UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BROWER DENTAL HEALTH, PC, Respondent.	OSHRC DOCKET NO. 16-0193

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado
For Complainant

Josh S. Brower, DDS, appearing *pro se*, Brower Dental Health, P.C., Sioux Falls, South Dakota
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On May 18, 2015, the Bismarck Area Office received an anonymous complaint about potential employee exposure to blood-borne pathogens at a Vermillion dental office located at 11 Court Street, Vermillion, South Dakota. (Tr. 46–48; Ex. C-1). Compliance Safety and Health Officer (CSHO) Wanlipa Quade contacted the individual who made the anonymous complaint to gather information and conducted additional research about the employer.[1] (Tr. 48–50). On May 19, 2015, Complainant sent a letter to Dr. Josh Brower at Smiles for Siouxland, 11 Court Street, Vermillion, South Dakota. The letter stated that the Bismarck Area Office received an anonymous complaint and requested the employer to

1. CSHO Quade conducted an internet search for Vermillion Dental Health, which brought up the Smiles for Siouxland website. (Tr. 49). The website showed that there were two locations—Vermillion and Sioux Falls—covered by the Smiles for Siouxland name. (Ex. C-3).

investigate the alleged hazard and provide a written response detailing its investigation. (Ex. C-4). On May 20, 2015, Dr. Brower responded to the letter describing the anonymous complaint via email, which recounted his conversation with an OSHA representative and detailed the manner in which he had addressed the hazard identified in the anonymous complaint.[2] (Tr. 51–52; Ex. C-4).

After reviewing the information provided by Dr. Brower, Complainant determined an inspection was necessary to ensure the conditions identified in the anonymous complaint were remedied. (Tr. 52). Complainant assigned CSHO Casey Bedingfield to conduct an inspection of the dental office located at 11 Court Street, Vermillion, South Dakota. (Tr. 53, 157). As a result of the inspection, Complainant issued a Citation and Notification of Penalty ("Citation") to Smiles for Siouxland, which alleged one serious violation of the Act and proposed a penalty of $1,200.00. The Citation was issued on November 20, 2015, and mailed certified mail, return receipt requested, to 11 Court Street, Vermillion, South Dakota. (Ex. C-5).

Even though Dr. Brower responded to the letter describing the anonymous complaint, which was sent to the Vermillion office where the inspection took place, the Citation which was mailed to the same address as the letter describing the anonymous complaint was returned to the Bismarck Area Office as "Unclaimed" on January 11, 2016.[3] (Ex. C-6). Upon receiving the unclaimed Citation, CSHO Bedingfield called Respondent and was notified that the proper mailing address was P.O Box 356, Sioux Falls, South Dakota. (Ex. C-9). Complainant re-sent the Citation via certified mail and also by electronic mail. (Ex. C-9). On February 2, 2016, Complainant received Respondent's *Notice of Contest*.

2. The Court would note that Dr. Brower's email signature block includes the website www.smilesforsiouxland.com.
3. The envelope indicates that the Post Office attempted delivery of the Citation three separate times, during which time the package was available for pick-up at the local Post Office. (Tr. 57; Ex. C-6).

During the course of discovery, Respondent informed Complainant that he had cited the wrong business name and that the correct entity was Brower Dental Health, PC. On June 14, 2016, the Court received an *Unopposed Motion to Amend the Citation to Name the Correct Legal Entity*, which was granted on June 16, 2016.

Trial in this matter commenced on September 8, 2016, in Sioux Falls, South Dakota. Three witnesses testified: (1) Assistant Area Director, Scott Overson; (2) CSHO Casey Bedingfield; and (3) Dr. Josh Brower. Both parties filed post-trial briefs.[4] Based on what follows, the Court finds Respondent violated the Act.

II. Stipulations

The parties entered into stipulations ("Joint Stipulations") prior to the beginning of trial. The Joint Stipulations were introduced into the record as Joint Exhibit No. 1 (hereinafter "Ex. J-1"). In lieu of reproducing them in their entirety, the Court shall make references to the Joint Stipulations as necessary.

III. Jurisdiction

Pursuant to the Joint Stipulations, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). (Ex. J-1 at ¶ 1). The Joint Stipulations also state Respondent is engaged in a business affecting interstate commerce and is an employer within the meaning of the Act. (Ex. J-1 at ¶¶ 5–6). *See also* 29 U.S.C. § 652(c).

