BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

STICK PROOF COMPANY

RESPONDENT.

DOCKET NO. OSHANC 95-3203
OSHA INSPECTION NO. 111126603
CSHO ID NO. B4071

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 26th day of April, 1996 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and Henry M. Whitesides, Member of the North Carolina Safety and Health Review Board.

APPEARANCES

Jane A. Gilchrist, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Mark T. Sheridan, Attorney At Law, Hillsborough, North Carolina for the Respondent.

ISSUE PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of the evidence that the Respondent's violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4), the prohibition against the manual opening of the sharps containers, was willful and serious?

2. Did Complainant meet its burden of proving by a preponderance of the evidence that the Respondent's violation of 29 CFR 1910.1030(c)(1)(i) for the failure to have an exposure control plan was serious?

3. Did Complainant meet its burden of proving by a preponderance of the evidence that the Respondent's violation of 29 CFR 1910.1030(g)(2)(i) for the failure to ensure that employees participated in a training program was serious?

4. Did Complainant meet its burden of proving by a preponderance of the evidence that the Respondent's violation of 29 CFR 1910.1030(d)(3)(i) for the failure to provide appropriate personal protective equipment was serious?

5. Did Complainant meet its burden of proving by a preponderance of the evidence that the Respondent's violation of 29 CFR 1910.1030(d)(4)(ii)(A) for the failure to decontaminate contaminated worksurfaces was serious?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. N.C.G.S. § 95-138(a) which states the following with respect to a willful violation:

> Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a civil penalty of not more than seventy thousand dollars ($70,000) and not less than five thousand dollars ($5,000) for each willful violation.

3. 29 CFR 1910.1030(d)(4)(iii)(A)(4) which provides:

> (A) Contaminated sharps Discarding and Containment.
>
> > (4) Reusable containers shall not be opened, emptied, or cleaned manually or in any other manner which would expose employees to the risk of percutaneous injury.

4. 29 CFR 1910.1030(c)(1)(i) which provides:

> (1) Exposure Control Plan. (i) Each employer having an employee(s) with occupational exposure as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.
>
> > Paragraph (b) reads as follows for the following definitions:
> >
> > Occupational Exposure means reasonable 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.
> >
> > Parenteral means piercing mucous membranes or the skin barrier through such events as needlesticks, human bites, cuts, and abrasions.
> >
> > Other Potentially Infectious Materials means
> >
> > (1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids;
> >
> > (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and
> >
> > (3) HIV-containing cell or tissue cultures, organ cultures, and HIV- or HBV-containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

5. 29 CFR 1910.1030(g)(2)(i) which provides:

> (2) Information and Training. (i) Employers shall ensure that all employees with occupational exposure participate in a training program which must be provided at no cost to the employee and during working hours.

6. 29 CFR 1910.1030(d)(3)(i) which provides:

> (3) Personal Protective Equipment--(i) Provision. When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective

equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.

7. 29 CFR 1910.1030(d)(4)(ii)(A) which provides:

> Contaminated work surfaces shall be decontaminated with an appropriate disinfectant after completion of procedures; immediately or as soon as feasible when surfaces are overtly contaminated or after any spill of blood or other potentially infectious materials; and at the end of the work shift if the surface may have become contaminated since the last cleaning.
>
> Section (b) defines contaminated as follows: "Contaminated means the presence or the reasonable anticipated presence of blood or other potentially infectious materials on an item or surface."

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the Order of the Hearing Examiner and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Board adopts the Hearing Examiner's findings of fact numbered 3 through 27, 30 through 54, 57 through 65, 68 through 73, 76 through 83 and 86 through 87.

4. The hazard involved in each of the violations that were contested in this action and against which the blood borne pathogen standard is intended to protect is the contraction of Hepatitis B and AIDS which are life threatening diseases and the contraction of Hepatitis C and other adverse health effects.

5. For the violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4), the possibility of an accident is that an employee would be stuck with a needle or other sharps contaminated with the HIV (human immunodeficiency virus), HBV (hepatitis B virus) or other bloodborne pathogen and/or that an employee would be splashed to the mucous membrane with blood or other bodily fluids contaminated with the HIV (human immunodeficiency virus), HBV (hepatitis B virus) or other bloodborne pathogen.

