UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR Complainant v. BORG-WARNER PROTECTIVE SERVICES CORPORATION, d/b/a BURNS INTERNATIONAL SECURITY SERVICES, Respondent	Docket Nr. 96-0253

APPEARANCES

For Complainant
J. Davitt McAteer, Esq.
Acting Solicitor

Deborah Pierce-Shields, Esq.
Regional Solicitor

Maureen A. Russo, Esq.
Attorney
U.S. Department of Labor
Philadelphia, Pennsylvania

For Respondent
Bradd N. Siegel, Esq.
Porter, Wright, Morris & Arthur
Columbus, Ohio

BEFORE

JOHN H FRYE, III
Judge, OSHRC

DECISION AND ORDER

I. INTRODUCTION

Respondent, Burns International Security Services ("Burns"), provided security on a contract basis at a manufacturing plant owned by Frick Company ("Frick") and located at 100 CV Avenue, Waynesboro, Pennsylvania. Approximately ten of Respondent's forty-thousand employees worked at that site. (JX-1; Tr. 5). This case arises out of an inspection of those security guards by OSHA

compliance officer Ralph Stoehr, II, on September 6, 1995. (Tr. 139). As a result of the inspection, the Secretary issued one Citation, which grouped together nine alleged violations of OSHA's bloodborne pathogen standard, 29 CFR 1910.1030. (Gov't Ex. 8). The Citation was classified as willful, and a penalty of $50,000 was proposed.

Following a timely notice of contest, the Secretary filed a complaint[1] which Burns answered. Trial of this matter took place in Harrisburg, Pennsylvania, on September 24-25, 1996. Respondent is subject to the jurisdiction of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("Act"). (Ex. J-1, Tr. 5.)

When this decision was substantially completed, Respondent's counsel filed a motion for leave to file a document entitled "Respondent's Corrections to the Secretary's Mischaracterizations of Fact and Law." On December 19, the Secretary's counsel responded in a letter that states: "Please accept this letter brief in lieu of a more formal brief in response to Respondent's reply brief." In her letter, counsel denies ever having "... blatantly or intentionally misled a Court of Law...," and makes two substantive points.

It is evident from this decision that I am in agreement with Respondent's counsel with regard to the facts established at trial and the interpretation of the law as reflected in his "Corrections." I believe that counsel's factual

[1] On August 13, 1996, counsel for the Secretary moved to amend the complaint to reflect the correct name of Respondent: Borg-Warner Protective Services Corporation, d/b/a Burns International Security Services. No opposition to the motion was filed and it is granted.

mischaracterizations and legal misinterpretations must have resulted from an excess of zeal on behalf of her client and too much haste rather than any intent to mislead. In this regard, I point out that counsel for the govenment not only has a duty to zealously represent her client, but also to see to it that justice is done. Too much of the former can sometimes result in too little of the latter.

II THE BLOODBORNE PATHOGENS STANDARD

In 1992, the Occupational Safety and Health Administration (OSHA) announced its bloodborne pathogens standard, a comprehensive set of protective rules to stem the spread in the workplace of HIV, Hepatitis B and other bloodborne diseases. The standard, codified at 29 CFR 1910.1030, requires employers to take various protective measures for employees with occupational exposure. Occupational exposure is defined as

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

29 CFR § 1910.1030(b). Most of the regulations address preventing an exposure incident, which is defined as

> a specific eye, mouth, other mucous membrane, non-intact skin, or parenteral contact with blood or other potentially infectious materials that results from the performance of an employee's duties.

29 CFR § 1910.1030(b). It is only through such contact that there is a risk of transmission.

III THE DUTIES OF BURNS' GUARDS

During opening conference, Mr. Noll, site supervisor for respondent, informed CSHO Stoehr that Frick required the guards to render first aid and transport injured employees to the hospital. Frick imposed this requirement by means of so-called security regulations, which stated that the guards were to treat minor cuts and burns, transport injured Frick employees to the hospital, provide CPR when required, and call 911 if the injury is major. (GX-3, Safety Regulations, Duties, No. 6). Further, Mr. Noll indicated that the guards did not have a written Exposure Control Plan as defined in 29 C.F.R. § 1910.1030(c)(1)(i). (GX-3; Tr. 15, 18, 51-56, 149.)

A. The Applicability of the Standard to the Guards at Frick

While the guards' actual exposure to blood appears to have been minimal, it was extensive enough to meet the definition of occupational exposure. The Security Regulations provided that

> Dispensary Service is available at the King St. Guard House to Employees Daily when the plant is in operation. Minor Cuts and Burns are to be treated by the Security Guards. All other Injuries should be treated at the Emergency Room of the Waynesboro Hospital.

(Security Regulations, & 11. 2.) Under "DUTIES, SECURITY PERSONNEL," item 6. provided

> Provide FIRST AID and C.P.R. when required. Transport all Injured personnel to the Hospital, if Mobile (sic). Call Rescue Service (911) for transport if injury is of a Major Nature.