IV. Factual Background

On June 2, 2015, Complainant sent CSHO Bedingfield to 11 Court Street, Vermillion, South Dakota in response to an anonymous complaint that Respondent's employees were exposed to blood-borne pathogens in violation of the Act. (Ex. C-2). CSHO Bedingfield

[4] Issues not briefed in the post trial briefs, even though raised at trial, are deemed abandoned. *See Georgia-Pacific Corp.,* 15 BNA OSCH 1127, 1130 (No. 89-2713, 1991).

determined there was insufficient information to support the issuance of a citation on the basis of the anonymous complaint. (Ex. C-19). During the inspection, CSHO Bedingfield determined, however, Respondent did not have a written Exposure Control Plan ("ECP") in violation of 29 C.F.R. 1910.1030(c)(1)(i). (Ex. C-19).

When CSHO Bedingfield arrived at the Vermillion office, the receptionist told him Dr. Brower was at the Sioux Falls, South Dakota office and that he was only in Vermillion on certain days of the week. (Tr. 158). CSHO Bedingfield called Dr. Brower, informed him OSHA was at the Vermillion office, and proceeded to conduct an opening conference. (Tr. 159; Ex. C-19). CSHO Bedingfield testified that he spoke to Dr. Brower on the telephone as he walked through the office space with some of Dr. Brower's employees. (Tr. 159). After walking through the office while on the phone with Dr. Brower, CSHO Bedingfield informed Dr. Brower that he needed to conduct employee interviews and would follow up after he was finished. (Tr. 159).

At trial, Dr. Brower testified that CSHO Bedingfield was mistaken and that he was at the Vermillion office during CSHO Bedingfield's inspection. The evidence suggests otherwise. First, CSHO Bedingfield not only testified that he conducted part of the inspection over the phone with Dr. Brower, he also documented his telephone call with Dr. Brower in his conference notes. (Tr. C-19). Second, Dr. Brower was inconsistent in his presentation of the facts—during his questioning of CSHO Bedingfield he suggested he would not have had time to participate in a phone call with CSHO Bedingfield because he was in surgery, only to later argue he could have closed up shop in Sioux Falls, South Dakota and driven to the Vermillion, South Dakota office for the inspection. (Tr. 182, 256). Third, if Dr. Brower was present for the inspection as he alleged, then this case would have been easily resolved. If Dr. Brower was present for the inspection, he could have readily produced the ECP CSHO Bedingfield requested during the inspection, and it is likely this case could never have proceeded along the course that it took.

Finally, and perhaps most unbelievable, Dr. Brower suggested his office received advanced notice of the inspection,[5] which explains why he was present for the inspection. (Tr. 228). Both CSHO Bedingfield and AAD Overson testified they have never provided advance notice of the inspection[6] and doing so could potentially subject them to criminal penalties for providing such information. (Tr. 257, 260). There is no evidence to support the allegation of Dr. Brower that he was provided advanced notice of the inspection. Based on these facts, the Court finds that Dr. Brower was not present during CSHO Bedingfield's inspection.

During his employee interviews, CSHO Bedingfield asked employees whether the office had an ECP, to which the employees responded they were not sure what he was looking for or that such a plan existed at all.[7] (Tr. 160). He probed deeper, asking employees questions that would reveal the existence of such a plan, such as whether they had a protocol to address exposure incidents.[8] (Tr. 160–61). Finally, he asked if the office had any program binders and whether he could look through them to see if an ECP might be included. (Tr. 161). The employees gave CSHO Bedingfield a copy of the employee manual, which provided a brief summary of an ECP. The employee manual indicated that a separate ECP was on file and accessible to employees. (Tr. 162). Still, the employees were unable to locate the ECP. (Tr. 162). CSHO Bedingfield then called Dr. Brower, who redirected the conversation towards a former employee and the original anonymous complaint. (Tr. 163). Dr. Brower was unable to explain why a copy of the ECP was unavailable. (Tr. 165–66). Ultimately, after asking Dr.

