

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

Employer Solutions Staffing Group
III, LLC,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on November 10, 2011, at the Office of Administrative Hearings in St. Paul, Minnesota. The record closed on January 17, 2012, upon receipt of the parties' post-hearing memoranda.

Jackson Evans, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry (Complainant). Rebecca J. Levine, Esq., Thiel, Campbell, Gunderson, Anderson and Levine PLLP, 7300 Metro Boulevard #630, Minneapolis, MN 55439, appeared for Employer Solutions Staffing Group, LLC (ESSG or Respondent).

STATEMENT OF ISSUES

1. Did the Respondent violate Occupational Safety and Health (OSH) rules requiring an employer to provide protective equipment when hazards capable of causing injury and impairment are encountered?¹

2. If so, what penalty is appropriate?

The Administrative Law Judge concludes the Respondent was not responsible for the provision of adequate personal protective equipment to its employee, who was working on a temporary basis at another employer's job site.

¹ 29 C.F.R. § 1910.132(a).

Based upon the record and all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Employer Solutions Staffing Group, LLC, is a business that provides temporary workers to companies undergoing labor disputes. The business is based in Edina, Minnesota, but it operates across the country.² For 2011, ESSG will issue approximately 18,000 W2 forms to employees in 30 to 35 states.³

2. Fabcon is a manufacturer of precast concrete products located in Savage, Minnesota. The company specializes in the fabrication and erection of precast concrete wall sections. The plant is about 20 acres in size and includes casting beds, batch plants, a water treatment plant, a maintenance shop, a wood shop, and a scale.⁴

3. Portland cement is a material used in fabricating concrete. Wet Portland cement can damage the skin because it is caustic, abrasive, and absorbs moisture. It can cause caustic burns.⁵

4. In April 2010, Fabcon employees were on strike, and Fabcon contracted with ESSG to provide temporary workers.⁶ On any given day during the strike, 30 to 40 ESSG employees worked at the plant with six or seven Fabcon supervisors.⁷

5. The contract between ESSG and Fabcon provides, in relevant part, that ESSG will recruit, screen, interview, and assign its employees, who must meet and/or exceed Fabcon expectations, to perform the type of work identified in the contract (crane operation, truck driving, clean-up crews, and project management); pay their wages and determine and provide any benefits; pay, withhold, and transmit payroll taxes; and provide unemployment insurance and workers' compensation benefits.⁸

6. The contract further provides, in relevant part, that Fabcon would:

Provide assigned employees with a safe work site and provide appropriate information, training, and safety equipment with respect to any hazardous substances or conditions to which they may be exposed at the work site. ESSG and ESSG's workers' compensation carrier shall have the right to inspect Client's premises during normal business hours and to make recommendations pertaining to job safety. It is agreed that ESSG, by inspecting such premises or

² Testimony of Chris Levine.

³ *Id.*

⁴ MnOSHA Ex. 1. The Department of Labor and Industry marked its exhibits as 1 through 6, and these will be referred to as "MnOSHA" exhibits.

⁵ MnOSHA Ex. 4.

⁶ Defendant's Ex. 1. ESSG's exhibits were marked as "Defendant's" exhibits and numbered 1 through 16; these will be referred to as "Defendant's" exhibits.

⁷ Testimony of Mike Kruse.

⁸ Defendant's Ex. 1 ¶ 1.

by not inspecting such premises, assumes neither liability nor responsibility for any unsafe working condition that may exist.⁹

7. Finally, the contract provides that the parties “understand and agree that ESSG is an independent contractor and all of the Assigned Employees are ESSG employees and only ESSG employees.”¹⁰

8. Fabcon’s safety orientation handbook provides that employees must wear the following personal protective equipment (PPE) at all times in the plant and yard: hardhat, safety glasses, safety vest, and steel-toed shoes. The handbook also provides that Fabcon is responsible for providing the necessary PPE for all jobs.¹¹ Although Fabcon employees routinely got their boots wet in various areas of the plant, Fabcon had no history of any employee experiencing a chemical burn (sometimes called “lime burn”) from Portland cement.¹²

9. Because employers are not obligated to pay for non-specialty steel-toed safety boots,¹³ Fabcon instructed ESSG that all temporary workers were to arrive at the plant wearing steel-toed safety boots. In accordance with this direction, ESSG advised its employees that they should wear steel-toed safety boots to work.¹⁴

