COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 4923-12

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v.

SAM'S CLUB STORE #4876 — RESPONDENT

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Hon. Mark F. Bizzell, Frankfort, for the Secretary. Hon. Richard S. Cleary and Kyle D. Johnson, Louisville, Kentucky, and Hon. Ronald W. Taylor and Thomas H. Strong, Baltimore, Maryland, for Sam's Club Store #4876.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us from Sam's Club Store #4876 ("Sam's") timely petition for discretionary review of our hearing officer's recommended order. We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we will: (1) dismiss Citation 1, Items 1 through 3 and Citation 2, Item 2, because the bloodborne pathogen standards, the subject of those items, are not applicable to Sam's employees; and (2) affirm Citation 2, Item 1 because we find that Sam's inadequately completed OSHA Form 301 to report a work place injury.

Standard of Review

KRS § 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the

Commissioner of the Department of Workplace Standards issues citations. KRS § 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS § 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS § 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission, which may grant the PDR, deny the PDR, or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Secretary of Labor v. O.S.H.R.C.,* 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the Commission hears a case it does so "de novo." *See also Accu-Namics, Inc. v. O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975), where the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission . . ."[1]

As stated by our Supreme Court in *Secretary of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "[t]he review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and

[1] *See* federal commission rule 92 (a), 29 CFR §2200.

accord more weight to one piece of evidence than another." *Terminix International, Inc. v. Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

Facts and Summary of Proceedings

Sam's, an affiliate of Walmart, operates a wholesale club store in Bowling Green, Kentucky. On December 19, 2011, one of Sam's employees partially amputated one of her fingers while operating a meat-cutting band saw in the meat department. A co-worker voluntarily provided first aid to the injured employee until emergency medical assistance arrived shortly thereafter.

Sam's completed an OSHA Form 301 after the accident, and the following three questions in particular were scrutinized in this matter:

Question 14: What was the employee doing just before the incident occurred?

Answer: Cut-Scratched/Puncture by Obj. Machinery.

Question 15: What happened?

Answer: R MIDDLE FINGER AMPUTATED BY BAND SAW.

Question 17: What substance directly harmed the employee?

Answer: Machinery

A compliance officer, Seth Bendorf, inspected the store on March 22, 2012 after Sam's made a timely report of the workplace injury. Mr. Bendorf found no deficiencies with machine guarding, or any other standard designed to protect against the type of accident that occurred. Instead, he found that Sam's had violated several bloodborne pathogen standards under 29 CFR Part 1910, Section 1030.[2] According

[2] The Secretary alleged that Sam's violated the following:

to Mr. Bendorf, Sam's had "designated" first aid responders, namely six store managers who were trained in first aid by the American Heart Association. Consequently, he found that those persons had "occupational exposure" to blood or other potentially infectious materials (OPIM) to trigger the application of those standards. Mr. Bendorf also found that Sam's had not adequately completed OSHA Form 301 to document the workplace injury pursuant to 29 CFR §1904.29(b)(2).

The Secretary issued citations for violations of the BBP standards in which he alleged that Sam's had "trained designated first aid responders who had occupational exposure to bloodborne pathogens as defined by 29 CFR §1910.1030 paragraph b." Citation, Trial Exhibit 6, p. 4 – 6. Sam's filed a timely notice of contest of the citations, denying that any of its employees had occupational exposure, and maintaining that it had provided sufficient information on OSHA Form 301 regarding the accident.

At the hearing, the Secretary offered the testimony of Mr. Bendorf, who testified that Sam's was required to designate someone to render first aid at its store pursuant to 803 KAR 2:310. The pertinent part of that regulation provides that

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(1) 1910.1030(c)(2)(i), stating that each employer who has an employee with occupational exposure shall prepare an exposure determination;

(2) 1910.1030(d)(3)(iii), providing that the employer shall ensure that appropriate personal protective equipment in the appropriate sizes is readily accessible at the worksite or is issued to employees;

(3) 1910.1030(f)(2)(i), mandating that a Hepatitis B vaccination be made available to all employees who have occupational exposure after the employee has received the required BBP training and within ten working days of initial assignment;

(4) 1910.1030(g)(2)(i), requiring that the employer train each employee with occupational exposure in accordance with the requirements of this section; and

(5) 1910.1030(c)(1)(iv), stating that the Exposure Control Plan shall be reviewed and updated at least annually and whenever necessary to reflect new or modified tasks and procedures which affect occupational exposure and to reflect new or revised employee positions with occupational exposure.

