

**BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION**

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BRITTHAVEN, INC.,  
and its successors

RESPONDENT.

OSHANC NO. OSHANC 2005-4523  
OSHA INSPECTION NO. 308758523  
CSHO ID NO. K2192

**ORDER**

THIS MATTER was heard by the undersigned and was originally scheduled to be heard on November 16, 2005 in Charlotte, North Carolina. The complainant is represented by Larissa Ellerbe, Assistant Attorney General; respondent is represented by Erik P. Lindberg, respondent's Associate General Counsel.

On November 9, 2005, prior to the scheduled hearing in this matter, counsel for the parties and the undersigned conducted a prehearing telephone conference during which counsel advised the undersigned that an evidentiary hearing was unnecessary due to the parties being in general agreement on the facts of the case and jointly believing that the sole issue was interpretation of the cited standard in Citation 1, Item 1 relative to the agreed facts. Citation 2, Item 1 was not contested by the respondent. Counsel suggested submission of agreed stipulated facts to the undersigned and argument of the position of each party through a brief. It was agreed and ordered that counsel for the parties submit the agreed stipulations by November 30, 2005 and submit their briefs by December 30, 2005. The stipulations and the briefs were all timely submitted.

The stipulations are reproduced below and constitute the Findings of Fact in this matter.

**STIPULATIONS  
(FINDINGS OF FACT)**

1. This Court has jurisdiction over the parties.
2. The Respondent is an employer as that term is defined in the United States Occupational Safety and Health Act and the Occupational Safety and Health Act of North Carolina.
3. All required notices have been given.
4. Neither party has any procedural objection to the decision of this matter by Judge Koch.
5. Complainant is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the Occupational Safety and Health Act of North Carolina.
6. Respondent is a corporation duly organized and existing under the laws of the State of North Carolina and maintains a place of business in Albemarle, North Carolina.
7. No indicated stipulation.
8. On March 16, 2005, a Compliance Officer for the North Carolina Department of Labor, Occupational Safety and Health Division, began an inspection at Respondent's facility located at 33426 Old Salisbury Road in Albemarle, North Carolina. As a result of the inspection, a Citation and Notification of Penalty was issued to Respondent on April 18, 2005. The citation alleged one serious violation based on Respondent's failure to perform titer testing following the administration of the Hepatitis B vaccination series and one other-than-serious violation.
9. Respondent duly filed its Notice of Contest to the Citation and Notification of Penalty, dated May 27, 2005. At all relevant times, Respondent has objected to the issuance of the Citation and Notification of Penalty on grounds that the NC OSH Division does not have the authority to enforce the suggestions and/or recommendations of the governmental agency, the U.S. Public Health Service (USPHS). Respondent contends that NC OSH Division may only enforce mandatory language.
10. Both parties agree that Britthaven, Inc. has contested Citation Number One, Item 1.
11. The primary issue for determination in this matter is whether the North Carolina Department of Labor OSH Division has the authority to mandate the recommendations of the U.S. Public Health Service as stated in the Bloodborne Pathogens Standard, 29 CFR 1910.132(f)(1)(ii)(D).
12. The parties agree that the U.S. Public Health Service suggests and/or recommends that Health Care Personnel who have contact with patients or blood and are at ongoing risk for percutaneous injuries should be tested 1-2 months after completion of the 3-dose vaccination series for the presence of Anti-HB's, which establishes the efficacy of the vaccine.
13. The parties agree that Britthaven administered the 3-dose Hepatitis B vaccination series to qualified Health Care Personnel.
14. The parties agree that, with the exception of the follow-up testing, Britthaven has complied with all other U.S. Public Health service guidelines for the administration of the HBV vaccination.
15. The parties agree that Hepatitis B can result in chronic illness or death.
16. The parties agree that the underlying Citation and Notification of Penalty can be resolved without the necessity of further hearing.
17. The parties agree that the penalty of \$1,375.00 is correctly calculated and is reasonable as alleged.
18. The parties further agree that Judge Koch, in his discretion, may decide the issue on these Stipulations and the parties' briefs and accompanying exhibits without the presentation of live testimony.
19. Attached to Complainant's Brief are exhibits in support of Complainant's position. Respondent's counsel has been furnished a copy of exhibits that are not easily accessible. Pursuant to Rules .0512(b) and .0513 of the Rules of Procedure of the Safety and Health Review Commission, the parties agree that each of these exhibits, if relevant and not otherwise privileged material, may be received in evidence without further identification or proof.
20. Attached to Respondent's Brief are exhibits in support of Respondent's position. Complainant's counsel has been furnished a copy of each exhibit. Pursuant to Rules .0512(b) and .0513 of the Rules of Procedure of the Safety and Health Review Commission, the parties agree that each of these exhibits, if relevant and not otherwise privileged material, may be received in evidence without further identification or proof.

