

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

**FILED**

DEC 16 2021

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA

Complainant,

v.

BRADLEY PERSONNEL INC  
and its successors

Respondent.

DOCKET NO: 2019-6136

INSPECTION NO: 318152824

CSHO ID: V4994

DECISION AND ORDER

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on October 21, 2021 via LifeSize video platform pursuant to a Notice of Hearing. The record closed on November 23, 2021 upon receipt of Post-Hearing Briefs from the parties.

Stacey A. Phipps, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Travis W. Vance, Attorney with Fisher & Phillips LLP, Charlotte, North Carolina, appeared for the Respondent.

Prior to the Hearing Respondent filed a Motion in Limine. After a conference with the parties at the beginning of the Hearing Respondent withdrew its Motion.

At the time of the Hearing the parties agreed upon and consented to Stipulations 1 through 28 set forth on Attachment 1.

At the Hearing the witnesses called by Complainant were: Compliance Safety and Health Officer Mr. James Dempsey, an Industrial Hygienist employed by the North Carolina Department of Labor ("CSHO Dempsey") and Ms. Shellie Musick, Safety Coordinator for Bradley Personnel Inc. Respondent cross examined Complainant's witnesses but did not call any other witnesses.

The Bradley Citation

Attachment 2 contains a copy of the Citation and Notification of Penalty issued to Respondent (the "Citation").

## **The Standard**

The Bradley Citation alleges a serious violation of NCGS 95-129(1); this statute is referred frequently to as the 'General Duty Clause'. The statute specifically provides:

§ 95-129. Rights and duties of employers.

Rights and duties of employers shall include but are not limited to the following provisions:

- (1) Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees;

## **Background**

Relevant to the history of this matter: Beginning on November 28, 2018, CSHO Dempsey inspected (the "November Inspection") the worksite of Elite Displays & Designs, Inc. ("Elite") located at 6771 Pike View Drive, Thomasville, North Carolina (the "Worksite"); CSHO Dempsey conducted an opening conference with Elite; CSHO Dempsey conducted a walk-through inspection of the Worksite on November 28, 2018; employees of Elite were at the Worksite; at some point during the Inspection CSHO Dempsey was informed that there were also at the Worksite employees of three agencies providing temporary employees, one of which was Respondent; Elite was considered the 'Host Employer'.

Based on the Stipulations at the time of the Hearing, and on the testimony/evidence presented at the Hearing and considering the record and the briefs/memoranda of the parties, and applicable law, the Undersigned makes the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. -28. The Stipulations set forth in Attachment 1 are herein incorporated by reference as Findings of Fact 1 through 28 inclusive.

29. The testimony of CSHO Dempsey established the following: (i) that at host employer's worksite some employees worked with adhesives which contain isocyanates; also there was cutting of ceramic porcelain tile which contains silica; (ii) that the chemicals of concern were silica and isocyanates; (iii) that the violation was based on there being hazardous chemicals and Respondent's employees being exposed to such chemicals; (iv) that he determined the violation was serious since exposure could result in serious illness such as silicosis by silica and adverse respiratory and skin reactions by isocyanates; (v) that a feasible means of abatement would be to increase ventilation and to wear proper personal protective equipment; (vi) that he did not

conduct any testing of the adequacy of ventilation or the adequacy of the personal protective equipment being used by Respondent's employees; (vii) that sampling was conducted for isocyanates on one of Respondent's employees that seemed to have the greatest exposure and that no isocyanates were detected; (viii) that the result of silica sampling conducted on one of Respondent's employees that worked in tile cutting showed no overexposure to silica; (ix) that during the Inspection of Respondent he did not find any actual exposure of Respondent's employees to silica or isocyanates at the Elite worksite; (x) CSHO Dempsey thought the personal protective equipment provided to Respondent's employees was not adequate; (xi) under OPN 146 Respondent had no obligation to do an inspection of the Elite worksite; and (xii) the penalty assessed for the Citation 01 Item 001 was calculated in accordance with the Field Operation Manual applied to all employers.