"employers with eight (8) or more employees within the establishment shall have persons adequately trained to render first aid and adequate first aid supplies shall be readily available." 803 KAR 2:310 Section 1 (1). The Secretary did not cite Sam's for a violation of 803 KAR 2:310. Instead, he claimed that Sam's automatically "designated" first aid responders by requiring its store managers to attend first aid training with the American Heart Association. Based on his interpretation of 803 KAR 2:310, the Secretary argued that Sam's was required to comply with the BBP standards to protect those managers that were "designated." Citation, Trial Exhibit 6 p. 4 – 6.

Sam's disagreed and argued that the plain language of 803 KAR 2:310 only required it to train persons to render first aid, not to assign first aid responsibilities to any of its employees as part of their job duties. Consistent with its interpretation, Sam's offered testimony of safety director, Ryan Stanton, Director of Safety for Walmart, Inc., Sam's Club Division, and its training materials and safety manual regarding BBPs, all of which stated that no employee, including the managers trained in first aid, were required to provide first aid as part of their job duties. Sam's had first aid supplies and BBP kits available to those employees who voluntarily chose to provide first aid as Good Samaritans.

The BBP Citations Are Hereby Dismissed Because the Secretary Failed to Prove that Sam's Employees Had Occupational Exposure

In order for this Commission to sustain this citation, the Secretary must prove four elements by a preponderance of evidence:

(1) the applicability of the standard;

(2) the employer's noncompliance with the terms of the standard,
(3) employee access to the violative condition; and
(4) the employer's actual or constructive knowledge of the violation.

Bowlin Group, LLC v. Secretary of Labor, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)). In this case, the Secretary failed to show the applicability of the cited bloodborne pathogen standards, and therefore we must dismiss the citations based on those standards.

The BBP standards only apply to employees who have "occupational exposure" to blood or OPIM. "Occupational exposure" means "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." 29 CFR §1910.1030(b). The preamble to the Federal Register that published this regulation identifies certain occupations where employees are presumed to have occupational exposure, including fire and rescue, law enforcement, funeral home personnel, and people working in the health care industry. 56 Fed. Reg. 64,004, 101 – 02 (Dec. 6, 1991). The preamble makes clear, however, that coverage of the BBP regulations includes any employee with a reasonable likelihood of exposure to BBP. *Id.* at 64,089. The Commission must therefore determine whether Sam's employees, who do not work in an industry presumed to have occupational exposure, have sufficient likelihood of exposure to BBP nonetheless.

The Commission has addressed the concept of occupational exposure in two previous decisions, *Secretary of Labor v. Donald D. Page & Assoc.*, KOSHRC No.

2511-94, and *Secretary of Labor v. M.R. Clean Janitorial & Carpet Cleaning Services*, KOSHRC No. 2314-93. The Commission found that the employees in those cases, a construction worker/painter in one and a janitor in the other, had occupational exposure based on the facts and circumstances of those cases.

Donald D. Page & Assoc. ("DPA") was a construction business performing a painting job. After inspecting the worksite, a compliance officer cited DPA for a violation of 1910.1310(c)(1) for its failure to have a compliant BBP program. DPA had trained certain employees in first aid, but maintained at trial that they were not "designated first aid providers." DPA's written program documents, however, stated that its employees have "potential to come into contact with bodily fluids in the course of the performance of their jobs."

Without explicitly stating the definition of occupational exposure, the Commission quoted the definition of what constituted a serious violation and then held that the BBP regulations applied to DPA's employees:

> . . . a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result. KRS 338.991(11) (emphasis added)
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> Where DPA employees ". . . have the potential to come into contact with bodily fluids in the course of the performance of their jobs . . . ," then the "could" requirement for a serious violation in Kentucky is satisfied. KRS 338.991 (11) and *Usery v. Hermitage Concrete Pipe Company & OSHRC*, 584 F.2d 127, 131 (6th Circ. 1978), CCH OSHD 22, 983 at p. 27,787. In effect, DPA's BBP manual admits to the possibility that its employees could come into contact with human blood during the course of their employment.