10. On the first day of work, each new employee attended an orientation and safety meeting at the plant. Frank Weber, Fabcon’s Area Safety Manager, led the meetings. He provided an overview of the company’s safety policies and procedures and provided information about the specific hazards on the site. As part of the Right to Know Act discussion, he described the use of and possible exposure to acids, fly ash, and caustic chemicals in Portland cement (used in making concrete) and the importance of avoiding skin contact with these chemicals. He advised the workers of the location of material safety data sheets (MSDS) for those chemicals. He also advised them to see a Fabcon supervisor with any questions about safety issues relating to any particular job to which they were assigned. At the conclusion of the meeting, Fabcon distributed vests, hardhats, and safety goggles to the workers.¹⁵

11. Frank Weber understood that Fabcon assumed the responsibility for OSHA compliance for all workers in the plant, including the temporary workers employed by ESSG.¹⁶

12. Mike Kruse, ESSG’s project manager, attended the orientation and safety meetings. Kruse has no background in either workplace safety or concrete manufacturing. At the meetings, Kruse explained that he was responsible for any issues involving pay or paychecks and that any employee who could not appear for work should contact him as

⁹ Defendant’s Ex. 1 at ¶ 2(c).

¹⁰ *Id.* at ¶ 6.

¹¹ Defendant’s Ex. 3 at 12.

¹² Testimony of Frank Weber; Testimony of Lisa Perzichilli.

¹³ 29 C.F.R. § 1910.132(h).

¹⁴ Testimony of Mike Kruse.

¹⁵ Test. of F. Weber; Test. of M. Kruse.

¹⁶ Test. of F. Weber.

opposed to a Fabcon supervisor.¹⁷ Kruse then helped Fabcon supervisors identify which employees had skills in various areas for purposes of matching them to particular jobs in the plant. Kruse remained on-site for most of each day, leaving for periods of time to do paperwork. He patrolled the different areas of the plant and monitored the employees to make sure they were working productively.¹⁸

13. Kruse had all the supervisory powers inherent in being an employer of temporary workers at a host employer's plant—he could discipline or fire them, remove them from the plant, or change their assignment within the plant as needed by Fabcon. He had no supervisory authority, however, over the production processes or safety within the plant.¹⁹

14. Just before the orientation and safety meeting on April 12, 2010, a new employee named M.M. advised Kruse that he had not had the opportunity to purchase steel-toed safety boots before coming to work. M.M. had been hired as a general laborer and was wearing casual leather tennis-type shoes. Kruse brought M.M. to Frank Weber and asked whether the tennis shoes were adequate or whether M.M. should be sent home for the day. Weber provided M.M. with a pair of rubber slip-on boots with steel toe inserts. The boots were three to four inches high. Weber advised M.M. that he could use the slip-on boots for the day, but that he should bring steel-toed safety boots the next day. He also advised M.M. that the slip-on boots were not adequate footwear and that he should be careful about where he worked. He did not advise either M.M. or Kruse that M.M. should avoid working in any specific areas of the plant.²⁰

15. Weber considered this decision to be his alone. He did not rely on Kruse in making any decisions with regard to safety.²¹

16. M.M. worked in several different areas of the plant that morning. At approximately 2:00 p.m, he was assigned to work in a new area called the Alar room of the water treatment plant. Joshua Flatla, a process engineer for Fabcon, was the acting supervisor in the water treatment area.²² Flatla instructed M.M. on how to use the cleaning equipment to remove wet and dried cement from tools and other production equipment. The debris was to be shoveled into a front-end loader, and as water accumulated on the floor, the water was to be pushed across the room into a trough containing a floor drain. The trough was about six inches below the level of the floor. From there the water was pumped into a holding tank to be neutralized and used again for cleaning.²³

17. When M.M. began this work, ESSG project manager Mike Kruse was off-site. Kruse did not assign M.M. to work in this area or supervise his work there.²⁴

¹⁷ Test. of F. Weber.

¹⁸ *Id.*; Test. of M. Kruse.

¹⁹ Test. of F. Weber; Test. of M. Kruse; Testimony of Joshua Flatla.

²⁰ Test. of F. Weber; Test. of M. Kruse; MnOSHA Ex. 5 at p. 49 (job duties).

²¹ Test. of F. Weber.

²² Testimony of Jason Featherly; Test. of J. Flatla.

