United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ENVISION WASTE SERVICES, LLC, Respondent.	OSHRC Docket No. 12-1600

ON BRIEFS:

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For the Complainant

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For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Envision Waste Services operates a solid waste facility in Seville, Ohio. On December 6, 2010, following an inspection of the facility, the Occupational Safety and Health Administration issued three citations to Envision under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. The citations, after subsequent amendment, allege a total of ten violations—six repeat-serious, three willful, and one other-than-serious. Administrative Law Judge Keith E. Bell affirmed all but one citation item and assessed each of the Secretary's proposed penalties, for a total penalty of $224,000. All nine affirmed items are on review before the Commission.

Most of these citation items concern the work of employees in the facility's "sorting rooms" through which mixed residential and commercial solid waste is transported by conveyors.

These employees, referred to as "sorters," remove recyclable materials from the waste as it is conveyed through the rooms. At issue is whether Envision provided sorters with adequate protection for eyes and hands (Citation 1, Item 1b and Citation 2, Item 1) and various types of training (Citation 1, Items 1a, 2, 3b, 3c, and 5). Also at issue is Envision's alleged failure to make the company's hazard exposure control plan accessible to employees (Citation 1, Item 3a) and to provide respirator information to employees who voluntarily wear dust masks (Citation 3, Item 1).

For the reasons that follow, we affirm Citation 1, Items 1b, 2, 3b, 3c, 5 and Citation 3, Item 1; recharacterize Citation 1, Items 2 and 5 from willful to serious; and vacate Citation 1, Items 1a and 3a, and Citation 2, Item 1. We assess penalties totaling $15,000.

I. Repeat-Serious Citation 1, Item 1b—Providing appropriate personal protective equipment (puncture-resistant gloves)

Citation 1, Item 1b pertains to the personal protective equipment (PPE) that sorters wear to protect their hands while separating recyclable materials from mixed waste. As waste travels through each sorting room on conveyors, sorters remove metal items, mixed papers, cardboard, and newspapers, and they deposit these recyclables down chutes or into bins. After the recyclables are removed, the remaining waste includes "all kinds of things" such as glass, clothing, waste from restaurants, and medical waste, including vials of blood, intravenous tubing that still contains blood, used gauze patches, surgical scissors, and used needles.

The Secretary alleges that because sorters come into contact with used needles when sorting mixed waste, the bloodborne pathogens (BBP) standard—specifically 29 C.F.R. § 1910.1030(d)(3)(i)—requires Envision to provide these employees with puncture-resistant gloves. This provision states that "[w]hen there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate [PPE] such as, but not limited to, gloves . . . ." Envision does not dispute that its sorters are subject to an "occupational exposure" when sorting mixed waste, but claims that the company adequately addresses this exposure by requiring employees to comply with certain work practices—which Envision concedes fail to completely eliminate the occupational exposure—and providing them with cut-resistant (but not puncture-resistant) gloves.[1] *See* 29 C.F.R. § 1910.1030(d)(3) (requiring that "[e]ngineering and work

[1] The work practices Envision instructs its employees to follow consist of two policies. The first is known as the "off-the-top" policy, which requires that sorters remove recyclables that are within arm's length from the top or sides of the waste piled on the conveyor. The second is known as the

practice controls . . . be used to eliminate or minimize employee exposure," but if "occupational exposure remains," then PPE must be used).

The judge agreed with the Secretary, finding that sorters are exposed to medical waste, including used needles, but are not adequately protected from this exposure because the gloves Envision provides are not puncture-resistant. On review, Envision argues that because the cited provision is a performance standard, it is part of the Secretary's prima facie burden to prove "the feasibility and utility" of puncture-resistant gloves. Envision further contends that the Secretary has failed to meet this burden. We disagree.

Regarding the Secretary's burden of proof, Envision relies on a Sixth Circuit decision in which the court recognized "the principle that where a standard imposes a duty *without specifying the means of compliance*, the Secretary has the burden of establishing the existence of a specific and technologically feasible means of compliance as an element of his showing that a violation has occurred."[2] *Diebold, Inc. v. F. Ray Marshall*, 585 F.2d 1327, 1333 (6th Cir. 1978) (emphasis added). The Secretary, however, is not required to prove feasibility where the cited standard "states the hazard to be protected against and the performance criterion by which the adequacy of the employer's abatement must be judged"; that is, where " 'the performance required by the standard is clear enough.' " *See Hughes Bros.*, 6 BNA OSHC 1830, 1835 (No. 12523, 1978) (contrasting circumstances, which involved citation under 29 C.F.R. § 1910.212(a)(3)(ii), to prior case in which Commission required Secretary to prove feasibility with respect to PPE standard that required "unspecified [PPE] against unspecified hazards"); *Consol. Aluminum Corp.*, 9 BNA OSHC 1144, 1156-57 (No. 77-1091, 1980) (extending rationale in *Hughes* to citation alleging violation of § 1910.212(a)(1) and concluding that Secretary did not bear burden of proving feasibility, because standard "states the hazards to be protected against and the performance required with sufficient clarity, particularly when read in the context of [§] 1910.212 as a whole").

"hands-off" policy, which requires that sorters not touch medical waste (including needles), chemicals, and other dangerous debris as it passes by on the conveyor.

[2] Envision's waste facility, as well as its corporate offices, are located in the Sixth Circuit. Pursuant to the Act, either the Secretary or an employer may appeal a Commission decision to "any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office . . . ." *See* 29 U.S.C. § 660(a), (b). Where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

Although the provision cited here, § 1910.1030(d)(3)(i), is performance-oriented in that it does not mandate particular PPE in all circumstances, it does set out a non-exclusive list of examples of acceptable PPE and specifies criteria that must be met. Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004, 64,126-27 (Dec. 6, 1991) (final rule) (describing performance-oriented nature of standard). Indeed, the provision explicitly states that PPE, such as "gloves," is " 'appropriate' only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's . . . skin . . . under normal conditions of use and for the duration of time which the protective equipment will be used." 29 C.F.R. § 1910.1030(d)(3)(i). Therefore, under Commission precedent, the Secretary need not demonstrate the feasibility of puncture-resistant gloves to establish a violation of § 1910.1030(d)(3)(i) in this case.

As the cases cited by the Secretary on review instruct, the pertinent inquiry is "whether a reasonable person, examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it." *W.G. Fairfield Co. v. OSHRC*, 285 F.3d 499, 505 (6th Cir. 2002) (internal quotation marks omitted; citing *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1387 (No. 88-0282, 1991)); *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005) ("[A] broad, performance-oriented standard . . . may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry."); *see, e.g.*, *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287-88 (No. 97-1073, 2007) (citing to *Siemens* and *W.G. Fairfield*, and holding that "[b]ecause performance standards, such as [the requirement for adequate hand-washing facilities], do not identify specific obligations, they are interpreted in light of what is reasonable"); *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2151 (No. 08-1656, 2016) (citing to *Siemens* and *Thomas*, and holding that standard regarding safe movement of equipment on access roadways and grades was performance standard and, therefore, must be "interpreted in light of what is reasonable").

We conclude that a reasonable person examining § 1910.1030(d)(3)(i) can determine that puncture-resistant gloves are "what is required." *W.G. Fairfield Co.*, 285 F.3d at 505. The record shows that Envision was aware its work practice controls did not eliminate exposure to the hazard posed by used needles. Specifically, even with these controls in place, needles sometimes "stick[] up on the [conveyor] belt" but are hidden from view underneath other garbage, exposing sorters to needle-sticks during the sorting process. Indeed, Envision's safety manager conceded that he

was informed needle-sticks had, in fact, occurred. Also, Envision knew the gloves it provided to employees, while made of Kevlar and cut-resistant, did not act as a protective barrier against needle-sticks, as the sorting room supervisor told the safety manager on multiple occasions that the gloves did not provide adequate protection, and the safety manager himself was aware that the gloves were not puncture-resistant. Finally, to the extent Envision's safety manager claims to have been unaware that puncture-resistant gloves are available for purchase on the market, testimony from the OSHA compliance officer shows that such gloves were, indeed, easily obtainable at the time of the inspection. In short, Envision understood that the conditions to which its sorters were exposed necessitated the use of puncture-resistant gloves; further, a reasonable person could have determined that they were available and provided them to the exposed employees.

Therefore, we conclude the Secretary has established that puncture-resistant gloves were required under § 1910.1030(d)(3)(i). Given that Envision concedes it failed to provide such gloves to its sorters and no other element of the Secretary's burden of proof is in dispute, we affirm the violation. As the characterization of this item has not been challenged, we affirm the violation as repeat-serious.

II. Willful Citation 2, Item 1—Eye protection for employees wearing prescription lenses

Citation 2, Item 1 pertains to Envision's practice of not requiring protective eyewear for sorters who wear prescription lenses while working. The Secretary alleges that this practice violates 29 C.F.R. § 1910.133(a)(3), which requires an employer to "ensure that each affected employee who wears prescription lenses while engaged in operations that involve eye hazards wears eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses." 29 C.F.R. § 1910.133(a)(3). Envision does not dispute that it permitted sorters to wear non-safety-grade prescription glasses in lieu of safety glasses. In addition, the CO observed during her inspection of one of the sorting rooms that sorters who wore prescription glasses were not using eye protection compliant with § 1910.133(a)(3).

Based on these facts, the judge affirmed the violation, but he did so without addressing Envision's argument—raised again on review—that the Secretary failed to establish § 1910.133(a)(3)'s applicability. Specifically, Envision claims the record does not show that, at the time of the inspection, the company knew of—or a reasonable person would have recognized—a hazard requiring the use of protective eyewear. We agree with Envision that the Secretary has

failed to establish the company had actual knowledge of a hazard requiring the use of eye protection.[3] *Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015) ("[t]o establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," Secretary must demonstrate that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE"), *aff'd in part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016).[4]

As with the provision at issue in *Wal-Mart*,[5] the provision cited here applies only when employees are exposed to "eye hazards." 29 C.F.R. § 1910.133(a)(3). The Secretary maintains that Envision knew sorters could be exposed to eye hazards from chemical splashes or flying debris. We find insufficient evidence of such exposure.

As to chemical splashes, the evidence is limited. Although certain company hazardous communication (HazCom) documents, which were highlighted by the Secretary, show chemicals come through the sorting room, nothing in the record shows that these chemicals have the potential to splash into the sorters' eyes during the sorting process. The CO merely speculated that there "could be a chemical splash, if a container should open up on the line" and spill when the sorter

[3] While the Secretary relies exclusively on Envision's "actual knowledge" as the basis for proving applicability and does not claim that "a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE," *Wal-Mart*, 25 BNA OSHC at 1400-01, there is no evidence in the record showing that eye protection, under the circumstances here, is generally used in Envision's industry. *Id.* at 1401-02 (" 'Commission precedent also holds that evidence of industry custom and practice will aid in determining whether a reasonable person familiar with the circumstances would perceive a hazard, though it is not necessarily determinative.' " (citation omitted)). Nor is there sufficient evidence to show that "a reasonable person" aware of conditions in the sorting room would have known of an eye hazard requiring use of eye protection.

[4] Chairman MacDougall noted in *Wal-Mart* that she would not limit, as part of the Secretary's burden, the reasonably prudent employer test to the element of applicability. In her opinion, when assessing an alleged violation of a PPE standard, which does not presume a hazard, the reasonably prudent employer test applies to the entire analysis of the Secretary's burden. *Wal-Mart*, 25 BNA OSHC at 1400 n.9.

[5] That provision, paragraph (a)(1) of the same section at issue here, requires "[t]he employer [to] ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards . . . ." 29 C.F.R. § 1910.133(a)(1).

pulls a bundle from the conveyor, or "if . . . an aerosol can [that] could compress and explode" comes through the sorting room. There is no evidence that the CO actually observed specific conditions that could result in splashing chemicals or that an eye injury had, in fact, ever resulted from such splashes at Envision's facility.

As to flying debris, neither the nature of such a hazard nor the risk of injury is apparent from the record. Indeed, there is only one recorded eye injury that occurred in the sorting rooms between 2009 and 2012: a sorter was injured in 2009 when a "[p]article" entered his right eye.[6] Neither party, however, has provided a methodology for assessing the risk of injury, and we cannot determine an injury rate ourselves based on this one recorded injury; the record does not even show how many employees worked in the sorting room during this period.[7] *Wal-Mart*, 25 BNA OSHC at 1402-04 (vacating § 1910.133(a)(1) item because evidence was insufficient to show that employer had actual knowledge, or reasonably prudent person would have known, of hazard requiring eye/face protection, where Secretary established "existence of only three pertinent incidents" over two-year period in workforce of 60 order fillers, and neither party, including Secretary who had burden of proof on issue, "provided expert or other relevant evidence describing accepted injury rate methodologies").