6. The substantially probable result of the accident set out in finding of fact 5 is the contraction of AIDS which results in serious physical injury and ultimately death and/or the contraction of HBV with chronic liver damage which is a serious physical injury and death and/or the contraction of other serious bloodborne disease.

7. The Respondent allowed at least one of its employees to manually open, empty and clean the contaminated sharps containers after she had received just one of the three required hepatitis B inoculations and before she had received the maximum protection from the vaccinations.

8. Dick Sheridan, the president of Respondent admitted to the Health Compliance Officer that he knew that the OSHA bloodborne pathogen standard prohibited the manual opening, emptying and cleaning of the reusable sharps containers and the Board finds as a fact that he knew that the OSHA bloodborne pathogen standard prohibited the manual opening, emptying and cleaning of the reusable sharps containers.

9. Dick Sheridan, the president of Respondent designed the process used at his facility for the opening, emptying and cleaning of the reusable sharps containers and he knew of and therefore Respondent knew of the violative

condition--that the reusable sharps containers were manually opened, emptied and cleaned.

10. Respondent's employee operations manual which was provided by Dick Sheridan has a section that dealt with the opening and dumping of the reusable sharps containers and Respondent through its President knew of the violative condition--that the reusable sharps containers were manually opened and emptied.

11. At the time of the Review Board hearing Respondent was still in violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4) in that he continues to manually open the reusable sharps containers thereby exposing his employees to the risk of contracting HBV, AIDS or other bloodborne pathogen disease.

12. It was technologically and economically feasible for the Respondent to comply with the standard, 29 CFR 1910.1030(d)(4)(iii)(A)(4) by purchasing an automated dumping machine to manually open and empty the reusable sharps containers for approximately $40,000.00 or by sending the unopened sharps containers to be incinerated in the same manner as many of its competitors.

13. For the violation of 29 CFR 1910.1030(c)(1)(i) for the lack of a written exposure control plan, the possibility of an accident is that an employee would be stuck with a needle or other sharps contaminated with the HIV, HBV or other bloodborne pathogen and/or that an employee with skin abrasions or dermatitis would come in contact with or would be splashed to the mucous membrane with blood or other bodily fluids contaminated with the HIV, HBV or other bloodborne pathogen.

14. The substantially probable result of the accident set out in finding of fact 13 is the contraction of AIDS which results in serious physical injury and ultimately death and/or the contraction of HBV with chronic liver damage which is a serious physical injury and death and/or the contraction of other serious bloodborne disease.

15. The Respondent knew or should have known about the condition of the lack of a written exposure control plan in that the president of Respondent, Mr. Dick Sheridan was familiar with the blood borne pathogen standard and knew or should have known that a written exposure control plan was required and knew or should have known what was required in the written exposure control plan.

16. For the violation of 29 CFR 1910.1030(g)(2)(i) for the lack of a training program, the possibility of an accident is that an employee would be stuck with a needle or other sharps contaminated with the HIV, HBV or other bloodborne pathogen and/or that an employee with cuts, skin abrasions or dermatitis would come in contact with or would be splashed to the mucous membrane with blood or other bodily fluids contaminated with the HIV, HBV or other bloodborne pathogen.

17. The substantially probable result of the accident set out in finding of fact 16 is the contraction of AIDS which results in serious physical injury and ultimately death and/or the contraction of HBV with chronic liver damage which is a serious physical injury and death and/or the contraction of other serious bloodborne disease.

18. The Respondent knew or should have known about the condition of the lack of a training program in that the president of Respondent, Mr. Dick Sheridan was familiar with the blood borne pathogen standard and had documents in his possession that referred to the requirements of a training program to comply with the bloodborne pathogen standard and knew or should have known that a training program was required and knew or should have known what was required in the training program.

19. For the violation of 29 CFR 1910.1030(d)(3)(i) for the failure to provide appropriate personal protective equipment, the possibility of an accident is that an employee with nonintact skin would come in contact with blood or other bodily fluids contaminated with the HIV, HBV or other bloodborne pathogen.

