STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. ALLIANCE PERSONNEL, INC., Respondent.	CASE NO. OSH 2004-19 ORDER NO. 158 ORDER GRANTING RESPONDENT ALLIANCE PERSONNEL, INC.'S MOTION FOR SUMMARY JUDGMENT TO DISMISS THE HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION'S CITATION AND NOTIFICATION OF PENALTY

ORDER GRANTING RESPONDENT ALLIANCE PERSONNEL, INC.'S MOTION FOR SUMMARY JUDGMENT TO DISMISS THE HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION'S CITATION AND NOTIFICATION OF PENALTY

On November 3, 2004, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant or DIRECTOR), through the Hawaii Occupational Safety and Health Division (HIOSH), issued a Citation and Notice of Penalty (Citation) to Respondent ALLIANCE PERSONNEL, INC. (Respondent or ALLIANCE). On November 23, 2004, ALLIANCE, by and through its counsel, filed an Appeal and Notice of Appeal with the HIOSH administrator contesting the Citation and the contest was filed with the Hawaii Labor Relations Board (Board) on December 8, 2004.

On June 7, 2005, Respondent ALLIANCE filed a Motion for Summary Judgment to Dismiss the Hawaii Occupational Safety and Health Division's (HIOSH) Citation and Notification of Penalty with the Board. Board Exhibit (Ex.) 9.

On June 21, 2005, the Complainant filed the Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment. Board Ex. 11.

On June 29, 2005, Respondent filed its Reply to Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment. Board Ex. 12.

On June 30, 2005, the Board conducted a hearing on Respondent's Motion for Summary Judgment.

Having considered the arguments, memoranda, depositions and affidavits, the Board hereby issues its findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Respondent ALLIANCE is a Hawaii corporation whose business office is 1136 Union Mall, Union Plaza Building, Suite 202, Honolulu, Hawaiii 96813.

2. Respondent is a temporary staffing employment agency that sends white collar and blue collar workers to client companies in need of full-time help for a temporary period of time. Respondent's owner and president is June Fernandez (Fernandez), who started the business two years ago.

3. Fernandez hired Pua Hardwick (Hardwick) to develop the business, contact new client companies, visit jobsites and conduct periodic safety meetings for its temporary workers. Respondent manages, dispatches, trains, and removes the workers from the job sites. Respondent can cancel a client account or refuse to send workers when a job site is deemed unsafe.[1]

4. Respondent contracted with a payroll and benefits company ProSERVICE Hawaii to handle the administrative functions of its business that includes providing medical coverage, payroll and employer taxes, workers compensation and other benefits to Respondent's temporary workers. Id.

5. Since April 2004, Respondent has leased approximately five to ten labor and clerical workers to C.S. Wo & Sons, Ltd. (C.S. Wo) warehouse, located at the Service Center on Malaai Street. Respondent's labor workers were tasked with opening boxes, uncrating furniture, and assembling and unloading containers at the warehouse. Usually three to four containers are unloaded at the warehouse each day. No formal contract was entered into between the Respondent and C.S. Wo. When the arrangement was made for the Respondent to provide workers, safety was not openly discussed because it was assumed that C.S. Wo would provide a safe work place.

[1]Deposition of June Fernandez, dated April 14, 2005, pp. 6-29, Ex. 1 of Board Ex. 11.

6. Respondent's Safety and Health Mission Statement[2] emphasizes the importance of safety to all of their leased employees. Respondent's Injury and Illness Prevention Program encourages its employees to report any safety concerns to the jobsite supervisor or Respondent, and prohibits its employees from working with hazardous substances.[3]

7. Hardwick conducted mandatory monthly safety meetings for the Respondent's workers at the various jobsites. If Respondent's workers refused to attend the mandatory safety meetings, it would be grounds for termination by Respondent.

