United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CAREER TRAINING INSTITUTE
Respondent.

OSHRC DOCKET
NO. 94-1307

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 19, 1995. The decision of the Judge will become a final order of the Commission on August 18, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 8, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

Ray H. Darling, Jr. 7/19/95

Date: July 19, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-1307

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 94-1307
CAREER TRAINING INSTITUTE, Respondent.	:	

Appearances:

Sharon Calhoun, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Kathleen L. Maloney, Esq.
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Orlando, Florida
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Career Training Institute (CTI) is a vocational training school located in Orlando, Florida. The State of Florida licenses CTI to award diplomas in a number of programs, including medical assistance, phlebotomy, computer operations, barber styling and cosmetology. On March 3, 1994, the Secretary issued a notification of failure to abate (FTA notification) to CTI, along with a citation for two other-than-serious violations of the Occupational Safety and Health Act of 1970 (Act). CTI contests the FTA notification and the citation.

Sue Tracy, an industrial hygienist compliance officer for the Occupational Safety and Health Administration (OSHA), conducted an inspection of CTI's school on November 16, 1993.[1] At that time, CTI's school was located at 2120 West Colonial Drive, Orlando, Florida. After the November, 1993, inspection but before the March, 1994, reinspection, CTI relocated to 3326 Edgewater Drive, Orlando. Roger Bradley, the president of CTI, stated that until November of 1993, no one at CTI realized that CTI was required to comply with OSHA regulations (Tr. 20). He and his wife, Nancy Macin-Bradley, purchased CTI in November, 1990 (Tr. 230).

Tracy's inspection had been prompted by a complaint from CTI employee Sharon Ruckle, who was a medical assistant instructor (Tr. 83). During a closing conference held with Bradley and Macin-Bradley on November 18, 1993, Tracy informed them that the Secretary would be citing CTI for various violations of the Act. She testified they were provided with an OSHA 300 book which describes the employer's rights and responsibilities following an inspection. The notice of corrective action was discussed as well as petitions for modification of abatement (Tr. 125-126, 249). Tracy also informed Bradley and Macin-Bradley that if they treated Ms. Ruckle differently in any way, that OSHA would "be all over them like flies" (Tr. 97). Tracy explained why she believed it was necessary to make that statement (Tr. 129):

> Sharon Ruckle, after I had been there that first day, she went into the management office, and she admitted that she made the complaint. Now, for a complainant to actually do that, they take a great risk of having repercussions brought upon them.
>
> In addition to that, some of the questions and some of the statements that were made during the closing conference on November 18 led me to believe that the company was very angry that this inspection had taken place, they were very angry at who the complainant was. They felt that this complaint [sic] was disgruntled even though all the complaint items with the exception of a few were actually true, valid complaints.
>
> I let them know that this person actually had the right to make a complaint. That was her right as an employee and that some of the questions that I felt were

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1 At the time of the November 16, 1993, inspection, the compliance officer's name was Sue Johnson. By the time of the hearing, she had married, changing her last name to Tracy (Tr. 46).

discriminatory and that I wanted them to make sure that she had rights under the law for 11c discrimination.

As a result of Tracy's inspection, the Secretary issued two citations to CTI on December 13, 1993. Citation No. 1 contained ten items, all of which involved serious violations of provisions of either § 1910.1030, the bloodborne pathogens standard, or § 1910.1200, the hazard communication standard. Citation No. 2 contained four items alleging other-than-serious violations of the Act. On January 6, 1994, an informal conference was held at OSHA's regional office in Tampa, Florida. CTI agreed to pay a total penalty in the amount of $8,500 and not contest the citations. The citations were affirmed as a final order of the Review Commission on January 11, 1994. The date of abatement set for Items 7 and 10 of Citation No. 1, at issue here, was January 18, 1994 (Exh. J-1).

On January 26, 1994, Lawrence Falck, area director for OSHA's Tampa office, sent a letter to CTI stating that CTI's abatement dates had passed and that CTI "should inform us of the specific corrective action you have taken and the date the action was taken" (Exh. C-6). On January 31, 1994, Bradley Campbell, assistant to the president, sent a letter to Grimes stating that all the items at issue "have been abated, and Career Training Institute is in compliance with OSHA guidelines" (Exh. C-5). Campbell also stated in the letter that documentation regarding abatement of the items "will be forwarded under separate cover through the U. S. Mail within the next 2 days."

Campbell never forwarded the promised items because, he testified, "I basically forgot. With all of the things going on with the move and trying to get everything set up at the new location, I just plain forgot. With everything going on. It was a regrettable oversight" (Tr. 201).