30. Testimony also showed that (i) Respondent had no knowledge of the silica in the tile being cut or of the isocyanates in the adhesive; (ii) Respondent did not conduct its own hazard investigation of the Worksite; (iii) the job descriptions given to Respondent by Elite could have included more detail relative to weight lifting, personal protective equipment, binding/stooping, etc; (iv) Respondent did not have the MDS/SDS for the tile or adhesive; (v) in March 2018 an employee of Respondent complained to Respondent of glue fumes and Respondent's Safety Coordinator Musick went to the Worksite and inspected ventilation visually but did no monitoring or testing; (vi) in general Safety Coordinator Musick took Elite's word that it had a safety program and training and that Elite had MDS/SDS for products it used; (vii) there was no written contract between Respondent and Elite; (viii) Respondent requested Elite to do site specific training and general training, and requested documentation of such training but did not receive documentation and did not follow-up on getting the documentation; (ix) Respondent expected Elite to do its own hazard assessment but Respondent did not receive documentation of such assessment; (x) Respondent completed annual Work Site Evaluation forms but portions of the responses were incomplete or blank; (xi) Respondent did not have a supervisor present on the Elite Worksite; (xiii) Elite maintained OSHA 300 files for Respondent's workers; and (xii) Safety Coordinator Musick thought the personal protective equipment provided to Respondent's employees was appropriate.

31. While Respondent's Safety Coordinator did not followed-up on several matters there was evidence that Respondent made efforts to ensure the health and safety of its employees which included but is not limited to the following: Respondent conducted annual worksite evaluations which included whether Elite provided to Respondent's temporary employees PPE, training when taking on new job assignment, a hazardous chemical awareness program, and whether Elite had a list of hazardous chemicals at the worksite; Respondent obtained job descriptions; Respondent had an Employee Safety Manual; and Respondent's Safety Coordinator was designated as an OSHA Authorized General Industry Trainer.

## DISCUSSION

To establish a violation of the General Duty Clause, Complainant must establish the following elements: the employer failed to keep the workplace free of a hazard to which

employees of that employer were exposed; the hazard was recognized in the industry; the hazard was causing or was likely to cause death or serious physical harm; and there was a feasible and useful method to correct the hazard.

Complainant has the burden of establishing each element by a preponderance (greater weight) of the evidence. *Rule .0514(a)*; *See Hartford Roofing Co., 17 BNA OSCH 1361 (No. 92-3855, 1995)*. A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982). If Complainant fails to meet its burden of proof on any one of the required elements, then the violation cannot be sustained.

### **Health and Safety Protection For Workers**

The Occupational Safety and Health Act was enacted at the federal level in 1970 (The Occupational Safety and Health Act of 1970 (Public Law 91-596, 91st Congress, Act of December 29, 1970, 84 Stat. 1950; herein referred to as the “Federal Act”). The North Carolina state plan received initial approval in 1973 and final approval in 1996.

The express purpose of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter the “Act”) is “to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources” . (NCGS §95-126(b)(2)) The Act authorizes the Commissioner of Labor of North Carolina: (i) to develop occupational safety and health standards and to adopt standards promulgated from time to time by the Secretary of Labor under the Federal Act (NCGS §95-126(b)(2)c); (ii) to conduct inspections (NCGS §95-136); and (iii) to issue citations (NCGS §95-137). The Act covers workplaces and employers engaged in interstate commerce and it covers full-time, part-time, and temporary workers as long as they are “employees” within the meaning of the Act.

Under the Federal Act protection for temporary employees depends on a determination of who is the employer -- generally it treats the entity that is in charge of the worksite and most capable of preventing/correcting the hazard as the employer, however employers may be jointly or individually responsible for a single employee.<sup>1</sup>

In 2013 the U.S. Department of Labor announced an initiative (the Temporary Worker Initiative (“TWI”)) to further protect temporary employees from workplace hazards. (See OSHA News Release 13-800-NAT, April 29, 2013)<sup>2</sup>

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<sup>1</sup> See e.g. *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1985 CCH OSHD 27, 408 at p. 35,570 (No. 83-231, 1985); *National Mutual Insurance v. Darden* (503 U.S. 318 (1992)); *Loomis Cabinet Co. v OSH Review Commission*, 20 F.2d 938 (9<sup>th</sup> Cir. 1994); *CNG Transmission Corp.*, 1994 OSAHRC Lexis 12 (1994); *Union Drilling*, 1994 WL 86002 (1994); *Sam Hall & Sons, Inc.*, 8 OSH Cas. (BNA 2176 (1980)