Donald D. Page & Assoc., slip opinion, at *11- 12. This opinion instructs that any statement or determination regarding a written policy indicating that employees may

reasonably expect to encounter blood or bodily fluids as part of performing their job duties may be an admission of occupational exposure by the employer.

M.R. Clean Janitorial was a janitorial service hired to clean the Franklin County Medical Center. M.R. instructed its employees not to touch medical waste, blood or needles during the performance of their job duties. Yet, there was evidence introduced at trial showing that the employees were still exposed to those materials during the course of their employment. An M.R. employee had filed a complaint against the medical facility with the Labor Cabinet, disclosing that she found needles in trash bags, specimen slides on the floor, and had cleaned blood off chairs and floors. She also revealed that a scalpel improperly disposed of with regular trash had stuck her.

Quoting the definition of occupational exposure, the Commission stated, "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." *M.R. Clean Janitorial*, slip opinion, at *5. The Commission then found that M.R.'s employees had a "reasonable expectation of encountering improperly disposed of bloody waste, spilled and splattered 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." *Id.* at *4. Based on these facts, we held that M.R.'s employees had occupational exposure.

After the Commission decided these cases, the Kentucky Court of Appeals addressed the issue of occupational exposure in *Secretary of Labor v. Irvin H.*

Whitehouse & Sons, 977 S.W.2d 250 (Ky. Ct. App. 1998). The Secretary cited Whitehouse, which employed painters, for violating certain BBP regulations. The Commission did not accept discretionary review of our hearing officer's recommended order affirming the citations. The Secretary sought further review from the Court of Appeals after the Franklin Circuit Court dismissed the citations finding that there was no reasonable expectation that painters would encounter BBPs during the performance of their jobs. The Court of Appeals reversed the Circuit Court and held:

> While the general duties of painters would not normally involve occupational exposure, Whitehouse had designated an employee to render first as aid as part of his job duties. An employee whose duties include first aid responsibilities automatically has occupational exposure. It can be reasonably anticipated that this individual might come into contact with blood and other infectious materials while performing his or her duty – the rendering of medical assistance to injured co-workers. It is irrelevant that only one employee may have such a duty; the employer is absolutely required to protect that particular employee from exposure to bloodborne pathogens.

Id. at 251 (emphasis added). The Court of Appeals stated that Whitehouse had designated first aid responders to comply with 803 KAR 2:310, and, in a footnote, stated that this regulation "required" it to do so. *Id.* at fn. 1.

We have reviewed the recommended order entered in *Whitehouse* for reasons why the Court of Appeals concluded that Whitehouse had designated a first aid responder. Our hearing officer pointed out that an employee told the compliance officer ("CO") that he was trained in first aid and would provide care to any injured worker at the site. The CO, however, admitted that he would not have cited Whitehouse for a violation of the BBP standards if that employee had not admitted to being a first aid responder. If the employee had denied being a first aid responder,

the CO posited that he would have cited the employer for violating 803 KAR 2:310. Our opinion is that the footnote in the Court of Appeals' opinion simply acknowledges that the employer had designated a first aid responder and therefore complied with that regulation as interpreted by the CO.

A federal review commission administrative law judge (ALJ) employed a similar approach in *Secretary of Labor v. Patterson Drilling Co.*, 16 O.S.H. Cas. (BNA) 1989, 1994 WL 416960 (O.S.H.R.C.A.L.J. 1994). The employees in that case were oil field workers who did not have routine occupational exposure to BBP. The Secretary, however, maintained that certain employees had occupational exposure because they were trained to render first aid and because an oil-drilling site has hazards that may cause bleeding injuries. The employer had provided first aid training to its drillers through the Red Cross to comply with the federal counterpart to 803 KAR 2:310. The trained driller on-site, however, was not the person who assisted an employee crushed by falling equipment.

The ALJ quoted a section of the preamble to the Federal Register publishing 29 CFR 1910.1030 discussing the Good Samaritan exception:

> In addition to being reasonably anticipated, the contact must result from the performance of an employee's duties. An example of a contact with blood and other potentially infectious materials that would not be considered to be an "occupational exposure" would be a "Good Samaritan" act. For example, one employee may assist another employee who has a nosebleed or who is bleeding as the result of a fall. This would not be considered an occupational exposure unless the employee who provides assistance is a member of a first aid team or is otherwise expected to render medical assistance as one of his or her duties.