Typically, according to Mr. Noll, Burns' site commander, the guards

> ... would assess the wound. If [they] thought it was too bad that it might need stitches, [they] would just put a dressing on it and transport him to the hospital.
>
> Otherwise, [they] would clean it up, peroxide and use a sink in the restroom, clean it up and put an antiseptic on it and a bandaid.

(Tr. 54.) Mr. Noll testified that, so far as he knew, no Frick employee had left blood or gauze in the truck, and no guard had rendered any sort of medical assistance or treatment during the rides. (Tr. 66, 88). Further, it is undisputed that there was no instance in which the guards performed CPR. (Tr. 29-30).

On two occasions, Mr. Noll treated workers who were bleeding profusely (Tr. 54-56, 161-162) without using a mask, eye, or other protection. (Tr. 58-59, 162.) Additionally, Mr. Stoehr testified

that the Employer Report of Occupational Injury or Disease, the emergency room reports, and the OSHA 200 logs "for ... two or three years" depict numerous lacerations, some requiring sutures. These workers were treated by respondent's employees and when necessary respondent's employees transported the workers to the hospital. (Tr. 162-164.) A review of the Frick OSHA 200 log for the period March through September, 1995, reveals a total of 44 entries, 14 of which were lacerations (including one puncture). Two of the 14 involved days missed from work and two involved restricted work duties.

Given the nature of the duties actually performed by the guards, the surgical gloves, which were routinely used when treating the Frick employees, evidently were sufficient to prevent any exposure incident from taking place,[2] and no such incident was shown to have occurred over the six-year period preceding the Citation.[3] (Tr. 85). Mr. Noll testified that he wore these gloves during the only two occasions when he cleaned up blood (Tr. 65, 85), and that it was standard practice for minor cuts to have the injured Frick employee wash off any excess blood before any bandaids or salves were applied. (Tr. 89). The scope of the guards' first aid duties is such that it is reasonable to

[2] The Secretary's expert witness, Dr. Presson, indicated that a person treating minor cuts and burns is protected by using surgical gloves. (Tr. 253).

[3] The Secretary was able to find only two instances where there was bleeding such that any additional protection, beyond the rubber gloves, conceivably would have had some utility. These were an instance when an employee with what apparently was a puncture wound spurted blood on Mr. Noll's pantleg (Tr. 54-55) and an instance of an employee with a severe nosebleed (Tr. 55). Both occurred in 1993. In neither of these cases did the employee's blood come into contact with the eyes, mouth, mucous membrane or non-intact skin of a guard. (Tr. 87).

anticipate "skin, eye, mucous membrane, or parenteral contact with blood." The Secretary established that the guards were occupationally exposed and that the standard applies to them.

B. Burns' Knowledge Regarding the Guards' Duties

Mr. Washington,[4] as District Operations Manager for the Harrisburg district, had responsibility for the guards at the Frick site from June 1995 through the date of the inspection in September 1995. (Tr. 404). Mr. Washington was, by virtue of his training and experience, aware of the risks posed by bloodborne pathogens and the importance of following appropriate procedures when such exposure could be anticipated. However, he testified that he was unaware that the guards were expected to render first aid. (Tr. 433-34). Ronald Swope, Frick's Manager of Operations,[5] testified that the security regulations were not a part of the contract between Burns and Frick.[6] (Tr. 13). The contract between Frick

[4] Mr. Washington, a retired colonel in the United States Army, has a master's degree in hospital administration, and a doctorate degree in education. (Tr. 404-05). He took tours of duty in the Army as a health care administrator and combat medic in Vietnam; spent four years in medical research and development at Fort Detrick; and commanded a combat support hospital -- later turned into a MASH unit -- at Fort Bragg. (Tr. 405-06). He served as a Medical Service Corps Officer with the Surgeon General's Office, where he drafted procedures for, among other things, infectious materials control. (Tr. 407). Further, he was the Executive Officer at Walter Reed Hospital, where he worked in infection control. (Tr. 408).

[5] At all relevant times, Ronald Swope was employed by Frick Company, a division of York International, as manager of Support Operations. (Tr. 8-9.)

[6] It is uncontroverted that these security regulations were unilaterally promulgated by Frick (Tr. 27); were never sent to Burns' Corporate Office or its Harrisburg District Office (Tr. 365); were signed by Frick, not Burns, management (Tr. 27-29); and were never reviewed by Burns' legal department. (Tr. 343-44). It is also undisputed that neither Barbara Britt, Respondent's human resources manager, nor Mr. Washington was aware of the security regulations -- or the provisions therein relating to first aid and CPR -- until the Secretary produced them during discovery. (Tr.

and Burns did not provide for the guards to render any first aid, but did require that the security guards be trained in first aid and CPR.[7] Frick's purchase order to Burns specifically required this and further required that at least one guard with the necessary training be on duty on each shift.[8] (GX-3, purchase order dated 2/27/89).