<sup>2</sup> Under this Federal initiative the following are noteworthy: (i) temporary workers are considered to be “workers hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis”; (ii) the staffing agency and host employer are considered to be “joint employers” of such workers; (iii) the staffing agency and the host employer are to work together so that the temporary worker’s workplace is safe; (iv) “If a temporary

Although the North Carolina Department of Labor (“NCDOL”) has not adopted the TWI, in 2015 the NCDOL published Operational Procedure Notice 146 (“OPN 146”) to provide to North Carolina Compliance Safety and Health Officers (“CSHOs”) “guidance on conducting inspections and issuing citations associated with the temporary workforce.” (OPN 146 Section A and Section C)

The following are relevant provisions of OPN 146: (i) the OPN applies to all employment placement agencies and temporary help services with a NAICS code 5613 (Section C); (ii) temporary workers are “those who are working under a host employer-staffing agency employment structure” (i.e. worker “hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis” (Section B); (iii) “Although the relationship between host employer and staffing agencies is evolving, resulting in varying levels of involvement, the elements needed for citation issuance remain the same. The presence of a hazardous condition, employee exposure within the past six months, an applicable standard, and employer knowledge must be established and documented in the case file for any employer cited, whether it is the staffing agency, host employer, or both.” (Section D); and (iv) depending on the specific facts of the case the NCDOL OSH Division will consider issuing citations to either the host employer or the staffing agency or to both the host employer and the staffing agency (Section F).

Regarding whether the CSHO should conduct an inspection of the staffing agency OPN 146 expressly provides in Section E (captioned Inspection Guidance) : “If a temporary worker is or could be exposed to a serious hazard or if the staffing agency has not exercised due diligence to learn of the conditions at the host’s worksite, then the CSHO should initiate an inspection with the staffing agency.”

Regarding whether a citation should be issued to the staffing agency OPN 146 expressly provides in Section F (captioned Citation Guidance): “There must be a hazardous condition, employee exposure, and the CSHO must establish employer knowledge. The CSHO must make inquiries into the staffing agency’s actual or constructive knowledge of the worksite’s hazards, whether the staffing agency knew, or with the exercise of reasonable diligence, could have known about the hazards.”

Regarding employee exposure OPN 146 also expressly provides in Section F (captioned Citation Guidance, subsection “Employee exposure”) the following: “The CSHO must determine within the scope of their inspection whether any employees are temporary workers and whether any of the identified temporary workers are exposed to a violative condition.”

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worker is or could be exposed to a serious hazard or if the staffing agency does not appear to have taken any actions to learn of the conditions at the host’s worksite, then the CSHO should initiate an inspection with the staffing agency.”; and (v) “When investigations reveal a temporary worker exposed to a violative condition, and the worker is considered to be employed by both a staffing agency and a host employer, OSHA will consider issuing citations to either or both of the employers, depending on the specific facts of the case.” (See USDOL Memorandum from Thomas Galassi, Directorate of Enforcement Programs, July 15, 2014, Subject: Policy Background on the Temporary Worker Initiative).

In March 2000 the NCDOL OSH Division adopted for application in North Carolina the US Department of Labor's Multi-Employer Citation Policy (CPL 2-00.124). This policy gives guidance for issuing citations when multiple employers have their own employees performing work at a single worksite; in general, this policy provides classifications of such employers as creating, exposing, correcting or controlling employers depending on each employer's role at the worksite. The employees involved are employees of a single employer, and are not employees of multiple employers --- the employees are not hired by one employer and provided to another employer to preform work for the other employer. Under the Multi-Employer Citation Policy only an employer whose own employees are exposed to a hazard can be cited for a General Duty Clause violation.

Both OPN 146 and the Multi-Employer Citation Policy are part of NCDOL OSH Division enforcement policy; however, neither is a standard under the Act for which a violation can be cited.

### **Respondent's Arguments**

Respondent argued: (1) that NC DOL lacked a legal basis for the Inspection of Respondent and violated Respondent's walk-around rights in connection with the Inspection; (2) that the General Duty Clause cannot be applied to Respondent pursuant to the Multi-Employer Worksite Policy (CPL 2-0.124); and (3) that Respondent did not violate the General Duty Clause.

