

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Walmart Stores East, LP, d/b/a Walmart
Distribution Center #7035,

Respondent.

OSHRC Docket No. 16-0272

Appearances:

Amy R. Walker, Esquire, and Joseph Gilliland, Esquire, U.S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For the Secretary

Steven R. McCown, Esquire, and Kimberly J. Doud, Esquire, Littler Mendelson, P.C.
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

Wal-Mart Stores East, LP d/b/a Wal-Mart Distribution Center #7035 (Wal-Mart) operates a large warehouse facility in Alachua, Florida, where it receives merchandise. Wal-Mart employees unload the merchandise, process it, and ship it to Walmart stores. In lieu of employing medical personnel on the premises, Wal-Mart organized a volunteer response team, known as the Serious Injury Response Team (SIRT), to provide first aid to injured employees. Wal-Mart provided training in first aid, CPR, AED, and bloodborne pathogens safety to the SIRT volunteers.

The Occupational Safety and Health Administration conducted a complaint inspection of Wal-Mart's facility from September 24, 2015, to January 7, 2016. Based on the inspection, the Secretary issued a Citation and Notification of Penalty to Wal-Mart on February 1, 2016, alleging one serious and one repeat violation of the bloodborne pathogen standard, 29 C.F.R. § 1910.1030.

Item 1 of Citation No. 1 alleges a serious violation of § 1910.1030(f)(1)(ii)(D), for failing to provide employees with the hepatitis B vaccine and vaccination series according to recommendations of the U.S. Public Health Service. The Secretary proposes a penalty of \$5,000.00 for this item.

Item 1 of Citation No. 2 alleges a repeat violation of 29 C.F.R. § 1910.1030(f)(2)(i), for failing to make the hepatitis B vaccination available to all employees who have occupational exposure to bloodborne pathogens within 10 working days of the initial assignment. The Secretary proposes a penalty of \$25,000.00 for this item.

Wal-Mart timely contested the Citation and Notification of Penalty. I held a hearing in this matter on November 30, 2016, in Jacksonville, Florida. The parties filed briefs on March 3, 2017.

For the reasons that follow, I **AFFIRM** Item 1 of Citation No. 1, reclassify the violation as other than serious, and assess a penalty of \$1,000.00. I **AFFIRM** Item 1 of Citation No. 2 as a repeat violation and assess a penalty of \$25,000.00.

BACKGROUND

Serious Injury Response Team (SIRT)

Wal-Mart operates a large warehouse facility that serves as a distribution center (DC) in Alachua, Florida. Wal-Mart established SIRT to respond to injuries to employees occurring at the DC. Keith Hall, who was an Asset Protection (AP) area manager for Wal-Mart and supervisor of SIRT at the time of the OSHA inspection, stated, “Duties of the SIRT team are to provide first aid in an emergency situation and/or keeping someone comfortable if it’s beyond our scope of being able to help.” (Tr. 195)

Exhibit G-6 is a copy of Wal-Mart’s *Logistics Safety Manual*.¹ It provides, “A member of SIRT can be any associate 18 years or older and certified through the American Red Cross; Standard First Aid with CPR/AED—Adult 5 course or certified as an Emergency Medical Technician (EMT).” (Exh. G-6, p. 1) SIRT supervisor Hall stated, “Anybody is eligible. It’s volunteer based.” (Tr. 196) The *Logistics Safety Manual* states the number of SIRT volunteers

¹ “Logistics” refers to distribution centers (Tr. 222).

should not exceed twenty-five and the volunteers “should provide for at least two members per shift.” (Exh. G-6, p. 1) At the time of the OSHA inspection, twenty-one Wal-Mart employees were serving as SIRT volunteers (Tr. 195).

Prior to serving as an active member of SIRT, a volunteer receives training in first aid, CPR, AED, and bloodborne pathogens safety (Tr. 31-32). After training is completed, the SIRT volunteers may be paged over the intercom system of the DC when they are working in their paid positions to respond to an incident (Tr. 30, 32). The *Logistics Safety Manual* states, “Upon notification of an incident, team members must respond directly to the scene and provide emergency first aid as needed. . . . The primary function of SIRT is to perform first-aid emergency care. Their goal is to provide first-aid care until emergency medical personnel, if necessary, arrives at the facility.” (Exh. G-6, p. 1) SIRT Volunteer #1 explained, “When someone gets injured in the warehouse, we receive a page for a SIRT team member or we get our names paged out specifically to help that individual.” (Tr. 30) Although the *Logistics Safety Manual* states SIRT members “must respond directly to the scene” of the incident, SIRT Volunteer # 1 testified, “Ninety-nine percent of the time,” the SIRT volunteers will be directed to go to the SIRT Room, where management personnel will inform them of the nature of the incident (Tr. 30). The volunteers will then wash their hands and don latex gloves before attending to the injured employee (Tr. 30-31, 44, 55). In rare instances, “the individual can’t be moved” and the SIRT volunteers “go to the spot they’re in.” (Tr. 30)

The SIRT Room, as described by SIRT Volunteer #1, is “basically for people’s privacy if they’ve been injured to go for us to help them and make them feel more comfortable give them their privacy.” (Tr. 45) The SIRT Room is kept locked. A member of the AP department has the key to the SIRT Room. SIRT volunteers must ask someone from AP to unlock the door of the SIRT Room if they want to enter it (Tr. 48).

After treating the employee, the SIRT volunteer completes a SIRT Patient Information form. SIRT Volunteer #1 stated,

You fill out the patient’s name, area—work area, their manager, age, what is the patient complaining of, and you give a description of how you treated the individual, if the patient needed CPR, things like that, you fill out the vital signs, airways, you sign and date it.

(Tr. 35) The SIRT volunteer places the SIRT Patient Information form “in a folder that stays in the SIRT Room.” (Tr. 37)

SIRT Volunteer #1 estimated she responded to “four to five” calls as a SIRT team member per year and that “one or none” of those calls “actually involve blood.” (Tr. 44) If SIRT volunteers believe they have been exposed to blood, they immediately report the exposure to a manager (Tr. 39-40).

Bleeding Control

The SIRT Patient Information form has an entry for “BLEEDING CONTROL” as part of its checklist under “TREATMENT.” (Exh. G-10) SIRT Volunteer #1 testified a volunteer would check that space if “you request to go to the doctor because you’ve been exposed” to blood (Tr. 47). She distinguished between the presence of blood resulting from the injury incident and the need for bleeding control. She stated she would mark the space for bleeding control only if she had “been exposed to blood,” meaning blood made contact with her skin (Tr. 35). “If I did not have any gloves on and blood got on me and I felt like I needed to go, you know, get myself tested for anything. I had a concern.” (Tr. 36) SIRT Volunteer #1 testified she learned from the bloodborne pathogen training provided by Wal-Mart that, as a SIRT member, “[Y]ou could be exposed to blood,” and if that occurred, “We have the option to get the shot for hepatitis. That is a possible exposure.” (Tr. 39) She had never reported an instance of exposure to blood (Tr. 41).

