

Secretary of Labor,

Complainant,

v.

Lowe's Home Centers, Inc.,

Respondent.

OSHRC Docket No. 02-1147

E-Z

Appearances:

Karen Mock, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Raymond A. Haas, Esq. and Morgan L. Gaynor, Esq., Haas, Lewis & Longley, Tampa, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Lowe's Home Centers, Inc. (Lowe's), operates retail home improvement stores throughout the United States. The Occupational Safety and Health Administration (OSHA) conducted an investigation and inspection of respondent's facility in Port Orange, Florida, from May 28, 2002, through June 14, 2002. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting only item 1a of this citation. A hearing was held pursuant to EZ trial procedures in Daytona Beach, Florida, on September 30, 2002, and October 1, 2002.

For the reasons that follow, Citation No. 1, item 1a, is affirmed and a penalty of \$1,700.00 is assessed. Citation No. 1, items 1b and 1c, were not contested and have become a final order of the Review Commission.

Discussion

The Secretary has the burden of proving the violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1a
Alleged Serious Violation of 29 C.F.R. § 1910.1030(c)(1)(ii)(B)

In Citation No. 1, item 1a, the Secretary alleges that:

The employer's Exposure Control Plan did not include the schedule and/or method of implementation for 29 C.F.R. 1910.1030(F), Hepatitis B Vaccination and Post Exposure Evaluation and Followup:

- a. The written exposure control plan for bloodborne pathogens did not provide for hepatitis B vaccinations being made available to employees who had the potential for occupational exposure to blood when providing first aid to employees or customers or when cleaning blood from work surfaces.

The standard at 29 C.F.R. § 1910.1030(c)(1)(i) and (ii) provides:

(c) *Exposure Control - (1) Exposure Control Plan.*

(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.

(ii) The Exposure Control Plan shall contain at least the following elements:

(A) The exposure determination required by paragraph (c)(2),

(B) The schedule and method of implementation for paragraphs (d) Methods of Compliance, (e) HIV and HBV Research Laboratories and Production Facilities, (f) Hepatitis B Vaccination and Post-Exposure Evaluation and Follow-up, (g) Communication of Hazards to Employees, and (h) Recordkeeping, of this standard, and

(C) The procedure for the evaluation of circumstances surrounding exposure incidents as required by paragraph (f)(3)(i) of this standard.

“Occupational Exposure” is defined in 29 C.F.R. § 1910.1030(a) as follows:

Occupational Exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.

29 C.F.R. § 1910.1030(f) provides in part:

(f) *Hepatitis B Vaccination and Post-exposure Evaluation and Follow-up –*

(1) *General.* (i) The employer shall make available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-

exposure evaluation and follow-up to all employees who have had an exposure incident.

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

The standard at 29 C.F.R. § 1910.1030 requires employers to establish a written Exposure Control Plan for bloodborne pathogens only when contact by their employees with human blood or other potentially infectious materials (OPIM) is reasonably anticipated from the performance of their work.

In accordance with this standard, respondent established a written Exposure Control Program (Exh. R-1). In the Introduction of its Plan, respondent referenced this standard and stated “Lowe’s recognizes that there is a potential for these hazards to exist in our stores and a potential for exposure in some situations.”

The standard at 29 C.F.R. § 1910.1030(c)(2) provides:

(2) *Exposure Determination.* (i) Each employer who has an employee(s) with occupational exposure as defined by paragraph (b) of this section shall prepare an exposure determination. This exposure determination shall contain the following:

- (A) A list of all job classifications in which all employees in those job classifications have occupational exposure;
- (B) A list of job classifications in which some employees have occupational exposure, and
- (C) A list of all tasks and procedures or groups of closely related task and procedures in which occupational exposure occurs and that are performed by employees in job classifications listed in accordance with the provisions of paragraph (c)(2)(i)(B) of this standard.

(ii) This exposure determination shall be made without regard to the use of personal protective equipment.