Mr. Washington did not believe that the guards at Frick faced occupational exposure as defined in the standard.[9] Mr. Washington testified:

> [I]n my knowledge of what occupational exposure is and what I know the duties for the guards to be, they were exposed as we are right now [in this hearing] to the bloodborne pathogen [risk].

(Tr. 414).

It appears that sometime in 1993, Mr. Swope provided Mr. Noll with information regarding bloodborne pathogens protection as defined in 29 C.F.R. Section 1030 et seq. in 1993. (GX 2, Tr. 10, 49.) Mr. Swope testified that he became aware of the need for respondent's employees to be provided with this protection after

---

365, 410). Thus, at least from June 1995 on, no manager at the Harrisburg District office was aware that the guards at the Frick site were expected by Frick to be rendering first aid or CPR as a regular part of their job duties.

[7] Mr. Washington indicated that Burns used the training as a sales tool, to make Burns services more attractive to clients. Mr. Washington was aware of only one site in the Harrisburg District, Bethlehem Steel, where Burns employees were required by contract to provide emergency first aid services as part of their duties. (Tr. 424-25).

[8] Mr. Washington's characterization of the guards' qualification in first aid and CPR as a sales tool only is inconsistent with the fact that Frick saw fit to include it in the purchase order and to add the requirement that at least one certified guard be present at all times.

[9] Similarly Barbara Britt, Human Resources Manager for the Harrisburg District Office, testified that even after reviewing the bloodborne pathogens training video, she was not concerned because she understood the guards' duties to be to simply assess an injury and then call for assistance, rather than render first aid such that they could be exposed to blood. (Tr. 377-78).

attending the Governor's Safety Conference and participating in the local fire department's training course. (Tr. 10.)

Mr. Noll immediately contacted Mr. Patrick Schell,[10] then Burns' Operations Manager and his supervisor, to inquire about the need for bloodborne pathogens protection. (Tr. 49-50.) According to Mr. Noll, Mr. Schell never responded to this inquiry.[11] (Tr. 50.) Mr. Schell testified that he was aware that the security guards at the worksite were performing first-aid and transporting injured workers to the hospital (Tr. 101-103), but he was not aware of any requirement for an Exposure Control Plan and had never heard of the term bloodborne pathogens before OSHA contacted him in August of 1996. (Tr. 103-108.) Moreover, it appears that Mr. Noll did not inform any managers at Burns, either in writing or orally, about the only two incidents since 1990 in which there was any significant bleeding.[12] (Tr. 97).

Although Frick's purchase order put Burns on notice concerning the requirement that the guards render first aid and Mr. Schell was aware of it, Frick's managers did not alert the managers at Burns' Harrisburg District about the security regulations or about the fact that the guards at the Frick site were treating minor cuts and

---

[10] Mr. Schell had held various supervisory positions for respondent from 1987 until June of 1995 including Operation's Manager for the district. He was the Client Service Supervisor at the time respondent contracted with the Frick Company.

[11] Mr. Schell did not recall being contacted by Mr. Noll about bloodborne pathogens. (Tr. 112). Schell further testified that if he had received a question about bloodborne pathogens, he would have immediately referred it to Barbara Britt, the District Personnel Manager, but, in fact he made no such call to Ms. Britt. (Tr. 116).

[12] Both of these incidents happened in 1993, over two years before the issuance of the citation. The first occurred when blood spurted onto Mr. Noll's pantleg, and the second when a Frick employee had a profuse nosebleed. (Tr. 54-55, 61).

burns. While Mr. Swope spoke with Ralph Noll about the bloodborne pathogens regulation, he never raised the issue with any of Noll's superiors at Burns after he became responsible for supervising the security at Frick. (Tr. 33-34). Moreover, although Frick provided first aid supplies and the protective rubber gloves for the use of the guards, Mr. Swope never alerted Burns management that the guards might require additional protective equipment or training. (Tr. 34). Finally, Frick managers directed that injuries be documented on specific forms and maintained by the guards at the Frick site, but did not share that information with anyone at Burns. (Tr. 96-97). I find that, at the time of the inspection, Burns' managers in Harrisburg did not know that the guards at Frick were rendering first aid. I also find that Frick's purchase order was sufficient notice to those managers that these guards would be required to render first aid. Further, Mr. Schell's knowledge may be imputed to Burns. Thus Burns had constructive notice of the guards' duties.

C. Burns' Section 9(c) Defense

Section 9(c) of the Act provides that "[n]o citation may be issued ... after the expiration of six months following the occurrence of any violation." Burns correctly points out that the Secretary did not establish that an exposure incident occurred within six months of the issuance of the citation. Consequently, Burns maintains that many of the items here at issue are barred by this provision.

The Secretary urges that he need only show occupational exposure, as that term is defined in the standard, in order to meet the Respondent's argument. He points out that the treating of bleeding workers, the transporting of these workers to hospitals, and the cleaning up of their spilt blood, unquestionably constitutes occupational exposure. Thus there is ample evidence that Burn's guards could "reasonably anticipate[] skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials" in the course of their duties. (Tr. GX- 10, GX-11.)