Patterson Drilling Co., 1994 WL 416960 at * 3 (quoting 56 Fed. Reg. 64,101 – 102).

In addition to the preamble to the regulation, the ALJ quoted and adopted guidance from an OSHA interpretative letter:

> It is not OSHA's intent to in any way discourage employers from providing their employees with first aid training paid for by the company. Employees receiving this training, however, may not be covered by the standard. First, the employee must reasonably be expected to come into occupational contact with blood or other potentially infectious materials (OPIM), and secondly, the employee must be a member of a first aid team or is otherwise expected and/or is designated by his/her employer to render medical assistance as one of his or her duties. Unless the employee providing this assistance meets both of these conditions, the individual would not have "occupational exposure" and thus would not be covered by the standard.
>
> Any humanitarian gesture by this individual, such as assisting another employee who has a nosebleed or who is bleeding as the result of a fall, would be considered to be a "Good Samaritan" act and would not be considered to be "occupational exposure" despite having had first aid training.

Id. (quoting interpretive guidance from OSHA's Kansas City regional office). Based on this guidance, the ALJ held that "circumstances such as those at the subject site do not constitute occupational exposure as contemplated by the standard." *Id.* Rather, the act of responding to an emergency, under the facts of the case, was held to be a 'Good Samaritan act."

Another federal ALJ addressed the issue of when an employee has occupational exposure in *Secretary of Labor v. Crown Cork & Seal, Inc.*, 23 O.S.H. Cas. (BNA) 1674, 2011 WL 1290676 (O.S.H.R.C.A.L.J 2011). The employer manufactured the tops of beer and soda pop cans. One of its employees severed her finger while cleaning a machine and was attended to by her supervisor. Every year, the employer showed a video on BBPs instructing employees what to do when an employee comes into contact with blood or bodily fluids. The supervisor and other employees were

trained in first aid, and the employer maintained a list of personnel who were trained. The manager of the facility testified, however, that none of the employees on the list had job responsibilities that included rendering first aid. The employer maintained BBP kits, which included goggles, a CPR kit, plastic coveralls, and bleach. There was no rule prohibiting any employee helping a co-worker who needs medical attention or first aid, which is why the employer claimed that they offered first aid training and made personal protective equipment (PPE) available. No employee, however, would be penalized if they elected to not help an injured employee.

The employer maintained that these facts failed to show that its employees had occupational exposure, and that any exposure during the accident was the result of a Good Samaritan act excepted from the BBP regulations. In response, the Secretary claimed that the proof showed that the employees were trained as first aid responders and therefore could reasonably expect to come into contact with blood or other potentially infectious body fluids in the performance of their job duties. The Secretary also maintained that, even if their employees were not formally designated as responders, they were required to respond under 29 CFR §1910.151(b), which is the federal counterpart to 803 KAR 2:310.[3] The Secretary argued that because a regulation required designated responders on site, the employer was also required to

[3] The federal regulation's obligation on employers to adequately train first aid responders depends on whether there is an infirmary, clinic or hospital within near proximity to the workplace. If not, "a person or persons shall be adequately trained to render first aid." 29 CFR §1910.151(b). The Kentucky regulation imposes a duty to have a person adequately trained to render first aid if there are more than eight employees at a particular worksite, even if a hospital, clinic or infirmary happens to be next door to the worksite.

comply with the BBP regulations. The Complainant in this case has essentially made the same arguments as the Secretary in *Crown Cork & Seal.*

Based on these facts, the ALJ found that the BBP regulations did not apply. In doing so, the ALJ relied on *Whitehouse* and *Patterson, supra*, and stated:

> Thus, where employees are designated first aid responders the bloodborne pathogen standards would apply. Moreover, as apparent from the Preamble, even if not explicitly designated first aid providers, the standards would still be applicable where employees could reasonably expect to be exposed to bodily fluids that might contain bloodborne pathogens (e.g. nurses, dental hygienists, etc.) *See e.g.* 56 Fed. Reg. at 64111. However, where the only employee exposure would come as a result of a "Good Samaritan" act, the standards do not apply.

