

the reasons that follow, the Commission affirms the judge's conclusion that Froedtert was the temporary housekeepers' common law employer. Accordingly, we conclude that Froedtert was subject to the requirements of the Act with respect to the temporary employees. We also affirm the judge's conclusions that Froedtert did not effectively delegate its compliance obligations to the temporary agencies, and did not establish that compliance with the hepatitis B virus (HBV) vaccine standard was infeasible. In addition, we affirm the judge's decision that the cited violations were not willful.

BACKGROUND

Froedtert obtained temporary workers from FlexiForce, later named AccuStaff (referred to hereafter as FlexiForce/AccuStaff), until September 1996, when it began to rely on the StaffWorks agency for temporary housekeeping staff. Froedtert established its relationships with the temporary help agencies through a series of phone calls and meetings, never entering into a written agreement with either agency. Temporary housekeepers from both agencies worked at Froedtert during the period covered by the October 8, 1997 OSHA citation, though Froedtert ceased all use of temporary housekeepers on July 14, 1997.

A. FlexiForce/AccuStaff

Evidence of Froedtert's initial use of FlexiForce/AccuStaff temporary workers, though it predates the citation period here, shows that Froedtert asked the agency to provide only basic housekeeping training to the temps, such as vacuum cleaner operation, dusting, and cleaning product use. As part of its orientation program, Froedtert showed the temps a film on how to clean office areas, identified what cleaning products to use, instructed them in the use of scrubs and gloves, and paired the temporary housekeepers with an experienced housekeeper for on-the-job instructions. Froedtert also told the temporary temps of the potential for contact with blood, but assured them not to be afraid and to use gloves and the proper chemicals for cleaning. Contrary to Froedtert's characterization of the record, former Froedtert Environmental Services (EVS) director William Herrick stated that he never discussed with FlexiForce/AccuStaff the need for temps to be offered the HBV vaccine.

Addressing the period commencing in early 1995, FlexiForce/AccuStaff manager Cindi Gutbrod testified that Froedtert did not request that any training or information be provided by

FlexiForce/AccuStaff to the temps assigned to Froedtert. She specifically stated that no one from Froedtert ever discussed with her any need for the temps to receive BBP or hazcom training, or showed her the chemicals used at Froedtert or their material safety data sheets. Apparently just *prior* to learning from Froedtert that the housekeepers would be exposed to blood, Gutbrod contacted OSHA about whether the temp housekeepers needed the HBV vaccine and was purportedly told that the housekeepers did not. On this basis, FlexiForce/AccuStaff decided not to offer the vaccine to the temps. Gutbrod learned from Froedtert that it offered the HBV vaccine to its own employees and asked whether Froedtert would do so for the temps, one of whom wanted it. Froedtert responded that it would not vaccinate the FlexiForce/AccuStaff temps.²

Upon initial assignment to Froedtert, FlexiForce/AccuStaff told the housekeepers where to report and to whom, how to dress, that work schedules would be posted at Froedtert, and instructed them in proper time card procedures and pay arrangements. The record shows that FlexiForce/AccuStaff had little contact with the housekeepers thereafter. Froedtert personnel placed orders for temps and advised FlexiForce/AccuStaff if a particular housekeeper's performance was unacceptable, requesting removal and replacement. FlexiForce/AccuStaff would not reassign a terminated EVS temp to another Froedtert department without Froedtert's approval, but might remove a temp from a client on its own without the client's permission, though Gutbrod knew of no circumstance where that occurred at Froedtert. Only FlexiForce/AccuStaff could terminate a temp from its own employment rolls and "discipline" its own employees. Gutbrod acknowledged that there were occasions when client supervisors disciplined temps, but normally FlexiForce/AccuStaff would intervene to relay any of Froedtert's concerns to the temps.

Once at Froedtert, the hospital gave the temps their assignments, ordered any

²Froedtert mischaracterizes this testimony as a "communicat[ion] to representatives of [FlexiForce/Accustaff] that they were to offer the HBV vaccination." While the Secretary also mischaracterizes this testimony as establishing *Froedtert's* knowledge that FlexiForce/AccuStaff did not provide the vaccine, there is no evidence to establish that Froedtert had any reason to believe that FlexiForce/AccuStaff did provide it.

reassignments when necessary and, according to Gutbrod, controlled the temps day-to-day activities, including the manner and means of their work. Anthony Barzycki, Froedtert EVS director from April to November 1996, testified that while he did not “manage” the temps or evaluate their performance, he directed them to the location of their work and advised them of the functions they were expected to perform. He stated that the temps blended in with the Froedtert EVS staff and that Froedtert informally trained them through the “buddy” system. Gina Kiedinger, Froedtert quality assurance supervisor from August 1996 until September 1997, placed orders for temps when requested by Froedtert EVS supervisors, and asked to have temps removed in instances of poor performance, but testified that Froedtert could not “supervise” the temps. Kiedinger conceded, however, that Froedtert controlled the temps’ day-to-day activities “as far as assigning people, where they go, yes.” She also never asked Cindi Gutbrod whether the temps were trained in BBP or hazcom prior to working at Froedtert, did not know whether FlexiForce/AccuStaff trained its temps, and “very rarely” saw FlexiForce/AccuStaff representatives at Froedtert, as they came by only to pick up time cards.

FlexiForce/AccuStaff filed injury reports/workers’ compensation claims for injured temps, reported all injuries to clients, and paid for job-related medical care. FlexiForce/AccuStaff paid the temps directly, but its costs plus profit margin were built into the sum it charged Froedtert. Agency-provided time cards for all temps were filled out and signed weekly by Froedtert personnel. On the back of the client’s copy of the time card was the following statement, which Gutbrod did not bring to anyone’s attention:

The client will furnish to our employees a safe place of employment in accordance with applicable OSHA and other safety requirements. The client indemnifies us against and holds us harmless from any violations of OSHA or other safety requirements.

B. StaffWorks

In September 1996, Froedtert began to obtain EVS temps from the StaffWorks employment agency to improve the quality of temp housekeepers. Froedtert’s arrangements with StaffWorks were different from those with Flexiforce/Accustaff in three principal ways:

1. Froedtert specifically discussed with StaffWorks the agency’s ability to provide BBP and hazcom training to the temps and offer them the HBV vaccine;

2. StaffWorks had personnel on-site at Froedtert for a number of hours each week; and
3. StaffWorks transmitted to the temps some infection control information, largely received from Froedtert, and commenced documenting the workers' receipt of that information shortly after OSHA began its inspection.

Former Froedtert EVS director Barzycki and EVS supervisor/coordinator Susan Bailey met with StaffWorks representative Julia Chiger in late summer 1996 to discuss Froedtert's need for temporary housekeepers. As noted in the judge's decision, Barzycki and Bailey testified that they discussed StaffWorks' providing training to the temps in BBP and hazcom, and offering the HBV vaccine. Barzycki added that the discussion included on-site supervision by StaffWorks. When asked whether Froedtert and StaffWorks agreed that StaffWorks would provide these services, Bailey testified that she "believed" that they would, and Barzycki stated that "[t]hey told me that that's what they do with their health care employees." In later testimony Bailey was more direct, stating that other than discussions about providing those services, she was not aware of "an agreement that this would actually be done." Although Julia Chiger testified that StaffWorks and Froedtert never discussed training or the HBV vaccine, the judge discredited this testimony because he found it untrustworthy based on his observation of Chiger's demeanor.

As the judge also found, however, the record establishes that prior to the OSHA inspection Froedtert did not directly confirm whether StaffWorks ever provided these services. Barzycki did not recall having received any documentation confirming that the StaffWorks temps had been trained or vaccinated, he did not discuss training with any of the temps, and he did not leave any written documentation to his successor delineating the arrangements with StaffWorks. Barzycki did "think" that he asked for a checklist from StaffWorks confirming that it provided training, which he never received, but he stated that StaffWorks "indicated that they were functioning in that manner where everything was documented." Former EVS supervisor Bailey testified that she had no knowledge that Froedtert was ever offered proof that StaffWorks provided BBP or hazcom training or administered the HBV vaccine. She did not remember seeing any documentation to that effect, nor did she ever inquire about whether the StaffWorks temps were offered the shots. Former Froedtert EVS supervisor Gina Kiedinger testified that

although she believed that StaffWorks was providing some training to the temps based on their exchange of infection control information and her observation of the temps' work habits, she did not recall whether she was ever told that the agency provided training, she did not instruct StaffWorks account manager Sandra Swenson to pass on the information to the temps, she did not discuss training when placing temp orders with the agencies, and she never asked Swenson whether she trained the temps in BBPs or hazcom. Froedtert Vice President of Human Resources Nancy Heisler assumed that the temp agencies provided training, but had no documentation. Thomas White, EVS director since December 1996, testified that he "had the understanding" that StaffWorks trained the temps and disseminated information to them because Froedtert provided StaffWorks with "many materials" and included the StaffWorks representatives in an infection control in-service held at the hospital. White conceded, however, that he did not know whether this information was ever passed on to the StaffWorks temps prior to the commencement of the OSHA inspection, nor did he ask StaffWorks whether the temps had been offered the HBV vaccine.

StaffWorks required a written application from job applicants and conducted personal interviews prior to placing them with a client. The agency also paid the workers assigned to clients, withheld their taxes, and processed workers' compensation claims. StaffWorks increased a temp's salary when requested by client supervisors, increasing the client's bill accordingly. StaffWorks did not evaluate the quality of the temps' work, but disciplined or removed temps from Froedtert at the hospital's request. StaffWorks representative Sandra Swenson testified that Froedtert placed orders by phone, indicating which of three shifts the temp would work, where in the hospital the job was located, and whether the job was for a floor care, janitorial, or housekeeping worker. Prior to placement at Froedtert, StaffWorks told the temps the location of their hospital assignment and time sheets, the name of their Froedtert supervisor, and where to report. Thereafter, Swenson might have contact with the temps when she visited Froedtert approximately three days each week for a "couple" of hours to pick up time sheets, drop off pay checks, show temps the location of their time sheets, deal with "basic things" such as inappropriate phone use, snacking, and other problems, or to terminate a temp at Froedtert's request.

Beginning in March 1997, one month prior to the OSHA inspection, Swenson held monthly meetings with the temps at Froedtert to pass on information and handouts from Froedtert regarding chemicals, rules, etc. Swenson stated that Froedtert provided all tools, chemicals, supplies and scrubs, and that Froedtert would change the temps' shifts and add overtime without Swenson's knowledge. She also testified that Froedtert lead people and supervisors directed the temps' day-to-day activities at the hospital, which is consistent with Julia Chiger's testimony that Froedtert controlled the means and manner of the temps' work, and is consistent with Froedtert EVS supervisor/coordinator Susan Bailey's testimony that she directed the temps' day-to-day activities.

In August 1996 Froedtert re-employed Bertha Bowen, an eighteen-year Froedtert veteran and retiree, as a management-level housekeeping coordinator in the EVS department. Bowen's tenure, during which she supervised up to thirty mostly temp workers at a time, continued beyond the OSHA inspection and citation period. Bowen testified that she made shift and department assignments and reassignments, sometimes in response to worker concerns about blood exposure, and requested that the temp agencies terminate a worker for poor performance on "several occasions." She also explained sign-in procedures, showed temps what chemicals to use, supplied gloves and equipment, had some discussion regarding BBP issues and hazardous substances, and assigned new temps to "buddy" with an experienced housekeeper. Bowen had contact with Sandra Swenson about once each week, but she did not know whether the temp agencies trained the workers they sent to Froedtert. Although Bowen was not allowed to directly reprimand temps, she would intervene if she saw a temp doing something that was unsafe. Bowen and Nancy Heisler testified that Froedtert supervisors and lead people controlled the temps' day-to-day activities. Even Froedtert admits that it "controlled the activities that occurred on-site at the [h]ospital (where the temporary workers performed their tasks)," but contends that its lack of authority to hire, fire, discipline and pay precluded it from becoming the temps' employer.

ANALYSIS

A. Statutory Duty As Employer of Temporary Housekeepers

The first issue before us is whether Froedtert is the employer of the temporary

housekeepers. The Act defines an employer as “a person engaged in a business affecting commerce who has employees,” and defines an employee as “an employee of an employer who is employed in a business of his employer.” Section 3(5) and (6), 29 U.S.C. § 652 (5) and (6). Froedtert admits that it is an employer – that it has its own employees. Froedtert argues, however, that the temp housekeepers were not its employees but, rather, were employees of their respective agencies, and that its non-compliance with the cited OSHA standards as to this group of workers was consequently not violative. We conclude that Judge Schwartz’ finding, that Froedtert had an employment relationship with the temp housekeepers, is well supported by long-standing legal precedent and the record evidence.