Lowe’s prepared an exposure determination in accordance with this standard. This determination of job classifications in which some or all employees have occupational exposure is contained in Lowe’s written Exposure Control Program in the section titled “Potential Exposure Determination: Who should be trained.” That section provides:

In your location individuals that may have some potential for exposure to blood or other potentially infectious materials (OPIM) are:

<u>General Classification</u>	<u>Potential Exposure Source</u>
Volunteer First Aid Trained Personnel	<ul style="list-style-type: none"> • Assist in Employee/customer injuries
Spill Clean-up Personnel	<ul style="list-style-type: none"> • Cleaning surfaces, picking-up debris, emptying trash, etc.
Loss Prevention Personnel	<ul style="list-style-type: none"> • Customer interaction • Assist in employee/customer injuries
Personnel performing housekeeping duties in restrooms	<ul style="list-style-type: none"> • Cleaning body fluids from sinks/toilets • Emptying trash that may contain personal hygiene products or sharp objects
Management Personnel (MOD)	<ul style="list-style-type: none"> • Assist in employee/customer injuries

Respondent, in this section, acknowledges only that these employees are individuals that may have some potential for exposure to blood or OPIM. This section, however, was developed by Lowe's as required by 29 C.F.R. § 1910.1030(c)(2). By including the above listed job classifications in this section, respondent has acknowledged that reasonably anticipated contact with blood or OPIM may result from the performance of duties for employees in those general classifications. Respondent is bound by its own determination that all or some of its employees in the above-listed classifications have occupational exposure.

Lowe's made this determination of occupational exposure, but it attempted to limit the applicability and requirements of 29 C.F.R. § 1910.1030 by identifying individuals that may have some potential for exposure rather than those employees with occupational exposure as required by § 1910.1030(c)(2). That standard does not allow an employer to make equivocal determinations or determinations intended to limit applicability or the effect of its mandatory requirements.

Respondent was required by 29 C.F.R. § 1910.1030 to make a determination whether any employees have occupational exposure to blood or OPIM. Once it determined that employees have such occupational exposure, it then was required to develop a written Exposure Control Plan for Bloodborne Pathogens. Respondent developed such a plan. The standard requires that an Exposure

Control Plan contain an exposure determination. Required elements of this plan include a list of all job classifications in which all or some employees have occupational exposure. The standard does not allow for deviation or modification. It does not authorize or permit an employer to list those employees that may have some potential for exposure rather than listing them as having occupational exposure. If such employees do not have occupational exposure, they are not to be listed in this section. By listing them, the employer has identified these individuals as having occupational exposure; that is, reasonably anticipated contact with blood or OPIM that may result from the performance of the employees' duties. Having listed these general classifications of employees pursuant to a requirement of the standard, Lowe's cannot now argue that such employees are not occupationally exposed.

Respondent's Exposure Control Program contains sections that address various elements required by 29 C.F.R. § 1910.1030(c). In the section titled *HBV Vaccinations*, Lowe's plan discusses only post-exposure Hepatitis B vaccinations and post-exposure evaluation and follow-up. There is nothing included in this section or anywhere in the Lowe's plan relating to pre-exposure incident Hepatitis B vaccination for employees who have occupational exposure.

No testimony at the hearing even suggested that respondent provide anything other than post-incident vaccinations. Mr. Steve Taylor, Southern Division Safety Manager for Lowe's testified as to Lowe's policy in offering vaccinations to employees as follows.

Q: What is – am I correct, what's your understanding of what – in what circumstances, if any, Lowe's will offer the hepatitis B vaccination to an employee?

A: The policy is now that they would offer it post-incident. And that's in the Bloodborne Pathogen Program that we have.

(Tr. 34).

Consistent with this testimony, during the inspection Mr. Taylor admitted that the vaccine would be given for an exposure incident and would not be given just because they had occupational exposure.

The standard at 29 C.F.R. § 1910.1030(c)(1)(ii)(B) specifically requires that the Exposure Control Program contain the schedule and method of implementation of paragraph (f), Hepatitis B

Vaccination and Post-Exposure Evaluation and Follow-up. Paragraph (f) requires an employer to make the hepatitis vaccine available to all employees with occupational exposure. Employers must make this vaccine available to these employees after required training and within ten days of initial assignment. The standard does not allow an employer to ignore pre-exposure incident vaccinations in its plan.

Respondent's Exposure Control Program contains a section on personal protective equipment which describes the contents of bloodborne pathogen kits. These kits are found at various locations throughout Lowe's Port Orange facility. First aid cabinets are also located throughout the store. Listed on the first aid cabinets are the names of employees trained in first aid and CPR. Respondent's goal is to train ten to twelve employees each year in first aid and to have two first aid/CPR trained employees in the store at all times during regular business hours. This training is voluntary and, currently, staff scheduling is not done so as to assure that two employees with such training are present at the store at all times.