Tracy reinspected CTI at its new address on March 2, 1994, because OSHA had not received verification that the items at issue had been abated (Tr. 64). At that time, Tracy discovered that CTI had not trained any of its employees in the bloodborne pathogens standard, and that all but one employee, Ruckle, had been trained in the hazard communication standard (Tr. 65).

Item 7: § 1910.1030(g)(2)(i)

The Secretary alleges that CTI failed to abate a violation of § 1910.1030(g)(2)(i), which requires employers to train employees with occupational exposure to bloodborne pathogens. In order to establish a failure to abate where the original citation was not contested and there is a reinspection subsequent to the expiration of the abatement date, the Secretary must show that:

> (1) the original citation has become a final order of the Commission, and (2) the citation or hazard found upon reinspection is the identical one for which respondent was originally cited. An employer may rebut this prima facie case by showing that the condition was corrected, or if not corrected, that the employer has prevented the exposure of his employees to the violative condition.

Braswell Motor Freight Lines, Inc., 5 BNA OSHC 1469, 1470, 1977 CCH OSHD ¶ 21,881 (No. 9480, 1977).

There is no dispute that the December 13, 1993, citation was uncontested by CTI and became a final order of the Commission on January 11, 1994. It is also undisputed that when Tracy reinspected on March 2, 1994, a month and a half after the January 18 abatement date, CTI had not trained any of its employees in accordance with § 1910.1030(g)(2)(i). Bradley, Macin-Bradley and Campbell each testified that Tracy remarked at the January 6, 1994, conference that training had only to be "scheduled" prior to the January 18, 1994, abatement date (Tr. 168, 209, 238). Both Tracy and her supervisor, Bill Grimes, deny that either stated abatement required only that training be scheduled (Tr. 124, 137).

CTI maintains, however, that abatement had been accomplished because training had been scheduled. CTI argues that it attempted to hold the training but was thwarted by Ruckle's continued absences. A memo dated January 15, 1994, from Brad Campbell states (Exh. R-8):

> A training session has been scheduled for January 22, 1994 at 1:00 PM for instructors who are involved in the clinical training of our students. This is to meet the requirements of the bloodborne pathogens standard of OSHA.
>
> Your attendance is expected and your cooperation is appreciated.

Despite this memo, on the day of the scheduled training, Ruckle failed to show up. Ruckle had not informed anyone at CTI that she would be absent (Tr. 171). Instead of holding the training session with the employees who did show up, CTI canceled the training session and rescheduled it for February 9, 1994 (Tr. 172). Campbell testified that CTI chose not to hold the training session without Ruckle because it believed that to do so would constitute an impermissible difference in treatment of Ruckle.

> I felt that having [Ruckle] there was the most important part of having the whole process take place. Based upon conversation we had with Sue and other folks from OSHA having to do with making sure that we dealt with her the way we were supposed to and that type of thing, I felt it was most important she be there. (Tr. 172)

On January 12 and 13, 1994, CTI did, however, hold training sessions on the hazardous communication standard without Ruckle being present. By conducting the training, the Secretary points out that "respondent apparently clearly understood that it was to 'schedule' and conduct and not just 'schedule' the hazardous chemical training by January 18, 1994." The fact that Respondent conducted the hazardous chemical training before the abatement date but failed to conduct the bloodborne pathogens training is inconsistent with its argument that it misunderstood the abatement requirements. Moreover, misunderstanding the abatement requirements is no defense. *Caldwell Lace Leather Co.*, 1 OSHC 1302, 1973-74 OSHD ¶ 16,410 (1973). In addition to the foregoing, CTI was provided a copy of the OSHA 300 book at the November 18 closing conference. The OSHA 300 book contains the employer's rights and responsibilities following an inspection. The book outlines the procedures for filing a petition for modification of abatement and also the consequences of failing to abate a violation. Under the circumstances of this case, Respondent cannot be heard to say it misunderstood the abatement requirements. CTI failed to abate Item 7 as alleged.

Item 10: § 1910.1200(h)

The Secretary charges CTI with failure to abate a violation of § 1910.1200(h), which requires training in the handling of hazardous chemicals. The citation issued to CTI for the violation was affirmed as a final order of the Commission on January 11, 1994. CTI provided

training to all of its employees, except Sharon Ruckle, on January 12 and 13, 1994, meeting the January 18 abatement date.

