UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
CENTRAL OPERATING CO.-PHILIP SPORN
Respondent.

OSHRC DOCKET
NO. 93-0436

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 February 13, 1995. The decision of the Judge will become a final order of the Commission on March 15, 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 March 6, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 13, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0436

NOTICE IS GIVEN TO THE FOLLOWING:

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

Catherine Oliver Murphy
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Dudley F. Woody, Esq.
Woods, Rogers & Hazlegrove
Dominion Tower, Suite 1400
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038 4125

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00101182574:03

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,

Complainant,

v.

CENTRAL OPERATING COMPANY – PHILIP, SPORN PLANT,

Respondent.

Docket No. 93-0436

Appearances:

Mark Swirsky, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Dudley F. Woody, Esq.
Woods, Rogers & Hazelgrove, P.L.C.
Roanoke, VA
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

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

Respondent was issued one citation alleging 8 serious violations of the Act and one citation alleging a single other than serious violation of the Act. All alleged violations

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

NOTICE OF DECISION

IN REFERENCE TO:

SECRETARY OF LABOR v. CENTRAL OPERATING COMPANY – PHILIP, SPORN PLANT
OSHRC DOCKET NO. 93-0436

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on **February 10, 1995.** The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless with that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party that is adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. There after, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th Street, N.W. 9th Floor
Washington, D.C. 20036-3419

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. 2200.91 (51 Fed. Reg. 32026, Sept. 8, 1986). It is appended hereto for easy reference, as are related rules prescribing post-hearing procedures.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: January 20, 1995
Washington, D.C.

except items Nos. 6 and 8 of the serious citation have been settled.[1]

The remaining items in contest (Serious Citation Items 6 and 8) allege violations of two of OSHA's bloodborne pathogens standards. Item 6 alleges that Respondent did not have any written Bloodborne Pathogen Exposure Control Plan as required by 29 C.F.R. § 1910.1030(c) while Item 8 alleges that Respondent failed to ensure that employees with occupational exposure to infectious materials were trained. The latter alleged violation specifies as separate sub-parts, nine elements each required by a different sub-section of 29 C.F.R. 1910.1030(g)(2).

The parties, with the approval of the Administrative Law Judge, requested that the case be submitted for decision without a hearing pursuant to Rule 61.[2] The parties had an opportunity to present written as well as oral argument and to respond to the proffer into evidence by the Administrative Law Judge of exhibit ALJ-1.[3] No affected employees have asserted party status.

---

[1] The settlement agreement between the parties is attached hereto and incorporated fully into this decision and order. The settlement agreement meets all of the requirements of Commission Rule 100, 29 C.F.R. § 2200.100 and, accordingly, it is approved in its entirety.

[2] Rule 61, 29 C.F.R. § 2200.61, provides:

> **§ 2200.61 Submission without hearing.**
>
> A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof. Motions for summary judgment are covered by Fed.R.Civ.P. 56.

[3] At the oral argument the Administrative Law Judge notified the parties that he would take official notice of and place into evidence as Exhibit ALJ-1, a document published by OSHA's Directorate of Compliance Programs entitled *Occupational Exposure to Bloodborne Pathogens Interpretive Quips (IQs), June 1993 Version.* The parties were afforded ample time following the oral argument to file comments, objections or replies regarding ALJ-1. See, Rule 201, Fed. Rule Evid. Both parties have filed post-hearing comments.

Discussion

The determinative issue in this matter is whether, under the specific facts of the case, the cited standards are applicable to Respondent.[4]

The cited standards apply if the members of the first aid crews have "Occupational Exposure" (to bloodborne pathogens) as defined by 29 C.F.R. § 1910.1030(c)(1) which states:

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

(Emphasis added.)

Respondent's basic position is that because members of its first aid crew are instructed that it is informal company policy that the rendering of first aid is voluntary, the actual performance of first aid procedures upon an injured person is not part of these employees' duties.

It is undisputed that of its 355 employees, 82 are members of Respondent's First Aid Crew. (Stip. § § 1, 17). Respondent argues that the crew members actually have the option to decline to render first aid. Respondent's first aid trainer stated in his affidavit that his training classes include the instruction to employees on the first aid crew that the actual rendering of first aid to a victim in need is voluntary (Powers affidavit, ¶ ¶ 8 - 11). According to Respondent, since the rendering of first aid is voluntary, it cannot be said that any exposure to bloodborne pathogens[5] "results from the performance of the duties of the

---

[4] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989). Respondent defends in this case solely by arguing that the cited standards are not applicable.