The law is well settled that the housekeepers’ status as temp agency employees is *not* determinative of whether the temps were also Froedtert employees. Under traditional principles of agency law, two unrelated employers may each have an employment relationship with a particular employee acting in the service of both, or working as a loaned servant of one and as the borrowed servant of the other. RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a, and § 227 cmt. a, illus. 3 (1957); *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) (holding that union-paid organizer also may be employee of company union seeks to organize); *Kelley v. Southern Pacific Co.*, 419 U.S. 255 (1974) (stating that “under common law, plaintiff can establish employment by rail carrier while nominally employed by another as borrowed servant, as servant of two masters, or as subservant”).

The Commission has addressed co-employment issues in a number of cases over the years. In some cases the evidence established an employment relationship between the loaned workers and the borrowing entity. *E.g.*, *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1984-85 CCH OSHD ¶ 27,408 (No. 83-231, 1985) (vacating citation to supplying employer based on finding that borrowing company was the workers’ statutory employer); *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1978 CCH OSHD ¶ 22,829 (No. 14801, 1978) (finding company that harvests and markets fruit crop is statutory employer of temporary migrant crew hired, disciplined, directed, and paid by farm labor contractor); *Joseph Bucheit and Sons Co.*, 2 BNA OSHC 1001, 1973-74 CCH OSHD ¶ 17,946 (No. 2684, 1974) (consolidated) (imposing OSH Act obligations on borrowing employer during time of loan arrangement regarding

employee loaned by other contractor working on same construction project). In other cases, the Commission has found that no employment relationship exists between a borrowing employer and worker. *E.g.*, *Vergona Crane*, 15 BNA OSHC 1782, 1991-93 CCH OSHD ¶ 29,775 (No. 88-1745, 1992) (finding that cited crane lessor was employer of experienced crane operator and oiler where borrowing entity only showed workers which load to move and where to locate it, and put workers on its payroll at lessor's request); *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1995-97 CCH OSHD ¶ 31,150 (No. 9354, 1996) (consolidated) (finding NASA not employer of highly trained and experienced workers who volunteered to participate in NASA project and were paid and trained by contractors for whom they worked full time, where NASA tightly controlled sequence of activities but did not direct the specific activities performed by workers who “ ‘kn[e]w where to go’ and ‘exactly what to do’ ”).

Applying contemporary court precedent developed under analogous statutes, the Commission has most recently evaluated questions of OSH Act employment status utilizing the common-law agency doctrine to determine whether a conventional master-servant relationship exists. *Don Davis*, 19 BNA OSHC 1477, 1479-80, 2001 CCH OSHD ¶ 32,402, pp. 49,896-97 (No. 96-1378, 2001), *citing* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989). In these latter cases, the Supreme Court interpreted federal statutes in which Congress either had not specifically defined the term “employee” or had utilized essentially a circular definition. In the absence of a specific definition, the Court held that Congress was presumed to have adopted the common-law definition as derived from the Restatement (Second) of Agency. *See* RESTATEMENT (SECOND) OF AGENCY § 220. Although section 220 generally envisions a two-dimensional focus – whether the worker relates to a putative employer as an employee or as an independent contractor – its multifaceted test does have relevance in the three-dimensional situation such as here, involving Froedtert as the hiring party, the temporary employment agencies, and the hired workers who were provided to Froedtert by the agencies. *Id.* §227 cmt. c (“factors . . . which determine that a person is a servant are also useful in determining whether a lent servant has become the servant of the borrowing employer”). *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 173 F.3d 713, 723-24 (9th Cir. 1999) (finding that temp agency employment

does not preclude common law employment relationship with borrowing company (Microsoft), and concluding that determination of whether temps were Microsoft employees is based “not on whether they were also employees of an agency but rather on application of the *Darden* factors to the relationship with Microsoft”), *amended by, rehearing denied*, 184 F.3d 1070 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000); *Richardson v. Century Products, Inc.*, 163 F. Supp. 2d 771 (ND Ohio 2001)(worker who was referred by employment agency on a temporary basis to a customer company could file Title VII claim against latter as an employer under common law principles of agency). *Cf. Doe v. Allied-Signal, Inc.*, 925 F.2d 1007 (7th Cir. 1991) (finding janitor an employee of both company for whom she performed services and of janitorial services firm, court concluded that workers’ compensation is sole remedy for job injuries).

Relying upon the analysis enunciated in *Reid, supra*, the *Darden* Court articulated the following factors for determining whether an employment relationship exists:

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). As Froedtert correctly notes, the Court has emphasized that all of these factors must be considered, and no one factor is decisive. *Id.* at 324. Yet, as reflected in the Supreme Court’s most recent analysis of the common law meaning of “employee” in the context of a federal labor statute, the control exercised over a worker remains a “principal guidepost.” *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003) (issue of whether physician-shareholders of an employer could be counted as “employees” for purposes of small employer exemption of the Americans With Disabilities Act, 42 U.C.S. §12101 *et seq.*). Further, *Clackamas* teaches that the relational context in which the issue arises has a bearing on how the multiple factors derived from the common law are to be

applied and weighed.³ With these precepts in mind and on the basis of the record before us, we consider the evidence pertaining to the *Darden* factors, together with their respective legal significance.

The record amply supports the judge's finding that the weight of the evidence indicates that Froedtert controlled the manner and means of the temps' daily work. The product accomplished by the temp housekeepers was cleaning the assigned areas of Froedtert Hospital, which is an essential part of Froedtert's regular business of operating a hospital. The record is clear that only Froedtert knew and directed the way in which it wanted its facility cleaned, and also directed and provided the means, *i.e.*, the tools and products, by which it wanted the job done. Froedtert also directed the housekeepers to the areas it needed cleaned, including "stat" cleanings required on an emergency basis, and reassigned the temps to different locations and shifts as needed. While there is evidence that Froedtert asked the temp agencies to send workers with "basic" training in general cleaning methods, the work remained relatively unskilled manual labor and Froedtert directed the housekeepers in which methods and products to use in the variety of particular cleaning jobs present in the hospital.

Froedtert also corrected the temps when their work was unsafe or wrong, assigned the temps a "buddy" to provide on-the-job instruction, and provided the only significant on-site "supervision." FlexiForce/AccuStaff had no personnel assigned to the hospital, and Sandra Swenson of StaffWorks spent only a "couple" of hours at Froedtert three days each week during which she handled mostly time sheet/pay issues and addressed disciplinary matters as requested by Froedtert. Froedtert asked the temp agencies to intervene on its behalf to correct inappropriate behavior and to remove a temp whose work was unacceptable to the hospital. The evidence indicates that neither Froedtert nor the temp agencies evaluated the temps'

³ The Court observed that professional corporations are a "new type of business entity that has no exact precedent in the common law," 123 S.Ct. at 1679, and "the[] particular factors [in *Darden*] are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer." *Id.* at 1677-78 n.5.

performance. *See MLB Industries, Inc.*, 12 BNA OSHC at 1529, 1984-85 CCH OSHD at pp. 35,510-11 (borrowing employer provided sole supervision, instructing workers in what to do, how to do it, when to take breaks, and supplier's role largely indirect or theoretical).

Although the temps' placement at Froedtert was often of short duration, the record evidence of the temps' work at Froedtert is incomplete. The evidence we do have shows that thirty-three temps worked as little as one week, at least two housekeepers worked for one year, and numerous temps worked for many months. For the limited period of time covered by Froedtert's data, our computations show that the average work duration was over five weeks for StaffWorks temps and was seven weeks for FlexiForce/AccuStaff temps.

Nevertheless, we do not think that the relatively short duration of employment for a number of the temps does anything to diminish their status as employees of Froedtert. A comment to section 220 of the Restatement (Second) of Agency explains the significance of the time of employment as follows: "The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him." RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j. In other words, duration of employment is regarded as only a corroborating fact that sheds additional light on the nature of the control that a putative employer exercises over a worker; as a matter of general experience, a shorter employment tenure has tended to go hand in hand with less control exercised over the worker. However, in the context of the employment referral business, where temporary hiring is the norm, the weight normally assigned to duration of employment as an indicia of control has little corroborating influence. As the record here unquestionably demonstrates, Froedtert exercised extensive control over the activities of the temps no matter the length of their individual employment. *See Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 1984 U.S. Dist. LEXIS 22888 (S.D.N.Y. 1984), *aff'd without published opinion*, 770 F.2d 157 (2d Cir. 1985) (finding Title VII plaintiff employee of both temp agency and borrowing employer for whom she worked only two weeks prior to being fired).

With respect to the temps' discretion over when and how long to work, the evidence

suggests that Froedtert assigned the temps to work one of three eight-hour shifts and that, aside from preferring a particular shift, calling in sick, or just not showing up for work, the housekeepers had little, if any, control over their schedules. This reinforces the conclusion that the temps were not working independently of Froedtert's direction and control. We disregard the factor pertaining to hiring assistants, as Froedtert's regular staffing structure included a large staff of housekeepers, obviating the need for hiring any assistants. *See Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111,118 (2d Cir. 2000) (disregarding ninth *Reid* factor as "irrelevant to th[e] case: Eisenberg hired no one to assist her with her work at Advance, and Advance hired no assistants for Eisenberg" (citation omitted)).

The pay/benefits/taxes factors all show a direct connection between the agencies and temp workers, but also show indirect involvement by Froedtert, as the agencies' costs were passed on to the hospital in the rates the agencies charged. The Commission and some courts have discounted the effect of this factor on evaluating the employer status of a using employer. *MLB Industries, Inc.*, 12 BNA OSHC at 1529, 1984-85 CCH OSHD at p. 35,511 (characterizing supplying employer as merely "conduit for labor"); *Richardson v. Century Products, Inc.*, *supra*, 163 F. Supp. 2d at 775 (even though employment agency was responsible for paying the worker and withholding all taxes and deductions, this was not conclusive that worker was solely the agency's employee; the court noting that the employing customer company paid agency enough to compensate for the employee's wage and for additional fee); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 611 F. Supp. at 349 (payment by temp agency found not conclusive that worker was solely temp agency's employee). *Cf. N.L.R.B. v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1267 (7th Cir. 1987)(finding using employer and temp agency joint employers, court characterized agency's pay/benefits/taxes responsibilities as "administrative").

We recognize that there is no precision to the weighing of all of these factors, and that there is evidence showing that Froedtert did not *directly* control all aspects of the housekeepers' placement at the hospital or their working conditions. We find, however, that the weight of the

evidence, in light of extensive court precedent, supports the judge's conclusion that the temp housekeepers were employees of Froedtert under the OSH Act.⁴

B. Delegation of Duty

We also agree with the judge that Froedtert did not effectively delegate its compliance obligations to the temp agencies. "An 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." *Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978). See also, *REA Express*, 495 F.2d 822 (2d Cir. 1974); *Weicker Transfer*, 2 BNA OSHC 1493, 1974-75 CCH OSHD ¶ 19,215 (No. 1362, 1975); *Bayside Pipe Coaters*, 2 BNA OSHC 1206, 1974-75 CCH OSHD ¶ 18,677 (No. 1953, 1974). In *Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1180, 1993-95 CCH OSHD ¶ 30,734, p. 42,684 (No. 90-1786-S, 1995), the Commission noted that even if Baker's contract with a plant owner provided for the plant owner to instruct Baker's own employees, "Baker could not contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them." *Accord Brock v. City Oil Well Serv.*, 795 F.2d 507, 512 (5th Cir. 1986); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333 (10th Cir. 1982).

The record evidence shows that Froedtert never discussed hazcom and BBP training or HBV vaccination with Flexiforce/Accustaff, but that it did discuss with StaffWorks the possibility of providing these services, though it never confirmed with the agency or the housekeepers that StaffWorks actually would or did provide the required training or vaccine.

⁴Because we conclude that Froedtert was obligated to comply with the cited OSHA standards based on its status as the temporary housekeepers' common-law employer, we need not reach the alternate theory of multi-employer liability. In addition, Commissioners Stephens and Rogers agree with the Chairman that the increasing use of temporary or contingent workers poses novel and interesting challenges in applying the traditional rules of employer responsibility under the OSH Act which might, in the appropriate circumstances, incorporate reliance on a joint employer doctrine. Nonetheless, they decline to speculate on the parameters of such a new theory of liability or the implications it would have on compliance obligations generally, or on the facts of this case, as it is neither necessary to decide this case nor has it been (continued ...

