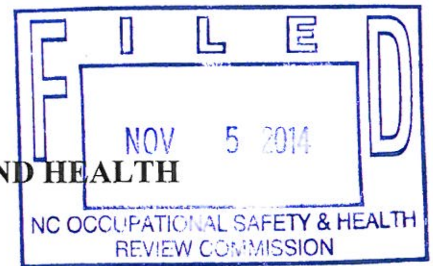

NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,
COMPLAINANT,

v.

ANDREW C. GEER, D.D.S., P.L.L.C.,
and its successors,
RESPONDENT.

DOCKET NO.: OSHANC 2014-5586
INSPECTION NO.: 317366706
SHCO ID: K3723

THIS MATTER came on to be heard and was heard before the undersigned Administrative Law Judge, Ellen R. Gelbin, on August 12, 2014, in Winston-Salem, North Carolina. Complainant was represented by Jill F. Cramer, Assistant Attorney General, North Carolina Department of Justice. Dr. Andrew C. Geer, D.D.S. personally appeared and represented himself.

Also appearing for the North Carolina Department of Labor (NCDOL), were Mary Perkinson, Safety Health Compliance Officer (HCO), with Alexa Cherry and Ben Harris, observing.

Based on pleadings, testimony, evidence, and, arguments, the undersigned makes the following:

FINDINGS OF FACT:

1. The Occupational Safety and Health Act of North Carolina (the Act) charges the NCDOL with the duty of enforcing the Act. N.C. Gen. Stat. §95-126 *et seq.*

2. The Act also provides for the creation of a Safety and Health Review Commission to hold independent hearings regarding contested citations and/or penalties.

3. Respondent is a dentist and the owner of Andrew C. Geer, D.D.S., P.L.L.C., which is an employer within the meaning of and subject to the provisions of the Act.

4. Respondent's business is an office of general dentistry with its primary place of business in Winston-Salem, Forsyth County, North Carolina.

5. Respondent employs 17 professionals overall, including the following: 4 dentists, 4 dental hygienists, 5 dental assistants, and, 4 front desk personnel.

6. Respondent's dentists, dental hygienists – and in some cases, dental assistants – are occupationally exposed to blood-borne pathogens (BBP) and Other Potentially Infectious Materials (OPIM) during routine dental procedures (including simple root canals).

7. On January 24, 2014, as a result of random selection, the North Carolina Department of Labor (NCDOL) conducted a comprehensive inspection of respondent's newly-built work site located at 3244 Reynolda Road, Winston-Salem, North Carolina.

8. After following proper protocol for obtaining permission and inspecting the dental office, the HCO issued two citations as follows:

CITATIONS

Citation 1: Item 1 Type of Violation: Serious:

29 CFR 1910.1030(c)(1)(iv): The Exposure Control Plan was not reviewed and/or updated annually:

a) facility-wide - for employees with occupational exposure to blood or OPIM, the employer had not updated the Exposure Control Plan since August 2009.

Citation 1 Item 2 Type of Violation: Serious:

29 CFR 1910.1030(d)(2)(vii)(B): Bending, recapping, or needle removal was not accomplished through the use of a mechanical device or a one-handed technique:

a) operatories - for employees using the Aim-Safe device for recapping which were not secure and could result in a potential two handed recapping process.

Citation 1 Item 3 Type of Violation: Serious

29 CFR 1910.1030(g)(2)(ii)(A): The employer did not ensure that training provided to employees with occupational exposure at the time of initial assignment to tasks where occupational exposure might take place:

a) facility-wide - for employees with occupational exposure to blood and/or OPIM hired in September 2013 and had not been through BBP training until November 2013.

Citation 1 Item 4a Type of Violation: Serious

29 CFR 1910.1030(g)(2)(vii)(B): The bloodborne pathogens training program did not contain a general explanation of the epidemiology or symptoms of bloodborne diseases:

a) facility-wide - for employees with exposure to blood and/or OPIM the employers training program did not contain a general explanation of the epidemiology or symptoms of bloodborne diseases.

Citation 2 Item 1 Type of Violation: Nonserious

29 CFR 1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling:

a) operatories - for the electric box(s) that the computers were plugged into (under the cabinets) which have not been mounted and were adjacent to a water line.

b) unfinished operatory - for the electrical box on the floor, adjacent to a water line, that was not mounted.