²³ MnOSHA Ex. 1; Testimony of M.M..

²⁴ Test. of M. Kruse.

18. While pushing water toward the floor drain, M.M. stepped into the trough, and his shoes became saturated with water.²⁵ He complained to Flatla that his feet were wet, and Flatla told him not to stand in water.²⁶ Flatla directed M.M. to shovel loose gravel into the front-end loader. After some period of time, M.M. began to feel a burning sensation in his feet, and at about 4:00 p.m., his feet hurt so badly that he left the Alar room and went to an area of the plant known as the break room, adjacent to the Quality Assurance area.²⁷ Two Fabcon quality control technicians, Jesse Hennen and Curtis Doric, advised M.M. to remove his shoes and socks. They provided bottled water to rinse his feet and paper towels to dry them. They also provided him with a pair of dry socks. Hennen went to look for Kruse, who had just returned to the plant.²⁸

19. Kruse went to the break room and talked to M.M., who said he was feeling better and wanted to finish his shift. It is unclear whether M.M. returned to the Alar room or whether he went immediately to a different area to work for the rest of the shift.²⁹ In any event, Joshua Flatla advised Kruse that M.M. should not return to the plant.³⁰ When the ESSG employees left the plant that evening after working a 12-hour shift (7 a.m. to 7 p.m.), Kruse advised M.M. that Fabcon did not want him to return because he was not a good fit for the job.³¹

20. M.M. went to the emergency room that evening, where he was diagnosed with second-degree chemical burns on his feet.³² The burns were extremely painful and required narcotic pain medications. He was subsequently treated at the Burn Clinic at Regions Hospital.³³

21. The next day, M.M. sent an email to Frank Weber at Fabcon describing the injury and his intention to file a worker's compensation claim against Fabcon.³⁴ ESSG's worker's compensation carrier accepted the claim and paid wage loss benefits for temporary total disability.³⁵ M.M. was medically released to return to work, as long as he had no contact with cement, on April 30, 2012.³⁶

22. An investigator from MnOSHA visited Fabcon on April 14, 2012. Citations were issued to both Fabcon and ESSG for failing to provide adequate personal protective equipment.³⁷

²⁵ MnOSHA Ex. 5 at p. 5.

²⁶ Test. of J. Flatla.

²⁷ Test. of M.M..

²⁸ Testimony of Jesse Hennen; Testimony of Curtis Doric; MnOSHA Ex. 5 at pp. 5-6.

²⁹ Test. of M.M..

³⁰ Test. of J. Flatla.

³¹ Test. of M. Kruse; MnOSHA Ex. 5 at p. 49.

³² Test. of M.M.; MnOSHA Ex. 5 at p. 8.

³³ MnOSHA Ex. 5 at pp. 29, 64-67, 74-77.

³⁴ *Id.* at p. 2.

³⁵ *Id.* at pp. 36, 38.

³⁶ *Id.* at p. 96.

³⁷ MnOSHA Ex. 1 (ESSG); MnOSHA Ex. 6 (Fabcon).

Penalty Calculations

23. In calculating penalties, the Minnesota OSHA Field Compliance Manual provides that a severity rating is to be assigned to each violation. The severity rating is based upon a scale, ranging from A (violation unrelated to injury) to F (violation could result in death, permanent total disability, or 60% or greater permanent partial disability). Severity ratings of C through F are considered serious violations.³⁸ In addition, a probability rating is assigned to each violation. The probability rating is a sum of factors pertaining to employee exposure, proximity to hazard, duration of hazard, work conditions, and additional instances found at the work site.³⁹

24. The Minnesota OSHA Field Compliance Manual provides that a severity rating of D should be used if the injury causes a temporary total disability of up to ten lost workdays.⁴⁰ The Department properly classified the violation in this case as a serious violation with a severity rating of "D."⁴¹

25. In assigning a probability rating, the Field Compliance Manual provides that the employee exposure should be rated at "1" if one employee has had exposure to a hazard; proximity should be rated as a "2" if the employee is required to put any part of his or her body in the hazard area.⁴² The Department properly rated these areas of exposure as a 1 and 2.