5. If this allegation were true, then Dr. Brower would have had notice in order to be present during the inspection which the Court finds he was not present. Also, advanced notice would have provided him of sufficient opportunity to correct any deficiencies in his health and safety practices, which did not occur.
6. 29 U.S.C. § 666(f) is the statute which subjects anyone providing notice of advanced notice of an inspection, except in very narrow circumstances, to criminal sanctions.
7. If an ECP was in existence and the employees were trained on its contents as required by the regulation, employees would have been able to respond appropriately to CSHO Bedingfield's inquiries and know what he was looking for. Not knowing whether an ECP existed or not even knowing certain information that would have been in the ECP leads the Court to conclude Respondent did not have an ECP and the employees were not adequately trained on recognizing an ECP and its requirements. *Okland Construction Co.,* 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence).
8. This is one of the required elements of an ECP. *See* 29 C.F.R. § 1910.1030(c)(1)(i).

Brower and his employees multiple times for the ECP, CSHO Bedingfield determined Respondent did not have an ECP. (Tr. 166). Based on this information, Complainant issued the Citation.

After Complainant issued the Citation—and Respondent eventually received it—Area Director Eric Brooks made an additional request for Respondent's ECP. (Tr. 63–64). In response, Peggy Brower, Dr. Brower's wife, sent AD Brooks a copy of Respondent's HIPPA policy and employee manual. (Tr. 60; Ex. C-12, C-13). This confirmed CSHO Bedingfield's initial conclusion that Respondent did not have an ECP, because Respondent's employees could not find nor identify one. On March 15, 2016, approximately one month after AD Brooks made his request—and nearly nine months after CSHO Bedingfield's first request—Dr. Brower sent Complainant a copy of an ECP. (Tr. 79; Ex. C-15, C-16). While there appeared to be consensus that the late-provided ECP was compliant, Complainant determined the late-produced ECP was generated after the Citation was issued. (Tr. 68).

V. Discussion

Before determining whether the standard was applicable and violated, the Court must first address Respondent's argument that the Citation is barred by the six-month statute of limitations because it did not receive the Citation until after the six months permitted by the Act. A finding by the Court that the Citation was not issued within the prescribed six-month statute of limitations would effectively bar this action and the analysis as to whether the standard was applicable or violated would be moot. Based on the following discussion, however, the Court finds that Complainant issued the Citation within the time allowed by Section 9(c) of the Act. Accordingly, Respondent's statute of limitations defense is rejected.

a. Statute of Limitations

Section 9(c) of the Act states, "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). On the face of it, Complainant complied with section 9(c)—the inspection occurred on June 2, 2015, and the citation was issued by the Bismarck Area Office on November 20, 2015. (Ex. C-5). Respondent claims, however, the Citation, which was addressed to Smiles for Siouxland, 11 Court Street, Vermillion, South Dakota, should be dismissed because it was not received until January, 2016.[9] Respondent's argument is rejected for the following reasons.

First, the failure of "proper" service in this case is entirely attributable to Respondent. On May 18, 2015, Complainant received an anonymous complaint that identified the office located at 11 Court Street, Vermillion, South Dakota as the location where the alleged hazards could be found. After some preliminary research, CSHO Quade discovered that the Vermillion dental health office located at 11 Court Street, Vermillion, South Dakota was associated with a website entitled, "www.smilesforsiouxland.com". (Ex. C-3). The name "Smiles for Siouxland" is also prominently displayed at the top, right-hand corner of the webpage and is underscored by the phrase "Accepting New Patients". (Ex. C-3). Based on this information, CSHO Quade sent Respondent a letter on May 19, 2015, which notified him of the anonymous complaint. The letter was addressed to Dr. Josh Brower at Smiles for Siouxland, 11 Court Street, Vermillion, South Dakota. (Ex. C-4). The very next day, Dr. Brower responded to Complainant via email outlining his office's policy on sharps handling, which was the target of the anonymous complaint. (Ex. C-4 at 3). Dr. Brower's signature line in that email also included the web address, www.smilesforsiouxland.com. (*Id.*). There is nothing in the email to indicate that Dr. Brower attempted to correct any misunderstanding about the name of the dental practice.

9. As noted above in Section I, *supra*, Respondent received an electronic copy of the Citation in January, 2016 but did not "receive" the certified mail version of the Citation until February, 2016.