The Secretary also claims that the safety manager had knowledge of an eye hazard, given that a November 2010 hazard assessment he conducted states that sorting poses a medium risk level of "[s]mall flying debris" coming into contact with employees' eyes. The safety manager's testimony, however, shows that his assessment of a medium risk level pertained to the sorters' potential exposure to "a little bit of dust." Based on this risk-level assessment, it is not clear the safety manager knew that such exposure would have constituted a "significant risk of harm" and,

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[6] According to one former sorter, pulling recyclables from the line can cause broken glass to "fl[y] up in air." This witness also claimed that while working as a sorter, he once "got a piece of glass . . . with a chemical" in his eye even though he was wearing safety goggles at the time. The record does not show, however, that he ever told anyone at Envision about the injury. Also, the CO testified that sorters "could be" exposed to flying metal shards and that such exposure could result in a condition "called rust rings in their eyes." Nothing in the record, however, shows that the CO observed this during her inspection, and none of the employees testified that they had ever observed or were exposed to flying metal shards.

[7] According to the company's OSHA 300 logs, Envision has around 80 or 90 employees overall, and a supervisor for one of the sorting rooms testified that she supervised eight workers. It is not clear from the record, though, how many workers were in the two sorting rooms at any given time, let alone whether the number of workers was the same during all three work shifts.

therefore, was a hazard under the standard, particularly since his assessment lacked specific information concerning the severity of potential harm and the likelihood of occurrence.[8] *Id.* at 1400-01; *see Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) ("Whether there exists a significant risk depends on both the severity of the potential harm and the likelihood of its occurrence . . . .").

Finally, the Secretary claims that Envision's safety policies show the company knew sorters could be exposed to hazards requiring the use of eye protection. Envision's safety manual states generally when eye protection is required, but it does not identify which jobs at the facility require the use of eye protection.[9] A written safety policy specific to the sorters contains more detail: "Appropriate safety glasses or prescription glasses must be worn at all times in all areas of the plant, tipping floor, transfer floor and sorting rooms. Employees wearing prescription glasses should wear safety straps." As Envision correctly points out, however, this safety policy alone cannot be used to establish the employer's knowledge of an alleged hazard. *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066 (No. 78-1443, 1984) (consolidated) ("An employer's safety recommendations do not establish that such precautions were necessary in order to comply with a standard."), *aff'd*, 764 F.2d 32 (1st Cir. 1985). Moreover, nothing in this safety policy shows that it is intended to comply with the requirements of § 1910.133(a)(3). Thus, neither policy supports a finding that the company knew sorters were exposed to hazards that require the use of

[8] The Secretary also relies on testimony from the CO that the safety manager admitted to her that allowing sorters to wear only prescription glasses was a hazardous practice. It is not clear from the CO's testimony, however, whether the safety manager recognized that the conditions in the sorting room exposed the sorters to the types of hazards that would have been covered by § 1910.133(a)(3).

[9] Envision's safety manual states that "[s]afety goggles, glasses and face shields shall correspond to the degree of hazard, i.e., chemical splashes, welding flashes, impact hazard, dust, etc." The manual also includes the following eye protection requirements:

> 1. Where there is a danger of flying particles or corrosive materials, employees must wear protective goggles and/or face shields provided [or approved] by Envision . . . .
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> 2. Employees are required to wear safety glasses at all times in areas where there is a risk of eye injuries such as punctures, contusions or burns.
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> 3. Employees who need corrective lenses are required to wear only approved safety glasses, protective goggles, or other medically approved precautionary procedures when working in areas with harmful exposures, or risk of eye injury.

eye protection under § 1910.133(a)(3). *See id.* ("If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so free from concern that their efforts will be relied on to establish their knowledge of an alleged hazard."). Accordingly, we conclude that the Secretary has failed to establish Envision had actual knowledge of a hazard requiring the use of eye protection under § 1910.133(a)(3) and therefore, has not shown that the provision applies. We therefore vacate Citation 2, Item 1.

III. Repeat-Serious Citation 1, Item 1a—PPE training

Citation 1, Item 1a alleges that Envision violated 29 C.F.R. § 1910.132(f)(1) because it "did not train new employees who are required to use [PPE]." This provision requires an employer to train "each employee who is required by this section to use PPE," and it specifies that the employees must "be trained to know . . . (i) When PPE is necessary; (ii) What PPE is necessary; (iii) How to properly don, doff, adjust, and wear PPE; (iv) The limitations of the PPE; and, (v) The proper care, maintenance, useful life and disposal of the PPE." In affirming the violation, the judge found that the safety manager had "provided PPE training to new employees upon initial hire," but he nonetheless concluded that Envision failed to comply with § 1910.132(f)(1). According to the judge, the eye protection training Envision provided was inadequate because employees were instructed that they could wear prescription glasses in lieu of safety glasses.

On review, Envision argues that the judge improperly amended the pleadings sua sponte to add an "inadequate training" theory, which the Secretary never pleaded, and that this amendment caused "considerable prejudice towards Envision['s] ability to adequately prepare and defend its case." The Secretary maintains that the judge did, in fact, find that training "never" occurred with respect to "use of proper equipment for eye protection"; therefore, he made no amendment to the pleadings. Contrary to the Secretary's characterization of the judge's decision, the judge explicitly found that training was given, but he affirmed the violation because the training was deficient. Thus, the effect of the judge's decision was to sua sponte amend the pleadings. *Cf. NORDAM Grp.*, 19 BNA OSHC 1413, 1414-15 (No. 99-0954, 2001) (where citation alleged violation of § 1910.133(a)(1) based on employer not *providing* eye protection, but judge instead based affirmance on employer not *ensuring* that employees wore eye protection, Commission amended pleadings—following Secretary's motion—to conform to judge's legal theory because Respondent " 'squarely recognized' that it was trying the issue of whether it *ensured* that employees used eye protection" (emphasis added)), *aff'd*, 37 F. App'x 959 (10th Cir. 2002).

Nonetheless, there was nothing improper about the judge's sua sponte amendment because this unpleaded issue was tried by consent of the parties. Under Federal Rule of Civil Procedure 15(b)(2), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Trial by consent exists "only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue." *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (internal footnote omitted). Here, the parties included arguments concerning the adequacy of PPE training in their post-hearing briefs to the judge; this shows that they both "squarely recognized" that the adequacy of training was at issue. In addition, the factual matter on which the judge based his finding of noncompliance—that employees were improperly instructed on what eyewear to use in the sorting room—was thoroughly litigated by the parties with respect to the protective eyewear violation (Citation 2, Item 1, discussed *supra*). Since the parties consented to try this issue, it is treated "as if [it] had been raised in the pleadings." FED. R. CIV. P. 15(b)(2) ("A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue[,] [b]ut failure to amend does not affect the result of the trial of that issue."). Further, because there is nothing to suggest that Envision did not have a fair opportunity to defend or that it could have introduced additional evidence if the case were retried, there is no basis for its claim of prejudice.[10] *See NORDAM Grp.*, 19 BNA OSHC at 1415.

We vacate Citation 1, Item 1a, however, on its merits. As discussed above, the Secretary has failed to establish Envision's knowledge of an eye hazard requiring the use of PPE under § 1910.133(a)(3) (Citation 2, Item 1). That failure of evidence also requires that we vacate this item—a training violation alleged under § 1910.132(f)(1)—because the judge's finding of inadequate training was based exclusively on Envision providing improper instruction concerning the use of prescription glasses as eye protection. Since the Secretary has not established that Envision knew of an eye hazard requiring use of PPE under § 1910.133(a)(3), he cannot establish

[10] Because Chairman MacDougall agrees with her colleagues to vacate this item on its merits, she finds it unnecessary to resolve the issue of whether the judge's sua sponte amendment was proper. However, she notes that it is at least concerning that the judge failed to address whether the issue was tried by consent of the parties. If this issue was outcome determinative, Chairman MacDougall would deem a remand to the judge appropriate in order for him to consider whether the unpleaded issue was tried by implied consent.

that Envision should have known that its training under § 1910.132(f)(1) required instruction to wear eye protection compliant with § 1910.133(a)(3).

IV. Willful Citation 1, Item 2 (Fire extinguisher training); Repeat-Serious Citation 1, Items 3b and 3c (BBP training); and Willful Citation 1, Item 5 (HazCom training)

In Citation 1, Items 2 and 5, the Secretary alleges that Envision failed to provide portable fire extinguisher training "annually," in violation of 29 C.F.R. § 1910.157(g)(2);[11] BBP program training both "annually" and "[a]t the [employees'] time of initial assignment," in violation of 29 C.F.R. § 1910.1030(g)(2)(ii);[12] and HazCom program training "at the time of [the employees'] initial assignment," in violation of 29 C.F.R. § 1910.1200(h)(1).[13] The judge affirmed all four

[11] Section 1910.157(g)(2) requires the employer to "provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter"; paragraph (g)(1), in turn, states that "[w]here the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting." 29 C.F.R. § 1910.157(g).

[12] Citation 1, Item 3b alleges a failure to provide training at the time of initial assignment and Citation 1, Item 3c alleges a failure to provide annual training, in violation of § 1910.1030(g)(2)(ii)(A) and (B), respectively. This provision requires as follows:

> (2) *Information and Training.* (i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.
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> (ii) Training shall be provided as follows:
>
> (A) *At the time of initial assignment* to tasks where occupational exposure may take place;
>
> (B) *At least annually thereafter*.

29 C.F.R. § 1910.1030(g)(2)(ii) (emphasis added).

[13] Citation 1, Item 5 alleges that Envision, in violation of § 1910.1200(h)(1), failed to train employees at the time of their initial assignment "on the hazardous chemicals such as household chemicals and industrial chemicals that include used motor oil, organics and engineered fuel fractions that come through on the sorting line." This provision requires as follows:

> (h) *Employee information and training.* (1) 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 chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g.,

violations based on training failures that he found occurred in 2011. He characterized Items 2 and 5 as willful, and Items 3b and 3c as repeat-serious. The only element of these four violations that Envision disputes is its alleged noncompliance with the cited training provisions. For the reasons that follow, we find the Secretary has established noncompliance as to all four training items, but that the judge erred by characterizing two of the violations as willful.

A. Compliance

Employees E1 and E2 work as sorters at Envision, and S1 is a supervisor in the sorting room. All three employees were interviewed by the CO, after which each employee signed a Statement of Interview ("SOI"). The CO drafted each SOI from handwritten notes she took during the interviews; the employee signed the SOI after the CO read the statement aloud and the employee was given an opportunity to make any corrections.[14] In their SOIs, which the Secretary questioned the employees about at the hearing, the employees identified the types of training they had, or had not, received from Envision in 2011: (1) E1's SOI states that she did not receive fire extinguisher, BBP, or HazCom training; (2) E2's SOI states that he did not receive BBP or HazCom training; and (3) S1's SOI states that she received fire extinguisher training and had seen

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> flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

29 C.F.R. § 1910.1200(h)(1).

[14] On review, Envision argues that the judge erred in relying on the SOIs as corroborating evidence that the Secretary had established noncompliance with the cited training provisions when he had previously ruled that the SOIs were not admissible as prior out-of-court statements under Federal Rule of Evidence 801(d)(1)(A). As Envision points out, the judge expressly concluded that the SOIs were not "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," and therefore they could only "be admitted into evidence for impeachment purposes"—in other words "not as substantive evidence." *See Rush v. Illinois Cent. R.R. Co.*, 399 F.3d 705, 720-22 (6th Cir. 2005) ("It is well-settled that where the contents of the writing used to refresh a witness's memory include prior statements of that witness that are inconsistent with the witness's present testimony, the prior statement may be introduced to impeach the witness."), *cert. denied*, 546 U.S. 1172 (2006). The Secretary responds that the judge's reliance on the SOIs as corroborating evidence was nonetheless appropriate, because they are admissions by a party opponent under Federal Rule of Evidence 801(d)(2)(D). The SOIs, however, were never "offered" by the Secretary as evidence under this rule. We agree, therefore, that the judge erred to the extent that he relied on the SOIs as corroborating evidence. Nonetheless, because there is other evidence in the record, as discussed above, to support the Secretary's allegations of noncompliance, the judge's error in this regard is harmless.

the HazCom program, but she did not receive BBP training.[15] At the hearing, however, all three employees testified, at times contrary to their respective SOIs, that in 2011 they did receive fire extinguisher, BBP, and HazCom training.