#### **Respondent Argument 1**

Regarding Respondent's argument that NC DOL lacked a legal basis for inspection of Respondent the following is relevant.

Respondent is a full-service recruiting and staffing agency that provides services including traditional temporary placement, direct placement, full time place, and project staffing to other employers including Elite Displays & Designs, Inc. located in Thomasville, North Carolina ("Elite"). Respondent is an "employer" within the meaning of the Act, and the workers it placed with Elite are "employees" within the meaning of the Act. The provisions of the Act apply to Respondent and its employees. Further, since Respondent is a staffing agency with a NAICS code of 5613, and OPN 146 is applicable to Respondent.

To carry out the purposes of the Act inspections can be made of worksites. NCGS §95-136(a). Accordingly, NC DOL had the authority to make an inspection pertaining to Respondent's workers. An inspection must be conducted at reasonable times, in a reasonable manner and within reasonable limits.<sup>3</sup>

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<sup>3</sup> Specifically NCGS §95-136(a) provides:

OPN 146 provides guidance for inspectors in connection with inspecting and issuing citations relating to host/staffing agency worksites. OPN 146 does not purport to impose new duties on employers nor deny employers their statutory rights under the Act. OPN 146 (Section E) states that "If a temporary worker is or could be exposed to a serious hazard or if the staffing agency has not exercised due diligence to learn of the conditions at the host's worksite, then the CSHO should initiate an inspection with the staffing agency." The statutory inspection requirements/procedures are not changed. In this case CSHO Dempsey determined that the adhesive being used at the host worksite contained isocyanates and the tile contained silica; these substances can be hazardous if not handled properly and could lead to a hazardous situation for workers. Accordingly, NC DOL had the right to conduct an inspection of the site where Respondent's employees were working.

Considering Respondent's argument that its walk-around rights in connection with its inspection were violated, NCGS §95-136 of the Act sets forth the conditions/circumstances under which the inspector conducting an inspection will be accompanied during the physical inspection of an employer's worksite. Specifically NCGS §95-136(c) provides that:

(c) Subject to regulations issued by the Commissioner a representative of the employer and an employee authorized by the employees shall be given an opportunity to consult with or to accompany the Commissioner, Director, or their authorized agents, during the physical inspection of any work place described under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Commissioner, Director, or their authorized agents, shall consult with a reasonable number of employees concerning matters of health and safety in the work place.

NCGS §95-136(a) and NCGS §95-136(c) do not materially differ from the federal version set forth in 29 U.S.C. § 657, §8(a) and 29 U.S.C. § 657, §8(e) respectively.

Based on applicable federal law a defense based on 29 U.S.C. § 657, §8 is considered an affirmative defense for which the employer bears the burden of proof. To establish a §8 defense the employer must show by a preponderance of evidence that the Department of Labor inspector substantially failed to comply with the provisions of §8 and that such non-compliance substantially prejudiced the employer in the preparation for or presentation of its case. See *Hamilton Fixture*, 16 BN OSHC 1073,1077 (NO. 88-1720, 1993; *Gem Industrial, Inc.*, 17 BNA OSHC 1184, 1187 (No. 93-1122, 1995); *Teddy Mosley Painting*, 2013 OSHARC Lexis 31 (2013).

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(a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and

(2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Respondent's argument that its walk-around rights were violated constitutes an affirmative defense and Respondent must show by a preponderance of evidence that CSHO Dempsey substantially failed to comply with the provisions of NCGS §95-136(c) and that such non-compliance substantially prejudiced Respondent in the preparation for or presentation of its case.

A review of the facts in this matter shows that: on November 28, 2018 CSHO Dempsey inspected the worksite of Elite; CSHO Dempsey conducted an opening conference with Elite; CSHO Dempsey conducted a walk-through inspection of Elite's worksite; employees of Elite were at the Worksite; at some point during the physical inspection CSHO Dempsey was informed that employees of Respondent were also at the Worksite; on November 28, 2018 NC DOL did not notify Respondent that an inspection, including a walk-through, of the Worksite was being conducted; NC DOL did not inform Respondent of the inspection of Elite or walk-through of the Worksite until approximately one month later; NC DOL opened its inspection of Respondent on January 8, 2019, conducted its closing conference with Respondent on February 8, 2019, and on April 24, 2019 issued to Respondent a Citation and Notification of Penalty. At the Hearing Complainant called CSHO Dempsey and Ms. Shellie Musick who was the Safety Coordinator for Respondent. Respondent cross examined Complainant's witnesses but did not call any other witnesses.