20. Only one protective face shield was provided to be shared by the three people who were simultaneously opening and dumping, rinsing and cleaning the reusable sharps containers.

21. The substantially probable result of the accident set out in finding of fact 19 is the contraction of AIDS which results in serious physical injury and ultimately death and/or the contraction of HBV with chronic liver damage

which is a serious physical injury and death and/or the contraction of other serious bloodborne disease.

22. The Respondent knew or should have known about the condition of the lack of appropriate personal protective equipment in that the president of Respondent, Mr. Dick Sheridan designed the process which was used at the facility and visited the work site several times and was aware of the equipment which was used and knew or should have known that the appropriate personal protective equipment was not being provided to the employees.

23. For the violation of 29 CFR 1910.1030(d)(4)(ii)(A) for the failure to decontaminate contaminated work surfaces with an appropriate disinfectant, the possibility of an accident is that an employee with nonintact skin would come in contact with blood or other bodily fluids contaminated with the HIV, HBV or other bloodborne pathogen.

24. The substantially probable result of the accident set out in finding of fact 23 is the contraction of AIDS which results in serious physical injury and ultimately death and/or the contraction of HBV with chronic liver damage which is a serious physical injury and death and/or the contraction of other serious bloodborne disease.

25. The Respondent knew or should have known about the condition of the failure to decontaminate the work surfaces in that the president of Respondent, Mr. Dick Sheridan visited the work site and provided the instructions for cleaning the worksurfaces which did not include the instructions to decontaminate with a disinfectant and he had received several reports from the Department of Environmental Health that referred to housekeeping problems and needles around the area and on the floor.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

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 Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a willful/serious violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4), as stated in Citation One, Item 1b, by willfully allowing employees to manually open, empty, and clean reusable sharps containers that contained contaminated sharps and that the penalty of $14,000.00 was properly calculated.

4. The Respondent has failed to prove by a preponderance of the evidence the impossibility of compliance with 29 CFR 1910.1030(d)(4)(iii)(A)(4).

5. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.1030(c)(1)(i) as stated in Citation Two, Item 1a by failing to establish a written Exposure Control Plan when the Employer has employees who have occupational exposure to blood or other potentially infectious materials and that the penalty of $1,400.00 was properly calculated.

6. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.1030(g)(2)(i) as stated in Citation Two, Item 1b for the failure to ensure that employees participated in a training program and that the penalty was properly calculated and grouped with Citation Two, Item 1a.

7. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.1030(d)(3)(i) as stated in Citation Two, Item 2a for the failure to provide appropriate personal protective equipment and that the penalty of $1,400.00 was properly calculated.

8. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.1030(d)(4)(ii)(A) as stated in Citation Two, Item 3a for the failure to decontaminate

contaminated worksurfaces and that the penalty of $1,400.00 was properly calculated.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981). The Board is not bound by the findings of fact of the Hearing Examiner and is required by N.C.G.S. § 95-135(i) to make its own findings of fact.

The Occupational Safety and Health Act of North Carolina, Article 16, N.C.G.S. § 95-126 et seq. (hereinafter OSHANC) does not define a willful violation but states in N.C.G.S. § 95-138(a) the following with respect to a willful violation:

> Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a civil penalty of not more than seventy thousand dollars ($70,000) and not less than five thousand dollars ($5,000) for each willful violation.

(emphasis added). The term "Article" refers to Article 16 which is titled "Occupational Safety and Health Act of North Carolina". It is clear from the above quoted statute that a willful violation can be found for violating the requirements of the overall Act, an individual standard, rule, order or regulation prescribed pursuant to the Act.

The Respondent admits that it violated all of the standards for which it was cited except for Citation One, Item 1a which was dismissed by the Complainant but contends that the designation of the violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4) set out in Citation One, Item 1b as willful and serious constitutes an error of law and that the finding that the violation was willful was also not supported by a preponderance of the evidence. The Respondent also contends that the Commissioner failed to prove by a preponderance of the evidence and by substantial evidence that death or serious physical injury was the substantially probable result of any possible accident for all of the serious violations that it contested. The Respondent also contends that the Hearing Examiner committed an error of law in the analysis of what constitutes an "accident" in the context of the "serious" standard. The Board will address each of these contentions seriatim.