After determining Dr. Brower's response to the anonymous complaint was insufficient, Complainant sent CSHO Bedingfield to 11 Court Street, Vermillion, South Dakota to perform an inspection. Approximately five months later, Complainant sent the Citation certified mail, return receipt requested, to Smiles for Siouxland, located at 11 Court Street, Vermillion, South Dakota. (Ex. C-5). The Citation, after three attempted deliveries at 11 Court Street, was returned to the Bismarck Area Office as "Unclaimed". Dr. Brower testified that he owned the practice at the office located on 11 Court Street both when the inspection occurred and when the Citation was sent. (Tr. 215–16).

Notwithstanding the foregoing, Dr. Brower insists that service was improper because the Citation was made out to Smiles for Siouxland[10] and because he was only at the Vermillion, South Dakota office a couple of times per month and, therefore, presumably would not be able to accept the Citation delivered by certified mail. The Court disagrees. According to the Commission, "[T]he test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." *B.J. Hughes, Inc.*, 7 BNA OSHC 1471 (No. 76-2165, 1979). The Citation was addressed to Smiles for Siouxland, a name which Respondent's website boasts in large font at the top of its webpage and which Dr. Brower includes as part of his email signature. Approximately six months before the Citation was sent, Dr. Brower received and responded to a complaint letter sent to the same address that the Citation was sent—11 Court Street, Vermillion, South Dakota. In both instances, the letter detailing the anonymous complaint and the actual Citation were addressed to Dr. Brower and included the name "Smiles for Siouxland" as the second line of the

10. The Court finds that Respondent waived any argument that Complainant cited the wrong legal entity when Respondent joined in an *Unopposed Motion to Amend the Citation to Name the Correct Legal Entity*, which was granted by the Court on June 16, 2016.

address. Finally, the inspection that precipitated the Citation took place at 11 Court Street, Vermillion, South Dakota. Based on the information available to Complainant, the Court finds service at the dental office located at 11 Court Street, Vermillion, South Dakota, addressed to a trade name prominently displayed on the company website, was reasonably calculated to provide Respondent with knowledge of the citation and penalty and provided it with an opportunity to decide whether to abate or contest. *See id.*

Second, with respect to the question of when a citation is "issued" under Section 9(c), the Court is convinced by the rationale of ALJ Heather Joys in her order denying a motion to dismiss in *Excel Contractors, Inc.*, Docket No. 16-0633 (July 13, 2016). Relying on the Act's use of both "issue" and "receipt", Judge Joys held, "Had the Congress intended a citation be considered issued upon receipt only, there would have been no need to draw the distinction between timeframes calculated based on issuance and timeframes calculated based on receipt. In short, to equate issuance with receipt would render the use of the two terms superfluous." *Excel*, Docket No. 16-0633, slip op. at 2. Further, Judge Joys cited other ALJ orders wherein the term "issue" was held to mean when the Citation was "signed, dated, and mailed" to Respondent. *See, e.g., Francis J. Palo, Inc.*, Docket No. 13-2150 (April 24, 2014) (finding citation issued on date it was signed and mailed to Respondent). Accordingly, the Court finds the Citation in this case was issued on November 20, 2015, when it was dated, signed, and sent by certified mail to Respondent's office at 11 Court Street, Vermillion, South Dakota.[11]

11. With respect to Respondent's argument that he was not in the office often enough to accept the mail, the Court finds that this is an insufficient excuse. "'The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' of [Notices of Contest]." *NYNEX*, 18 BNA OSHC 1967 (No. 95-1671, 1999) (quoting *E.K. Constr. Co., Inc.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991). Respondent had employees at the 11 Court Street location capable of accepting mail and providing Dr. Brower with notice of its receipt. The fact that he was not always present in the Vermillion office does not provide shelter for his failure to claim mail delivered to the same building where the inspection took place. Because the address was the same for both the letter and the Citation, the Court could infer either: (1) Respondent did not have in place an adequate procedure to make sure mail is properly received and processed, or (2) if he did have such a procedure in place, Dr. Brower elected not to sign for the Citation after being provided three notices by the U. S. Postal Service that a certified letter was waiting to be picked up. Neither inference supports Respondent's position regarding the

Based on the foregoing, the Court finds the Citation was properly and timely served in such a manner that Respondent was both given adequate notice of the Citation and an opportunity to respond. The Citation was not received by Respondent until after the six-month statute of limitation had run because Respondent either chose not to accept or collect it or failed to have in place a sufficient business process for the receipt and processing of incoming mail. The Citation was not returned as "Undeliverable", which indicates the address is incorrect; rather, it was returned as "Unclaimed" after three attempts to deliver it to the same address where previous correspondence was received and replied to and where the inspection took place. Respondent's argument that the Citation should be dismissed based on the statute of limitations is rejected.