Early in Froedtert's arrangements with FlexiForce/AccuStaff, it requested that the agency provide only "basic" housekeeping training, and former Froedtert EVS Director William Herrick's testimony, that he never discussed with the agency the need for the temps to be offered the HBV vaccine, is unrebutted. Moreover, according to FlexiForce/AccuStaff manager Cindi Gutbrod, Froedtert's housekeeper work orders did not change, and no one from Froedtert ever discussed with her any need for BBP or hazcom training. Former Froedtert quality assurance supervisor Gina Kiedinger confirmed that she never asked Gutbrod about BBP or hazcom training and did not know whether the temps were trained. Accordingly, we find that Froedtert did not effect a delegation of its statutory responsibilities to FlexiForce/AccuStaff.

Nor does the record show that Froedtert effectively delegated its statutory responsibilities to StaffWorks. There is no dispute that StaffWorks did not offer the temp housekeepers the HBV vaccine and did not provide the training required under the hazcom and BBP standards. Although Froedtert argues that it reasonably believed otherwise, the evidence supports the judge's finding that Froedtert did not follow up on any belief that StaffWorks would provide these services; it neither inquired of StaffWorks' personnel whether the housekeepers were trained and offered the vaccine, nor did it ask the workers themselves whether they received these services. In these circumstances, legal precedent supports the judge's conclusion that Froedtert did not effectively delegate its statutory obligations to StaffWorks. *E.g., R.P. Carbone Constr. Co. v. OSHRC*, 18 BNA OSHC 1551, 1554 (6th Cir. 1998) (unpublished) (finding employer's reliance on subcontractor's safety efforts unjustified where employer "failed to inform itself as to what safety measures [subcontractor] had implemented"); *Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d at 624 (employer acts at its peril by contracting out statutory responsibilities where it cannot show inability to enforce third party agreement).

C. Compliance

Although Froedtert admits that it did not comply with the cited standards, it contends that it lacked notice that it was required to comply, and that compliance with the vaccination

litigated by the parties.

requirement was infeasible. The Commission has long held that the knowledge required to establish a violation is not directed “to the requirements of the law, but to the physical conditions which constitute a violation of [the Act].” *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1092, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977). *Accord*, e.g., *Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1544 n.6, 2001 CCH OSHD ¶ 32,428, p. 49,994 n.6 (No. 00-0322, 2001) (“[w]hether or not employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance [i]t is no defense that they did not understand the reasonable interpretation of a regulation’ ” quoting *Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991)); *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-80, 1993-95 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995) (“[e]mployer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation [-] [i]t need not . . . be shown that the employer understood or acknowledged that the physical conditions were actually hazardous”), *aff’d without published opinion*, 17 BNA OSHC 1628 (5th Cir. 1996); *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199, 1993-95 CCH OSHD ¶ 30,052, p. 41,299 (No. 90-2304, 1993), *aff’d*, 26 F.3d 573 (5th Cir. 1994); *George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436, 1445, 1982 CCH OSHD ¶ 25,956, p. 32,533 (No. 76-647, 1982).

Froedtert argues that it did not “believe” that the cited standards applied to it “because it did not consider itself the workers’ ‘employer.’ ” Under the foregoing precedent, however, any misunderstanding of law would not be relevant to whether a violation is established, especially where the statute plainly states that it applies to an “employer,” and case law interpreting the meaning of that term under the OSH Act predates the 1997 citation. *See Pitt-Des Moines*, 168 F.3d 976, 984 (7th Cir. 1999) (applying multi-employer doctrine to criminal OSH Act violation, court found fair warning of potential criminal multi-employer liability provided by “clear language of the statute, combined with the doctrine’s wide acceptance and long history” in civil penalty cases).

Froedtert also contends that provision of the HBV vaccine to the temp housekeepers was infeasible because the short duration of their work at Froedtert made it impossible to provide the entire three-shot series necessary for full sero-immunity. The judge found that “Froedtert

succeeded in establishing that its provision of the HBV vaccine would be unreasonable or senseless[.]” He rejected the defense, however, concluding that by failing to specifically delegate to the temp agencies the responsibility for providing the vaccine, Froedtert failed to “make any attempt to ensure the protection of employees who worked under its control” and thereby “failed to show that it availed itself of all available means of protecting its employees[.]” *Citing Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28, 1991-93 CCH OSHD ¶ 29,442, p. 39,685 (No. 88-821, 1991) (holding that excuse from compliance with standard’s abatement measure requires employer to establish that alternative protective measure was used or that there was no feasible alternative measure).

The cited standard, 29 C.F.R. § 1910.1030(f)(2)(i), provides that the

[h]epatitis B vaccination shall be made available after the employee has received the training required . . . 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 usual three-dose protocol of the HBV vaccine involves an initial injection, followed one month later by a second dose, and a final injection six months after the initial injection. The standard, however, requires only that the vaccine be “made available” to exposed employees within ten days of initial assignment. It does not require that immunity be achieved prior to exposure, that exposed employees agree to receive the entire three-shot course of vaccine or any vaccine at all, or that the vaccine be made available to individuals no longer covered by the standard. *See* 29 C.F.R. § 1910.1030(f)(2)(iii). In these circumstances, we fail to see how Froedtert could not comply with the standard’s requirements for short-term personnel or abate any violation for its non-compliance. Accordingly, we reject its infeasibility defense to this citation item.

D. Characterization

In general, Commission precedent establishes that “[a] willful violation is 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 (No. 98-0701, 2003) (citations omitted). Numerous cases also make clear that willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible. *E.g.*, *General 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) (employer’s non-compliance with OSHA records access rule not willful where employer had mistaken though good-faith belief that pending workers compensation claim, for which requested records could not be lawfully obtained, invalidated applicability of the OSHA rule). *Accord American Wrecking Corp. v. Secretary of Labor*, No. 02-1379, 2003 U.S. App. LEXIS 25778, at *19-20 (D.C. Cir. Dec. 19, 2003).

Chairman Railton and Commissioner Stephens agree with the judge that the Secretary failed to establish that these violations were willful.⁵ As a threshold matter, in their view Froedtert’s efforts to structure an arms-length business arrangement with the temp agencies in order to have them assume certain employment responsibilities is not evidence of “ ‘an intentional disregard of, or plain indifference to, the Act’s requirements.’ ” *Kaspar Wire Works, Inc. v. Sec’y of Labor*, 268 F.3d 1123, 1127 (D.C. Cir. 2001) (citation omitted). The Secretary herself has recognized the propriety of such arrangements, as evidenced by the interpretations provided to Froedtert during the inspection. Those interpretative documents explain that responsibility for OSH Act compliance under the BBP and hazcom standards can be shared between a host employer and personnel agencies. *See* OSHA Interpretation, *Most Frequently Asked Questions Concerning the Bloodborne Pathogens Standard* (2/1/93) (primary responsibility for compliance regarding contract healthcare workers rests with client employer, but responsibility is shared with personnel providers who must provide general training and required vaccinations); OSHA Interpretation, *Employers’ Responsibilities Towards Temporary Employees* (2/3/94) (responsibility for hazcom training of temporary employee is shared by agency and client, with client having primary responsibility; lessor employer is expected to

⁵The characterization of the recordkeeping violation is not at issue on review.

provide training and information under 29 C.F.R. § 1910.1200(h)(1), and client is responsible for providing site-specific training and exposure control).

Chairman Railton and Commissioner Stephens also find that Froedtert believed in good faith that the temporary housekeepers were not its employees, and that Froedtert's belief in the lawfulness and effectiveness of its business arrangements with the temporary agencies was reasonable. In this regard, there is evidence showing that the EEOC dismissed a discrimination charge against Froedtert after Froedtert successfully argued that it was not the worker's employer. Moreover, former EVS director Barzycki, human resources VP Heisler, and EVS supervisor Kiedinger all testified that they thought Froedtert was not the temps' employer and had no OSH Act obligations with respect to them. In the absence of prior OSHA citations or other evidence to establish that Froedtert knew of its duty to the temporary housekeepers, Chairman Railton and Commissioner Stephens find no basis in the record upon which to question Froedtert's veracity. *See McLaughlin v. Union Oil Co.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (finding OSHA violation for failure to provide employees fireproof clothing not willful where "[i]t was not obvious that the general regulation would be extended to operating employees in oil refineries, given that a colorable argument existed that even members of the fire brigades at such refineries are not required to be issued fireproof clothing . . . [-] [a] violation is not willful when it is based on a nonfrivolous interpretation of OSHA's regulations") (citations omitted).

Indeed, in addition to the uncertainties created by a thirteen-part fact-specific legal test of employment status, Froedtert's belief in the plausibility of its legal position finds support in the Secretary's own instruction, provided to Froedtert during the inspection, which states that the determination of employer status "may be a very complex question, in which case the Area Director may seek the advice of the Regional Solicitor." OSHA Instruction CPL 2.103, 9/26/94. *See Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, pp. 41,142-43 (No. 90-2179, 1993) (finding failure to comply with known OSHA regulatory interpretation non-willful where employer held erroneous but good faith belief that its "plausible" interpretation was correct). These circumstances stand in stark contrast to those in *Calang Corp.*, 14 BNA OSHC 1789, 1790, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-71

(No. 85-0319, 1990), where the Commission affirmed a willful violation of the trenching standards, finding that the employer could not, in good faith, have believed that it complied with standards after the compliance officer correctly explained the standards' requirements and pointed out deficiencies that the employer failed to correct.

Chairman Railton and Commissioner Stephens acknowledge that the term "willful" has been characterized as "notoriously slippery," *U.S. v. Ladish Malting Co.*, 135 F.3d 484, 487 (7th Cir. 1998), and subject to inconsistent legal interpretation, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Nonetheless, based on the record evidence in this case, they take issue with Commissioner Rogers' assertion that Froedtert could not have believed in good faith that it owed no duty to the temporary housekeepers. In their view, she blurs the distinction between conscious disregard and mere negligence, particularly in light of the Supreme Court's admonition in *McLaughlin v. Richland Shoe Co.*, that a good faith belief obviates willfulness where it is non-reckless, even if it is unreasonable. 486 U.S. at 134-35, n.13. *See also McLaughlin v. Union Oil*, 869 F.2d at 1047 ("a negligent violation of the statute is merely 'serious,' . . . and for a 'willful' violation more is necessary"). While Froedtert's belief that it was not the temps' employer was mistaken, it was surely sufficiently plausible to obviate willfulness. Accordingly, based on their finding that Froedtert believed in good faith that it owed no legal duty to the temp housekeepers, Chairman Railton and Commissioner Stephens affirm the violations as non-willful.⁶

⁶Commissioner Rogers dissents from her colleagues' finding that Froedtert's failure to comply with the cited BBP and hazcom standards was not willful. As a hospital, Froedtert's very existence requires expertise in the handling of bloodborne pathogens and the hazardous chemicals needed to remove them, and renders it subject to the myriad requirements of the OSHA BBP and hazcom standards. *American Dental Ass'n v. Martin*, 984 F.2d 823, 829 (7th Cir. 1993). Moreover, Froedtert was keenly aware that the temporary housekeepers' work required regular exposure to bloodborne pathogens and hazardous chemicals, knew and understood the requirements of the OSHA BBP and hazcom standards, and appreciated the medical consequences of its failure to provide this group of workers with the required site-specific training and HBV vaccine. Nonetheless, Froedtert knowingly put these workers at risk without ensuring that they had the basic tools with which to protect themselves.

(continued ...

E. Penalties

With respect to penalties, the judge took into account Froedtert's large size, the gravity of the violations, and absence of any prior violations. Froedtert does not contest the appropriateness of the penalty amounts, nor does the Secretary object to the amounts based on a non-willful characterization. *See* Section 17(j), 29 U.S.C. § 666(j). We conclude that the penalty amounts assessed by the judge are appropriate in light of the statutory factors, and affirm those assessments, as follows.

Citation 2, Item 1, 29 C.F.R. § 1904.2(a), affirmed as other-than-serious: \$180

Citation 2, Item 2, 29 C.F.R. § 1910.1030(f)(2)(i), affirmed as serious: \$6,300

Citation 2, Item 3, 29 C.F.R. § 1910.1030(g)(2)(i), affirmed as serious: \$6,300

Citation 2, Item 4, 29 C.F.R. § 1910.1200(h), affirmed as serious: \$4,900

SO ORDERED.