Respondent's counsel argued that Respondent was significantly prejudiced by not being allowed to participate in the walk-around during the inspection of Elite's worksite. Arguments by counsel do not constitute evidence. Respondent did not present through witnesses evidence of prejudice sufficient to carry its burden of proof to show that it was prejudiced in the preparation of or presentation of its case.

### **Respondent Argument 2**

Respondent argued that the General Duty Clause cannot be applied to Respondent under the multi-employer citation policy'

The Multi-Employer Citation Policy is applicable to worksites at which multiple employers have their own employees performing work at a single worksite. The work being performed by each employee is at the direction and under the control of each separate employer (i.e. the employees at the worksite are not hired by one employer and provided to another employer to perform work at the direction of the other employer).

The evidence shows that Respondent is a staffing agency and that its employees were hired by Respondent and sent to the Worksite to work for Elite. The Multi-Employer Citation Policy is not applicable in this case.

### **Respondent Argument 3**



Respondent argued that it did not violate the General Duty Clause.

To prove a violation of the General Duty Clause the Complainant must establish by a preponderance of evidence each of the following four elements:

- Element A: The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- Element B: The hazard was recognized in the industry;
- Element C: The hazard was causing or was likely to cause death or serious physical harm; and
- Element D: There was a feasible and useful method to correct the hazard.

Regarding Element A:

Complainant alleged in the Citation that the Respondent's "employees were exposed to unsafe working environment and hazardous chemicals" and the Respondent "failed to fulfill their due diligence responsibilities including but not limited to: -evaluate/access the host employer's worksite for safety and health hazards; -ensure the host employer met staffing agency standards to include the development and assignment of safety and health programs and policies".

The Abatement Note in the Citation recommended : "The temporary employer is encouraged to – conduct a thorough site and job hazard assessment including but not limited to site safety and health programs, - ensure the host agency meets the temporary agencies standards, - follow the elements outlined in the Temporary Worker Inspection Activity, OPN 146".

There is conflict between the Citation as issued and the testimony of CSHO Dempsey describing the violative condition which existed and the means of abatement. There are specific general industry standards promulgated that pertain to exposure to silica (29 CFR 1910.1053; 29 CFR 1910.1000) and to isocyanates (29 CFR 1910.119; 29 CFR 1910.1000; 29 CFR 1910.1450). However Respondent was not cited with a violation of any specific standards, but rather for violation of the General Duty Clause for exposing its employees to unsafe working environments and hazardous chemicals. In fact, CSHO Dempsey testified that he did not find any actual exposure of Respondent's workers to any hazardous substance.

Based on the totality of the evidence presented and the arguments of counsel for Complainant it appears that the General Duty Violation was asserted based on Respondent not satisfying the due diligence criteria set forth in OPN 146<sup>4</sup> . Specifically, one of the recommended means of

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<sup>4</sup> The stated due diligence criteria include but are not limited to the following: review factors such as the staffing agency-host employer contract, the interaction and communications between the staffing agency and the host employer, the staffing agency's contact with its temporary workers, whether those workers have had any complaints or concerns and whether they have made those concerns known to the employers; determine what type of work the staffing agency's employees will be performing at the host employer's worksite, and the equipment and hazards that those employees will be exposed; ensure staffing agency's workers receive appropriate safety and health training either by the staffing agency or by the host employer; answer the questions in Appendix A of OPN 146 to help in evaluating staffing agency-host employer employment structure and in

abatement is to “follow the elements outlined in the Temporary Worker Inspection Activity, OPN 146”, and another recommended means of abatement is to “ensure the host agency meets the temporary agencies standards’.

The stated purpose of OPN 146 is to provide guidance to inspectors relative to whether, at a host employer/staffing agency worksite, an inspection of the staffing agency should be initiated, and, if initiated, whether a citation should be issued to the staffing agency. Although an employer has a statutory duty under the Act to determine whether violations of the OSHA standards exist, OPN 146 does not purport to be a checklist for definitively determining whether the employer has satisfied its statutory duty or a mandate that it ensure that a host employer complies with standards which the staffing agency sets for itself.