b. Legal Standard

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

c. Citation 1, Item 1

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.1030(c)(1)(i): The employer having employees with occupational exposure did not establish a written Exposure Control Plan designed to eliminate or minimize employee exposure:
>
> (a) On or about June 2, 2015, for employees exposed to bloodborne pathogens and other potentially infectious materials while performing and assisting in dental procedures at the Smiles for SiouxLand practice located at 11 Court Street in Vermillion, South Dakota.

The cited standard provides:

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statute of limitations.

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

29 C.F.R. § 1910.1030(c)(1)(i).

i. The Standard Applies

According to the Scope and Application paragraph, the cited standard "applies to all occupational exposure to blood or other potentially infectious materials as defined by paragraph (b) of this section." 29 C.F.R. § 1910.1030(c)(1)(i). Occupational Exposure is defined as "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties." *Id.* § 1910.1030(b). At trial, Dr. Brower admitted that his staff was exposed to blood-borne pathogens and saliva on a daily basis. (Tr. 222–23). Thus, the Court finds that the standard applies.

ii. The Terms of the Standard Were Violated

The dispute in this case is quite simple: Did Respondent have an ECP when the inspection took place in May 2015? Respondent eventually produced an ECP approximately nine months after the inspection.[12] Complainant argues Respondent's failure to produce an ECP after multiple requests over the course of nine months indicates the ECP Dr. Brower ultimately produced was created after the inspection. Thus, Complainant contends Respondent violated 29 C.F.R. 1910.1030(c)(1)(i).

Respondent, on the other hand, contends: (1) the ECP it provided to Complainant in March 2016 was in existence at the time of the inspection, and (2) none of Complainant's representatives ever asked for the ECP. Thus, resolution of this case depends on the Court's

12. CSHO Bedingfield testified that the ECP produced by Respondent would be compliant had it been timely produced. (Tr. 168).

assessment of the witnesses' credibility. Based on the evidence presented at trial, the Court finds Complainant's version of the facts more credible.

"The Secretary has the burden of establishing a violation . . . by a preponderance of the evidence." *Home Depot #6512*, 22 BNA OSHC 1863 (No. 07-0359, 2009). A 'preponderance of the evidence' "is that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126 at n.17 (No. 78-6247, 1981) (citing *Burch v. Reading Co.*, 240 F.2d 574 (3d Cir.) *cert. denied*, 353 U.S. 965 (1957)); *see also Okland Constr. Co.*, 3 BNA OSHC 2023 (No. 3395, 1976) (concluding judge properly entered findings that the Secretary established a violation based on inferences drawn by the judge from circumstantial evidence).

During the course of his inspection, CSHO Bedingfield made multiple inquiries regarding the existence of an ECP. None of the employees he interviewed were able to find, identify, or even understand what CSHO Bedingfield was seeking. (Tr. 160–62). Eventually the employees gave him a copy of the employee manual. Although the employee manual contained a reference to a separate ECP and provisions related to exposure control,[13] CSHO Bedingfield could not find a document or section within the manual that qualified as an ECP. The employees did not appear to understand the reference in the manual and, according to CSHO Bedingfield, expressed surprise that such a plan existed. (Tr. 162). After his interviews, CSHO Bedingfield testified that he called Dr. Brower and specifically asked for an ECP. Dr. Brower deflected questions

13. At trial, Dr. Brower attempted to convince the Court that the provisions in the employee manual constituted an ECP even though the manual stated an ECP existed separate from the employee manual. First, the Court rejects the argument that the abbreviated provisions in the employee manual constitute an ECP. At trial, CSHO Bedingfield testified that while the employee manual made reference to employee exposure it did not meet the requirements of an ECP. For instance, CSHO Bedingfield testified that elements discussing hand washing, puncture-resistant PPE, and restrictions on eating, drinking, and using cosmetics in certain work areas, which are required elements of an ECP, are lacking from the provisions of the employee manual. (Tr. 170–72). Also, should the Court accept Dr. Brower's argument that the employee exposure provisions of the employee manual was the ECP, such an argument undermines and contradicts Dr. Brower's position that the ECP produced nine months later was in existence at the time of the inspection. Such a position also conflicts with the clear and unambiguous provisions of the employee manual which states that there was a separate ECP available to employees for inspection.

regarding the ECP and instead discussed problems he had with a former employee and continued to direct CSHO Bedingfield to the manual, which CSHO Bedingfield had already determined was insufficient. (Tr. 163).