26. The Field Compliance Manual provides that the duration of the hazard should be rated as "1" if the employee exposure is from 10% to 50% of the work day and "2" if the employee exposure is from 51% to 100% of the work day.⁴³ The Department rated the duration of the hazard in this case as a "2," for a total probability rating of 5.⁴⁴

27. The record reflects that M.M. was exposed to the hazard in the Alar room from approximately 2 p.m. to 4 p.m. on April 12, 2011. Even if M.M. were in the Alar room from 1:00 p.m. to 7:00 p.m., when he left for the day, this would only be six hours, or 50% of the normal work day. The Department improperly rated the duration of the hazard in this case to be more than half the work day. The duration of the hazard should have been rated at "1" for exposure of 10% to 50% of the normal work day, resulting in a total probability rating of 4.

28. Based on a severity/probability rating of D5, the Field Compliance Manual provides for an unadjusted penalty for this violation of \$3,000.⁴⁵ Based on the correct severity/probability rating of D4, the unadjusted penalty would be \$2,500.⁴⁶

29. Up to this point, the Department had similarly calculated the unadjusted penalties for Fabcon and ESSG as being \$3,000.⁴⁷

³⁸ MnOSHA Ex. 2 at 64.

³⁹ *Id.* at 65-67.

⁴⁰ *Id.* at 64.

⁴¹ MnOSHA Ex. 1 at p. 4, Violation Worksheet.

⁴² MnOSHA Ex. 2 at 66.

⁴³ *Id.* at 66-67.

⁴⁴ MnOSHA Ex. 1 at 4 (Violation Worksheet).

⁴⁵ MnOSHA Ex. 2 at 80.

⁴⁶ *Id.*

30. The Department determined, however, that ESSG's penalty should be multiplied by the probability factor of "5" because the Field Compliance Manual provides that for each serious violation that caused or contributed to the serious injury of an employee, a serious injury factor that equals the probability rating will be imposed on the penalty. Credits for good faith, size, and history are applied to this amount to determine the adjusted penalty.⁴⁸

31. When the "serious injury factor" was applied, ESSG's unadjusted penalty became \$15,000. When credits for good faith, size, and history were applied, the proposed adjusted penalty was \$4,500.⁴⁹ The Department did not apply the "serious injury factor" to Fabcon, and it calculated Fabcon's proposed adjusted penalty as \$600.⁵⁰

32. The Field Compliance Manual does not contain any directions for application of the serious injury factor when more than one employer is involved. The Department contended at the hearing that the multiplier is only applicable to the employer that issues the employee's paycheck.⁵¹

33. Fabcon disputed the fine and reached a settlement with the Department through which the fine was reduced to \$400.⁵² After being cited, Fabcon changed its policy and required employees working in the Alar room to wear knee-high rubber boots with steel toes.⁵³

34. MnOSHA has not previously cited a temporary agency for violating the PPE standard with regard to employees placed on a host employer's work site.⁵⁴

35. ESSG has never before been cited by any state with regard to employees placed on a host employer's work site.⁵⁵

Procedural Findings

36. On June 10, 2010, the Commissioner issued the Citation and Notification of Penalty Orders.

37. The Respondent contested the citation and the penalty calculations.⁵⁶

38. On June 14, 2011, the Commissioner served a Notice and Order for Pre-Hearing Conference and Hearing in this matter.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

⁴⁷ MnOSHA Ex. 1; MnOSHA Ex. 6.

⁴⁸ MnOSHA Ex. 2 at 71.

⁴⁹ MnOSHA Ex. 1 at 4 (Violation Worksheet).

⁵⁰ MnOSHA Ex. 6 at 4 (Violation Worksheet).

⁵¹ Test. of L. Perzichilli.

⁵² Defendant's Ex. 14.

⁵³ Test. of F. Weber.

⁵⁴ Test. of L. Perzichilli.

⁵⁵ Test. of C. Levine.

⁵⁶ Notice of Contest (June 30, 2010).

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3, 182.664 and 14.50 (2010).⁵⁷

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law or rule.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. The Complainant has the burden of establishing an OSH violation by a preponderance of the evidence.⁵⁸

5. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Chapter 182. In Minn. R. 5205.0010, subp. 2, the Department incorporated and adopted by reference the standards contained in 29 C.F.R. § 1910.⁵⁹

6. 29 C.F.R. § 1910.132(a) provides that:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

7. The Department has failed to prove by a preponderance of the evidence that Respondent violated 29 C.F.R. §§ 1910.132(a).

8. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.

9. Even if the Department had proved the Respondent's violation of 29 C.F.R. § 132(a), the record would not support the Department's penalty calculation regarding the duration of the hazard or the use of a 5-times multiplier applied to the Respondent for a serious violation causing serious injury.