Citation 1, Item 1 SERIOUS
Violation of 29 CFR 1910.1030(c)(1)(iv)
(Failure to Annually Update Exposure Control Plan)

9. The paragraphs above are hereby incorporated by reference into this section.

10. The Act requires employers – whose employees are occupationally exposed to blood-borne pathogens (BBP) and other potentially infectious materials (OPIM) — to review and update their related Exposure Control Plan (ECP) annually.

11. Dr. Geer knew of his annual obligation to update the plan and document compliance.

12. Dr. Geer designated himself as OSHA Coordinator in 2003, 2004, 2005 and 2009. As such, he apparently reviewed and updated respondent's ECP in each of those years as evidenced by his signatures on the Annual Review sign-off sheet. (R2, p2)[1]

13. Dr. Geer stipulated that his office's most recent Annual Review/Update was in 2009.

14. Dr. Geer testified he sent "someone every year" to OSHA training.

15. The pages offered in respondent's Exhibit #2 (R2) did not satisfy the requirements of 29 CFR 1910.1030(c)(1)(iv) because, among other things:

- Respondent did not conduct and/or failed to document annual reviews to ensure updated training and equipment for all exposed employees;

- Respondent did not note which employees were exposed to what hazards; and,

- Respondent did not note job titles for employees who signed attendance forms.

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1 References to C1, C2 etc., relate to Complainant's Exhibits #1 and #2; and, references to R1, R2, etc., relate to Respondent's Exhibits #1 and #2, etc.

16. Complainant proved a *prima facie* violation of 29 CFR 1910.1030(c)(1)(iv) for failing to review, update, and, implement its Exposure Control Plan annually.

Citation 1, Item 2 SERIOUS
Violation of 29 CFR 1910.1030(d)(2)(vii)(B)
(Failure to Provide Proper Needle Stick Protection)

17. The paragraphs above are hereby incorporated by reference into this section.

18. The Act requires employers – whose employees are occupationally exposed to blood-borne pathogens (BBP) and other potentially infectious materials (OPIM) – to provide mechanical devices or one-handed techniques for recapping needles.

19. Respondent's employees are frequently exposed to BBPs and OPIM.

20. Respondent stipulates to using an "Aim + Safe" needle recapping device. C1-4

C1 C2 C3 C4

21. Aim + Safe is a needle recapping device (device) variously pictured as follows: C1-4

- An Aim + Safe needle re-capper is a round, semi-hard rubber cone;
- The outer top ring flares down and out like a mushroom cap; C3- 4
- The inner top ring is slightly concave and tapers into a center hole, extending down through the center of device and into the stem; C1, 2, 4
- A tri-pronged stem protrudes from underneath the "mushroom cap," and may be grasped with several fingers; C4 (shows needle cap in place);
- The device is free-standing. It can inadvertently be knocked-over, moved, rolled, turned, or, scooted on or off the work surface either before, during, or after dental procedures; C3, 4
- The user inserts the capped or needle-end of the loaded syringe into the gently sloped concavity at the top of the device; C1, 2

- Dr. Geer demonstrated with one hand how one could insert a syringe into the device as it lay on its side. By pressing the syringe downward and forward into the hollow, the device leverages up to 45 degrees (on two prongs of the stem) and then to a vertical, upright position, where the needle cap is pushed into place; C4

- Once the needle cap is locked into place, the syringe is placed horizontally on the work surface, with the device protecting the capped-end of the needle; C2, 4

- The weight of a metal syringe flattens out the flared rubber lip, preventing the loaded device from rolling; and, C4

- The metal finger grips protruding from the top of the syringe also keep the loaded device from being rolled or pushed off of the work surface. C2, 4

22. To remove the syringe, a user must either grasp the stem of the device with one hand and pull out the syringe with the other hand; or, the user must hold down the device with one hand and pull out the syringe with the other hand.

23. The HCO testified that the employees she interviewed reported no complaints with the device and it was dentist Dr. Schweitzer who first brought it into the office.

24. Dr. Geer did not offer written proof of employee training programs or the circumstances under which a private OSHA trainer may have recommended the Aim + Safe device.

25. Dr. Geer presented no evidence of when he last reviewed "changes in technology that eliminate or reduce exposure to" BBP, to determine if there exists a safer way to recap or remove a needle through the use of "a mechanical device or a one-handed technique."

26. Dr. Geer presented no evidence of any "alternative [recapping device or technique] that is feasible or that the nonconforming device or technique is required by a specific medical or dental procedure" pursuant to 29 CFR 1910.1030(d)(2)(vii)(A).