Froedtert defends its unconscionable conduct by claiming that it believed that it was not the temporary housekeepers' employer. In Commissioner Rogers' view, Froedtert's belief that it owed no legal duty to the temporary housekeepers was unreasonable under these circumstances. *See American Wrecking Corp. v. Secretary of Labor*, No. 02-1379, 2003 U.S. App. LEXIS 25778, at *19-20 (D.C. Cir. Dec. 19, 2003). Froedtert knew that its use of temporary housekeepers presented an issue of employment status. In fact, its admitted purpose was to avoid legal responsibility for the temps under state and federal employment statutes. Contrary to its assertion that prior dismissed, but uninvestigated and unlitigated, EEOC charges legitimized its position, those charges should have prompted Froedtert to question the validity of its employment practices. *See U.S. v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (noting that courts will infer actual knowledge element of willfulness where "a person with a lurking suspicion goes on as before and avoids further knowledge"). Although Commissioner Rogers agrees with her colleagues that in some cases there may be uncertainties in applying the thirteen-part *Reid/Darden* test of employer status, this is not such a case. Froedtert's exclusive control over the manner and means of the temps' daily work and its sole on-site supervision of the temps, combined with the other enumerated factors, squarely and plainly satisfy the common law test of employer status. In these circumstances, Commissioner Rogers would find that Froedtert did not have an objectively reasonable good faith belief that it owed no legal duty to the temporary housekeepers, and would affirm the BBP and hazcom violations as willful.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: January 15, 2004

RAILTON, Chairman, concurring:

While I agree with my colleagues concerning the disposition of this case, I believe it raises an issue worthy of comment that was not addressed by the parties or the judge – the question of compliance responsibilities where workers are jointly employed by a referral agency and borrowing employer. It is common knowledge that in recent years employers have increasingly relied on temporary and contract employees to augment their workforces when necessary rather than hiring new permanent employees. This practice has resulted in the creation of an industry specializing in providing client employers with both unskilled temporary workers and with workers having specialized skills, e.g., accountants, lawyers, medical specialists, word processing specialists and a slew of other skilled workers. Here, presented with an immediate need to augment its housekeeping staff upon acquisition of the new adjacent facility, Froedtert utilized the services of two temporary help agencies to expediently provide it with workers for whom, it thought, the agencies would retain sole employment responsibility. These factual circumstances have been found, under other federal labor statutes, to present the question whether the borrowing employer was a joint employer with the agencies who supplied the temporary workers, resulting in shared employment responsibility among the two employing entities. *E.g., N.L.R.B. v. Western Temporary Services, Inc.*, 821 F.2d 1258 (7th Cir. 1987) (upholding joint employer status of production facility and temporary help agency that supplied it with part-time temporary employees during peak production periods). Although that issue was not litigated here and presents a number of subsidiary issues under the Occupational Safety and Health Act (Act) which cannot be resolved on the record before the Commission, it is one that warrants consideration in light of the ever-increasing trend of American companies to utilize the services of workers referred by temporary help agencies.

The Secretary laid the scene by following her usual practice of citing everybody in sight. She issued duplicate citations for certain conditions to Froedtert and to the two agencies, citing the hospital and both temporary agencies under the bloodborne pathogen (BBP) standard for alleged willful violations for failure to provide the hepatitis B virus (HBV) vaccine to the housekeepers, and for willful violations for failure to train the housekeepers under the BBP standard. StaffWorks, like the hospital, was also cited under the hazard communications

(hazcom) standard. Thus, on the face of it, OSHA treated the three employers as if each had primary responsibility for abatement of the cited conditions. The Seventh Circuit, in a multi-employer worksite case arising under the OSH Act, has questioned this practice, commenting that it might prove counter productive or confusing, and could result in subsequent litigation between parties to affix liability. *See Anning-Johnson Co. v. O.S.H.R.C.*, 516 F.2d 1081, 1089 (7th Cir. 1975). *See also U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 984 (7th Cir. 1999) (upholding application of multi-employer worksite doctrine with respect to employer that created hazardous condition, court questioned appropriateness of “overlapping liability”).

The Secretary cited only Froedtert for its failure to record needlestick injuries suffered by six temporary housekeepers working at the hospital. Four of the needlestick injuries were incurred by FlexiForce/AccuStaff workers, and two were incurred by StaffWorks housekeepers. Although FlexiForce/AccuStaff made and maintained OSHA illness/injury logs for the housekeepers assigned to Froedtert, it is important to note that at the time this case arose, OSHA exempted temporary employment agencies from making and maintaining the OSHA logs. *See* 29 C.F.R. § 1904.16. Accordingly, the Secretary’s policies in regard to recordkeeping at that time did not treat the hospital and the temporary agencies on the same level for citation purposes. The Secretary subsequently amended her recordkeeping requirements and policy; temporary employment agencies, rather than the borrowing employer, are now required to make and maintain OSHA injury/illness logs if they provide the “day-to-day supervision” to the loaned workers. *See* 29 C.F.R. § 1904.2, Appendix A and § 1904.31(b)(3) and (4).

It seems to me that under the circumstances extant at the time OSHA made its inspections of these three employers, Froedtert could not transfer the recordkeeping obligation to the employment agencies. In other words the responsibilities for OSHA compliance could not be shared equally among the three employers.⁷ I note, however, that OSHA has indicated

⁷ The revised recordkeeping rules may complicate matters in future cases. The Secretary interprets them like the prior rules using an either/or approach to employment law issues. That is, she states that the “controlling employer” is required to make and maintain the OSHA 300. As we have concluded in this case, Froedtert would have that responsibility as the controlling employer in that it controlled the exposures of the temporary housekeepers, notwithstanding the (continued ...

that employers can share some obligations under the BBP standard. *See* OSHA Interpretation, *Most Frequently Asked Questions Concerning the Bloodborne Pathogens Standard* (2/1/93) (primary responsibility for compliance regarding contract healthcare workers rests with client employer, but responsibility is shared with personnel providers who must provide general training and required vaccinations). Similarly, OSHA admits that employers can share compliance responsibilities under the hazcom standard. *See* OSHA Interpretation, *Employers' Responsibilities Towards Temporary Employees* (2/3/94) (responsibility for hazcom training of temporary employee is shared by agency and client, with client having primary responsibility; lessor employer is expected to provide training and information under section (h)(1), and client is responsible for providing site-specific training and exposure control). The concept of shared employment responsibilities raises the question of abatement allocation, which has been addressed by the NLRB in the joint employer context as well. *See Capitol-EMI Music*, 311 NLRB 997 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994).

Where, as here, multiple putative employers potentially share OSH Act responsibilities with respect to a particular employee or group of employees, the joint employer doctrine may provide a more coordinated vehicle by which to assess abatement responsibility and ensure compliance. In my view, the record here arguably shows that Froedtert was a joint employer of FlexiForce/AccuStaff, and of StaffWorks.

A joint employer test acknowledges that two entities are separate, but looks to whether they co-determine the essential terms and conditions of employment. *See, e.g., Graves v. Lowery*, 117 F.3d 723, 727-28 (3d Cir. 1997); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359-61 (11th Cir. 1994); *Rivas Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 819-21 (1st Cir. 1991). The two employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *See, e.g., Riverdale Nursing Home*, 317 N.L.R.B. 881, 882 (1995), citing *TLI, Inc.*,

fact that the agencies may now make and maintain the logs. It appears to me that the Secretary's interpretation under the new regulations fails to apply the *Reid* criteria as expressed in *Darden*. *See* 29 C.F.R. § 1904.31(b)(3) and (4).

271 NLRB 798 (1984). In other words, courts look to whether both entities exercise significant control over the same employees. *N.L.R.B. v. Western Temporary Services*, 821 F.2d at 1266; *Graves v. Lowry*, 117 F.3d at 727 (applying the joint-employer test to determine if state-court clerks were employees of the county as well as the judicial branch); *see also Virgo v. Riviera Beach*, 30 F.3d at 1360 (looking to control to determine whether a hotel and the partnership that owned it were “joint employers” under Title VII).

The Seventh Circuit has recognized joint employer status between a temporary services agency and its client in the labor law context, where “two employers ‘exert significant control over the same employees.’” *N.L.R.B. v. Western Temporary Services, Inc.*, 821 F.2d at 1266 (citations omitted). However, the question of whether a joint employer theory is applicable to discrimination cases is an unsettled one in the Seventh Circuit. *See Alexander v. Rush North Shore Med. Ctr.*, 101 F.3d 487, 493 n.2 (7th Cir. 1997). In discrimination cases in which the issue is merely whether an individual is an employee or an independent contractor, the Seventh Circuit emphasizes the amount of control that the putative employer exercises over the individual. In such cases, the Court considers five factors, with the employer’s right to control being the most important:

- (1) the extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work;
- (2) the kind of occupation and nature of skill required, including whether skills are obtained in the work place;
- (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations
- (4) method and form of payment and benefits; and
- (5) length of job commitment and/or expectations.

Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 378-79 (7th Cir. 1991).

The record in this case can arguably be said to demonstrate that Froedtert and the respective temporary employment agency that assigned a temporary employee to work at the hospital “share[d] or codetermine[d] matters governing essential terms and conditions of employment.” *M.B. Sturgis, Inc., et. al v. N.L.R.B.*, 331 NLRB 1298, 1301 (2000) (finding borrowing entity and supplier of contingent workers joint employers – borrowing employer assigned, directed, and oversaw daily work, had authority to discipline, and was responsible to monitor time); *N.L.R.B. v. Western Temporary Services, Inc.*, 821 F.2d 1258 (upholding joint

employer status of production facility and temporary employment agency that supplied it with part-time temporary employees during peak production periods). Both Froedtert and the temporary employment agency also could be said to have meaningfully affected matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. Froedtert determined the level of skill required for the nature of the work performed by the temporary employees. Froedtert was responsible for daily supervision of the temporary employees assigned to work there. Froedtert supervised the performance of the temporary employees' work. Froedtert assigned shifts, hours, and daily assignments to the temporary employees. Froedtert supplied the temporary employees with the necessary equipment and supplies in the workplace, including chemicals and scrubs, and was responsible for maintaining the operations of the hospital.

In addition, the record evidence could be said to establish that the temporary agency that assigned a temporary employee to the hospital had sufficient authority over the workers to be deemed a joint employer of the temporary employees. When Froedtert placed an order for more temporary employees, the temporary agencies had candidates fill out applications and the agencies conducted the interviews and hiring. The temporary agencies paid the temporary employees directly, provided time cards, and filed workers compensation claims for injured temporary employees and provided medical services to employees injured on the job at the hospital. In addition, the temporary agencies were responsible for issuing discipline to temporary employees, including terminating their employment. I think this record contains ample evidence that both Froedtert and the temporary agencies were joint employers because they co-determined the essential terms and conditions of employment for the temporary employees assigned to work at the hospital.

Notwithstanding, the record in this case is not sufficient for, and the arguments of the parties do not address, important questions which arise under the Act. For example, Froedtert controlled the work of the housekeepers and therefore their exposures to BBP and hazardous chemicals. One housekeeper suffered a needlestick injury from a sharp that was left in the linens that should have been disposed of in a sharp's container. 29 C.F.R. § 1910.1030(d)(2)(viii). The hospital was responsible for disposal of the sharp and therefore

responsible for the exposure to the housekeeper. One can easily conceive of other possible exposures which the temporary agencies as joint employers could not control. The question thus presented under the Act for the joint employer situation concerns the extent to which a joint employer who controls the exposure to occupational hazards can shift its compliance obligations (hazard abatement) to another joint employer. The record does not permit an answer in this case. *See e.g., American Dental Ass'n v. Martin*, 984 F.2d 823, 829-30 (7th Cir. 1993) (upholding validity of BBP standard regarding medical personnel agencies only where the cited employer controls the worksite or where the controlling employer “is itself subject to the . . . rule”).

However, it is clear that Froedtert should have been able to push the compliance responsibilities onto the employment agencies to provide training and to provide the HBV vaccine to the exposed temporary workers. As my colleagues conclude and the judge concluded, Froedtert simply did not do enough in this regard. Indeed, the record shows that Froedtert did essentially nothing in its relationship with FlexiForce/AccuStaff to assure itself that the housekeepers were trained and had been offered the vaccination series. That alone is enough to sustain the citations. The record is not as clear with respect to StaffWorks, but again I agree that more could have been done by Froedtert to determine whether the employment agency had satisfied the training and vaccination requirements of the cited standards. At the very least the hospital could have interrogated the housekeepers upon assignment to assure that the compliance obligations had been satisfied or it might have required and obtained certifications to that effect from the temporary agencies.

I concur also in my colleagues' conclusion that we do not need to decide the thorny issue of the application of the Secretary's multi-employer workplace policy in this case.⁸ I also join in Commissioner Stephens' characterization of the violations as non-willful for the reasons discussed in our portion of the principal decision, and concur in the penalty assessments made

⁸ The judge applied the policy in the alternative as a second basis for affirming the citations. In my view he misread and misapplied the decision of the D.C. Circuit in *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Circuit. 1998).

therein.

/s/
W. Scott Railton
Chairman

Dated: January 15, 2004

SECRETARY OF LABOR,

Complainant,

v.

FROEDTERT MEMORIAL LUTHERAN
HOSPITAL, INC.,

Respondent.