SIRT Volunteer #2 concurred with SIRT Volunteer #1’s account of Wal-Mart’s bloodborne pathogen training. When asked when she would mark “bleeding control” on the SIRT Patient Information form, she responded, “To my understanding, it’s when [patients are] bleeding profusely and they need—you need to apply pressure and it isn’t very well controlled.” (Tr. 56) SIRT Volunteer #2 stated she would report any exposure to blood “to AP and my supervisor and, more than likely, the ops manager for the Asset Protection Team as well.” (Tr. 57) Her definition of “exposure” is similar to that of SIRT Volunteer #1. “Exposed means contact with the skin, whether it be it’s on my clothing and it’s going to hit my skin or into my pores and my mouth, eyes, anything that would flow into my blood stream.” (Tr. 57) SIRT Volunteer #2 likewise had never reported an instance of exposure to blood (Tr. 57).

Hepatitis B Virus (HBV)

Section 1910.1030(b) defines *bloodborne pathogens* as “pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).” “Hepatitis

means inflammation of the liver. . . . Viruses that cause hepatitis are given letters. Hepatitis B, a virus primarily found in blood and bodily fluids, is transmitted when a susceptible host comes in contact with blood or infectious bodily fluid.” *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1053-54 (Nos. 89-2804 & 89-3097, 1993). “Vaccination is one of the critical ways of preventing the harmful effects of exposure to bloodborne pathogens.” *The Barbosa Grp., Inc.*, 21 BNA OSHC 1865, 1869 (No. 02-0865, 2007).

Hepatitis B virus (HBV) infection is the major infectious bloodborne occupational hazard to healthcare workers. The Hepatitis Branch of the Centers for Disease Control (CDC) estimates that there are approximately 8,700 infections in healthcare workers with occupational exposure to blood and other potentially infectious materials in the United States each year. . . . These infections cause over 2,100 cases of clinical acute hepatitis, 400-440 hospitalizations and approximately 200 deaths each year in healthcare workers. Death may result from both acute and chronic hepatitis. Infected healthcare workers can spread the infection to family members or rarely, to their patients. . . . The use of hepatitis B vaccine, engineering and work practice controls, and personal protective equipment will prevent almost all of these occupational hepatitis B infections.

Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64004-01 (December 6, 1991).

JURISDICTION AND COVERAGE

Wal-Mart timely contested the Citation and Notification of Penalty on February 10, 2016. The parties stipulate the Commission has jurisdiction over this action and Wal-Mart is a covered employer under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 11). Based on the parties' stipulations and the record, I find the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Wal-Mart is a covered employer under § 3(5) of the Act.

CITATION NO. 1

Item 1: Alleged Serious Violation of § 1910.1030(f)(1)(ii)(D)

Item 1 of Citation No. 1 alleges,

At the Plant, on or about September 25, 2015, five (5) employees who were expected to provide first-aid services to injured co-workers were potentially exposed with an occupational exposure to bloodborne pathogens because the employer did not provide the Hepatitis B vaccination series in accordance with the recommendations of the U.S. Public Health Service, exposing these employees to contracting the Hepatitis B virus.

Section 1910.1030(f)(1)(ii)(D) provides:

The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are:

* * *

(D) Provided according to recommendations of the U.S. Public Health Service current at the time these evaluations and procedures take place[.]

The Secretary's Burden of Proof

To establish a violation of a safety or health OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

The Cited Standard Applies

Section 1910.1030(f)(1)(ii)(D) is found in *Subpart Z-- Toxic and Hazardous Substances* of the General Industry Standards. Section 1910.1030(a) provides, "This section applies to all occupational exposure to blood or other potentially infectious materials as defined by paragraph (b) of this section." Section 1910.1030(b) defines *occupational exposure* as "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties." Here, performance of SIRT volunteers' duties includes providing "first aid in an emergency situation." (Tr. 195) Contact with blood in the course of providing first aid in a warehouse where industrial equipment is used is "reasonably anticipated." Wal-Mart's SIRT volunteers were subject to occupational exposure to blood. I find § 1910.1030(f)(1)(ii)(D) applies to the cited condition.

The Terms of the Standard Were Violated

Section 1910.1030(f)(1)(ii)(D) requires the employer ensure the hepatitis B vaccine and vaccination series be provided "according to recommendations of the U.S. Public Health Service." The U.S. Public Health Service (USPHS) is a division of the Department of Health and Human Services, which encompasses the Centers for Disease Control and Prevention (CDC). "CDC is the USPHS agency responsible for issuing guidelines and making recommendations regarding infectious agents referred to in [§ 1910.1030] as bloodborne

pathogens.” *Occupational Exposure to Bloodborne Pathogens*, 56 Fed. Reg. 64004 (December 6, 1991).

In 2006, the CDC issued *A Comprehensive Immunization Strategy to Eliminate Transmission of Hepatitis B Virus Infection in the United States* (Exh. G-15). The *Strategy* states in pertinent part:

**Recommendations and Implementation Strategies
for Hepatitis B Vaccination of Adults**

Recommendations

- Hepatitis B vaccination is recommended for all unvaccinated adults at risk for HBV infection and for all adults requesting protection from HBV infection (Box 4). Acknowledgment of a specific risk factor should not be a requirement for vaccination.
- Providers should select the vaccine schedule they consider necessary to achieve completion of the vaccine series (Table 2, Box 5).

* * *

BOX 5. Hepatitis B vaccine schedules for adults (aged ≥ 20 years)²

0, 1, and 6 months
0, 1, and 4 months
0, 2, and 4 months
0, 1, 2, and 12 months

(Exh. G-15, p.15)

The longest time span recommended by the CDC between administering the second dose and administering the third dose of the HBV vaccine is five months. The CSHO identified four (not five, as Item 1 of Citation No. 1 alleges) SIRT volunteers who had received the first and second doses of the HBV vaccine, but had not received the third at the time his inspection began on September 24, 2015. The SIRT volunteers all received the third dose of the series in October of 2015, following OSHA’s inspection (Exh. G-18; Tr. 136-138). Exhibit G-18 comprises copies of the immunization consent forms for the SIRT volunteers. The forms show the dates the doses of the HBV vaccine were administered to the employees. The lapse of time between the second

²Box 5 is accompanied by a footnote stating, “All schedules are applicable to single-antigen hepatitis B vaccines [.]” The 4-dose schedule appearing on the last line is for a specific formulation of the vaccine available for all age groups. It is not at issue here (Exh. G-15, p. 15, Box 5).

dose for each employee and the date the OSHA inspection began (September 24, 2015) is of significance here:

