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United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,  
Complainant,

v.

ENVISION WASTE SERVICES, LLC.,  
Respondent.

OSHRC DOCKET No. 12-1600

Appearances:

Paul Spanos, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, OH  
For the Complainant

Joseph J. Brennan, Esquire, Fisher & Phillips, LLP, Cleveland, OH  
For the Respondent

Before: Keith E. Bell, Administrative Law Judge

### **DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On February 16, 2012, the Occupational Safety and Health Administration (“OSHA”) attempted to conduct an inspection of a worksite located at 8700 Lake Road in Seville, Ohio, based on a complaint. On March 21, 2012, OSHA returned with an administrative warrant and conducted an inspection of the worksite. Based on the inspection findings, OSHA issued a Citation and Notification of Penalty (“Citation”) to Envision Waste

Services (“Respondent” or “Envision”) on July 10, 2012, alleging violations of the Act. Respondent filed a timely Notice of Contest, bringing this matter before the Commission.

The Citation issued to Respondent consisted of the following alleged violations and proposed penalties:

Citation 1, Item 1a is classified as “Repeat-Serious” and alleges that Respondent violated 29 C.F.R. § 1910.132(f)(1), based on information that employees did not receive training on the use of personal protective equipment (“PPE”). A penalty of \$7,000.00 is proposed for this item.

Citation 1, Item 1b is also classified as “Repeat-Serious” and alleges that Respondent violated 29 C.F.R. § 1910.1030(d)(3)(i) based on information and observations that some employees were not provided with PPE.<sup>1</sup>

Citation 1, Item 2 is classified as “Willful” and alleges that Respondent violated 29 C.F.R. § 1910.157(g)(2) based on information that employees were not provided with training on the use of portable fire extinguishers.<sup>2</sup> A penalty in the amount of \$70,000.00 is proposed for this item.

Citation 1, Item 3a is classified as “Repeat-Serious” and alleges that Respondent violated 29 C.F.R. § 1910.1030(c)(1)(iii), for failure to make a copy of its Bloodborne Pathogens (“BPP”) Exposure Control Plan accessible to employees. A penalty in the amount of \$7,000.00 is proposed for this item.<sup>3</sup>

Citation 1, Item 3b is classified as “Repeat-Serious” and alleges that Respondent violated 29 C.F.R. § 1910.1030(g)(2)(ii)(A) based on information that employees did not receive training on employer’s BPP program upon initial assignment.

Citation 1, Item 3c is classified as “Repeat-Serious” and alleges that Respondent violated 29

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<sup>1</sup> Citation 1, Items 1a and 1b are grouped for penalty purposes.

<sup>2</sup> By Order dated May 22, 2013, granting Complainant’s Motion to Amend, Citation 1, Items 2 and 5 were reclassified from “Repeat-Serious” to “Willful.” Citation 2, Item 1 was also reclassified from “Serious” to “Willful.” The penalty for each of these citation items was increased to the statutory maximum of \$70,000.00.

<sup>3</sup> Citation 1, Items 3a, 3b, and 3c are grouped for penalty purposes.

C.F.R. § 1910.1030(g)(2)(ii)(B), based on information that employees who worked in the “sorting room” did not receive annual training on the employer’s BPP program.

Citation 1, Item 4 is classified as “Repeat-Serious” and alleges that Respondent violated 29 C.F.R. § 1910.1030(f)(2)(i), based on information that the Hepatitis B vaccination was not made available to employees working in the “sorting line” within 10 working days of initial assignment. A penalty in the amount of \$7,000.00 is proposed for this item.

Citation 1, Item 5 is classified as “Willful” and alleges that Respondent violated 29 C.F.R. § 1910.1200(h)(1), based on information that employees who worked on the “sorting line” were not provided with effective information and training on hazardous chemicals upon initial assignment. A penalty in the amount of \$70,000.00 is proposed for this item.

Citation 2, Item 1 is classified as “Willful” and alleges that Respondent violated 29 C.F.R. § 1910.133(a)(3), when it did not provide adequate eye protection for employees who wear prescription lenses. A penalty in the amount of \$70,000.00 is proposed for this item.

Citation 3, Item 1 is classified as “Other-than-Serious” and alleges a violation of 29 C.F.R. § 1910.134(k)(6), based on information that employees who wear respirators were not provided basic advisory information on respirators in written or oral form. No penalty is proposed for this item.

A hearing in this case was held on June 4-5, 2013, in Cleveland, Ohio. The parties each filed a post-hearing brief. For the reasons that follow, all items except Citation 1, Item 4 are AFFIRMED and penalties totaling \$224,000.00 are assessed.

### **Jurisdiction**

The record establishes that at all times relevant to this case, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. §

625(5).

### **Factual Background**

Respondent is the operator of the Medina County processing facility which receives the entire county's sanitary waste. Tr. 406. Various independent haulers bring the waste to the facility. Tr. 406. Incoming waste includes such material as: paper, cardboard, metals glass, toys, clothing, and medical waste from the local hospital. Tr. 213-214. The hospital waste includes, among other things, needles, vials of blood, I.V. tubing (with blood still in it), and used gauze patches. Tr. 326-327. In the summer, the facility also receives human waste from port-a-pots. Tr. 327. Once the waste is received at the facility, it travels by conveyor belt into sorting rooms where recyclables are removed. Tr. 402-403.

#### **February 16 Attempted Inspection**

On February 16, 2012, the OSHA Area Office in Cleveland, Ohio sent a Compliance Safety and Health Officer ("CSHO") to conduct an inspection of Respondent at its facility located at 8700 Lake Road in Seville, Ohio. Upon arrival, CSHO Janelle Zindroski met with the Plant Manager Gary Kaufman and informed him that she was there to conduct an inspection based on a complaint. Tr. 33. The complaint concerned an issue with sharp objects. Tr. 435. In response to a request for documents, the CSHO received the following: (1) BPP Exposure Control Agenda, Dec. 30, 2010 (C-1) <sup>4</sup>; (2) Fire Extinguisher training records for 2010 (C-2); Hazard Communication ("HAZCOM") agenda dated December 30, 2010 (C-3); and (4) PPE agenda dated December 22, 2010 (C-4). Tr. 38-39. After providing the documents to the CSHO, Mr. Kaufman left the room to take a phone call. When he returned, he asked the inspector for a warrant. Tr. 40. The CSHO then left to obtain an administrative warrant. Tr. 41.

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<sup>4</sup> "C" denotes Complainant's exhibit and "R" denotes Respondent's exhibit.

### March 21 Inspection

CSHO Zindroski, along with another OSHA inspector, returned with an administrative warrant on March 21, 2012. Tr. 41. After presenting the warrant, the inspectors proceeded to conduct an inspection of Respondent's facility beginning in the sorting room. *Id.* During the inspection, photographs were taken and employee interviews were conducted. *Id.* The Respondent provided the CO with additional documents to include: (1) BBP Exposure Control Plan (C-7); (2) HAZCOM Program (C-6); and (3) PPE Hazard Assessment (C-13). Tr. 42.

