



COMMONWEALTH OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2314 -93

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

M.R. CLEAN JANITORIAL AND
CARPET CLEANING SERVICES

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS COMMISSION

This case comes to us on the secretary of labor's petition for discretionary review which we granted June 29, 1995. Each side then submitted briefs for our consideration.

Complainant secretary of labor takes exception to that portion of hearing officer Bowman's decision dismissing items 1, 2 and 3 of serious citation 1 and item 1a of other than serious citation 2. After consideration of the evidence, the arguments of the parties and the law in this case, we disagree with our hearing officer's findings of fact and conclusions of law which led him to the dismissal of the above citations. We therefore reverse Mr. Bowman and affirm serious citation 1, items 1, 2-and 3, with the penalties which total \$2,250 and we further affirm citation 2, item 1a with no penalty.

KRS 338.071 (4) says this review commission "... shall hear and rule on appeals from citations..." Hearing officers appointed by KRS 338.081 (1) write recommended orders from which affected

parties may appeal to this commission. Rules of procedure¹ (ROP) 48. This commission bears the ultimate responsibility to decide whether an occupational safety and health citation is proper. ROP 3 (1).

DISCUSSION OF THE CASE

M.R. Clean Janitorial (MR) was responsible for the ordinary cleaning at Franklin Medical Center in Frankfort. Under the contract for janitorial services, MR vacuumed, mopped, dusted, cleaned venetian blinds, waxed floors and washed windows. One woman did the work after regular working hours. According to the owner of the cleaning service, his employee was instructed not to touch medical waste, blood or needles.

MR's employee filed a complaint (complainant's exhibit 1) against the medical facility (received by labor in December 1992) which alleged the employee found hypodermic needles in trash bags and specimen slides on the floor. In her complaint she also wondered whether she had to clean' blood she. found On chairs and the floor. Hearing officer Robert Bowman in his recommended order made findings of fact and conclusions of law. Since we reverse Mr. Bowman's recommended order, we will enter our own findings and conclusions as is our right and responsibility under KRS 338.071 (4) and ROP 3 (1).

FINDINGS OF FACT

1. This commission acquired jurisdiction over the parties following respondent MR's notice of contest.

Enacted as section 48, 803 KAR 50:010.

2. MR did not have a bloodborne pathogens exposure control plan when inspected. Transcript of the Evidence (TE) 25.

3. MR did not make a hepatitis B vaccination available to its employee who cleaned at Franklin Medical Center prior to the inspection. TE 46.

4. MR did not train its cleaner at Franklin Medical Center about occupational exposure to bloodborne pathogens prior to the inspection.

5. MR did not have a written hazard communications program when inspected. TE 25. Respondent withdrew its contest to the hazard communications citations (citation 2, items 1 and 2') at trial. TE 51.

6. Franklin Medical Center conducts phlebotomy procedures (the drawing of blood for testing), .conducts gynecological examinations and treats wounds with the attendant bloody waste, spills and splatters. TE 31.

7. Sharps (used hypodermic needles and scalpels) are sometimes disposed of in the regular trash at Franklin Medical Center. TE 32. MR's cleaner was cut by an improperly disposed of scalpel. TE 32.

8. Hepatitis B and HIV (AIDS) are life-threatening bloodborne diseases. TE 36 and 29 Code of Federal Regulations (CFR) 1910.1030 (b).²

9. MR's employee was exposed to bloodborne pathogens hazards while cleaning Franklin Medical Center for respondent. TE 36.

² Adopted in Kentucky by 803 KAR 2:320E.

10. We infer from the above and find that a cleaning employee working at a medical facility (whether during normal working hours or thereafter) has a reasonable expectation of encountering improperly disposed of bloody waste, spilled and spattered blood, improperly disposed of hypodermic needles and scalpels and other improperly disposed of medical supplies which contain or are covered with blood and other bodily fluids.

CONCLUSIONS OF LAW

Serious citation 1, with three items, charges respondent MR Clean with not protecting its employees from the hazards associated with bloodborne pathogens (HIV, AIDS, hepatitis, etc.). Item 1 says MR did not have a written exposure control plan, 1910.1030 (c) (1) (i). Item 2 says respondent did not offer its employees a hepatitis B vaccination as required by 1910.1030 (f) (2) (i). Finally, item 3 says M.R. Clean did not train its employee in the hazards of bloodborne pathogens according to 1910.1030 (g) (2) (i). Taken collectively respondent's argument is that because he cleaned a medical clinic, rather than actually provide .medical services within the clinic, his employee was not exposed to bloodborne pathogens and MR was not subject to 1910.1030, the bloodborne pathogens standard.