Employee	Date of Second Dose	Time Lapsed Until Inspection
#1	September 6, 2013	2 years, 18 days
#2	October 29, 2013	1 year, 10 months, 26 days
#3	November 18, 2013	1 year, 10 months, 6 days
#4	December 16, 2013	1 year, 9 months, 8 days

Keith Hall, who supervised the SIRT program, testified the missing doses resulted from “logistical problems” in transporting volunteers to the medical clinic where the HBV vaccinations were administered (Tr. 205). When he took over supervision of the SIRT program in late 2012, he reviewed the HBV vaccination records of the SIRT volunteers (Tr. 194). He stated, “I found that some [records] were not complete and I did not understand where they were in the series.” (Tr. 204) Hall attempted to bring the SIRT volunteers up to date on their vaccinations. He “got off to a really good start” with the program, but then ran into the aforementioned logistical problems (Tr. 205). The vehicle he used to transport volunteers to the medical clinic where the HBV vaccinations were administered was no longer available (Tr. 205). “And then there was also the problem that female employees had to be accompanied by a female manager to go the clinic.” (Tr. 206)³ As a result, Hall failed to ensure the SIRT volunteers received the third shot in the HBV vaccination series.

The Secretary has established Wal-Mart failed to provide the third dose of the HBV vaccine five months after the second dose. Wal-Mart argues, however, this evidence does not establish it violated § 1910.1030(f)(1)(ii)(D). Wal-Mart contends it was not in violation of the cited standard because (1) the CDC’s HBV vaccine schedules are “merely guidelines and do not prescribe a required schedule of shots,” and (2) the CDC *Strategy* states providers “should” select the vaccine schedule they find appropriate, which is not mandatory language (Wal-Mart’s brief, p. 15-16). I disagree with both of Wal-Mart’s arguments.

Section 1910.1030 (f)(1)(ii)(D) Requires the Employer to Follow the CDC’s Recommendations

Under Wal-Mart’s theory, the CDC’s HBV vaccination schedule does not require employers to provide the third and final dose of the series; it only informs them that, if they

³ Neither of these excuses appears to present an insurmountable, or even a particularly difficult, obstacle for Wal-Mart.

intend to administer the third dose, they must wait at least two, three, or five months (depending on the formulation of the vaccine being used) after the second dose to do so.

[T]he Secretary misreads the recommended time schedule for administering the vaccination. Rather than prescribing *maximum* time periods between shots, the PHS recommendations prescribe *minimum* time periods between vaccinations. Tr. at Ex. C-15; *see also* Ex. 14⁴ and 2016 version at <https://www.cdc.gov/vaccines/schedules/downloads/adult-schedule.pdf> (“Administer missing doses to complete a 3-dose series of hepatitis B vaccine to those persons not vaccinated or not completely vaccinated. The second dose should be administered at least 1 month after the first dose; the third dose should be administered at least 2 months after the second dose (and at least 4 months after the first dose”). Consequently, the failure to adhere to a specific schedule is immaterial. Indeed, the CDC schedule notes that if a vaccination is missed, simply administer it; there is no need to begin the series anew. *Id.* That is exactly what occurred here. When the DC became aware that its AP manager had not completed the vaccination series for a handful of SIRT members, he was admonished and the series completed. The minimum spacing recommended by the CDC was unquestionably met, so no violation exists.

(Wal-Mart’s brief, pp. 15-16)

Wal-Mart improperly focuses solely on the CDC schedule to the exclusion of the cited standard. Section 1910.1030(f)(1)(ii)(D) requires that the employer “*shall ensure* that . . . the hepatitis B vaccine and vaccination series . . . *are . . . [p]rovided* according to recommendations of the U.S. Public Health Service current at the time” the vaccinations are given (emphasis added). The Secretary intentionally drafted the standard so as to accommodate future medical advances and newly revised recommendations. The preamble to the bloodborne pathogen standard explains,

OSHA recognizes the dynamic nature of medical knowledge relating to bloodborne pathogens, and notes, from a retrospective compliance standpoint, that USPHS recommendations current at the time the standard is published may differ from recommendations at the time of the evaluation. . . . OSHA thus defers specific details of medical practice to the USPHS recommendations [.]

56 Fed. Reg. 64004-01.

The employer is not given the option to omit the final dose of the vaccination series, or to put it off indefinitely. Until the HBV vaccination series is complete, the person receiving the series remains susceptible to HBV. Delaying the third dose of the vaccination series past the

⁴ There is no exhibit in the record, adduced either by the Secretary or by Wal-Mart, designated with the number 14.

recommended interval “might increase the risk for acquisition of HBV infection among persons who have a delayed response to vaccination.” (Exh. G-15, CDC’s *Strategy*, p. 10)

Wal-Mart also improperly focuses on the CDC’s statement regarding missing doses that complete a 3 dose series. The CDC’s statement does not condone omitting the third dose; it provides guidance in the event the third dose is delayed (which is why it instructs the provider to administer “missing doses *to complete* a 3-dose series of hepatitis B vaccine.” (emphasis added) Wal-Mart interprets this to mean the schedule for the third dose is open-ended. To interpret § 1910.1030(f)(1)(ii)(D) as Wal-Mart urges would be to render it meaningless. “*See Empire Co. v. OSHRC*, 136 F.3d 873 (1st Cir. 1998) (basic canon of statutory construction that every portion of the regulatory language must have meaning); *General Motors*, 17 BNA OSHC 1217, 1220, 1993-95 CCH OSHD ¶ 30,793, p. 42,810 (No. 91-2973, 1995) (consolidated) (must give effect to every clause and word in defining a standard’s application), *aff’d*, 89 F.3d 313 (6th Cir. 1996).” *Lancaster Enterprises, Inc.*, 19 BNA OSHC 1033, 1037 (No. 97-0771, 2000).

Nothing in Box 5 of the CDC’s *Strategy* indicates the third dose is optional or that it can be delayed. It does not state the interval between doses is the minimum or the maximum. The CDC’s reference to the schedule and doses as “recommendations” does not mean an employer can choose to ignore them—the cited standard requires the employer to provide the HBV vaccination series “according to recommendations of the” CDC.

I reject Wal-Mart’s argument the CDC’s HBV vaccination schedule is a “non-binding recommendation” employers are entitled to ignore. The language of § 1910.1030(f)(1)(ii)(D) is clear that employers are required to follow the CDC’s recommended schedule.

Section 1910.1030 (f)(1)(ii)(D) Is an Enforceable Standard

Wal-Mart argues the cited standard is “unenforceable by way of citation. It is well-settled the Secretary cannot make a recommendation enforceable simply by substituting the word *shall* for *should*. *See William B. Hopke Co.*, 12 BNA OSHC 2158 (1986) (‘should’ standards merely advisory).” (Wal-Mart’s brief, p. 16) The *Hopke* case involved an ANSI standard adopted in accordance with § 6(a) of the Act. The D.C. Circuit addressed the history of the Secretary’s adoption of national consensus standards under § 6(a).