Based on the foregoing stipulated Findings of Fact, the undersigned makes the following

**CONCLUSIONS OF LAW**

1. The foregoing stipulated Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Occupational Safety and Health Act of North Carolina.
3. The complainant has failed to show by the greater weight of the evidence and as a matter of law that the respondent is required by the provisions of 29 CFR 1910.1030 (f)(1)(ii)(D) to require its health care personnel who have contact with patients or blood and are at ongoing risk for percutaneous injuries to be tested 1-2 months after completion of the 3-dose Hepatitis B vaccination series.
4. The complainant has proved by the greater weight of the evidence a nonserious violation by the respondent of 29 CFR 1910.132(d)(2) by not verifying that the required workplace hazard assessment for personal protective equipment had been performed through a written certification relating to use of gowns.

**DISCUSSION**

Based on the briefs of the parties submitted to the undersigned, this appears to be a case of first impression, if not for federal OSH and the other state plans, at least for North Carolina. At issue is the plain language of the cited standard, which would seem to make the recommendation of the United States Public Health Service a mandatory standard. This language collides with the language of 29 CFR 1910.6, which seems to require that only mandatory language (the word "shall") in standards or guidelines incorporated into OSH standards become enforceable.

I believe the complainant's reading of 29 CFR 1910.6 is not the only reading of the standard that can be taken. If one looks at 29 CFR 1910.6(a)(1), it references the standards of two groups: agencies of the federal government and organizations which are not agencies of the federal government. None of the laundry list of organizations contained in §1910.6(b)-(w) includes any agencies of the federal government. I do not know why, but a reading of these sections gives contact information as well as the standards, which are incorporated into the OSH standards and the location of incorporation. If one looks directly at those OSH standards, they do not reference the incorporated standards of the outside organization.

That the cited standard specifically mentions the United States Public Health Service indicates that federal agencies are referenced differently. One does not have to use the words "incorporated by reference" when the provisions of the agency are specifically mentioned in the OSH standard. For the complainant to enforce those recommendations, they are of necessity incorporated into the OSH standard. If they were not part of the standard, they could not be enforced.

This leads back to the specific language of 29 CFR 1910.6(a)(1), which states that only mandatory provisions (provisions containing the word "shall" or other mandatory language, are adopted as standards of the Occupational Safety and Health Act. That language appears to apply to both federal agencies and other organizations. Thus, it applies to the United States Public Health Service. Absent a specific provision in the OSH standards that the recommendations of the United States Public Health Service become mandatory standards notwithstanding 29 CFR 1910.6(a)(1), I believe that standard governs.

Contrary to the Complainant's assertion, this result does not eviscerate the standard, although it does affect enforceability of the follow-up testing aspect. If Congress or the General Assembly wants to make the United States Public Health Services recommendations mandatory, it needs to enact language that specifically excepts this standard from §1906.6. Clearly this can be done, but until it is, the benefit of the doubt of applicability goes to the respondent.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation 1, Item 1, an alleged serious violation of 29 CFR 1910.1030(f)(1)(ii)(D), is dismissed;
2. Citation 2, Item 1 is affirmed as a nonserious violation of 29 CFR 1910.132(d)(2) with no penalty; and
3. All violations not previously abated shall be immediately abated.

This 28th day of April, 2006.

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RICHARD M. KOCH  
HEARING EXAMINER