OSHRC DOCKET NO. 97-1839

APPEARANCES:

For the Complainant:

Steve Walanka, Esq., Lisa R. Williams, Esq., U.S. Department of Labor,
Office of the Solicitor, Chicago, Illinois

For the Respondent:

Eric Hobbs, Esq, Brenda Kasper, Esq, Michael Best & Fredrich, L.L.P.,
Terrance E. Nilles, Esq., Von Briesen, Purtell and Roper, S.C.,
Milwaukee, Wisconsin

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Froedtert Memorial Lutheran Hospital, Inc. (Froedtert), at all times relevant to this action maintained a place of business at 9200 W. Wisconsin Ave., Wauwatosa, Wisconsin, where it was engaged in health care. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 11 through October 1, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Froedtert's Wauwatosa work site. As a result of that inspection, Froedtert was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Froedtert brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing, the parties agreed to settlement of some of the citations (Tr. 13); on December 14, 1998 the Stipulation and Partial Settlement Agreement was filed with this judge. That document is

hereby adopted and made part of this record. On October 14-21, 1998, a hearing was held in Milwaukee, Wisconsin on the matters remaining at issue. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1904.2(a)

Willful citation 2, item 1 alleges:

29 CFR 1904.2(a): The log and summary of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein:

- (a) The employer did not include on the OSHA-200 log instances of injuries experienced by temporary workers whose activities were controlled by the employer. Such workers include those employed by temporary employment agencies who worked in the Environmental Services Department of the employer and experienced injuries such as, but not necessarily limited to, needle sticks. There were four such recordable events in 1996 and two such recordable events in 1997.

The cited standard provides:

Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. . .

Employer/Employee Relationship

As a threshold matter, Froedtert maintains that this and the other citations at issue should be vacated because they concern temporary workers, not Froedtert employees. Froedtert argues that the employment agencies who provided the temporary workers, AccuStaff (then FlexiForce), and StaffWorks were the employers of the subject workers, and were solely responsible for safeguarding those workers' safety and health and for ensuring compliance with applicable OSHA regulations.

Facts

AccuStaff interviews and hires the workers it sends out as temporary workers (Tr. 120-21, Vol. 3). It pays all compensation and benefits for its employees; the cost of such benefits is built into the client's bill rate (Tr. 119-20, 128, Vol. 3). While the client may request that an AccuStaff employee be disciplined, or no longer be assigned to its facility, only the temporary agency can terminate its own employees (Tr. 121-25, Vol. 3). AccuStaff can, at any time, reassign its personnel to another facility (Tr. 133, Vol. 3). AccuStaff employees are obliged to comply with AccuStaff's drug-testing policy, and time-card procedures (Tr. 129-31, Vol. 3). All on the job injuries are reported to AccuStaff for workmen's compensation purposes (Tr. 135, Vol. 3); it is AccuStaff's practice to pay for medical evaluation and

follow-up for needle stick injuries (Tr. 139, Vol. 3). AccuStaff keeps an OSHA 200 log of injuries and illnesses suffered by its employees assigned to Froedtert (Tr. 140, Vol. 3).

StaffWorks similarly interviews and hires all its temporary workers (Tr. 201, Vol. 2). Like AccuStaff, StaffWorks pays workers compensation premiums for its employees, provides their benefits, withholds taxes from their pay (Tr. 199-200; Vol. 2). StaffWorks provides raises based on merit, though the client, Froedtert, could also request a raise in pay, for which it would be billed (Tr. 202, Vol. 2).

When temporary personnel are assigned to Froedtert, Froedtert controls their day-to-day activities (Tr. 150, Vol. 3). Froedtert controls the hours the temporary employees work when they are assigned to Froedtert, determines what jobs will be performed and how, provides immediate supervision, and assigns a more experienced employee or “buddy” to work with new temporary employees (Tr. 17-18, 134, Vol. 6). Froedtert supervisory personnel will correct the temporary employees if their behavior jeopardizes patients or visitors, and then report them to their agency (Tr. 41, Vol. 6). Froedtert can, at any time, for any reason, ask that a particular temporary worker be removed from its premises (Tr. 72, Vol. 3). Froedtert provides personal protective equipment, as well as uniforms, or scrubs, and equipment, *i.e.* mops, buckets, rags, and chemicals (Tr. 190-92, Vol. 3, 16, 26-27, 75, Vol. 6).

The Bureau of Labor Statistics (BLS) Recordkeeping Guidebook specifically addresses the question of which employer bears the responsibility of tracking recordable illnesses and/or injuries of temporary workers supplied by a personnel agency, assigning the duty to record temporary employees' occupational illnesses and injuries to the using, or client employer, unless the temporary workers are subject primarily to the supervision of the personnel supplier.

In Chapter IV. **Employer Decisionmaking**, the BLS guidelines state:

Employee status generally exists when the employer supervises not only the output, product, or result to be accomplished by the person's work, but also the details, means, methods, and processes by which the work objective is accomplished. This means that the employer who supervises the worker's day-to-day activities is responsible for recording his injuries and illnesses. . . .

* * *

If the temporary workers are subject to the supervision of the using firm, the temporary help supply service contract is acting merely as a personnel department for the using firm, and the using firm must keep the records for the personnel supplied by the service. If the temporary workers remain subject primarily to the supervision of the supply service, the records must be kept by the service. . . . In short, the records should usually be kept by the firm responsible for the day-to-day direction of the employee's activities.

(Tr. 49-50, Vol. 4; Tr. 133, Vol. 5; Exh. R-4, R-6).

Discussion

In *Secretary of Labor v. Vergona Crane Co., Inc.* 15 BNA OSHC 1782, CCH OSHD ¶129,775 (No. 88-1745, 1992), the Commission adopted the position that the term “employee” should be interpreted under common law principals. The Commission stated that:

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.

citing the Supreme Court’s opinion in *Nationwide Mutual Insurance Co. V. Darden*, 112 S.Ct. 1344, 1348, (1992)(citations omitted). In determining an employee’s employer, the Commission primarily relies upon its determination of who has control over the work environment such that abatement of hazards can be obtained. *See, Abbonizio Contractors Inc.* 16 BNA OSHC 2125, 1994 CCH OSHD ¶130,615 (No. 91-2929, 1994).

It is clear that in this case, Froedtert had the right to, and in fact did control the day-to-day activities of temporary personnel assigned to its facility. Froedtert supplied both personal protective equipment and uniforms as well as all the tools and supplies to be used on the job. All work was performed at Froedtert’s site, and was part of its regular business. Froedtert had sole control over the work environment, had the most immediate and comprehensive knowledge of any illness and/or injury and so was best situated to identify reportable incidents and log them, thus abating the violation.

Moreover the Bureau of Labor Statistics (BLS) Recordkeeping Guidebook, using an analysis similar to that enunciated by the Commission in *Abbonizio, supra*, assigns the duty to record temporary employees’ occupational illnesses and injuries to the using, or client employer, where the temporary employees are subject primarily to the supervision of that employer. The BLS guidelines are intended to provide guidance to employers in maintaining records required under the Act, and have been found by the Commission to provide fair and reasonable warning of OSHA 200 recording requirements. *Caterpillar Inc.*, 15 BNA OSHC 2153, 1993 CCH OSHD ¶129,962 (No. 87-0922, 1993).

For purposes of tracking illnesses and/or injuries, Froedtert is deemed the employer of its temporary employees⁹ under both Commission precedent and OSHA guidelines.

⁹ Because Froedtert exercises substantial control over the temporary workers
(continued ...

The Violation

The facts are not disputed. Between March 1996 and January 1997, six temporary employees at Froedtert suffered needle stick injuries requiring follow-up medical treatment with prescription medications (Exh. C-1, C-3, C-12, C-26, C-27). Such injuries are recordable under the Bureau of Labor Statistics guidelines, which state that injuries requiring medical treatment are recordable no matter who provides the treatment (Exh. C-23, p. 29, Chart 1; p. 44-45).

Froedtert admits the cited injuries were not recorded. The violation is established.

Willful Characterization

Froedtert argues that the cited violation was, though deliberate, not “willful,” because Froedtert reasonably believed that it could avoid creating a co-employer relationship with its personnel providers by distancing itself from its temporary employees, thus limiting its obligations under Federal employment statutes. (*See*, Respondent’s Post-hearing Brief at p. 48).

Facts

Cathleen Piermarini was a co-coordinator for occupational health at Froedtert from April 1996 through July 1998 (Tr. 109, 130, Vol. 5). Piermarini testified that it was her responsibility to maintain the OSHA 200 log for Froedtert (Tr. 110, 130, Vol. 5). Piermarini testified that in January or February 1997 she attended one presentation concerning, *inter alia*, proper recording of occupational illnesses and injuries in the 200 log (Tr. 130, Vol. 5). In addition, she referred to the blue book, *i.e.* the BLS guidelines, to determine whether an injury was recordable (Tr. 131-32, Vol. 5). Piermarini stated that she had contacted OSHA regarding the recordability of needle sticks, and was told that they were not recordable unless the stick was treated with more than first aid (Tr. 132, Vol. 5; Exh. R-8, p. 6). Piermarini believed that because the personnel agency, rather than Froedtert, provided all medical follow-up, her responsibility was fulfilled by contacting the employment service and reporting the injury to them for inclusion in their logs (Tr. 134-35, Vol. 5).

assigned to its facility, it would be liable for the workers’ safety and health under the multi-employer worksite test, as well as under the common law analysis. *See, IBP, Inc., v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

Piermarini's belief was confirmed by her boss, Nancy Heisler, vice president of human resources (Tr. 222, Vol. 5), who told Piermarini that Froedtert's occupational health department provided no services for temporary employees (Tr. 116, Vol. 5). Heisler's belief was based on a 1996 incident in which Froedtert was named in a suit filed by a temporary employee alleging two charges of discrimination. Heisler testified that Froedtert contacted the Equal Rights Division and the EEOC, arguing, successfully, that it was not the employer of the temporary worker; the charges were later dropped (Tr. 228-29, 253, Vol. 5; Exh. R-16, R-17). As a direct result of that incident, in August 1996 Heisler issued a memorandum to Froedtert managers and supervisors instructing them to avoid discussing employment issues such as pay, bonuses, discipline, termination, and overall job performance directly with temporary staff so as to avoid creating a co-employment situation wherein Froedtert might become liable for the employment decisions of the personnel agency (Tr. 227, Vol. 5; Exh. R-18). Heisler testified that she did not know that Froedtert might be deemed the employer of its temporary staff under OSHA regulations (Tr. 232, Vol. 5). She did not consider that the employer/employee relation might be defined differently outside the antidiscrimination context (Tr. 230, Vol. 5).

Piermarini testified that she began recording injuries and illnesses for temporary workers immediately after her deposition in July 1997, when she was asked to read the relevant passage from the BLS guidelines out loud (Tr. 140-41, Vol. 5).

Discussion

In a recent case the Commission stated that its precedent defines a willful violation as:

. . . one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation. . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference. . . . 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. [citations omitted]

Propellex Corporation (Propellex), No. 96-0265, slip op. at 14 (March 30, 1999). The Commission went on to note that it had found heightened awareness where an employer had been previously cited for violations of the same standards, was aware of the standards' requirements, and was on notice of the existence of the violative conditions. *Id.* In *Propellex*, the Commission found that the cited violation was not willful, because even though the lead person was aware of the violative conditions, and her supervisor failed to enforce work rules which would have eliminated the hazard (employee smoking and use of a burn barrel near explosives), neither appreciated the hazardous nature of the conditions. The Commission held

that neither negligence nor the exercise of poor judgment demonstrates the heightened awareness of illegality required to establish willfulness. *Id.* at pp. 14-15.

The Secretary failed to establish that Cathleen Piermarini had the requisite heightened awareness that her actions were unlawful. Piermarini credibly testified that she honestly believed Froedtert's temporary personnel were not employees of Froedtert, and that their injuries were properly recorded on the OSHA 200 log of the personnel provider. Though her analysis was faulty, and her conclusions contrary to the instructions contained in the BLS guidelines, they were supported by Froedtert's prior experience with the EEOC and the state Equal Rights Division. Moreover, the personnel agencies did, in fact, record the temporaries' injuries on their own 200 logs. It is clear that Froedtert's failure to record the cited injuries arose from a shared misinterpretation of the standard's requirements and not from any deliberate attempt to conceal injury rates.

Penalty

A penalty of \$18,000.00 was proposed for this item.

The Secretary does not argue that the cited violation gives rise to a substantial probability of death or serious physical harm; citation 2, item 1 is affirmed, therefore, as an "other than serious" violation. Six needlestick injuries were misreported; as noted above, the cited injuries were recorded, though not in Froedtert's log.

Taking into account Froedtert's size, the gravity of the violation and Froedtert's good faith and the absence of any history of previous violations, I find that a penalty of \$180.00 is appropriate.