That is true. But the fact that these guards were occupationally exposed does not serve to make all violations of the standard continuing in nature. For example, the continuing fact of occupational exposure does not transform the failure to clean and decontaminate, in conformance with ' 1910.1030(d)(4)(ii), a specific working surface on which blood had been spilled continuing in nature.

The decisions on which the Secretary relies on do not support this position. *Secretary v. Yelvington Welding Service*, 6 BNA OSHC 2013, (Rev. Com. 1978); *Secretary v. Sun Ship, Inc.*, 12 BNA OSHC 1185 (Rev. Com. 1985); and *Secretary v. Johnson Controls, Inc*., 15 BNA OSHC 2132, 2136 (Rev. Com. 1993) all involved recordkeeping or reporting standards. Consequently, they are distinguishable.

The Secretary also relies on *Secretary v. Kaspar Electroplating Corp*., 16 BNA OSHC 1518 (Rev. Com. 1993), a case more akin to this one. *Kaspar* involved machine guarding violations

on machines that were not being used at the time of the inspection. The evidence indicated that these unguarded machines had been used last two months before the inspection began, at least eight months before the citations issued. However, the Commission clearly rested its holding in *Kaspar* that the citations were not time-barred on the fact that the machines were available for use by employees. Thus, employee exposure within the six-month period, and consequently a violation, was shown.

Insofar as the subsections of the standard which the Secretary alleges Burns violated refer to requirements imposed in specific situations, Burns is correct.

D. Burns' Corporate Compliance Efforts

Despite Burns failure to take any action to comply with the standard at the Frick worksite, it was not unaware of the standard's applicability and took the following steps to comply on a corporate-wide basis.

February 1992	Burns' corporate counsel directed each District Office to identify all employees who, as a regular part of their job duties, could come in contact with bloodborne pathogens. (Tr. 306.)
	Burns' Loss Control Manager distributed to all business unit safety managers and business unit presidents copies of OSHA's standard and a summary of its requirements; along with copies of the CDC's guidelines for health care and public safety workers. (Tr. 299, Resp. Ex. 2).
June 1992	Burns held a training seminar for district managers and district personnel managers, and disseminated extensive written materials regarding the bloodborne pathogens standard. (Tr. 358, Resp. Ex. 4).
June 1994	

A uniform Corporate Exposure Program was fully effective and remains in effect. (Tr. 312, 314; Gov't Ex. 11, memorandum of June 3, 1994).

June 1995

Burns' Harrisburg District began training all new employees in bloodborne pathogens exposure control, regardless of their job duties. (Tr. 369).

III. THE ALLEGED VIOLATIONS

Item 1(a). In Item 1(a), the Secretary alleges a violation of §1910.1030(c)(1)(i) This provision states:

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

The citation charged the following violation.

> The employer having employee(s) occupational exposure did not established (sic) a written Exposure Control Plan designed to eliminate or minimize employee exposure:
>
> (a) Burns International Security Services - Employee(s) providing first aid to employees of Frick Company on a contract basis were not provided with a bloodborne exposure control plan.

From the above discussion, it is clear that Burns' guards at the Frick worksite were occupationally exposed and Burns was on notice of that fact. It is also clear that, while Burns had a corporate-wide written exposure control plan that was fully effective at the time of the inspection, this plan was not available to the guards at the Frick worksite. Thus the Secretary established a violation of ' 1910.1030(c)(1)(iii), which requires employers to make exposure control plans available to employees, rather than ' 1910.1030(c)(1)(i), which requires the preparation of such plans. Consequently, the question whether the complaint should be amended to conform with the evidence is presented.

Here, although it charged a violation of an inapplicable subsection of the standard, the item put Burns on notice that the Secretary was alleging that it had not provided an exposure control plan to the guards at the Frick worksite. An amendment to charge a violation of ' 1910.1030(c) (1)(iii) would not alter the factual allegations of the citation. *Secretary v. Safeway Store No. 914*, 16 OSHC 1504, 1516-17 (Rev. Com. 1993). Consequently, I amend the complaint to charge a violation of ' 1910.1030(c) (1)(iii). I find that Burns was in violation of that provision.

Items 1(b), (c), and (d). The Secretary alleges violations of 29 C.F.R. Section 1910.1030(d)(3)(i), (d)(3)(x), and (d)(3)(xi). These require that:

> (i) Provision. When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.
>
> (x) Masks, Eye Protection, and Face Shields. Masks in combination with eye protection devices, such as goggles or glasses with solid side shields, or chin-length face shields, shall be worn whenever splashes, spray, spatter, or droplets of blood or other potentially infectious materials may be generated and eye, nose, or mouth contamination can be reasonably anticipated.
>
> (xi) Gowns, Aprons, and Other Protective Body Clothing. Appropriate protective clothing such as, but not limited to, gowns, aprons, lab coats, clinic jackets, or similar outer garments shall be worn in occupational exposure situations.