8. The safety meetings would occur at the will of C.S. Wo because Respondent could not disrupt the work. None of the training sessions were about chemical or fumigant exposure because the workers never reported that they were exposed to a fumigant. If Hardwick observed a dangerous or potentially hazardous condition at the service center, she would have brought it to the attention of C.S. Wo with a recommendation to correct it. C.S. Wo was not

---

[2]Respondent's Safety & Health Mission Statement states, in part:

> Safety is the highest priority at Alliance Personnel. We place a high value on the safety of our employees. We are committed to providing safe job sites for all of our employees and have developed this injury prevention program to involve management and employees in identifying and eliminating hazards that may develop during our work process. See, Ex. E of Board Ex. 9.

[3]Respondent's Injury and Illness Prevention Program, includes "Safety Rules for All Employees" which states, in part, as follows:

> 3. Certain job duties are absolutely forbidden. They are as follows: working with hazardous chemicals and or materials, climbing ladders, operating electrical or motorized machinery, lifting more than 50 pounds individually. At no time are you required to do any of these tasks. Any requests for you to do so must be reported to Alliance Personnel immediately.

Under "Communication," the program states, in part:

> Alliance Personnel, Inc. will communicate with its employees verbally and in written form. Understand that communication is two-way, back and forth; therefore we at Alliance Personnel will listen to your concerns regarding any job or situation you deem a safety risk.

See, Ex. F of Board Ex. 9.

required to correct any hazard identified by Hardwick. However, the Respondent maintained control over its workers and could remove them from the job if C.S. Wo did not eliminate or correct a hazardous condition.[4]

9. Phosphine gas is a fumigant that was introduced in some of the containers at a foreign port of origin or in transit to kill pests. A sign or notice is attached to the outside of the container with instructions on how to ventilate or air out the container for any residual fumigant. One day prior to unloading containers, a C.S. Wo employee airs out any container marked with a notice of fumigation. The aeration of containers takes place in a parking lot across from the warehouse loading dock about 150 feet away. None of Respondent's workers participated in the aeration of the containers. One day after the container is properly aerated, the container is unloaded by both C.S. Wo employees and Respondent's workers at the warehouse loading dock.[5]

10. C.S. Wo did not have a material safety data sheet for phosphine gas or hydrogen phosphide. Some C.S. Wo staff knew that the chemical could cause eye irritation, runny nose, malaise, dizziness, nausea, and vomiting.

11. On September 17, 2005, some workers experienced symptoms consistent with exposure to phosphine gas when they unloaded a container of furniture.

12. Respondent's workers at C.S. Wo did not file a workers compensation claim for any injury arising out of any exposure to phosphine gas on September 17, 2004 through ProSERVICE. None of Respondent's workers working at the C.S. Wo jobsite ever reported to Respondent that C.S. Wo workers were exposed to "some noxious substance" on September 17.[6]

13. On September 29, 2004, HIOSH compliance officer Liese Barnes conducted an "unprogrammed related" inspection at the service center of C.S. Wo and interviewed five workers who experienced symptoms consistent with exposure to phosphine gas when they unloaded a container of furniture from the

---

[4]Deposition of June Fernandez, pp. 29-32, Ex. 1 of Board Ex. 11, Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment.

[5]Deposition of Dan Garonzik, pp. 12-13, 17-18, 31, 45-46, Ex. 2 of Board Ex. 11, Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment..

[6]Declaration of June N. Fernandez, attached to Board Ex. 12, Respondent Alliance Personnel, Inc.'s Reply to Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment.

Philippines on or about September 17, 2004. Two of the five workers were employed by Respondent.[7]

14. By letter dated October 10, 2004, C.S. Wo Director of Operations, Daniel Garonzik, notified Respondent of plans: 1) to stop offloading containers treated in transit with a fumigant; 2) to not accept future shipments that are fumigated in transit; and 3) to develop a new procedure for handling "the few containers we do have that have already been fumigated before we start to unload them."[8]

15. On November 3, 2004, HIOSH issued a Citation to ALLIANCE, which states, in part, as follows:

> Citation 1 Item 1a Type of Violation: **Serious**
> 29 CFR 1910.1200(g)(1)[9] [Refer to chapter 12-203.1, HAR] was violated because:
> The MSDS [material safety data sheet] for a fumigant containing phosphine was not made available to exposed employees.
>
> * * *
>
> Penalty: $875.00
>
> Citation 1 Item 1b Type of Violation: **Serious**

---

[7]Affidavit of Liese Barnes, attached to Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment, Board Ex. 11.