On March 29, 2012, Respondent, through its attorney, provided the employee vaccination log for Hepatitis B (C-11) and 2011 training sign-in sheets for the following: (1) HAZCOM (C-8); (2) PPE; (3) Fire Extinguisher (C-10); and (4) BPP (C-9). The CSHO noticed that an employee that had not yet been hired was listed on a 2011 sign-in sheet and notified Envision that the 2011 training sign-in sheets may have been falsified. Tr. 45, 47-48, 450. In response, the Plant Manager Gary Kaufman, conceded that the sign-in sheets "didn't seem to be correct." Tr. 450, 455-456. Mr. Kaufman implied that [redacted] may have tampered with the sign-in sheets because she had been the only one with physical control over them. Tr. 413, 453-454. Kaufman also testified that he had no knowledge that [redacted] tampered with the sign-in sheets and that she had no history of tampering with records in her eight years of employment with Envision. *Id.* Despite the inaccurate sign-in sheets, Mr. Kaufman maintained that training did occur in 2011. Tr. 454-455.

### 2010 Inspection

Respondent's facility had previously been inspected by OSHA on or about August 13, 2010. Tr. 257. Based on that inspection, OSHA issued citations to Respondent for violations of the

following standards: (1) §§ 1910.132, 1910.133, 1910.134 (PPE); (2) § 1910.157 (portable fire equipment); (3) § 1910.1030 (BBP); and (4) § 1910.1200 (HAZCOM). Tr. 260-261, 264, 265-266, 268, 275. C-14. The citations were resolved as part of an informal settlement agreement. C-15.

### **Secretary's Burden of Proof**

The Secretary has the burden of establishing that the employer violated the cited standard.

“To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.” *JPC Group Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009) (citations omitted).

### ***Serious Classification***

To demonstrate that a violation was “serious” under § 17(k) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited. The Secretary need not show the likelihood of an accident occurring. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

### ***Repeated Classification***

The Commission has held that a violation is repeated under § 17(a) of the Act, if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary may establish a prima facie case that a violation is repeated by showing

that the two violations were of the same standard, or if they were not, that they otherwise were substantially similar. *Id.*

### ***Willful Classification***

To establish that a violation was “willful” the Secretary must prove that it was “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995) (citations omitted), *aff’d*, 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.*, 17 BNA OSHC at 1136. “The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.” *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999) (citations omitted).

## **Discussion**

### **The Hearing**

At the hearing, the Secretary called the following witnesses to establish his case-in-chief: Janelle Zindroski, OSHA Compliance Officer; [redacted], Envision employee; Michael Bopp, OSHA Industrial Hygienist; [redacted], Envision employee; [redacted], Envision employee; [redacted], Envision employee; and, [redacted], Envision employee. The Respondent called the following witnesses: Gary Kaufman, Envision Plant Manager; Steven Stottsberry, Envision employee; David Hitchings, Envision employee; Patty Zaccardelli-Bart, Envision Office Manager; and, Janelle Zindroski (on rebuttal).

CSHO Janelle Zindroski and Plant Manager Gary Kaufman were the key witnesses for Secretary and Respondent respectively. Ms. Zindroski, based the Citation issued to the Respondent, in large part, on the out-of-court statements she received from employee witnesses and Mr. Kaufman. Ms. Zindroski's testimony concerning the out-of-court statements given to her and offered for the truth of the matter asserted is, by definition, hearsay.<sup>5</sup> Rule 801(d)(2)(D) of the Federal Rules of Evidence provides an exception to the hearsay rule for statements by a party opponent. Such statements are treated as "non-hearsay" if made by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Fed. R. Evid. 801. All of the employee witnesses who gave the out-of-court statements of interview ("SOI" or "statement(s)") during the 2012 inspection were employees/agents of Respondent, Envision, at the time the statements were given. Thus, a determination of the facts will rest on to the credibility of the Secretary's key witness versus that of Respondent's key witness.

Janelle Zindroski

Ms. Zindroski was the CSHO assigned to inspect Envisions Waste Services facility in Seville, Ohio. Tr. 32. She has been employed with OSHA for 3½ years and holds an undergraduate degree in environmental health with an emphasis on industrial hygiene. Tr. 26. She has training and work experience with BPP as well as HAZCOM. Tr. 28-30.<sup>6</sup> Ms. Zindroski has work experience in PPE which includes serving as the coordinator of health and safety programs for OSHA. She also conducts training at OSHA's Occupational Training

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<sup>5</sup> As a procedural matter, it should be noted that Respondent failed to make a timely objection to this testimony as required by Federal Rule of Evidence 103(a)(1).

<sup>6</sup> Ms. Zindroski received part of her work experience with HAZCOM evaluating factories in Ethiopia and conducting training on reading and understanding material safety data sheets, as well as sampling.

Institute (“OTI”) on PPE programs. Tr. 31. Additionally, she has received training at OTI on how to evaluate a fire extinguisher program. *Id.*

During her testimony, Ms. Zindroski’s demeanor was calm on both direct and cross-examination. Also, she frequently made eye contact with the undersigned when answering questions. When asked how she felt about Respondent’s demand for a warrant, she simply stated, “it’s an employer’s right.” Tr. 40. Ms. Zindroski had not inspected Envision prior to this inspection. *Id.* For all of the foregoing reasons, I find Ms. Zindroski to be credible and I accord full weight to her testimony.

### ***Evidentiary Conflicts and Witness Credibility***

Much of the government’s case rests upon out-of-court statements. The following witnesses gave statements of interview (“SOI” or “statement”) to the CSHO during the inspection which served, in part, as the basis for the violations at issue in this case: (1) [redacted]; (2) [redacted]; and (3) [redacted].<sup>7</sup> However, each individual’s testimony under oath at the hearing, to varying degrees, told a different story and often amounted to a recant of the SOI. The Secretary did not admit the SOI’s into evidence, but rather used selected portions to impeach these witnesses when their testimony contradicted their SOI’s. These employee witnesses were called as part of the government’s case-in-chief.<sup>8</sup>

Generally, statements made outside of court which are then offered in court for the truth of the matter asserted are “hearsay” and not admissible as evidence. Fed. R. Evid. 801(c).<sup>9</sup> Here, the employee witnesses told one story in their SOIs and a different story at the hearing. As a result, each was confronted with the inconsistency of the prior statements made in their SOI. A

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<sup>7</sup> Two executives from Envision were present during the testimony of the employees: Steve Viny, CEO and Clayton Minder, CFO. Tr. 6.

<sup>8</sup> If the SOIs had been offered into evidence, they may have qualified for admission as an opposing party’s statement. Fed. R. Evid. 801(d)(2)(D).

<sup>9</sup> The Commission applies the Federal Rules of Evidence. 29 C.F.R. § 2200.71.

witnesses' prior out-of-court statement is admissible if it is: (1) inconsistent with his/her in court testimony; and (2) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. Fed. R. Evid. 801(d)(1)(A). The SOIs given by these witnesses fail to meet the second prong of that test because they weren't given under penalty of perjury. Tr. 147. Prior inconsistent statements that do not meet the test of Rule 801(d)(1)(A) may be admitted into evidence for impeachment purposes, but not as substantive evidence. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 801.21 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2013).