Alleged Violation of §1910.1030(f)(2)(i)

Willful citation 2, item 2 alleges:

29 CFR 1910.1040(f)(2)(i): Hepatitis B vaccination was not made available after the employee had received the training required in 29 CFR 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) The employer did not make the Hepatitis B vaccination series available to employees of temporary employment agencies who were assigned by Froedtert Memorial Lutheran Hospital to perform tasks and work in areas of the hospital where there was exposure to blood or other potentially infectious materials. Tasks performed by employees which entailed such exposure included, but were not limited to, emptying of biohazardous waste receptacles, changing linens in patient rooms and cleaning of contaminated surfaces. Areas to which employees were assigned to work where such exposure would occur included, but were not limited to, areas such as the operating rooms, emergency rooms, outpatient clinics and patient care rooms.

The cited standard provides:

Hepatitis B vaccination shall be made available after the employee has received the training required in paragraph (g)(2)(vi)(I) and within 10 working days of initial assignment to all employees who have occupational exposure. . .

The Violation

Facts

William Herrick, director of environmental services (EVS) at Froedtert until May 1995, when he was involuntarily separated (Tr. 12-13, Vol. 3), testified that EVS recommenced using temporary workers on its general housekeeping staff during his tenure (Tr. 14, Vol. 3). Herrick stated that EVS asked AccuStaff, then FlexiForce, to supply the workers because Froedtert had dealt with that company in the past (Tr. 15, Vol. 3). Herrick stated that around 1992 EVS began to assign temporary workers to clean patient contact areas (Tr. 16, Vol. 3). Herrick testified that at about that time he met with AccuStaff representatives (Tr. 16, Vol. 3). Herrick stated that, among other things, he told the AccuStaff representative that there was a possibility that their employees would be exposed to blood and body fluids at times, and could come into contact with contaminated sharps (syringes) in trash (Tr. 18-19, Vol. 3). Herrick stated that he assumed that AccuStaff told the temporary workers of the risk of exposure to blood and body fluids before they were sent to Froedtert (Tr. 38, Vol. 3). Herrick stated, however, that he was sensitive to the fact that Froedtert could be exposing a worker to bloodborne pathogens who did not have the training and experience of his own staff, and so attempted to limit the exposure of temporary workers to bloodborne pathogens by assigning them, whenever possible to public and office areas (Tr. 47-48, Vol. 3).

Herrick testified that he was familiar with the OSHA Bloodborne Pathogen Standard, and knew that employees who were at high risk for exposure to blood and/or body spills must have a TB test, and be offered a hepatitis B (HBV/HIV) vaccination (Tr. 40, Vol. 3). Herrick admitted that no exposure determination was made for temporary workers (Tr. 41, Vol. 3). Herrick testified that no HBV vaccinations were offered to temporary workers, because the temporaries were not Froedtert employees (Tr. 43, Vol. 3). Herrick did not ask AccuStaff whether they were providing the required vaccinations (Tr. 43, Vol. 3).

Cindi Gutbrod, an AccuStaff staffing manager (Tr. 50-53, Vol. 3), testified that AccuStaff had changed over its computer system in 1993 or 1994, and that there was no record that AccuStaff had provided housekeeping workers to Froedtert prior to 1995¹⁰ (Tr. 56, 83-89, Vol. 3; Exh. C-6). Froedtert's

¹⁰ Gutbrod testified that she did not know William Herrick (Tr. 72, Vol. 3). Gutbrod stated that the first orders for EVS workers were received by telephone from Judy Gottinger (continued ...)

1995 job orders describe job duties as mopping floors, cleaning patient rooms, emptying and separating trash, 50 pounds lifting. The job orders state that good work shoes are needed and that the client will be training during the week for scheduled weekend work (Tr. 60-61, Vol. 3; Exh. C-8, C-9). Gutbrod testified that at one point she was asked to send someone with a strong stomach, as they would be working around blood in operating and emergency rooms (Tr. 71, Vol. 3).

Gutbrod testified that AccuStaff had no written agreement with Froedtert concerning their respective responsibilities to protect the safety and health of the temporary workers assigned to Froedtert (Tr. 158, Vol. 3). Gutbrod testified that AccuStaff began giving workers assigned to Froedtert TB tests around April 1996 at Froedtert's request (Tr. 67, Vol. 3). Gutbrod maintained that AccuStaff was not asked to, and did not provide hepatitis B vaccinations to the temporaries assigned to Froedtert. AccuStaff knew Froedtert was not providing HBV vaccinations to AccuStaff personnel (Tr. 69, 107, Vol. 3). Gutbrod stated that as she understands the OSHA Bloodborne Pathogen Standard today, AccuStaff was obligated to offer HBV vaccinations to employees who might be so exposed (Tr. 96, 148, Vol. 3).

Tony Barzycki testified that during his tenure as Froedtert's director of environmental services from April to December 1996, he decided to begin using a new temporary agency, StaffWorks (Tr. 67, Vol. 6). Barzycki testified that his environmental services coordinator, Sue Bailey, recommended he talk to StaffWorks (Tr. 68, Vol. 6). Ms. Bailey testified that she had heard from a colleague at Columbia that StaffWorks was providing HBV vaccinations and assisting in training the health care workers it was providing Columbia (Tr. 12, Vol. 6).

Barzycki, Bailey, and Gina Keidinger, a quality assurance supervisor in EVS (Tr. 123, Vol. 6), met with Julia Chiger, an area manager with StaffWorks, in September 1996 (Tr. 69, 145, Vol. 6). Barzycki testified that Chiger indicated that HBV vaccinations could be provided to the StaffWorks health care workers (Tr. 70, 73, 96, Vol. 6). Barzycki testified that, though there was no specific written agreement, he came away from the meeting with the impression that the vaccinations discussed were automatically provided to all StaffWorks health care personnel (Tr. 96, 106, Vol. 6). Sue Bailey similarly testified that Chiger told them StaffWorks would be available to do HBV vaccinations (Tr. 15, 53, Vol. 6).

from Human Resources and/or Pat Hedstrom from EVS (Tr. 64-65, Vol. 3).

Chiger denied knowing that any of the employees StaffWorks supplied would be working in patient areas where they might be exposed to bloodborne pathogens, and never discussed StaffWorks' providing hepatitis B vaccinations (Tr. 156-57, 182-84, 186 Vol. 2).

Between March 1996 and January 1997, six temporary employees at Froedtert suffered needle stick injuries requiring follow-up medical treatment with prescription medications (Exh. C-1, C-3, C-12, C-26, C-27). Froedtert informed the personnel agencies of needle stick incidents involving their workers (Tr. 193, 197, Vol 2; 100, 103, 136-38, Vol. 3; 134-35, Vol. 5; Tr. 143, Vol. 6), but never inquired whether those, or other temporary employees had received the Hepatitis B vaccine (Tr. 35, 106, Vol. 6; Tr. 213, Vol. 5).

Bernadette Giddings, the OSHA Compliance Officer (CO) testified that, in its written interpretations, OSHA has taken the position that personnel providers and their clients bear a shared responsibility for compliance with the provisions of the Bloodborne Pathogen standard (Tr. 45-46, Vol. 4; Exh. C-21). In a 1993 interpretation, the agency states:

... [T]here is a shared responsibility for assuring that your employees are protected from workplace hazards. The client employer has the primary responsibility for such protection but the "lessor employer" likewise has a responsibility under the Occupational Safety and Health Act. In the context of OSHA's standard on Bloodborne Pathogens, 29 CFR 1910.1030, your company would be required, for example, to provide the general training outlined in the standard; ensure that employees are provided with the required vaccinations; and provide proper follow-up evaluations following an exposure incident. Your clients would be responsible, for example, for providing site-specific training and personal protective equipment and would have the primary responsibility regarding the control of potential exposure conditions. The client of course, may specify what qualifications are required for supplied personnel, including vaccination status. It is certainly in the interest of the lessor employer to ensure that all steps required under the standard have been taken by the client employer to ensure a safe and healthful workplace for leased employees. Towards that end, your contracts with your clients should clearly describe the responsibilities of both parties to ensure that all requirements of the regulation are met.

(Exh. C-21, R-7).

Cathleen Piermarini testified that Froedtert did not offer HBV vaccines to temporary personnel (Tr. 123-124, Vol. 5). Ms. Piermarini testified that the HBV vaccination consists of a series of shots producing positive hepatitis B antibodies in the host when given over a six month period (Tr. 124, Vol. 5). Piermarini stated that the series must be started over if not completed within six months, and that because every injection carries with it a risk of infection and allergic or anaphylactic reaction, a reasonable clinician would not begin the vaccination series unless she believed the patient would be able to complete it (Tr. 126-29).

Expert reports from Dr. Melvin Kramer and Dr. Angela Presson submitted after the hearing, quote studies finding the hepatitis B vaccination safe, in that the risk to the recipient of adverse reactions is low and, in general, outweighed by the benefits of the vaccination. Both experts point out, however, that the rare serious reaction can be fatal. Studies cited by Kramer and Presson found that the levels of seroprotection provided by only one dose of the vaccine were unacceptable. Only 5-17% of the recipients exhibited acceptable levels of immune response. Studies showed that a second dose provided acceptable seroprotection for between 50 and 71% of the recipients. (Exh. J-1, J-2).

Michael Holzum, a supervisor in Froedtert's human resource services, testified that he is the custodian of Froedtert's employment and billing records for temporary workers supplied by AccuStaff and StaffWorks. Holzum testified that he reviewed the records of such workers employed in Froedtert's environmental services department (EVS) during the calendar years 1996 and 1997 (Tr. 92-95, Vol. 5; Exh. R-22). In reviewing those records, Holzum found that from January through April 1997, AccuStaff workers had a turnover rate of between 4% and 50% per week; the median stay was three weeks (Tr. 97, 99-100, Exh. R-20). From October 1996 to April 1997, Staff Works employees had an average turnover rate of 6% and 21% per week and stayed at Froedtert an average of four weeks total (Tr. 98-99; Exh. R-21).

Discussion

Employer/Employee Relationship. Froedtert admits that it did not offer HBV vaccinations to temporary personnel, although it knew that such workers were exposed to blood and other potentially infectious materials at its worksite. Froedtert maintains that it had no duty to do so, as the temporary workers were not its employees.

As discussed under item 1, above, Froedtert's relationship with its temporary workers exhibits a number of the indicia of "control" enunciated in *Vergona Crane*. So long as the temporary workers were assigned to Froedtert, all their work was performed at Froedtert's site, where the hazard was created. Froedtert controlled the day-to-day activities of the temporary personnel, supplying both personal protective equipment and uniforms as well as all the tools and supplies to be used on the job. So long as the temporaries were assigned to their facility, Froedtert controlled their workplace, and bore the primary responsibility for assuring that those employees received the protection provided for under the Act.

Infesibility. Froedtert, however, maintains that it was not feasible for Froedtert to provide the vaccinations required by the cited standard. Froedtert argues that temporary personnel do not, as a general rule, stay at Froedtert long enough for Froedtert to provide a full HBV series, or for the employees to

acquire full seroimmunity. Thus Froedtert is unable to fully abate the hazard that the cited standard addresses, and could, in providing an incomplete course of the vaccine, expose temporary employees to a greater hazard.¹¹

In order to establish the affirmative defense of infeasibility, the employer must show not only that compliance with the standard was functionally impossible, but that alternative means of employee protection were unavailable, *i.e.* that it did as much as was capable of being done. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991).

In its 1993 interpretation, OSHA explicitly acknowledges that the client employer is not best placed to effect compliance with the cited standard. That interpretation places the responsibility for providing necessary vaccinations with the “lessor,” or provider employer, which maintains a long term relationship with the workers it places, short term, with its client employers. The representatives from AccuStaff and StaffWorks supplying temporary workers for Froedtert recognize that, under OSHA guidelines, they were responsible for providing the vaccinations required under §1910.1030(f)(2)(i).

Nonetheless, Froedtert, because it both creates the hazard and controls the cited employees, bears the ultimate responsibility for ensuring that its temporary employees actually receive the protection provided for under the cited standard. An employer must exercise reasonable diligence to discover and eliminate hazards by anticipating hazards to which employees may be exposed, and taking measures to prevent their occurrence. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). At a minimum Froedtert has a duty to clearly inform the personnel agency supplying its workers of the workers’ potential exposure to blood and/or body spills, to specifically delegate the responsibility for providing the HBV vaccination to the agency, and to confirm that the agency is, in fact, complying with its obligations. This Froedtert failed to do.