The issue is whether 1910.1030 applies to medical service employees alone or whether instead the standard applies to all employees with occupational exposure to blood and other bodily fluids and thus bloodborne pathogens. Section (a) of 1910.1030 says in part:

This section applies to all occupational exposure to blood or other potentially infectious materials... (emphasis added)

So right from the outset, the bloodborne pathogens standard makes it clear that any person with occupational exposure to blood is covered. Then under section (b), the definitions section, "Occupational Exposure means reasonably anticipated...contact with blood..." (emphasis added) Not to belabor the point but the same definitions section says an "Exposure Incident...means specific...parenteral³ contact with blood...that results from the performance of an employee's duties. (emphasis added)

We conclude these regulations taken together mean that if an employee encounters blood or may reasonably anticipate contact with blood, then her employer is subject to the provisions of the bloodborne .pathogens standard (1910.1030).

If we could summarize respondent's brief to us, before taking his objections to the citations in turn, MR argues that 1910.1030 is directed specifically at medical personnel - impliedly exempting (we take it) those service industries and suppliers who come into contact with medical services organizations. But we note, again under the definitions section (b) of 1910.1030, that Universal Precautions says human blood is "... treated as if known to be infectious for HIV...and other bloodborne pathogens." This we understand means that blood when found is handled as if it contained a bloodborne pathogen. So when an employee who in the

³ Parenteral essentially means pierced skin caused by needle sticks or cuts. Section (b), 1910.1030.

course of her job encounters blood or other bodily fluid, 1910.1030 requires her employer to behave as if the bodily fluid contained a bloodborne pathogen. See sections (a), (c) and (d) of 1910.1030.

Respondent points out the cleaning took place after business hours which is true. Exposure to a hazard, here blood and other bodily fluids, however, does not depend on the hour of the day but whether such fluids are present. Next MR argues his contract was for general cleaning only, protecting him from liability under the bloodborne pathogens standard. An employer cannot contract away his responsibilities under the act which requires him to "...comply with the occupational safety and health standards..." KRS 338.031 (1) (b). So despite the existence of a contract for general cleaning at a medical clinic, when an employee is confronted with blood or other fluids, then the bloodborne pathogens standard takes effect.

Respondent asserts MR's cleaner was not exposed to the hazards of blood. That is not true. The woman who did the cleaning for MR said she occasionally had to clean blood off chairs and the floor. TE 22. She reported to the compliance officer she had seen some needles in the regular trash (not medical trash) (TE 32) and had been stuck in 1991 with a scalpel improperly disposed of in the regular trash. TE 32. "Occupational Exposure means reasonably anticipated...contact with blood...that may result from the performance of an employees duties." 1910.1030 (b). We find MR could reasonably anticipate its cleaner would come into contact

with blood at the Franklin Clinic.' This leads us to the conclusion, according to the facts of this case, that general cleaning of a medical facility is controlled and protected by the provisions of the bloodborne pathogens standard. 1910.1030.

Next respondent, in his brief to us, cites several passages which he hopes prove the regulation applies only to medical employers. But a careful reading of these quoted standards yields a different conclusion. 1910.1030 (d) (2) (xi) says procedures involving blood "...shall be performed...to minimize splashing." Here the regulation contemplates (or admits if you will) that blood will necessarily be spilled in a clinical setting. Then sections (xiii) and (xiv) of the same paragraph use the words "transporting," "servicing" and "shipping." Here the standard takes into consideration that employees other than medical personnel will necessarily handle or come into contact with spilled blood.

Respondent's brief argues the housekeeping section (1910.1030 (d) (4)) is intended solely for medical services employers. Not true. Section (d) (4) applies to any employer with employees confronting a contaminated work site. 1910.1030 (d) (4) (ii) (D). How can an untrained general cleaner recognize if clinical personnel are doing a proper cleaning job? To avoid the bloodborne pathogens hazard, the cleaner must be able to distinguish between

⁴ We find spills and accidents happen. Medical personnel are supposed to put sharps (used needles) and medical waste into special containers to prevent accidental contact. But what about the needle that gets put into the regular trash occasionally or blood or clear bodily fluid spilled onto the floor or furniture?

work she can safely perform and work she cannot or should not do. Training on bloodborne hazards gives her those protections. In any event, 1910.1030 (d) (4) was not cited. MR's employee had two choices when she confronted blood, scalpels and needles: she could walk away from them or clean.

We find the MR employee who found blood on surfaces which needed cleaning, got cut by a scalpel and observed improperly disposed of needles did so during the performance of her job; that means exposure of an employee whose employer is subject to the bloodborne pathogens standard.