Crown Cork & Seal, at *20 (emphasis added). Applying this rule, the ALJ held that Crown Cork & Seal's employees did not have occupational exposure. Even though the employer was found to have offered first aid training to its employees, none of the employees were "required, as part of their job, to render first aid or other medical services." *Id.* at *21. The ALJ also noted that it was reasonably prudent for any employer to maintain a list of employees who, in the event of an emergency, may be able to provide first aid or CPR" and to have PPE and BBP kits available. *Id.* at 22. Because it did so, however, does not imply that first aid trained personnel were "either required or expected to provide first aid as part of their job responsibilities." *Id.*

The ALJ also addressed the Secretary's argument that the employer was required to designate a first aid responder under 29 CFR §1910.151(b) because there was no infirmary, hospital, or clinic within near proximity of the work site, and, by implication, the employer was required to comply with the BBP standards. The

Secretary argued that there was no such facility in near proximity because it took approximately 12 - 20 minutes after the accident for EMTs to arrive on scene. The ALJ noted, however, that it only took two minutes for the EMT to arrive from a nearby fire station after they were called, which he found was a timely response. The ALJ found that the Secretary failed to prove a violation of 29 CFR §1910.151(b) based on his theory that the response time was too long, and, therefore, Crown Cork & Seal was not required to designate a first aid responder.

In a footnote, the ALJ also expressed skepticism of the Secretary's theory that the employer must comply with BBP regulations simply on account of whatever its obligations were under 29 CFR §1910.151(b):

> Given that, under his own interpretation, the Secretary has failed to demonstrate a violation of 29 CFR §1910.151(b), I do not address the propriety of her interpretation. First, I do not reach the propriety of the Secretary's attempt to find a violation of one standard by alleging a violation of an uncited standard where any alleged violation of that standard was not tried by the consent of the parties. Second, 29 CFR §1910.151(b) makes no mention of having a fire department or EMT personnel in "near proximity." Rather, it requires the presence of trained first aid personnel where there is no infirmary, clinic, or hospital in near proximity. More importantly, there is nothing in the standard that requires an employer to designate a first aid responder. Rather, it only requires that trained first aid personnel be on the premises. In that regard, I note that, although not designated as first aid responders as part of their job duties, respondent maintained a list of personnel who were trained in both first aid and CPR. (Ex. S-5).

See id., at fn. 10 (emphasis added).

Other federal ALJ decisions addressing the issue of occupational exposure have also focused on the employee's assigned job duties to determine whether the employee could reasonably anticipate exposure to bodily fluids or blood. *See e.g. Secretary of Labor v. Lowes Home Centers, Inc.*, 19 O.S.H. Cas. (BNA) 2199, 2002

WL 31931903 (O.S.H.R.C.A.L.J. 2002) (holding that Lowes was bound by its exposure determination prepared in accordance with the BBP standard, which acknowledged that employees in certain job classifications "may have some potential for exposure to blood or potentially infectious materials"); *Secretary of Labor v. Borg-Warner Protective Services, Corp.*, 18 O.S.H. Cas. (BNA) 1119, 1997 WL 68085 (O.S.H.R.C.A.L.J. 1997) (security guards had occupational exposure because their written job descriptions included providing first aid to personnel injured at the work site); *Secretary of Labor v. Central Operating-Philip, Sporn Plant,* 17 O.S.H. Cas. (BNA) 1300, 1995 WL 121507 (O.S.H.R.C.A.L.J. 1995) (employees assigned to first aid team had occupational exposure because the employer expected the first aid team to respond to incidents and provide first aid). If actual or potential exposure results only from Good Samaritan acts during an emergency, then the bloodborne pathogen regulations do not apply. *See e.g., Crown Cork & Seal, supra*; *Patterson Drilling Co., supra.*

The Secretary in this case, through his citation and opening statement at the hearing, asserted that occupational exposure arose from Sam's alleged designation of first aid responders under the Secretary's interpretation of 803 KAR 2:310. The Secretary maintains that "adequately trained to render first aid" means designated by the employer to render first aid. Because Sam's allegedly "designated" first aid responders by sending its managers to first aid training, the Secretary relies on the holding of *Whitehouse, supra*, to find that those designated persons are automatically deemed to have occupational exposure. Sam's interpreted the regulation differently

and instructed its employees trained in first aid that they were not obligated to provide first aid as part of their job duties (*i.e.,* they were not designated first aid responders).

