



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
DR. DIONE WILLIAMS
Respondent.

OSHRC DOCKET
NO. 95-1007

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 30, 1996. The decision of the Judge will become a final order of the Commission on July 1, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 19, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 30, 1996

DOCKET NO. 95-1007

NOTICE IS GIVEN TO THE FOLLOWING:

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Karol Corbin Walker, Esquire
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Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,
v.
Dione Williams, M.D.,
Respondent.

DOCKET NO. 95-1007

Appearances: Nancy Adams-Taylor, Esq.
Office of the Solicitor
U. S. Department of Labor
For Complainant

Karol Corbin Walker, Esq.
Robinson, St. John & Wayne
Newark, N.J.
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) ("the Act").

Having had her office inspected by a compliance officer of the Occupational Safety and Health Administration, Dione Williams, M.D. ("Respondent" or "employer"), was issued one citation alleging two serious violations and one citation alleging three other-than-serious violations of the Act. Civil penalties in the amount of \$2,700.00 were proposed by OSHA. Respondent timely

contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in New York, New York on February 8 & 9, 1996.¹ No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that she is physician engaged in a medical practice specializing in ear, nose and throat, head and neck surgery. Respondent admits that she uses instruments, equipment and supplies which have moved in interstate commerce. On these facts, I find that Respondent is engaged in a business affecting interstate commerce.

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

Discussion

Notwithstanding any other issue in this case, the final resolution of whether Respondent failed to comply with the cited standard³ as alleged in the citation⁴ distills down to whether the phrase "shall make available" as used in the standard requires an employer to make an appointment

¹ Prior to the hearing the parties entered into a stipulated settlement which resolved all issues except as to the disposition of Item 1a of Citation 1. The settlement was approved by order of July 26, 1995.

² Title 29 U.S.C. § 652(5).

³ The cited standard, 29 C.F.R. § 1910.1030(f)(2)(iii), reads:
(iii) If the employee initially declines hepatitis B vaccination but at a later date while still covered under the standard decides to accept the vaccination, the employer shall make available hepatitis B vaccination at that time.

⁴ Citation I, Item 1a, alleges that;
The hepatitis B vaccination was not made available to an employee who initially declined the hepatitis B vaccination but at a later date, while covered under the standard, requested the vaccination.

and perform the other ministerial arrangements necessary for the requesting employee⁵ to receive such a vaccination. I conclude that the standard imposes no such requirement where, as here, such information is known to the employee.

While many facts in this case are in controversy, even if the complaining employee's testimony is taken at face value, she testified that upon requesting a Hepatitis B vaccination from her employer she was informed that it was available at no cost to her at a nearby hospital (Tr. 33, 48, 163-164, 167); she knew the location of the hospital (Tr. 48, 164); she had been to the hospital before; the hospital was conveniently located in relation to her place of employment; she had available to her transportation back and forth to the hospital (Tr. 177-178); and she was specifically aware of a "physician bulletin," a copy of which was included in a loose-leaf binder containing information for employees⁶, (Tr. 165, 179-181); and the "physician bulletin" included precise instructions on how to obtain further information or make an appointment to receive the shots (Exhibit C-3, p. 240; Tr. 166). Even if the employee was, as she claimed, under the "impression" that her employer was going to make "the necessary arrangements," (Tr. 175) there is no substantial, reliable evidence demonstrating or raising the inference that the employer knew or should have known that the employee was anticipating that "arrangements" would be made for her.⁷ Under these circumstances, I find that the employer took all reasonably necessary and appropriate steps to "make available" the Hepatitis B Virus vaccination to the complaining employee.

In its post-hearing brief the Secretary argues that the ultimate responsibility for the employee's failure to get the vaccine must rest with Respondent. The argument is rejected. This

⁵ The matter was initiated by the filing of a formal complaint with OSHA. While there may be some conflict as to the precise dates of employment of the person who filed the complaint, there is no dispute that she was employed by Respondent at the time she allegedly requested the vaccine.

⁶ Exhibit C-3, at page 000240.

⁷ Additional requests for the vaccination by the same employee at later dates might be considered to place the employer on notice that something more had to be done to "make [the vaccine] available." The evidence on this record, however, is insufficient and not reliable enough to make a finding of fact that a second or subsequent requests were communicated by the employee to the employer. (See, Tr. 30, 32-33, 44-45, 48-49.)

is not, as the Secretary argues, a matter of protection not being afforded an employee due to the lack of training received by the employee. This is a matter of an employee's failure to act reasonably on knowledge she already possessed or had readily available to her (*e.g.*, physician's bulletin, phone number and location of Beth Israel Hospital, Etc.).

The record in this case does not demonstrate by a preponderance of the reliable evidence that Respondent failed to make available the Hepatitis B vaccination to an employee. It has not been established that Respondent failed to comply with the standard. Thus, Citation 1, Item 1a is VACATED.

FINDINGS OF FACT

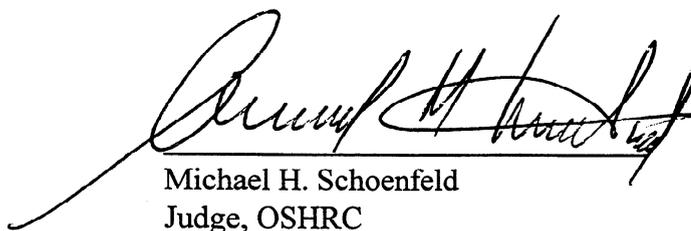
All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).
2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.
3. Respondent was not in violation of the standard at 29 C.F.R. § § 1910.1030(f)(2)(iii) as alleged in item 1a of Citation 1, issued to Respondent on May 5, 1995.

ORDER

1. Item 1a of Citation 1, issued to Respondent on May 5, 1995 is VACATED.


Michael H. Schoenfeld
Judge, OSHRC

Dated: **MAY 28 1996**
Washington, D.C.