OSHA grants to the Secretary the authority to promulgate regulations concerning safety in the workplace. During the first two years following passage of the Act, the Secretary had two options as to the procedures he could follow for these regulations. Under 29 U.S.C. § 655(a), the Secretary could adopt any national

consensus standard without pursuing formal rulemaking procedures. A national consensus standard is a rule adopted by a nationally recognized standards-producing organization in such a fashion that the Secretary can determine that, after the expression of diverse views, those interested in and affected by the rule reached substantial agreement as to its contents. *Id.* at § 652(9). Unless the Secretary adopted a national consensus standard, more elaborate procedures (such as those contained in 29 U.S.C. § 655(b)) were required. For example, 29 U.S.C. § 655(b)(8) states that if the Secretary adopts a rule which “differs substantially from an existing national consensus standard,” the Secretary must concurrently publish a notice in the Federal Register explaining the modification.

Simplex Time Recorder Co. v. Sec’y of Labor, 766 F.2d 575, 582 (D.C. Cir. 1985).

In *Brown & Root, Inc., Power Plant Division*, 9 BNA OSHC 1027 (No. 76-2938, 1980), the Commission held § 1926.550(a)(17), which used the word “shall” but incorporated an ANSI standard that used the word “should,” could not be the basis for finding a violation of § 5(a)(2) of the Act. The Commission concluded “that standards adopted under section 6(a) of the Act, 29 U.S.C. § 655(a), that are derived from advisory source standards are advisory under the Act.” *Id.* at 1029. Here, the bloodborne pathogens standard was not adopted under § 6(a) of the Act—it resulted from the formal rulemaking process. The Secretary published the proposed bloodborne pathogen rule in the Federal Register where it went through the notice and comment process in accordance with § 6(b)(2) of the Act.⁵ Section 1910.1030 became a final rule on March 6, 1992. The Commission’s decisions in *Hopke* and *Brown & Root* do not apply to § 1910.1030.

Wal-Mart argues construing the cited standard as enforceable violates due process considerations and quotes the following:

“A statute or regulation is considered unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments if it ‘forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Secretary of Labor v. KS Energy Servs., Inc.*, OSHRC Doc. No. 06-1416, at 3 (July 14, 2008) (citing *Ga.-Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))).

⁵Section 6(b)(2) of the Act provides:

The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(Wal-Mart's brief, p. 16)

Wal-Mart does not specify what terms of § 1910.1030(f)(1)(ii)(D) are “so vague that men of common intelligence must necessarily guess at its meaning.” The standard requires the employer to ensure the HBV vaccination series is provided according to the recommendations of the CDC. Box 5 of the CDC's *Strategy* instructs the provider to administer the vaccine in three doses according to a specific schedule. No person of “common intelligence” would have to “guess at its meaning.” Wal-Mart's argument on this point is rejected.

The Secretary has established Wal-Mart failed to comply with the terms of § 1910.1030(f)(1)(ii)(D).

Employees Were Exposed to the Violative Condition

Wal-Mart's *Logistics Safety: Bloodborne Pathogen Control* states,

The following job classifications may be exposed to blood or other potentially infectious materials during the performance of duties considered collateral to their routine work assignments:

- Serious Injury Respond Team (SIRT)
- Janitorial Staff
- Other associates that periodically perform janitorial duties.

(Exh. G-12, p. 1)

As first responders to workplace injuries, the SIRT volunteers were exposed to bloodborne pathogens. SIRT Volunteer #2 recounted several instances where she administered first aid to Wal-Mart employees who were bleeding as a result of injuries:

[An employee] was on power equipment and his foot was not in the confines of the equipment and it ended up with his foot between the power equipment and the cement pillar. . . . [W]hen I came upon him, he had—his shoe was already off and he was laying on the floor in pain. . . I pretty much guessed that there was going to be [blood] with that type of injury.

(Tr. 52)

[With respect to another employee,] the dock door had fallen onto the top of his head and basically scalped him from the top of his head to his ear.

(Tr. 53)

[Regarding a third employee,] [w]hen I arrived, the associate was bleeding from her leg where she had impaled—had a piece of power equipment that was not

enclosed. . . It had punctured her leg and she got caught between her power equipment as well.

(Tr. 54)

[For a fourth employee,] I responded to the SIRT room. The associate had cut his finger with a box cutter while—I believe he was cutting shrink wrap. He wasn't aware of his hand placement, he wasn't paying attention. So he ended up with a small cut on his finger.

(Tr. 56)

The Secretary has established Wal-Mart's SIRT volunteers experienced occupational exposure to bloodborne pathogens, including HBV.

The Employer Knew of the Violative Condition

SIRT supervisor and AP area manager Keith Hall knew the SIRT volunteers' HBV vaccinations were not up to date. He informed Stanley Mathis, AP manager for Wal-Mart and Hall's supervisor, of the incomplete vaccinations (Tr. 208, 216, 218-219). Both managers had actual knowledge Wal-Mart was not in compliance with § 1910.1030(f)(1)(ii)(D).

[T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.*, 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at *9 (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to respondent")

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

As supervisory employees, the actual knowledge of Hall and Mathis is imputed to Wal-Mart. The Secretary has established Wal-Mart knew of the violation.

The Secretary has established all elements of the alleged violation. I find Wal-Mart violated § 1910.1030(f)(1)(ii)(D).⁶

⁶ In the parties *Joint Pre-Hearing Statement*, Wal-Mart listed as one of its "Remaining Issues at Law" the question of "Whether the citations are barred by Section 9(c) of the Act, 29 U.S.C. 658(c)?" ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation."). Wal-Mart does not address this issue in its brief. Issues not briefed are deemed waived. *See, Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991). Because Wal-Mart abandoned the issue, I will not consider it in this decision.

Unpreventable Employee Misconduct Defense

Wal-Mart asserts if a violation is found, it was the result of unpreventable misconduct on the part of Hall. Unpreventable employee misconduct is an affirmative defense. “This defense requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered.” *Id.* at 1308.

Here, Wal-Mart created a work rule, which was part of its *Bloodborne Pathogens Exposure Control*, requiring the HBV vaccination series to be given in three doses at zero, one, and six months to SIRT volunteers (Exh. G-12, p. 4). This work rule was adequately communicated to its employees. Hall testified he was aware of and understood the rule (Tr. 201, 210).