[redacted]

[redacted] has been an employee of Envision since September 2011. Tr. 281, 293. She is a sorter on the conveyor line which requires her to split open trash bags and sort out certain items, such as newspapers and cardboard, from the trash as it moves down the conveyor. Tr. 281-284. During OSHA's inspection of Envision, she signed the SOI she provided to the CSHO.<sup>10</sup>

In her statement to the CSHO, she said that she had not been trained on BPP, HAZCOM, fire extinguishers, and had been told that wearing only her prescription glasses was okay. Tr. 287-290. However, her testimony at the hearing was quite different.

For example, [redacted] denied telling the CSHO that she wasn't trained on BPP, and instead, testified that she had been trained. Tr. 287. She denied telling the CSHO that she did not receive training on fire extinguishers. Tr. 288. [redacted] also denied telling the CSHO that she had not received training on the company's HAZCOM program. Tr. 290. To the contrary, [redacted] testified that she received training from Mr. Kaufman, the Plant Manager, on: (1) HAZCOM; (2) Fire Extinguishers; and (3) BPP. Tr. 298, 300-302. When asked about her prior

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<sup>10</sup> During the inspection, CSHO Zindroski asked questions and recorded answers as a SOI; she then had each person sign the SOI. Tr. 152, 293-94.

statement to the CSHO that wearing prescription glasses only was okay, she responded by saying that she also wears her safety glasses. Tr. 289.

I find that the out-of-court statement given by [redacted] is credible in that it was given at an earlier time when the facts in question were fresher in her mind. Further, I find that [redacted] gave the statement when she was not facing her employer thereby placing herself at risk by making statements against Envision's interest. [redacted] testified that she did not think she would get into trouble for not signing her SOI. Tr. 294. This is an indication that she was not under duress or threat of coercion when giving her statement to the CSHO.

In weighing [redacted] SOI against her in-court testimony, I also considered her demeanor on the stand. At times, her testimony at the hearing seemed coerced and rehearsed. For example, during her testimony she declared that she had been trained on BPP before the Secretary's attorney could finish asking her about her prior statement to OSHA that she had not been trained on BPP. Tr. 287. She did not make eye contact with the undersigned even when answering questions. Also, she seemed very defensive while answering questions on direct examination.

In view of the fact that [redacted] SOI was offered for impeachment purposes only during her direct examination, I do not treat it as substantive proof; however, I do find that it substantially contradicts her in-court testimony. For these reasons, I accord little weight to her testimony at the hearing.

[redacted]

[redacted] has been an employee of Envision for approximately 15 years. Tr. 334. His current job is a sorter in Room 1. This job requires him to sort out paper and bulk items. *Id.* During the inspection, he also gave a signed SOI to OSHA. Tr. 339-340. Like [redacted], at the hearing, [redacted] told a very different story from the one he told the CSHO in his SOI. For

example, he denied telling OSHA that he did not have safety glasses and that his prescription glasses were “good enough.” Tr. 343-344. He also denied telling OSHA that he did not receive any HAZCOM training. Tr. 345. [redacted] was confident that when there is training he always signs the training “sign-in” sheet. He was also confident in his testimony that he received firefighting training from Steve Stottsberry, an Envision employee, who is also a volunteer firefighter. Tr. 342, 349-350. However, when confronted with Envision’s firefighting training sign-in sheet that did not include his name, he admitted that his name would not be on the sheet if he “wasn’t there at work that day.” Tr. 357-358. Finally, he did concede that his name was not on the firefighting training sign-in sheet. C-10; Tr. 358.

I find that the out-of-court SOI given by [redacted] is credible in that it was given at an earlier time when the facts in question were fresher in his mind. Further, I find that [redacted] gave the statement when he was not facing his employer thereby placing himself at risk by making statements against Envision’s interest. Although [redacted] testified that he signed the SOI only because he felt it was part of his job, he made no claim of coercion by the CSHO. Tr. 355-356. In weighing [redacted]’ SOI against his in-court testimony, I also considered his demeanor on the stand. For example, he did not make eye contact with the undersigned and seemed to be very defensive during direct examination.

In view of the fact that [redacted]’ SOI was offered only for impeachment purposes during his direct examination, I do not treat it as substantive proof; however, I do find that it substantially contradicts his in-court testimony. For these reasons, I accord little weight to his testimony at the hearing.

[redacted]

[redacted] has been employed by Envision since February 2007. Tr. 362. At the time of the inspection, she was a room supervisor/sorter. Tr. 363. She has been a supervisor at Envision for five years. Tr. 364.

[redacted] gave a signed SOI to OSHA during the inspection. Tr. 365. Unlike [redacted] and [redacted], [redacted] did not recant her entire SOI at the hearing. Initially, she denied telling the CSHO that Envision had not provided her with any training for the past year. Tr. 366. She also testified that she did not remember telling the CSHO that she hadn't been trained on Envision's PPE hazard assessment. Tr. 368. She testified that she received BPP and HAZCOM training conducted by Gary Kaufman in the fall of 2011. Tr. 370, 373. She also testified that the gloves being used at Envision were not cut resistant and that she's spoken to Gary about this many times. Tr. 390. In response to my questions about which of the statements in her SOI that she still agreed with, [redacted] agreed with the following statements:

- [T]he "gloves don't work. They are not puncture resistant." Tr. 382.
- "[I]n two weeks I've had to pull glass out of my fingers." Tr. 383.
- "Gary told me as long as I wear my prescription glasses, I don't have to wear my safety glasses." Tr. 385.
- She had never been trained on evacuation procedures in the event of a fire. Tr. 386.

In weighing Robertson's SOI against her in-court testimony, I also considered her demeanor on the stand. For example, she did make eye contact with the undersigned and appeared to be calm and relaxed while answering questions about her SOI. [redacted] testified that she did not feel coerced into signing her SOI. Tr. 381. In contrast, other parts of her testimony seemed coerced and rehearsed. For example, the undersigned had to admonish her about offering answers before Respondent's attorney could finish the questions on cross-examination. Tr. 372.

In view of the fact that [redacted]'s SOI was offered for impeachment purposes only, I do not treat it as substantive proof; however, I do find that it contradicts her in-court testimony, in part. For these reasons, I accord some weight to her testimony at the hearing, to the extent it is corroborated or consistent with other evidence.

Gary Kaufman

Mr. Kaufman is currently employed by Envision as the first shift plant manager, safety manager, and third shift maintenance crew/cleaning crew supervisor. Tr. 393, 471. His responsibilities include supervising daily operations and conducting safety meetings. Tr. 394. Mr. Kaufman has a bachelor's degree in health and education. Tr. 472. Mr. Kaufman did not receive any formal training for his position as safety manager. Tr. 405-406, 472. He testified that his knowledge of health and safety is based on his own experience along with Internet research. Tr. 402, 462. He was the plant manager and safety manager for Envision at the time of both the 2010 and 2012 OSHA inspections. Tr. 33, 263, 395, 474.