27. Dr. Geer preferred the affixed needle recapping device installed after the inspection.

C8

28. The Aim + Safe is inadequate because it is a two-handed device which exposes users to a needle stick while trying to insert, remove, or, re-place a capped or uncapped, loaded or unloaded syringe from or into the center of a round rubber device that could possibly move, roll, turn, scoot across, or fall off the work surface.

29. Complainant made a *prima facie* case for respondent's violation of **29 CFR 1910.1030(c)(1)(iv)** for using a two-handed needle stick protection device.

Citation 1, Item 3 – SERIOUS
Violation of 29 CFR 1910.1030(g)(2)(ii)(A)
(Failure to Provide BBP/OPIM Training for Exposed New Hires or Exposed Employees Assigned to New Tasks or Annually)

30. The paragraphs above are hereby incorporated by reference into this section.

31. The Act requires employers to provide no-cost, in-house, updated BBP/OPIM training programs during regular business hours to each new exposed employee when hired, when each exposed employee is assigned to a new task, and, annually, specifically within a year of the exposed employee's prior training.

32. Dr. Geer testified that the employees who were not sent to annual OSHA training were trained, "on- the-job." R3

33. Prior to exposure, respondent did not document timely BBP/OPIM training of new hires and did not document training of staff assigned to new tasks or annually.

34. From 2010 through the hearing in 2014, respondent failed to properly and timely document its annual reviews and OSHA employee training. C11 and R2

35. Respondent's Exhibit #3 consists of 18 brief employee statements from 16 employees covering 7 pages as follows:

    - Each employee states their impressive background and experience;
    - The e-mailed, typed, or written employee statements are undated;
    - Most of the statements are general in nature and do not effectively impeach complainant's *prima facie* case supporting each Citation;
    - The statements are not records of past events generated just prior to, contemporaneously with, or just after the events. The statements were generated after the inspection/citations for the purpose of the OSH Hearing;
    - The statements do not satisfy the Act in that they do not contain documentation of the following:
        - Annual BBP/OPIM training of each exposed employee;

- The names and titles of each exposed employee (new hires or staff assigned to a new task) who prior to exposure received "on-the-job training prior to exposure;

- The names and titles of staff members who provided on-the-job training to each employee prior to BBP/OPIM exposure, and/or assignment to a new exposure task and/or annually; and,

- A documented overview of the subjects and materials covered during on-the-job training.

36. Complainant proved a *prima facie* violation of 29 CFR 1910.1030(c)(1)(iv) for failure to timely train new hires, and to timely train employees who are assigned new exposure tasks and annually.

Citation 1, Items 4a-c – SERIOUS
(Training Lacked Substantive Explanations)
4a: 29 CFR 1910.1030(g)(2)(vii)(B)(epidemiology or symptoms of bloodborne diseases)
4b: 29 CFR 1910.1030(g)(2)(vii)(C)(modes of transmission of BBP)
4c: 29 CFR 1910.1030(g)(2)(vii)(E)(of methods for assessing exposure risks)

37. The paragraphs above are hereby incorporated by reference into this section.

38. Respondent's OSHA update program required employees only to "read over" the OSH and hazardous communication standards. R2, p5

39. Respondent's method of OSHA education did not comply with the standards, in that it did not include substantive explanations of:

   - The epidemiology or symptoms of blood borne diseases, in violation of 29 CFR 1910.1030(g)(2)(vii)(B)(Citation 1, Item 4a);

   - The modes of transmission of BBP, in violation of 29 CFR 1910.1030(g)(2)(vii)(C)(Citation 1, Item4b); nor,

   - The methods for identifying and assessing workplace exposure risks, in violation of 29 CFR 1910.1030(g)(2)(vii)(E)(Citation 1, Item 4c)

40. Complainant proved *prima facie* violations of 29 CFR 1910.1030(g)(2)(vii)(B)(C) and (E) for failing to include in its OSHA training, reviews, and updates, explanations of the epidemiology or symptoms of blood borne diseases, the modes of transmission, and the methods for identifying and assessing workplace exposure risks.

Citation 2, Items Ia and b
Violation of 29 CFR 1910.303(b)(2)
(Electrical Equipment Not Properly Installed)

41. The paragraphs above are hereby incorporated by reference into this section.

42. In an unfinished dental operatory temporarily being used for storage, the electrically connected outlet box was uninstalled and lying on the floor near the water line. C5

43. Outlets installed near water lines in computer cabinets were not properly mounted. C6-7

44. The uninstalled/un-mounted outlet boxes were in violation of 29 CFR 1910.303(b)(2).

45. Complainant proved a *prima facie* violation of 29 CFR 1910.303(b)(2) for failing to have the electrical outlet box(es) properly installed and mounted.