Wal-Mart contends it took reasonable steps to discover noncompliance. The record does not support this contention. AP manager Stanley Mathis (Hall’s supervisor) testified he was responsible for compliance, safety, and security of the DC (Tr. 214). He stated he conducts quarterly audits of the bloodborne pathogens program to ensure compliance by taking a random sample of five SIRT volunteers (Tr. 214-215). When asked why the audits (amounting to eight between the last vaccinations administered in 2013 and the 2015 OSHA inspection) failed to discover the missing vaccinations, Mathis stated, “The audit doesn’t look at vaccinations.” (Tr. 219) Instead, the audit monitors the forms acknowledging training in bloodborne pathogens. Wal-Mart had no mechanism in place to discover noncompliance with § 1910.1030(f)(1)(ii)(D).

Wal-Mart also failed to enforce the work rule by disciplining Hall when the noncompliance was discovered. Mathis only discovered the vaccinations were not up to date because Hall informed him he “was a little behind in shots and things like that.” (Tr. 206) Wal-Mart states that when he found out about the late shots, “Mr. Mathis disciplined Mr. Hall.” (Wal-Mart’s brief, p. 23) This would come as a surprise to Mathis and Hall. When asked what happened after Hall told him Wal-Mart was in noncompliance with the cited standard, Mathis stated, “Just asked, oh, you know, how did we get here? What—what—what’s our plan to move forward? And what’s our timetable, and what are the resources we need to get it done?” (Tr. 217) Hall corroborated Wal-Mart’s lack of enforcement. “I had a conversation with Mr. Mathis and

our Divisional about what happened, what went wrong, how did we get behind and how do we not do it in the future. And that's where it ended." (Tr. 208)

Wal-Mart has failed to establish the third and fourth element of the employee misconduct defense. It did not take steps to discover noncompliance with the cited standard and it did not enforce disciplinary measures. I find Wal-Mart's violation of the cited standard was not the result of unpreventable employee misconduct.

Classification of the Violation

The Secretary classified the violation of § 1910.1030(f)(1)(ii)(D) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

Collateral Duty Exemption

Wal-Mart argues the classification of the violation should be *de minimis* (or that the Citation should be vacated altogether), based on the "collateral duty exemption." The exemption appears nowhere in the standard. Rather, it appears in the Secretary's interpretative guidance. On April 17, 1997, John B. Miles, Director of OSHA's Directorate of Compliance Programs, explained the collateral duty exemption in a Standard Interpretation Letter:

OSHA policy states that designated first aiders are covered under the scope of the standard, however, failure to provide the Hepatitis B vaccine pre-exposure to persons who render first aid only as a collateral duty will be considered a *de minimis* violation carrying no penalty, provided certain conditions are met. These conditions include the requirement that employers institute a reporting procedure for all first aid incidents involving the presence of blood or OPIM and offer the vaccine to any employee who has rendered first aid in such an incident regardless of the occurrence of an actual "exposure incident" as defined by the standard. All other requirements of the Bloodborne Pathogens standard continue to apply to designated first aiders.

(Exh. R-1, p. 1)

On May 16, 2011, Thomas Galassi, Director of OSHA's Directorate of Enforcement Programs, issued another Standard Interpretation Letter, which provides:

OSHA's CPL 02-02-069 provides a *de minimis* policy, wherein employers will not be issued a citation for not offering the pre-exposure hepatitis B vaccine series to employees if specific conditions are met. CPL 02-02-069, section XIII.F.8. The specific conditions stated in the compliance directive are:

- a. The primary job assignment of such a designated first-aid provider is not the rendering of first aid or other medical assistance, and
- b. Any first aid rendered by such person is rendered only as a collateral duty, responding solely to injuries resulting from workplace incidents, generally at the location where the incident occurred.
- c. The employer's exposure control plan must specifically address the provision of the hepatitis B vaccine to all unvaccinated first aid providers who render assistance in any situation involving the presence of blood or OPIM (regardless of whether an actual "exposure incident" as defined by the standard occurred) and the provision of appropriate post-exposure evaluation, prophylaxis, and follow-up for those employees who experience an "exposure incident."

(Exh. R-6)

Wal-Mart did not rely on the collateral duty exemption in failing to offer the pre-exposure HBV vaccine to its SIRT volunteers. Michael Trusty, senior director of compliance and safety for Wal-Mart Logistics, testified Wal-Mart “became aware of it after this citation was issued.” (Tr. 227) Nevertheless, Wal-Mart claims “the citations are barred by OSHA’s Collateral Duty Exemption . . . [and] [t]he evidence in this case supports the exemption, such that both citations should be vacated.”⁷ (Wal-Mart’s brief, pp. 10-11) I disagree.

First, both Standard Interpretation Letters state the collateral duty exemption applies to situations where the employer failed to offer the pre-exposure HBV vaccine. That is the violation alleged in Item 1 of Citation No. 2 (alleging a repeat violation of § 1910.1030(f)(2)(i)). The item at issue here involves a situation where the employer did not provide the third dose of the three-dose vaccination series. On its face, the Collateral Duty Exemption does not apply to Item 1 of Citation No. 1.

Second, the employer must comply with the three listed conditions before the collateral duty exemption may be applied. Section (b) of the exemptions states it applies to first-aid providers “responding solely to injuries resulting from workplace incidents, generally at the location where the incident occurred.” Wal-Mart argues,

⁷ If I had determined the Commission and the Secretary were bound by the terms of the collateral duty exemption, Wal-Mart would have the burden of establishing it met those terms. “A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.” *C.J. Hughes Construction, Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996).

The Secretary tries to escape [the location requirement] by suggesting that occasionally, SIRT members respond to the SIRT room rather than the exact location of the injury. This is a meaningless distinction because the first aid is rendered at the DC where the injured associate is located at the time the SIRT member responds to the call.

(Wal-Mart's brief, p. 12)

Wal-Mart mischaracterizes the record—the Secretary does not suggest SIRT members *occasionally* report to the SIRT Room instead of to the location where the injury occurred. Rather, the record establishes SIRT members report to the SIRT Room for the great majority of calls for SIRT volunteers. Counsel for Wal-Mart similarly mischaracterized the evidence at the hearing.

Q.: “The first aid rendered by such person is rendered only as a collateral duty responding solely to injuries resulting from workplace incidents generally at the location where the incident occurred.” We’ve had testimony about that, correct?

CSHO Houser: Kind of. At the location where it happened or treatment within the SIRT Room.

Q.: Or the SIRT Room, if that’s where the employee is, if it’s not a serious injury.

CSHO Houser: If it’s what?

Q.: I think that the witnesses testified if it’s not a serious injury, they will go there and then they will be called, unlock the door and render first aid if necessary.

CSHO Houser: I don’t recall that they said about it being serious, but I know they treat it in both locations, primarily in the SIRT Room.

(Tr. 182-183)

CSHO Houser was correct in his recollection. SIRT Volunteer #1 was emphatic the SIRT Room was the primary location where SIRT volunteers provided first aid, even correcting counsel for Wal-Mart the first time her testimony was mischaracterized:

Q.: And so after you’re paged, where do you typically go?