[8]Ex. R of Board Ex. 9.

[9]29 CFR 1910.1200(g)(1) states:

> Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

29 CFR 1910.1200(h)(3)[10] [Refer to chapter 12-203.1, HAR] was violated because:
Employees exposed to phosphine gas were not provided training on its hazards, protective measures or emergency procedures.

* * *

Citation 1 Item 1c Type of Violation: **Serious**
HAR § 12-202-1(e)[11] was violated because:

---

[10]29 CFR 1910.1200(h)(3) states

Training. Employee training shall include at least: 1) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.); (ii) The physical and health hazards of the chemicals in the work area; (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and, (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

[11]HAR § 12-202-1(e) states

All employers shall measure, monitor and record employee exposure to toxic materials or harmful physical agents. The measurement shall determine if any employee may be exposed to concentrations of the toxic materials or harmful physical agents at or above the permissible exposure limit. The determination shall be made each time there is a change in production, process, or control measures which could result in an increase in concentrations of these materials or agents. A written record of the determination shall be made and shall contain at least: (1) Any information, observations, or calculations that may indicate employee exposure to toxic or potentially toxic materials or harmful physical agents; (2) Any measurements taken; (3) Any employee complaints of symptoms that may be attributable to exposure to toxic or potentially toxic materials or harmful physical agents; (4) Date of determination, work being performed at the time, location within work site, name, and social security number of each employee considered; and (5) Any other information that may be relevant to employee exposure.

Employee exposure to phosphine gas was not measured or monitored, resulting in an exposure incident causing eye irritation, runny nose, malaise, headache, dizziness, nausea and vomiting.

* * *

Citation 1 Item 2 Type of Violation: **Serious**
HAR § 12-60-2(1)(B)(vii) was violated because:
The employer's system for employees to report hazardous conditions was unreliable, with the result that the employer was unaware that employees had experienced symptoms associated with exposure to phosphine gas.

* * *

Penalty: $875.00

The aggregate penalty assessed was $1,750.00.

16. Daniel Garonzik, C.S. Wo's Director of Operations, saw Hardwick stop by the warehouse many times to check if C.S. Wo needed more workers and to look out for the safety of Respondent's temporary workers. C.S. Wo never informed Hardwick that some of the containers had or were aerated for a fumigant before the September 17, 2004 incident.[12]

---

[12]Deposition of Dan Garonzik, pp. 34-36, Ex. 2 of Board Ex. 11, Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment. See also Deposition of June Fernandez, pp. 16-17, Ex. 1 of Board Ex. 11, Director of Labor's Memorandum in Opposition to Respondent's Motion for Summary Judgment, where Fernandez testified as follows:

Q.: [by Mr. Lau] Do you know if during this initial meeting or several meetings between C..S. Wo and Pua, if the subject of chemical exposures was brought up? That is, that if Alliance were to send over temporary workers or full-time workers to C.S. Wo, that they would be exposed to any kind of chemical, or in this case fumigants?
A. [by Ms. Fernandez] Prior to the incident?
Q. Yes.
A. No.
Q. I'm talking about when this arrangement or contract was first brought up.
A. No, never. It was never brought up until OSHA came.

Id., pp.16-17.

17. The subject of chemical or fumigant exposure to workers was not discussed until the HIOSH inspection.[13]

18. Respondent did not know about the fumigated container and the potentially hazardous condition until on or about the HIOSH inspection on September 29, 2004.[14]

19. On December 29, 2004, HIOSH issued a Citation to C.S. Wo arising out of the hazardous condition on September 17, 2004. C.S. Wo did not contest the Citation.[15]

DISCUSSION

In order to establish a prima facie violation of a specific standard, the Director must prove: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of reasonable diligence. Astra Pharmaceutical Products, Inc., 1981 OSHD §25, 578 (1981), affirmed in part, remanded in part, 681 F.2d 69 (1st Cir. 1982).

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Hawaii Rules of Civil Procedure (HRCP) Rule 56(c). "The standard whereby disposition of the case by summary judgment is proper is where, from the record, there is no genuine issue as to any material fact and movants clearly demonstrate they should prevail as a matter of law." Hulsman v. Hemmeter Development Corp., 65 Haw. 58, 61, 647 P.2d 713 (1982), citing HRCP Rule 56(c).