Mr. Kaufman testified that he did recall the 2010 inspection and that citations were issued to Envision. Tr. 395. He also testified that after the 2010 inspection Envision implemented a "formal lockout, tag-out program and a risk assessment and a formal Blood-Borne Pathogen and Hazardous Communication [program]." Tr. 396. The changes to the safety policy were done with the assistance of an outside safety consultant hired by Envision, Steve Ogle. Tr. 396.

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that because Envision doesn't have a lot of turnover he had not done any training. Tr. 51. Interestingly, he also told the CSHO that Envision had eight or nine new hires since 2010. Tr. 62, 69, 106.

As a result of the 2010 inspection and resulting Citation, Envision hired a safety consultant, Steve Ogle, who provided, *inter alia*, the creation of a HAZCOM program. Tr. 399. When asked about the creation of a written BPP program, Mr. Kaufman testified that he developed this document with the assistance of Envision's attorney, Joseph Brennan. *Id.* Also, after the 2010 inspection he utilized the Internet for self-education. Tr. 401-02.

Regarding health and safety at Envision, he told the CSHO that he wasn't very familiar with what he was required to do and no one told him when he was supposed to provide training for employees. *Id.* Yet, on direct examination at the hearing, he testified that Steve Ogle, an expert in OSHA requirements, suggested that safety trainings be conducted once a month. Tr. 396-398. Kaufman conceded that he has no training on OSHA regulations and compliance nor does he have a copy of the regulations. Tr. 410. He provided new hires with initial training by reviewing highlights of Envision's safety manual. Tr. 422. In addition to oral presentations, Mr. Kaufman utilized a series of VHS tapes as part of Envision's safety and health training program. Tr. 479-480. Mr. Kaufman confirmed that he is the "Responsible Safety Officer" referred to in Envision's safety manual. Tr. 482.

Regarding training in 2011, Mr. Kaufman testified that fire extinguisher training was conducted in the fall and led by Steve Stottsberry, who is an Envision employee and volunteer firefighter. Tr. 408-409. Mr. Kaufman testified that except for the firefighting training, he alone conducted all other training. *Id.* at 409. He testified that BPP training was conducted in November 2011. Tr. 413-414. According to Mr. Kaufman, HAZCOM training was conducted on the same day as the BPP training. Tr. 416. PPE training was addressed during a new hire's initial training as part of the review of Envision's safety manual. Tr. 422. Employees signed

employee training certifications for initial PPE training after reviewing the safety manual with Mr. Kaufman. R-7.

In November 2010, Mr. Kaufman used a PPE assessment data form provided by Mr. Ogle to conduct a safety audit. Tr. 431, 433. With regard to safety glasses, Mr. Kaufman recorded “appropriate safety glasses **or** prescription glasses.” *Id.* at 433. He believed that prescription glasses were sufficient based on the lack of eye injuries. Tr. 434. Mr. Kaufman denied telling the CSHO that Envision didn’t offer Hepatitis B vaccines. Tr. 459. Finally, regarding the CSHO’s note referencing his comment that he “got stuck doing health and safety . . . ,” Mr. Kaufman didn’t deny making the comment but rather testified that he was “unclear as to how this refers to anything.” Tr. 460.

Mr. Kaufman’s testimony concerning training conducted in 2011 is at odds with the testimony of CSHO Zindroski whose testimony I have fully credited. Additionally, his contention that training was conducted is not supported by credible documentary evidence such as sign-in sheets or written agendas. The SOI statements of employee witnesses also indicate a lack of training at Envision. There are inconsistencies in Mr. Kaufman’s own testimony that there was a lack of employee turnover at Envision, yet eight or nine employees were hired since 2010. Additionally, there is Mr. Kaufman’s statement that no one told him when training should be done which contradicts his testimony that Steve Ogle had suggested training be conducted at least once a month. For the foregoing reasons, I find Mr. Kaufman’s testimony to be less than credible and I accord his testimony little weight.

### ***Training Records***

According to Mr. Kaufman, Envision uses sign-in sheets created by the administrative assistant to memorialize the names of attendees at training. Tr. 411. The administrative assistant

was responsible for collecting and maintaining the sign-in sheets. Tr. 412-413. In 2011, [redacted] at Envision. Tr. 413. At the end of each training session she collected the sign-in sheets.<sup>11</sup> Tr. 417. Mr. Kaufman testified that if an employee missed a training session, he offered an individual make-up session. Following the make-up session, the employee would sign the same sign-in sheet as those who attended the initial training session. Tr. 419. Mr. Kaufman testified that [redacted] was the only person with physical control over the sign-in sheets. Tr. 453-454. Despite the implication that [redacted] may have tampered with the sign-in sheets, Kaufman admitted that he had no knowledge of such an occurrence. Moreover, during her eight-year tenure at Envision, [redacted] had no known history of tampering with company records. Tr. 453-454.

The name of one employee, [redacted], appeared on a sign-in sheet that pre-dated his employment with Envision. Tr. 47, 451. Also, the names of two Envision employees who were employed at the time of the alleged September 2011 firefighting training are missing from the sign-in sheets: (1) [redacted]; and (2) [redacted]. Tr. 62-63; R-10. Regardless of who may have tampered with the sign-in sheets, Kaufman conceded that the sign-in sheets presented were not correct. Tr. 180-181, 455-456.

I find that the testimony regarding these sign-in sheets renders them an unreliable source of evidence in this case. The absence of accurate sign-in sheets, in and of itself, is not dispositive of the question of whether training was actually conducted. However, when considered in

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<sup>11</sup> [redacted] had been having serious health issues prior to her death that caused her to miss work during the last few months of 2011. Tr. 437. On January 16, 2012, [redacted] tendered her resignation indicating that she would be leaving at the end of March or when a replacement could be hired. R-10. [redacted] passed away prior to her effective retirement date. Tr. 439.

conjunction with credible testimonial evidence, it strengthens the government's argument that Envision failed to conduct training as required.<sup>12</sup>

### **The Citations**

Rather than numerical order, the citations are presented by subject matter in the following sequence: training, PPE, Hepatitis B vaccines, BBP program, and N-95 mask information.

#### ***Citation 1, Item 2 -- Alleged "Willful" violation of 29 C.F.R. § 1910.157(g)(2)***

The Portable Fire Extinguisher regulation found at 29 C.F.R. § 1910.157(g) states in pertinent part:

(g)(1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting.

(g)(2) The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

In his Citation, the Secretary alleges:

29 CFR 1910.157(g)(2): The educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting was not provided to all employees upon initial employment, and at least annually; On or about March 21, 2012, the employer did not provide annual training for portable fire extinguishers when available for employee use:

Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.157(g)(1), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 03, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

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<sup>12</sup> In reaching this conclusion, I also considered the testimony of witnesses Steve Stottsberry and David Hitchings. Like Mr. Kaufman, their testimony concerning training is unsupported by the quantum of evidence to the contrary and any credible documentary evidence.