In affirming the training violations, the judge discounted the testimony of these employees based on credibility determinations he made regarding their demeanor at the hearing—the adequacy of which Envision does not dispute—and his conclusion that their testimony contradicted prior statements documented in their SOIs.[16] *See L & L Painting Co.*, 23 BNA OSHC at 1990; *see also Rush*, 399 F.3d at 720 ("Rule 613 of the Federal Rules of Evidence authorizes the impeachment of a witness by use of a prior inconsistent statement."). We conclude that the

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[15] The judge mischaracterized part of S1's SOI by suggesting that her SOI corroborates that no training was conducted in 2011, when in fact her SOI indicates that she received fire extinguisher training.

[16] The judge also relied on specific testimony from the CO, who he found "to be credible" and "accord[ed] full weight to her testimony" based, in part, on her calm demeanor and frequent eye contact. According to the CO, Envision's safety manager told her the facility "[doesn't] have a lot of turnover and that he had had nine new employees since 2010 and they hadn't received training." Envision argues on review that the judge should not have credited this testimony because it contradicts the CO's own inspection notes. We agree.

The CO's inspection notes from the first day she visited Envision's facility quote the safety manager as stating, " 'We don't have a lot of turnover, *so it's not like we are training all the time.*' " (Emphasis added.) Then, on her return visit to the facility over a month later, the CO recorded in her notes that Envision had "8-9 new employees since 2010," but this appears to be neither a quote of the safety manager nor specifically attributed to him. Subsequently, in the OSHA Violation Worksheets, the CO conflated these two sets of notes into the following statement from the safety manager: "[nine] new employees have been hired since 2010 and have not been trained on [fire extinguisher use or PPE in their work areas]." The CO admitted that these Worksheets include only a summary of the safety manager's statements, and when presented with her inspection notes, the CO first denied that they were inconsistent with her testimony and the Worksheets. When asked, though, whether she interpreted the safety manager's quote "to mean that he doesn't train new employees," the CO simply responded: "From employee interviews and from documents [OSHA] determined that [the safety manager] hadn't done the training."

Given the disparity between her testimony, the Worksheets, and her inspection notes, which she failed to adequately explain under direct questioning, we accord no weight to the CO's testimony on this issue despite the judge's otherwise sound demeanor-based credibility determinations. *See Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1707 (No. 96-1459, 1999) (finding judge's reliance on CO's testimony was in error when record as whole contradicted that testimony); *Brickfield Builders, Inc.*, 17 BNA OSHC 1084, 1084-85 (No. 93-2801, 1995) (rejecting judge's reliance on credibility findings favoring CO, because photographic evidence conclusively supports employer's position).

judge's demeanor-based credibility determinations, coupled with the portions of E1's, E2's, and S1's testimony on training they received in 2011 that directly conflict with their SOI statements (which were properly relied upon for impeachment purposes), show that these witnesses were being "dishonest[] about a material fact." This, we find, establishes that the required training was, in fact, not provided to them. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (noting in case involving action under Age Discrimination in Employment Act that "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt' " (citing *Wright v. West*, 505 U.S. 277, 296 (1992)); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2182 & n.12 (No. 90-2775, 2000) (finding that while witness claimed her recordkeeping practices remained unchanged from 1970 until 1990, her claim is belied by data included in some records from those years; citing to *Reeves* as analogous support), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Thus, the record shows that the required training was not provided as follows: (1) E1 did not receive fire extinguisher training, in violation of § 1910.157(g)(2) (Citation 1, Item 2);[17] (2) E1 did not receive BBP training at the time of initial assignment after being hired in September of that year,[18] in violation of § 1910.1030(g)(2)(ii)(A) (Citation 1, Item 3b); (3) E1, E2, and S1 did not receive annual BBP training, in violation of § 1910.1030(g)(2)(ii)(B) (Citation 1, Item 3c); and

[17] Because the Secretary did not raise E2's SOI in questioning him about whether he received fire extinguisher training, there is no basis to find that E2—unlike E1—was being dishonest about a material fact. The judge noted in his decision that E2 testified that he must not have been at work when the fire extinguisher training occurred, because his name did not appear on a training sign-in sheet (which Envision concedes was falsified, as discussed *infra*). This testimony, however, merely shows that E2's name did not appear on the falsified sheet, not that Envision failed to provide him fire extinguisher training in 2011. Accordingly, this item is affirmed only as to E1.

[18] Of E1, E2, and S1, only E1 was hired in 2011. Without evidence that S1 and E2 were newly exposed to BBPs in 2011, E1 was the only one of the three that year who required BBP training "[a]t the time of initial assignment." 29 C.F.R. § 1910.1030(g)(2)(ii).

(4) E1 did not receive HazCom training at the time of initial assignment after being hired in September of that year,[19] in violation of § 1910.1200(h)(1) (Citation 1, Item 5).[20]

Corroborating this evidence of noncompliance is Envision's failure to produce authentic training documents for 2011. As several employees testified (and Envision concedes), it was the company's practice to have sign-in sheets for training. After the 2012 OSHA inspection, Envision provided the CO with sign-in sheets purportedly for fire extinguisher, BBP, and HazCom training that occurred in 2011. Envision admits on review, as it did before the judge, that these documents were falsified,[21] and it has provided no other training documentation for 2011. In these circumstances, we find that Envision exhibited a "culpable state of mind,"—in other words, an intent to actually suppress or withhold the evidence. *See Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *cf. Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d

[19] E2, like E1, did not receive HazCom training in 2011, but E2 was not hired in 2011. Rather, he was hired in March 2010 and, therefore, would not have required such training under the cited provision in 2011 since that was not "the time of [his] initial assignment." 29 C.F.R. § 1910.1030(g)(2)(ii).

[20] Envision points out that other hearing testimony shows training did in fact occur in 2011. Specifically, Envision's safety manager testified that fire extinguisher, BBP, and HazCom training were provided to Envision employees that year, and his claim finds support in testimony from two other employees (E3 and E4) about training they either conducted or received. As Envision correctly notes, the judge made no demeanor-based credibility determinations for these two employees, but even if he had credited their testimony, along with that of the safety manager, we fail to see how it undermines or contradicts the evidence establishing that training was not specifically provided to E1, E2, and S1.

[21] The CO testified that after receiving the sign-in sheets from Envision, she raised some concerns regarding their authenticity with Envision. The CO noted that an employee listed on the 2011 BBP training sign-in sheets was not actually employed by Envision at the time the employee supposedly signed them; the signatures on the 2011 HazCom training sign-in sheets are identical to the signatures on the previous year's HazCom training sign-in sheets; and the headings on the fire extinguisher training sign-in sheets are slanted in a way that may suggest the documents were fabricated.

Once these concerns were brought to the safety manager's attention, he reviewed the sign-in sheets and agreed that they were not accurate. He testified that he found the sign-in sheets in a stack of files, and, before that, he had last seen the sign-in sheets at the safety training meetings. He claimed that when he initially found the sign-in sheets, he had no reason to doubt their authenticity. The CO testified that the safety manager informed her during his deposition that "a deceased [Envision] secretary . . . was thought to have made the false documents." The CO could not follow-up with the secretary because the CO did not learn of her purported involvement until after the secretary had died.

99, 107 (2d Cir. 2002) (similar to rules concerning destruction of evidence, when "an adverse inference instruction is sought on the basis that the evidence was not produced in time for use at trial, the party seeking the instruction must show (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had 'a culpable state of mind'; and (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense").

An adverse inference may be drawn against a party for failing to produce documents if those documents were "within the party's control" and it "appear[s] that there has been an actual suppression or withholding of evidence . . . ." *Brewer*, 72 F.3d at 334; *see Jones v. Hawley*, 255 F.R.D. 51, 52-53 (D.D.C. 2009) (" '[i]t is settled beyond all question that at common law the destruction, alteration, or failure to preserve evidence in pending or reasonably foreseeable litigation warrants the finder of fact inferring that the destroyed evidence would have been favorable to the opposing party' " (cited case omitted)).[22] Based on Envision's initial production of fraudulent 2011 sign-in sheets and subsequent failure to produce the authentic ones, we infer that the names of employees who should have received training did not appear on those sign-in sheets, if indeed those sign-in sheets existed. *See, e.g., Xin Qiu Lin v. Gonzales*, 231 F. App'x 94, 96 (2d Cir. 2007) (determining, in review of immigration judge's denial of asylum and withholding of removal, that judge "was entitled to draw 'adverse inferences' from the submission of fraudulent documents, especially a marriage certificate that related to the crux of Lin's claim that he was married to a person who was forcibly sterilized").

Accordingly, we find the Secretary has established that three Envision employees did not receive the training required by the cited standards in 2011. We therefore affirm Items 2, 3b, 3c, and 5 of Citation 1. As the characterization of Items 3b and 3c is not challenged, we affirm them as repeat-serious. The characterization of Citation 1, Items 2 and 5, however, is challenged upon review.

[22] In contrast, "[n]o unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." *Brewer*, 72 F.3d at 334.

B. Willful characterization for Citation 1, Items 2 and 5

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181 (citation omitted).

> [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 . . . .

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). This state of mind is evident where " '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.' " *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted). On review, Envision does not claim it lacked a heightened awareness of the standards' requirements, but it argues that the record does not show it possessed the state of mind necessary for willfulness. According to Envision, the judge "in his haste to find willfulness, could not find any evidence of clear intent to intentionally disregard the [t]raining requirements outside of the allegation that the [t]raining just did not occur."[23]

We agree that the record fails to establish Envision intentionally disregarded the requirements of the cited standards. *See Hern Iron Works, Inc.*, 16 BNA OSHC at 1214; *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007) (noting distinction between mere negligence and willfulness), *aff'd*, 262 F. App'x. 716 (6th Cir. 2008). The judge based his

[23] In concluding that Envision had a heightened awareness of the requirements in § 1910.157(g)(2) and § 1910.1200(h)(1), the judge noted that the company was issued a citation in 2010 following OSHA's inspection of the same facility at issue here; this citation was resolved by a settlement agreement in which Envision waived its right to contest items alleging, as relevant here, violations of § 1910.157(g)(1) (fire extinguisher) and § 1910.1200(h) (HazCom). The judge specifically relied on evidence that Envision's safety manager was the plant and safety manager at the time of both the 2010 and 2012 OSHA inspections, and that during the closing conference for the 2010 inspection, the safety manager discussed with OSHA how to comply with the cited standards, and was informed that fire extinguisher and HazCom training were both required. *Altor, Inc.*, 23 BNA OSHC 1458, 1470-71 (No. 99-0958, 2011) (concluding that previous citations involving violations of fall protection standards resulted in employer's heightened awareness of OSHA's fall protection requirements), *aff'd*, 498 F. App'x 145 (3d Cir. 2012).

finding of intentional disregard solely on the safety manager's "statement to the CO at the inspection that he had not conducted training because there was no employee turnover." As discussed *supra* in footnote 16, however, we accord the CO's testimony on this issue no weight given the contradictions between her testimony and her inspection notes. Moreover, having reviewed the entirety of the record, it is not clear that the safety manager ever indicated to the CO that, prior to OSHA's inspection of the facility, he was cognizant of his failure to provide training in 2011 to the particular employees at issue here. *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1043-44 (No. 91-2834E, 2007) (consolidated) (concluding Secretary did not establish willful characterization where employer "was keenly aware of the LOTO standard and its requirements" but no evidence showed employer "appreciated its procedure was deficient"); *see also AJP Constr., Inc.*, 357 F.3d at 74 (willful state of mind is evident where "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" (internal quotation marks omitted; emphasis added)).

Accordingly, we conclude that the record does not establish that Envision intentionally disregarded the training requirements at issue under Citation 1, Items 2 and 5. *See Stanley Roofing Co.*, 21 BNA OSHC 1462, 1466 (No. 03-0997, 2006) (Secretary bears "burden of proof to show the requisite state of mind for willfulness"); *see also E.R. Zeiler Excavating, Inc.*, 24 BNA OSHC 2050, 2053 (No. 10-0610, 2014) (declining to characterize violation as willful where record is poorly developed on key evidentiary issues); *George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1983 (No. 93- 0984, 1997) (same); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1727-28 (No. 95-1449, 1999) (same). The Secretary does not claim that any other basis exists for finding these violations willful. Both items are, therefore, affirmed as serious. *Stanley Roofing Co.*, 21 BNA OSHC at 1466 (violation found serious rather than willful where seriousness was evident from record).