We do not necessarily fault Sam's for interpreting the phrase "adequately trained to render first aid" to mean what it says, which is that Sam's discharged its duty under the first aid regulation by providing first aid training, and that it did not have to go a step further and designate first aid responders. Guidance concerning that exact same phrase in a comparable federal first aid regulation supports Sam's interpretation. *See e.g., Crown Cork & Seal, supra*, at fn. 10; OSHA December 11, 1996 and May 25, 2004 Interpretation Letters (cited and discussed in Sam's Initial Brief to the Commission, p. 11).[4]

Whether 803 KAR 2:310 obligates Sam's to designate first aid responders, however, extends beyond the scope of what we should decide here.[5] We simply reject the Secretary's contention that 803 KAR 2:310 somehow caused Sam's to unwittingly designate first aid responders when it had its managers attend first aid training. In order for us to sustain such an interpretation, we would have to (1) ignore the definition of occupational exposure, which requires a showing of reasonably anticipated exposure to blood or OPIM during the performance of an employee's

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[4] The Commission should look to federal law when interpreting KOSHA. *Ky. Labor Cabinet v. Graham*, 43 S.W.3d 247, 253 (Ky. 2001), rev'd on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

[5] If the Secretary had amended his citation to include a violation of 803 KAR 2:310, we would have that issue squarely before us.

assigned job duties; and (2) that Sam's instructed its managers and employees that they were not required to render first aid.

Instead, we hereby adopt the approach taken in *Crown Cork & Seal* and *Patterson Drilling Co., supra*, to determine whether an employee trained in first aid has occupational exposure. First, the Secretary cannot prove occupational exposure by simply showing that the employer had BBP kits available for use by first aid trained employees on site. Moreover, an employer may provide first aid and BBP awareness training to its employees without fear that such training constitutes an admission that its employees have occupational exposure. We hold that the proper inquiry is whether the Secretary offered sufficient evidence to prove that Sam's had, in fact, designated employees to provide first aid as part of their assigned job duties.

The Secretary failed to offer proof of that here. In fact, the evidence refutes that Sam's designated any of its employees to be first aid responders as part of their job duties. Sam's written BBP program specifically stated Sam's determination that none of its employees had occupational exposure as defined in 1910.1030, but that it "was beneficial that all [employees] go through general awareness training." Trial Exhibit 4, p. 2. Those materials further provided under a section entitled, Good Samaritan Acts, that "Sam's club does not require or expect any [employee] to be a first aid responder." *Id.*, p. 3. Sam's safety director, Mr. Stanton, also testified that Sam's specifically instructed its employees, including the managers who were trained in first aid, that they had no obligation to provide first aid to anyone as part of their job duties. *See* Transcript, p. 93 – 94, 96. If anyone chose to render first aid, the

written and verbal policies made clear that they would be doing so voluntarily as Good Samaritans. *See id.*, p. 98 - 99; Exhibit. 4, p. 3.

Even though the Secretary's theory of the case was focused on his interpretation of 803 KAR 2:310, he also argues in his brief that the Commission should find occupational exposure like we did in *Donald D. Page & Assoc., supra* by referring to Sam's safety manual and training materials. He states that those written materials provide information on universal precautions, PPE, cleaning up an accident site, and biohazardous waste and how associates are to protect themselves from BBP or OPIM. *See* Labor's Brief to the Commission, p. 22 – 24. He also points to the purpose statement of these materials, which is to "protect all Associates from bloodborne infections by eliminating or reducing their work exposure to human blood or potentially infectious material." *Id.* at 22 – 23. The Secretary argues that this content, when viewed in context that some of Sam's employees had first aid training, was sufficient to infer occupational exposure. We disagree.

Sam's safety manual does not constitute an admission that its employees had occupational exposure like the policy discussed in *Donald D. Page & Assoc.*, *supra*. *See* Sam's Reply Brief, p. 9 – 11. Sam's BBP program stated that Sam's had determined that none of its employees had occupational exposure. Sam's trained its employees on general precautions for BBPs to foster a basic awareness among its employees and made PPE available in the event that they chose to provide first aid. We find that those materials simply apply to those employees who voluntarily choose to provide first aid or may unexpectedly encounter blood or OPIM during an

emergency. Donald D. Page & Associate's BBP program, on the other hand, specifically stated that its employees "have the potential to come into contact with bodily fluids in the course of the performance of their jobs." *Donald D. Page & Assoc., supra*, at * 11-12 (emphasis added).