> The type and characteristics will depend upon the task and degree of exposure anticipated.
>
> Both Item 1b and Item 1c charge that
>
> Employee(s) providing first aid to the employees of Frick Company on a contract basis were not wearing the proper eye or face and body protection necessary to prevent exposure.
>
> Item 1d charges that
>
> Employee(s) providing first aid to the employees of Frick Company on a contract basis were not provided with clothing necessary to protect against possible exposure.

There is no dispute between the parties that respondent did not provide its employees at the worksite with any personal protective equipment. The equipment which was available to the guards was furnished by Frick. It consisted of a supply of latex surgical gloves.[13] (Tr. 34, 39; GX-3, attachment entitled "First Aid Kits".)

Burns defends of the ground that the Secretary's expert indicated that, if properly utilized, the gloves were adequate to protect the guards while treating minor lacerations. (Tr. 253.) Burns argues that the Secretary did not show a single instance in over six years where there was an actual exposure incident, nor a single instance in the six months before the Citation where blood contacted a guard's clothes, skin, eyes, mouth or mucous membranes. Consequently, Burns believes that the citation of subsection (i) must be vacated.

[13] Mr. Swope testified that a face mask was also provided, but this was not confirmed by the list of contents of the first aid kits contained in GX-3, or by Mr. Stoehr, or by the guards who testified. I find that no face mask was provided.

Burns notes that the face masks, face shields, and goggles referred to in subsection (x), are to be used when it is reasonably anticipated that blood will contact an employee's eye, nose, or mouth. It points out that the two incidents referred to above were the only ones in six years (none in the last three years) where there was significant bleeding, and not a single instance where blood actually splashed the eyes, nose or mouth of a guard. Given this history, Burns contends that the guards' duties were such that contact of their eyes, noses, or mouths with blood was not to be reasonably anticipated. Therefore, in Burns' view, failure to require the guards to wear goggles, glasses with side shields, or face shields does not constitute a violation of §1910.1030(d)(3)(x).

Burns makes the same argument with respect to the alleged violation of subsection (xi), pointing out that the guards' tasks did not include such extensive first aid that gowns and aprons would be necessary; rather, the guards tended to minor cuts and burns. The anticipated degree of exposure to blood from such limited medical duties is, in Burns' view, *de minimis*. Thus, in Burns' view, the surgical gloves provided to the guards were appropriate for these tasks and degree of exposure, and there is no demonstrated need to require them to routinely don gowns, aprons, and the like as well.

In addition, Burns believes that Mr. Stoehr misunderstood the condition precedent to finding a violation of subsection (xi). Burns argues that while the standard requires that protective body clothing shall be worn during high degrees of exposure, it was

cited because the guards were not provided with outer garments. (Government Ex. 9 at 1(d)). Burns urges that a violation of the standard cannot be based upon the failure to provide equipment when the standard requires the wearing of equipment under certain circumstances.

Burns also urges that, in view of the lack of any proof of any instance requiring the use of equipment referred to in subsections (x) and (xi) occurring within six months before the issuance of the citations, the citations are time-barred and should be vacated.

Burns is correct in that, with the exception of the two incidents when Mr. Noll treated workers who were bleeding profusely, there was little evidence concerning the nature of the injuries the guards were expected to treat. In at least one of those incidents (the apparent puncture wound), it appears that gloves alone might not have been adequate to prevent an exposure incident.[14] In addition, Mr. Stoehr testified that his review of the records of injuries indicated that many of the lacerations required sutures. While this evidence is sketchy at best, it indicates that the guards reasonably might expect to be exposed to situations where additional protective equipment would be necessary.

In adopting the standard here in question, the Secretary noted that the requirement was "... set to assure adequate protection

[14] There is no indication that this incident amounted to an "exposure incident" as that term is defined in the standard. However, surgical gloves could have proved inadequate to prevent such an incident. For example, a gown and face shield could well be necessary.

during task performance."[15] The Secretary referred to NIOSH's position that "[a]ppropriate protective clothing and equipment should ... be selected based on the specific work and exposure conditions that will be encountered and the anticipated level of risk," and CDC's position that "... [t]he type of protective barrier(s) should be appropriate for the procedure being performed and the type of exposure anticipated."[16] Here, there is substantial evidence that indicates that more than surgical gloves were required. Indeed, subsection (xi) of the standard requires that suitable outer garments be furnished whenever there is an occupational exposure. Consequently, I conclude that the Secretary has established a violation of subsection (i).[17]

I reach the same conclusion with respect to subsection (xi). As noted, subsection (xi) requires suitable outer garments whenever there is an occupational exposure. Burns' position that this subsection is inapplicable because the Secretary failed to establish its condition precedent is not well taken. Unlike subsection (x), which comes into play only when certain specific events can be anticipated, subsection (xi) is applicable whenever there is occupational exposure. The evidence that such exposure existed at the Frick site is not open to question.[18]