SIRT Volunteer #1: If the individual can't be moved, we go to the spot they're in, the area they're in, or we go to the SIRT Room.

Q. Okay. About what percentage of the time would you say you respond to the SIRT Room when you're paged?

SIRT Volunteer #1: Ninety-nine percent of the time.

(Tr. 30)

* * *

Q.: And I believe you testified earlier that ninety percent of the time you respond to the SIRT Room. Did I understand that correctly?

SIRT Volunteer #1: Ninety-nine percent.

Q.: Okay. And when you—when you receive the call, you aren't the first one that's notified that there is an injury, are you?

SIRT Volunteer #1: No.

Q.: Okay. And so do you respond to where the person who is injured is?

SIRT Volunteer #1: One percent of the time.

(Tr. 44)

SIRT Volunteer #2 agreed the SIRT Room was the location generally where SIRT volunteers administered first aid.

Q. Just in terms of the usual procedure when you are paged, where do you typically respond once you're paged?

SIRT Volunteer #2: Most of the time, I am paged and they're already in the SIRT Room.

(Tr. 55)

Wal-Mart contends the difference between attending the injured employee at the site of the injury and in the SIRT Room is a "meaningless distinction" because all the treated employees were injured at the DC, identifying the warehouse as a whole as "the location where the incident occurred." I disagree with Wal-Mart's interpretation of section (b). The DC is a large facility. The phrase "the location where the incident occurred" must refer to a place more specific than

the entire facility or section (b) would be superfluous—any workplace first aid would occur at the location where the incident occurred if “the location” meant merely the business address of the employer. I interpret “the location where the incident occurred” to mean the specific room or area that is the immediate vicinity of the incident. Because the undisputed testimony established the great majority of the first aid administered by the SIRT team occurs in the SIRT Room, Wal-Mart failed to establish first aid was rendered “generally at the location where the incident occurred.”

Third, Wal-Mart seeks to enforce a policy of the Secretary set out in CPL 02-02-069 and in its Standard Interpretation Letters (Exhs. R-1 & R-6). The Supreme Court has held such agency interpretations are not legally enforceable.

[T]he critical feature of interpretive rules is that they are “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” *Ibid.*

Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1204, 191 L. Ed. 2d 186 (2015).

The collateral duty exemption is not found in the bloodborne pathogen standard—it is a policy implemented by the Secretary as an exercise of his discretionary power in issuing citations. As such, the collateral duty exemption does not have the force and effect of law and I do not accord it that weight. I find the collateral duty exemption does not apply.

De Minimis Classification

Wal-Mart argues the cited items, if affirmed, should be classified as *de minimis*, based on the collateral duty exemption policy as set out by OSHA. As noted, I find OSHA’s policy is not binding. I also find the classification of *de minimis* is not appropriate here. A violation is *de minimis* “when a deviation from the standard has no ‘direct or immediate’ relationship to employee safety.” *Star Brite Constr. Co.*, 19 BNA OSHC 1687, 1691, 2001 CCH OSHD ¶ 32,511, p. 50,434 (No. 95-0343, 2001) (citation omitted); 29 U.S.C. § 658(a) (noting that *de minimis* violations are those ‘which have no direct or immediate relationship to safety or health’).” *Otis Elevator Co.*, 24 BNAOSHC 1081, 1088 (No. 09-1278, 2013). That classification “is limited to situations in which the hazard is so trifling that an abatement order

would not significantly promote the objectives of the Act.” *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88–1642, 1991).

The hazard created by the violation of § 1910.1030(f)(1)(ii)(D) is exposure to HBV, which has a direct and immediate relationship to health and which cannot be characterized as “trifling.” Requiring employers to comply with the cited standard promotes the objectives of the Act. The violation of § 1910.1030(f)(1)(ii)(D) is not *de minimis*.

Other than Serious Classification

On the other hand, I find the Secretary has not established violation of the cited standard created “a substantial probability that death or serious physical harm” could result. It is undisputed the four SIRT volunteers at issue had received the first two doses of the three-dose HBV vaccination series at the time of the OSHA inspection. The Secretary presented no testimony, expert or otherwise, regarding the consequences of missing the third dose in the series. The CDC’s *Strategy* states,

No apparent effect on immunogenicity has been documented when minimum spacing of doses (i.e., 4 weeks between doses 1 and 2, 8 weeks between doses 2 and 3, and 16 weeks between doses 1 and 3) is not achieved precisely. . . . The third dose confers the maximum level of seroprotection but acts primarily as a booster and appears to provide optimal long-term protection.

(Exh. G-15, p. 10)

According to the CDC, the missing third dose of the HBV vaccine served “primarily as a booster,” indicating the first two doses provides most of the protection against HBV to be gained from the vaccination series. The Secretary has not established Wal-Mart’s failure to complete the vaccination series created a substantial probability of death or serious physical harm for the four SIRT volunteers. Substantial probability of death or serious physical harm “does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992). Here, if a SIRT volunteer who had received two doses of the HBV vaccine had experienced an occupational exposure incident with an employee infected with HBV, the likely result would not be serious, according to the CDC’s *Strategy*.

I find Wal-Mart's violation of § 1910.1030(f)(1)(ii)(D) is properly classified as other than serious.

CITATION NO. 2

Item 1: Alleged Repeat Violation of § 1910.1030(f)(2)(i)

Item 1 of Citation No. 2 alleges,

Throughout Establishment: On or about September 24, 2015, eight (8) employees from the SIRT were expected to render first-aid services to injured co-workers and the employer did not offer these employees the Hepatitis B vaccine within ten (10) working days of assignment.

Section 1910.1030(f)(2)(i) provides:

Hepatitis B vaccination shall be made available after the employee has received the training required in paragraph (g)(2)(vii)(I) and within 10 working days of initial assignment to all employees who have occupational exposure unless the employee has previously received the complete hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or the vaccine is contraindicated for medical reasons.

The Cited Standard Applies

Section 1910.1030(f)(2)(i) is also found in *Subpart Z-- Toxic and Hazardous Substances* of the General Industry Standards and also "applies to all occupational exposure to blood." As first aid providers, the eight SIRT volunteers cited in the Alleged Violation Description were subject to occupational exposure to blood. I find § 1910.1030(f)(2)(i) applies to the cited condition.