Recently the North Carolina Supreme Court and the Safety and Health Review Board have dealt with the interpretation of the term "willful", the North Carolina Supreme Court in Associated Mechanical Contractors, Inc. v. Payne, ____NCOSHD ____, OSHANC No. 90-1794 (1996), 342 N.C. 825 (1996) and the Board in City of Mt. Airy, ____NCOSHD _____, OSHANC No. 91-2077. The North Carolina Supreme Court held the following:

> . . . This Court has said that a violation is deemed willful when there is shown "'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.'" Brewer v. Harris, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) (quoting Foster v, Hyman, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929); see also O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 631, 353 S.E.2d 869, 871 (1987). As stated by the Court of Appeals in a recent case:
>
> > [A] violation of an OSHA standard is willful if the employer deliberately violates the standard. A deliberate violation is one "done voluntarily with either an intentional disregard of or plain indifference" to the requirements of the standard. Mark A. Rothstein, Occupational Safety and Health Law 315 at 343 (3rd ed. 1990). An

> employer's knowledge of the standard and its violation, although not alone sufficient to establish willfulness, is one of the most effective methods of showing the employer's intentional disregard of or plain indifference to the standards.
>
> Brooks v. Ansco & Assoc., 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (1994) (citations omitted) (emphasis added).

Associated Mechanical Contractors, Inc. v. Payne, ____NCOSHD ____, OSHANC No. 90-1794 (1996), 342 N.C. 825 (1996).

The OSHA standard, 29 CFR 1910.1030(d)(4)(iii)(A)(4) imposes a duty on the employer to not allow reusable sharps containers to be opened, emptied, or cleaned manually or in any other manner which would expose employees to the risk of percutaneous injury. The standard has already determined that allowing employees to manually open, empty or clean reusable sharps containers exposes employees to an unacceptable risk of percutaneous injury and that the prohibition against manually opening, emptying and cleaning is a duty necessary to the safety of a person. The only element left that is necessary to prove a willful violation is whether there is a deliberate purpose not to discharge this duty, that is, whether the employer deliberately allowed the employees to manually open, empty or clean the reusable contaminated sharps containers. One of the methods of showing a deliberate purpose not to discharge a duty is by showing the presence of the four elements of (1) employer knowledge of the violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act. See, Associated Mechanical Contractors, Inc. v. Payne, ____NCOSHD ____, OSHANC No. 90-1794 (1996), 342 N.C. 825 (1996) and City of Mt. Airy, ____NCOSHD _____, OSHANC No. 91-2077. A violation can also be shown to be willful if the employer shows intentional disregard of or plain indifference to employee safety and health. City of Mt. Airy, ____NCOSHD _____, OSHANC No. 91-2077.

It is clear from a preponderance of the evidence and by substantial evidence that the four elements cited above to show a deliberate purpose not to discharge a duty necessary to the safety of a person have been proven in this case. Dick Sheridan, the president of Respondent designed the system for the opening, emptying and cleaning of the reusable sharps containers and he knew of the violative condition--that these containers were being opened, emptied and dumped manually. (See Board's finding of fact # 9). Dick Sheridan had knowledge of the standard, he sent a letter to Federal OSHA commenting on the proposed blood borne pathogen standard and had documents in his possession at the time of the inspection that set out the requirements of the final standard. (See findings of fact # 33, 34 and 35 in the Hearing Examiner's Order). He also admitted to the health officer that he knew that the standard specifically prohibited the manual opening, emptying and cleaning of the sharps containers. (Board's finding of fact # 8, supra). (T p 173). It is overwhelmingly clear from the videotape, the testimony of the health officer and employees and the admission of the Respondent that there was a subsequent violation of the standard. As was stated by the Court of Appeals in Ansco, supra, and cited with approval by the North Carolina Supreme Court in Associated Mechanical, supra, an employer's knowledge of the standard and its violation is one of the most effective methods of showing the employer's intentional disregard of or plain indifference to the standards. Dick Sheridan also voluntarily and intentionally disregarded the standard in that he continued to allow his employees to manually open, empty and clean the reusable contaminated sharps containers for more than one full year after the prohibition against manually opening, emptying and cleaning the contaminated sharps containers became effective. The Respondent asserts that its method of manually opening, emptying and cleaning the reusable sharps containers is safe. " . . . ' [A] conscious disregard for OSHA requirements, and the substitution of other measures believed to be as safe as OSHA standards constitutes' willfulness. Rothstein, § 315, at 344." Associated Mechanical Contractors, Inc. v. Payne, ____NCOSHD ____, OSHANC No. 90-1794, 118 N.C. App. 54 (1995), reversed on other grounds, ____NCOSHD ____, OSHANC No. 90-1794 (1996), 342 N.C. 825 (1996).____N.C. ____, (1996). The Hearing Examiner found in findings of fact numbered 36 that "Mr. Dick Sheridan made limited inquiry into the costs and methods of abatement prior to the inspection and made an intentional, deliberate decision to disregard the regulation and continue the respondent's process as originally designed" and in finding of fact numbered 37 that "The respondent, through its officers and supervisor, deliberately violated the standard." These findings of fact are supported by the