The Secretary predicates his failure to abate allegation on CTI's failure to train Sharon Ruckle. Sharon Ruckle's official termination date with CTI was March 16 or 17, 1994 (Tr. 185). Between the abatement date and her termination date, Ruckle was present at CTI for a total of nine days (Exh. J-1). There is no dispute that CTI never provided the training to Sharon Ruckle before January 18, 1994, or during the subsequent nine-day period. CTI failed to abate Item 10.

Penalty Determination for Failure to Abate
Violation of § 1910.1030(g)(2)(i)

The Secretary proposed a penalty of $30,000 for CTI's failure to abate its violation of § 1910.1030(g)(2)(i) and $900 for failure to abate § 1910.1200(h)..

> Penalties are assessed by the Commission and not by the Secretary, and when a penalty proposed by the Secretary is contested by the employer, the amount proposed by the Secretary is merely advisory. If the Commission finds that a penalty should be assessed, it may be in the same ambient proposed by the Secretary, or a lesser amount, or a greater amount.

Long Mfg. Co., N. C., Inc. v. OSAHRC, 554 F.2d 903 (8th Cir. 1977).

Section 17(j) of the Act requires the Commission to give "due consideration" to four factors when assessing a penalty: the size of the employer's business, the gravity of the violation, good faith of the employer, and the employer's prior history of violations. "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *Dream Set Fashion, Inc.* (Slip Opinion, p. 2, No. 92-2962, 1994).

1. Size of the employer's business

Evidence regarding the employees employed by CTI was not adduced at the hearing, although counsel stated the number was 13. Tracy testified that she gave CTI a minimum of 60% reduction when calculating the proposed penalties "because they had a low number of employees" (Tr. 72).

2. Gravity of the violation

"Gravity includes the severity of any possible injury and the probability of an accident. Matters such as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result are also factored into any determination of gravity." *Dream Set Fashion, Inc., supra.*

There is no dispute that instructors in the medical assistance and phlebotomy programs are occupationally exposed to blood or other bodily fluids. If Hepatitis B or HIV were contracted, irreversible injury or death would result. Therefore, the Secretary considered injury from exposure to bloodborne pathogens to be of high severity. Since some connections had been made, such as the disposal of Sharps containers and personal protective equipment, the probability of an accident was low.

The evidence shows that one employee, phlebotomy instructor Joan Briggs-Estinval, was occupationally exposed during the period December 13, 1993, to March 4, 1994. She testified that she never practiced or allowed her students to practice finger sticks, and that the veni-puncture involved only demonstration dummies (Exh. R-10; Tr. 40, 42-43). Briggs-Estinval took universal precautions when dealing with blood and body fluids (Tr. 218). CTI provided her with goggles, later gloves, and Sharps containers for disposal, which she used (Tr. 219).

The probability of an injury occurring in Briggs-Estinval's class was slight. Given the precautions taken by Briggs-Estinval and her background in bloodborne pathogen training, the gravity of CTI's failure to abate Item 7 is considered low.

3. Good faith of the employer

The compliance officer explained that good faith is not a factor that she is allowed to consider in failure to abate cases. The same is true regarding adjustments for history if violations have occurred within the prior three years (Tr. 73).

The specific circumstances of this case do warrant consideration of good faith. The inspecting officer stated that by the time of the January 6, 1994, informal conference, CTI "did a substantial amount of work" (Tr. 92-93). CTI prepared a hazardous communication program, a bloodborne pathogen training program, an exposure control program, and other forms required

by the regulations. It purchased different sized gloves and different Sharps containers (Tr. 167, 235). CTI conducted the hazardous materials training on January 12 and 13, 1995 (Tr. 168-169).

The Secretary maintains that all allowable factors were considered in the penalty proposed for violation of the hazardous chemical standard. Only 1/6 of the gravity based penalty was used because five of Respondent's employees were trained by the abatement dates.

4. Employer's prior history

Prior to the November 16, 1993, inspection, CTI had never been inspected by OSHA.

Amount of Penalty

The failure to abate a violation of an OSHA regulation is a serious matter and employers cannot be allowed to ignore the consequences of their violative conduct. On the other hand, in determining an appropriate penalty for failure to abate § 1910.1030(g)(2)(i) the gravity of the violation and good faith efforts to comply are given considerable weight.

The Secretary agrees that when an employer acts in good faith and seeks to abate violations, the employer's financial condition can be considered in assessing penalties. But he argues in this case that no such consideration should be given because of CTI's failure to protect its employees and to abate the conditions for six weeks. Because of CTI's good faith efforts to comply, it must be noted that the record discloses:

1. CTI could not remain open if it was obligated to pay the penalty in the amount of $30,000 (Tr. 246).

2. CTI's payments are current based on the balance of the penalty owed for the prior violations (Tr. 242, 243).

3. Since the Bradleys have owned CTI, it has never made a profit (Tr. 245).

4. Although salaries have always been paid to other employees, on occasion CTI failed to pay Mr. and Mrs. Bradley (Tr. 245).