V. Repeat-Serious Citation 1, Item 3a—Accessibility of exposure control plan

Citation 1, Item 3a pertains to the accessibility of Envision's exposure control plan to its employees. Specifically, the Secretary alleges that "[o]n or about March 21, 2012," Envision, in violation of § 1910.1030(c)(1)(iii), failed to "ensure that a copy of the Exposure Control Plan was accessible to employees." This provision requires that "[e]ach employer . . . ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with [29 C.F.R.

§ 1910.1020(e)]."[24] Section 1910.1020(e) requires, among other things, that "[w]henever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner." The judge affirmed the violation.

On review, Envision challenges only the judge's conclusion that the Secretary established noncompliance. The judge relied in part on what he considered "an admission" by the safety manager to the CO that the company lacked an exposure control plan:

> [The CO] testified that when she inquired about Respondent's BBP Exposure Control Plan, on her first attempt to [inspect] Envision on February 16, 2012, [the safety manager] stated that the company didn't have one and that such information was communicated verbally. The plan was not provided to the [CO] until she returned on March 21, 2012 with the warrant to conduct the inspection. The fact that the . . . safety manager wasn't able to provide [the CO] a copy of the plan upon request along with his admission [to her] that it didn't exist, establishes the plan was not accessible to employees.

However, the plan Envision provided to the CO on March 21, 2012 is the same plan Envision provided to OSHA on January 3, 2011 to successfully abate a 2010 citation.[25] Although the Secretary states on review that the plan provided to the CO "did not appear to relate to Envision's Seville facility," he does not identify or discuss any specific inadequacies in the plan. Determining whether the Secretary has established noncompliance, therefore, turns solely on the accessibility of Envision's plan under § 1910.1030(c)(1)(iii), not its existence or adequacy.

Moreover, there is no dispute that when the CO returned to the facility on March 21, 2012, a copy of the plan was immediately provided to her. Because the plan was "accessible" at the time the Secretary alleges in the citation that the violation occurred ("on or about March 21, 2012"), we conclude that the record does not establish Envision's noncompliance with the cited provision.[26] Accordingly, we vacate Citation 1, Item 3a.

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[24] The Code of Federal Regulations mistakenly refers to this provision as § 1910.20(e), which was redesignated as § 1910.1020(e) in 1996. Consolidation of Repetitive Provisions; Technical Amendments, 61 Fed. Reg. 31,427, 31,429 (June 20, 1996) (final rule).

[25] As to the settlement agreement resolving the 2010 citation, Envision waived its right to contest an item that alleged a violation of § 1910.1030(c)(1)(i). The violation alleged that "[t]he employer had not compiled and made available a written [BBP] program for all workers with occupational exposure including, but not limited to the workers in the sorting area who are exposed to sharps and other potentially infectious materials while sorting the household and business wastes."

[26] We do not construe the citation's use of the phrasing "on or about March 21, 2012" as encompassing the February date—a day that was four weeks earlier. In addition, the Secretary has made no attempt to amend the citation to allege that the violation occurred on February 16, 2012,

VI. Other-than-Serious Citation 3, Item 1—Providing information on respirators

The Secretary alleges in Citation 3, Item 1 that Envision, in violation of 29 C.F.R. § 1910.134(k)(6), failed to "provide Appendix D of the respirator standard when employees voluntarily wear N-95 dust masks." This provision requires that "[t]he basic advisory information on respirators, as presented in appendix D of this section, . . . be provided by the employer in any written or oral format, to employees who wear respirators when such use is not required by this section or by the employer."

The judge affirmed the violation, finding that the cited standard was applicable because the CO testified that the safety manager "told her that Envision makes N-95 dust masks available for an employee's [voluntary] use." On review, Envision argues that no evidence shows the dust masks made available to its employees were "N-95" dust masks or any other type of respirator covered by § 1910.134(k)(6); thus, the item should be vacated because the provision does not apply. The Secretary responds that even if there is no evidence identifying the type of dust mask, this is "inconsequential" because "dust masks are defined in § 1910.134(b) as respirators."[27]

We agree that a requirement under § 1910.134(k)(6) to provide Appendix D was triggered by Envision when it made "dust masks" available to its employees for voluntary use.[28] The requirement at issue is triggered by an employee wearing any type of "respirator[] when such use is not required" by the standard.[29] Even when used colloquially, as the safety manager might have

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and nothing in the record suggests that the parties impliedly consented to try this unpleaded issue. *See McWilliams*, 11 BNA OSHC at 2129-30.

[27] Section 1910.134(b) defines "*Filtering facepiece* (dust mask)" as "a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium." There is no evidence in the record describing the type or characteristics of the masks at issue.

[28] Our holding that the cited requirement applies here is confined to the specific circumstances present in this case; we do not address whether an employer has obligations under the cited provision where the employer does not provide the respirator, such as in situations in which an employee brings his own dust mask to the workplace.

[29] "Respirator" is not defined by the standard, but the term is used broadly throughout it to refer to various types of personal air-filtering/supplying devices. *See* 29 C.F.R. § 1910.134(b) (defining "negative pressure respirator," "positive pressure respirator," "pressure demand respirator," etc.); *see also* RANDOM HOUSE UNABRIDGED DICTIONARY 1640 (2d ed. 1993) (defining respirator as "a masklike device, usually of gauze, worn over the mouth, or nose and mouth, to prevent the inhalation of noxious substances or the like").

done when speaking with the CO, "dust mask" refers to *some* type of filtering "masklike device," —a respirator.[30] As there is no dispute that Envision failed to provide the Appendix D information to its employees and no other elements of the violation are at issue, we affirm Citation 3, Item 1 as other-than-serious.

VII. Penalty

In assessing penalties, the Act requires the Commission to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The judge assessed the penalties proposed by the Secretary for each of the violations that he affirmed—$70,000 for each item characterized as willful, and $7,000 for each item characterized as either serious or repeat-serious.

Taking into consideration the gravity of the violations (two of which are no longer characterized as willful), as well as Envision's business size (*see supra* footnote 7) and its efforts to come into compliance following the 2010 citation, we find that a reduction in the penalty amounts assessed by the judge is warranted. As to gravity, we recognize the dangers posed by BBPs, particularly when employees are not adequately protected from exposure. Indeed, given the nature of the work performed by the sorters, the potential for sticks from contaminated needles is a grave concern. For the training items, however, our affirmance is limited to Envision's failure to train three of its employees. In addition, while portable fire extinguisher training is no doubt important, in the event of a fire, the presence of other employees who attended such training would mitigate the risks associated with failing to train one employee. This is not the case with respect to PPE, HazCom, and BBP training, as those types of training focus more on ensuring the safety of the individual employee.

Under these circumstances, we find it appropriate to assess the following penalties for the items affirmed in Citation 1: $5,000 for Item 1b (repeat-serious), $1,000 for Item 2 (serious), a

[30] Envision cites to *Cranesville Block Co.*, 23 BNA OSHC 1977, 1980 & n.2 (No. 08-0316, 2012) (consolidated), *rev'd on other grounds*, 878 F.3d 25 (2d Cir. 2017), to support its contention that the term "dust mask," as used colloquially by the safety manager, may not be referring to a "respirator" covered by the cited standard. In *Cranesville*, however, the factual matter at issue pertained to the specific *type* of respirator that an employee was using, not whether the term "dust mask," if used colloquially, might refer to something other than a respirator. *Id.*

single penalty of $5,000 for Items 3b and 3c (repeat-serious), and $4,000 for Item 5 (serious). For Citation 3, Item 1, no penalty is assessed.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
James J. Sullivan, Jr.
Commissioner

Dated: April 4, 2018

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ENVISION WASTE SERVICES, LLC., Respondent.	OSHRC DOCKET No. 12-1600

Appearances:

Paul Spanos, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, OH
For the Complainant

Joseph J. Brennan, Esquire, Fisher & Phillips, LLP, Cleveland, OH
For the Respondent

Before: Keith E. Bell, Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On February 16, 2012, the Occupational Safety and Health Administration ("OSHA") attempted to conduct an inspection of a worksite located at 8700 Lake Road in Seville, Ohio, based on a complaint. On March 21, 2012, OSHA returned with an administrative warrant and conducted an inspection of the worksite. Based on the inspection findings, OSHA issued a Citation and Notification of Penalty ("Citation") to Envision Waste Services ("Respondent" or "Envision") on July 10, 2012, alleging violations of the Act.

Respondent filed a timely Notice of Contest, bringing this matter before the Commission.

The Citation issued to Respondent consisted of the following alleged violations and proposed penalties:

Citation 1, Item 1a is classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.132(f)(1), based on information that employees did not receive training on the use of personal protective equipment ("PPE"). A penalty of $7,000.00 is proposed for this item.

Citation 1, Item 1b is also classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.1030(d)(3)(i) based on information and observations that some employees were not provided with PPE.[1]

Citation 1, Item 2 is classified as "Willful" and alleges that Respondent violated 29 C.F.R. § 1910.157(g)(2) based on information that employees were not provided with training on the use of portable fire extinguishers.[2] A penalty in the amount of $70,000.00 is proposed for this item.

Citation 1, Item 3a is classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.1030(c)(1)(iii), for failure to make a copy of its Bloodborne Pathogens ("BPP") Exposure Control Plan accessible to employees. A penalty in the amount of $7,000.00 is proposed for this item.[3]

Citation 1, Item 3b is classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.1030(g)(2)(ii)(A) based on information that employees did not receive training on employer's BPP program upon initial assignment.

Citation 1, Item 3c is classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.1030(g)(2)(ii)(B), based on information that employees who worked in the

[1] Citation 1, Items 1a and 1b are grouped for penalty purposes.
[2] By Order dated May 22, 2013, granting Complainant's Motion to Amend, Citation 1, Items 2 and 5 were reclassified from "Repeat-Serious" to "Willful." Citation 2, Item 1 was also reclassified from "Serious" to "Willful." The penalty for each of these citation items was increased to the statutory maximum of $70,000.00.
[3] Citation 1, Items 3a, 3b, and 3c are grouped for penalty purposes.

"sorting room" did not receive annual training on the employer's BPP program.

Citation 1, Item 4 is classified as "Repeat-Serious" and alleges that Respondent violated 29 C.F.R. § 1910.1030(f)(2)(i), based on information that the Hepatitis B vaccination was not made available to employees working in the "sorting line" within 10 working days of initial assignment. A penalty in the amount of $7,000.00 is proposed for this item.

Citation 1, Item 5 is classified as "Willful" and alleges that Respondent violated 29 C.F.R. § 1910.1200(h)(1), based on information that employees who worked on the "sorting line" were not provided with effective information and training on hazardous chemicals upon initial assignment. A penalty in the amount of $70,000.00 is proposed for this item.

Citation 2, Item 1 is classified as "Willful" and alleges that Respondent violated 29 C.F.R. § 1910.133(a)(3), when it did not provide adequate eye protection for employees who wear prescription lenses. A penalty in the amount of $70,000.00 is proposed for this item.

Citation 3, Item 1 is classified as "Other-than-Serious" and alleges a violation of 29 C.F.R. § 1910.134(k)(6), based on information that employees who wear respirators were not provided basic advisory information on respirators in written or oral form. No penalty is proposed for this item.

A hearing in this case was held on June 4-5, 2013, in Cleveland, Ohio. The parties each filed a post-hearing brief. For the reasons that follow, all items except Citation 1, Item 4 are AFFIRMED and penalties totaling $224,000.00 are assessed.

Jurisdiction

The record establishes that at all times relevant to this case, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 625(5).

Factual Background

Respondent is the operator of the Medina County processing facility which receives the entire county's sanitary waste. Tr. 406. Various independent haulers bring the waste to the facility. Tr. 406. Incoming waste includes such material as: paper, cardboard, metals glass, toys, clothing, and medical waste from the local hospital. Tr. 213-214. The hospital waste includes, among other things, needles, vials of blood, I.V. tubing (with blood still in it), and used gauze patches. Tr. 326-327. In the summer, the facility also receives human waste from port-a-pots. Tr. 327. Once the waste is received at the facility, it travels by conveyor belt into sorting rooms where recyclables are removed. Tr. 402-403.

February 16 Attempted Inspection

On February 16, 2012, the OSHA Area Office in Cleveland, Ohio sent a Compliance Safety and Health Officer ("CSHO") to conduct an inspection of Respondent at its facility located at 8700 Lake Road in Seville, Ohio. Upon arrival, CSHO Janelle Zindroski met with the Plant Manager Gary Kaufman and informed him that she was there to conduct an inspection based on a complaint. Tr. 33. The complaint concerned an issue with sharp objects. Tr. 435. In response to a request for documents, the CSHO received the following: (1) BPP Exposure Control Agenda, Dec. 30, 2010 (C-1) [4]; (2) Fire Extinguisher training records for 2010 (C-2); Hazard Communication ("HAZCOM") agenda dated December 30, 2010 (C-3); and (4) PPE agenda dated December 22, 2010 (C-4). Tr. 38-39. After providing the documents to the CSHO, Mr. Kaufman left the room to take a phone call. When he returned, he asked the inspector for a warrant. Tr. 40. The CSHO then left to obtain an administrative warrant. Tr. 41.