preponderance of the evidence and by substantial evidence. A search of the record fails to reveal any credible evidence to the contrary. The Respondent through its president exhibited such a state of mind that shows an intentional disregard of the requirements of the standard.

We next turn to the Respondent's contention that the Hearing Examiner committed an error of law in her analysis of what constitutes an "accident" in the context of the "serious" standard for the violations alleged in Citation 1, Item 1b and Citation Two, Items 1a, 1b, 2a, and 3a. In order to prove a serious violation of a specific standard, the Commissioner must prove by a preponderance of the evidence the following elements:

1. A hazard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident could be death or serious physical injury and

5. the employer knew or should have known of the condition or conduct that created the hazard. (applying the reasonable man test developed by the Court of Appeals in Brooks v. Daniel Construction Company, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984).

In Associated Mechanical Contractors, Inc. v. Payne, supra, the North Carolina Supreme Court stated the following with respect to the definition of a serious violation:

> Pursuant to statute,
>
> > [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 from a condition which exists, or from one or more practices, means methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.
>
> N.C.G.S. § 95-127(18) (1993). This Court has interpreted this statute to mean that a violation is serious if there is "(1) the possibility of an accident resulting from the conditions at the work site and (2) the substantial probability that death or serious physical harm could result if an accident did occur." Brooks, 303 N.C. at 584, 281 S.E.2d at 31.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 NCOSHD 299, at 305 (RB 1981), affirmed, 2 NCOSHD 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 NCOSHD 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The Respondent has admitted the violations that are the subject of this contestment and there is therefore no need to show that a hazard existed or that employees were exposed although the Complainant has certainly proven by a preponderance of the evidence and by substantial evidence both that a hazard exists and that employees were exposed. The Respondent through its president also admits that it had knowledge of the violative condition and the Complainant again has independently proven employer knowledge. The Respondent asserts that none of the citations that have been assessed against it can be serious because of the remote possibility of contracting aids, the HBV virus or other bloodborne diseases from the potential exposure to needle sticks, blood or other potentially infectious materials during the recycling of the sharps containers at its facility. It basis its argument in its analysis of the McWhirter requirements that the Commissioner must prove that there be a possibility of an accident the substantially probable result of which was death or serious physical injury. The Respondent's

contention is that the evidence supports the finding that the "possibility of an accident" for a serious violation of the blood borne pathogen standard is the possibility that an employee will be stuck with a needle contaminated with the HIV and HBV virus or the possibility of an employee having HIV or HBV contaminated blood splashed or spilled so that it comes in contact with the employee's mucous membrane tissue. The Respondent asserts that the Commissioner failed to prove by a preponderance of the evidence and by substantial evidence that death or serious physical injury was the substantially probable result of any possible accident for all of the serious violations that it contested including the serious component of the willful/serious violation. The Respondent argues that there is a very low risk of contracting AIDS from a needlestick contaminated with the HIV virus and that there was also a very low risk of contracting Hepatitis B virus from a needle contaminated with the Hepatitis B virus if the person had received the required series of three Hepatitis B vaccinations. Respondent's work practice in allowing at least one of its employees to manually clean the reusable sharps containers after they had received only one of the three required series of vaccinations against HBV nullifies Respondent's argument about the low risk of contracting Hepatitis B virus by its workers because a worker who has had only one of the required vaccinations does not have the necessary protection against the Hepatitis B virus.