The lack of understanding illustrated by Respondent's employees was on display again when AD Brooks contacted Respondent and requested a copy of the ECP roughly seven months after the initial inspection. (Tr. 64–65; Ex. C-12, C-13). In response to AD Brooks' request for a copy of the ECP, Peggy Brower forwarded a copy of Respondent's HIPAA policy and employee manual.[14] (Tr. 64–65; Ex. C-12, C-13). HIPAA does not address exposure control. Eventually, after a phone call from AAD Overson, Respondent provided Complainant with a copy of an ECP on March 15, 2016. (Tr. 68; Ex. C-16).

As noted above, the Court determined Dr. Brower's testimony was not credible insofar as he claimed to be present at the Vermillion office at the time of the inspection. CSHO Bedingfield's testimony, on the other hand, was not only supported by his field notes and subsequent report, but his conclusion that Respondent's employees were not aware of the existence of an ECP was buttressed by Mrs. Brower's inability to provide an ECP upon request. If an ECP existed at the time of the inspection, even if not titled as such, Respondent's employees would have been able, at the very least, to respond to CSHO Bedingfield's questions about its substance. According to CSHO Bedingfield, however, they were not able to answer such questions. When coupled with the fact that Mrs. Brower was similarly unable to identify or provide an ECP in response to requests made almost nine months after the inspection took place—and four months after the Citation was issued—such facts permit the reasonable inference that the ECP did not exist at the time of either request. Likewise, even if the Court

14. As an employee, Peggy Brower, if trained on the ECP, would know what it was and would be able to forward it to OSHA. Ms. Brower not forwarding the ECP, which Dr. Brower insists was in existence at the time of the inspection, undermines that position that it was in existence at the time of the inspection.

were to assume that Dr. Brower was present during the inspection (it does not), such a presumption would not inure to Dr. Brower's benefit. If he was present and available, the Court has a hard time understanding why there would be a misunderstanding about the nature of CSHO Bedingfield's request and why the disputed ECP was not provided to him.

The Court has difficulty accepting Respondent's argument that OSHA would issue a citation alleging a missing document and then never request a copy of that document. The weight of the evidence shows Complainant's representatives asked for the ECP on multiple occasions from multiple people and received nothing but a HIPPA plan or an employee manual. The ECP Respondent produced did not come until nine months after the inspection and four months after the Citation was issued. The ECP, though claimed by Dr. Brower to have been generated contemporaneously with the employee manual, was in a different font and format. (*Compare* C-16 with R-26).

Dr. Brower's testimony was inconsistent and, in some cases, improbable. He suggested that he would not have had time to discuss matters with CSHO Bedingfield on the phone because he would have been busy with patients at the other office, but then argues that it was possible for him to drop everything and attend the inspection in person. He claimed that he received advance notice of the inspection, notwithstanding the fact that Overson and Bedingfield both testified that they would be subject to criminal sanctions had they provided such information. Finally, he attempted to argue that the bullet points in the employee manual were sufficient for the purposes of the standard, further undermining his position that a separate document actually existed during the relevant period of time.

Based on the foregoing, the Court finds that Respondent did not have an ECP at the time of the inspection. Accordingly, the terms of the standard were violated.

iii. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

"To establish knowledge, Complainant must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Jacobs Field Svcs. N.A.*, 2015 WL 1022393 at * 3 (No. 10-2659, 2015) (citing *Contour Erection & Sliding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007)). To determine reasonable diligence, the Court considers several factors, including "an employer's obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately supervise employees, and implement adequate work rules and training programs." *Id.* (citations omitted); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000).