William Herrick, Froedtert’s EVS director, knew that AccuStaff personnel could potentially be exposed to bloodborne pathogens; he knew that employees who are at risk for exposure to blood and/or

¹¹ Though raised by Froedtert, the affirmative defense of greater hazard is unavailable here. In order to establish the greater hazard defense, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). Because Froedtert did not introduce any evidence establishing that it either applied for a variance, or that such application would have been inappropriate, the other elements of the defense are moot. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991)

body spills must be offered the hepatitis B vaccine. Herrick knew that it was not Froedtert's policy to offer the HBV vaccinations to temporary employees. Nonetheless, Herrick never discussed the issue with AccuStaff representatives or made any effort to ascertain whether AccuStaff was, or would be offering the required vaccinations to its personnel.

Froedtert's next EVS director, Tony Barzycki, did discuss the issue of hepatitis B vaccinations with a StaffWorks representative, who assured him that StaffWorks could provide the vaccinations as a service to Froedtert.¹² Froedtert's evidence shows that Barzycki initially had reason to believe that StaffWorks would provide the services discussed, including vaccinations. The record establishes, however, that Barzycki made no effort to ensure that StaffWorks lived up to their verbal agreement; the agreement was never set down in writing; no one at Froedtert ever inquired whether StaffWorks was providing the hepatitis B vaccine.

Ample evidence was introduced establishing that AccuStaff and StaffWorks knew their employees were working around blood, in operating and emergency rooms, and had actually been exposed to bloodborne pathogens through needlesticks. It is undisputed that the agencies should have offered the hepatitis B vaccine to personnel being assigned to Froedtert. That those agencies failed to fulfill their own duties under the Act, however, does not absolve Froedtert's failure to make any attempt to ensure the protection of employees who worked under its control. It is well settled that an employer's responsibilities under the Act, though they may be delegated, cannot be discharged by contractual agreement. *Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1995 CCH OSHD ¶130,734 (No. 90-1786-S, 1995); *Bayside Pipe Coaters, Inc.*, 2 BNA OSHC 1206, 1974-75 OSHD ¶18,677 (No. 1974).

This judge finds that Froedtert succeeded in establishing that its provision of the HBV vaccine would be unreasonable or senseless under the cited circumstances. Froedtert, however, failed to show that it availed itself of all available means of protecting its employees, and, thus, failed to establish the affirmative defense. The violation is established.

Willful Characterization

¹² In observing the testimony and demeanor of Julia Chiger I found her not to be trustworthy. Mr. Barzycki's testimony was consistent with that of Ms. Bailey; both appeared straitforward. I credit their testimony over that of Ms. Chiger.

It is clear that, under well established common law principles and Commission precedent, Froedtert was the employer of the temporary employees exposed to bloodborne pathogens at its facility, and was ultimately responsible for compliance with OSHA safety and health regulations applicable to those workers. Nonetheless, as Froedtert argues, and as OSHA itself has stated in its interpretation of the Bloodborne Pathogens standard, the personnel provider is better situated in these circumstances to provide the vaccinations required by the cited standard. Froedtert's duty as the personnel user is, as discussed above, limited to the exercise of reasonable diligence in ensuring that the personnel provider is aware of its duty to provide the required protection, contractually delegating that responsibility if necessary. The record does not establish that Froedtert had a heightened awareness of that duty.

In *Propellex, supra*, the Commission noted that it has found a heightened awareness of its responsibilities in cases where an employer had been cited previously for the standards in question, or ignored warnings from city inspectors, and/or compliance officers, *Id.* at 14-15. Froedtert, however, had not been cited under the bloodborne pathogens standard before, or been otherwise alerted to its responsibilities under the standard. No Commission cases have addressed the application of the standard to personnel suppliers and their clients. Moreover, OSHA's 1993 interpretation fails to clearly apprise employers of their duties.

The 1993 interpretation states that the client employer "shares" responsibility for providing the required protection with the lessor employer, and that it "may" specify the qualifications it requires for its supplied personnel, including vaccination status. Such precatory language fails to apprise the personnel user of its *obligation* to inquire about vaccination status. On the contrary, when read in context, the provision may be read as completely excusing the client employer from responsibility for providing vaccinations. "Share" is defined in WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY as both, "1. To separate and parcel out in shares: APPORTION," and "2. To take part in, use, or have in common, <share responsibilities>... ." The 1993 interpretation seems to apportion responsibility, specifically assigning the duty to "ensure that employees are provided with the required vaccinations" to the personnel provider. Certainly no client employer could be accused of having a heightened awareness of the standard's requirement that it retain primary responsibility for providing vaccinations after reading OSHA's interpretation.

Because Froedtert had no prior experience with OSHA and the Bloodborne Pathogens standard, and because OSHA's own interpretation could be read to support Froedtert's own conclusion, *i.e.* that it had no duty to provide vaccinations required under the standard, I cannot find that its violation of the cited standard was willful. *See, Baker Concrete Construction Company, __ BNA OSHC __, 1995 CCH OSHD*

¶30,768, (No. 93-606, 1995)[OSHA's inartful interpretive pronouncements may deprive an employer of notice as to a standard's scope and/or application].

Penalty

A penalty of \$63,000.00 was proposed for this item.

It is undisputed that temporary employees working in Froedtert's EVS were exposed to bloodborne pathogens and to the hazard of infection with the HIV or Hepatitis B virus, which can result in death or serious injury. The cited violation is, therefore, "serious" as defined by §17k of the Act. Six employees actually suffered needlestick injuries requiring follow-up medical treatment. Though none actually contracted a virus, the gravity of the violation is high.

Taking into account Froedtert's large size, the gravity of the violation and the absence of any history of previous violations, I find that a penalty of \$6,300.00 is appropriate.

Alleged Violation of §1910.1030(g)(2)(i)

Willful citation 2, item 3 alleges:

29 CFR 1910.1030(g)(2)(i): The employer did not ensure that employees with occupational exposure participated in a training program.

- (a) The employer did not provide site specific training with regards to exposure to blood or other potentially infectious materials to employees of temporary employment agencies. Such employees included those assigned to work for the Environmental Services Department of Froedtert Memorial Lutheran Hospital which, in turn, assigned these people to work in areas where there was exposure to blood and other potentially infectious materials during the performance of their assigned tasks. Specific areas to which these workers were assigned included, but were not limited to, the operating rooms, emergency rooms, outpatient clinics and patient care rooms. Tasks assigned to these workers included, but were not limited to, emptying of biohazardous waste receptacles, changing linens in patient rooms and cleaning of contaminated surfaces. Such training must include, but is not necessarily limited to, an explanation of the hospital Exposure Control Plan and how to access a copy of it; tasks which may involve exposure to blood or body fluids; information on the basis of selection, availability, types, limitations and means of disposal of personal protective equipment; a description of the appropriate actions to take and follow up involved should an exposure incident occur; and an explanation of the hospital policy on biohazard signs and labels.

The cited standard provides:

Information and Training. (i) Employers shall ensure that all employees with occupational exposure participate in a training program which must be provided at no cost to the employees during working hours.

Alleged Violation of §1910.1200(h)

Willful citation 2, item 4 alleges:

29 CFR 1910.1200(h): Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

- (a) The employer did not provide site specific information and training regarding chemicals to employees of temporary employment agencies. Such employees included those assigned to work for the Environmental Services Department of Froedtert Memorial Lutheran Hospital which, in turn, assigned these people to work in areas where there was exposure to chemicals. Areas to which these workers were assigned included, but were not limited to, the operating rooms, emergency rooms, outpatient clinics and patient rooms. Tasks performed by these workers included, but were not limited to cleaning of contaminated surfaces, patient rooms and patient clinics. Chemicals routinely used by these workers include, but were not limited to, cleaning products and disinfectants. Hazardous ingredients of these products included phosphoric acid, 2-butoxyethanol, hydrochloric acid and potassium hydroxide. Such information and training to be provided to temporary workers must include, but is not necessarily limited to, an explanation of the hospital hazard communication program, and its availability; tasks which the employees may perform which involve use of hazardous chemicals; the location of material safety data sheets and how to access them; an explanation of the labeling system used for containers of hazardous chemicals; and details of the hazards associated with exposure to hazardous chemicals used in the work place.

The cited standard provides:

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. . . .

The Violations

Facts

William Herrick testified that in 1992, he met with AccuStaff representatives to discuss their providing some basic training for the temporaries prior to the workers' assignment to Froedtert (Tr. 16, Vol. 3). Herrick stated that he told the AccuStaff representatives that he expected the workers they sent to Froedtert would be able to distinguish the difference between a glass cleaner, a bowl cleaner, and a general versus a quadrant disinfectant. Herrick didn't want his staff to have to show the workers how to turn on a vacuum cleaner (Tr. 18, Vol. 3). Herrick testified that he was assured that training could be done, and left the meeting believing that AccuStaff would be providing basic housekeeping training (Tr. 23, Vol. 3). Herrick defined "basic skills" as knowing how to vacuum, how to clean (*i.e.*, high-dust first, spot clean second, empty trash third, and mop floor last), as well as knowing the difference between cleaners (Tr. 32, Vol. 3). Herrick stated that when the temporaries arrived at Froedtert he showed them a cleaning film,

and told them what chemicals to use on blood spills, assuring them that they needn't be afraid so long as they followed the proper procedures and used gloves (Tr. 38, Vol. 3).

Cindi Gutbrod testified that Froedtert did not ask that AccuStaff provide any training or information on OSHA's Bloodborne Pathogen to the workers AccuStaff was sending Froedtert, and that AccuStaff provided none (Tr. 67-68, 72, Vol. 3). Gutbrod testified that Froedtert did not ask AccuStaff to provide training required by OSHA's Hazard Communication standard; however, AccuStaff did provide its employees with a written general overview of the standard, a sample Material Safety Data Sheet (MSDS) and warning label. The overview states that, upon their arrival at their assignment, a supervisor will conduct site specific training on the hazardous chemicals with which they would be working (Tr. 68, 118-19, Vol. 3; Exh. R-46).

Gutbrod testified that Froedtert phased out its orders for industrial housekeepers in June, 1997 (Tr. 69, Vol. 3). Gutbrod stated that Gina Keidinger, a quality assurance supervisor in EVS, told her that Froedtert would, in the future, be using a service that would provide on-site supervision (Tr. 70).

As noted above, Tony Barzycki testified he decided to begin using StaffWorks in 1996 based on the recommendation of his environmental services coordinator, Sue Bailey (Tr. 68, Vol. 6), who had heard from a colleague at Columbia that StaffWorks was assisting in training the health care workers it was providing Columbia (Tr. 12, Vol. 6).

Barzycki testified that at a September 1996 meeting, he, Bailey, and Gina Keidinger discussed Froedtert's need for qualified employees with Julia Chiger (Tr. 69-70, Vol. 6). Barzycki stated that Chiger told him that StaffWorks could send a "mini-resume" of the workers it would supply (Tr. 70, 99; Vol. 6). Barzycki stated that Ms. Chiger brought up the issue of training, telling him that StaffWorks provided training in both hazard communication and bloodborne pathogens for the health care workers it sent out to its other clients. Barzycki testified that, though there was no specific written agreement, he came away from the meeting with the impression that the training discussed was automatically provided to all StaffWorks health care personnel (Tr. 96, 106, Vol. 6). Barzycki admitted that he never specifically discussed site-specific training with StaffWorks, but stated that StaffWorks had agreed to provide some on-site supervision of its employees (Tr. 99, Vol. 6).

Sue Bailey similarly testified that Chiger told them that StaffWorks had project people available who were already trained in standard universal precautions, hazard communication and standard infection control procedures (Tr. 15, 53, Vol. 6). Bailey testified that the temporary workers initially supplied by StaffWorks seemed to be aware of both bloodborne pathogen and hazard communication issues (Tr. 16, Vol. 6).

Julia Chiger testified that she discussed Froedtert's need for workers who were experienced in floor care during an August 1996 meeting (Tr. 148, Vol. 2). Chiger stated that she told Bailey and Barzycki a little about StaffWorks, and explained that they provided TB testing and criminal background checks (Tr. 148, Vol. 2). Chiger denied discussing training with Barzycki, or telling him that StaffWorks provided training for other health care workers (Tr. 148-49, Vol. 2). Chiger testified that she met again with Barzycki and Gina Keidinger in October 1996 after StaffWorks had already begun supplying floor care workers to Froedtert (Tr. 150-52). Chiger testified that there was no discussion of any type of training at all, and that StaffWorks had no knowledge of, or experience with the Bloodborne Pathogen or Hazard Communication standards (Tr. 152-55, 182, Vol. 2). Chiger testified she believed Froedtert would be providing any necessary safety and health training; though she admitted that Froedtert never told her they would be conducting any training (Tr. 192, Vol. 2).