---

[15] *See* the Secretary's statement, "Personal Protective Equipment," accompanying the final rule, 56 Fed. Reg. at 64124 (December 6, 1991).
[16] *Id.*
[17] While Burns clearly had the obligation to furnish equipment pursuant to subsection (xi), the fact that Frick furnished the necessary equipment might tend to make the violation *de minimis*. Because the equipment furnished by Frick was not sufficient to satisfy Burns' obligation, it not necessary to address this question.
[18] Burns' position that the Secretary incorrectly cited this provision because the citation faults Burns for failing to provide appropriate outer garments, while the standard speaks in terms of the wearing of such

Burns' position that the citations of subsection (xi) is time-barred is similarly not well taken. Subsection (xi) requires that suitable outer garments be worn in occupational exposure situations. I have found that occupational exposure existed during the six-month period prior to the issuance of the citation.

Subsection (x) is applicable only when "... splashes, spray, splatter, or droplets of blood ... may be generated and eye, nose, or mouth contamination can be reasonably anticipated." Here, the Secretary showed only one instance in which a spray of blood occurred, and that was two years prior to the citation. Assuming that this was such a situation, the fact that it occurred outside the six-month period prior to the citation dictates the conclusion that this item is time-barred.

Item 1e. In Citation 1, Item 1(e), the Secretary alleges a violation of 29 C.F.R. Section 1910.1030(d)(4)(ii), which provides:

> All equipment and environmental and working surfaces shall be cleaned and decontaminated after contact with blood or other potentially infectious materials.

Item 1e charges that

> Employee(s) providing first aid to the employees of Frick Company on a contract basis were cleaning up the spilled blood from the sink with paper towels and throwing them in the trash. No decontamination process was done.

---

garments is not well taken. Here, it might be said that the guards did not wear outer garments because none were provided. Burns may not avoid this citation by hiding behind its failure to have complied with subsection (i).

The Secretary correctly points out that prior to the inspection, respondent had not provided its employees at the worksite with any training or any products for decontaminating surfaces where a worker's blood had spilt (Tr. 59, 63-64, 167), and that Mr. Stoehr discovered that respondent's employees had in the past cleaned up blood and not decontaminating the surface. (Tr. 56-57, 63-65, 167.)

Respondent urges that this item should be vacated because it was not cited within six months of an alleged violation. The only record evidence of any occasion on which a guard cleaned blood from a work surface occurred when Mr. Noll cleaned up after the nosebleed and pantleg episodes. (Tr. 65). Both of these incidents occurred in 1993, two years before the Citation was issued. Mr. Stoehr indicated that he had not found evidence of any incident in the six months preceding the Citation in which a guard had cleaned blood from any work surface. (Tr. 276).

The standard is directed to a specific situation rather than protection in general. In order to show a violation of it, the Secretary must show that blood was spilt and not cleaned and decontaminated properly. The fact that, at the time of the inspection, the guards may not have been trained to recognize an exposure incident or to properly deal with spilt blood does not make the 1993 violations continuing. Item 1(e) is vacated.

Item 1f. In Citation 1, Item 1f, the Secretary alleges a violation of 29 C.F.R. Section 1910.1030(f)(1)(ii)(A), which requires

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

(1) General.

(i) The employer shall make available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-exposure evaluation and follow-up to all employees who have had an exposure incident.

(ii) The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are:

(A) Made available at no cost to the employee;

* * *

The citation charged that

Employee(s) providing first aid to the employees of Frick Company on a contract basis for at least one year had exposure to blood and blood products and were not provided with a Hepatitis B vaccinations (sic), post exposure and followup.

Mr. Stoehr learned through an interview with Mr. Noll that respondent's employees at the worksite had not been offered a hepatitis B vaccine and vaccination series nor were they informed by respondent of their rights to post exposure evaluation and follow-up should they have an exposure incident. (Tr. 67, 169.)

This subsection of the standard addresses two distinct requirements: first, hepatitis B vaccination; and second, post-exposure medical evaluation and follow-up. The requirement for hepatitis B vaccination is triggered by occupational exposure and consequently it was Burns' obligation to offer it to the guards. Post-exposure medical evaluation and follow-up are triggered only by an exposure incident, and the Secretary has not established any such instances. Thus, Item 1f is affirmed insofar as it is based

on a failure to provide vaccinations, and vacated insofar as it is based on the failure to provide post-exposure follow-up.

Item 1g. In Citation 1, Item 1g, the Secretary alleges a violation of 29 C.F.R. Section 1910.1030(f)(3), which requires that

> (3) Post-exposure Evaluation and Follow-up. Following a report of an exposure incident, the employer shall make immediately available to the exposed employee a confidential medical evaluation and follow-up, including at least the following elements: * * *

The elements provide for testing of the source individual's blood and for appropriate follow-up if the test is positive.