⁵⁷ All citations to Minnesota Statutes are to the 2010 edition.

⁵⁸ Minn. R. 1400.7300, subp. 5 (2011). All citations to Minnesota Rules are to the 2011 edition.

⁵⁹ Minn. R. 5205.0010, subp. 2, Item EE (3).

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that: the citation is REVERSED.

Dated: February 16, 2012

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subds. 3 and 5 (2010), this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rule Ch. 5215.

MEMORANDUM

The US Department of Labor, Occupational Safety and Health Administration (OSHA) considers temporary agency employers who send their own employees to work at other facilities to be employers whose employees may be exposed to hazards. In situations where a temporary agency employer maintains a continuing relationship with its employees, but the host employer creates and controls the hazards, the agency has interpreted its multi-employer citation policy to conclude that there is a shared responsibility for assuring that temporary workers are protected from workplace hazards. The host employer has the primary responsibility of such protections, but the temporary agency employer likewise has responsibilities under the OSH Act.⁶⁰

The precise nature of the temporary agency's responsibility depends on the standard at issue. In general, OSHA considers host employers of temporary workers to be responsible for providing PPE for site-specific hazards to which employees may be exposed. The terms of a

⁶⁰ Office of Health Compliance Assistance interpretation letter dated February 3, 1994; Office of General Industry Compliance Assistance interpretation letter dated April 30, 1996 (host employer is responsible for providing PPE for site-specific hazards to which employees may be exposed). These letters are available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22156 and http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21393. See also Ex. 15 (OSHA interpretation letter dated Aug. 15, 1991; where contracts do not define which employer is responsible for the safety and health of the employee, the relationship between employees and employers is evaluated on a case by case basis, and the primary determination of responsibility is which employer directly supervises the employee's day-to-day work activities and thereby directs the details, means, methods, and processes by which the employee reaches the work objective).

contract between a host employer and a temporary employment agency, however, may specify the services that the temporary agency should supply, including the provision of PPE for placed employees. OSHA has stated that contracts should clearly describe the responsibilities of both parties in order to ensure that all requirements of OSHA regulations are met.⁶¹

As noted above, temporary agencies are not absolved of all responsibility simply because their employees are placed in worksites controlled by others. OSHA has interpreted other standards (for example, hazard communication and exposure to bloodborne pathogens) to require affirmative compliance by temporary agencies with at least portions of the standards.⁶² Temporary agencies must provide certain general training and information under the hazard communication standard, and they must provide certain vaccinations, post-exposure follow-up, recordkeeping, and generic training with regard to bloodborne pathogen exposure. But OSHA has clearly permitted a temporary agency to determine by contract with a host employer that the host employer will be the party responsible for the provision of PPE.

The Department has contended that it cited ESSG because ESSG had a supervisor on site and the supervisor had constructive knowledge of the hazard and could have abated it. It further argues that ESSG should not be allowed to contract away its safety obligations to employees. It cites *Sec'y of Labor v. Summit Contractors, Inc.*, 2006 WL 6619948, for the proposition that a general contractor may not contract out of its OSHA obligations to the employee of a subcontractor. Even if ESSG could contractually make this arrangement with Fabcon, the Department argues that its delegation was ineffective because it had a supervisor on site. See *Sec'y of Labor v. Barbosa Group, Inc.*, 2007 WL 962960, *Sec'y of Labor v. Allstate Painting and Contracting Co., Inc.*, 2005 WL 682104, and *Sec'y of Labor v. Froedtert Memorial Lutheran Hosp.*, 2004 WL 2308763.

The Department's argument goes too far, in the sense that the law is clear that ESSG cannot "contract away" all of its safety obligations to employees. The question presented is whether ESSG's contract with Fabcon is effective to assign responsibility for PPE to Fabcon. Two of the cases cited by the Department involved the use of temporary workers, but none involved the standard for personal protective equipment. In *Barbosa Group*, the temporary agency was cited for violating the bloodborne pathogen standard with regard to employees placed to work in security positions at a detention facility operated by the Immigration and Naturalization Service (INS). The INS was exempt from citation under federal law. The contract between the temporary agency and the INS provided that the INS was required to provide site-specific job training on bloodborne pathogens to security personnel, and the temporary agency was responsible for separately training its on-site supervisors. The temporary agency first disputed that it was the employer of the workers at the site, and the OSHA Review Commission determined, based on application of common-law agency principles, that the temporary agency was in fact the employer, in part because a supervisor was on site. It also determined that the temporary agency had not effectively delegated its compliance responsibilities, both because it had retained compliance responsibilities under the contract and because it should have known, based on the training it had done for its own employees in the past, that the INS training was inadequate.