Chiger testified that StaffWorks did provide some on-site supervision for its employees; StaffWorks would personally introduce its employees to their Froedtert supervisor; a few times a week a StaffWorks representative would visit Froedtert to answer questions, but only about payroll and check-in, and to help Froedtert with discipline problems (Tr. 188, Vol. 2). Chiger admitted, however, that StaffWorks held monthly meetings with its employees to pass along any information Froedtert had provided them, and that StaffWorks had offered to help fit its employees for masks used in isolation control procedures (Tr. 188, Vol. 2). In addition Chiger ordered a video addressing bloodborne pathogens following two needle stick incidents involving StaffWorks' employees (Tr. 192, Vol. 2, 177-79, Vol. 3; Exh. C-13).

Sandra Swensen was an account manager at StaffWorks in December 1996 (Tr. 165, Vol. 3). Swensen testified that she conducted orientation programs for StaffWorks employees assigned to Froedtert, providing general information on signing in and out, payroll, and discipline (Tr. 170-74, 210, Vol. 3). Swensen testified that when Julia Chiger turned the account over to her she was not told that she would be providing safety and health training (Tr. 210, Vol. 3). Swensen admitted that from February or March 1997 on, StaffWorks employees were no longer allowed to attend staff meetings at Froedtert (Tr. 174, 231, Vol. 3). Swensen stated that after that, Gina Kiedinger would give her safety information which had been disseminated at staff meetings, such as Complainant's Exhibit 14, "New Changes in Isolation Precautions;" Swensen was expected to go over the material with StaffWorks employees (Tr. 180, 220-24, 226, 233, Vol. 3). Swensen also stated that she gathered additional training materials to hand out during interviews and at mandatory monthly meetings for StaffWorks personnel (Tr. 175, 177-78, 224, 228, 231-32, Vol. 3). At one point Swensen gave training materials to Gina Kiedinger for comment (Tr. 224, Vol

3). In May, after the OSHA inspection began, those materials were compiled into a pamphlet to be used regularly in training StaffWorks health care workers, "StaffWorks Housekeeping/Janitorial Orientation" (Tr. 228-29, Vol. 3, Exh. C-17). Around May 1997 Kiedinger gave Swensen a safety checklist which Swensen was to go over with StaffWorks' temporaries before they were assigned to Froedtert (Tr. 182, 188, Vol. 3; Exh. C-16, R-28 mandatory meetings for StaffWorks personnel). Swensen maintained that although she handed out the materials provided her, she had no training in industrial hygiene, was not familiar with the OSHA Bloodborne Pathogens or Hazard Communication standards and so did not believe that she was qualified to train employees in those areas (Tr. 27, Vol. 5).

Gina Keidinger, testified that she was hired in August 1996 to develop a training program for the EVS staff (Tr. 126, Vol. 6). Keidinger understood that the temporary employees supplied by StaffWorks, however, were trained by their agency (Tr. 134, Vol. 6). Keidinger testified that StaffWorks' representatives were on site for an hour or two at least three or four times a week (Tr. 167, Vol. 6). Keidinger stated that, several times, she set up rooms for StaffWorks so that they could hold meetings on site with thier employees (Tr. 167, Vol. 6). Keidinger testified that she gave documents and personal protective equipment to Sandra Swensen to use in training the StaffWorks health care workers assigned to Froedtert, and that Sandra, in return, provided her with StaffWorks training documents to review (Tr. 136, 148-52, 190, Vol. 6). Around April 1996, after the OSHA inspection had been initiated, Keidinger testified that she provided Sandra Swensen with a checklist to go over with StaffWorks' health care workers prior to their beginning work at Froedtert (Tr. 162, 210, Vol. 6). Keidinger believed that temporary workers who had signed off on the checklist had been trained in the items contained therein, by the trainer signing the form (Tr. 164-65, Vol. 6).

Thomas White became director of environmental services at Froedtert in December 1996 (Tr. 165, Vol. 5). White testified that Gina Keidinger acted as the EVS liason with StaffWorks and AccuStaff (Tr. 177, 197, Vol. 5). White stated that he routinely saw Sandra Swensen on site, often with Keidinger (Tr. 180, Vol. 5). White understood that Keidinger was providing Swensen with materials and information, and that Swensen was training the temporary workers her agency provided (Tr. 181, 199, Vol. 5). In April, after the initiation of the OSHA investigation, White asked Keidinger to document the temporary employees' training, using a checklist compiled by Keidinger and Swensen (Tr. 182; Vol. 5).

White admitted that he was aware of Froedtert's responsibility to provide site-specific training to temporary workers (Tr. 189, Vol. 5). White testified that temporary employees were paired with a "buddy" who provided them with site specific training including information on the chemicals they would be working with and the personal protective equipment to be used (Tr. 185-87, Vol. 5). Keidinger affirmed

that Froedtert provided some site specific on-the-job training to temporary employees, *i.e.*, the temporary worker's buddy would show the temporary the chemicals he or she would be using, and explain the difference between clear and red waste (Tr. 134-35, Vol. 6). Keidinger admitted, however, that she gave no specific directions on training the temporary workers to Froedtert staff, and did not know what was being done (Tr. 178-80, Vol. 6). Bertha Bowen became a housekeeping supervisor at Froedtert in August 1996 (Tr. 188, Vol. 1). Bowen testified that she was not given any specific instruction on how to train temporary workers, but stated that she did, on occasion, discuss the hazards of the chemicals they would be using, and the material safety data sheets for those materials (Tr. 192-93, 202, Vol. 1).

April Gross, Ricky Jones, Andrew Crayton, Robert Antony, Valerie Jackson, and Nodie Williams, temporary employees assigned to the EVS from Accustaff (FlexiForce), all testified that neither the temporary agency nor Froedtert gave them specific information on the chemical hazards they would be exposed to, or told them where to find the MSDS's for those chemicals (Tr. 61, 94, 139, 278, Vol. 1; Tr. 12, 40, 113, 116, Vol. 2). No one talked to them specifically about bloodborne pathogens, though they were provided with masks and protective latex gloves (Tr. 58, 62, 95, Vol. 1; Tr. 12, 41, 113, Vol. 2). Regina Ratzel and Lisa Blackwell, who were assigned through StaffWorks, testified similarly (Tr. 149, 152-153, 165, Vol. 1; Tr. 63-64, 73, Vol. 2). Lisa Blackwell signed off on Froedtert's Safety Checklist for Temp Staff, but stated that she received no information or training on any of the areas listed on the checklist except what was actually printed on the form (Tr. 79, 82, 85 Vol. 2; Exh. R-29). Blackwell stated that she had attended the weekly staff meetings held by Sandra Swensen, but did not remember her speaking on any bloodborne pathogens or hazard communication issues (Tr. 86, Vol. 2).

White testified about the extensive EVS training materials and checklist which were first used to train its own staff in July 1997 (Exh. R-31, R-32, R-33, R-55, R-56). The training materials are intended to document that all staff members have not only received information on chemical safety and isolation procedures, but have demonstrated an understanding of those materials in a patient room environment (Tr. 170-72, Vol. 5). White stated that the training program had been in planning since December 1996, before the inception of the April 1997 OSHA inspection (Tr. 169-70, 175, Vol. 5).

Discussion

Froedtert admits that its temporary workers did not receive adequate site specific training addressing either bloodborne pathogens or chemical hazards. The record establishes that AccuStaff personnel were being phased out and fell between the cracks, receiving none of the training intended for StaffWorks employees. Moreover, StaffWorks' on-site supervisor, Sandra Swensen, was inadequately prepared to conduct the intended training, and did no more than pass along hand-outs to temporary

personnel. Froedtert's buddy system was ill defined and so did not ensure that required information was supplied to temporary employees.

Froedtert's argument that it had no duty to its temporary workers is rejected based on Froedtert's exercise of control over those employees' workplace. For purposes of the Act, Froedtert was the employer of its temporary personnel. As discussed in the preceding item, Froedtert had a duty to exercise reasonable diligence to discover and eliminate hazards by anticipating hazards to which its employees may be exposed, and taking measures to prevent their occurrence. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). At a minimum Froedtert was responsible for clearly informing the personnel agencies supplying its workers of the workers' potential exposure to blood and/or body spills and hazardous chemicals, and for specifically delegating the responsibility for providing training in bloodborne pathogens hazard communications. Froedtert had a duty to confirm that the agencies were, in fact, complying with its obligations. This Froedtert failed to do. The violations have been established.

Willful Characterization

Froedtert argues that the cited violation was not willful because Froedtert believed, in good faith, that the personnel agencies were responsible for, and were providing the required training. In addition, Froedtert did, in fact, attempt to provide site-specific training through the use of the buddy system, assigning a more experienced employee to show temporary workers the ropes.

This judge agrees. The Secretary failed to present evidence that Froedtert had a heightened awareness of its duty to provide OSHA required training for temporary employees. *See, Propellex, supra*. As discussed in item 1, in 1996 Froedtert argued successfully before the Equal Rights Division and the EEOC that it was not the employer of its temporary worker, and so believed that it could avoid creating a co-employment situation wherein it would be liable for ensuring the safety and health of employees of its personnel providers. There is no evidence that any of Froedtert's managers or supervisors were aware of the common law principles of employer/employee from which their duty under the Act arises.

Nor does the evidence show that Froedtert had a heightened awareness of the hazardous conditions. Froedtert did make some attempts to protect the temporary workers. During his tenure, William Herrick provided on-site training on the chemicals, proper methods and protective equipment to be used in cleaning blood spills. Beginning in late 1996 Tony Barzycki began hiring its temporary personnel through Staff Works, making the change solely because of its understanding that StaffWorks could provide on-site supervision of its personnel, and would provide training for such personnel in both hazard communication and bloodborne pathogens. Froedtert had reason to believe that the training discussed was, in fact, being

provided. Sandra Swensen was frequently on site, held monthly meetings with StaffWorks' personnel, and exchanged safety information with Gina Kiedinger. When Thomas White came on board in December 1996, he understood that training was being provided by the personnel service, an understanding that was supported by his observations of StaffWorks supervisory personnel on site. In addition to the apparent on site training, Froedtert continued to provide experienced buddies to work with new temporary employees.

The evidence establishes that Froedtert's failure to verify the quality and content of the training temporary personnel received was not due to a disregard for the Act, or for indifference to the safety of the temporary employees, but rather to a high turnover in EVS management, and Froedtert's misplaced confidence in StaffWorks' services. There were at least three separate directors of Froedtert's EVS during the period covered in OSHA's inspection. None of the safety provisions made for training temporary employees was formalized or reduced to writing, so the incoming directors relied on verbal reports of prior arrangements, and made inaccurate assumptions concerning the temporaries' training. The record shows that Froedtert's inattention to the training of the temporary workers was at worst, the result of negligence, rather than a disregard for those employees' safety. Froedtert's efforts to arrange for temporary personnel employees to receive separate training, and their institution of training programs and organization of extensive training materials for their permanent employees, demonstrates their good faith in attempting to safeguard the safety and health of their employees. Based on the record, I cannot say that Froedtert, if informed of the nature of its duty to its temporary employees, would have continued to neglect its responsibilities, or that the cited violation was willful in nature.

Penalty

A penalty of \$63,000.00 and \$49,000.00, respectively, were proposed for these items.

It is undisputed that temporary employees working in Froedtert's EVS were exposed to bloodborne pathogens and to the hazard of infection with the HIV or Hepatitis B virus, which can result in death or serious injury. Temporary employees were routinely exposed to hazardous chemicals including phosphoric acid, 2-butoxyethanol, hydrochloric acid and potassium hydroxide (Exh. C-30, C-37). The cited chemicals can cause eye, skin, ear, nose and throat irritations, which may be severe if not treated properly. The cited violations are, therefore, "serious" as defined by §17k of the Act.

Taking into account Froedtert's large size, the gravity of the violation and the absence of any history of previous violations, I find that penalties of \$6,300.00 and 4,900.00, respectively, are appropriate.

ORDER

1. Citation 2, item 1, alleging violation of §1904.2(a) is AFFIRMED as an “other than serious” violation of the Act, and a penalty of \$180.00 is ASSESSED.
2. Citation 2, item 2, alleging violation of §1910.1030(f)(2)(i) is AFFIRMED as a “serious” violation of the Act, and a penalty of \$6,300.00 is ASSESSED.
3. Citation 2, item 3, alleging violation of §1910.1030(g)(2)(i) is AFFIRMED as a “serious” violation of the Act, and a penalty of \$6,300.00 is ASSESSED.
4. Citation 2, item 4, alleging violation of §1910.1200(h) is AFFIRMED as a “serious” violation of the Act, and a penalty of \$4,900.00 is ASSESSED.

/s/ _____
Stanley M. Schwartz
Judge, OSHRC

Dated: January 16, 2004