The citation charged that

> Employee(s) providing first aid to employees of Frick Company on a contract basis were not provided with a confidential medical evaluation.

The Secretary argues

> that no one knows, not even the many employees who passed through this worksite from 1992 until 1995, whether they have had an exposure incident and are currently infected because of it. These employees merely treated these bleeding workers, and transported them to emergency rooms, and cleaned up their spilt blood in blissful ignorance. While some people may state ignorance is bliss, it is not if it is deadly.
>
> It is unseemly that respondent would wilfully allow these employees to remain ignorant to this potential danger and then attempt to hide behind the very ignorance they embraced. (Brief, pp. 41-42.)

Thus the Secretary would rewrite this citation to charge a violation of the standard requiring training. That subject is raised in Item 1h. Because there is no evidence that an exposure incident occurred, Item 1g is vacated.

Item 1h. In Citation 1, Item 1h, the Secretary charges a violation of 29 C.F.R. Section 1910.1030(g)(2)(i), which requires

(2) 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 employee and during working hours.

The citation charged that

Employee(s) providing first aid to employees of Frick Company on a contract basis were not provided with training in bloodborne exposure.

This subsection of the standard is clearly applicable to the guards at the Frick worksite and is affirmed.

Item 1i. In Citation 1, Item 1i, the Secretary alleges a violation of 29 C.F.R. Section 1910.1030(h)(1)(i), which requires

(h) Recordkeeping.

(1) Medical Records. (i) The employer shall establish and maintain an accurate record for each employee with occupational exposure, in accordance with 29 CFR 1910.1020.

The citation charged that

Employee(s) were providing first aid to employees of Frick Company on a contract basis. The employer did not establish accurate medical records for the employees (sic) exposures, in fact, there were no records maintained of any exposure.

The Secretary notes that Mr. Stoehr ascertained that the employer had not established nor maintained any medical records for respondent's employees working at the worksite. (Tr. 174.) Because the guards were occupationally exposed, Item 1i is affirmed.

IV. THE WILLFUL CHARACTERIZATION

The Secretary points out that Burns only defense to the citation is ignorance to the work duties of its employees at the worksite, and asserts that Burns did nothing to inform itself after

being informed that these employees were covered by the standard. Apparently, in making this assertion the Secretary has reference to Mr. Swope's conversation with Mr. Noll concerning the standard. The Secretary believes that these facts alone prove willful disregard for the standard. But he also points to other factors as illustrative of Burns' total disregard for employee safety. These are summarized in Section II D, above.

The Secretary makes much of the fact that, despite corporate guidance, the Harrisburg District Office apparently took no action to determine whether the guards at the Frick worksite were occupationally exposed. He also seeks to pin this failing on the Human Resources Manager for that office, Barbara Britt. However, Ms. Britt testified that responsibility for the identification of sites within the District that are occupationally exposed lay with the District Manager. (Tr. 385.) The District Manager did not testify.

The Secretary states that

> It seems incongruous for respondent to plead ignorance regarding the occupational exposure of the security officers at the worksite, when time and time again it was instructed to determine whether these employees could be "occupationally exposed." At the very least, management for the district where the Frick Company was located voluntarily disregarded the standard.

Brief, p. 31. The Secretary points out that Mr. Stoehr was able to determine that Burns' employees were occupationally exposed by simply asking Frick about their duties, and verifying this information with Burns' Site Supervisor. Moreover, the Secretary points to Burns' heightened awareness of the standard by reason of having been cited for violating ' 1910.1030(c)(1)(ii)(c) and

(f)(2)(i) at another site, located in Connecticut, in May 1993. (Ex. J-1, GX-8, Tr. 6.) Indeed, Burns corporate efforts at compliance seem to reflect this.

The Secretary's arguments that Burns' violations were willful establish no more than that Burns was on notice that the guards at the Frick worksite were occupationally exposed and that Burns took no action to comply with the standard at that site. That is insufficient to establish willfulness:

> The elements of a willful violation are well established under Review Commission precedent:
>
> > A willful violation is one committed with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety. To uphold a willful violation, the Secretary must show that the employer was aware of the particular duty at issue in the case, if not the particular standard embodying the duty. Willful conduct by an employee in a supervisory capacity constitutes a prima facie case of willfulness against his or her employer unless the supervisory employee's conduct was unpreventable.
>
> *V.I.P. Structures, Inc*., 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (citations omitted).

Secretary's brief, pp. 22-23.