A reduction in the proposed penalty is in order. Consistent with the Commission's recent decision in *Valdak Corporation* (No. 93-239), the reasons for reducing the proposed penalty are more fully explained. It is determined that the appropriate penalty for failure to abate Item 7 is $10,000. The appropriate penalty for failure to abate Item 10 is $900.

Citation No. 1

On March 31, 1994, the Secretary issued a citation alleging two "other" violations of the bloodborne pathogens standard to CTI. The citation resulted from the March 2, 1994, reinspection.

Item 1: § 1910.1030(f)(2)(iv)

The Secretary alleges that CTI violated § 1910.1030(f)(2)(iv), which provides:

> The employer shall assure that employees who decline to accept Hepatitis B vaccination offered by the employer sign the statement in appendix A.

Compliance Officer Tracy initially testified that in checking CTI's records, she found that two employees occupationally exposed to bloodborne pathogens, Sharon Ruckle and Wendy Bennett, had not signed declination statements (Tr. 78). However, when shown her OSHA 1-B form that she filled out for the reinspection, Tracy conceded that only one employee, Sharon Ruckle, had not signed the declination statement (Exh. R-5, p. 4a; Tr. 107, 112). Tracy stated that CTI had told her that Ruckle was given the declination form and that she had refused to sign it or return it. Ruckle told Tracy that she had never received the form (Tr. 108).

It is the Secretary's burden to prove a violation by a preponderance of the evidence. The evidence of record fails to establish the violation as alleged. Since Ms. Ruckle was not available as a witness, and in light of the conflicting statements to Ms. Tracy, there is no reason to believe what Ms. Ruckle said over CTI's statement.

The standard was not violated as alleged.

Item 2: § 1910.1030(f)(5)(i)

The Secretary alleges a violation of § 1910.1030(f)(5)(i), which provides:

> The employer shall obtain and provide the employee with a copy of the evaluating health-care professional's written opinion within 15 days of the completion of the evaluation. (i) The healthcare professional's written opinion for Hepatitis B vaccination shall be limited to whether Hepatitis B vaccination is indicated for an employee, and if the employee has received such vaccination.

The compliance officer testified that Respondent had not obtained a healthcare professional's written opinion for two employees, Wendy Bennett and Sharon Ruckle, who had

occupational exposure. She explained that a written opinion is not required when an employee declines the vaccination because it was received from another employer. But otherwise, if the Hepatitis B vaccination is declined, a professional's written opinion is necessary (Tr. 79).

Respondent does not deny the allegations, but argues that the Secretary's interpretation of the standard is erroneous. It is asserted that compliance is impossible when an employee refuses to take the vaccine or visit a doctor. Although the wording and application of § 1910.1030(f) captioned "Hepatitis B vaccination and post-exposure evaluation and follow-up" is not clearly set forth, the employer is shown to have had fair notice of its requirements in this case.

Section 1030(f)(1)(i) provides that the "employer shall make available the Hepatitis B vaccine and vaccination series to all employees who have occupational exposure. . ."

Section 1030(f)(2) details the requirements for providing the Hepatitis B vaccination, including use of the declination statement. Section 1910.1030(f)(4) is captioned "Information provided to the Healthcare Professional" and 1030(f)(4)(i) refers to the "healthcare professional responsible for the employee's Hepatitis B vaccination." Section 1910.1030(5), the standard section at issue, refers to the "Healthcare Professionals's written opinion" and distinguishes between (i) "the opinion for the Hepatitis B vaccination" and (ii) "the opinion for post-exposure evaluation." The record discloses that Respondent was familiar with the bloodborne pathogens standard at § 1910.1030 and the vaccine requirements of Section (f).

The standard at § 1910.1030(f)(5)(i) was violated as alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED that:

1. Item 7 of the FTA Notification, alleging a failure to abate § 1910.1030(g)(2)(i), is affirmed and a penalty of $10,000 is hereby assessed;

2. Item 10 of the FTA Notification, alleging a failure to abate § 1910.1200(h), is affirmed and a penalty of $900 is hereby assessed;

3. Item 1 of Citation No. 1, alleging a violation of § 1910.1030(f)(2)(iv) is hereby vacated.

4. Item 2 of Citation No. 1, alleging a violation of § 1910.1030(f)(5)(i) is hereby affirmed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: July 10, 1995