The Secretary also refers to Sam's BBP manual discussing minor clean-ups in its brief to the Commission, but fails to elaborate how this proved that Sam's employees had occupational exposure.[6] *See* Labor Brief, p. 22 – 23. Regardless, the Secretary did not cite Sam's with violations of the BBP standard based on cleanup of accidents causing potential occupational exposure. Nor did he offer any evidence that an employee had been assigned by Sam's to clean up blood as part of their job duties. Based on the limited record before us, we find that the Secretary failed to carry his burden of proof to show that Sam's employees had occupational exposure simply because Sam's safety manual mentioned instructions for cleaning up minor accidents.

The evidence demonstrates that Sam's did not designate first aid responders. The Secretary also failed to prove that Sam's employees are otherwise exposed to blood or OPIM during the performance of their job duties by simply referring to Sam's BBP program. Because the Secretary failed to prove that Sam's employees had

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6 To argue that Sam's "designated" first aid responders had occupational exposure, the Secretary mentions Sam's safety manual's directions for the clean-up of minor accidents. *See* Labor's Brief, p. 22 – 23. Mr. Bendorf also testified that managers trained in first aid could be exposed to blood or OPIM when cleaning up a first aid incident. *See* Transcript, p. 52. Mr. Stanton testified that minor cleanup of blood would be accomplished by a Good Samaritan, if that person chose to do so. *See* Transcript, p. 98. It is also undisputed that Sam's instructed its employees to seek out the assistance of a third party for major accident clean-ups. *See* Exhibit 4, p. 4. In a footnote in its reply brief to the Commission, Sam's also claimed that it would have offered proof that none of its employees had exposure based on the methods employed to clean up the accident that led to the citation.

occupational exposure, the bloodborne pathogen regulations do not apply, and the citations based on those standards must be dismissed.

The Record Keeping Violation Pursuant to 29 CFR §1904.29(b)(2) Is Affirmed

An employer must complete an OSHA 301 incident report form, or an equivalent form, when an employee suffers a recordable workplace injury. *See* 29 CFR §1910.04(b)(2). The form must contain the following information: "the employee activities at the time of the incident; the details of the injury or illness; the extent of harm suffered by the employee; and the nature of the treatment provided." Rothstein, Occupational Safety & Health Law, § 8.6 (2016 ed.). A citation for a violation of §1904.29(b)(2) should issue if an employer's completion of the 301 "materially impairs the understandability of the nature of hazards, injuries and illnesses in the workplace." *See* OSHA Directive CPL 02-00-135, December 30, 2004.

Sam's maintained that its answers to questions on Form 301, taken together, provided sufficient information about the accident in compliance with the regulation. The Secretary, however, maintained that, the answers omitted key pieces of information concerning what the injured employee was doing just before the accident occurred. We agree with the Secretary.

The answers provided by Sam's reflect a poor effort to document the accident. In particular, Sam's completely disregarded question 14 of the form by failing to state what the employee was doing right before she was injured or where she was when the accident occurred. Someone reviewing this form would not know whether the band saw inadvertently started while she was performing maintenance on the

machine or cleaning it, or whether she was using it to cut meat. We find that a proper response, at the very least, would have disclosed that the employee was cutting meat with a band saw in the store's meat department. Leaving out this key piece of information materially impairs the nature of the work place hazard that injured Sam's employee. Accordingly, we affirm Citation 2, Item 1 and the penalty of $850.00 for Sam's failure to adequately complete the OSHA 301 incident report form.

Order

For the reasons discussed above, we hereby affirm Citation 2, Item 1 issued for Sam's failure to properly complete an OSHA Form 301, and dismiss all of Citation 1, and Citation 2, Item 2 based on Sam's alleged violation of various bloodborne pathogen standards.

It is so ordered.

February 14, 2017.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify that a copy of the foregoing brief has been served this 14th day of February, 2017, on the following as indicated:

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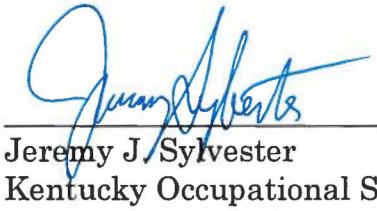

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