[4] "C" denotes Complainant's exhibit and "R" denotes Respondent's exhibit.

March 21 Inspection

CSHO Zindroski, along with another OSHA inspector, returned with an administrative warrant on March 21, 2012. Tr. 41. After presenting the warrant, the inspectors proceeded to conduct an inspection of Respondent's facility beginning in the sorting room. *Id.* During the inspection, photographs were taken and employee interviews were conducted. *Id.* The Respondent provided the CO with additional documents to include: (1) BBP Exposure Control Plan (C-7); (2) HAZCOM Program (C-6); and (3) PPE Hazard Assessment (C-13). Tr. 42.

On March 29, 2012, Respondent, through its attorney, provided the employee vaccination log for Hepatitis B (C-11) and 2011 training sign-in sheets for the following: (1) HAZCOM (C-8); (2) PPE; (3) Fire Extinguisher (C-10); and (4) BPP (C-9). The CSHO noticed that an employee that had not yet been hired was listed on a 2011 sign-in sheet and notified Envision that the 2011 training sign-in sheets may have been falsified. Tr. 45, 47-48, 450. In response, the Plant Manager Gary Kaufman, conceded that the sign-in sheets "didn't seem to be correct." Tr. 450, 455-456. Mr. Kaufman implied that [redacted] may have tampered with the sign-in sheets because she had been the only one with physical control over them. Tr. 413, 453-454. Kaufman also testified that he had no knowledge that [redacted] tampered with the sign-in sheets and that she had no history of tampering with records in her eight years of employment with Envision. *Id.* Despite the inaccurate sign-in sheets, Mr. Kaufman maintained that training did occur in 2011. Tr. 454-455.

2010 Inspection

Respondent's facility had previously been inspected by OSHA on or about August 13, 2010. Tr. 257. Based on that inspection, OSHA issued citations to Respondent for violations of the following standards: (1) §§ 1910.132, 1910.133, 1910.134 (PPE); (2) § 1910.157 (portable fire

equipment); (3) § 1910.1030 (BBP); and (4) § 1910.1200 (HAZCOM). Tr. 260-261, 264, 265-266, 268, 275. C-14. The citations were resolved as part of an informal settlement agreement. C-15.

Secretary's Burden of Proof

The Secretary has the burden of establishing that the employer violated the cited standard. "To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition." *JPC Group Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009) (citations omitted).

Serious Classification

To demonstrate that a violation was "serious" under § 17(k) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited. The Secretary need not show the likelihood of an accident occurring. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Repeated Classification

The Commission has held that a violation is repeated under § 17(a) of the Act, if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary may establish a prima facie case that a violation is repeated by showing that the two violations were of the same standard, or if they were not, that they otherwise were substantially similar. *Id*.

Willful Classification

To establish that a violation was "willful" the Secretary must prove that it was "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp*., 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995) (citations omitted), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp*., 17 BNA OSHC at 1136. "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." *Propellex Corp*., 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999) (citations omitted).

Discussion

The Hearing

At the hearing, the Secretary called the following witnesses to establish his case-in-chief: Janelle Zindroski, OSHA Compliance Officer; [redacted], Envision employee; Michael Bopp, OSHA Industrial Hygienist; [redacted], Envision employee; [redacted], Envision employee; [redacted], Envision employee; and, [redacted], Envision employee. The Respondent called the following witnesses: Gary Kaufman, Envision Plant Manager; Steven Stottsberry, Envision employee; David Hitchings, Envision employee; Patty Zaccardelli-Bart, Envision Office Manager; and, Janelle Zindroski (on rebuttal).

CSHO Janelle Zindroski and Plant Manager Gary Kaufman were the key witnesses for Secretary and Respondent respectively. Ms. Zindroski, based the Citation issued to the

Respondent, in large part, on the out-of-court statements she received from employee witnesses and Mr. Kaufman. Ms. Zindroski's testimony concerning the out-of-court statements given to her and offered for the truth of the matter asserted is, by definition, hearsay.[5] Rule 801(d)(2)(D) of the Federal Rules of Evidence provides an exception to the hearsay rule for statements by a party opponent. Such statements are treated as "non-hearsay" if made by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Fed. R. Evid. 801. All of the employee witnesses who gave the out-of-court statements of interview ("SOI" or "statement(s)") during the 2012 inspection were employees/agents of Respondent, Envision, at the time the statements were given. Thus, a determination of the facts will rest on to the credibility of the Secretary's key witness versus that of Respondent's key witness.

Janelle Zindroski

Ms. Zindroski was the CSHO assigned to inspect Envisions Waste Services facility in Seville, Ohio. Tr. 32. She has been employed with OSHA for 3½ years and holds an undergraduate degree in environmental health with an emphasis on industrial hygiene. Tr. 26. She has training and work experience with BPP as well as HAZCOM. Tr. 28-30.[6] Ms. Zindroski has work experience in PPE which includes serving as the coordinator of health and safety programs for OSHA. She also conducts training at OSHA's Occupational Training Institute ("OTI") on PPE programs. Tr. 31. Additionally, she has received training at OTI on how to evaluate a fire extinguisher program. *Id*.

[5] As a procedural matter, it should be noted that Respondent failed to make a timely objection to this testimony as required by Federal Rule of Evidence 103(a)(1).

[6] Ms. Zindroski received part of her work experience with HAZCOM evaluating factories in Ethiopia and conducting training on reading and understanding material safety data sheets, as well as sampling.

During her testimony, Ms. Zindroski's demeanor was calm on both direct and cross-examination. Also, she frequently made eye contact with the undersigned when answering questions. When asked how she felt about Respondent's demand for a warrant, she simply stated, "it's an employer's right." Tr. 40. Ms. Zindroski had not inspected Envision prior to this inspection. *Id*. For all of the foregoing reasons, I find Ms. Zindroski to be credible and I accord full weight to her testimony.

Evidentiary Conflicts and Witness Credibility

Much of the government's case rests upon out-of-court statements. The following witnesses gave statements of interview ("SOI" or "statement") to the CSHO during the inspection which served, in part, as the basis for the violations at issue in this case: (1) [redacted]; (2) [redacted]; and (3) [redacted].[7] However, each individual's testimony under oath at the hearing, to varying degrees, told a different story and often amounted to a recant of the SOI. The Secretary did not admit the SOI's into evidence, but rather used selected portions to impeach these witnesses when their testimony contradicted their SOI's. These employee witnesses were called as part of the government's case-in-chief.[8]

Generally, statements made outside of court which are then offered in court for the truth of the matter asserted are "hearsay" and not admissible as evidence. Fed. R. Evid. 801(c).[9] Here, the employee witnesses told one story in their SOIs and a different story at the hearing. As a result, each was confronted with the inconsistency of the prior statements made in their SOI. A witnesses' prior out-of-court statement is admissible if it is: (1) inconsistent with his/her in court testimony; and (2) was given under penalty of perjury at a trial, hearing, or other proceeding or

[7] Two executives from Envision were present during the testimony of the employees: Steve Viny, CEO and Clayton Minder, CFO. Tr. 6.
[8] If the SOIs had been offered into evidence, they may have qualified for admission as an opposing party's statement. Fed. R. Evid. 801(d)(2)(D).
[9] The Commission applies the Federal Rules of Evidence. 29 C.F.R. § 2200.71.

in a deposition. Fed. R. Evid. 801(d)(1)(A). The SOIs given by these witnesses fail to meet the second prong of that test because they weren't given under penalty of perjury. Tr. 147. Prior inconsistent statements that do not meet the test of Rule 801(d)(1)(A) may be admitted into evidence for impeachment purposes, but not as substantive evidence. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 801.21 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2013).

[redacted]

[redacted] has been an employee of Envision since September 2011. Tr. 281, 293. She is a sorter on the conveyor line which requires her to split open trash bags and sort out certain items, such as newspapers and cardboard, from the trash as it moves down the conveyor. Tr. 281-284. During OSHA's inspection of Envision, she signed the SOI she provided to the CSHO.[10]

In her statement to the CSHO, she said that she had not been trained on BPP, HAZCOM, fire extinguishers, and had been told that wearing only her prescription glasses was okay. Tr. 287-290. However, her testimony at the hearing was quite different.

For example, [redacted] denied telling the CSHO that she wasn't trained on BPP, and instead, testified that she had been trained. Tr. 287. She denied telling the CSHO that she did not receive training on fire extinguishers. Tr. 288. [redacted] also denied telling the CSHO that she had not received training on the company's HAZCOM program. Tr. 290. To the contrary, [redacted] testified that she received training from Mr. Kaufman, the Plant Manager, on: (1) HAZCOM; (2) Fire Extinguishers; and (3) BPP. Tr. 298, 300-302. When asked about her prior statement to the CSHO that wearing prescription glasses only was okay, she responded by saying that she also wears her safety glasses. Tr. 289.

[10] During the inspection, CSHO Zindroski asked questions and recorded answers as a SOI; she then had each person sign the SOI. Tr. 152, 293-94.

I find that the out-of-court statement given by [redacted] is credible in that it was given at an earlier time when the facts in question were fresher in her mind. Further, I find that [redacted] gave the statement when she was not facing her employer thereby placing herself at risk by making statements against Envision's interest. [redacted] testified that she did not think she would get into trouble for not signing her SOI. Tr. 294. This is an indication that she was not under duress or threat of coercion when giving her statement to the CSHO.

In weighing [redacted] SOI against her in-court testimony, I also considered her demeanor on the stand. At times, her testimony at the hearing seemed coerced and rehearsed. For example, during her testimony she declared that she had been trained on BPP before the Secretary's attorney could finish asking her about her prior statement to OSHA that she had not been trained on BPP. Tr. 287. She did not make eye contact with the undersigned even when answering questions. Also, she seemed very defensive while answering questions on direct examination.

In view of the fact that [redacted] SOI was offered for impeachment purposes only during her direct examination, I do not treat it as substantive proof; however, I do find that it substantially contradicts her in-court testimony. For these reasons, I accord little weight to her testimony at the hearing.

[redacted]

[redacted] has been an employee of Envision for approximately 15 years. Tr. 334. His current job is a sorter in Room 1. This job requires him to sort out paper and bulk items. *Id*. During the inspection, he also gave a signed SOI to OSHA. Tr. 339-340. Like [redacted], at the hearing, [redacted] told a very different story from the one he told the CSHO in his SOI. For example, he denied telling OSHA that he did not have safety glasses and that his prescription glasses were "good enough." Tr. 343-344. He also denied telling OSHA that he did not receive

any HAZCOM training. Tr. 345. [redacted] was confident that when there is training he always signs the training "sign-in" sheet. He was also confident in his testimony that he received firefighting training from Steve Stottsberry, an Envision employee, who is also a volunteer firefighter. Tr. 342, 349-350. However, when confronted with Envision's firefighting training sign-in sheet that did not include his name, he admitted that his name would not be on the sheet if he "wasn't there at work that day." Tr. 357-358. Finally, he did concede that his name was not on the firefighting training sign-in sheet. C-10; Tr. 358.

I find that the out-of-court SOI given by [redacted] is credible in that it was given at an earlier time when the facts in question were fresher in his mind. Further, I find that [redacted] gave the statement when he was not facing his employer thereby placing himself at risk by making statements against Envision's interest. Although [redacted] testified that he signed the SOI only because he felt it was part of his job, he made no claim of coercion by the CSHO. Tr. 355-356. In weighing [redacted]' SOI against his in-court testimony, I also considered his demeanor on the stand. For example, he did not make eye contact with the undersigned and seemed to be very defensive during direct examination.

In view of the fact that [redacted]' SOI was offered only for impeachment purposes during his direct examination, I do not treat it as substantive proof; however, I do find that it substantially contradicts his in-court testimony. For these reasons, I accord little weight to his testimony at the hearing.

[redacted]

[redacted] has been employed by Envision since February 2007. Tr. 362. At the time of the inspection, she was a room supervisor/sorter. Tr. 363. She has been a supervisor at Envision for five years. Tr. 364.