### *1. Applicability*

The cited standard requires employers who provide portable fire extinguishers for use by employees to provide training on their use and the hazards that can be encountered when fighting a fire in its early stages. Respondent's safety manual states, "[p]ortable fire extinguishers are provided..." and "[a]ll employees are periodically instructed in the use of extinguishers and fire protection procedures." R-8 at pg. 11. Therefore, I find that this standard applies to the condition cited.

### *2. Non-compliance*

According to CSHO Zindroski, she asked Plant Manager Kaufman why there were no 2011 training documents available and he stated that due to the lack of turnover at Envision, no training had been done. Tr. 51. This statement is corroborated by the SOI's given by: [redacted] and [redacted]. Tr. 288, 366. Employee [redacted], who testified that he always signs the sign-in sheets, conceded that he must not have been at work for the training since his name did not even appear on the sign-in sheets. Tr. 342, 357-358. Ultimately, during testimony, Mr. Kaufman admitted that the sign-in sheets presented were inaccurate. Tr. 180-181, 455-456, 500. As a result, there is no objective, credible documentary evidence to support Respondent's contention that firefighting training was conducted in 2011. Accordingly, I find that Respondent did not conduct firefighting training in 2011.

### *3. Employee exposure*

Based on my finding that no firefighting training was conducted in 2011, employees were exposed to hazards resulting from non-compliance with this standard.

#### *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety Officer in Envisions written safety program. Tr. 482. Moreover, he was the safety manager for Envision and such training was part of his responsibility. Tr. 394, 471. Based on Mr. Kaufman's statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision's knowledge is established.

With respect to the willful characterization, I find that Envision knew or could have known of OSHA's requirement for fire extinguisher training. Gary Kaufman was the plant and safety manager for Envision at the time of the 2010 and 2012 inspections. Tr. 33, 263, 395, 474. During the closing conference of the 2010 inspection, Mr. Kaufman met with OSHA Industrial Hygienist, Michael Bopp to discuss recommendations for compliance with this standard. Tr. 254-255, 265. In particular, Mr. Bopp told Kaufman that training on the use of fire extinguishers was required. *Id.*

Additionally, an Envision representative<sup>13</sup> signed an informal settlement agreement based on the 2010 inspection which also shows that Envision knew or could have known of OSHA's requirement. I find that Envision, through the 2010 inspection's closing conference, citations and settlement agreement, had a heightened awareness of the requirement. As discussed above, I find there is no credible evidence that employees were provided with training. Further, Mr.

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<sup>13</sup> The name of the individual signing on behalf of Envision is in cursive and therefore, difficult to read. C-15.

Kaufman intentionally disregarded the training requirement when he failed to ensure that every employee received annual training in 2011. The Secretary has met his burden and proved a willful violation.

***Citation 1, Item 3b -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A)***

The Bloodborne Pathogen Training regulation found at 29 C.F.R. §1910.1030(g)(2)(i) and (ii) states in pertinent part:

*(2) Information and Training.* (i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program. (ii) Training shall be provided as follows: (A) At the time of initial assignment to tasks where occupational exposure may take place; (B) At least annually thereafter.

The Secretary alleges:

The employer did not ensure that training was provided to employees with occupational exposure at the time of initial assignment to tasks where occupational exposure might take place: On or about March 21, 2012, the employer did not train employees on the Bloodborne Pathogen Program at the time of initial assignment:

Envision Waste Services, LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

*1. Applicability*

The standard requires employers whose employees have "occupational exposure" to provide BBP training upon initial assignment. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent's employees are

exposed to human waste from port-a-pots in the summer. *Id.* at 327. I find that the standard applies to the condition cited.

### *2. Non-compliance*

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn't have a lot of turnover so he hadn't done any training. Tr. 51. [redacted] was hired by Envision in September 2011. Tr. 281. In her SOI and again at the hearing, [redacted] stated that she was familiar with BPP because she worked in a nursing home. Tr. 287. Though she denied it at the hearing, [redacted] told the CSHO that she had not been trained on BPP. Tr. 287. Her SOI concerning lack of BPP training corroborates Mr. Kaufman's admission that he didn't do any training in 2011. I find that these statements taken together along with the absence of any objective, credible documentary evidence of training establish that BPP training was not conducted at initial assignment for [redacted].

### *3. Employee exposure*

[redacted] is a "sorter" who separates the trash as it comes down the conveyor belt. Tr. 284. [redacted] who is also a "sorter" and a supervisor testified that she knows of two employees in her sorting room who were stuck by needles. Tr. 328.<sup>14</sup>

### *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and**

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<sup>14</sup> Envision instructed its employees on two policies: hands-off, and take/pull from the top. The "hands off" policy instructs employees not to touch medical waste but rather let it pass. Tr. 310. The "take/pull from the top" policy instructs employees to refrain from digging into the trash but rather take/pull from the top only. Tr. 311. These policies, at best, could only reduce the exposure of employees to hazards such as needle-sticks. The needle-sticks demonstrate that despite these policies, such exposures do occur. In any case, these policies do not negate the violations cited.

**regulations** necessary to maintain a safe work place and safe work habits and practices.” (emphasis added). R-8 at pp. 2, 32. Envision had a BBP Exposure Control plan in place at the time of the violation which required “training upon hiring.”<sup>15</sup> C-7, pp. 1-2. Based on Mr. Kaufman’s statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision’s knowledge of the violation is established.

CSHO Zindroski testified that BBP training is needed due to the hazard of needle-sticks at this facility. Needle-sticks could expose employees to Hepatitis B which, if not treated, can be permanently disabling and even lethal. Tr. 67. Accordingly, I find that this violation is properly classified as “Serious.”

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14. That citation became a final order as part of an informal settlement. C-15. The 2010 citation was for a different subsection of the same standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. Both citations are for the hazard of employees in the sort room exposed to bloodborne pathogens through needle-sticks and are substantially similar. I find the Secretary has established a “repeat” violation for this item.

***Citation 1, Item 3c -- Alleged “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(B)***

Subsection (B) of 29 C.F.R. § 1910.1030(g)(2)(ii) adds the requirement that such training be conducted at least annually thereafter.

The Secretary alleges:

29 CFR 1910.1030(g)(2)(ii)(B): The employer did not ensure that the training was provided to employees with occupational exposure at least annually: On or about

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<sup>15</sup> Envision’s plan also requires the training be done by a “qualified medical professional.” C-7 at pgs. 1-2. However, the OSHA standard does not require a qualified medical professional to conduct the training.

March 21, 2012, the employer did not provide annual training to employees in the Sorting Room on the Bloodborne Pathogen Program:

Envision Waste Services, LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

*1. Applicability*

The standard requires employers whose employees have “occupational exposure” to provide training annually. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent’s employees are exposed to human waste from port-a-pots in the summer. *Id.* at 327. I find that this standard applies to the condition cited.