[5] The parties stipulated that in rendering first aid, crew members could reasonably be anticipated to contact infectious materials. Stip., ¶ 8.

employees." Respondent claims that the provision contained in the job descriptions of many of its employees to the effect that the employee "carry out first aid assignments" does not alter the voluntary aspects of its first aid policy. It also notes that under its policy it would not discipline an employee member of the first aid crew who was present but declined to render first aid. There have been, however, no such incidents recorded. (Stip. ¶ 13). Moreover, Respondent maintains that the job descriptions do not necessarily include the rendering of first aid as a part of the job duties but merely identify the job classifications from which the first aid crew members are designated. Finally, Respondent argues that when employees on the first aid crew voluntarily provide first aid, they are acting as "good samaritans" and are thus exempt from coverage of the cited standards.[6]

Complainant relies on the employees' job descriptions which contain "first aid duties" amongst other requirements.[7] The Secretary disagrees with Respondent's good samaritan argument. He claims that the preamble to the standard distinguishes between first aid rendered by a good samaritan as opposed to first aid rendered by a member of a first aid team.

I reject Respondent's position and conclude that the standard is applicable to members of Respondent's first aid crew.

First, the wording of the standard is reasonably unambiguous. Where an employee's job duties include placing that employee in a position where it is reasonable to anticipate that he or she might come into contact with potentially infectious materials, the employee is to be protected under the blood borne pathogene standards. Respondent's claims that the job descriptions' references to first aid are not in a mandatory tone and that its first aid

---

[6] Respondent also intimates that applying the standards to its first aid crew members would be detrimental to workplace safety overall and that compliance with the standard would be bothersome and difficult. These arguments, suggesting the "greater hazard" and "infeasibility" defenses are rejected in that they were neither pled nor are they supported by any evidence at all.

[7] Several of the job descriptions in appendix C submitted as part of the stipulation between the parties, contain the following under "DUTIES:" "[c]arrying out assignments in training for or performing fire fighting and first aid."

crew members are subject to an "informal policy" described above warrant little weight. First aid responsibilities are included as "duties" in employee job descriptions as are other job functions. They are described in the same or similar language suggesting that the employee is to anticipate being called upon to perform "assignments in. . .performing. . .first aid."[8] It is thus within the employees' job duties to be trained in and to provide first aid if so directed by the employer. Second, training an employee in first aid and assigning him or her to the first aid crew raises the reasonable expectation that the individual will render medical assistance as part of his or her job at some time or another. Explanatory materials from OSHA make it clear that assignment to a first aid team is one way in which an employer can be found to have reasonably anticipated that the employee so assigned would render first aid. An interpretation of the applicability of § 1910.1030 issued by the Kansas City regional office of OSHA warns that contact with infectious materials is reasonably anticipated where an employee providing first aid to another employee "is a member of a first aid team or is otherwise expected to render medical assistance as one of his or her duties." (Emphasis added.)[9]

Third, Respondent's assertion that employees who render first aid are "good samaritans" exempted from coverage of the standard and its similar reliance on its "policy" that first aid crew members can refuse to render first aid without fear of disciplinary action is unrealistic and unpredictable and is thus unreasonable. Even though it is stipulated (and must be accepted as an established fact) that Respondent instructs its first aid team

---

[8] See, *e.g.*, Stipulation, Exhibit C, Job description of Maintenance Mechanic - C, which lists 26 job duties.

[9] This interpretation is quoted at length in Judge Schwartz's opinion in *Patterson Drilling Co.*, ___ BNA OSHC ____ , (No. 93-1371, June 4, 1971). The parties have discussed the *Patterson* opinion at length and are both thoroughly familiar with its contents.

Despite the fact that the Judge's decision in *Patterson* is not of precedential value because it was never directed for review by the Commission, it is highly instructive and warrants close reading. Judge Schwartz, in a closely reasoned and carefully analyzed opinion held that the rendering of first aid by employees neither trained in first aid nor assigned as members of a first aid team were the acts of "good samaritans" falling outside the coverage of the cited standards. The holding in *Patterson* is not inconsistent with conclusions reached herein.

members that they may decline to render first aid, it "requires that members of the First Aid Crew respond when a call for first aid is made." (Stip., ¶ 13) (Emphasis added.). Thus, while one or more members of the first aid team which responds might decline to render aid, Respondent "has an expectation that one or more members of the First Aid Crew will respond in any first aid emergency and will participate in rendering first aid services." (Stip. ¶ 15). Whether any member or members of the first aid team gathered in the vicinity of a victim needing assistance will decline to render first aid at the scene of an accident is purely serendipitous and unpredictable. The fact that Respondent anticipates that first aid team members will respond when needed and at least one or more members of that team will render first aid, renders it reasonably predictable that at least some first aid team members may be exposed to infectious materials. Because Respondent cannot possibly anticipate which, if any first aid team members might respond to any given incident and which, if any of the responding team members might decline to render first aid, its position amounts to failing to provide protection to all employees who do respond and render first aid. Finally, the "good samaritan" exception was designed to cover employees who perform unanticipated first aid. 56 Fed. Reg. 64008, at 64102 (Dec. 6, 1991); Ex ALJ-1, (file: a-faid11.irs, p. 4; file: a-faid05.irs, p. 5).