Robert Gross, respondent's Port Orange Store Manager, testified that on each shift one manager is designated as the Manager on Duty (MOD). That manager evaluates accidents and injuries involving blood or OPIM. He determines how spills are cleaned. He stated that the manager would do it, or assign some employee to do it, depending on how comfortable he was with the employee. He said that, if a customer is bleeding, the manager does what is appropriate and what the customer requests.

While he characterized the list of first aid/CPR trained employees on the first aid cabinets as informational only, he stated clearly that when a customer was bleeding, he could ask those on the list for help and some response would be expected from them. He felt it was helpful to know who had first aid training. Mr. Gross further testified that he would not prevent a MOD from assisting a customer if he was treating the person and comfortable doing it.

James England, respondent's Loss Prevention Manager at the Port Orange store, testified that, for other than major spills, it is management's responsibility to clean blood and OPIM spills, or assign an employee to clean them. He expects respondent's personnel to clean up all minor spills. He stated that he would assist an injured person or call paramedics. When asked about the purpose

of the list of first aid trained employees, he testified that these employees could provide first aid if needed.

John Howard, Lowe's Assistant Store Manager, had the same opinion that the purpose of the list was to identify employees who could be called to administer first aid. Other managers and hourly employees testified to the same understanding of the purpose of that list.

Managers consistently testified that they would clean blood and OPIM spills and were aware of the location of, and need to use, the Bloodborne Pathogens Kit.

Respondent's Exposure Control Program includes examples of response procedures for small, medium and large cleanup of blood or OPIM. This section gives examples of acceptable courses of action, including the administering of first aid by the MOD or first aid and BBP-trained employees. It also advises that cleanup should begin as soon as possible. Consistent with these response procedures, Arden Herrin, Lowe's Assistant Store Manager for Administration, testified he would clean small spills himself, and for medium spills he would clean it or call for help. For large spills, he would ask the MOD or employee with first aid training to assist. Mr. Herrin, who is trained in first aid, testified that with this training, he can take care of somebody at work.

Alan Shapiro, an assistant store manager at Lowe's, testified that he cleaned a blood spill at the store. He understood this was part of his responsibility as a manager and was not going to leave it. He stated that as MOD, he would ask first aid trained employees or other employees for assistance in cleaning spilled blood. If employees refused to help, he would do it. He emphasized that, as a manager, his responsibility is to make the store safe. This includes cleanup of blood, urine and vomit.

Stan Wysocki, a cashier in the Lawn and Garden Center at Lowe's, is trained in first aid and his name appears on the list. His understanding of the list's purpose is to alert employees of those certified so they can look for one of these individuals for help. He stated that while cleaning blood spills is not part of his job, it is part of his role as a first aid trained individual at Lowe's. He went on to say that, since he was on the first aid list, it was reasonable to expect a manager to request his help in a situation involving blood or OPIM.

Dan Scales, a customer service associate at Lowe's, is a State of Florida certified paramedic. He was not trained by Lowe's but had extensive first aid training in another occupation. Lowe's

management asked if he was available to help in situations involving a need for first aid. He agreed and later found his name on the posted first aid list. He testified that the MOD was responsible for blood and OPIM cleanup, and that it was also his duty to clean these spills.

Elizabeth Simpson, respondent's Personnel/Training Coordinator, testified as to the equipment used in this store including box cutters, saws, heavy equipment, and sharp objects sold and used for display. Regarding blood and OPIM cleanup, she said the MOD has always taken care of it and "made the blood go away." She stated also that janitors that clean up are required to use gloves. Kendall Schulz, a maintenance employee at the store, also stated that he must wear gloves and goggles to clean blood. He further testified that he would clean up small amounts of blood. Lowe's Exposure Control Plan provides that the BBP Kit should be used for body fluid spill cleanup. This includes gloves and masks with eye shields.

The testimony of Lowe's managers and hourly employees substantiated a determination of occupational exposure for the job classifications listed by respondent in its Exposure Control Program for Bloodborne Pathogens. After review and consideration of all evidence submitted in this case, I conclude that for employees in the job classifications listed in respondent's program, contact with blood or OPIM is reasonably anticipated and may result from the performance of duties by those employees.