The employee manual, which Dr. Brower created, specifically references a separate ECP document and contains bullet point generalizations of basic ECP requirements. (Ex. R-26). Those references—coupled with Dr. Brower's testimony that he was aware that the content of the regulation had not changed since he purportedly first developed an ECP—illustrate Respondent knew an ECP was required. *See, e.g., Amer. Recycling & Mfg. Co., Inc.*, 25 BNA OSHC 1709 (No. 13-1101 *et. al.*, 2015) (ALJ Phillips) (holding safety manual outlining general responsibilities and requirements of LOTO program establishes actual knowledge that LOTO program was required). As the owner and manager of Respondent, it was Dr. Brower's obligation to develop and maintain an ECP, which means he was the only person in a position to know whether such a plan existed. Because the Court found Respondent did not have an ECP at the time of the inspection, it follows that Dr. Brower was actually aware of that fact. *See A.P O'Horo Co., Inc.*, 14 BNA OSHC 2004 (No. 85-369, 1991) (holding company president's knowledge of his own omissions is imputable to company). Thus, the Court finds that Respondent knew of the violation.

iv. Respondent's Employees Were Exposed to the Hazard

The Commission does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)).

As indicated above, the cited standard "applies to all occupational exposure to blood or other potentially infectious materials as defined by paragraph (b) of this section." 29 C.F.R. § 1910.1030(c)(1)(i). Both CSHO Bedingfield and Dr. Brower testified that Respondent's employees were exposed to blood-borne pathogens on a daily basis. (Tr. 71, 222–23). An ECP is designed to prevent or otherwise minimize exposure through identification of hazards, implementation of engineering and work practice controls, and procedures for addressing exposure incidents. 29 C.F.R. § 1910.1030(c). Without an ECP that properly outlines the aforementioned requirements, Respondent's employees were limited in their ability to protect themselves against exposure to blood-borne pathogens. *See, e.g., Thoroughgood, Inc. d/b/a Azalea Court*, 18 BNA OSHC 1811 (No. 97-0023, 1999) (ALJ Spies) (lack of ECP limited employees' ability to protect against blood-borne pathogens). Although Respondent's employees are potentially exposed to blood-borne pathogens by virtue of their occupation, the Court finds they were unnecessarily exposed to hazards that should have been addressed in a properly developed ECP. The employee manual, which contains references to an independent ECP and discusses general requirements of such a plan, is not an adequate substitute for those protections. Accordingly, the Court finds that Respondent's employees were exposed to the hazards posed by exposure to blood-borne pathogens.

v. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *See Trinity Industries, Inc.*, 504 F.3d 397, 401 (3d Cir. 2007).

According to CSHO Bedingfield, occupational exposure to blood-borne pathogens can result in any number of infectious diseases, including hepatitis, tuberculosis, and HIV. (Tr. 175). Those diseases, amongst others, could result in time off of work, hospitalization, or, in extreme cases, death. (Tr. 176). Without a proper ECP, which should include procedures for preventing exposure incidents and what to do if an exposure occurs, there was a substantial probability that Respondent's employees could suffer from a serious and potentially lifelong illness if an exposure incident were to occur. *See Thoroughgood, Inc.*, 18 BNA OSHC 1811 (finding "[e]xposure to blood can result in contracting grave diseases of HIV or HBV" and affirming violation as serious).

Respondent claims the violation should not be characterized as serious because Complainant took almost five months to issue a citation. He contends this delay belies any suggestion that employees were exposed to serious injury or death. The Court disagrees. First, CSHO Bedingfield testified he spoke with Dr. Brower about the need for an ECP during his closing conference, at which time Dr. Brower inquired as to whether he needed a consultant to aid in developing an ECP. (Tr. 164–65). The Citation memorialized the concerns already

expressed by CSHO Bedingfield during his closing conference, which should have placed Dr. Brower on notice that he needed to develop a plan. The fact that it took five months to issue the Citation simply reflects the logistical difficulties of coordinating multiple inspections, reviewing the proposed citations resulting therefrom, and deciding whether to issue citations. This process was made no less difficult by Dr. Brower's evasive responses to requests for information both during and after the inspection.

Second, Complainant is only obliged to serve a citation within six months of the violation. *See* 29 U.S.C. § 658(c). There is no case law or standard to suggest that the length of time it takes to issue a citation is indicative of whether the violation is serious; in fact, the Secretary cannot seek to penalize an employer for its failure to correct a condition until *after* the entry of a final order by the Commission. *See* 29 U.S.C. § 659(b). The operative question in the assessment of a serious violation is simple: if an accident were to occur, is there a substantial probability that the ensuing injury will be serious? In this case, the answer to that question is "Yes". *See Charles W. Mason DDS & Assocs., PLLC*, 25 BNA OSHC 1792 (No. 10-2313, 2015) (affirming as serious a violation that exposed employees to blood-borne pathogens). Although Complainant determined the probability of an accident actually occurring in this situation was low, such a determination is only relevant to the appropriate penalty. (Tr. 73); *see also* Section VI, *infra*.