"A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." SCI Management Corp. v. Sims, 101 Hawai`i

---

[13]Id., pp. 8-18; Deposition of Dan Garonzik, dated April 14, 2005, p. 11, Ex. 2 of Board Ex. 11.

[14]Deposition of June Fernandez, pp. 16-17, Ex. 1 of Board Ex. 11.

[15]Id., pp. 63-64; Ex. R of Board Ex. 9, Respondent Alliance Personnel Inc.'s Motion for Summary Judgment to Dismiss the Hawaii Occupational Safety and Health Division's Citation and Notification of Penalty.

438, 445, 71 P.3d 389, 396 (2003), citing Coon v. City and County of Honolulu, 98 Hawai`i 233, 244-45, 47 P.3d 348, 359-60 (2002).

"The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law." GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530 (1995).

First, Respondent contends that the hazard communication standard that it allegedly violated is not applicable because as a temporary employment agency, Respondent did not direct, control and supervise workers leased to C.S. Wo. Respondent argues that since it is not an employer, it should not be required to comply with the requirements of the hazard communication standard and the citations should be dismissed.

The Director does not dispute that Respondent is neither a chemical manufacturer nor an importer. The Director argues that given the broad remedial purpose of the Hawaii Occupational and Safety Law, HRS § 396-1, the Board should defer to the Director's interpretation to find that Respondent is an employer because it exercises management and control over its leased workers. The Board agrees with the Director and concludes that Respondent is an employer not only within the meaning of HRS § 396-3,[16] but also as defined under 29 CFR 1920.1200(c).[17]

In this case, although Respondent did not supervise the workers leased to C.S. Wo on a daily basis, Respondent cannot dispute that it directed the workers to the C.S. Wo jobsite, and Respondent exercised management and control over them. For example, Hardwick conducted mandatory monthly safety meetings for the Respondent's workers at the C.S. Wo job site. If Respondent's workers refused to attend the mandatory safety meetings, it would be grounds for termination by Respondent.

---

[16]The Hawaii Occupational Safety and Health Law, HRS § 396-3 defines an employer as follows:

> Employer means:
>
> * * *
>
> (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

[17]29 CFR 1920.1200(c) provides that:

> Employer means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor.

Respondent also does not dispute that it manages, dispatches, trains, and can remove its workers from the jobsite. For example, if Hardwick observed a dangerous or potentially hazardous condition at the Service Center, she would have brought it to the attention of C.S. Wo with a recommendation to correct it. C.S. Wo was not required to correct any hazard identified by Hardwick. However, the Respondent maintained control over its workers and could pull its workers from the job site if C.S. Wo did not eliminate or correct a hazardous condition. Respondent admits it can cancel a client account or refuse to send workers when a jobsite is deemed unsafe. Therefore, viewing the evidence in the light most favorable to the Director, the Board concludes that Respondent is an employer to whom the hazard communication standard applies.

Second, Respondent argues that none of its leased workers were exposed to phosphine fumigant or gas that caused any harm or injury. For example, none of Respondent's workers participated in the aeration of the containers treated with a fumigant. The task of airing out a container was done by a C.S. Wo employee the day before the container was unloaded. Moreover, none of Respondent's workers reported any injury to Hardwick or Respondent and did not file a workers compensation claim for an injury arising out of any exposure to phosphine gas on September 17, 2004 through ProSERVICE.

The Director argues that whether Respondent's employees were exposed to a hazardous condition on September 17, 2005, is a material issue of fact in dispute given the declaration of its HIOSH inspector. The HIOSH inspector determined that two of the five workers who experienced symptoms consistent with exposure to phosphine gas when they unloaded a container of furniture from the Philippines on or about September 17, 2004, were employed by Respondent. Viewing the evidence and drawing all inferences in the light most favorable to the Director, the Board concludes that exposure is a material issue of fact in dispute which the Director would be left to prove by a preponderance of evidence.