Respondent is correct in his assertion that the "possibility of an accident" for a serious violation of the blood borne pathogen standard is the possibility that an employee will be stuck with a needle contaminated with the HIV, HBV virus or other bloodborne pathogen or the possibility of an employee having HIV or HBV contaminated blood or other bodily fluids splashed or spilled so that it comes in contact with the employee's mucous membrane tissue or abraded or cut skin. The Respondent is mistaken, however that a serious violation requires proof that the substantial probability of an accident is serious physical injury or death. This is a more restrictive standard than is called for by the Act. The statutory language and our North Carolina Supreme Court's interpretation of that language in Associated Mechanical, supra, and McWhirter, supra, requires only that there be a substantial probability that death or serious physical harm could result if an accident did occur and not that death or serious physical injury is the substantially probable result of any possible accident as Respondent asserts.

In addition, our Supreme Court has indicated its agreement with the proposition that when a standard's purpose is to protect employees from contracting a life threatening disease, then any violation of that standard is serious. This interpretation that the violation of a standard that is intended to protect against a life threatening disease is serious is supported by language from a Ninth Circuit Court of Appeals case that was quoted with approval by the North Carolina Supreme Court in McWhirter, supra:

> Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious".

Brooks v. McWhirter, 2 NCOSHD 115, at 127-128, 303 NC 573 (Supreme Court, 1981), quoting with approval, California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, at 988 (9th Cir. 1975). Respondent in deciding that the remoteness of getting HBV or AIDS justified continuing his practice of manually opening, emptying and cleaning reusable sharps containers has guessed that the probability of an accident is low and decided not to obey the regulation. This is exactly what Congress and our State Legislature did not intend. The Bloodborne Pathogen Standard was passed to protect human life and any violation of that standard is therefore serious.

The Board, though not required to, will look to federal case law interpreting like provisions of the federal OSH Act as guidance in interpreting similar North Carolina provisions. Brooks v. Southern Bell Telephone and Telegraph Co., 2 NCOSHD 283, at 286-287 (RB 1981). The Court of Appeals for the Sixth Circuit in an opinion later cited with approval by the Review Commission held the following:

> . . . the Commission employed a more restrictive standard for a serious violation than that which is called for by the Act. The Commission appears to have ignored the standard that there be a "substantial probability that death or serious physical harm could result from a condition which exists." Instead a majority of the Commission by consistent employment of the term "would" in

> place of "could" appears rather clearly to have required a greater degree of certainty. (emphasis in original).

Hermitage Concrete Pipe Company., 1978 OSHD ¶22,983, at p. 27,789, 584 F.2d 127 (6th Cir. 1978). The statute does not require proof that the substantial probability of an accident is serious physical injury or death but that the substantial probability could be serious physical injury or death.

In Anaconda Aluminum Co., 1981 OSHD ¶ 25,300, a case addressing the question whether a violation of an air contaminant standard has presented a substantial probability of death or serious harm, the Review Commission adopted the reasoning of the 6th Circuit, overruled its decision in Hermitage Concrete and stated the following:

> However, as the Sixth Circuit pointed out in reversing our decision in Hermitage Concrete, the Commission's test was more stringent than that set forth in the Act, for the Commission required the Secretary to prove the degree of exposure to the contaminant that would lead to a serious disease, while section 17(k) of the Act requires a showing only that a substantial probability of death or serious harm could result from a violation.

Anaconda Aluminum Co., 1981 OSHD ¶ 25,300, at 31,349. The Commission then concluded that the violation was serious and in support of that conclusion stated the following:

> . . . it is not the Commission's function to determine whether a particular substance should be regulated as a carcinogen. Instead, we must interpret and apply the standards the secretary has promulgated in a manner consistent with the intent underlying that promulgation. (citations omitted). Accordingly, in deciding whether a violation is serious, we must look to the hazard against which the standard is intended to protect.