PROPOSED PENALTIES

46. The paragraphs above are hereby incorporated by reference into this section.

47. The HCO properly calculated proposed penalties in accordance with the NC General Statutes, Sec. 95-138, and, the detailed formulas contained in Chapter 6 (Penalties) of the Field Operations Manual (FOM) for the OSH Division NCDOL, as follows: (C10)

Citation 1, Item 1: Failure to Update BBP/OPIM Annually:

48. The HCO properly calculated the amount of respondent's penalty for Citation 1, Item 1of $250.00 (Two Hundred and Fifty Dollars) according to the FOM as follows:

    - The violation gave rise to the possibility of an accident, to wit: a needle stick contaminated with HIV or Hepatitis B;
    - The probability of an accident occurring was lesser because of the small number of exposed employees, the infrequency of exposure and, the limited point of contact when in use during a dental procedure;
    - The severity of an accident was high because contaminated needle sticks can cause HIV or Hepatitis B, the substantial probable result of which is permanent disability or death;
    - The gravity based penalty (GBP) for an accident of lesser probability and high severity is $5,000.00 (Five Thousand Dollars);

- Respondent is entitled to a 60% reduction in the GBP for size, due to respondent's workforce of fewer than 25;
- Respondent is entitled to a 25% GBP reduction for good faith for having a basic health and safety program;
- Respondent is entitled to a 10% GBP reduction for its lack of history of OSHA violations in the three years prior to the inspection at issue;
- The adjustment factors total 95%; and,
- The adjusted GBP was $250.00 (Two Hundred and Fifty Dollars).

<u>Citation 1, Item 2: Failure to Provide Proper Needle Stick Protection</u>

49. The HCO properly proposed respondent's adjusted GBP as $250.00 (Two Hundred and Fifty Dollars) using the same FOM method described for Citation 1, Item 1, above.

<u>Citation 1, Item 3: Failure to Provide Appropriate Training to New Hires; Staff Assigned to New Tasks; and Annually</u>

50. The HCO properly calculated respondent's adjusted GBP as $250.00 (Two Hundred and Fifty Dollars) using the same FOM method described for Citation 1, Item 1, above.

<u>Citation 1, Items 4a-c: BP Training Program Lacked Substantive Explanations</u>

51. The HCO properly grouped Citation 1, Items 4a-c to calculate an adjusted GBP of $2,100 (Two Thousand, One Hundred Dollars) as follows:

    - The violations gave rise to the possibility of an accident, to wit: a needle stick contaminated with HIV or Hepatitis B;
    - The probability of an accident was greater because of the high number of employees (13) who were not properly and timely trained prior to exposure;
    - The severity was high because needle sticks can cause HIV or Hepatitis B, the substantial probable result of which is permanent disability or death;
    - Respondent is entitled to a 60% reduction in the GBP for size due to respondent's workforce of fewer than 25;

- Respondent is entitled to a 10% GBP reduction for its lack of history of OSHA violations in the three years prior to the inspection at issue;
- The FOM does not permit respondent an additional 25% reduction for good faith because of the greater probability and high severity of the violations; and,
- The adjustment factors totaled 70% and the adjusted GBP was $2,100 (Two Thousand, One Hundred Dollars).

<u>Citation 2, Item 1: Electrical Equipment Was Not Installed/Mounted Properly</u>

52. The HCO properly concluded as follows:

- The un-mounted and un-installed electrical outlet boxes near water lines gave rise to the possibility of an accident, to wit: electrical shock;
- The substantial probable result of electric shock is permanent disability or death;
- Respondent employees exposed to this hazard were few and infrequent; and,
- The HCO properly found this violation to be non-serious with no penalty.

DISCUSSION

Dr. Geer was the OSHA Coordinator in his office during the years 2003, 2004, 2005 and 2009. He testified that his office has not complied with the above OSHA standards regarding BBP/OPIM since 2009. He knew, or should have known, that keeping up-to-date on standards and training was vital to OSHA compliance and employee safety.

Dr. Geer essentially testified that he failed to fully comply with OSHA standards because:

I. Neither he nor anyone at his office had the time to read and understand the OSHA standards in detail;

II. His employees are safe professionals as follows:

a. They have background, training, and experience involving BBP/OPIM standards;
b. They know and understand the substance of the standards;
c. They avoid needle stick contamination at all times as part of their jobs; and,
d. They receive undocumented on-the-job training; (C11; R2-3)

III. NCDOL and/or NCOSH have a conflict of interest because the agencies are seeking the monetary penalties to enrich their agencies; and,

IV. The building inspector signed off on the Certificate of Occupancy on his new office, thus, the un-mounted electric outlet must be compliant.