⁶¹ *Id.*

⁶² *Id.* (hazard communication); http://www.osha-slc.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2570 (bloodborne pathogens).

In *Froedtert*, both the temporary agency and the host employer were cited for failure to comply with OSHA standards for bloodborne pathogens, hazard communication, and record-keeping. The issue before the OSHA Review Commission was the *host employer's* responsibility for OSHA compliance. There was no written contract between the temporary agencies and the host employer, and there was no explicit delegation of OSHA responsibilities. The OSHA Review Commission determined, again based on common-law agency principles, that the host employer was an employer of the temporary workers and that it had not effectively delegated its OSHA responsibilities to the temporary agency.⁶³

In *Summit Contractors*, the OSHA Review Panel determined that a general contractor on a multi-employer construction site was properly cited for failure to provide ground fault circuit interrupter protection. The case involved the viability of OSHA's multi-employer citation policy as applied to a controlling employer on a construction site. The *Allstate* case did not involve a temporary agency but instead involved the interpretation of an unusual management agreement between two companies, one of which was the contractor in name only on a prime contract and the other of which performed the actual work on the prime contract. The written contract did not address OSHA responsibilities. When the contractor in name was cited for health and safety violations, the Review Commission reversed on the basis that this company had insufficient control over the employees actually performing the work. These cases present significantly different legal issues than the case at hand.

Here, there is no question but that ESSG and Fabcon were both properly considered employers of the temporary workers at Fabcon's plant. The question again is whether the contract effectively assigned responsibility for provision of PPE to Fabcon as opposed to ESSG, and the Administrative Law Judge concludes that it did. Fabcon, not ESSG, was in a position to know what the hazards were and to assess the adequacy of the required PPE. There is no evidence that ESSG's project manager should have known that Fabcon's decision to allow M.M. to use rubber slip-ons would expose M.M. to injury, or more importantly, that he should have known that Fabcon's then-existing practice of requiring steel-toed safety boots in the water treatment area (as opposed to knee-high rubber boots) was inadequate to meet the standard. If he had known or should have known that these measures would be inadequate, the result might well be different.⁶⁴

Much of the Department's argument that Kruse should have done something different is based on the assertion that Kruse supervised or was at least aware of M.M.'s work in the water treatment area that afternoon. The ALJ has not accepted this assertion as a matter of fact. M.M.'s memory of these events was poor and essentially unreliable. He did not recall that he was told to wear steel-toed safety boots to work, and he did not recall that Frank Weber had given him rubber slip-on boots with steel-toe inserts. In fact, he affirmatively denied that he

⁶³ See also *Sec'y of Labor v. Southern Scrap Materials Co., Inc.*, 2011 WL 4634275 (host employer clearly can be considered the employer of a temporary worker for purposes of OSHA compliance; no discussion of temporary agency's responsibilities).

⁶⁴ See *Central of Georgia RR Co. v. OSH Review Commission*, 576 F.2d 620 (5th Cir. 1978) (affirming citation where employer continued to send its permanent employees onto the property of another for a period of 18 months, knowing that the property presented unsafe working conditions, and the employer failed to avail itself of contractual remedies to address the issue).

was given rubber slip-on boots with steel toes. He did not recall talking to Jesse Hennen or Curt Doric near the break room, and he could not remember if he returned to the water treatment area after his feet were rinsed and dried or went directly to do other work until his shift ended. Moreover, he was susceptible to leading questions by both parties. He acknowledged that Kruse “was not around too much” and that he did not know where Kruse was during the afternoon that day; he was only sure that Kruse was there at about 4:00 p.m., when they talked in the break room. In comparison, Kruse’s testimony that he did not assign M.M. to work in the water treatment area and did not supervise his work there was straightforward and direct. His testimony that he was absent from the plant for several hours in the afternoon (during the time when M.M. was working in the water treatment area) is corroborated by his contemporaneous note. The ALJ accordingly has accepted Kruse’s version of these events.

K.D.S.