Finally, Respondent argues there is no dispute that prior to the HIOSH inspection on September 29, 2004, it had no knowledge and was unaware that workers unloading containers could be exposed to a fumigant identified as phosphine gas. Thus, Complainant cannot prove one of the essential elements of a prima facie violation, i.e., that Respondent knew or should have known of the potentially hazardous condition with the exercise of reasonable diligence. The Board agrees.

As a temporary employment agency, Respondent emphasized the importance of safety to all of their leased employees in its Safety and Health Mission Statement. Respondent's Injury and Illness Prevention Program encouraged its employees to report any safety concerns to the jobsite supervisor or Respondent, and prohibited its employees from working with hazardous substances. Despite Respondent's encouragement to report safety concerns, Respondent's workers sent to C.S. Wo did not file a workers compensation claim for an injury arising out of any exposure to phosphine gas on September 17, 2004 through ProSERVICE. None of Respondent's workers working at the C.S. Wo jobsite ever reported

to Respondent that C.S. Wo workers were exposed to "some noxious substance" on September17, 2004.

Viewing the evidence and drawing all inferences in the light most favorable to the Director, there is no material issue of fact in dispute that Respondent did not know about the fumigated container and the potentially hazardous condition created with the exercise of reasonable diligence until the HIOSH inspection on or about September 29, 2004. Respondent's workers never reported any adverse effects or illness from unloading the containers on September 17, 2004 to Hardwick or any other representative of Respondent. No workers compensation claims were filed. C.S. Wo's Director of Operations saw Hardwick stop by the warehouse many times to check if C.S. Wo needed more workers and to look out for the safety of Respondent's temporary workers. C.S. Wo never informed Hardwick that some of the containers had or were aerated for a fumigant before the September 17, 2004 incident. Thus, none of Hardwick's monthly training sessions were about chemical or fumigant exposure because the workers never reported that they were exposed to a fumigant. If Hardwick observed a dangerous or potentially hazardous condition at the Service Center, she would have brought it to the attention of C.S. Wo with a recommendation to correct. Regarding the hazardous condition on September 17, 2004, Respondent was notified by C.S. Wo by letter dated October 10, 2004 of its plans: 1) to stop offloading containers treated in transit with a fumigant; 2) to not accept future shipments that are fumigated in transit; and 3) to develop a new procedure for handling "the few containers we do have that have already been fumigated before we start to unload them."

Based on these undisputed facts, the Board concludes that the Director cannot prove by a preponderance of evidence that Respondent knew or should have known about the hazardous condition with the exercise of reasonable diligence. Thus, the Board concludes that the Director cannot establish a prima facie violation of the applicable standard in the instant Citation and Notification of Penalty issued to Respondent on November 3, 2004. Accordingly, the Board concludes that Respondent is entitled to judgment as a matter of law, and hereby grants Respondent's motion for summary judgment.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint.

2. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." HRCP Rule 56(c).

3. To establish a prima facie violation of a standard, the Director must prove: "(1) the standard applies, (2) there was a failure to comply with the cited

standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence."

4. As a temporary employment agency, Respondent manages, dispatches, trains, and can remove its workers from the job site. Accordingly, the Board concludes that Respondent is an employer within the meaning of HRS § 396-3, and 29 CFR 1920.1200(c).

5. Viewing the evidence and drawing all inferences in the light most favorable to the Director, there is no material issue of fact in dispute that Respondent did not know about the fumigated container and the potentially hazardous condition with the exercise of reasonable diligence until the HIOSH inspection on or about September 29, 2004. As such, the Board concludes that the Director cannot prove by a preponderance of evidence a prima facie violation of the applicable standard in the instant Citation and Notification of Penalty issued to Respondent on November 3, 2004. Accordingly, the Board concludes that the Respondent is entitled to judgment as a matter of law.

ORDER

Based on the foregoing, the Board hereby grants Respondent's motion for summary judgment and vacates the Citation and Notification of Penalty issued to Respondent on November 3, 2004.

DATED: Honolulu, Hawaii, September 7, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

KATHLEEN RACUYA-MARKRICH, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the trial

date. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees at least five working days prior to the trial date.

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
Wayne M. Sakai, Esq.