Taking the Secretary's position in the most favorable light, the facts do not support a conclusion that Burns' conduct amounted to an intentional, knowing, or voluntary disregard of the standard, or plain indifference to safety. There is no showing that Burns' intentionally disregarded the standard, or that knowing of its requirements, ignored it or was plainly indifferent to it. On a corporate level, Burns actively sought to comply with the standard. The failure of the Harrisburg District Office to comply with those corporate directions was a serious violation of the standard, but

there was no showing that this violation was committed with a state of mind justifying the willful characterization.[19]

Unlike *V.I.P. Structures, supra*, where a supervisor made a conscious decision to proceed with work requiring safety nets in spite of the fact that, because of the muddy condition of the site, it was not possible to move the nets already on site into position, there is no indication in this case that the District Office chose to ignore the standard with actual knowledge that the guards were occupationally exposed. Similarly, unlike *Secretary v. Caterpillar*, 17 OSHC 1731 (Rev. Com. 1996) where a willful characterization was upheld because corporate knowledge of a particular hazard was withheld from those responsible for carrying out a procedure subject to the hazard, there is no showing that corporate knowledge of the hazard and the need to respond to it was withheld from those responsible for compliance. To the contrary, the Secretary makes much of corporate efforts to achieve compliance and the failure of the District Office to heed them. The Secretary's case fails because he has not shown that those in the District Office acted with an intentional, knowing, or voluntary disregard of the standard, the corporate efforts, or the fact that the guards were occupationally exposed. Simply put, the Secretary offered no evidence bearing on their state of mind. Thus there is no basis for his argument that the violations were willful.

[19] The Secretary's attempt to impute an intentional disregard of the standard's requirements to the District Office through Ms. Britt's failure to identify sites which were occupationally exposed following a seminar on the standard's requirements, not having been predicated upon a showing that such was her responsibility, is mischievous.

V. APPROPRIATE PENALTY

In calculating the penalty for Citation 1, Mr. Stoehr considered the violation to be high severity and greater probability (Tr. 156), which, in accordance with the Field Inspection Reference Manual[20] (FIRM) results in a penalty of $5,000. Mr. Stoehr gave Burns no reduction for size, good faith or history. (Tr. 157.) Burns maintains that Mr. Stoehr miscalculated the proposed base penalty and that it should be $2,500.

The procedure to be used for calculating the base penalties is set forth in the FIRM, Chapter IV. (Resp. Ex. 1). It provides:

> To determine the gravity of a violation the following two assessments shall be made:
>
> (1) The severity of the injury of illness which could result from the alleged violation.
>
> (2) The probability that an injury or illness could occur as a result of the alleged violation. (Id. at C.2.d.).
>
> * * *
>
> Probability shall be categorized either as greater or as lesser probability.
>
> (a) Greater probability results when the likelihood that an injury or illness will occur is judged to be relatively high.
>
> (b) Lesser probability results when the likelihood that an injury or illness will occur is judged to be relatively low. (Id. at C.2.f.1).

In the case at issue, Mr. Stoehr acknowledged that, rather than assessing the probability of whether, after exposure,

[20] At the time of Stoehr's calculation of the base penalty, the Field Operations Manual, rather than the Field Inspection Reference Manual, was in effect, but compliance officers were in the process of switching over to the FIRM, which is in effect today. (Tr. 271). Despite this change, however, Stoehr acknowledged that the provisions in the FIRM regarding base penalty calculations were identical to those in the FOM. (Tr. 273).

employees will develop an illness, he assessed the probability of whether there would be blood-to-blood contact. He rated this as greater. (Tr. 270-75, 279). Thus Mr. Stoehr ignored the clear instructions of the FIRM.

The Secretary's expert, Dr. Presson, indicated that the risk of contracting the disease from a direct stick from an HIV infected needle is only 0.5 percent (Tr. 247). The risk of contracting Hepatitis B under the same circumstances is 6 to 30 percent. (Tr. 245). The risk associated with less direct contact obviously must be less. Based on this testimony, the probability of any of Burns' employees at the Frick site actually contracting an illness as a result of performing his duties must be assessed as lesser rather than greater. A lesser probability, greater severity illness results in a penalty of $2500. (Tr. 273-74.)

VI. CONCLUSIONS OF LAW

Respondent, Borg-Warner Protective Services Corporation, d/b/a Burns International Security Services, is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) (the Act).

Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Respondent, Borg-Warner Protective Services Corporation, d/b/a Burns International Security Services, was in serious violation of the standards set out at 29 CFR '' 1910.1030(c)(1)(iii),

1910.1030(d)(3)(i), 1910.1030(d)(3)(xi), 1910.1030(f)(1)(ii)(A), 1910.1030(g)(2)(i), and 1910.1030(h)(1)(i). Respondent, Borg-Warner Protective Services Corporation, d/b/a Burns International Security Services, was not in willful violation of these standards. A penalty of $2500 is appropriate.

Respondent, Borg-Warner Protective Services Corporation, d/b/a Burns International Security Services, was not in violation of 29 CFR '' 1910.1030(d)(3)(x), 1910.1030(d)(4)(ii), and 1910.1030(f)(3).

VI. Order

Citation 1, items 1a, 1b, 1d, 1f, 1h, and 1i are affirmed as a serious violations of the Act.

A total civil penalty of $2500 is assessed.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated:
Washington, D.C.