I. Not Having Enough Time To Read and Interpret the Standards is Without Merit:

Congress passed the *Needlestick Safety and Prevention Act of 2000(Pub. L. 106-430),* because occupational exposure to bloodborne pathogens from accidental sharps injuries in healthcare was a serious problem. Quick Reference Guide to the Bloodborne Pathogens Standard, OSHA, U.S. Department of Labor. C9 "The standard places requirements on employers whose workers can be reasonably anticipated to contact blood," or OPIM. Id. Because of continuing serious problems, OSHA periodically revises these standards (20 CFR 1910.1030). Changes are designed to assist employers by adding more detailed information so that employers can more easily identify, evaluate, and, implement safer medical devices (such as needleless systems and sharps with engineered sharps protections). Id. Paragraph 19 of the quick reference guide lists OSHA resources employers may use for streamlining their compliance.

Most employees do not seek out work-related injuries. However, OSHA courts universally recognize that, "[s]ome degree of employee negligence or carelessness must be expected" in the workplace. Brooks v. Budd Piper Roofing Co., Inc. OSHANC 80 1039 (RB 1985)

Despite years of education, training, and, experience, exposed employees may be ill-educated or may become unaware, out-of-date, complacent, negligent, forgetful, over-worked, stressed-out, tired, distracted, harried, or, hurried, and – accidently – get stuck with a contaminated needle. Thus, dental professionals are held to strict standards in protecting employees and others from deadly threats by providing appropriate continuing medical education.

Dr. Geer testified that he provided on-the-job training to his employees. Respondent failed to provide appropriate documentation of this training. It is idiomatic in the medical profession that, "[i]f you didn't document it, you didn't do it." His testimony did not effectively impeach the *prima facie* case made by complainant for each Citation.

Dr. Geer complained that neither he nor his staff have the time to read, understand, and train others regarding the details of the standards. His argument is unconvincing. Federal and state OSHA agencies provide direct, authoritative resources that Dr. Geer may use for making effective compliance less burdensome (i.e. Quick Reference Guides; Model ECPs; etc.).

II. Neither NCDOL nor NCOSH Review Commission Benefit From Monetary Penalties

Neither the NCDOL nor the NCOSH Review Board is enriched with monetary penalties. N.C.G.S. §95-138(c) provides that the "proceeds of all civil penalties and interest recovered … shall be remitted to the Civil Penalty and Forfeiture Fund." The Fund is appropriated to the State Public School Fund. N.C.G.S. §115C-457.2 to 457.3.

III. An Officially Signed Certificate of Occupancy Does Not Satisfy the Act

Dr. Geer argued that the building inspector signed the Certificate of Occupancy (COO), implying that the cited electric outlets passed inspection. This position has no merit. The HCO found at the time of her inspection that the outlets failed to comply with the Act. She properly proposed a non-serious citation with no penalty because employees had little access to the hazard.

Based upon the foregoing **FINDINGS OF FACT**, the undersigned makes the following:

CONCLUSIONS OF LAW

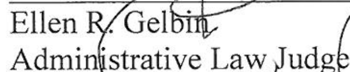
1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order;
2. The Review Commission has jurisdiction of this cause and the parties are properly before it;
3. Complainant has proffered evidence to support a *prima facie* case for each violation and each proposed penalty assessed;
4. Respondent stipulated to his noncompliance of the violated standards; and,
5. Penalties totaling $2,850 (Two Thousand, Eight Hundred and Fifty Dollars) were proper.

Based upon the foregoing **FINDINGS OF FACT** and **CONCLUTIONS OF LAW**, the undersigned **HEREBY** enters the following:

ORDER

1. **Citation I, Items 1-4c, and Citation 2, Item 1,** are hereby **AFFIRMED;**
2. Respondent shall pay the **penalties totaling $2,850** (Two Thousand Eight Hundred and Fifty Dollars); and,
3. The penalties shall be paid within ten (10) days of the filing date of this Order.

It is **hereby ORDERED, ADJUDGED and DECREED**, this the 3rd day of November, 2014.



Ellen R. Gelbin
Administrative Law Judge

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

ANDREW GEER DDS
3244 REYNOLDA RD
WINSTON-SALEM NC 27106

JILL CRAMER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 6th **DAY OF** November **2014.**

OSCAR A. KELLER, JR.
CHAIRMAN

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