Based on the foregoing, the Court finds that Complainant established a serious violation of 29 C.F.R. § 1910.1030(c)(1)(i). Accordingly, Citation 1, Item 1 shall be AFFIRMED.

VI. Conclusion

The entirety of Dr. Brower's case hinges on a series of "what ifs" that are not supported by the facts. First, he suggests that he did not receive a certified letter sent to the same address as a complaint letter he responded to within 24 hours of receipt. But, Respondent claims, what if

Complainant had just put the proper company name on the envelope?[15] Second, Dr. Brower claims that he was present for the inspection, which is contrary to the sworn testimony of CSHO and his inspection narrative. In response, Dr. Brower argues he could have driven there after the CSHO called him; notwithstanding his claim that he would have been unable to take time out of his surgical schedule to discuss the inspection over the phone. Failing there, he suggests OSHA scheduled the inspection with him in advance. This certainly would explain his attendance, even though providing such notice to Dr. Brower carries criminal penalties for the CSHO involved.

Third, he claims no one ever asked him for the ECP—not the CSHO, not the AD. His proof: Complainant cannot show documentation of those requests. While documenting those requests would corroborate the testimony of CSHO Bedingfield and AAD Overson, the absence of documentation does not, of itself, mean that the requests never happened. Respondent could have provided the ECP when he received the Citation penalizing him for not having it, but he waited an additional two months to provide it.

In his brief, Respondent references Occam's Razor, which states, "*pluralitas non est ponenda sine necessitate*" or "plurality should not be posited without necessity." *Occam's Razor*, Encyclopaedia Britannica Online, https://www.britannica.com/topic/Occams-razor (last updated June 4, 2015). This is more commonly understood to mean that the simplest explanation is preferred over more complex explanations of the same phenomenon. *Id.* Respondent proposes a bunch of implausible "what ifs" in a piecemeal attempt to chip away at what is otherwise a strong and simple case wherein the Secretary's burden of proof is whether "it is more likely than not" that Respondent did not have an ECP. Based on the evidence, the simplest, most reasonable explanation for Respondent's continued failure to produce the ECP is that it did not exist.

15. According to his testimony, he would not have accepted it. (Tr. 220)

VII. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Respondent is a relatively small dental practice, which employs approximately twelve people at two locations in South Dakota. (Ex. C-19). Respondent has not been inspected or cited previously, and Dr. Brower testified he has not had an exposure incident during his twenty years of practice. As previously stated, Complainant determined the probability of an accident occurring was low and, similarly, that the severity of any potential injury was also low. (Tr. 72–73). Complainant's severity assessment was based, in part, on Complainant's determination that illnesses stemming from an exposure incident are typically treatable, as compared to more severe occupational injuries, such as amputations and falls from heights. (*Id.*). As for probability, Complainant determined that the likelihood of actual contamination in Respondent's dental office was lower than the potential that exists in a hospital, where the presence of infectious disease is arguably higher. Complainant did not provide Respondent a discount in penalty for

good faith because it appeared that Respondent's attempts at compliance, if any, were negligible. Based on this assessment, Complainant assessed a penalty of $1,200.00.

The Court generally agrees with Complainant's assessment. Although exposure to blood-borne pathogens presents the potential for very serious health hazards, the likelihood of that coming to fruition in a dental office was fairly low; however, given the potentially grave consequences of exposure to blood-borne pathogens, the Court finds that the violation is of medium gravity. Respondent does not have a documented history of violations or complaints, and, with the exception of the missing policy, was not cited for any other violations related to exposure to blood-borne pathogens, including the basis for the original complaint. Given Respondent's small size, the fairly low likelihood of an accident occurring, and the lack of any complaint or citation history, the Court finds that a smaller penalty is appropriate. Accordingly, the Court shall assess a penalty of $600.00.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED, and a penalty of $600.00 is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: December 22, 2016
Denver, Colorado