[redacted] gave a signed SOI to OSHA during the inspection. Tr. 365. Unlike [redacted] and [redacted], [redacted] did not recant her entire SOI at the hearing. Initially, she denied telling the CSHO that Envision had not provided her with any training for the past year. Tr. 366. She also testified that she did not remember telling the CSHO that she hadn't been trained on Envision's PPE hazard assessment. Tr. 368. She testified that she received BPP and HAZCOM training conducted by Gary Kaufman in the fall of 2011. Tr. 370, 373. She also testified that the gloves being used at Envision were not cut resistant and that she's spoken to Gary about this many times. Tr. 390. In response to my questions about which of the statements in her SOI that she still agreed with, [redacted] agreed with the following statements:

- [T]he "gloves don't work. They are not puncture resistant." Tr. 382.
- "[I]n two weeks I've had to pull glass out of my fingers." Tr. 383.
- "Gary told me as long as I wear my prescription glasses, I don't have to wear my safety glasses." Tr. 385.
- She had never been trained on evacuation procedures in the event of a fire. Tr. 386.

In weighing Robertson's SOI against her in-court testimony, I also considered her demeanor on the stand. For example, she did make eye contact with the undersigned and appeared to be calm and relaxed while answering questions about her SOI. [redacted] testified that she did not feel coerced into signing her SOI. Tr. 381. In contrast, other parts of her testimony seemed coerced and rehearsed. For example, the undersigned had to admonish her about offering answers before Respondent's attorney could finish the questions on cross-examination. Tr. 372.

In view of the fact that [redacted]'s SOI was offered for impeachment purposes only, I do not treat it as substantive proof; however, I do find that it contradicts her in-court testimony, in part. For these reasons, I accord some weight to her testimony at the hearing, to the extent it is corroborated or consistent with other evidence.

Gary Kaufman

Mr. Kaufman is currently employed by Envision as the first shift plant manager, safety manager, and third shift maintenance crew/cleaning crew supervisor. Tr. 393, 471. His responsibilities include supervising daily operations and conducting safety meetings. Tr. 394. Mr. Kaufman has a bachelor's degree in health and education. Tr. 472. Mr. Kaufman did not receive any formal training for his position as safety manager. Tr. 405-406, 472. He testified that his knowledge of health and safety is based on his own experience along with Internet research. Tr. 402, 462. He was the plant manager and safety manager for Envision at the time of both the 2010 and 2012 OSHA inspections. Tr. 33, 263, 395, 474.

Mr. Kaufman testified that he did recall the 2010 inspection and that citations were issued to Envision. Tr. 395. He also testified that after the 2010 inspection Envision implemented a "formal lockout, tag-out program and a risk assessment and a formal Blood-Borne Pathogen and Hazardous Communication [program]." Tr. 396. The changes to the safety policy were done with the assistance of an outside safety consultant hired by Envision, Steve Ogle. Tr. 396.

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that because Envision doesn't have a lot of turnover he had not done any training. Tr. 51. Interestingly, he also told the CSHO that Envision had eight or nine new hires since 2010. Tr. 62, 69, 106.

As a result of the 2010 inspection and resulting Citation, Envision hired a safety consultant, Steve Ogle, who provided, *inter alia*, the creation of a HAZCOM program. Tr. 399. When asked about the creation of a written BPP program, Mr. Kaufman testified that he developed this document with the assistance of Envision's attorney, Joseph Brennan. *Id*. Also, after the 2010 inspection he utilized the Internet for self-education. Tr. 401-02.

Regarding health and safety at Envision, he told the CSHO that he wasn't very familiar with what he was required to do and no one told him when he was supposed to provide training for employees. *Id*. Yet, on direct examination at the hearing, he testified that Steve Ogle, an expert in OSHA requirements, suggested that safety trainings be conducted once a month. Tr. 396-398. Kaufman conceded that he has no training on OSHA regulations and compliance nor does he have a copy of the regulations. Tr. 410. He provided new hires with initial training by reviewing highlights of Envision's safety manual. Tr. 422. In addition to oral presentations, Mr. Kaufman utilized a series of VHS tapes as part of Envision's safety and health training program. Tr. 479-480. Mr. Kaufman confirmed that he is the "Responsible Safety Officer" referred to in Envision's safety manual. Tr. 482.

Regarding training in 2011, Mr. Kaufman testified that fire extinguisher training was conducted in the fall and led by Steve Stottsberry, who is an Envision employee and volunteer firefighter. Tr. 408-409. Mr. Kaufman testified that except for the firefighting training, he alone conducted all other training. *Id.* at 409. He testified that BPP training was conducted in November 2011. Tr. 413-414. According to Mr. Kaufman, HAZCOM training was conducted on the same day as the BPP training. Tr. 416. PPE training was addressed during a new hire's initial training as part of the review of Envision's safety manual. Tr. 422. Employees signed

employee training certifications for initial PPE training after reviewing the safety manual with Mr. Kaufman. R-7.

In November 2010, Mr. Kaufman used a PPE assessment data form provided by Mr. Ogle to conduct a safety audit. Tr. 431, 433. With regard to safety glasses, Mr. Kaufman recorded "appropriate safety glasses **or** prescription glasses." *Id.* at 433. He believed that prescription glasses were sufficient based on the lack of eye injuries. Tr. 434. Mr. Kaufman denied telling the CSHO that Envision didn't offer Hepatitis B vaccines. Tr. 459. Finally, regarding the CSHO's note referencing his comment that he "got stuck doing health and safety . . . ," Mr. Kaufman didn't deny making the comment but rather testified that he was "unclear as to how this refers to anything." Tr. 460.

Mr. Kaufman's testimony concerning training conducted in 2011 is at odds with the testimony of CSHO Zindroski whose testimony I have fully credited. Additionally, his contention that training was conducted is not supported by credible documentary evidence such as sign-in sheets or written agendas. The SOI statements of employee witnesses also indicate a lack of training at Envision. There are inconsistencies in Mr. Kaufman's own testimony that there was a lack of employee turnover at Envision, yet eight or nine employees were hired since 2010. Additionally, there is Mr. Kaufman's statement that no one told him when training should be done which contradicts his testimony that Steve Ogle had suggested training be conducted at least once a month. For the foregoing reasons, I find Mr. Kaufman's testimony to be less than credible and I accord his testimony little weight.

Training Records

According to Mr. Kaufman, Envision uses sign-in sheets created by the administrative assistant to memorialize the names of attendees at training. Tr. 411. The administrative assistant

was responsible for collecting and maintaining the sign-in sheets. Tr. 412-413. In 2011, [redacted] at Envision. Tr. 413. At the end of each training session she collected the sign-in sheets.[11] Tr. 417. Mr. Kaufman testified that if an employee missed a training session, he offered an individual make-up session. Following the make-up session, the employee would sign the same sign-in sheet as those who attended the initial training session. Tr. 419. Mr. Kaufman testified that [redacted] was the only person with physical control over the sign-in sheets. Tr. 453-454. Despite the implication that [redacted] may have tampered with the sign-in sheets, Kaufman admitted that he had no knowledge of such an occurrence. Moreover, during her eight-year tenure at Envision, [redacted] had no known history of tampering with company records. Tr. 453-454.

The name of one employee, [redacted], appeared on a sign-in sheet that pre-dated his employment with Envision. Tr. 47, 451. Also, the names of two Envision employees who were employed at the time of the alleged September 2011 firefighting training are missing from the sign-in sheets: (1) [redacted]; and (2) [redacted]. Tr. 62-63; R-10. Regardless of who may have tampered with the sign-in sheets, Kaufman conceded that the sign-in sheets presented were not correct. Tr. 180-181, 455-456.

I find that the testimony regarding these sign-in sheets renders them an unreliable source of evidence in this case. The absence of accurate sign-in sheets, in and of itself, is not dispositive of the question of whether training was actually conducted. However, when considered in

[11] [redacted] had been having serious health issues prior to her death that caused her to miss work during the last few months of 2011. Tr. 437. On January 16, 2012, [redacted] tendered her resignation indicating that she would be leaving at the end of March or when a replacement could be hired. R-10. [redacted] passed away prior to her effective retirement date. Tr. 439.

conjunction with credible testimonial evidence, it strengthens the government's argument that Envision failed to conduct training as required.[12]

The Citations

Rather than numerical order, the citations are presented by subject matter in the following sequence: training, PPE, Hepatitis B vaccines, BBP program, and N-95 mask information.

Citation 1, Item 2 -- Alleged "Willful" violation of 29 C.F.R. § 1910.157(g)(2)

The Portable Fire Extinguisher regulation found at 29 C.F.R. § 1910.157(g) states in pertinent part:

> (g)(1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting.
>
> (g)(2) The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

In his Citation, the Secretary alleges:

> 29 CFR 1910.157(g)(2): The educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting was not provided to all employees upon initial employment, and at least annually; On or about March 21, 2012, the employer did not provide annual training for portable fire extinguishers when available for employee use:
>
> Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.157(g)(l), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 03, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

[12] In reaching this conclusion, I also considered the testimony of witnesses Steve Stottsberry and David Hitchings. Like Mr. Kaufman, their testimony concerning training is unsupported by the quantum of evidence to the contrary and any credible documentary evidence.

1. Applicability

The cited standard requires employers who provide portable fire extinguishers for use by employees to provide training on their use and the hazards that can be encountered when fighting a fire in its early stages. Respondent's safety manual states, "[p]ortable fire extinguishers are provided…" and "[a]ll employees are periodically instructed in the use of extinguishers and fire protection procedures." R-8 at pg. 11. Therefore, I find that this standard applies to the condition cited.

2. Non-compliance

According to CSHO Zindroski, she asked Plant Manager Kaufman why there were no 2011 training documents available and he stated that due to the lack of turnover at Envision, no training had been done. Tr. 51. This statement is corroborated by the SOI's given by: [redacted] and [redacted]. Tr. 288, 366. Employee [redacted], who testified that he always signs the sign-in sheets, conceded that he must not have been at work for the training since his name did not even appear on the sign-in sheets. Tr. 342, 357-358. Ultimately, during testimony, Mr. Kaufman admitted that the sign-in sheets presented were inaccurate. Tr. 180-181, 455-456, 500. As a result, there is no objective, credible documentary evidence to support Respondent's contention that firefighting training was conducted in 2011. Accordingly, I find that Respondent did not conduct firefighting training in 2011.

3. Employee exposure

Based on my finding that no firefighting training was conducted in 2011, employees were exposed to hazards resulting from non-compliance with this standard.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety Officer in Envisions written safety program. Tr. 482. Moreover, he was the safety manager for Envision and such training was part of his responsibility. Tr. 394, 471. Based on Mr. Kaufman's statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision's knowledge is established.

With respect to the willful characterization, I find that Envision knew or could have known of OSHA's requirement for fire extinguisher training. Gary Kaufman was the plant and safety manager for Envision at the time of the 2010 and 2012 inspections. Tr. 33, 263, 395, 474. During the closing conference of the 2010 inspection, Mr. Kaufman met with OSHA Industrial Hygienist, Michael Bopp to discuss recommendations for compliance with this standard. Tr. 254-255, 265. In particular, Mr. Bopp told Kaufman that training on the use of fire extinguishers was required. *Id.*

Additionally, an Envision representative[13] signed an informal settlement agreement based on the 2010 inspection which also shows that Envision knew or could have known of OSHA's requirement. I find that Envision, through the 2010 inspection's closing conference, citations and settlement agreement, had a heightened awareness of the requirement. As discussed above, I find there is no credible evidence that employees were provided with training. Further, Mr.

[13] The name of the individual signing on behalf of Envision is in cursive and therefore, difficult to read. C-15.

Kaufman intentionally disregarded the training requirement when he failed to ensure that every employee received annual training in 2011. The Secretary has met his burden and proved a willful violation.

Citation 1, Item 3b -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A)

The Bloodborne Pathogen Training regulation found at 29 C.F.R. §1910.1030(g)(2)(i) and (ii) states in pertinent part:

> (2) *Information and Training*. (i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program. (ii) Training shall be provided as follows: (A) At the time of initial assignment to tasks where occupational exposure may take place; (B) At least annually thereafter.

The Secretary alleges:

> The employer did not ensure that training was provided to employees with occupational exposure at the time of initial assignment to tasks where occupational exposure might take place: On or about March 21, 2012, the employer did not train employees on the Bloodborne Pathogen Program at the time of initial assignment:
>
> Envision Waste Services, LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(l)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

The standard requires employers whose employees have "occupational exposure" to provide BBP training upon initial assignment. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent's employees are

exposed to human waste from port-a-pots in the summer. *Id*. at 327. I find that the standard applies to the condition cited.