In this case the Respondent took steps relative to determining what hazards, personal protective equipment, training, etc were present at Elite’s worksite. While Respondent’s Safety Coordinator did not follow-up on several matters there was sufficient evidence that Respondent made efforts to ensure the health and safety of its employees

Regarding Element B:

Complainant asserts the following in its Post Hearing Brief:

“The citation for a GDC violation was based on overall lack of due diligence. ‘Thus, it must be concluded that the hazardous character of [the practice] was generally known to the industry of which respondent is a part, and *should have been known to respondent corporation had it exercised due diligence.*’..*Emphasis added. Secretary of Labor v. Dietz, Inc.*, 5 O.S.H.Cas. (BNA) 1913 (O.S.H.R.C.A.L.J.). 1977-1978 O.S.H.D. (CCH) P 22021, 1977 WL 734. EDDI was a manufacturing business with title cutting and adhesive products in use. A reasonable staffing agency providing workers to manufacturers would have ensured that its workers were not exposed to hazards associated with those manufacturing processes.”

It is worthy of note that Dietz is a construction case and the recognized hazard was a ‘falling’ hazard -- workers would stand in the bucket of a front-end loader.

In this case there was not sufficient specific testimony presented at the Hearing pertaining to staffing-agency industry standards. The purpose of OPN 146 is to provide guidance to inspectors to help them determine if the staffing agency should be inspected. There is no indication that the due diligence activities covered in OPN 146 constitute ‘industry standard’ for staffing agencies. In fact, OPN 146 expressly states “Although this is not required of the staffing agency, the CSHO must determine if the staffing agency has inquired and determined what hazards, personal protective equipment, training, safeguards, etc. are present and in place at the client’s workplace.”

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determining the obligations of each employer and the delegation of responsibilities between the staffing agency and the host employer (this information may also be helpful in determining employer knowledge).

Regarding Element C:

Even if Respondent did not perform appropriate due diligence, there was insufficient evidence establishing a hazard which was causing or was likely to cause death or serious physical harm. The tests conducted by CSHO Dempsey showed that Respondent's employees were not exposed to either silica or isocyanates. The evidence that insufficient personal protective equipment was used by Respondent's employees was contradicted by the testimony of Respondent's Safety Coordinator Musick who was called by Complainant. Complainant did not carry its burden of proof on this element.

Having determined that Complaint did not carry its burden of proof regarding Elements A, B or C, it is unnecessary to reach a conclusion regarding whether the Abatement Note in the Citation constituted a feasible and useful method to correct the hazard.

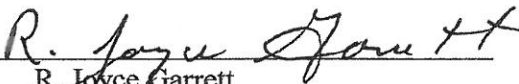
### CONCLUSIONS OF LAW

1. 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. The Respondent is subject to the provisions of the Occupational Safety and Health Act of North Carolina, N.C.G.S. 95-126 et seq (the "Act").
3. The burden of proof is on the Complainant to prove by a preponderance of the evidence that Respondent violated the terms of NCGS 95-129(1).
4. The Complainant has failed to prove by a preponderance of the evidence that Respondent violated the terms of NCGS 95-129(1).

### ORDER

Based on the foregoing decision, it is ORDERED that Citation 01 Item 001 in violation of NCGS 95-129(1) is VACATED.

This 16<sup>th</sup> day of December, 2021

  
\_\_\_\_\_  
R. Joyce Garrett  
Administrative Law Judge

## **Attachment 1 Stipulations**

As used herein "Act" refers to the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina.

1. The Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize";
2. The presence of a court reporter during the Hearing is waived;
3. The Hearing's audio and video will be recorded through Lifesize (the "Recording");
4. The Recording will be the official record of the Hearing;
5. The Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
6. The Administrative Law Judge shall control when the Hearing is on and off the record;
7. The Hearing will be deemed to have taken place in Raleigh, North Carolina;
8. Neither party objects to R. Joyce Garrett, Administrative Law Judge, conducting the Hearing;
9. Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and subject matter of this action;
10. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. § 95-133 et seq.;
11. Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(10); all of Respondent's employees referred to in this matter are "employees" within the meaning of N.C.G.S. § 95-127(9);
12. Respondent is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina. It is active and current and maintains a place of business in North Carolina;
13. Respondent is a full-service recruiting and staffing agency that provides services including traditional temporary placement, direct placement, full time place, and project staffing to other employers;
14. On or about November 28, 2018, Compliance Safety and Health Officer (CSHO) James Dempsey, an Industrial Hygienist employed by the North Carolina Department of