The Terms of the Standard Were Violated

Exhibit G-12 is a copy of Wal-Mart's *Logistics Safety: Bloodborne Pathogen Control*. It states SIRT volunteers "will be offered the HBV vaccination . . . after the associate has received Bloodborne Pathogen training and within ten working days of initial assignment. . . The HBV vaccination is given in a series of three injections, with the second and third given at one and six months, respectively, after the first." (Exh. G-12, p.4)

At the time of the OSHA inspection there were twenty-one SIRT volunteers who had each received the required SIRT team training. There is no documentation showing at least eight of the SIRT volunteers, within ten days of their initial assignments, had received the first dose of the HBV vaccination series or that they had signed a declination form refusing the vaccine. Such

documentation exists for other SIRT members (Exhs. G-7, G-17, and G-18; Tr. 82-83, 100).⁸ Supervisor Keith Hall was responsible for maintaining the paperwork relating to the SIRT team (Tr. 199). Hall conceded he failed to offer the HPV vaccine to the SIRT volunteers after they had completed their training.

Q.: Now, when you took over responsibility for the SIRT team, it was your understanding that certain members were required to be offered the hepatitis B vaccine.

Hall: So when I took over and started reading policies and procedures and guidelines, yeah, I became aware that the hep B vaccine was—was an option for the members.

Q.: Was an option?

Hall: It was their option to—whether they wanted to get it or not. It was not required.

Q.: But you had to offer them.

Hall: Yeah, of course.

(Tr. 203)

Q.: Did you understand, as part of that plan, certain associates, including the SIRT members, were to be offered the hepatitis B vaccination.

Hall: I was.

Q. And did you have any responsibility for ensuring compliance with that plan?

Hall: I did.

Q.: And I believe, as you testified earlier, you did not comply with those responsibilities, is that right?

Hall: That's correct.

Q.: Okay. And it was your responsibility to ensure that the vaccinations occurred, right?

Hall: Yes, ma'am, that is correct.

(Tr. 210)

⁸ Exhibit G-7 is the SIRT member roster as of September 27, 2015. Exhibit G-18 comprises copies of immunization forms from Company Care (the medical clinic where Wal-Mart took the SIRT members for the HBV vaccinations) showing the dates and doses of the HBV vaccine series administered to SIRT volunteers. Exhibit G-17 comprises copies of Wal-Mart's *Hepatitis B Vaccination Consent Form*. There are no consent forms for the eight cited SIRT volunteers.

Despite, Hall's admission, Wal-Mart contends the Secretary failed to establish it did not offer the cited SIRT volunteers the HBV vaccine. "The Secretary did not introduce any evidence that any SIRT member was not offered the vaccination after receiving training and within 10 days of his or her assignment. . . . There is no allegation or evidence the vaccination series was not made available (or initiated) in compliance with the cited standard." (Wal-Mart's brief, p. 19). Wal-Mart appears to confuse the evidence the Secretary relies on to establish the violation alleged in Citation No. 1 with the evidence he relies on to establish the violation of Citation No. 2.

To the extent the CDC recommendations mean anything, they establish the entire HBV series cannot be afforded within 10 days to an employee who elects to receive the vaccination. This point further highlights how the alleged violation in Citation 2 cannot be a violation of this standard, as well as why Citation 1 cannot be serious, because the vaccination does not need to be completed before the employee engages in work with occupational exposure. The standard simply requires the Hepatitis B vaccination be made available – i.e., offered – to associates such as the SIRT members so they can begin (or decline) the vaccination series. The standard does not require the vaccination be completed. As noted, OSHA did not introduce any evidence, because there is none, that the vaccinations were not offered and initiated by those opting to take same. This standard refers only to the initiation and not the completion of the series.

(Wal-Mart's brief, n. 16)

Wal-Mart is correct the employer is not required to administer the entire HBV vaccination series within ten days of the employee's initial assignment. The Commission has held,

The usual three-dose protocol of the HBV vaccine involves an initial injection, followed one month later by a second dose, and a final injection six months after the initial injection. The standard, however, requires only that the vaccine be "made available" to exposed employees within ten days of initial assignment. It does not require that immunity be achieved prior to exposure, that exposed employees agree to receive the entire three-shot course of vaccine or any vaccine at all, or that the vaccine be made available to individuals no longer covered by the standard.

Froedtert Mem'l Lutheran Hosp., Inc., 20 BNA OSHC 1500, 1510 (No. 97-1839, 2004).

Despite Wal-Mart's statement that there "is no allegation or evidence the vaccination series was not made available," within the required ten-day period, that is exactly the Secretary's allegation. The Alleged Violation Description states Wal-Mart "did not offer these employees

the Hepatitis B vaccine within ten (10) working days of assignment.” There is also adequate evidence to establish the allegation. In addition to Hall’s admission he failed to comply with the requirements of § 1910.1030(f)(2)(i), the Secretary established through documentary evidence Wal-Mart failed to make available the HPV vaccine within the time required.

Wal-Mart was aware which SIRT volunteers are at issue in this item. The parties submitted a *Joint Pre-Hearing Statement*, in which Exhibit G-7 is identified as “SIRT Roster, Revision Date 9/27/15, WM 077.” Under “Complainant’s Statement of Remaining Facts,” the Secretary states, “Whether Respondent made available the Hepatitis B vaccination to the following members of the Serious Injury Response Team within 10 working days of initial assignment to the team” and then lists the names of the SIRT volunteers at issue. Wal-Mart failed to call any of the listed employees to testify.⁹

It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party’s case. *CCI, Inc.*, 9 BNA 1169, 1174, 1981 CCH OSHD ¶ 25,091, pp. 30,994-95 (No. 76-1228, 1980), *aff’d*, 688 F.2d 88 (10th Cir. 1982); *see also Woolston Constr. Co.*, 15 BNA OSHC 1114, 1122 n.9, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 n.9 (No. 88-1877, 1991) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976)), *aff’d without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992).

Capeway Roofing Sys., Inc., 20 BNA 1331, 1342-43 (No. 00-1986, 2003)

It was within Wal-Mart’s power to produce the witnesses who could have testified as to whether Wal-Mart had offered them the HBV vaccine within ten days of receiving the bloodborne pathogen training. From its failure to do so, I infer the company was unable to rebut the evidence adduced by the Secretary regarding the absence of documentation for the cited employees and Hall’s admission he failed to offer the HBV vaccine. “[T]he Commission may draw reasonable inferences from the evidence[.]” *Fluor Daniel*, 19 BNA OSHC 1529, 1531

⁹ The Secretary called SIRT Volunteer #1 to testify. She was the only witness at the hearing who was named in the *Joint Pre-Hearing Statement* as one of the SIRT volunteers who was not offered the HBV vaccine. Curiously, neither party questioned her on this issue. The only testimony she gave regarding the HPV vaccine was in the context of an exposure incident:

Q. And what were you trained to do if you believed you were exposed to bloodborne pathogens?
SIRT Volunteer #1: We have the option to get the shot for hepatitis. That is a possible exposure.
(Tr. 39)

(Nos. 96-1729 & 96- 1730, 2001) (citing *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). The Secretary has established Wal-Mart failed to make available the HBV vaccine to the eight SIRT volunteers at issue.