2. Non-compliance

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn't have a lot of turnover so he hadn't done any training. Tr. 51. [redacted] was hired by Envision in September 2011. Tr. 281. In her SOI and again at the hearing, [redacted] stated that she was familiar with BPP because she worked in a nursing home. Tr. 287. Though she denied it at the hearing, [redacted] told the CSHO that she had not been trained on BPP. Tr. 287. Her SOI concerning lack of BPP training corroborates Mr. Kaufman's admission that he didn't do any training in 2011. I find that these statements taken together along with the absence of any objective, credible documentary evidence of training establish that BPP training was not conducted at initial assignment for [redacted].

3. Employee exposure

[redacted] is a "sorter" who separates the trash as it comes down the conveyor belt. Tr. 284. [redacted] who is also a "sorter" and a supervisor testified that she knows of two employees in her sorting room who were stuck by needles. Tr. 328.[14]

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and**

[14] Envision instructed its employees on two policies: hands-off, and take/pull from the top. The "hands off" policy instructs employees not to touch medical waste but rather let it pass. Tr. 310. The "take/pull from the top" policy instructs employees to refrain from digging into the trash but rather take/pull from the top only. Tr. 311. These policies, at best, could only reduce the exposure of employees to hazards such as needle-sticks. The needle-sticks demonstrate that despite these policies, such exposures do occur. In any case, these policies do not negate the violations cited.

regulations necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Envision had a BBP Exposure Control plan in place at the time of the violation which required "training upon hiring."[15] C-7, pp. 1-2. Based on Mr. Kaufman's statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision's knowledge of the violation is established.

CSHO Zindroski testified that BBP training is needed due to the hazard of needle-sticks at this facility. Needle-sticks could expose employees to Hepatitis B which, if not treated, can be permanently disabling and even lethal. Tr. 67. Accordingly, I find that this violation is properly classified as "Serious."

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14. That citation became a final order as part of an informal settlement. C-15. The 2010 citation was for a different subsection of the same standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. Both citations are for the hazard of employees in the sort room exposed to bloodborne pathogens through needle-sticks and are substantially similar. I find the Secretary has established a "repeat" violation for this item.

Citation 1, Item 3c -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(B)

Subsection (B) of 29 C.F.R. § 1910.1030(g)(2)(ii) adds the requirement that such training be conducted at least annually thereafter.

The Secretary alleges:

> 29 CFR 1910.1030(g)(2)(ii)(B): The employer did not ensure that the training was provided to employees with occupational exposure at least annually: On or about

[15] Envision's plan also requires the training be done by a "qualified medical professional." C-7 at pgs. 1-2. However, the OSHA standard does not require a qualified medical professional to conduct the training.

> March 21, 2012, the employer did not provide annual training to employees in the Sorting Room on the Bloodborne Pathogen Program:
>
> Envision Waste Services, LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(l)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

The standard requires employers whose employees have "occupational exposure" to provide training annually. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent's employees are exposed to human waste from port-a-pots in the summer. *Id*. at 327. I find that this standard applies to the condition cited.

2. Non-compliance

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn't have a lot of turnover so he hadn't done any training. Tr. 51. I find that this statement and the absence of any objective, credible documentary evidence of such training establish non-compliance with the cited standard.

3. Employee exposure

Based on Mr. Kaufman's admission that no training was conducted in 2011, I find that all Envision employees working at this facility were exposed.

4. Employer knowledge

Envision had a BBP Exposure Control plan in place at the time of the violation which required annual training. C-7, pp. 1-2. As discussed above, Mr. Kaufman's knowledge of the

lack of training provided is imputed to Envision. Envision's knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation immediately preceding this one, I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14. That citation became a final order as part of an informal settlement. C-15. The 2010 citation was for a different subsection of the same standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. Both citations are for the hazard of employees in the sort room exposed to bloodborne pathogens through needle-sticks and are substantially similar. I find the Secretary has established a "repeat" violation for this item.

Citation 1, Item 5 -- Alleged "Willful" violation of 29 C.F.R § 1910.1200(h)(1)

The Hazard Communication standard found at 29 C.F.R. § 1910.1200(h)(1) states in pertinent part:

> (1) 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. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

The Secretary alleges:

> 29 CFR 1910.1200(h)(1): The employer did not 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 had not previously been trained about was introduced into their work area; On or about March 21, 2012, the employer did not provide training to new employees on the hazardous chemicals such as household chemicals and

> industrial chemicals that include used motor oil, organics, and engineered fuel fractions that come through on the sorting line at the time of their initial assignment:
>
> Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1200(h), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 06(b), and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

This standard requires employers whose employees are exposed to hazardous chemicals to provide training upon initial assignment and whenever a new chemical is introduced to the workplace. CSHO Zindroski testified that Envision employees are exposed to hazardous chemicals such as: (1) Grimebuster; and (2) motor oil. Tr. 79-82. The hazards associated with Grimebuster are skin irritation and chemical burns. *Id*. at 81. A hazard associated with motor oil skin irritation. *Id*. at 82. I find that this standard applies to the condition cited.

2. Non-compliance

During the 2012 inspection, when asked about the 2011 training documents, Mr. Kaufman told the CSHO that Envision doesn't have a lot of turnover so he hadn't done any training. Tr. 51. This admission by Mr. Kaufman is corroborated by the SOI of both [redacted] and [redacted] who told OSHA that they didn't receive HAZCOM training at initial assignment. Tr. 290, 345. I find that these statements and the absence of any objective, credible documentary evidence of such training establish non-compliance with the cited standard.

3. Employee exposure

The Secretary did not establish when the chemicals, Grimebuster and motor oil, were introduced into the workplace; the standard only requires training upon initial assignment and whenever a new chemical is introduced into the workplace. However, [redacted] and [redacted]

both stated in their SOI's that the never received HAZCOM training. Tr. 290, 345. Their statements along with the statement of Mr. Kaufman that he did not do any training in 2011 establish employee exposure to the hazards resulting from non-compliance with the cited standard.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety Officer in Envision's written safety program. Tr. 482. Moreover, he was the safety manager for Envision and such training was part of his responsibility. Tr. 394, 471. Envision had a HAZCOM program in place at the time of the violation which required "hazard-specific training for employees. C-8, pp. 43, 45. Based on Mr. Kaufman's statement to the CO at the inspection that he had not conducted training because there had been no employee turnover, he had actual knowledge of the violative condition, which is imputed to Envision. Envision's knowledge of the violation is established.

With respect to the willful characterization, I find that Envision knew or could have known of OSHA's requirement for HAZCOM training. Gary Kaufman was the plant and safety manager for Envision at the time of the 2010 and 2012 inspections. Tr. 33, 263, 395, 474. During the closing conference of the 2010 inspection, Mr. Kaufman met with OSHA Industrial Hygienist, Michael Bopp to discuss recommendations for compliance with this standard. Tr. 254-255, 265. In particular, Mr. Bopp told Kaufman that HAZCOM training was required. *Id.*

Additionally, an Envision representative signed an informal settlement agreement based on the 2010 inspection which also shows that Envision knew or could have known of OSHA's requirement. I find that Envision, through the 2010 inspection's closing conference, citations and settlement agreement, had a heightened awareness of the requirement. As discussed above, I find there is no credible evidence that employees were provided with training. I also find that Kaufman intentionally disregarded the training requirement of the standard when he failed to conduct training for employees, [redacted] and [redacted]. The Secretary has established a "willful" violation for this item.

Citation 1, Item 1a -- Alleged "Repeat-Serious" violation of 29 CFR § 1910.132(f)(1)

The Personal Protective Equipment standard found at 29 C.F.R. § 1910.132(f)(1) states:

> (f) Training. (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following: (i) When PPE is necessary; (ii) What PPE is necessary; (iii) How to properly don, doff, adjust, and wear PPE; (iv) The limitations of the PPE; and, (v) The proper care, maintenance, useful life and disposal of the PPE.

The Secretary alleges:

> 29 CFR 1910.132(f)(1): The employer did not provide training to each employee who is required by this section to use personal protective equipment: On or about March 21, 2012, the employer did not train new employees who are required to use personal protective equipment such as safety glasses, gloves, and bump caps:
>
> Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.132(d)(2), which was contained in OSHA Inspection Number 314808163, Citation Number 02, Item Number 01, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

The standard requires an employer to provide training to employees who are required under this section to use PPE. Envision's safety manual states, "[p]roper safety equipment is necessary for your protection." R-8 at p. 9. I find that this standard applies to the condition cited.

2. *Non-compliance*

The record reveals that Mr. Kaufman provided PPE training to new employees upon initial hire. R-7. However, the standard requires training on "[w]hat PPE is **necessary**." (emphasis added). As discussed below in Citation 2, Item 1, employees who wear prescription lenses must wear protective lenses, either over their prescription lenses or be incorporated into their prescription lenses. Kaufman testified that Envision's policy toward safety glasses was that an employee had to wear them **or** prescription glasses. (emphasis added). Tr. 434. However, Envision's safety manual states that: "[E]mployees who need corrective lenses are required to wear only approved safety glasses, protective goggles, or other medically approved precautionary procedures when working in areas with harmful exposures, or risk of eye injury." R-8, p. 25.

Employee [redacted], testified that she agreed with her SOI statement that, "Gary told me as long as I wear my prescription glasses, I don't have to wear my safety glasses." Tr. 385. CSHO Zindroski testified that compliance with this standard requires that if an employee wears prescription glasses, they must have impact resistant lenses and side shields. Tr. 84. Based on the foregoing, Envision did not train its employees on the use of proper equipment for eye protection and failed to comply with the cited standard.

3. *Employee exposure*

CSHO Zindroski testified that she observed a sorting room supervisor wearing only prescription glasses. Tr. 85; C-5. I find that the lack of training on proper protective eyewear for employees with prescription lenses exposed those employees to eye hazards.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Based on Mr. Kaufman's testimony he did not train employees wearing prescription lenses on the use of proper eye protection. His knowledge is imputed to Envision. Envision's knowledge of the violation is established.

CSHO Zindroski testified that lack of adequate eye protection exposes employees to serious eye injuries, including metal shards and chemical burns. Tr. 86-87. I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated characterization, I find that the Secretary has not established the required substantial similarity between the current violation and the 2010 citation that she relies on. The prior citation of 29 C.F.R. § 1910.132(d)(2) alleged that Envision had not conducted and provided a written workplace hazard assessment for PPE. C-14. While both are generally related to PPE hazards, the prior citation for lack of written assessment is too attenuated from the current citation's training violation to be substantially similar. The record was deficient with respect to the evidence needed to sustain a repeated violation. Therefore, I find the evidence supports a "serious" violation for this item.

Citation 1, Item 1b -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(d)(3)(i)

This subsection of the Bloodborne Pathogens standard states in pertinent part:

> (3) *Personal protective equipment*---(i) *Provision*. When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but no 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.

The Secretary alleges:

> 29 CFR 1910.1030(d)(3)(i): When there was occupational exposure, the employer did not provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields, masks, eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices: On or about March 21, 2012, the employer did not provide puncture resistant gloves for employees who come in contact with used needles on the Sorting Line.
>
> Envision Waste Services LLC was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

This standard requires employers whose employees are exposed to BPP to provide appropriate PPE. The record reveals that Envision employees are exposed to hospital waste to include: needles, I.V. tubing containing blood, and used gauze patches. Tr. 326-327. I find that this standard is applicable to the condition cited.

2. Non-compliance

CSHO Zindroski testified that Mr. Kaufman admitted that he did not have puncture resistant gloves. Tr. 54. She testified that the gloves used by Envision employees would not prevent needle-sticks. Tr. 57.

3. Employee exposure

Envision employee, [redacted], testified that she knows of two employees who were stuck by needles in her sorting room. Tr. 328. [redacted] testified that the gloves do not work because they are not puncture resistant. Tr. 382. She further testified that she had pulled glass out of her fingers. Tr. 383. I find that the testimony of these employees along with Mr. Kaufman's admission that the company did not have puncture resistant gloves establishes that all Envision employees were exposed to the hazards resulting from non-compliance with this standard.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. As the safety manager for Envision, I find that Mr. Kaufman knew or could have known that employees did not have adequate gloves to prevent needle-stick injuries. His knowledge is imputed to Envision; knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation of 29 C.F.R. § 1910. 1030(g)(2)(ii)(A), I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of § 1910.1030(c)(1)(i). C-14 at p.8. The 2010 citation was for a different subsection of the bloodborne pathogen standard at issue here; it was a violation of the requirement to have a BBP exposure control plan. *Id.* In the violation description, the following was noted as the hazard requiring a program: "workers in the sorting area who are exposed to sharps." C-14 at p. 8. Envision was also cited in 2010 for not providing adequate PPE and in particular "for all hazards on site such as possible skin cuts or punctures and proper gloves etc." C-14 at p. 10. The 2010 citation became a final order as part of an informal settlement agreement. C-15. Both the 2010 and current citations are for the hazard of employees exposed to bloodborne pathogens through skin punctures and, thus, are substantially similar. I find that the Secretary has established a "repeat" violation for this item.