*2. Non-compliance*

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn’t have a lot of turnover so he hadn’t done any training. Tr. 51. I find that this statement and the absence of any objective, credible documentary evidence of such training establish non-compliance with the cited standard.

*3. Employee exposure*

Based on Mr. Kaufman’s admission that no training was conducted in 2011, I find that all Envision employees working at this facility were exposed.

*4. Employer knowledge*

Envision had a BBP Exposure Control plan in place at the time of the violation which required annual training. C-7, pp. 1-2. As discussed above, Mr. Kaufman’s knowledge of the

lack of training provided is imputed to Envision. Envision's knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation immediately preceding this one, I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14. That citation became a final order as part of an informal settlement. C-15. The 2010 citation was for a different subsection of the same standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. Both citations are for the hazard of employees in the sort room exposed to bloodborne pathogens through needle-sticks and are substantially similar. I find the Secretary has established a "repeat" violation for this item.

***Citation 1, Item 5 -- Alleged "Willful" violation of 29 C.F.R § 1910.1200(h)(1)***

The Hazard Communication standard found at 29 C.F.R. § 1910.1200(h)(1) states in pertinent part:

(1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

The Secretary alleges:

29 CFR 1910.1200(h)(1): The employer did not provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees had not previously been trained about was introduced into their work area; On or about March 21, 2012, the employer did not provide training to new employees on the hazardous chemicals such as household chemicals and

industrial chemicals that include used motor oil, organics, and engineered fuel fractions that come through on the sorting line at the time of their initial assignment:

Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1200(h), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 06(b), and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

*1. Applicability*

This standard requires employers whose employees are exposed to hazardous chemicals to provide training upon initial assignment and whenever a new chemical is introduced to the workplace. CSHO Zindroski testified that Envision employees are exposed to hazardous chemicals such as: (1) Grimebuster; and (2) motor oil. Tr. 79-82. The hazards associated with Grimebuster are skin irritation and chemical burns. *Id.* at 81. A hazard associated with motor oil skin irritation. *Id.* at 82. I find that this standard applies to the condition cited.

*2. Non-compliance*

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn't have a lot of turnover so he hadn't done any training. Tr. 51. This admission by Mr. Kaufman is corroborated by the SOI of both [redacted] and [redacted] who told OSHA that they didn't receive HAZCOM training at initial assignment. Tr. 290, 345. I find that these statements and the absence of any objective, credible documentary evidence of such training establish non-compliance with the cited standard.

*3. Employee exposure*

The Secretary did not establish when the chemicals, Grimebuster and motor oil, were introduced into the workplace; the standard only requires training upon initial assignment and whenever a new chemical is introduced into the workplace. However, [redacted] and [redacted]

both stated in their SOI's that they never received HAZCOM training. Tr. 290, 345. Their statements along with the statement of Mr. Kaufman that he did not do any training in 2011 establish employee exposure to the hazards resulting from non-compliance with the cited standard.

#### *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety Officer in Envision's written safety program. Tr. 482. Moreover, he was the safety manager for Envision and such training was part of his responsibility. Tr. 394, 471. Envision had a HAZCOM program in place at the time of the violation which required "hazard-specific training for employees. C-8, pp. 43, 45. Based on Mr. Kaufman's statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision's knowledge of the violation is established.

With respect to the willful characterization, I find that Envision knew or could have known of OSHA's requirement for HAZCOM training. Gary Kaufman was the plant and safety manager for Envision at the time of the 2010 and 2012 inspections. Tr. 33, 263, 395, 474. During the closing conference of the 2010 inspection, Mr. Kaufman met with OSHA Industrial Hygienist, Michael Bopp to discuss recommendations for compliance with this standard. Tr. 254-255, 265. In particular, Mr. Bopp told Kaufman that HAZCOM training was required. *Id.*

Additionally, an Envision representative signed an informal settlement agreement based on the 2010 inspection which also shows that Envision knew or could have known of OSHA's requirement. I find that Envision, through the 2010 inspection's closing conference, citations and settlement agreement, had a heightened awareness of the requirement. As discussed above, I find there is no credible evidence that employees were provided with training. I also find that Kaufman intentionally disregarded the training requirement of the standard when he failed to conduct training for employees, [redacted] and [redacted]. The Secretary has established a "willful" violation for this item.

***Citation 1, Item 1a -- Alleged "Repeat-Serious" violation of 29 CFR § 1910.132(f)(1)***

The Personal Protective Equipment standard found at 29 C.F.R. § 1910.132(f)(1) states:

(f) Training. (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following: (i) When PPE is necessary; (ii) What PPE is necessary; (iii) How to properly don, doff, adjust, and wear PPE; (iv) The limitations of the PPE; and, (v) The proper care, maintenance, useful life and disposal of the PPE.

The Secretary alleges:

29 CFR 1910.132(f)(1): The employer did not provide training to each employee who is required by this section to use personal protective equipment: On or about March 21, 2012, the employer did not train new employees who are required to use personal protective equipment such as safety glasses, gloves, and bump caps:

Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.132(d)(2), which was contained in OSHA Inspection Number 314808163, Citation Number 02, Item Number 01, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

*1. Applicability*

The standard requires an employer to provide training to employees who are required under this section to use PPE. Envision's safety manual states, "[p]roper safety equipment is necessary for your protection." R-8 at p. 9. I find that this standard applies to the condition cited.

*2. Non-compliance*

The record reveals that Mr. Kaufman provided PPE training to new employees upon initial hire. R-7. However, the standard requires training on "[w]hat PPE is **necessary**." (emphasis added). As discussed below in Citation 2, Item 1, employees who wear prescription lenses must wear protective lenses, either over their prescription lenses or be incorporated into their prescription lenses. Kaufman testified that Envision's policy toward safety glasses was that an employee had to wear them **or** prescription glasses. (emphasis added). Tr. 434. However, Envision's safety manual states that: "[E]mployees who need corrective lenses are required to wear only approved safety glasses, protective goggles, or other medically approved precautionary procedures when working in areas with harmful exposures, or risk of eye injury." R-8, p. 25.

Employee [redacted], testified that she agreed with her SOI statement that, "Gary told me as long as I wear my prescription glasses, I don't have to wear my safety glasses." Tr. 385. CSHO Zindroski testified that compliance with this standard requires that if an employee wears prescription glasses, they must have impact resistant lenses and side shields. Tr. 84. Based on the foregoing, Envision did not train its employees on the use of proper equipment for eye protection and failed to comply with the cited standard.

### 3. *Employee exposure*

CSHO Zindroski testified that she observed a sorting room supervisor wearing only prescription glasses. Tr. 85; C-5. I find that the lack of training on proper protective eyewear for employees with prescription lenses exposed those employees to eye hazards.

### 4. *Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Based on Mr. Kaufman's testimony he did not train employees wearing prescription lenses on the use of proper eye protection. His knowledge is imputed to Envision. Envision's knowledge of the violation is established.

CSHO Zindroski testified that lack of adequate eye protection exposes employees to serious eye injuries, including metal shards and chemical burns. Tr. 86-87. I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated characterization, I find that the Secretary has not established the required substantial similarity between the current violation and the 2010 citation that she relies on. The prior citation of 29 C.F.R. § 1910.132(d)(2) alleged that Envision had not conducted and provided a written workplace hazard assessment for PPE. C-14. While both are generally related to PPE hazards, the prior citation for lack of written assessment is too attenuated from the current citation's training violation to be substantially similar. The record was deficient with respect to the evidence needed to sustain a repeated violation. Therefore, I find the evidence supports a "serious" violation for this item.

***Citation 1, Item 1b -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(d)(3)(i)***

This subsection of the Bloodborne Pathogens standard states in pertinent part:

*(3) Personal protective equipment---(i) Provision.* When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.

The Secretary alleges:

29 CFR 1910.1030(d)(3)(i): When there was occupational exposure, the employer did not provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields, masks, eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices: On or about March 21, 2012, the employer did not provide puncture resistant gloves for employees who come in contact with used needles on the Sorting Line.

Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

*1. Applicability*

This standard requires employers whose employees are exposed to BPP to provide appropriate PPE. The record reveals that Envision employees are exposed to hospital waste to include: needles, I.V. tubing containing blood, and used gauze patches. Tr. 326-327. I find that this standard is applicable to the condition cited.

## *2. Non-compliance*

CSHO Zindroski testified that Mr. Kaufman admitted that he did not have puncture resistant gloves. Tr. 54. She testified that the gloves used by Envision employees would not prevent needle-sticks. Tr. 57.

## *3. Employee exposure*

Envision employee, [redacted], testified that she knows of two employees who were stuck by needles in her sorting room. Tr. 328. [redacted] testified that the gloves do not work because they are not puncture resistant. Tr. 382. She further testified that she had pulled glass out of her fingers. Tr. 383. I find that the testimony of these employees along with Mr. Kaufman's admission that the company did not have puncture resistant gloves establishes that all Envision employees were exposed to the hazards resulting from non-compliance with this standard.

## *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. As the safety manager for Envision, I find that Mr. Kaufman knew or could have known that employees did not have adequate gloves to prevent needle-stick injuries. His knowledge is imputed to Envision; knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A), I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14 at p.8. The 2010 citation was for a different subsection of the bloodborne pathogen standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. *Id.* In the violation description, the following was noted as the hazard requiring a program: “workers in the sorting area who are exposed to sharps.” C-14 at p. 8. Envision was also cited in 2010 for not providing adequate PPE and in particular “for all hazards on site such as possible skin cuts or punctures and proper gloves etc.” C-14 at p. 10. The 2010 citation became a final order as part of an informal settlement agreement. C-15. Both the 2010 and current citations are for the hazard of employees exposed to bloodborne pathogens through skin punctures and, thus, are substantially similar. I find that the Secretary has established a “repeat” violation for this item.

***Citation 2, Item 1 -- Alleged “Willful” violation of 29 C.F.R. § 1910.133(a)(3)***

This subsection of the Personal Protective Equipment standard states in pertinent part:

The employer shall ensure that each affected employee who wears prescription lenses while engaged in operations that involve eye hazards wears eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses.

The Secretary alleges:

29 CFR 1910.133(a)(3): The employer shall ensure that each affected employee who wears prescription lenses while engaged in operations that involve eye hazards wears eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses: On or about March 21, 2012, the employer did not provide eye protection for employees who wear prescription lenses.

*1. Applicability*

This standard requires employers whose employees wear prescription glasses to ensure that the prescription glasses are designed to protect against hazards or require employees to wear safety glasses over prescription glasses. CSHO Zindroski observed an employee wearing prescription glasses that were not adequate eye protection. Tr. 85. I find that this standard is applicable to the condition cited.

## *2. Non-compliance*

CSHO Zindroski testified that she observed a sorting room supervisor wearing only prescription glasses. Tr. 85. C-5. Employee [redacted], testified that she agreed with her previous statement that, “Gary told me as long as I wear my prescription glasses; I don’t have to wear my safety glasses.” Tr. 385. I find that the evidence shows Envision’s non-compliance with the cited standard.

## *3. Employee exposure*

Mr. Kaufman’s testified that Envision’s policy for safety glasses was that an employee had to wear either safety glasses **or** prescription glasses. (emphasis added). Tr. 434. I find that Kaufman’s testimony along with that of [redacted] concerning the use of prescription glasses instead of safety glasses establishes that Envision employees were exposed to the hazards resulting from non-compliance with the cited standard.

## *4. Employer knowledge*

Envision’s safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that “[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices.” (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety

Officer in Envision's written safety program. Tr. 482. Mr. Kaufman's testimony shows he knew that employees were wearing prescription lenses instead of safety glasses. His knowledge is imputed to Envision; knowledge of the violation is established.

With respect to the willful characterization, Envision had heightened awareness of the requirement to use safety glasses and intentionally disregarded that requirement. The 2010 inspection included a citation that the employer must assess the PPE needs of its employees. C-14. Mr. Kaufman was the plant manager and safety manager at the time of the 2010 inspection. Mr. Kaufman testified that he worked with the consultant, Gary Ogle, that Envision hired after the 2010 inspection. As a result of this consultation, Mr. Kaufman conducted a PPE hazard assessment in November 2010. Tr. 431, 509; C-13. In that assessment, Mr. Kaufman identified safety glasses as necessary PPE for the hazards of flying debris in the sort room. C-13.

Additionally, Envision's safety manual states:

[E]mployees who need corrective lenses are required to wear only approved safety glasses, protective goggles, or other medically approved precautionary procedures when working in areas with harmful exposures, or risk of eye injury. R-8, p. 25.

I find that the 2010 citation, the consultation with Mr. Ogle, and the PPE risk assessment put Mr. Kaufman, on behalf of Respondent, on heightened awareness of the requirement to have every employee using prescription glasses that had protective safety features or have protective safety glasses to wear over the prescription lenses. Mr. Kaufman was responsible for ensuring safety at the facility but did not enforce Envision's written policy that approved safety glasses are needed. I find that Kaufman intentionally disregarded the standard when he failed to require employees to wear the appropriate eyewear and instead told them just wearing their prescription lenses were sufficient. A willful violation has been established for this item.

***Citation 1, Item 3a -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(c)(1)(iii)***

This subsection of the Bloodborne Pathogens standard states in pertinent part:

(iii) Each employer shall ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with 29 CFR 1910.20(e).

The Secretary alleges:

29 CFR 1910.1030(c)(1)(iii): The employer did not ensure that a copy of the Exposure Control Plan was accessible to employees, in accordance with 29 CFR 1910.1020(e): On or about March 21, 2012, the employer did not make the Exposure Control Plan accessible to employees at the facility:

Envision Waste Services LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

### *1. Applicability*

This standard requires employers to make their BPP Exposure Control Plan accessible to employees. Envision has a written BPP Exposure Control Plan. C-7. I find that this standard is applicable to the condition cited.