Based on the above, I conclude that training an employee in first aid, including in the job description the duty of "carrying out assignments in performing first aid" and assigning that employee to the first aid team is sufficient to raise the reasonable anticipation that such an employee may come into contact with infectious materials as part of his or her job duties. Employees so designated must then be covered by the cited standards.

Pursuant to the stipulation between the parties, having found the standards applicable, Respondent was in violation of the Act as alleged in items 6 and 8.

The parties saw fit to stipulate that if affirmed, each of the violations would be properly classified to be other-than-serious and that a civil penalty of $1,000 would be appropriate for each violation under § 17(j) of the Act. While parties cannot bind the Commission by stipulating as to conclusions of law (what penalty is "appropriate"), there is nothing in this record which would indicate that any other penalty is more appropriate. Moreover, the parties stipulation as to the classifications and penalty amounts is an integral

element in their effort to have this case decided without a possibly lengthy and expensive hearing. Under these circumstances, I conclude that a penalty of $1,000 for each violation is appropriate.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in serious violation of § 5(a)(2) of the Act in that it failed to comply with the following OSHA standards; 29 C.F.R. § 1910.1030(c)(1)(i) as alleged in item 6 and 29 C.F.R. § § 1910.1030(g)(2)(vii)(A), (B), (E), (G), (H), (I), (K), (L) and (M) as alleged in item 8.

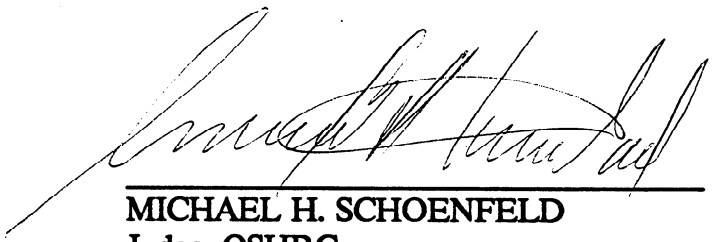
4. Each of the violations are other-than-serious.

5. A civil penalty of $1,000 each is appropriate for items 6 and 8 of the citation.

ORDER

1. Items 6 and 8 of the serious citation issued to Respondent on or about December 18, 1992 are AFFIRMED.

2. A civil penalty of $1,000 for each of the items is assessed.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: FEB 10 1995

Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CENTRAL OPERATING COMPANY -- PHILIP, SPORN PLANT, Respondent.	Docket No. 93-0436

ERRATA

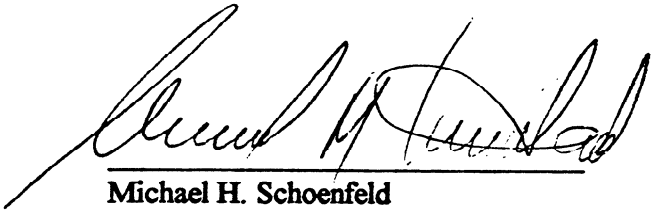
As a result of a telephone conference of this date, and pursuant to Rule 90(b)(3), 29 C.F.R. § 2200.90(b)(3), the following errors arising through oversight or inadvertence in the Decision and Order dated January 20, 1995 are hereby corrected.

1. Conclusion of law number 3 is amended to read as follows:

   3. Respondent was in violation of § 5(a)(2) fo the Act in that it failed to comply with the following OSHA standards; 29 C.F.R. § 1910.1030(c)(1)(I) as alleged in item 6 and 29 C.F.R. §§ 1910.1030(g)(2)(vii)(A), (B), (E), (G), (H), (I), (K), (L) and (M) as alleged in item 8.

2. Paragraph 1 of the Order dated January 20, 1995 is amended to read as follows:

   1. Items 6 and 8 of the citation issued to Respondent on or about December 18, 1992, and as amended to allege other than serious violations of the Act, are AFFIRMED AS AMENDED.



Michael H. Schoenfeld
Judge, OSHRC

Dated: JAN 24 1995
Washington, D.C.