Citation 2, Item 1 -- Alleged "Willful" violation of 29 C.F.R. § 1910.133(a)(3)

This subsection of the Personal Protective Equipment standard states in pertinent part:

> The employer shall ensure that each affected employee who wears prescription lenses while engaged in operations that involve eye hazards wears eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses.

The Secretary alleges:

> 29 CFR 1910.133(a)(3): The employer shall ensure that each affected employee who wears prescription lenses while engaged in operations that involve eye hazards wears eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses: On or about March 21, 2012, the employer did not provide eye protection for employees who wear prescription lenses.

1. Applicability

This standard requires employers whose employees wear prescription glasses to ensure that the prescription glasses are designed to protect against hazards or require employees to wear safety glasses over prescription glasses. CSHO Zindroski observed an employee wearing prescription glasses that were not adequate eye protection. Tr. 85. I find that this standard is applicable to the condition cited.

2. Non-compliance

CSHO Zindroski testified that she observed a sorting room supervisor wearing only prescription glasses. Tr. 85. C-5. Employee [redacted], testified that she agreed with her previous statement that, "Gary told me as long as I wear my prescription glasses; I don't have to wear my safety glasses." Tr. 385. I find that the evidence shows Envision's non-compliance with the cited standard.

3. Employee exposure

Mr. Kaufman's testified that Envision's policy for safety glasses was that an employee had to wear either safety glasses **or** prescription glasses. (emphasis added). Tr. 434. I find that Kaufman's testimony along with that of [redacted] concerning the use of prescription glasses instead of safety glasses establishes that Envision employees were exposed to the hazards resulting from non-compliance with the cited standard.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman confirmed he is the Responsible Safety

Officer in Envision's written safety program. Tr. 482. Mr. Kaufman's testimony shows he knew that employees were wearing prescription lenses instead of safety glasses. His knowledge is imputed to Envision; knowledge of the violation is established.

With respect to the willful characterization, Envision had heightened awareness of the requirement to use safety glasses and intentionally disregarded that requirement. The 2010 inspection included a citation that the employer must assess the PPE needs of its employees. C-14. Mr. Kaufman was the plant manager and safety manager at the time of the 2010 inspection. Mr. Kaufman testified that he worked with the consultant, Gary Ogle, that Envision hired after the 2010 inspection. As a result of this consultation, Mr. Kaufman conducted a PPE hazard assessment in November 2010. Tr. 431, 509; C-13. In that assessment, Mr. Kaufman identified safety glasses as necessary PPE for the hazards of flying debris in the sort room. C-13.

Additionally, Envision's safety manual states:

> [E]mployees who need corrective lenses are required to wear only approved safety glasses, protective goggles, or other medically approved precautionary procedures when working in areas with harmful exposures, or risk of eye injury. R-8, p. 25.

I find that the 2010 citation, the consultation with Mr. Ogle, and the PPE risk assessment put Mr. Kaufman, on behalf of Respondent, on heightened awareness of the requirement to have every employee using prescription glasses that had protective safety features or have protective safety glasses to wear over the prescription lenses. Mr. Kaufman was responsible for ensuring safety at the facility but did not enforce Envision's written policy that approved safety glasses are needed. I find that Kaufman intentionally disregarded the standard when he failed to require employees to wear the appropriate eyewear and instead told them just wearing their prescription lenses were sufficient. A willful violation has been established for this item.

Citation 1, Item 3a -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(c)(1)(iii)

This subsection of the Bloodborne Pathogens standard states in pertinent part:

> (iii) Each employer shall ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with 29 CFR 1910.20(e).

The Secretary alleges:

> 29 CFR 1910.1030(c)(l)(iii): The employer did not ensure that a copy of the Exposure Control Plan was accessible to employees, in accordance with 29 CFR 1910.1020(e): On or about March 21, 2012, the employer did not make the Exposure Control Plan accessible to employees at the facility:
>
> Envision Waste Services LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

This standard requires employers to make their BPP Exposure Control Plan accessible to employees. Envision has a written BPP Exposure Control Plan. C-7. I find that this standard is applicable to the condition cited.

2. Non-compliance

CSHO Zindroski testified that when she inquired about Respondent's BPP Exposure Control Plan, on her first attempt to inspection Envision on February 16, 2012, Kaufman stated that the company didn't have one and that such information was communicated verbally. Tr. 66. The plan was not provided to the CSHO until she returned on March 21, 2012 with the warrant to conduct the inspection. *Id*. The fact that the plant and safety manager wasn't able to provide a copy of the plan upon request along with his admission that it didn't exist, establishes the plan was not accessible to employees.

3. Employee exposure

I find that all employees working at Envision at the time of the violation were exposed to the hazards associated with non-compliance with the cited standard.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Based on his statement to the CSHO that he could not provide a copy of the plan to her, he had actual knowledge no plan was accessible to employees. This knowledge is imputed to Envision and, therefore, knowledge of the violation is established.

Based on the testimony of CSHO Zindroski addressed in the discussion of the violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A), I find that the classification of this violation as "serious" is appropriate.

Concerning the repeated classification of this violation, the Secretary has established that Respondent was cited in 2010 for a violation of 29 C.F.R. § 19l0.1030(c)(1)(i). C-14. The 2010 citation became a final order as part of an informal settlement agreement. C-15. Both the citations are for violations of the BBP standard. The 2010 citation was for a lack of a BBP exposure control plan; here the plan was not accessible to employees. C-14. Both citations address the hazard of not having a BBP plan available to protect employees from exposure to pathogens. I find the citations are substantially similar. I find that the Secretary has established a "repeat" violation for this item.

Citation 1, Item 4 -- Alleged "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(f)(2)(i)

This subsection of the Bloodborne Pathogens standard states in pertinent part:

> Hepatitis B Vaccination. (i) Hepatitis B vaccinations shall be made available after the employee has received the training required in paragraph (g)(2)(vii)(I) and within 10 working days of initial assignment to all employees who have occupational exposure unless the employee has previously received the complete hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or the vaccine is contraindicated for medical reasons.

The Secretary alleges:

> 29 CFR 1910.1030(f)(2)(i): Hepatitis B vaccination was not made available within 10 working days of initial assignment to all employee(s) with occupational exposure: On or about March 21, 2012, the employer did not provide Hepatitis B vaccines within 10 working days of initial assignment to employees who have occupational exposure to bloodborne pathogens while working on the Sorting Line:
>
> Envision Waste Services LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard, 1910.1030(c)(1)(i), which was contained in OSHA Inspection Number 314808163, Citation Number 01, Item Number 05, and was affirmed as a final order on 10/14/2010, with respect to a workplace located at 8700 Lake Road, Seville OH 44273.

1. Applicability

The standard requires employers to provide the Hepatitis B vaccine to new hires who will have "occupational exposure" within 10 days of initial assignment unless they have already had the vaccine series. The record reveals that Envision employees have occupational exposure to hospital waste that includes needles, vials of blood, I.V. tubing with blood still in it, and used gauze patches. Tr. 326-327. Additionally, Respondent's employees are exposed to human waste from port-a-pots in the summer. Id. at 327. I find that this standard applies to the condition cited.

2. Non-compliance

To establish Respondent's non-compliance with this standard, CSHO Zindroski relies on Envision's Hepatitis B vaccine records. C-11. The records have entries for a majority of the employees listed; however, there are a few employees who do not have complete entries. For

example, [redacted] has no entries beside his name. At the hearing, [redacted] testified that he already had the Hepatitis vaccination. Tr. 230. Envision's vaccination record alone does not establish non-compliance. Unlike the training violations, there is documentary and testimonial evidence that Envision employees had the requisite Hepatitis B vaccination. Although there may indeed be a problem with shoddy recordkeeping, I find that the Secretary has not proven Respondent's non-compliance by a preponderance of the evidence. Therefore, the Secretary has not met his burden and this item is vacated.

Citation 3, Item 1 -- Alleged "Other-than-Serious" violation of 29 C.F.R. § 1910.134(k)(6)

This subsection of the Respiratory Protection standard states in pertinent part:

> (6) The basic advisory information on respirators as presented in Appendix D of this section shall be provided by the employer in any written or oral format, to employees who wear respirators when such use is not required by this section or by the employer.

The Secretary alleges:

> 29 CFR 1910.134(k)(6): The employer did not provide the basic advisory information on respirators, as presented in Appendix D of 29 CFR 1910.134, in written or oral format to employees who wear respirators when such use was not required by the employer: On or about March 21, 2012, the employer did not provide Appendix D of the respirator standard when employees voluntarily wear N-95 dust masks.

1. Applicability

This standard requires employers to provide basic information on respirators when its employees wear respirators voluntarily. Such information can be provided orally or in writing. CSHO Zindroski testified that Mr. Kaufman told her that Envision makes N-95 dust masks available for an employee's voluntarily use. Tr. 89. I find that this standard is applicable to the condition cited.

2. Non-compliance

CSHO testified that Mr. Kaufman told her that Envision had not offered Appendix D to its employees. Tr. 89. I find that Mr. Kaufman's admission is evidence of non-compliance with the cited standard.

3. Employee exposure

I find that all employees working at Envision at the time of the violation were exposed insofar as these dust masks were made available for use and no one was provided with the basic advisory information from Appendix D.

4. Employer knowledge

Envision's safety manual states that the Responsible Safety Manager is delegated authority to administer the safety program and that "[t]he Plant Manager shall be responsible for implementing these policies by insisting that employees observe and obey **all rules and regulations** necessary to maintain a safe work place and safe work habits and practices." (emphasis added). R-8 at pp. 2, 32. Mr. Kaufman was the safety manager for Envision and providing such information is his responsibility. Tr. 394, 471. I find that Mr. Kaufman knew or could have known that employees were not provided with the information from Appendix D. I find the Secretary has met his burden and proved this "other-than-serious" citation item.

Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co*., 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1489 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and

the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

CSHO Zindroski testified that she considered severity, probability, size of the company, and eligibility for "good faith" discounts in assessing penalties for the violations at issue. Tr. 90. Although she did not address each citation item specifically, CSHO Zindroski explained her proposed penalty for the violations according to the nature of hazard as follows:

- HAZCOM was evaluated as "low" severity because she could not determine the chemicals to which the employees were exposed. Tr. 90.
- BPP was evaluated as "high" severity because of the possible exposure to HIV and Hepatitis. *Id.*
- Fire extinguisher was evaluated as "high" due to the number of fires Envision has had at this facility. *Id*.
- PPE (Eye protection) was evaluated as "low" severity because any resulting injury can be treated with first aid or by a doctor. Tr. 91.
- PPE (Safety gloves and training) was evaluated as "high" severity because of the possible exposure to HIV and Hepatitis. *Id*.

Based on the record in this case, I find that the penalty proposed for each of the affirmed cited violations is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.132(f)(1), is AFFIRMED as a "Serious" violation, and a penalty of $7,000.00 is assessed.

2. Citation 1, Item 1b, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(d)(3)(i), is AFFIRMED.

3. Citation 1, Item 2, alleging a "Willful" violation of 29 C.F.R. § 1910.157(g)(2), is AFFIRMED, and a penalty of $70,000.00 is assessed.

4. Citation 1, Item 3a, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(c)(1)(iii), is AFFIRMED, and a penalty of $7,000.00 is assessed.

5. Citation 1, Item 3b, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(A), is AFFIRMED.

6. Citation 1, Item 3c, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(g)(2)(ii)(B), is AFFIRMED.

7. Citation 1, Item 4, alleging a "Repeat-Serious" violation of 29 C.F.R. § 1910.1030(f)(2)(i), is VACATED.

8. Citation 1, Item 5, alleging a "Willful" violation of 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED, and a penalty of $70,000.00 is assessed.

9. Citation 2, Item 1, alleging a "Willful" violation of 29 C.F.R, § 1910.133(a)(3), is AFFIRMED, and a penalty of $70,000.00 is assessed.

10. Citation 3, Item 1, alleging an "Other-than-Serious" violation of 29 C.F.R. § 1910.134(k)(6), is AFFIRMED and no penalty is assessed.

DATED: December 31, 2013

/s/Keith E. Bell
KEITH E. BELL
Judge, OSHRC