Employees Were Exposed to the Violative Condition

As designated first responders, the SIRT volunteers are presumed to have occupational exposure. OSHA's Standard Interpretation Letter states, "[I]t is reasonable to anticipate that an employee designated to render first aid will have occupational exposure to blood or other potentially infectious material." (Exh. G-21) The nature of the work performed at the DC required the use of industrial power equipment, heavy overhead doors, and box cutters (Tr. 209-210). Under these circumstances, bleeding injuries were foreseeable. *See, Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2176 (No. 99-257, 2000) ("[D]esignated first aid providers . . . might be exposed to bloodborne pathogens in rendering assistance to a fellow employee who had been injured in any number of ways. . . . Given the nature of the work being done . . . --cutting out and replacing large, heavy steel plates that might have sharp edges -- an injury that would cause bleeding was reasonably foreseeable.").

As previously noted, SIRT Volunteer #2 listed four examples of employee injuries to which she responded where blood was present. The Secretary has established the cited employees were occupationally exposed to HBV.

The Employer Knew of the Violative Condition

Keith Hall was the supervisor of the SIRT team at the time of the OSHA inspection. He was responsible for ensuring compliance with the bloodborne pathogen standard. He testified he was responsible for recruiting SIRT volunteers and he was the person who provided the training, including bloodborne pathogen safety (Tr. 198-199, 201). He was aware Wal-Mart was required to make available the HBV vaccine within ten working days of the SIRT volunteers' initial assignments. He knew he had not done so (Tr. 210). Hall had actual knowledge Wal-Mart failed to comply with the cited standard. He informed manager Stanley Mathis SIRT volunteers had not received the HBV vaccine (Tr. 217-219). The knowledge of Hall and Mathis is imputed to Wal-Mart. Wal-Mart knew of the violative conduct.

The Secretary has established a violation of § 1910.1030(f)(2)(i).¹⁰

Item 1 of Citation No. 2 Is Not Duplicative of Item 1 of Citation No. 1

Wal-Mart argues this item “should be deleted because it is duplicative. The facts alleged to constitute the violation in Citation No. 1 are the same facts alleged to constitute the violation in Citation No. 1, and the abatement is essentially the same—provide the final vaccination shot according to the recommended guidelines.” (Wal-Mart’s brief, p. 20)

Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). Such is not the case here. The abatement of Item 1 of Citation No. 1 is administering the *third* dose of the HBV vaccination series according to the CDC’s recommended schedule. The abatement of the item here is to make available the *first* dose of the HBV vaccination series after the employees had undergone the required training and within ten days of their initial assignment.

The cited items are not duplicative.

Classification of the Violation

The Secretary classified Item 1 of Citation No. 2 as a repeat violation. Under § 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a “Commission final order against the same employer for a substantially similar violation.” See *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, (No. 16183, 1979). The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994). The Secretary cited Wal-Mart, under Item 2a of Citation No. 1, for a serious violation of the same standard, § 1910.1030(f)(2)(i), on January 27, 2012, at a store in Rochester, New York (Exh. G-23). The parties agreed to a *Stipulated Settlement* affirming the item on August 7, 2013 (Exh. G-25). A Commission ALJ approved the *Stipulated Settlement* and it became a final order of the Commission on September 23, 2013 (Exhs. G-26 & G-27).

¹⁰ As with Item 1 of Citation No. 1, Wal-Mart argues the Citation should be vacated based on the collateral duty exemption and that any violation is the result of unpreventable employee misconduct. For the reasons previously explained with regard to Item 1 of Citation No. 1, I reject Wal-Mart’s arguments.

Wal-Mart contends the repeat classification is “unsustainable” because the previous citation was issued to a Wal-Mart store, not a Wal-Mart distribution center. Michael Trusty, senior director of compliance and safety for Wal-Mart Logistics, explained the differences he perceived between the bloodborne pathogen programs for stores and distribution centers.

The difference is, in Logistics, we actually provide first aid. In the stores, they do not. And they do bodily fluid, blood-type spills. Very different. . . . So the difference is, if you’re providing first aid, you’re working with a person that may have a wound or some kind of injury. And so that’s entirely different than a customer or a child or something that has created a spill in the store. So you’re able to disinfect or neutralize any potential infectious material on the floor. If it’s beyond a certain point, say beyond a 12-inch square or a floor tile, approximately, they have different services to call. They use management personnel, whereas we have a first aid team in the distribution centers.

Trusty’s explanation does not present a compelling rationale for finding the two citations were not for a substantially similar violation. Trusty does not articulate the significance of the differences between exposure of SIRT volunteers to HBV in DCs and that of management personnel in stores.

In *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012), the respondent objected to the classification of a violation of a crane standard as repeat, claiming the earlier citation involved a different type of crane and circumstances than the current citation. The Commission found the differences did not warrant finding the citation at issue was not repeat.

We find no support in the record for Deep South’s contention. The same standard was violated in both cases, and the underlying violation became a final order before the instant violation occurred. In addition, the prior violation and the one before us clearly involve substantially similar hazards— a failure to adequately train a crane operator. See *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-1990 CCH OSHD ¶ 29,064, p. 38,819 (No.88-310, 1990) (“the principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards”). Under these circumstances, we affirm the repeat characterization of Citation 2, Item 1.

Id. at 2105.

I find the Secretary has established Wal-Mart’s violation of § 1910.1030(f)(2)(i) is properly classified as repeat.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. “In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer’s size, history of violation, and good faith.” *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Wal-Mart is a large employer, “only second to the United States government.” (Tr. 131) Wal-Mart has a history of OSHA violations (Tr. 131). I do not credit Wal-Mart with good faith based on the awareness of supervisors Hall and Mathis that the SIRT volunteers had not received or been offered the HBV vaccinations as required by the bloodborne pathogen standard. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

Under Item 1 of Citation No. 1, four SIRT volunteers experienced occupational exposure to HBV for over a year without the protection of the third dose of the HPV vaccine. They were not afforded the complete protection of the HBV vaccination series, but the risk of contracting HBV from an exposure incident after receiving the second dose is minimal. The gravity of the violation is low. For this item, I assess a penalty of \$1,000.00.

Under Item 1 of Citation No. 2, eight SIRT volunteers did not have the initial HBV dose of the vaccination series made available to them within ten days of their initial assignments after completing the required training. They had no immunogenicity against HBV. The gravity of the violation is high. I assess a penalty of \$25,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

- (1) Item 1 of Citation No. 1, alleging a serious violation of § 1910.1030(f)(1)(ii)(D), is **AFFIRMED** as other than serious and a penalty of \$1,000.00 is assessed, and
- (2) Item 1 of Citation No. 2, alleging a repeat violation of § 1910.1030(f)(2)(i), is **AFFIRMED** and a penalty of \$25,000.00 is assessed.

Dated: April 24, 2017

/s/ _____
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia