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. THE BARBOSA GROUP, INC., d/b/a EXECUTIVE SECURITY, Respondent.	OSHRC Docket No. 02-0865

APPEARANCES:

Eve Marie Stocker, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Donald G. Shalhoub, Deputy Associate Solicitor; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Henry L. Solano, Esq.; Le Boeuf, Lamb, Greene & MacRae, Washington DC

For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THOMPSON, Commissioner:

The Barbosa Group, Inc., d/b/a Executive Security (Barbosa), a Texas-based sole proprietorship, supplied security personnel under contract to a detention facility operated by the Immigration and Naturalization Service (INS) in Batavia, New York. In May 2002, following an inspection of the Batavia facility by the Occupational Safety and Health Administration (OSHA), OSHA issued Barbosa two citations—one serious and one willful—each alleging two violations of 29 C.F.R. § 1910.1030, OSHA's bloodborne pathogens (BBP) standard.[1] The late Administrative Law Judge Michael H. Schoenfeld

[1] Under the two serious citation items, the Secretary alleged that Barbosa lacked an exposure control program in violation of 29 C.F.R. § 1910.1030(c)(1)(i) and failed to provide post-exposure follow-up training in violation of 29 C.F.R. § 1910.1030(g)(2)(vii)(K). Under the two willful citation items, the Secretary alleged that

affirmed all four violations as alleged and assessed OSHA's total proposed penalty of $132,750.

On review, Barbosa does not dispute the existence of the violative conditions. Indeed, as the judge noted, Barbosa admits that "its contract employees at the Batavia facility were unlawfully denied adequate protection against blood borne pathogens." The issues we decide today include (1) whether Barbosa is the employer responsible for the cited conditions; and (2) whether two of the citation items—those alleging violations of the BBP standard's provisions on the hepatitis B virus (HBV) vaccine and post-exposure follow-up treatment—are not willful because Barbosa reasonably believed it had no duty and, in fact, was powerless to provide these required protections to its security personnel under its contract with the INS.

As indicated in this opinion, and in the separate opinions of Chairman Railton and Commissioner Rogers, we determine that Barbosa was responsible for the cited conditions as an employer of the contract security personnel it provided to the INS's Batavia facility and that it failed to effectively delegate its compliance responsibilities to the INS or any other entity. We, therefore, affirm the four citation items at issue. However, for the reasons stated herein, Chairman Railton and I agree to recharacterize one of the willful violations as serious, group the three affirmed serious violations for penalty purposes, and assess a total penalty of $69,300.

Background

The INS contracted with Barbosa to provide approximately sixty-five security personnel who worked alongside an equal number of INS security personnel at its Batavia detention facility. It is undisputed that the INS had control over the Batavia facility as well as all security personnel physically on the premises, including those provided by Barbosa. The INS's control even extended to duty assignments, as well as to discipline and removal.

Barbosa hired all of the security personnel it provided to the INS's Batavia facility and paid their salaries and benefits. Barbosa's security personnel also received day-to-day instructions, assignments, work schedules, promotions and pay from two Barbosa managers located at the facility. However, regular on-site supervision was also provided by Barbosa "shift" supervisors who were hourly employees. Barbosa and the Service

---

Barbosa failed to make hepatitis B vaccination available to its employees in violation of 29 C.F.R. § 1910.1030(f)(2)(i), and failed to provide post-exposure evaluation and follow-up treatment in violation of 29 C.F.R. § 1910.1030(f)(3).

Employees International Union were parties to a collective bargaining agreement covering nonmanagement personnel at the Batavia facility. Under the Barbosa/INS contract, the INS was required to provide site-specific job training, including BBP training, to Barbosa security personnel while Barbosa was required to provide separate training to its on-site supervisors. The U.S. Public Health Service conducted the BBP training for all hourly security personnel at the Batavia facility.

Discussion

I. Employer under the OSH Act

The first question presented by this case is that of Barbosa's status as an employer of the security personnel it provided to the INS at its Batavia facility. In determining whether an employer-employee relationship exists under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), the Commission applies the common-law agency doctrine enunciated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) ("*Darden*").[2] *See Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1506, 2002 CCH OSHD ¶ 32,703, p. 51, 733 (No. 97-1839, 2004) ("*Froedtert*"). In *Froedtert*, the Commission applied the *Darden* analysis to a case involving co-employment issues that is factually similar to this one. There, OSHA cited a hospital for violations of the BBP standard based on the exposure to workplace hazards of housekeepers supplied to the hospital by two temporary help agencies. Applying *Darden*, the Commission concluded that the hospital was properly cited under the OSH Act as an employer of the housekeepers because the hospital directed and controlled the means, methods, location, and timing of their work, and also provided sole on-site supervision and

[2] As stated by the Court:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

503 U.S. at 323-24 (citation omitted).

on-the-job instruction. *Froedtert*, 20 BNA OSHC at 1505-07, 2002 CCH OSHD at pp. 51,732-35.

Barbosa maintains that the Commission's holding in *Froedtert* dictates that the INS is solely responsible for the cited conditions. This contention is rejected. Application of the *Darden* factors clearly establishes that Barbosa had an employment relationship with its security personnel and, therefore, OSHA could properly cite it under the OSH Act. Barbosa's managers and supervisors provided regular on-site supervision to Barbosa security personnel at the Batavia facility. Consistent with the terms of its contract with the INS, Barbosa supervisors provided first-line direction and meted out discipline to its contract security personnel at the Batavia facility, unless contravened by INS personnel. Indeed, these contract security personnel considered Barbosa to be their employer due, in no small part, to the fact that Barbosa informed them of their daily work assignments and schedules, provided their pay and promotions, and entered into a collective bargaining agreement with their union covering the terms and conditions of their employment.

Unlike the unskilled manual work the housekeepers performed at the hospital in *Froedtert*, the duties performed by the contract security personnel at the Batavia facility required some degree of skill and prior experience, as evidenced by the Barbosa/INS contract provision that "[a]ll contract employees shall have a minimum one year's experience as a law enforcement officer or military policeman or six months experience as a security officer engaged in functions related to maintenance of civil order." While the INS provided site-specific job training to Barbosa's security guards, Barbosa provided separate supervisory training to its on-site "shift" supervisors, as required by its contract with the INS. Thus, regardless of whether the INS had any sort of employment relationship with the security personnel supplied by Barbosa, the degree of control Barbosa retained over its contract security personnel compels the conclusion that Barbosa remained their employer in these circumstances and was properly cited as such under the OSH Act.[3]

[3] I find no merit to Barbosa's claim that the Secretary's compliance directives addressing the BPP standard are confusing or contradictory with regard to the standard's applicability to a federal government agency like the INS. The prescribed "duties" under section 5 of the OSH Act clearly apply only to an "employer," 29 U.S.C. § 654, and the definition of "employer" under section 3(5) of the Act clearly excludes federal government agencies. Thus, any references in the Secretary's compliance directives regarding the BBP standard's applicability to such agencies would be circumscribed by the plain language of the Act. *See also* Exec. Order No. 12,196, 45 Fed. Reg. 12,769 (Feb. 26, 1980) (effective July 1, 1980) (Secretary authorized only to issue to Executive Branch agencies a report of any

II. Delegation of Duty

Based on the record in this case, there is no evidence that Barbosa effectively delegated its compliance responsibilities under the OSH Act to the INS or any other entity. As the Commission recognized in *Froedtert*, "[a]n employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made." *Froedtert*, 20 BNA OSHC at 1508 (quoting *Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978)). *See also Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1180, 1993-95 CCH OSHD ¶ 30,734, p. 42,684 (No. 90-1786-S, 1995) (an employer cannot "contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them"). Here, the question of delegation arises only with regard to the BBP training provided by the INS to Barbosa's security personnel pursuant to their contract.

Barbosa claims on review that the BBP training "included an 'overview of communicable diseases and use of universal precautions,'" and that "the INS trained the contract employees along side [sic] federal employees on blood borne [sic] pathogens." Barbosa neglects to mention, however, that the training provided by the INS clearly lacked procedures for employees to follow in the event that an exposure incident occurred, including how to obtain post-exposure follow-up medical treatment. These omissions, which would render any delegation ineffective, could have been discovered by Barbosa had it exercised reasonable diligence. *See Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980) (employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work"). Indeed, Barbosa was more than familiar with the contents of a comprehensive BBP training program, having provided such training to its personnel located at other facilities. According to Barbosa's operations manager, Jeanne McMichael, Barbosa brought in its own certified trainer for a BBP training program provided to Barbosa employees working for the federal government in New Jersey. McMichael sat in on four of these BBP training classes within a six-month period and described the trainer Barbosa hired as "one of the best" with regard to BBP training. As for

---

OSH Act violations, which "may" include recommendations); *AFGE v. Rumsfeld*, 321 F.3d 139, 144 (D.C. Cir. 2003) ("the Act confers no authority upon the Secretary to take enforcement action against federal agencies").

the training provided to Barbosa's contract security personnel at the Batavia facility, McMichael simply testified that the INS "said that they did" the training. Yet, neither McMichael nor any other Barbosa manager attended this training nor made any other inquiries prior to the OSHA investigation to determine whether the training complied with the BBP standard.

Under these circumstances, it is clear that Barbosa not only failed to delegate its compliance duties with regard to these specific requirements under the BBP standard but also failed to show why those duties were not carried out with regard to its contract security personnel located at the Batavia facility. *See Central of Georgia*, 576 F.2d at 624 (effective delegation of responsibilities to third parties requires that employer show why it cannot enforce its own arrangements). Accordingly, all four violations at issue are affirmed.

III. Willfulness

Willful violations are "characterized by an intentional or knowing disregard for the requirements of the Act or a 'plain indifference' to employee safety, in which the employer manifests a 'heightened awareness' that its conduct violates the Act or that the conditions at its workplace present a hazard." *Weirton Steel Corp*., 20 BNA OSHC 1255, 1261, 2003 CCH OSHD ¶ 32,672, p. 51,451 (No. 98-0701, 2003) (citations omitted). Willfulness may be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible. *E.g., Gen. Motors Corp., Electro-Motive Div*., 14 BNA OSHC 2064, 2068-69, 1991-93 CCH OSHD ¶ 29,240, pp. 39,168-69 (No. 82-630, 1991) (consolidated).

Here, as indicated in his separate opinion, Chairman Railton and I find that the contrasting approaches Barbosa took in addressing the conditions covered by the two BBP provisions under which it was cited for willful violations clearly differentiate these citation items for the purposes of characterization. With regard to the violation of 29 C.F.R. § 1910.1030(f)(3),[4] the post-exposure evaluation and follow-up treatment item, Barbosa paid—either directly or through workers' compensation—for the initial post-exposure evaluation obtained by its injured security personnel at a local hospital. All of these

[4] Section 1910.1030(f)(3) provides in relevant part:

> *Post-exposure Evaluation and Follow-up.* Following a report of an exposure incident, the employer shall make immediately available to the exposed employee a confidential medical evaluation and follow-up[.]

personnel also obtained the post-exposure evaluation and follow-up treatment required by 29 C.F.R. § 1910.1030(f)(3) pursuant to Barbosa's employer-provided health care coverage. However, Barbosa not only failed to cover the co-pay associated with this treatment, but it also charged leave to the injured personnel for the work-time spent obtaining this treatment. While Barbosa's conduct does not fully comply with the requirements of the cited provision, its personnel did receive the treatment required by the standard. Under these circumstances, Chairman Railton and I find no evidence in the record that Barbosa demonstrated an intentional disregard rising to the level of willfulness and, therefore, affirm the violation as serious.[5] *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1444-45, 1993-95 CCH OSHD ¶ 30,239, pp. 41,652-53 (No. 91-102, 1993) (employer's efforts to prevent violation sufficient to negate willfulness, even if efforts are insufficient to fully eliminate hazardous conditions), *aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995).

The willful characterization of the violation based on Barbosa's failure to provide the HBV vaccine to its security personnel is another matter altogether. Vaccination is one of the critical ways of preventing the harmful effects of exposure to bloodborne pathogens. *See* Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004, 64,152, 64,154 (Dec. 6, 1991) ("OSHA believes that the risk of infection is sufficient to require that the employer make Hepatitis B vaccination available to all employees who have occupational exposure"). The cited standard requires that "[h]epatitis B [or HBV] vaccination be made available … within 10 working days of initial assignment to all employees who have occupational exposure." 29 C.F.R. § 1910.1030(f)(2)(i).[6] The record here shows that

[5] Although this violation was not cited as serious, the record establishes the seriousness of the cited condition within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k). *See E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2052, 1993-95 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994) (citing *Simplex Time Recorder Company*, 12 BNA OSHC 1591, 1596-97, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985) (violation found serious rather than willful where seriousness was evident from record)). A serious violation is deemed to exist when there is a "substantial probability that death or serious physical harm could result" from a condition or practice. 29 U.S.C. § 666(k). Here, the record establishes that exposure to BBP's could result in death or serious physical harm.

[6] Section 1910.1030(f)(2)(i) provides:

> *Hepatitis B Vaccination.* (i) 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

Barbosa was aware of the working conditions at the Batavia facility, such as intervening in fights among detainees, which exposed its contract security personnel to blood and other bodily fluids. In addition, Barbosa officials were familiar with the BBP standard's requirement to provide HBV vaccinations, having both arranged for and attended numerous courses addressing the subject. Further, Barbosa received repeated requests for the vaccine from its contract security personnel located at the Batavia facility, yet nonetheless took no steps whatsoever to ensure that these employees were offered the HBV vaccine.

On review, Barbosa articulates no other reasons for its failure to offer the vaccine other than its belief that it had no duty to offer the vaccine and that its contract with the INS prevented it from offering the vaccine. Barbosa's contention that its conduct is indistinguishable from that of the hospital in *Froedtert* is rejected. In *Froedtert*, the Commission found that willfulness was not shown, in part, because even the Secretary recognized the propriety of an employer's efforts to structure a business arrangement to have temp agencies assume certain employment responsibilities. *Froedtert*, 20 BNA OSHC at 1510, 2002 CCH OSHD at p. 51,736. Here, there is no evidence that Barbosa's contract was intended to remove OSHA compliance obligations from Barbosa. Nor does the record provide a reasonable basis for Barbosa to believe that its compliance obligations, as they relate to federal agencies and their labor-supplying independent contractors, were unclear under the cited provisions of the BBP standard. Finally, the terms of the Barbosa/INS contract provide Barbosa with no reasonable basis to conclude it was contractually *prohibited* from offering the HBV vaccine to its employees.

Accordingly, my colleagues and I conclude that Barbosa knowingly disregarded its obligation to provide a preventative means of protecting its employees from exposure to BBPs and, therefore, affirm the violation of 29 C.F.R. § 1910.1030(f)(2)(i) as willful. *See AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (willful violation found where employer knew of standards' requirements and had notice of deficiencies in compliance).

IV. Penalties

For penalty purposes, Chairman Railton and I find it appropriate to group Serious Citation 1, Items 1 and 2, and Willful Citation 2, Item 2—all three of which are affirmed as

---

hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or the vaccine is contraindicated for medical reasons.

serious violations. The focus of all three items is the provision of BBP post-exposure evaluation and follow-up treatment. Two of these items require a written exposure control plan and BBP training, but both the plan and training provided here by the INS failed to address post-exposure evaluation and follow-up treatment procedures for Barbosa's contract security personnel. As discussed above, however, Barbosa did provide this treatment to its security personnel at the Batavia facility, though not without cost or lost work-time to the employees. In view of Barbosa's provision of post-exposure follow-up treatment despite the related shortcomings in both the BBP training and exposure control plan, Chairman Railton and I find that grouping these citation items for penalty purposes is appropriate. *See Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005) (appropriate to assess "one penalty" for "closely-related violations" (citing *L.E. Myers Co.*, 16 BNA OSHC 1037, 1048, 1993-95 CCH OSHD ¶ 30,016, p. 41,134-35 (No. 90-945, 1993))). Accordingly, giving due consideration to the statutory factors set forth at section 17(j) of the OSH Act, a single penalty of $6,300 for these three citation items is assessed.

My colleagues and I also find that the $63,000 penalty proposed for Barbosa's willful failure to offer the HBV vaccine to its employees is appropriate based on the section 17(j) factors. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶ 15,032 (No. 4, 1972). The record shows that the detainees at this detention facility regularly suffered cuts and scrapes that exposed the responding security personnel to blood, resulting in a heightened risk of employee exposure to bloodborne pathogens. In these circumstances, the gravity of the violation, the principle factor to be considered, is found to be high. *Cf. Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2176, 2000 CCH OSHD ¶ 32,137, p. 48,449 (No. 99-257, 2000) (finding exposure control plan violation not high gravity because shipyard workers unlikely to be exposed to bloodborne pathogens). With regard to good faith, apart from its unpersuasive claims that it was not required to offer the vaccine or was prohibited from offering it, Barbosa's primary reason for not offering the vaccine appears to have been its cost. Finally, the large size of Barbosa's business warrants no penalty reduction, although the proposed penalty was reduced based on its lack of a history of prior violations. Therefore, the $63,000 penalty assessed by the judge is deemed appropriate.

Order

Citation 1, Items 1 and 2, and Citation 2, Item 2, are affirmed as serious, and a single grouped penalty of $6,300 is assessed for these violations. Citation 2, Item 1, is affirmed as willful, for which a $63,000 penalty is assessed.

SO ORDERED.

/s/_____
Horace A. Thompson
Commissioner

Date: February 5, 2007

RAILTON, Chairman, concurring:

I concur with my colleagues that the citation items in this case be affirmed, and with Commissioner Thompson in the characterization of the items and penalty assessments articulated in his lead opinion. I do so, however, based on the joint employer analysis set out in my concurring opinion in *Froedtert Memorial Lutheran Hospital, Inc.*, 20 BNA OSHC 1500, 1512-15, 2002 CCH OSHD ¶ 32,703, pp. 51,739-41 (No. 97-1839, 2004) (Chairman Railton, concurring). As noted therein, an employer of contract workers may, in certain factual circumstances, be a joint employer with its labor-supplying agency, sharing with it OSH Act compliance responsibilities. *Froedtert*, 20 BNA OSHC at 1513, 2002 CCH OSHD at p. 51,740. I would find in this case that the INS and Barbosa had shared employment responsibilities with respect to the Barbosa-supplied security guards working at the INS facility. As with the hospital in *Froedtert*, the INS was the exposing employer with full control of the workplace, and was in the best position to control the guards' exposures to bloodborne pathogens. Indeed, the record demonstrates that neither Barbosa's on-site supervisors nor its guards could avoid the task of quelling fights and disturbances that presented the greatest exposure risk. The INS supervisors required and demanded the intervention of Barbosa's civilian guards to subdue the detainees, and the record identifies a few such disturbances during which the Barbosa-supplied guards were exposed to blood.

As required by the cited provisions of the bloodborne pathogen standard, the INS had both an exposure control plan for the Batavia detention facility and a bloodborne pathogen training program for all guards employed at the facility, including the Barbosa contract guards. The INS training program was developed and administered by the U.S. Public Health Service (PHS). Upon inspection, however, the OSHA compliance officer determined that the INS exposure control plan, as well as the training administered by the PHS, did not address exposure incidents which might occur when the INS and Barbosa guards were called upon to subdue detainees, nor did it include the required information for the Barbosa-supplied guards to obtain post-exposure follow-up medical treatment. The preamble to the bloodborne pathogen standard specifies that fights and other disturbances in detention facilities are covered by the standard. 56 Fed. Reg. 64,004, 64,052, 64,097-98 (Dec. 6, 1991). Yet these deficiencies in the INS exposure control plan and training program were most unfortunate for Barbosa, not the INS.

The lead opinion lightly dismisses any INS responsibility as a joint employer because, as a Federal agency, the INS is exempt under the definitional section of the OSH Act. *See* OSH Act § 3(5), 29 U.S.C. § 652(5). While it correctly points out that under Executive Order 12,196 OSHA can only issue reports of violations to Executive Branch agencies, the lead opinion does not acknowledge that the government is directed by section 19(a) of the OSH Act, 29 U.S.C. § 668(a), to comply with OSHA standards, regardless of whether OSHA can enforce compliance. In fact, the OSHA compliance officer recommended that the INS receive a report noting its willful failure to comply with the bloodborne pathogen standard, and his inspection file references other circumstances where OSHA issued a notice of violation to the INS. Inexplicably, OSHA failed to issue the report here.

With respect to Barbosa's responsibilities, I concur with my colleagues that Barbosa is the equivalent of the employment agencies that supplied the housekeepers to the hospital in *Froedtert*. In that case, OSHA cited both the employment agencies and the hospital for violations similar to those cited solely against Barbosa here, although only the citations against the hospital were contested. *Froedtert*, 20 BNA OSHC at 1501 n.1, 2002 CCH OSHD at p. 51,729 n.1. Moreover, the record here shows that, although the Barbosa guards obtained the required post-exposure follow-up medical treatment, they were docked for leave, and their medical insurance co-pays went unreimbursed. Neither the INS nor Barbosa complied with the standard's requirement to offer the hepatitis B virus (HBV) vaccine to the Barbosa guards.

As in *Froedtert*, the decision here has implications far beyond the facts of this case. Clearly, it has application to all INS facilities in the nation. Beyond that, civilian contract workers are engaged in employment alongside Federal employees in other institutions, such as hospitals operated by the Veteran's Administration. Indeed, many institutions are operated by states and municipalities in which I assume exempt government employees work alongside non-exempt contractor employees. Despite the contrary assertion contained in the lead opinion, OSHA's compliance instructions concerning joint employment *are* confusing. They do not clearly address situations involving shared responsibilities among civilian and governmental employers who jointly employ contract workers. OSHA could and should do a better job of providing compliance assistance for joint employer situations.

Following the contract dispute that ensued between Barbosa and the INS regarding reimbursement of the additional cost to Barbosa associated with its OSH Act compliance obligations, the INS did not renew its contract with Barbosa. Employers who obtain workers through such increasingly common arrangements would be well advised to address OSH Act compliance issues under the bloodborne pathogen standard in a carefully crafted contract. When disputes do arise as to which of the joint employers is responsible for providing required protections, employers who fail to take care of the compliance issues first, and wrangle over the terms of the contract later, may find that they do so at their own peril.

/s/_____
W. Scott Railton
Chairman

Dated: February 5, 2007

ROGERS, Commissioner, concurring in part and dissenting in part:

I concur with Commissioner Thompson's analysis except for the characterization of Citation 2, Item 2, with respect to the failure to provide post-exposure evaluation and follow-up treatment at no cost. In my view, that item must also be characterized as willful, along with Citation 2, Item 1, with respect to the failure to provide the hepatitis B virus (HBV) vaccine. Indeed, there is no legal basis for distinguishing the characterizations of the two items.

The record here reflects that Barbosa, despite specific requests from its employees, consciously refused *both* (1) to provide the HBV vaccine to its security personnel and (2) to cover the co-pay associated with post-exposure treatment. Because its state of mind was the same for both violations, and informed its inaction in both instances, I see no legally cognizable reason for distinguishing the characterization of the two items. In neither case was there a "plausible" basis for Barbosa to believe that the security personnel were not its employees and that it had no compliance obligation to them. *Cf. Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1511, 2002 CCH OSHD ¶ 32,703, p. 51,738 (No. 97-1839, 2004) (Commission majority found that mistaken belief by hospital that it was not employer of temporary housekeepers obtained from temporary help agency sufficiently plausible to obviate willfulness). Barbosa's protestations otherwise are "utterly unconvincing." *See AJP Constr. Inc. v. Secretary*, 357 F.3d 70, 76 (D.C. Cir. 2004). Accordingly, in both cases, I conclude Barbosa intentionally and knowingly disregarded its obligations under the Act and thus acted willfully.

My colleagues attempt to distinguish the characterization of the two citation items on the basis that Barbosa's personnel did receive the requisite post-exposure treatment, albeit without Barbosa covering the co-pay. However, that distinction reflects upon the gravity of the violation rather than Barbosa's state of mind in intentionally refusing to abide by the requirements of the standard. Accordingly, since gravity is a factor set forth in section 17(j) of the Act to be considered in penalty assessment, and in consideration of the reduced gravity of Citation 2, Item 2, I would assess a penalty considerably lower than the $63,000 assessed by the judge for this item.

/s/_____
Thomasina V. Rogers
Commissioner

Dated: February 5, 2007

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v THE BARBOSA GROUP, d/b/a EXECUTIVE SECURITY, Respondent.	DOCKET No. 02-0865

Appearances:

Jeffery S. Rogoff, Esq.
Jane Snell Brunner, Esq.
Office of the Solicitor
U. S. Department of Labor
New York, New York
For Complainant

Henry L. Solano, Esq.
LeBeouf, Lamb, Green and McCrae, LP
Denver, CO

and

Katherine T. Mike, Esq.
Crary, Jewel & McCall, LP
Houston, TX
For Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The most essential inquiry in this case does not truly raise the question of the degree, if any, of an employer's responsibility for the occupational safety and health of its employees who work at sites not controlled by the employer. The fact that Respondent's employees perform duties which may expose them to bloodborne pathogens ("BBP's") at a facility not under Respondent's control does not serve to insulate Respondent against liability for the particular violations in this case. Most

succinctly stated, Respondent is not charged with failing to prevent or reduce the exposure of its employees to bloodborne pathogens. The standards violated in this case require Respondent to undertake compliance activities which could take place at locations other than the site of potential or actual exposure to the bloodborne pathogens. The gravamen of the violations alleged here encompass sections of the bloodborne pathogens standards[1] relating to training, vaccinations, post-exposure testing and treatment and record keeping. All of the violations occurred either before or after exposure and all require abatement activities not necessarily performed at the situs of the employee exposure. The cited conditions are thus found to have been created by and under the control of Respondent.

Procedural History

A detention facility of the U.S. Department of Justice, Immigration and Naturalization Service ("INS"), was inspected by a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA" or "Complainant"). As a result of that inspection, the Barbosa Group, doing business under the name Executive Security, ("Barbosa" or "Respondent") was issued one citation alleging two serious violations of the Act and one citation alleging two willful violations of the Act on or about May 2, 2002. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in the course of a three-day hearing in Buffalo, New York. No affected employees sought to assert party status. Both parties have filed post-hearing briefs and have responded to the administrative law judge's request for supplemental briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in the business of supplying security personnel. It is undisputed that at the time of this inspection Respondent provided security personnel to INS at its Buffalo Federal Detention Facility in Buffalo, New York. Respondent does not deny that it uses tools, equipment and supplies which have moved

[1] Title 29 C.F.R. §1910.1030, *et. seq.*

in interstate commerce. (Complaint and Answer, ¶¶ 2 & 3). I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act.[2] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Alleged Violations

Barbosa does not dispute that the standards apply, that its employees were "unlawfully" denied adequate protection against bloodborne pathogens ("BBP"), that it did not have an exposure control plan, that there was inadequate BBP training of its employees and that its employees did not get the required vaccinations or adequate follow-up care as required by the BBP standard. (Resp. Brier, pp. 3-4). Respondent thus admits that the conditions of employment of its employees failed to comply with the standards cited.

Respondent raises several defenses. First, it maintains that INS, as the "actual employer" at the work site, is the entity responsible under the Act. Second, it argues that under the multi-employer doctrine, INS is the "controlling and creating employer," such that Barbosa is not responsible for the violations. Third, Respondent also maintains that the Secretary should be estopped from proceeding against it because it is being selectively prosecuted. Respondent's arguments as to its responsibility are rejected in totality.

Barbosa began operations in July of 1983 as a business supplying security guard services. It obtained its first government contract in about 1988 and has consistently had government contracts since that time. (Tr. 231, 384, 395 584-85). As business grew, the founder and owner, George R. Barbosa, brought in an operations manager, Ms. Jeanie McMichael, and a contracting officer, Mr. Bob VanZant. These corporate officials work in the home office in Houston, Texas. As contracting officer, VanZant administered Respondent's contracts for work at federal installations. (Ex. R-10). With extensive experience in government contracting, he described his responsibility for the cited facility as answering questions regarding the contract (Tr. 284-5) and administrative matters (Tr.

---

[2] *Title 29 U.S.C. § 652(5).*

350). McMichael, is the "overall boss for all guard activity" (Tr. 350) including such things as disciplinary problems and promotions. (Tr. 386). Not a quidnunc, she was in phone contact with Barbosa's managers at the facility on just about a daily basis. (Tr. 386).

In1998, Barbosa contracted with INS to provide security officers for it's newly opened facility in Buffalo. Extensive testimony was taken from a number of witnesses as to Barbosa's operations at the facility. At any given time starting in1998 to March 31, 2003, when their contract with INS ended, approximately sixty-five (65) Barbosa security personnel worked alongside an approximately equal number of INS security personnel (Tr. 60-1). Barbosa had two management employees at the facility. Curtis Archer, the Project Administrator, established work schedules for the Barbosa individuals as well as scheduling their time off and vacations. He also prepared and submitted payroll records to Respondent's offices in Houston. Project Manager, Eugene Richley, was responsible for supervising and disciplining Barbosa personnel at the facility.[3] Archer or Richley, or both, were in touch with McMichael nearly every day. (Tr. 386).[4] Neither Archer nor Richley, as salaried employees, were eligible to join the union. All Barbosa personnel at the facility were hired by Barbosa. Their salaries and benefits were paid by Barbosa. They received their day to day instructions, assignments, work schedules, promotions and pay from Barbosa. In addition, they all viewed Barbosa as their employer.

It is undisputed that INS retained the right to have final control of all activities of all personnel, including its own employees, staff supplied by two companies under contract with the INS, visitors and the detainees, for the entire time such people were physically on the premises. In addition, individuals Respondent sought to hire for work at the facility had to pass muster with the INS. Respondent could be precluded from hiring any individual not approved by INS. INS could also control virtually every activity, duty assignment, discipline and removal of every Barbosa employee while on the premises. Further, INS could remove any Barbosa employee from the site and deny entry to the facility to any Barbosa employee it deemed inappropriate for any reason. There

---

[3] Mr. Archer and Mr. Richley were preceded by Mr. Arena and Mr. Schwiner (Tr. 31).

[4] In addition, Barbosa had various "shift supervisors" at the facility. These "supervisors," however, were not management but hourly employees. (Tr. 67, 127, 180-82).

is no doubt that INS had virtually absolute control of everyone and all conditions on the premises of the detention facility.

The facts here are similar to those in *Rockwell Int'l Corp.*, 17 BNA OSHC 1801 (No. 93-228, 93-233 and 93-234, 1996) ("*Rockwell*"), in which the Commission, applying the test announced in *Van-Buren--Madawaska Corp.*, 13 BNA OSHC 2157 (Nos. 87-214, 87-217 and 87-450 through 459, 1989), held that members of a "debris team" were employees of Rockwell although they carried out their duties at a NASA facility where NASA "exercised a high level of control over all activities...." 17 BNA OSHC at 1805. The distinction in *Rockwell* lies in the fact that the hazards in *Rockwell* arose and could only be abated by activities near the launch pad. A more closely parallel situation was addressed by the United States Court of Appeals for the Seventh Circuit. In a case challenging the validity of the BBP standards, the Seventh Circuit was highly concerned with situations in which employers in the "home health and medical personnel industries" supply health care workers who perform their duties at locations not under the control of the employers. Addressing the question as one within the "multi-employer worksite defense," the court invalidated those parts of the BBP standards "insofar as it applies to sites not controlled either by the employer or by a hospital, nursing home, or other entity that is itself subject to the bloodborne-pathogens rule." *American Dental Ass'n v. Secretary of Labor*, 984 F.2d 823, 830 (7th Cir. 1993), *cert denied*, 510 U.S. 859 (1993). The court, however, noted that the work site control problem "does not affect compliance with the parts of the rule relating to HBV vaccination, post-exposure testing and treatment, and record keeping...." 984 F.2d at 829. The court focused its concern on circumstances where an employer would be cited for conditions which the employer could not know of or correct in that its employees worked in locations and situations which neither the employer nor another entity subject to the standard had control. (The court was addressing the situation where a home health care supplier employed nurses or aides who perform their duties in private residences). The rationale of the court is instructive and compelling. It is appropriate to apply it here.

Resting upon the power of INS at the site and its contract with INS, Respondent maintains that the INS is "the controlling and creating employer" of the Buffalo facility and, as such, the INS, and not Respondent, is "citable" for any OSHA violations at the facility. Even taking the facts most

favorable to Barbosa, the "OSHA violations" with which it has been cited[5] revolve around hazards arising at and which could be abated at locations other than the detention facility. They were not violations which took place at the facility. The violations here arose out of Respondent's failure or refusal to take actions which it could have taken. Moreover, the activities required to comply with the cited standards could have been accomplished at sites other than the detention facility. Barbosa is thus found to be both the "creating" and the "controlling" entity.

While it is clear that INS had control of the conditions and activities at the site, the same is not true as to the hazards for which Barbosa is cited. The hazards in this case are not the exposure to BBP's *per se,* they are the dangers of having employees who are in work situations where exposure to BBP's could occur without having had appropriate training beforehand or having assured appropriate medical treatment afterward. The hazards thus sought to be remedied by the particular standards cited here arose not at the time and place of the employees' contacts with BBP. Those conditions were controlled by INS. Rather, they arose due to Respondent's failure to take actions which could have taken place at physical locations other than the INS facility and before or after exposure incidents occurring at the INS facility. Thus, I conclude that Respondent is the actual employer of the exposed employees who worked at the INS facility, that Respondent created the hazardous conditions, and that it had the requisite "control" to abate the hazardous conditions.

Barbosa posits several additional arguments. First, it maintains (correctly) that its employees at the facility attended BBP training conducted by INS. To the extent that Respondent seeks to absolve itself of responsibility for the completeness and adequacy of INS training, its claim is rejected. An employer is ultimately responsible for the adequacy of the training its employees receive, even where it arranges for training to be conducted by others. See, *Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1180 (No. 90-1786, 1995). Second, its claim that it did not or could not reasonably know that its personnel could be exposed to BBP's at the facility because the detainees were tested prior to their entering the general detainee population is factually incorrect. All detainees were not so screened. Detainees, if screened and found to be HIV positive or to have Hepatitis B virus, were not segregated from the general detainee population. And, information identifying

[5] A synopsis of the standards cited and the nature of each item of the citations issued to Respondent is attached as Appendix A.

detainees who were "known positives" was not available to Barbosa personnel. (Tr. 69, 129,185, 210). Also, Respondent's highest level management officials reasonably should have known of the potential BBP contact by its employees at the facility by virtue of their duties there. (Tr. 247, 255, 365-67, 416-17).

Respondent has also raised the claim that the Secretary should be estopped from pursuing the case against it because the Secretary did not pursue the same or a similar case against INS. Respondent maintains that the decision to proceed against it amounts to forbidden "selective prosecution."

Specifically, Barbosa argues that:

> by choosing to close the case against the INS without citing the INS for any violations, contrary to the investigator's recommendations, the Secretary is now estopped from citing Barbosa for identical conduct.

(Corrected Resp. Reply Brief, p. 24).

There is no real dispute that the facts as stated by Respondent are correct. That is, that investigations by OSHA of both INS and Respondent were conducted, that the OSHA Compliance Officer initially recommended that the same or similar citations be issued against both INS and Respondent and that INS was never cited while Respondent has been. (Tr. 570).

The Commission has recognized a defense of "discriminatory enforcement" in *DeKalb Forge Co*., 13 BNA OSHC 1146, 1152-53 (No. 83-299) (*"DeKalb")*. The Commission stated that:

> a claim of selective prosecution is judged by ordinary equal protection standards (footnote omitted), under which it must be shown that the alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose. (Citations omitted).

Id. at 1153.

Respondent's defense is rejected because a defense of selective prosecution cannot succeed where, as here, the cited employer seeks to compare itself with a similarly situated federal government entity. A federal government agency cannot, under section 3(5) of the Act, 29 U. S.C. § 652, be an "employer." Thus, the Secretary is not authorized by the Act to issue citations to or penalize federal agencies. See also, Executive Order 12196, 45 F.R. 12769. In addition, there is no evidence that the INS failed to comply with the cited standards in regard to its own employees.

Such a "citation," if issued to INS, would have had to rest upon the argument that INS was the employer of Barbosa personnel at the site. On this record, and for the reasons set forth above and under the principles enunciated in *Rockwell*, supra, Barbosa personnel at the INS detention facility were employees of this Respondent, not the INS. Finally, in light of the Secretary's "broad prosecutorial discretion" in issuing citations, Barbosa has not fulfilled its burden of proving the existence of an improper motive or lack of a rational basis for OSHA's determination not to issue a citation to INS. *DeKalb*, 13 BNA OSHC at 1153. Accordingly, Respondent's defense is rejected.

Based on Respondent's concession that the violative conditions existed, and the above findings and conclusions, Items 1 and 2 of Citation 1 and Items 1 and 2 of Citation 2 are AFFIRMED.

Classification of Violations

Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. Each of the violative conditions, that is lack of an exposure control program, lack of appropriate training, lack of assured availability of vaccination and lack of assured medical follow-up, and the refusal to provide follow-up care at no cost to employees, all increased the likelihood that a Barbosa employee whose duties resulted in his possible exposure to BBP's, could contract Hepatitis B or HIV. In light of the nature of the health consequences involved, all of the violations are serious. Accordingly, Citation 1, Items 1 and 2 and Citation 2, Items 1 and 2 are all found to be serious violations.

Willfulness

Item 1 of Citation 2 alleges that Respondent's failure to make the hepatitis B vaccination to employees having occupational exposure to blood and other potentially infections material was willful. Item 2 of Citation 2 alleges that Respondent's failure to make follow-up medical care available at no cost to exposed employees was also willful.

A willful violation is one committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade,Inc.*, 13 BNA OSHC 1017, 1019 (No. 83-1189, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered as conscious disregard of or plain indifference to the standard, See, i.e., *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated); *Williams Enter. Inc.*, 13 BNA OSHC at 1249, 1256-57 (No. 85-355, 1987). This test describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.*, 595 F.2d 309, 318-19 (5th Cir. 1979); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The Commission has identified the employer's state of mind as the "focal point" for finding a violation willful. The Commission has also stated that there are two ways in which the Secretary can establish willfulness. First, the employer "knows of the legal duty to act," and, knowing an employee is exposed to a hazard, nonetheless "fails to correct or eliminate the hazardous exposure." Second, the employer's state of mind was "such that, if informed of the duty to act, it would not have cared." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-0752, 2000)

The Secretary maintains that the evidence is such that it demonstrates Respondent's knowledge of its duty to act. She places great emphasis on the evidence showing that Respondent's management, both at the site and at its offices, knew or should have known that Barbosa's employees at the facility had occupational exposures to blood and other bodily fluids. Barbosa's denial in this regard is rejected. Its officials and its employees made it abundantly clear that guards at the facility, as would be expected, had to intervene during fights amongst detainees, and had to search detainee premises and persons where contact with razors and other possible blood-bearing items or materials was possible. (Tr. 365-67, 399-400, 416-17, 244-45, 255). There is also uncontroverted evidence that Barbosa officials had seen written injury reports noting that its employees had been bitten or cut on the job. (Tr. 247, 255, Ex. R-14, Ex. C-3, Ex. C-5) Respondent's officials were also familiar with the requirement to provide Hepatitis B vaccinations to employees at risk of exposure and had taken as well as taught courses dealing with the requirements. (Tr. 244, 257, 321, 329, 361, 393-96) In addition, copies of the standard were given to Barbosa supervisory personnel at the site and faxed

to management officials at Barbosa offices by its employees (Tr. 44, 165-66, 244, 246, Ex. R-14) several of whom specifically asked to have the vaccinations made available to them. (Tr. 43-45, 79-80, 108-09, 165-66, 189-90, 245) Respondent's president personally declined to make the vaccinations available. (Tr. 43, 350). Barbosa's claim that it relied on its contract with INS for the belief that it was not obligated to make the vaccine available is rejected. Barbosa's asserted reliance on a contract provision is unreasonable given the evidence on this record. Here, Respondent knew of its duty to act, and made a deliberate and carefully calculated decision not to act. (Tr. 245.) Under the tests enunciated by the Commission, I find that the violation contained in Citation 2, was willful.

Similarly, Respondent's failure to make certain that post-exposure medical follow-up would be made available at no cost to the affected employee, as alleged in Citation 2, Item 2, and as required by 29 C.F.R. § 1910.1030(f)(1)(ii)(A), was willful. Barbosa knew of the requirement for the reasons stated above, and made the economically-based decision not to supplement whatever the employees' medical insurance covered. Barbosa did so in the full knowledge that employee medical insurance coverage was insufficient to render post-exposure care cost free to the employees.

Finally, Respondent's management personnel narrowly concentrated on the terms and definitions of their contract with INS and the added cost of providing employees with additional protection, vaccinations and medical follow-up. (Tr. 388-91, 420, 424-25, 505-06, 511-12, 525-26). Respondent's President asserted that he directed management officials to provide vaccinations and that Respondent "would argue with the INS over the money later." (Tr. 602-03) This assertion, however, is undocumented and vaccinations, in any case, were not provided, even after Barbosa received written instructions from INS to do so. (Ex. R-11, Tr. 351-52, 381-82). I find that Barbosa's maintaining such a narrow focus on the terms of its contract with INS, and its seeking to absolve itself of responsibility, especially in the face of employee requests, complaints and faxes, constitutes plain indifference.

Penalties

The Commission has long held that in determining appropriate penalties for violations, "due consideration" must be given to the four criteria under section17(j) of the Act, 29 U.S.C. § 666(j).

Those factors include the size of the employer's business, the gravity of the violation, the employer's good faith its history of prior violations. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." *Nacierma Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972).

The record in this case establishes that the Secretary took into account the necessary penalty factors. (Sec. Brief, pp. 29-31.). The gravity of the violations here is of the highest order. Moreover, Respondent's failure to act in the face of full knowledge that its employees at the facility were incompletely trained, were exposed to BBP's, and were and not receiving appropriate treatment in the presence of such exposure, warrants a finding of a total absence of good faith in regard to the health of its employees. Accordingly, I find that the penalties proposed for Citation 1, Items 1 and 2, and Citation 2, Items 1 and 2, are appropriate.

The willful violation identified in Item 2 of Citation 2, failing to provide appropriate follow-up medical attention at no cost to employees, requires more discussion. While the monetary injury to a few employees might raise the specter of an other-than-serious violation with a minimal penalty, I find otherwise. The Commission's conclusion in a 1983 decision that an employer's failure to provide medical examinations "without cost" to employees exposed to inorganic arsenic was serious within the meaning of the Act was affirmed by the United States Court of Appeals for the Ninth Circuit. *Phelps Dodge Corp. v. OSHRC*, 725 F. 2d 1237 (9th Cir. 1984) (*"Phelps-Dodge")* Similarly, the harm the cited regulation seeks to prevent is the unknown and unchecked progression of diseases caused by contaminated blood or body fluids, including HIV, AIDS and Hepatitis B. There is little room for doubt that the effect of these conditions is within the ambit of serious injury or death.

In regard to Citation 2, Item 2, section 10(c) of the Act, 29 U.S.C. § 659(c), provides that the Commission may issue an order "affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief...." The Commission has not spoken directly to the parameters of its authority to direct "other appropriate relief." *Cf., Amax Lead Co.*, 13 BNA OSHC 2169, 2173-74 (No. 80-1793, 1989) (Commission equally divided on whether it has the authority to grant back pay relief to employees who were removed from usual jobs due to elevated

blood lead levels). In this case, there is unrebutted evidence that a number of Respondent's employees sought and received at least some medical treatment following exposure to blood or other bodily fluids which might have contained BBP's and that their expenses, including lost wages and/or sick leave time and days, was not fully reimbursed or paid for by Barbosa. It is therefore appropriate that the Secretary submit an accounting of such unreimbursed expenses and that Respondent be directed to compensate the affected employees in the amounts to which they are entitled under this standard. Accordingly, for good cause and in order to effect justice in this case, the matter of appropriate reimbursement will be severed pursuant to Rule 10, 29 C.F.R. § 2200.10[6], and assigned a separate Commission docket number (No. 03-2042). An Order will issue forthwith for further proceedings to determine what amounts, are due to Respondent's employees as a result of it's failure to comply with the subject standard.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All suggested or proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

---

[6] Rule 10 provides:

> §2200.10 Severance.
> Upon its own motion, or upon motion of any party or intervenor, where a showing of good cause has been made by the party or intervenor, the Commission or the Judge may order any proceeding severed with respect to some or all claims or parties.

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1030(c)(1), as alleged in Citation 1, Item 1. The violation was serious. A civil penalty of $ 4,500.00 is appropriate.

4. Respondent was in violation of section 5(a)(2) of the 2Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1010(g)(2)(vii)(K), as alleged in Citation 1, Item 2. The violation was serious. A civil penalty of $ 2,250.00 is appropriate.

5. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1030(f)(2)(i), as alleged in Citation 2, Item 1. The violation was serious and willful. A civil penalty of $63,000.00 is appropriate.

6. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1030(f)(3), as alleged in Citation 2, Item 1. The violation was serious and willful. A civil penalty of $63,000.00 is appropriate.

7. Pursuant to section 10(c) of the Act, reimbursement to employees of Respondent for medical and reasonably related expenses not paid for by Respondent which were incurred in obtaining and receiving appropriate evaluation, treatment, medication and follow-up after exposure to bloodborne pathogens at the Federal Detention Facility in Buffalo, New York, is appropriate.

ORDER

1. Citation 1, Item1 is AFFIRMED. A civil penalty of $ 4,500 is assessed.
2. Citation 1, Item 2 is AFFIRMED. A civil penalties of $ 2,250 is assessed.
3. Citation 2, Item 1 is AFFIRMED. A civil penalty of $63,000.00 is assessed.
4. Citation 2, Item 2 is AFFIRMED. A civil penalty of $ 63,000.00 is assessed.
5. The matter of an accounting and reimbursement of medical expenses is severed and assigned OSHRC Docket Number 03-2042.

/s/
Michael H. Schoenfeld
Judge, OSHRC
Washington, D.C.

Dated: November 24, 2003

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v THE BARBOSA GROUP, d/b/a EXECUTIVE SECURITY, Respondent.	DOCKET No. 02-0865

DECISION AND ORDER
APPENDIX A

CITED STDS AND CITATION ITEM DESCRIPTIONS

Citation 1 (Serious), Item 1
Cited Standard: 29 C.F.R. § 1910.1030(c)(1)

Exposure Control Plan.
1910.1030(c)(1)(i)
Each employer having an employee(s) with occupational exposure as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.

Description in Citation:

The employer having employee(s) with occupational exposure did not establish a written Exposure Control Plan designed to eliminate of minimize employee exposure:
a) INS Buffalo Federal Detention Facility - On or about 11/04/2001, the employer having employees with occupational exposure did not establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.

Citation 1 (Serious), Item 2 - Serious
Cited Standard: 29 C.F.R. § 1910.1010(g)(2)(vii)(K)

The training program shall contain at a minimum the following elements
1910.1030(g)(2)(vii)(K)
An explanation of the procedure to follow if an exposure incident occurs, including the method of reporting the incident and the medical follow-up that

will be made available

Description in Citation:

The bloodborne pathogens training program did not contain an explanation of the procedure to follow if an exposure incident occurred, including the method of reporting the incident or the medical follow-up that would be made available:
a) INS Buffalo Federal Detention Facility - On or about 11/04/2001, the employer did not provide employees having occupational exposure to blood or other potentially infectious material with training that included an explanation of the procedure to follow if an exposure incident occurred, including the medical follow-up that would be made available.

Citation 2 (Willful), Item 1 - Willful

Cited Standard: 29 C.F.R. § 1910.1030(f)(2)(I)

1910.1030(f)(2) Hepatitis B Vaccination.
1910.1030(f)(2)(i)
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.

Description in Citation:

Hepatitis B vaccination was not made available after the employee had received the training required in 29 C.F.R. § 1910.1030(g)(2)(vii)(I) or within 10 working days of initial assignment to employees who had occupational exposure to blood or other potentially infectious materials:
a) INS Buffalo Federal Detention Facility - On or about 11/04/2001, the employer did not make the hepatitis B vaccination available to employees having occupational exposure to blood and other potentially infectious material.

Citation 2 (Willful), Item 2
Cited Standard: 29 C.F.R. § 1910.1030(f)(3)
1910.1030(f)(3)
Post-exposure Evaluation and Follow-up. Following a report of an exposure incident, the employer shall make immediately available to the exposed employee a confidential medical evaluation and follow-up, including at least

the following elements:
1910.1030(f)(1)(ii)(A)
Made available at no cost to the employee;

Description in Citation:

Following a report of an exposure incident the employer did not make immediately available to the exposed employee a confidential medical evaluation or follow-up:
a) INS Buffalo Federal Detention Facility - On or about 11/04/2001, following the report of an exposure incident, the employer did not make immediately available to the exposed employee a confidential medical evaluation or follow-up.