MR cannot complain now that Humana, who at the time owned the Franklin Medical Center, did not inform it about the necessity for observing the bloodborne pathogens standard. Testimony in this case reveals the cleaner worked by herself on the second shift. It is the responsibility of her employer to supervise and observe the working conditions of his employee. How else may an employer know what his responsibilities are under the law. KRS 338.031 (3). Had he done so, he would have realized what his employee was finding and dealing with at work. Then he could have either taken precautions under 1910.1030 (d), (f), (g) and (h) or closed down his cleaning operation at the Franklin center.

Implicit in MR's argument that it is not responsible for the exposure of its cleaner to bloodborne pathogens is the contention that since Franklin Medical Center created the hazard (performed the medical procedures which spilled the blood), MR is not responsible for any exposure of its employee to the hazard.

But this case does not present a situation where Franklin Medical Center created a hazard (blood, needles and scalpels) which MR is powerless to correct or at least need not correct. Obviously Franklin created the hazard by performing medical procedures on its patients. But when MR's cleaner employee is confronted with the Franklin-created hazards, the standard 1910.1030 responds by requiring all employers who have employees with occupational exposure to blood to take measures to protect their employees. For the case at bar, those measures include 1) the offering of a hepatitis inoculation, 2) providing a written exposure control plan and 3) training employees about bloodborne pathogens. In other words, 1910.1030 spells out specific measures MR can take to protect its employees from the hazards of exposure to blood.

The cleaning lady at the medical facility is just as deserving of the protections of the bloodborne pathogens standard as any regular hospital employee.

We conclude that 1910.1030 takes account of the situation where an employer does not control the creation of the hazard but does have employees with occupational exposure to bloodborne pathogens.

We conclude MR violated 1910.1030, when it failed to provide a written control plan (1910.1030 (c) (1) (i)), when it failed to make available a hepatitis B vaccination (1910.1030 (f) (2) (i) and when it failed to train its employee about the hazards of bloodborne pathogens (1910.1030 (g) (2) (i)).

We further conclude the above violations are serious. KRS

338.991 (11) says a violation is serious "...if there is a substantial probability that death or serious physical harm could result from conditions..." (emphasis added) The secretary of labor must prove respondent's employee could be exposed to the hazards of bloodborne pathogens, W.J. Usery, Jr., Secretary of Labor v. Hermitage Concrete and Company and Occupational Safety and Health Review Commission, 584 F.2d 127, 131 (CA6 1978), CCH OSHD 22,983, and we find the secretary in this case did so.

Hospitals may very well employ outside cleaning services whose employees are instructed not to touch blood and other contaminated medical waste. But since these cleaners work in and around hazardous medical waste, they cannot know how to protect themselves when they encounter improperly disposed of waste unless they are trained to recognize it, understand the hazards and take precautions.

Hearing officer Robert Bowman sustained citation 2, item 2 (a) which alleged that respondent M.R. Clean violated 1910.1200 (h) by failing to provide employees with information and training on hazardous chemicals found in their workplace. Neither party appealed this decision. Finding no error, we affirm that portion of hearing officer Bowman's recommended order as if fully set out within this decision. Further, we sustain citation 2, item 1, since respondent did not have a hazard communications program. 1910.1200 (e) (1). In any event, respondent at trial elected not to contest the hazardous waste citations. TE 51.

We reviewed the calculation of the \$2,250 penalty for the

three serious items of citation 1, finding no error.

We hold the M.R. cleaning employee is occupationally exposed to the hazards of bloodborne pathogens and entitled under the law to the protections derived from the bloodborne pathogens program. 29 CFR 1910.1030.

ORDER

1. We reverse our hearing officer's recommended order.

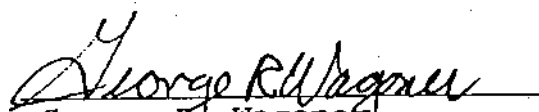
2. We sustain items 1, 2 and 3 of serious citation 1, a violation of the bloodborne pathogens standard (1910.1030) and the accompanying penalty of \$2,250.

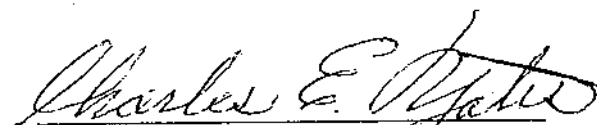
3. We sustain items 1 and 2 of the other than serious citation 2, a violation of the hazard communications standard (1910.1200).

4. We order abatement of all hazards within 30 days of this decision.

It is so ordered.

Entered October 19, 1995.


George R. Wagonec
Chairman


Charles E. Yates
Member

Donald A. Butler
Member

Copy of the foregoing Order is being served upon the following, in the manner indicated:

Hon. Kembra Sexton Taylor
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This 19th day of October, 1995.


Debbie Linnig Hchals