### *2. Non-compliance*

CSHO Zindroski testified that when she inquired about Respondent's BPP Exposure Control Plan, on her first attempt to inspect Envision on February 16, 2012, Kaufman stated that the company didn't have one and that such information was communicated verbally. Tr. 66. The plan was not provided to the CSHO until she returned on March 21, 2012 with the warrant to conduct the inspection. *Id.* The fact that the plant and safety manager wasn't able to provide a copy of the plan upon request along with his admission that it didn't exist, establishes the plan was not accessible to employees.

### *3. Employee exposure*

I find that all employees working at Envision at the time of the violation were exposed to the hazards associated with non-compliance with the cited standard.

#### *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Based on his statement to the CSHO that he could not provide a copy of the plan to her, he had actual knowledge no plan was accessible to employees. This knowledge is imputed to Envision and, therefore, knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A), I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of 29 C.F.R. § 1910.1030(c)(1)(i). C-14. The 2010 citation became a final order as part of an informal settlement agreement. C-15. Both the citations are for violations of the BBP standard. The 2010 citation was for a lack of a BBP exposure control plan; here the plan was not accessible to employees. C-14. Both citations address the hazard of not having a BBP plan available to protect employees from exposure to pathogens. I find the citations are substantially similar. I find that the Secretary has established a "repeat" violation for this item.

#### ***Citation 1, Item 4 -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(f)(2)(i)***

This subsection of the Bloodborne Pathogens standard states in pertinent part:

Hepatitis B Vaccination. (i) Hepatitis B vaccinations 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 Secretary alleges:

29 CFR 1910.1030(f)(2)(i): Hepatitis B vaccination was not made available within 10 working days of initial assignment to all employee(s) with occupational exposure: On or about March 21, 2012, the employer did not provide Hepatitis B vaccines within 10 working days of initial assignment to employees who have occupational exposure to bloodborne pathogens while working on the Sorting Line:

Envision Waste Services LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

### *1. Applicability*

The standard requires employers to provide the Hepatitis B vaccine to new hires who will have “occupational exposure” within 10 days of initial assignment unless they have already had the vaccine series. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent’s employees are exposed to human waste from port-a-pots in the summer. Id. at 327. I find that this standard applies to the condition cited.

### *2. Non-compliance*

To establish Respondent’s non-compliance with this standard, CSHO Zindroski relies on Envision’s Hepatitis B vaccine records. C-11. The records have entries for a majority of the employees listed; however, there are a few employees who do not have complete entries. For

example, [redacted] has no entries beside his name. At the hearing, [redacted] testified that he already had the Hepatitis vaccination. Tr. 230. Envision's vaccination record alone does not establish non-compliance. Unlike the training violations, there is documentary and testimonial evidence that Envision employees had the requisite Hepatitis B vaccination. Although there may indeed be a problem with shoddy recordkeeping, I find that the Secretary has not proven Respondent's non-compliance by a preponderance of the evidence. Therefore, the Secretary has not met his burden and this item is vacated.

***Citation 3, Item 1 -- Alleged "Other-than-Serious" violation of 29 C.F.R. § 1910.134(k)(6)***

This subsection of the Respiratory Protection standard states in pertinent part:

(6) The basic advisory information on respirators as presented in Appendix D of this section shall be provided by the employer in any written or oral format, to employees who wear respirators when such use is not required by this section or by the employer.

The Secretary alleges:

29 CFR 1910.134(k)(6): The employer did not provide the basic advisory information on respirators, as presented in Appendix D of 29 CFR 1910.134, in written or oral format to employees who wear respirators when such use was not required by the employer: On or about March 21, 2012, the employer did not provide Appendix D of the respirator standard when employees voluntarily wear N-95 dust masks.

*1. Applicability*

This standard requires employers to provide basic information on respirators when its employees wear respirators voluntarily. Such information can be provided orally or in writing. CSHO Zindroski testified that Mr. Kaufman told her that Envision makes N-95 dust masks available for an employee's voluntarily use. Tr. 89. I find that this standard is applicable to the condition cited.

*2. Non-compliance*

CSHO testified that Mr. Kaufman told her that Envision had not offered Appendix D to its employees. Tr. 89. I find that Mr. Kaufman's admission is evidence of non-compliance with the cited standard.

### *3. Employee exposure*

I find that all employees working at Envision at the time of the violation were exposed insofar as these dust masks were made available for use and no one was provided with the basic advisory information from Appendix D.

### *4. Employer knowledge*

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman was the safety manager for Envision and providing such information is his responsibility. Tr. 394, 471. I find that Mr. Kaufman knew or could have known that employees were not provided with the information from Appendix D. I find the Secretary has met his burden and proved this "other-than-serious" citation item.

### **Penalty Determination**

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1489 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and

the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

CSHO Zindroski testified that she considered severity, probability, size of the company, and eligibility for “good faith” discounts in assessing penalties for the violations at issue. Tr. 90. Although she did not address each citation item specifically, CSHO Zindroski explained her proposed penalty for the violations according to the nature of hazard as follows:

- HAZCOM was evaluated as “low” severity because she could not determine the chemicals to which the employees were exposed. Tr. 90.
- BPP was evaluated as “high” severity because of the possible exposure to HIV and Hepatitis. *Id.*
- Fire extinguisher was evaluated as “high” due to the number of fires Envision has had at this facility. *Id.*
- PPE (Eye protection) was evaluated as “low” severity because any resulting injury can be treated with first aid or by a doctor. Tr. 91.
- PPE (Safety gloves and training) was evaluated as “high” severity because of the possible exposure to HIV and Hepatitis. *Id.*

Based on the record in this case, I find that the penalty proposed for each of the affirmed cited violations is appropriate.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.132(f)(1), is AFFIRMED as a “Serious” violation, and a penalty of \$7,000.00 is assessed.
2. Citation 1, Item 1b, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(d)(3)(i), is AFFIRMED.
3. Citation 1, Item 2, alleging a “Willful” violation of 29 C.F.R. § 1910.157(g)(2), is AFFIRMED, and a penalty of \$70,000.00 is assessed.
4. Citation 1, Item 3a, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(c)(1)(iii), is AFFIRMED, and a penalty of \$7,000.00 is assessed.
5. Citation 1, Item 3b, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A), is AFFIRMED.
6. Citation 1, Item 3c, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(B), is AFFIRMED.
7. Citation 1, Item 4, alleging a “Repeat-Serious” violation of 29 C.F.R. § 1910.1030(f)(2)(i), is VACATED.
8. Citation 1, Item 5, alleging a “Willful” violation of 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED, and a penalty of \$70,000.00 is assessed.
9. Citation 2, Item 1, alleging a “Willful” violation of 29 C.F.R. § 1910.133(a)(3), is AFFIRMED, and a penalty of \$70,000.00 is assessed.
10. Citation 3, Item 1, alleging an “Other-than-Serious” violation of 29 C.F.R. § 1910.134(k)(6), is AFFIRMED and no penalty is assessed.

DATED: December 31, 2013

/s/Keith E. Bell  
KEITH E. BELL  
Judge, OSHRC