying Ms. Ewart on the walk-around "not far" from Respondent's trailer.

Respondent asks the Court to suppress the evidence Ewart obtained from her walk-around, including photographs and witness interviews. Respondent contends that Ewart should have made a greater effort to locate its representatives before beginning her walk-around inspection, and, that its Fourth Amendment rights were violated or that it was otherwise prejudiced as a result. Resp. Br. p 25.

N.C. Gen. Stat. §95-135(c) provides that an employer's representative "shall be given an opportunity to consult with ***or*** to accompany" an authorized agent during the physical inspection of a workplace. *Emphasis supplied.* N.C. Gen. Stat. §95-135(a) authorizes the Commissioner's designee to enter the worksite "without delay."

Because the investigator had the consent of the property owner, confined her search to common areas and areas in plain sight, and did not otherwise violate Respondent's privacy expectations, her search did not violate Respondent's Fourth Amendment rights. *United States v. Matlock*, 415 U.S. 164, 171 (1974) (voluntary consent to search is established by showing that "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises of effects sought to be inspected."). *Donovan v. A.A. Biero Constr. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) (Employer could not have reasonable expectation of privacy in common areas used by other contractors).

The investigator did not search Respondent's work site trailer on the day of the fire. Once she had obtained consent to continue her investigation from Respondent's representative James Whelton, she searched the contents which had been moved off-site, accompanied by Respondent's representatives. Compl. Ex. #1, p 49. Furthermore, on the day of the fire Respondent's representatives were given an opportunity to consult with Complainant's investigator and declined the opportunity. T., Day 1, pp 34; 36; T., Day 2, p 75:10-18; 77:19-21. Greer Test., T., Day 2, pp 108-109. Compl. Ex. #1, pp 48-49.

Respondent has also not demonstrated prejudice from the investigator conducting the opening conference and first walk-around inspection. Respondent contends that it was deprived of the opportunity to provide information that addressed the citations issued for lack of safety data sheets, lack of pre-job coordination with the other contractor, and, violations of confined space permitting requirements. Resp. Br., p 26. Respondent's contentions ignore the fact that its representatives were given an opportunity to consult with the investigator on the day of the fire and accompanied the investigator on her subsequent off-site inspections after Respondent's work trailer contents were moved from the original job site. T., Day 1, pp 44-45.

Assuming without agreeing that any part of the investigator's search on September 21, 2020 was a technical violation of the statute's inspection requirements, the undersigned finds that the investigator's conduct substantially complied with the walk-around inspection requirements. The investigator inquired about Respondent's availability, provided an opportunity to confer when she met Respondent's representatives, and obtained specific consent before inspecting any of the contents in Respondent's work trailer. Given the circumstances of an active fire and rescue scene, which Respondent's representative also described as "chaotic," (T., Day 3, p 51:5-7) and the investigator's offer of an opportunity to consult, this degree of substantial compliance would not justify suppression of evidence or the dismissal of citations. *Chi. Bridge & Iron Co. v. OSHRC*, 535 F.2d 371, 376; 37 (7th Cir. 1976) (when there has been "substantial compliance with the mandate of the Act in regard to the granting of a walkaround right and the employer is unable to demonstrate that prejudice resulted from his non-participating in the inspection, citations issued as a result of the inspection are valid."). Accord. *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004) (collecting a consensus from the Fourth, Fifth, Eighth, Ninth and Tenth U.S. Circuit Courts of Appeals) .

Based upon the foregoing, the undersigned DENIES Respondent's Motion to Suppress Evidence.

Respondent's Motion for Sanctions (Adverse Inference / Dismissal)

Following the enforcement hearing Respondent renewed its earlier motion seeking sanctions, up to and including dismissal, based upon alleged spoliation of evidence by CSHO Ewart. More specifically, Respondent contends that CSHO Ewart created handwritten notes during the opening conference of the investigation, that Ewart and three other CSHOs created handwritten notes during their interviews with certain witnesses, and, that all of these

handwritten notes contained potential evidence that was intentionally destroyed. Respondent also contends that Ewart received email correspondence from third parties and that these emails were deleted by Ewart (and by the other CSHOs assisting her). Respondent contends that it made a request to receive the CSHOs' original handwritten notes and the email correspondence via North Carolina's Public Records law (N.C. Gen. Stat. §132-6) and that, in any case, Complainant should have preserved the notes and emails in anticipation of litigation.[1] Respondent contends that the destruction of the handwritten notes and emails was spoliation of evidence justifying an adverse inference against Complainant and that Respondent was deprived of procedural due process warranting sanctions up to and including dismissal of the citations.

The Official Report of the Investigation

A threshold question is whether the handwritten notes and email correspondence (hereafter "the documents") should have been considered to be a part of Ewart's "official report" of the inspection as that term is used in N.C. Gen. Stat. §§95-136(e) and 95-136(e1). If these items are part of the "official report," then Complainant had an obligation not only to preserve the documents but also to include the documents within the "official report" that was provided to the Respondent in accordance with N.C. Gen. Stat. §95-136(e1) and each of Respondent's requests for the investigative file, including its August 15, 2024 request for the "unredacted investigative file . . . and any related information." Resp. Ex.'s #32, #34. If the notes and email correspondence were part of the official report then the attestations given to Respondent regarding the completeness of the file provided were misleading. Resp. Ex.' s #31, #33.

[1] There is no exhibit in the record that Respondent sent a litigation hold letter that included preserving emails.

The undersigned finds that the documents were not part of the "official report" compiled in accordance with N.C. Gen. Stat. §95-136(e). The statute provides, in pertinent part:

> The Commissioner is authorized to compile, analyze, and publish, in summary or detailed form, all reports or information obtained under this section. Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending, except that, subject to the provisions of subsection (e1) of this section, an employer cited under the provisions of this Article is entitled to receive a copy of the official inspection report which is the basis for citations received by the employer following the issuance of citations.

For the present analysis, the statute provides two relevant instructions: (1) Complainant is authorized to summarize the information it obtains in the conduct of investigations; and (2) while ***proceedings*** are pending, none of the records which were gathered or compiled pursuant to an investigation, whether considered part of the "official file" or not, are subject to public disclosure under North Carolina's public records laws, except as specifically provided in N.C. Gen. Stat. §95-136(e1).

The first sentence of N.C. Gen. Stat. §95-136(e1) provides that:

> Upon the written request of and at the expense of the requesting party, official inspection reports of inspections conducted pursuant to this Article shall be available for release in accordance with the provisions contained in this subsection and subsection (e) of this section.

Thus, it is the "official inspection report" which is to be made available to a requesting party. While ***proceedings are pending***, other documents, not part of the official inspection report, are not available pursuant to a public records request, subject to one additional exception delineated in N.C. Gen. Stat. §95-136(e1) and discussed *infra*.

Is an investigator authorized to decide what is "relevant" to include in the "official report" of the investigation and, as a result, to also decide that some of the information gathered is irrelevant and can be omitted from the "official report?" In addition, in response to an

employer's request to receive the investigative file, is the Complainant permitted to restrict an employer's access only to those records which the investigating officer has determined to include in the "official report" of the investigation? Based on the language of the statute and long-standing principles and precedent in administrative law, the undersigned concludes that the investigator has the authority to decide what is relevant to include in her official report and Complainant is authorized to restrict the public records disclosure to the "official report," at least up until that time that Complainant is required under the statute to make additional disclosures regarding witness statements.

The statute provides that an employer is entitled to receive "the official report which is the basis for citations received . . . ." N.C. Gen. Stat. §95-136(e). The legislature has delegated to the Commissioner the authority to "compile, analyze, and publish, in summary or detailed form" records of its investigation. *Id.* The agency has also adopted regulations further defining requirements for the disclosure of documents "in the investigative and other files." 13 NCAC 07A .0303. The regulations state that disclosure is to be in accordance with N.C. Gen. Stat. §95-136(e1) and also restricts disclosure of "interagency and intra-agency documents otherwise protected by law." *Id.*

Where the statute does not explicitly define the term "official report" of an inspection, an agency may interpret the term, so long as the interpretation is reasonable. That is because "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151 (1991). If the agency's interpretation is reasonable and consistent with the agency's delegated authority a court should defer to the agency's knowledge and expertise. *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 707, 845 S.E.2d 802,

823 (2020), *aff'd* 385 N.C. 1, 891 S.E.2d 83 (2023) ("A reviewing Court should defer to [the] agency's interpretation of statutes or rules it administers so long as the agency interpretation is reasonable and based upon a permissible construction of the statute or rule.") (Cleaned up).

However, an agency's interpretation is not binding on a court. A court should consider the validity of the agency's reasoning, including "consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Company,* 323 U.S. 134, 140 (1944). Adopted by North Carolina Appellate Courts in *Britthaven, Inc. v. N.C. Dept. of Human Resources,* 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) and *Total Renal Care of N.C., L.L.C. v. N.C. HHS,* 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005).

The record in this case reveals that Compliance Health and Safety Officer Robin Ewart is appropriately educated and that Complainant carefully trains all of its investigators to make discretionary decisions about what to include in an "official report" of an inspection. T., Day 1, pp 16-18; T., Day 3, p 108:13-21. In addition, Complainant trains its officers to include information which supports a violation as well as information which may be exculpatory. T., Day 3, p 121:17 - 122:5;125:11 - 125:5; T., Day 1, p 20. The investigative procedures typically involve making hand-written notes while visiting a site or interviewing witnesses. These notes are then incorporated into the OSHA Express database either in summary form or verbatim, at the officer's discretion. T., Day 3, p 127:5-11. At some point after the officer's handwritten notes are incorporated into the database, the notes are shred. T., Day 1, pp 18-20; 162-63. The shredding of notes has been Complainant's long-standing practice. T., Day 2, p 11:10 - 21; 11:22 - 12:6.

A hypothetical example of information omitted from an official report was provided by Ewart. If she is investigating a possible violation based on employee training but evidence confirms that there was not a training standards violation, the information on training is not included in the narrative section explaining the basis for the violations. However, the information would be applied to another section, where Ewart evaluates factors which mitigate against penalties. T., Day 1, p 20; 167-168; 167:25 - 168:2.

Respondent has distorted Ewart's testimony in its filings with the Court and in oral arguments made during the hearing, referring to Ewart's description of the aforementioned hypothetical as evidence proving that Ewart omitted from her official report evidence "that they [the employer] were doing the right thing." Respondent has used Ewart's phrasing to argue that Complainant's regular practice is to discard evidence which exculpates the employer from the *issued* citations. Respondent has ignored the context of Ewart's explanation that when she determines a *potential* violation is not supported, that information is not relevant to the "official" report, whose purpose, as delineated in the statute, is to provide the employer with "the basis for citations" which are *issued.* N.C. Gen. Stat. §95-135(e). Respondent also ignores the additional information provided by both Ewart and Complainant's witness, Officer Grant Quiller, that information which does not support a violation may nevertheless be determined to be relevant to penalty calculations and would, therefore, be included in the official report in a different section. T., Day 1, pp 167-168; T., Day 2, p 156.

Based upon the information contained in the record before the undersigned, Complainant's interpretation of what constitutes the "official report" of the investigation which must be provided to the Respondent pursuant to a public records request constrained by N.C. Gen. Stat. §95-136(e1) is a reasonable interpretation of its enabling statute and its own

regulations. A trained officer should have the discretion to decide what information is relevant to include in the "official" inspection report and the cited employer is only entitled to the "official" inspection report when it makes a public records request.

Required Disclosures of Witness Statements

However, the analysis of Respondent's spoliation contentions and due process violations does not end with an understanding of what constitutes the "official" report. When a contested matter is set for an enforcement hearing, N.C. Gen. Stat. §95-136(e1) imposes additional disclosure obligations upon the Complainant:

> The Commissioner shall make available to the employer 10 days prior to a scheduled enforcement hearing unredacted copies of: (i) the witness statements the Commissioner intends to use at the enforcement hearing, (ii) the statements of witnesses the Commissioner intends to call to testify, or (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer; provided a written request for the statement or statements is received by the Commissioner no later than 12 days prior to the enforcement hearing.

Thus, without attempting to disambiguate the third category of witness statements identified in the statute, it is fair to say that, upon a timely request no later than 12 days before the enforcement hearing, Complainant should disclose to the Respondent any witness statements collected during the investigation.

Except in extraordinary circumstances, a Compliance Safety and Health Officer (investigator) will be the Complainant's primary witness at the enforcement hearing. Some portion or all of the investigator's notes *may* constitute statements made by the officer which should fairly be considered a witness statement. The statute does not make a distinction between written statements provided directly by a witness and oral statements of a witness which are written verbatim or in summary form by an investigator.

Complainant contends that the term "witness statements" in the statute means those statements written by the witness on a particular form. Compl. Br., p 30. Complainant's position is unpersuasive and does not meet the reasonableness test to be accorded deference. The testimony at this hearing demonstrated: the investigators' use of the form is discretionary; to support a recommendation for a citation, the investigators give equal weight to statements which they record "verbatim" from their notes as those statements which are written by the witness on a form; and, the Compliance Safety and Health Officer ***is*** a witness whose prior relevant statements are fair-game for cross examination. T., Day 1, pp 2:7-13; 166:8-12; T., Day 2, pp 115:15-24; 151:10-14; 153:18-25; T., Day 3, pp 117:3 - 118:3. Thus, any recordation, in any form, of a statement by a witness, including the investigator, is a public record required to be disclosed under N.C. Gen. Stat. §95-136(e1).

Complainant avers that the investigator's notes are "transitory" and without evidentiary value. Complainant urges the Court to recognize its privilege to keep from disclosure "pre-decisional material" which may reveal the government's decision making process. Compl. Br., p 29, citing *Latite Roofing & Sheet Metal, LLC*, No. 09-1074, 2010 OSAHRC LEXIS 90 at *10-11 (Nov. 3, 2010). It is certainly possible that parts of the handwritten notes do not have evidentiary value. It is also possible that the notes contain interagency or intra-agency deliberations, or, attorney-client communication and that those particular statements would be protected from disclosure pursuant to regulation 13 NCAC 07A .0303 or other lawful protections. The Complainant's concern is not frivolous and there is substantial precedent and sound policy for the protection of materials revealing the pre-decisional deliberations of regulatory agencies. *Latite* at *10-12.

However, there is no support for Complainant's preemptive determination that all of the investigator's notes are privileged from disclosure and can be destroyed. A finding that the notes are privileged can only be made after review of the information to determine: (1) whether the requested documents, or parts thereof, can be fairly categorized as "pre-decisional;" and, (2) whether the respective interests of the public and the Respondent tip in favor of disclosure or non-disclosure. With respect to the former, it is the Complainant who bears the burden of proving that material it seeks to protect from disclosure meets the criteria for protections. With respect to the latter, the Respondent must demonstrate that its need for the information outweighs the negative consequences of disclosure. *Id.*, at *13-15. These determinations are for the Court to make and the Complainant's decision to destroy the documents ahead of litigation is a "usurpation" of the Court's role. *Frazee Construction Company*, 4 OSAHRC 188, 1973 OSAHRC LEXIS 201 at *193, (Aug. 8, 1973) (Cleaned up).

Spoliation

The Complainant's decision to destroy investigative records that are not part of its official report constitutes the spoliation of potentially relevant witness statements which Complainant is statutorily required to provide to Respondent. The issue for the undersigned is whether, in this instance, Complainant's destruction of the documents warrants an adverse inference or other sanction.

Spoliation "is not a substantive claim or defense but a 'rule of evidence,'" and whether or not to apply a spoliation inference is within a court's discretion. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004). Accord. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 183, 527 S.E. 2d 712, 716 (2000). In deciding whether to exercise its discretion, a court should first consider whether litigation should have been reasonably anticipated at the time the evidence was

destroyed. *McLain,* 137 N.C. App. at 187-188, 527 S.E.2d at 718. The obligation to preserve evidence arises prior to the instigation of formal litigation; it arises when a party is aware of circumstances that are "likely to give rise to future litigation." *Id.* Here the potential evidence was destroyed at or near the time that the citations were issued. T., Day 1, pp 18-20; 162-163. Circumstances clearly suggested that future litigation should be anticipated. The citations were issued to the employer with an invitation to "contest" both the citations issued and the penalties assessed. Compl. Ex. #1, p 14. In addition, this case was a fatality case and the assessed penalties were substantial. Complainant was also aware from the opening day of the inspection that Respondent had retained legal counsel. T., Day 1, pp 34; 36; T., Day 2, p 75:10-18. Complainant should have anticipated litigation and should have taken appropriate steps to preserve notes containing potentially relevant witness statements.

The second factor to assess is the degree of culpability involved in the decision to destroy the evidence. *McLain,* 137 N.C. App. at 184, 527 S.E.2d at 716. While evidence of bad faith is not required as a basis for invoking a spoliation inference, the degree of culpability is relevant to the court's consideration as to whether the inference is warranted. A spoliation inference is rooted in the assumption that a person would not deliberately destroy evidence that is helpful to his or her case. *Yarborough v. Hughes*, 139 N.C. 199, 208-209, 51 S.E. 904, 907 (1905). However, if there is an explanation for the destruction which rebuts the underlying assumption, then an inference of spoliation may not be warranted. *McLain,* 137 N.C. App. at 184, 527 S.E.2d at 716. In this case, the evidence regarding culpability tilts against an adverse inference. The investigator, who is not a litigator, did not make an idiosyncratic decision to destroy her notes in this case. She was following a long-standing policy of her employer where notes were destroyed once they were substantively incorporated into the report database that formed the basis for the

official investigative report. T., Day 2, pp 11:14 - 12:6. Complainant's policy was based, albeit incorrectly, on an assumption that the notes were not subject to N.C. Gen. Stat. 95-136(e1)'s disclosure requirements. The cited reasons for the destruction were efficiency and apparent redundancy of the information. T., Day 2, p 61:14-15; T. Day 3, p 120:1-12.

A Court should also consider whether the spoliated evidence was relevant to the opposing party's claims or defenses such that the absence of the evidence was prejudicial to the party. See, e.g., *SCR-Tech LLC v. Evonik Energy Servs. LLC*, No. 08 CVS 6632, 2014 NCBC 70, 2014 NCBC LEXIS 72, at *P35 (Mecklenburg Cty. Dec. 31. 2014), citing *Arndt v. First Union Bank*, 170 N.C. App. 518, 528, 613 S.E. 2d 274, 281 (2005). In the context of spoliation, relevance concerns whether the party's ability to present its case was compromised as a result of the missing evidence. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (2010).

In this case, the record reveals that Complainant's interviews with witnesses and attempts to interview witnesses only produced evidence that was equally accessible to the Respondent or otherwise demonstrated that Complainant did not selectively discard witness statements. All of the employee witness interviews were attended by other witnesses, who either represented the Respondent or who testified at the enforcement hearing. The latter witnesses, who were sequestered before testifying, corroborated one another's testimony regarding what information, or lack thereof, was conveyed through the witnesses in question. See, Findings of Fact ("FOF"), *infr*a, #35, #41, #44, #59; Compl. Ex. #1, pp 184-189; 190-193; Resp. Ex. #21-#27. In addition, Respondent obtained sworn witness statements from the same witnesses, which in many cases contained more detail than what the witnesses provided to the government. See Resp. Ex.'s #21-#27.

In the Court's discretion, the circumstances surrounding spoliation in this case do not warrant an adverse inference or other sanction.

Due Process

There is no question that the failure to preserve evidence implicates a separate due process concern which must be addressed. As a general rule, the right to evidence gathered by the government is fundamental to the procedural due process rights of the Respondent. *Frazee Construction* at *190-191; *195-196. When faced with a procedural due process claim a court must begin by asking: how much process was due? *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) (the issue before the court is "what process the State provided, and whether it was constitutionally adequate"). The standard for evaluating how much process is due is the federal constitution. *Tooly v. Schwaller*, 919 F.3d 165, 172 (2d Cir. 2019) ("In determining how much process is adequate, we look to federal constitutional standards rather than state statutes to define the requirements of procedural due process." (cleaned up)).

Where an agency has afforded the minimal due process rights of notice and an opportunity for hearing, a claim that the agency has not adhered to discovery rules, whether statutory or regulatory, does not, by itself, "sustain an action for redress of procedural due process." *Goodrich v. Newport News Sch. Bd.*, 743 F.2d 225, 227 (4th Cir. 1984). The requirements of due process are "flexible and call for such procedural protections as the particular situation demands." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). Therefore, to determine if more process was due a court should weigh

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In the circumstances of this case, the Court concludes that Respondent's interests are significant and that the government's burden in providing additional procedural due process would not be significant. However, the risk of erroneous deprivation of due process was low to nonexistent based upon the notice and hearing procedures that were actually used in this case.

Clearly, the Respondent's interests in any proceeding before the State's Occupational Safety and Health Review Commission is very significant. An employer is subject to property loss in the form of a monetary penalty and any finding of a violation may have implications for the size of future penalty assessments. On the other hand, the reasons articulated by the Government for the destruction of handwritten notes is the volume of physical or electronic space required to maintain the notes. Considering that physical storage space is not needed with the availability of electronic storage and that the work required to electronically store an investigator's notes would probably not take much longer than the time it takes to shred the notes, the Government's reasons do not support a finding that there are significant burdens with the maintenance of the investigator's notes.

The Government's existing procedural due process protections are, however, more than constitutionally adequate in this case. Respondent received an official report which detailed the grounds for the citations issued and Respondent had a full opportunity to rebut those grounds in a *de novo* hearing. Moreover, any risk that exculpatory, or even relevant, information was withheld by Complainant is miniscule, if at all, in this case. The government attempted to interview ten witnesses and only accomplished three full interviews. See FOF #35, *infra*. Two additional witnesses allowed limited interviews by the investigators but would not answer questions about the accident, itself. T., Day 2, pp 139:6-7; 139:24 - 140:5. Two other witnesses

gave written statements, not under oath, to the property owner and subsequently declined to speak voluntarily with the Government. The written statements collected by the property owner were provided to Complainant. The remaining three witnesses declined to provide any interview or alternative statement to the Government.

All of the witnesses from whom the Government attempted to gather evidence were Respondent's employees. Two of the employees who provided full interviews were separately interviewed by the Respondent and Respondent introduced into evidence sworn declarations from those witnesses. FOF #35; Resp. Ex. #23, #24. Furthermore, those employees' interviews were attended by three investigators, all of whom were sequestered prior to testifying at the enforcement hearing, and, whose testimonies corroborated one another. FOF #57; #61-63. The third employee who gave a full interview was a management employee whose interview was attended by Respondent's representative. FOF #41.

The individuals who permitted limited interviews were also separately interviewed by Respondent who introduced sworn declarations from those employees into the record. FOF #62; Resp. Ex. #23, #26. These interviews were also attended by three testifying investigators who were sequestered before providing testimony. The two written witness statements provided to Complainant by the property owner were also provided to the Respondent. Compl. Ex. #1, pp 181-193. The witnesses who declined to be interviewed by the Government were interviewed by Respondent and provided sworn declarations which Respondent introduced into evidence. FOF #59; #60; Resp. Ex. #22, #25, 26. Thus, the chance that handwritten notes of these interviews or attempted interviews contained any relevant evidence not otherwise introduced through the testifying witnesses and other declarations admitted is pure speculation and is of such a low probability that it can be regarded as nonexistent. The failure of the Complainant to preserve

these documents did not impede Respondent's presentation of its case. The procedures used in this case did not deprive the Respondent of procedural due process.

Based upon the foregoing, the undersigned concludes that an adverse inference based upon spoliation of evidence or other sanctions based upon an alleged deprivation of due process is not warranted and Respondent's Motion 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, Rule 201and 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 and 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, Industrial Services Group, d/b/a Universal Blastco, is a South Carolina corporation authorized to do business in North Carolina. Stip. #3 and #4.

The Accident

3. On September 21, 2020, shortly after 7:00 a.m., the N.C. Department of Labor, Occupational Safety and Health Division, District 1 office (Ashville) was notified of a large commercial structure fire at 175 Main Street, Canton, NC which potentially involved employee injuries and/or fatalities. Compl. Ex. #1, p 47.

4. The worksite was a papermill owned by Evergreen Packaging and consisted of 185 acres that included "multiple production buildings, a wastewater treatment plant, exterior pulp and wood storage, and a distribution center." T., Day 1, p 31; Compl. Ex. #1, p 50.

5. At the time of the accident, the entire facility was on a scheduled outage. Respondent and another employer, Rimcor, had been contracted by Evergreen to perform maintenance on a structure identified as the D2 tower. T., Day 1, p 65-66. Compl. Ex. #1, p 51. Photograph #3.png.

6. The D2 tower consisted of "two atmospheric tanks, a fiberglass lined tank and a brick / tile lined tank." The tanks were used to transform wood pulp into "stock" bleached to "a required color / brightness standard." The two tanks were connected by a cross-over tube located 100 feet above the ground. The D2 upflow tank where Respondent was contracted to work was the fiberglass lined tank. Respondent was contracted to re-line thirty feet of fiberglass in the tank. The D2 downflow tank, where Rimcor was performing work, was the brick and tile lined tank. Compl. Ex. #1, pp 50-51; Photograph #3.png & #4.png.

7. Respondent was required to grind off the existing fiberglass lining and replace the lining with new fiberglass mat. In order to adhere the fiberglass mat to the tank's interior, Respondent used Derakane 510N epoxy vinyl ester resin, a Category 3 flammable liquid with a flashpoint of 79° F. The Derakane was contained in a 55 gallon metal drum. Respondent's employees transferred the Derakane from the 55 gallon drum to 5 gallon buckets to transport the chemical into the tower. Compl. Ex. #1, pp 52; 63; 75; 87.

8. On the morning of September 21, 2020 a fire erupted in the D2 tower and two employees who worked for subcontractor Rimcor and who were working in the D2 downflow tank were killed in the fire. Compl. Ex. 1, pp 48; 296-314. T., Day 1, p 84.

9. When the fire broke out Respondent's employees Yassir Morales, Jonathan Santana, Jack Roa, Jose Torres, Dakota Baswell and Terry Godoy were performing various aspects of the lamination of the D2 upflow tank. T., Day 1, pp 93; 159.

NC OSH Division's Investigative Process

10. Cynthia "Kay" Knezevich has been a district health compliance supervisor for approximately seven years. Her overall tenure with the North Carolina Department of Labor ("NC DOL") is twenty years. Her experience includes performing the duties of a compliance safety and health officer as well as supervision of compliance safety and health officers in Complainant's Asheville office. Compliance Safety and Health Officers ("compliance officers" or "CSHOs") inspect or investigate workplaces in order to ensure compliance with Occupational Safety & Health regulations. T., Day 3, p 99.

11. All NC DOL compliance safety and health officers are provided with a year-long training program before they are permitted to conduct their own investigations. They receive training in all aspects of investigation and the preparation of investigative files. The goal of the training is to develop competence in the preparation of a "legally defensible" investigative file. Cynthia Knezevich Testimony, T., Day 3, p 108:13-21.

12. Compliance officers typically make hand-written notes when they visit a site and incorporate those notes into OSHA Express, a database used by compliance officers to compile and summarize information collected over the course of an investigation. Compliance officers' handwritten notes are not separately attached to an investigative case file but become part of the official investigative file when their relevant contents are incorporated into the case file. Some notes are incorporated in summary form; other notes may be typed into the case file verbatim. Knezevich Testimony, T., Day 3, p 127:5-11.

13. When compiling their investigative files, compliance officers include information which supports a violation as well as information which mitigates against finding a violation in order to prepare an objective analysis. Knezevich Testimony, T., Day 3, p 121:17 - 122:5.

14. Qualified compliance officers have discretion to decide what is relevant and what is not relevant to include within the official investigative file. Knezevich Testimony, T., Day 3, p 125:11 - 125:5.

15. State employees are not incentivized to recommend citations. T., Day 1, pp 128-129; Knezevich Testimony, T., Day 3, pp 128-131; 133:4-17.

16. Complainant's witness Robin Marie Ewart ("Ewart") is a Safety Compliance Officer II who has been employed with the NC DOL for ten years, starting as a Safety Compliance Officer I and then being promoted to her current position approximately five years ago. T., Day 1, pp 16-17.

17. Ewart holds a baccalaureate degree in biology and environmental health science. She also holds certifications as an occupational safety and health construction safety specialist, as a manager of environmental safety and health, and, as a manager of environmental safety and health for construction standards. Prior to joining the NC DOL, Ewart had twelve years of industry experience as a training coordinator and as a safety coordinator. T., Day 1, pp 17-18.

18. For the past ten years Ewart's duties with the NC DOL have required her to investigate workplace accidents and complaints and to conduct otherwise general scheduled workplace inspections in order to ensure compliance with NC Occupational Health and Safety Regulations. In her investigative capacity, Ewart gathers information from relevant sources, including physical evidence and witnesses, compiles reports of her investigations and recommends whether or not investigated employers should be cited for violations of safety regulations. T., Day 1, p 17.

19. Ewart uses her knowledge and expertise as a CSHO to determine what information is relevant to her investigations. "If it is relevant to the case in any way, whether it is in the narrative or the citations, then I include it." T., Day 1, pp 166-167; 167:5-7.

20. Ewart takes handwritten notes when conducting an inspection and incorporates her handwritten notes into the OSHA Express data base, which she then uses to create the final inspection report. If Ewart wants to insert a direct quotation from a witness into her inspection report, she types what is in her notes verbatim, otherwise she summarizes the information. T., Day 1, pp 18-20; 162-63.

21. Once the citations are issued, Ewart shreds her original notes. For the entirety of the ten years during which she has been employed as a CSHO, she has always shred her handwritten notes once she learns that the recommended citations were issued. This practice is consistent with her training and with the practice that she understood other CSHOs to follow. T., Day 1, pp 18-20; 162-63; Day 2, p 11:10 - 21; 11:22 - 12:6.

22. Ewart admitted that not all of the information in her original (handwritten) notes is incorporated into the inspection report. Some information is deemed irrelevant; other information is subsequently determined to be inaccurate. T., Day 1, p 20.

23. A hypothetical example of information omitted was provided by Ewart. If she is investigating a possible violation based on employee training but witness interviews confirm that there was not a violation of training standards, the information on training is not included in the narrative section of the report supporting violations. However, the information would be applied to another section, where Ewart evaluates factors which mitigate against penalties. T., Day 1, p 20; 167-168; 167:25 - 168:2.

24. Former NC DOL CSHO Grant Quiller also testified that the general practice was to include information regarding the employer's good faith compliance with training standards and other relevant mitigating factors in the penalty section of the narrative. T., Day 2, p 156.

25. Ewart is not an attorney and does not have any training or expertise regarding obligations to retain documents in anticipation of litigation. T., Day 1, p 173.

The Investigation of the September 21, 2020 Fire and Employee Fatalities

26. On September 21, 2020 Ewart was assigned to investigate the industrial accident that is the subject of this contested case. Compl. Ex. #1, p 47.

27. At approximately 9:00 a.m. when Ewart arrived at the site a fire was still actively burning and emergency medical personnel were attempting to recover the bodies of two deceased employees. T., Day 1, p 29.

28. Ewart and her colleague were shown to a conference room. Ewart presented her credentials to Evergreen managers Don Jambran, Human Resources, and Paul Sislo and Dan Curry, both with Evergreen's Environmental Health and Safety department. Sislo and Curry consented to the inspection. T., Day 1, pp 30-31; 137.

29. Evergreen's Director of Environmental Health & Safety, Dan Curry, informed Ewart that he was unable to get representatives of the subcontractors, Rimcor and Respondent Industrial Services Group, d/b/a Universal Blastco ("Blastco") to participate in the investigation at this time. Ewart was informed that all personnel employed by the subcontractors had left the property. T., Day 1, p 33. Compl. Ex. #1, p 48.

30. An opening conference was held with the Evergreen personnel who were present in the conference room. Ewart took handwritten notes during the opening conference. T., Day 1, pp 33; 162.

31. Following the opening conference and once first responders had left the accident scene, Ewart conducted a walk-around inspection with the Evergreen representatives as well as the medical examiner. The walk-around inspection involved the area where the accident had occurred and any "plain sight" hazards. Ewart does not recall whether she took notes during the walk-around. T., Day 1, pp 34-35; 162. Compl. Ex. #1, p 48.

32. Ewart did not inspect the Blastco trailer on the worksite. Subsequent to the day of the fire, Ewart was able to inspect the contents of the trailer after the contents were moved to a warehouse in Salisbury, NC. T., Day 1, p 160.

33. Upon returning to the conference room, Ewart learned that representatives from Rimcor and Respondent Blastco were on the property. Ewart introduced herself to Respondent's representatives Reginald Epps and Kirk Kuipers. Respondent's representatives declined to speak with Ewart, indicating that they were waiting for legal counsel. T., Day 1, pp 34; 36; T., Day 2, p 75:10-18; 77:19-21. Greer Test., T., Day 2, pp 108-109. Compl. Ex. #1, pp 48-49.

34. On September 23, 2020 Ewart received consent from Respondent's representative, Board of Directors member, James Whelton, to proceed with her inspection. Compl. Ex. #1, p 49.

35. As part of her investigation, Officer Ewart attempted to conduct interviews with Respondent's employees. Individual details of Ewart's contact with employees are provided in relevant Findings of Fact below. In summary:

    a) Respondent's employee Yassir Morales consented to an interview. Three Compliance Safety and Health Officers were present during his interview and all three testified at this hearing.
    b) Respondent's employee Jose Torres consented to an interview. Three Compliance Safety and Health Officers were present during his interview and all three testified at this hearing.
    c) Superintendent Mason Morales was interviewed by Officer Ewart in the presence of Respondent's Safety Director, Jennifer Dye.
    d) Respondent's employee Jonathan Velez Santana was interviewed by Officer Ewart in the presence of Respondent's employee Jean Carlos, who provided Spanish to English translation, and in the presence of Respondent's Board of

Directors member attorney James Whelton. On a subsequent date, Mr. Santana was asked to give a follow-up interview but he declined to do so.

e) Employees Kevin Marcial and Gustavo Rivera gave limited interviews in the presence of three Compliance Safety & Health Officers who all testified at this hearing.

f) Employees Dakota Baswell, Terry Godoy, Jack Roa, and Frank Sanchez declined to be interviewed by Complainant.

36. With respect to this investigation, Ewart took handwritten notes regarding every representative and potential witness she encountered. Even if the only communication that Ewart had with an individual was the potential witness's statement declining to be interviewed, Ewart made a written record of the encounter. T., Day 2, pp 8:13 - 9:15; 10:10-17. T., Day 1, p 162

37. When an NC DOL Spanish interpreter was used to interpret statements made by Spanish-speaking witnesses during interviews, the interpreters would provide notes to Ewart in English. T., Day 1, p 164.

38. Two days after the accident, on September 23, 2020, Respondent's then-Director of Safety, Jennifer Dye, had arranged for employee interviews in a hotel conference room. Ewart had expected to conduct interviews of all Blastco employees who had been at the worksite on the day of the accident, totaling eight to ten interviews. Instead, Respondent presented two employees for interviews. Of those two, only one was present on the worksite at the time of the accident. T., Day 1, pp 36-39.

39. Complainant's witness Kristie Hall has been employed by the NC DOL for twenty-two and a half years and currently serves as a Health Compliance Officer II. Hall accompanied Ewart on September 23, 2020 to assist with the interviews. T., Day 2, p 85.

40. Ms. Hall took notes during the interviews conducted on September 23, 2020. Once her notes were incorporated into the case file, she shred her notes. T., Day 2, p 88.

41. On September 23, 2020 Mason Morales, Respondent's Fiberglass Reinforcement Plastics Division Superintendent was interviewed by Ewart in the presence of NC DOL employee Kristie Hall and Respondent's Director of Safety Jennifer Dye. Compl. Ex. p 49 T., Day 2, p 90.

42. Mason Morales stated that, on September 20, 2020, the day crew had completed grinding of the existing fiberglass in the D2 upflow tank and then removed the debris from the tower before the end of their shift. Once the debris was cleaned up, he directed the day crew to stage the material for the night crew to begin applying the new fiberglass mats. It was Mason Morales' job to instruct other employees on how to properly stage the materials that the night crew would use to do their work. Compl. Ex. #1 pp 86-87.

43. Respondent used Derakane 510N resin to adhere the fiberglass mats to the wall of the D2 upflow tank. The Derakane was stored in 55 gallon drums and then poured into five

gallon buckets to be taken into the tower. It was Morales who designed a process for the crew to move the Derakane from the large drums located outside the tower to the smaller buckets carried into the tower for the laminators to apply the tank walls. Morales' procedure was intended to be used throughout the September 20, 2020 night shift and, presumably, into the next shift until the job was completed. T., Day 1, pp 71; 88-91; Compl. Ex. #1, pp 87-88.

44. Hall was also present when employee Jonathan Santana was interviewed on September 23, 2020 and confirmed that the interview was conducted in the presence of Respondent's representative James Whelton with Respondent's employee Jean Carlos providing Spanish to English translation. T., Day 2, p 87; 88; 90-91. Compl. Ex. #1, p 49.

45. Jonathan Santana was a laminator working at the worksite on the day of the fire. Mr. Santana identified which of Respondent's employees were working in the D2 upflow tank when the fire started and what their locations were. T., Day 1, p 91. Compl. Ex. #1, p 65.

46. Respondent's employee, Terry Godoy was also present on September 23, 2020. Godoy was a laminator who was in the D2 upflow tower when the fire started. On September 23, 2020 he entered the conference room and informed Ewart that he had sought legal representation and declined to be interviewed. T., Day 1, pp 39-40.

47. Respondent's employee, Dakota Baswell, was the fiberglass reinforcement plastic supervisor assigned to the night shift. Baswell was in the D2 upflow tower when the fire started. Baswell was also present on September 23, 2020 and informed Ewart that he had sought legal representation and declined to be interviewed. T., Day 1, pp 39-40.

48. Hall confirmed that Godoy and Baswell said nothing more than that they were seeking legal representation and declined to be interviewed. T., Day 2, p 87. Compl. Ex. p 49.

49. At some point, Ewart was provided with several handwritten statements that Godoy had provided to Evergreen investigators on September 21, 2020. Subsequently, a typewritten statement was provided to Ewart by Godoy's attorney. The typewritten statement was signed by him in the presence of a notary. T., Day 1, p 48. Compl. Ex. #1, pp 184-189.

50. A representative from Evergreen also gave Ewart a handwritten document purported to be a statement from Dakota Baswell. Subsequently, Baswell's attorney provided a typed version of the handwritten statement. T., Day 1, pp 53-54; 56. Compl. Ex. #1, pp 190-193.

51. There was no attempt to use a subpoena to obtain an interview with Baswell or Godoy while the NC OSH investigation was still active. T., Day 1, p 159; T., Day 3, p 16.

52. Complainant did not call Baswell as a witness in its case-in-chief.

53. Complainant did not call Godoy as a witness in its case-in-chief.

54. On October 6, 2020 Rimcor employee Laricia Ledent provided a written statement for Officer Ewart. Ms. Ledent stated that when the fire started she saw "the other workers coming down the scaffold [and] one guy threw down a heating gun." Compl. Ex. 1, p 194. T., Day 1, p 57.

55. The damaged upflow and downflow tanks from the worksite were moved to a warehouse in Salisbury, NC. Ewart had the opportunity to inspect the equipment on October 28, 2020. T., Day 1, p 40. Photographs #11.jpg, #13.jpg, #ufl.jpg - #6uf6.jpg.

56. Photographs hg1.jpg - hg9.jpg depict the heat gun removed from the worksite which was believed to have been seen by Ms. Ledent. T., Day 1, pp 45-46.

57. Griselle Negron and Grant Quiller were Compliance Safety and Health Officers who accompanied Ewart during interviews with Spanish-speaking witnesses on October 29, 2020 and October 30, 2020 at the offices of Respondent's attorneys Fisher and Phillips, LLC. Both officers were present with Ewart during all interviews conducted on those days and both provided Ewart with their notes, written in English, based on the interviews. Ewart read the notes from the other CSHOs and determined what information from their notes was relevant to include in her investigative file. T. Day 1, p 165; T. Day 2, pp 134-135; 140-141; 147; 165-166. Compl. Ex. #1, pp 59; 61.

58. Negron and Quiller provided oral translations from English to Spanish and from Spanish to English contemporaneously during the interviews. T. Day 2, pp 175-176.

59. On October 29, 2020 Jonathan Santana, who had been interviewed on September 23, 2020 in the presence of James Whelton, was present at the offices of Fisher & Phillips but declined to be further interviewed by Complainant's investigators. T. Day 2, pp 139; 164-165.

60. On October 29, 2020 Respondent's employees Jack Roa and Kevin Marcial were present at the offices of Fisher & Phillips, LLC but declined to be interviewed by Complainant's investigators. T. Day 2, pp 139; 164-165.

61. On October 29, 2020 Respondent's former employee Yassir Morales was present at the offices of Fisher & Phillips, LLC and agreed to be interviewed. Mr. Yassir Morales confirmed that the Derakane 510N epoxy vinyl ester resin was dispensed from a 55 gallon drum located outside the tank to 5 gallon buckets which were brought into the D2 upflow tank. T. Day 2, p 139. Compl. Ex. #1, p 75.

62. On October 30, 2020 Respondent's employee Franklin Sanchez was present but declined to be interviewed. Respondent's employee Gustavo Rivera was interviewed and stated only that he "did everything right to the letter and the 'T,'" and that he did not observe anything else. He answered limited questions concerning atmospheric monitoring in the confined space but then declined to further participated in the interview process. Mr. Rivera's statement was the only verbatim quotation used by Ewart in her official inspection report. At the enforcement hearing, Ewart and Negron both testified as to the

verbatim quotation attributed to Mr. Rivera. T. Day 1, pp 165-166; T. Day 2, pp 18; 139-140; 171. Compl. Ex. #1, p 59.

63. On October 30, 2020 Respondent's employee Jose Torres agreed to be interviewed. T. Day 2, p 166.

64. From Respondent's employees Jose Torres, Yassir Morales and Mason Morales Ewart learned what tasks were being "done in the tanks . . . where they were located, who was located near them, who was working in the tanks at the time of the accident and what they saw." T., Day 1, pp 79-80; 92.

65. Witnesses Mason Morales and Gustavo Rivera both stated that the multigas meter used to perform atmospheric testing was located outside of the tower. Witnesses Jonathan Santana, Yassier Morales and Jose Torres all stated that employees did not wear personal monitors for monitoring the atmosphere inside the tank. The monitor that was located outside the tank was not capable of monitoring the indoor air quality. Compl. Ex. #1, p 93.

66. Ewart returned to the Salisbury warehouse on November 20, 2020 where she was able to view other equipment taken from the site, including: lighting, personal protective equipment, heat guns, buckets, and barrels. Three of Respondent's employees were present at the warehouse on November 20, 2020 and accompanied Ewart as she inspected the equipment. T., Day 1, pp 42; 44-45. Compl. Ex. #1, pp 49-50.

67. Ewart determined that the accident occurred when Respondent's employees were using Derakane 510N epoxy resin to adhere fiberglass mats to the walls of the D2 upflow tank. A heat gun was used by employee Terry Godoy to heat the resin. The heat gun fel into a bucket containing the Derakane and started a fire. Godoy's written statement claimed that he was instructed to bring the heat gun into the tower by Dakota Baswell. T., Day 1, pp 67-70; 74 (heat gun found among the contents identified as being in the Respondent's trailer at the worksite); 79:5-9; 83-84. Compl. Ex. 1, pp 65; 75; 188. See also Resp. Ex. #21 (Declaration of Kevin Marcial stating that he was Godoy with the heat gun inside the tank);

68. There is no dispute that a heat gun was used in the confined space by Respondent's employees. Stipulation by Respondent's attorney, T., Day 3, pp 13-14; Epps' Testimony, T., Day 3 p 44:2-8.

69. As part of her investigation, Ewart requested documents from Respondent, including its confined space policies, training records and copies of entry permits. T., Day 1, p 59.

70. Ewart's investigation included research on the adhesion chemicals being used by Respondent. The nature of the Derakane was such that large amounts of the resin could not be used at once because the resin would set in approximately 30 minutes. In addition, the large drums could not be transferred into the confined space. Therefore, a plan needed to be designed in advance for the continuous transfer of the Derakane 510N resin

from the large drums to the smaller five gallon buckets. The need for the continuous transfer was foreseeable and a plan for the transfer was an intrinsic part of the design of the work. Compl. Ex. #1, p 87.

71. The Safety Data Sheet for Derakane 510N epoxy vinyl ester resin states "electrically bond and ground all containers, personnel and equipment before transfer or use of materials." Compl. Ex. #1, pp 89; Appendix 14, p 323.

72. The 55 gallon drum of Derakane 510 N resin was not electrically bonded to the 5 gallon buckets when employees were pouring the resin from the large drum to the smaller buckets. T., Day 1, pp 71; 88-91; Compl. Ex. #1, pp 87-88; photo 16, 21, 22

73. Because Respondent's Superintendent Mason Morales was responsible for designing a procedure to move the resin from the larger drums to the smaller buckets he was aware that the 55 gallon drums and the five gallon buckets were not electrically connected. Compl. Ex. #1, pp 87-88.

74. Respondent maintains safety data sheets for products used in its work. Those sheets were available in Respondent's work trailer and were also provided to Evergreen when the job was initially bid. The safety data sheets specifically included the Safety Data Sheet for Derakane Epoxy Resin. T., Day 2, pp 200-201; T., Day 3, pp 75-76. Compl. Ex. #1, p 89; Appendix 14, p 323.

75. The Safety Data Sheet for the Derakane would have been available to Superintendent Mason Morales from Respondent's work trailer before he designed the procedure for transferring the resin from the larger drums to the smaller buckets. *Id.*

76. The failure to use proper electrical grounding while transferring the Derakane could have resulted in ignition from the chemical's vapors and a resulting fire on the ground outside the D2 tank. Employees in the area could be exposed to the hazard of burns requiring medical treatment. Compl. Ex. #1 p 86.

77. A confined space entry permit is required to be completed by an employer authorizing its employees to enter a confined space to perform work. T., Day 1, p 97; Compl. Ex. #1, pp 363-365 (Respondent's permitting policies).

78. When a host employer has a form for confined space permitting, the host employer's form rather than a contractor's own form is used. T., Day 2, p 199.

79. In this case, Evergreen's employees, as the host employer, recorded information on its permit form in all areas except where Respondent's attendant monitored the entry and exit of Respondent's employees into the tower. T., Day 1, p 108

80. Prior to allowing employees to enter the confined space, the employer must perform testing to determine atmospheric hazards. Once entry is authorized, the employer is required to monitor for the same hazards within the space where employees are working

T., Day 1, pp 97-98. Compl. Ex. #1, pp 359-363 (Respondent's Permit Required Confined Space Program).

81. Ewart determined that only the entry to the D2 upflow tank was being monitored. There was no monitoring of atmospheric conditions inside the tank. Witnesses Mason Morales and Gustavo Rivera both stated that the multi-gas meter was located outside of the tower. Witnesses Jonathan Santana, Yassier Morales and Jose Torres stated that employees did not wear personal monitors for monitoring the atmosphere inside the tank. The monitor that was located outside the tank was not capable of monitoring the indoor air quality. T., Day 1, p 98-99; 102 (employees were not wearing personal monitors while working in the confined space); Compl. Ex. #1, p 93.

82. Because there were two different contractors' employees working in the connected confined spaces, procedures for entry into the upflow and the downflow tanks needed to be coordinated so that employees working in one space would not endanger employees working in the other, connected, space. T., Day 1, pp 104-105.

83. Respondent's Confined Space Entry procedures instructed employees that they were required to coordinate entry operations with any other contractor working in the space or anywhere else on the worksite where Respondent's activities could create a hazard. Compl. Ex. #1, pp 103; 362-363.

84. Employees of Rimcor confirmed that there were no meetings with Respondent's employees concerning what work was being done in the D2 upflow tank and, more specifically, that Rimcor employees were not advised that a heat gun was introduced into the D2 upflow tank to warm the resin. Compl. Ex. #1, p 100.

85. Respondent's employee Mason Morales also confirmed that there was no coordination with the Rimcor employees. T., Day 1, pp 104-105. Compl. Ex. #1, p 103.

86. As a result of Ewart's inspection, three citations with one, nine and three items respectively were issued on March 16, 2021 carrying the following proposed abatement dates and penalties:

CITATION / ITEM NO.	STANDARD	DESCRIPTION OF VIOLATION	PENALTY	ABATEMENT DATE
1 - 001	1910.106(e)(2)(iv)(c)	Category 3 Flammable Liquid w a flashpoint 79° used where there were open flames. At the D2 upflow tank a heat gun was used to warm Derakane 510 epoxy vinyl resin	63,000.00	3/26/21
2-001	1910.106(e)(6)(ii)	Category 3 Flammable Liquid w a flashpoint 79° dispensed was into containers in which the nozzle and container	2100.00	3/26/21

		were not electrically interconnected At the D2 upflow tank employees dispensed Derakane from 55 gal metal drum to 5 gal buckets; the drum / bucket were not electrically connected		
2-002	1910.146(d)(5)(i)	In a confined space too large to feasibly isolate, pre-entry testing was not performed. Where authorized employees were working continuous monitoring was not done At the D2 upflow, employees were contracted to replace 30 ft vertical section, 20 ft up, multi-gas monitor being used for continuous monitoring had 4ft sampling hose and monitor was located outside confined space	5600.00	3/26/21
2-003	1910.146(d) (11)	Employer did not coordinate entry operations in a confined space where employees of another contractor would not be endangered by Employer's operations At D2 upflow tank Blastco employees were working while Rimcor employees were also working at connected D2 downflow tank. Procedures to coordinate entry operations were not coordinated and implemented	5600.00	5/3/21
2-004	1910.146(e)(1)	Employees worked in confined space w/o entry permit being prepared. Specifically on 9/20/20 btwn 2:32 and 8:11 pm	5600.00	5/3/21
2-005	1910.146(e)(6)	Failure to retain each cancelled entry permit; no permit for work was completed 9/19/20 morning to afternoon	5600.00	5/3/21

2-006	1910.146(f)(6)	Entry permit was not signed or initialed by the supervisor 9/20/20 atmospheric testing time 8:11 pm	5600.00	5/3/21
2-007	1910.146(f)(7)	Entry permit did not identify hazards of the confined space - D2 upflow tank, hazards such as presence of chlorine dioxide and use of volatile chemicals	5600.00	5/3/21
2-008	1910.146(f) (14)	Other missing information from entry permit -- info regarding ventilation req'd for hazardous gas or volatile chemicals	5600.00	5/3/21
2-009	1910.1200(e) (2)	Blastco who used and stored hazardous chemicals, did not ensure a communication program was developed & implemented for the benefit of another Employer's employees No access to safety data sheets, or inform regarding chemical labeling system or other precautions needed	5600.00	5/3/21
3-001	1910.146(f)(1)	entry permit did not properly identify permit space to be entered - permit identified D2 downflow; should have said D2 upflow	--	5/3/21
3-002	1910.146(f)(2)	entry permit did not identify purpose of entry	1050.00	5/3/21
3-003	1910.146(g)(4)	Employer's certification of training missing name of trainer	1050.00	4/12/21

Respondent's Policies and Practices

87. Reginald Epps is Respondent's Corporate Safety Director. Mr. Epps has held his current position for three years but has been employed with the Respondent for thirteen years. Epps' current responsibilities include the development, implementation and management of Respondent's safety program. T., Day 2, pp 186; 188-189.

88. Mr. Epps has observed Respondent to have a successful safety program that includes a written safety manual provided to each employee and electronically accessible through

the employee's employee portal, training provided at the hiring stage and annually thereafter, safety meetings at each job site, weekly "toolbox" talks, and by direct supervision of employees. Some training is conducted in face-to-face settings other training is conducted virtually through a training vendor. Testing is administered to give the employer feedback about effectiveness and where indicated, follow-up with direct observations occurs. T., Day 2, pp 189-192; 193:4-6; Day 3, p 69. Resp. Ex. #4.

89. Employee violations of safety protocols result in re-training opportunities, at a minimum, or disciplinary measures for serious violations. T., Day 2, p 194.

90. Respondent's employee training includes training for safety within confined work spaces, including training regarding the attendant's role and responsibilities, the responsibilities for entry and supervision within a confined space. T., Day 2, p 192; 194. Resp. Ex. #4.

91. Respondent's training also incorporates training from host employers as well as on-site safety inspections by Respondent's managers. T., Day 2, p 193.

92. Respondent's safety policies include specific requirements for "hot work," which is "any operation capable of providing a source of ignition" including "riveting, welding, cutting, burning or heating." T., Day 2, p 196:1-10.

93. Use of a heat gun would be considered "hot work" under Respondent's policies and would require an employee who intended to use a heat gun to complete a hot work permit. T., Day 2, pp 196-197.

94. Respondent performed its own investigation regarding events leading to the September 20, 2020 fire. At the time of the fire, Mr. Epps was a Regional Site Safety Manager for Respondent and was the safety site manager for the Evergreen job site. Mr. Epps participated in Respondent's investigation of the fire. T., Day 2, pp 202-203.

95. Employees Terry Godoy and Dakota Baswell received training on "hot work" and the requirement to complete a hot work permit. T., Day 2, p 197; T., Day 3, pp 53-54; 69.

96. As an alternative to using a heat gun to heat the resin, Respondent's employees had barrel warmers available. One was in Respondent's on-site trailer; the other had been brought to the site by employee Dakota Baswell. T., Day 3, pp 45-46.

97. Following the fire at Evergreen, Baswell and Godoy were terminated from their positions with Respondent for violating Respondent's safety policies regarding the use of a heat gun in a confined space. T., Day 2, p 194; T., Day 3, pp 66-67.

98. The most credible evidence presented at the hearing was that use of a heat gun in a confined space was not a practice ever used by Respondent and was a violation of the employer's policies as well as proscribed by Respondent's employee training protocols. T., Day 3, p 44.

99. Respondent had no reason to foresee the safety violations committed by their employees Baswell and Godoy. T., Day 3, p 83:10-15.

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. Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(11). Stip. #6.

3. The Review Commission has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. § 95-135.

4. To establish a violation of a specific OSHA standard, the Complainant has the burden of proof to demonstrate that (1) the standard applies to the alleged violative act; (2) a violation occurred; (3) employees were exposed to the hazard which the standard was designed to prevent; and, (4) the employer had actual or constructive knowledge of the violation. *N&N Contrs. Inc. v. OSHRC*, 255 F.3d 122, 126 (4th Cir. 2001).

5. The Complainant correctly applied the General Industry Standards to assess potential hazardous working conditions at Respondent's worksite and Complainant's interpretation of its own standard is reasonable and owed deference.

a) In May 1995, the Directorate of Compliance Programs for OSHA published CPL 2.100 ("Application of the Permit-Required Confined Space (PRCS) Standard, 29 C.F.R. 1910.146.") The CPL addresses the circumstances under which a confined space may be classified as PRCS because of "recognized serious safety or health hazards." The CPL is organized in question and answer format.

b) CPL 2.100 provides that "refurbishing of existing equipment or space is maintenance" covered by 29 C.F.R. 1910.146 and is distinguished from construction work. Appendix E, Question #8.

c) CPL 2.100 also provides that construction generally means "reconfiguration of space or installation of substantially new equipment (as for a process change)." *Id.*

d) An example of the application of 29 C.F.R. 1910.146 includes "The lining in a tank is in need of restoration either to prevent the structural part of the tank from

deteriorating or to prevent the product from being contaminated by the material making up the tank structure." *Id.*

e) Evergreen contracted with Respondent to refurbish its existing manufacturing tanks with the same material previously used. Respondent was not replacing the existing structures. Compl. Ex. #1 pp 52; 198-199 (noting that Respondent was re-lining only thirty feet of the D2 upflow tank, not the entire tank). See also, the parties' Stipulation #10 "Evergreen hired ISG to perform maintenance on a fiberglass tank known as the D2 Up flow tank/tower."

6. In order to impute liability to Respondent for the hazards associated with the introduction of the heat gun into the confined space of the D2 upflow tank Complainant must prove that Respondent had actual or constructive knowledge that its employees brought a heat gun into the tank to warm the flammable resin being applied to the tank walls.

7. The idea to use the heat gun is attributed to Dakota Baswell. (See Finding of Fact "FOF" #67). The fact that Dakota Baswell is identified as a "supervisor" is not sufficient to impute actual knowledge regarding the use of the heat gun to the Respondent.

a) While Baswell was identified as a "night supervisor," the mere title is insufficient to characterize Baswell as someone who acted with Respondent's knowledge. The appropriate test for whether an employee is a supervisor is the test applied for matters arising under the National Labor Relations Act. *Otis Elevator Co.*, No. 03-1344, 2005 OSAHRC LEXIS 11 at *17 (Mar. 7 2005).

b) To determine whether an employee is a supervisor for the purpose of imputing employer knowledge it must be shown that the employee, acting in the interest of the employer, has the authority to do one or more of the following: "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 USC §152(11).

c) Evidence presented at the hearing was that Baswell did not possess any of the authoritative functions listed in 29 USC §152(11). T., Day 3, p 81. Furthermore, evidence was that it was Mason Morales who directed the work to be performed by the night shift, including staging the materials used. There was no evidence that Baswell had any discretion to use materials not specifically directed by Morales. Compl. Ex. #1, pp 87-88. T., Day 1, pp 71; 88-91.

8. Assuming without agreeing that Baswell was a supervisor, his status as a supervisor is insufficient to prove employer knowledge because his conduct was not reasonably foreseeable.

(a) "[I]f a violation by an employee is reasonably foreseeable, the company may be held responsible. But, if the employee's act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes behind the Act require that a citation be set aside." *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979).

(b) A supervisor's knowledge of his own violations may be imputed to the company only if the violations were foreseeable to others in the company. *Id.*

(c) In the instant case, the facts that Respondent had policies and training which proscribed the practice of introducing a flammable heat source into a confined space, and, had supplied an alternative, barrel blankets to warm the Derakane resin, make Baswell's use of the heat gun unforeseeable to Respondent. FOF #s 88-93; 95-96; 98-99.

(d) Baswell's self-serving, unsworn and vague written statement that "this happens all the time" (Compl. Ex. #1, pp 192-193) lacks credibility when compared to the sworn testimony, subjected to cross-examination, presented at the hearing which credibly demonstrated that training had been given to the employee(s) in question. Likewise, Godoy's self-serving unsworn statement, revised several times, lacks credibility compared to the sworn testimony presented at the hearing. Compl. Ex. #1, pp 184-189.[2]

9. It is the Complainant's burden to show that employees' exposure to the hazards of an ignition source brought into the confined space by Respondent's employees was foreseeable. *New River Elec. Corp. v. OSHRC*, 25 F.4th 213, 221 (4th Cir. 2022) (To avoid unfairly imposing liability on an employer for a rogue supervisor, our circuit requires the Secretary to prove that a supervisor's misconduct was "reasonably foreseeable" to establish the employer had constructive knowledge.) *L.R. Willson & Sons v. OSHRC*, 134 F.3d 1235, 1237 (4th Cir. 1998) (holding the Commission erred where it placed the burden of proving unforeseeability on the Employer).

10. Constructive knowledge may also be shown if the employer fails to use reasonable diligence to discern the presence of the violative condition. *N&N Contrs. Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001). In this case, Respondent's policies and training procedures and the presence of alternative means for warming the resin demonstrate reasonable diligence negating an inference of constructive knowledge. FOF #86-91; #96.

11. Complainant has not met its burden to prove that Respondent is liable for a violation of 29 C.F.R. §1910.106(e)(2)(iv)(c) as a result of its employees Terry Godoy and Dakota

[2] Complainant has unpersuasively argued that credibility should be ascribed to the fact that Godoy's statement was signed in the presence of a notary. Compl. Br., p 11. The fact that it was signed in the presence of a notary merely authenticates the person signing but does not provide any indicia of trustworthiness of the statements made.

Baswell using a heat gun in the confined space of the D2 upflow tank to warm the resin being applied to the tank walls.

12. Complainant has met its burden to prove that Respondent is liable for a violation of 29 C.F.R. §1910.106(e)(2) where Respondent dispensed Derakane 510N resin, a Category 3 Flammable Liquid, from fifty five gallon drums into five gallon buckets without electrically connecting the two containers.

(a) The two containers were not electrically connected. FOF #72.

(b) Superintendent Mason Morales designed the procedures for the employees to transfer the Derakane. FOF #73

(c) The Safety Data Sheets for the Derakane were available to Morales in Respondent's work site trailer. FOF #s 74-75.

(d) The hazard created by the failure to connect the two containers is a hazard the standard is designed to prevent. FOF #s 70; 76.

(e) Morales' conduct can be imputed to the Respondent as actual knowledge of the violative conduct because, as the Fiberglass Reinforcement Plastics Division Superintendent, Morales had the authority to design and direct the processes used by the night crew and exercised his judgment and discretion in staging the materials for the crew. Morales' authority is consistent with the factors identifying him as a supervisor within the meaning of 29 USC §152(11).

13. Complainant correctly classified the violation of 29 C.F.R. §1910.106(e)(2) as a serious violation where there was substantial evidence that Respondent's violation created the possibility of an accident and that the substantially probable result of said accident is death or serious physical injury. *Brooks, Com'r of Labor v. Grading Co.*, 303 N.C. 573, 585-6, 281 S.E.2d 24, 32 (1981). See, FOF #76.

14. Complainant met its burden to prove that Respondent is liable for a violation of 29 C.F.R. §1910.146(d)(5) where Respondent authorized its employees to enter a confined space but did not continuously monitor the atmospheric conditions in the confined space. FOF #s 80-81. Mason Morales' knowledge of the violation is attributable to the Respondent because the condition had existed throughout the day shift and he assigned the work, and had the authority to correct the violations. Morales' authority is consistent with the factors identifying him as a supervisor within the meaning of 29 USC §152(11).

15. Complainant correctly classified the violation of 29 C.F.R. §1910.146(d)(5) as a serious violation where there was substantial evidence that Respondent's violation created the possibility of asphyxiation and the substantially probable result would be death or serious physical injury. *Brooks, Com'r of Labor v. Grading Co.*, 303 N.C. 573, 585-6, 281 S.E.2d 24, 32 (1981). See, T. Day 1, p 100.

16. Complainant met its burden to prove that Respondent is liable for a violation of 29 C.F.R. §1910.146(d)(11) where Respondent did not coordinate entry operations into the D2 upflow tank with Rimcor employees working in the D2 downflow tank and where the two tanks were connected. The coordination with the other contractor should have been part of the overall management of the project. FOF #s 6, 83-85.

17. Complainant correctly classified the violation of 29 C.F.R. §1910.146(d)(11) as a serious violation where there was substantial evidence that Respondent's failure to implement a regular procedure of coordination with the Rimcor employees resulted in a failure to notify Rimcor employees that an ignition source and flammable liquid were introduced into the common space and that said failure resulted in the death of two employees.

18. Complainant failed to meet its burden to prove that Respondent is liable for violations of 29 C.F.R. §1910.146(e)(1). Where Complainant's evidence showed that some permit entries were completed by Evergreen employees and other entries on the same permit forms were completed by contractors, including Respondent, and, where the evidence showed that the permit forms were more likely to be retained by Evergreen, Complainant failed to show by the preponderance of the evidence that a missing permit was due to Respondent's failure to complete permit entries.

19. Complainant failed to meet its burden to prove that Respondent is liable for violations of 29 C.F.R. §1910.146(e)(6), 29 C.F.R. §1910.146(f)(6), 29 C.F.R. §1910.146(f)(7) and 29 C.F.R. 146(f)(14). Where the evidence showed that the permit forms were partially completed by Evergreen employees, that the forms were created by Evergreen and where Evergreen tended to retain copies of permits, the preponderance of the evidence did not support a finding that Respondent failed to retain cancelled permits, or failed to supply information that was missing from the permits.

20. Complainant failed to meet its burden to prove that Respondent is liable for violations of 29 C.F.R. §1910.1200(e)(2) where the preponderance of the evidence presented at the enforcement hearing showed that Respondent maintained Safety Data Sheets in its work trailer and had supplied copies of the same documents to Evergreen before work on the project began. FOF #74; T. Day 2, p 200.

21. Complainant failed to meet its burden to prove that Respondent is liable for violations of 29 C.F.R. §1910.146(f)(1) and 29 C.F.R. §1910.146(f)(2). Where the evidence showed that the permit forms were partially completed by Evergreen employees, that the forms were created by Evergreen and where Evergreen tended to retain copies of permits, the preponderance of the evidence did not support a finding that Respondent failed to supply information required on the permit forms.

22. Complainant failed to meet its burden to prove that Respondent is liable for violations of 29 C.F.R. §1910.(g)(4). Where the evidence showed that the training certificates contained the electronic stamp of the website where the employee had accessed the training the same constitutes a verification of the training that the standard is designed enforce. During the year 2020 when most of the employees' training took place the

employer's use of the online training programs displaying the vendor's website address from where the training was obtained was the equivalent of an electronic signature.

23. For the violations proved by the Complainant by the preponderance of the evidence, the Complainant properly calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant's North Carolina Operations Manual.

24. Based upon the violations found, Respondent shall pay the following penalties:

Citation 2, Item 001, violation of 29 C.F.R. §1910.106(e)(6)(ii)	$2,100.00
Citation 2, Item 002, violation of 29 C.F.R. §1910.146(d)(5)(i)	$5,600.00
Citation 2, Item 003, violation of 29 C.F.R. §1910.146(d)(11)	$5,600.00

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that:

Citation 1, Item 001 is DISMISSED;
Citation 2, Item 001 is AFFIRMED;
Citation 2, Item 002 is AFFIRMED;
Citation 2, Item 003 is AFFIRMED;
Citation 2, Item 004 is DISMISSED;
Citation 2, Item 005 is DISMISSED;
Citation 2, Item 006 is DISMISSED;
Citation 2, Item 007 is DISMISSED;
Citation 2, Item 008 is DISMISSED;
Citation 2, Item 009 is DISMISSED;
Citation 3, Item 001 is DISMISSED;
Citation 3, Item 002 is DISMISSED;
Citation 3, Item 003 is DISMISSED.

Respondent's total penalty amount of **$13,300.00** shall be paid within **30 days** of the entry of this ORDER.

Respondent's Motion to Suppress Evidence is DENIED and Respondent's Motion for an Adverse Inference and/or Sanctions is DENIED.

This the 4th day of April 2025.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner Presiding
maleon@leonlaw.org

APPENDIX A

PARTIES' STIPULATIONS

Prior to the hearing the parties submitted a joint prehearing report which included the following stipulated facts:

1. Pursuant to N.C.G.S. § 95-135, the Review Commission has jurisdiction over the parties to this action and its subject matter.
2. 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, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§ 95-133 et seq.
3. Respondent, Industrial Services Group, Inc. (ISG), is a South Carolina Corporation, which is authorized to do business in North Carolina. It is active and current and maintains a place of business in North Carolina.
4. ISG was at all times relevant herein doing business as Universal Blastco (Blastco).
5. Respondent's business includes custom fabrication, installation, repairs, and inspections of Fiberglass Reinforced Plastic, an engineered composite.
6. Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(11).
7. During the period from September 21, 2020, through March 16, 2021, various Compliance Safety and Health Officers (CSHOs) with the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at Evergreen Packaging, LLC, (Evergreen) 175 Main Street, Canton, North Carolina (the site).
8. CSHO Robin Ewart was Complaint's primary officer for this inspection.
9. The site was a paper mill.
10. Evergreen hired ISG to perform maintenance on a fiberglass tank known as the D2 Up Flow tank/tower.
11. The Up Flow tank measured approximately 10' (10 feet) in diameter, 105' 4" (105 feet 4 inches) high and had walls approximately 4" (4 inches) thick.
12. The Up Flow tank had a conical bottom elevated 12' (12 feet) from the ground.
13. Evergreen hired Rimcor, Inc. to perform maintenance on a brick/tile lined tank known as the D2 Down Flow tank/tower.
14. The Down Flow tank measured approximately 22' (22 feet) in diameter.
15. The Down Flow tank was cylindrical and rose from the ground to a height of approximately 109'6" (109 feet and 6 inches).
16. The two tanks were connected by a crossover tube located approximately 110' (110 feet) above ground.
17. CSHOs Robin Ewart and Michael Greer entered the site and conducted the inspection pursuant to a fatality report.
18. Two Rimcor employees died in the incident.
19. Wally McDonald, General Manager for Evergreen Packaging, LLC, gave CSHOs consent to conduct the inspection.
20. Leslie Frady, Safety and Loss Prevention officer for Evergreen, accompanied CSHOs during the walkaround portion of the inspection, along with Stewart Coates, Environmental Health and Safety Engineer, and Donny Buchanan, Pulp Mill Supervisor.
21. Following the fatalities, the Up Flow tank was transferred to a secure storage facility.
22. The Down Flow tank was dismantled due to safety concerns regarding its structural integrity.
23. On October 28, 2020, CSHO Ewart viewed the Up Flow tank and the exterior crossover walkway at the storage facility.
24. On November 20, 2020, CSHO Ewart, accompanied by CSHOs Grant Quiller and Griselle Negron viewed additional evidence that had been moved to the storage facility.

25. On March 16, 2021, as a result of the inspection, Complainant issued one WILLFUL SERIOUS citation with one item, two SERIOUS citations with nine items and one NONSERIOUS citation with three items, carrying the following proposed abatement dates and penalties:

CITATION / ITEM NO.	STANDARD	PENALTY	ABATE DATE
	Citation One	**(Willful Serious)**	
1 - 001	1910.106(e)(2) (iv)(c)	63,000.00	3/26/21
	Citation Two	**(Serious)**	
2-001	1910.106(e)(6)(ii)	2100.00	3/26/21
2-002	1910.146(d)(5)(i)	5600.00	3/26/21
2-003	1910.146(d) (11)	5600.00	5/3/21
2-004	1910.146(e)(1)	5600.00	5/3/21
2-005	1910.146(e)(6)	5600.00	5/3/21
2-006	1910.146(f)(6)	5600.00	5/3/21
2-007	1910.146(f)(7)	5600.00	5/3/21
2-008	1910.146(f) (14)	5600.00	5/3/21
2-009	1910.1200(e) (2)	5600.00	5/3/21
	Citation Three	**(Nonserious)**	
3-001	1910.146(f)(1)	--	5/3/21
3-002	1910.146(f)(2)	1050.00	5/3/21
3-003	1910.146(g)(4)	1050.00	4/12/21

26. Evergreen was not cited by the Complainant.
27. For the alleged violations, the Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant's North Carolina Operations Manual. Pursuant to Chapter VI, section B of the North Carolina Operations Manual, Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty, as appropriate: 10% for size, 0-10% for good faith, and 0-10% for history.
28. Per Chapter VI penalties assessed for violations that are a proximate cause of a fatality or serious injury will be adjusted for size only, as appropriate.
29. Respondent submitted a timely Notice of Contest, dated April 15, 2021.
30. Respondent submitted a timely Statement or Employer's Position dated May 3, 2021, which requested formal pleadings.
31. A complaint and answer were timely filed.

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST STE 2020
CHARLOTTE, NC 28202

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

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

via email.

THIS THE 7 DAY OF April 2025.

PAUL E. SMITH
CHAIRMAN

K B Sluss

Karissa B. Sluss
Docket Administrator
NC Occupational Safety &
Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (984) 389-4132
NCOSHRC@oshrc.labor.nc.gov