Labor (“NC DOL”), inspected the worksite of Elite Displays & Designs, Inc. located at 6771 Pike View Drive, Thomasville, North Carolina (the “November Inspection”);

15. NC DOL, through its compliance officer CSHO James Dempsey, conducted a walk-through inspection of the 6771 Pike View Drive, Thomasville, North Carolina (the “Worksite”) on or about November 28, 2018;
16. CSHO James Dempsey did not have an opening conference with Respondent at the time of the November Inspection of Elite;
17. Elite manufactures display and signage products;
18. On November 28, 2018 NC DOL did not notify R that an inspection, including a walk-through, of the Worksite was being conducted;
19. NC DOL did not inform Respondent of the November Inspection of Elite or walk-through of the Worksite until approximately one month after the November Inspection;
20. NC DOL opened its inspection of Respondent (the “January Inspection”) on January 8, 2019;
21. The January Inspection occurred during the period between January 8, 2019 and February 8, 2019;
22. Respondent objected to the January Inspection by letter dated January 15, 2019;
23. In connection with the January Inspection, on February 8, 2019, NC DOL conducted its closing conference with Respondent;
24. On February 8, 2019, Shellie Musick, Safety Coordinator for Respondent, reviewed and signed an OSHA 59 form in connection with the January Inspection;
25. On or about April 24, 2019, NC DOL issued a Citation and Notification of Penalty to Respondent (the “Bradley Citation”);
26. The Bradley Citation was for a SERIOUS violation of the General Duty Clause (N.C.G.S. §95-129(1)) with a penalty of \$2,700.00;
27. Respondent denies the allegations contained in the Bradley Citation and objects to the proposed penalty and abatement date; and
28. In connection with the January Inspection Respondent submitted a timely Notice of Contest dated June 4, 2019.

## North Carolina Department of Labor

Occupational Safety and Health Division  
4964 University Parkway, Suite 202  
Winston-Salem, NC 27106  
Phone: 336-776-4420 FAX: 336-767-3989  
Jim Dempsey\NH



### Citation and Notification of Penalty

**To:**  
Bradley Personnel, Incorporated  
2640 Williard Dairy Road Suite 104  
High Point, NC 27265

**Inspection Number:** 318152824  
**CSHO ID:** V4994  
**Activity ID No.:** 140723  
**Inspection Date(s):** 1/8/2019 - 2/8/2019  
**Issuance Date:** 4/24/2019

**Inspection Site:**  
6771 Pike View Drive  
Thomasville, NC 27360

*The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.*

This Citation and Notification of Penalty describes violation(s) of the labor laws of Chapter 95 of the North Carolina General Statutes. The penalty(ies) listed herein is (are) based on these violations. You must correct the violation(s) referred to in this citation by the date(s) listed and pay the penalty proposed, unless within 15 working days (excluding weekends and holidays) from receipt of this Citation and Notification of Penalty, you mail a request for an informal conference or Notice of Contestment to the North Carolina Department of Labor district office at the address shown above.

**Posting** - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and State holidays), whichever is longer. **The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.**

**Informal Conference** - You may request an informal conference. To request an informal conference, you must return the enclosed form marking the block requesting an informal conference or provide other written notice to the district supervisor within 15 working days of receipt of the citation. **Do not mark more than one block on the enclosed form if you want an informal conference.** The informal conference must be held no longer than 20 working days from the date you receive the Citation and Notification of Penalty, so your immediate response is necessary if you choose this option.

If you make a timely request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you preserve your right to contest. The time for contestment does not begin until

CERTIFICATE OF SERVICE

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

TRAVIS W VANCE  
FISHER & PHILLIPS LLP  
PO BOX 36775  
CHARLOTTE NC 28236

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

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

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

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1101

via email to [carla.rose@labor.nc.gov](mailto:carla.rose@labor.nc.gov).

THIS THE 21 DAY OF December 2021.



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