Respondent's argument that first aid trained employees act voluntarily is not persuasive. While these employees volunteer for this training, the employer expects their help when situations arise requiring first aid assistance. Managers are expected to respond to all such situations and are responsible for blood and OPIM cleanup. Janitorial and maintenance employees are expected by management to clean such spills. While the number of instances requiring first aid and blood cleanup may be low, respondent's expectations that these employees will help is very high in any given situation in which injury or cleanup of blood or OPIM is involved.

The testimony and documentary evidence show a pattern of behavior by respondent that allows, suffers and permits management and hourly employees to provide first aid assistance to customers and employees who are injured or bleeding at Lowe's facility. The employer also expects these employees to clean up blood and OPIM spills at the store. While respondent asserts first aid

assistance and spill cleanup are voluntary, managers, maintenance personnel and first aid certified employees consider the above discussed functions to be part of their duties.

Respondent does not allege that employees are prohibited from rendering first aid or cleaning blood or OPIM spills. The evidence clearly shows that first aid and cleanup are expected or permitted to be done by someone in the job classifications listed in Lowe's Plan. An employee who is allowed, suffered or permitted to perform duties in which contact with blood or OPIM is reasonably anticipated must be afforded the same protection of pre-exposure incident vaccinations as employees that are required to perform such functions.

Voluntary action by such employees does not mean that the contact with blood or OPIM is not reasonably anticipated. This occupational exposure does not constitute unanticipated assistance of an employee acting as a "Good Samaritan." At Lowe's such responses are planned, orderly responses outlined in the Exposure Control Plan. The realities of the workplace are consistent with respondent's plan. Managers and hourly employees know what is expected of them and respondent expects, permits and reasonably anticipates employees listed in its Plan to contact blood or OPIM in the performance of certain duties, including providing first aid and cleaning blood and OPIM spills.

In its post-hearing brief, respondent limited its argument to the applicability of 29 C.F.R. § 1910.1030(c)(1)(ii)(B) and employee access to the violative conditions. It does not present argument relating to Lowe's failure to comply with the standard's terms or its knowledge of the violative conditions. It is clear from the above that Lowe's did not include in its plan a schedule and method of making available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure as required by the standard. It is also clear from the testimony of Mr. Steve Taylor, Lowe's Southern Division Safety Manager, that respondent had actual knowledge that this provision was not contained in its Exposure Control Program for Bloodborne Pathogens.

This standard applies to all occupational exposure to blood and OPIM. The Secretary has proven applicability by establishing occupational exposure, as defined in the standard. The standard at 29 C.F.R. § 1910.1030(c) requires an employer to establish an Exposure Control Plan only when that employer has an employee with reasonably anticipated contact with blood or OPIM that may result from the performance of an employee's duties. Respondent prepared such a plan pursuant to

the standard. It made a determination of occupational exposure, but attempted to limit its responsibility under the standard by stating in its plan that this was a determination of individuals that may have some potential for exposure to blood or OPIM. Respondent is specifically required by the standard to offer certain employees vaccinations. It cannot arbitrarily limit its responsibility and circumvent these requirements by language it included in its Exposure Control Plan. It cannot choose provisions of the standard with which it will comply. To allow such would allow this employer to engage in selective compliance. By establishing the plan and making this determination, respondent has admitted it has employees with occupational exposure, and, by so doing, has admitted that the standard is applicable.

The Secretary has presented sufficient evidence to prove that this occupational exposure resulted from the performance of an employee's duties through testimony of respondent's management and hourly employees, and through documentary evidence. The Secretary has carried her burden of proving all elements of this violation.

The violation is properly classified as a serious violation. Without pre-exposure vaccines, employees reasonably anticipated to contact blood or OPIM could contract hepatitis B, a serious health condition.

The Secretary proposed a penalty of \$1,700.00 for combined items 1a, 1b, and 1c of Citation No. 1. Respondent did not contest items 1b and 1c. It did not argue that the penalty, as proposed, was unreasonable. Respondent is a large employer with over 100,000 employees. The violation could result in severe illness. The \$1,700.00 penalty proposed by the Secretary is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Items 1b and 1c of Citation No. 1 were not contested and have become a final order of the Commission.
2. Citation No. 1, item 1a, is affirmed as a serious violation and a grouped penalty of \$1,700.00 is assessed for items 1a, 1b and 1c of Citation No. 1.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: November 15, 2002