Id. The Commission then looked at the source of the standard which was a recommendation made by the American Conference of Governmental Industrial Hygienists ("ACGIH") that coal tar pitch volatiles (CTPV) contained carcinogens. The Commission then stated:

> Thus, the standard's purpose in limiting exposure to CTPV is to protect employees against contracting a life-threatening disease, and Anaconda's failure to provide the ore trucker with a respirator suitable to reduce his CTPV exposure to within the limits provided in section 1910.1000 is a serious violation.

Id. "In Anaconda Aluminum Co., . . . the Commission held that if a standard is intended to protect against a life-threatening disease, then a violation of the standard is serious. The Secretary need not prove that the levels of exposure at the cited employer's workplace would lead to a serious disease." Mark A. Rothstein, Occupational Safety and Health Law § 313, at 334 (3d ed. 1990).

The Board likewise in deciding whether a violation of the bloodborne pathogen standard is serious will look to the hazard against which the standard is intended to protect. The hazard against which the Bloodborne Pathogen Standard is intended to protect is the contraction of AIDS and Hepatitis B which are life threatening diseases. Page 20 of the Preamble to the Bloodborne Pathogen Standard which was introduced into evidence by the Complainant as exhibit # 11 sets out the hazard in its explanation of the statutory authority for the Standard as follows:

> The Agency's judgement is that the bloodborne pathogens standard is reasonably related to these statutory goals, that the evidence satisfies the statutory requirements, and that the standard will reduce a significant risk of hepatitis B and other adverse health effects, including but not limited to AIDS and hepatitis C.

(emphasis added). The Respondent's assertion that the substantially probable result of a needle stick or splash with blood is not death or serious physical injury because of the remote probability of contracting either AIDS or

Hepatitis B, if correct, would mean that there could never be a serious violation of the Bloodborne Pathogen Standard.

The answer to Respondent's argument is that the Occupational Safety and Health Division took the remoteness of contracting HIV and HBV into account in the promulgation of the Bloodborne Pathogen Standard and has determined that the substantial probability of an accident that exposes employees to blood or other bodily fluids contaminated with HIV (human immunodeficiency virus), HBV (hepatitis B virus) or other bloodborne pathogen could be serious physical injury and/or death. AIDS is lethal and Hepatitis B causes serious liver damage and death in a significant number of employees and therefore meet the definition of serious physical injury. The Bloodborne Pathogen Standard is intended to protect against the contraction of a life threatening disease and any violation of that standard is serious. See, Anaconda Aluminum Co., supra. The Respondent has admitted that it violated each of the bloodborne pathogen standards that it contested and by our analysis those violations are therefore serious. In addition, the Complainant presented substantial evidence through the testimony of the compliance health officer and the excerpts from the Preamble to the Bloodborne Pathogen Standard that the substantial probability of an accident for each of the contested serious violations could be serious physical injury and/or death and has proven by a preponderance of the evidence and by substantial evidence the second prong of the McWhirter and Associated Mechanical test for a serious violation.

The serious designation of Respondent's violation of 29 CFR 1910.1030(d)(4)(iii)(A)(4) mandate that reusable sharps containers shall not be opened, emptied or cleaned manually can be underscored by reviewing the case law and the history leading up to the adoption of the standard. A search of the case law reveals that only one federal court has reviewed the history of the promulgation of the Bloodborne Pathogen Standard. The Seventh Circuit Court of Appeals heard a challenge to the Bloodborne Pathogen Standard and covered the history of and the purpose for the promulgation of the standard and the dangers and remoteness of contracting AIDS and HIV. American Dental Association and Home Health Services and Staffing Association v. Lynn Martin, Secretary of Labor, and OSHA, 1991-1993 OSHD ¶ 29,933, 984 F.2d 823 (7th Cir. 1993), cert. denied, ___U.S. ___ (1993). The judge reviewed much of the same history that was covered in the Preamble to the Bloodborne Pathogen Standard, upheld the validity of the Bloodborne Pathogen Standard and succinctly summarized that history as follows:

> In 1991 the Occupational Safety and Health Administration promulgated a rule on occupational exposure to bloodborne pathogens . . . 29 CFR 1919.1030. The rule is designed to protect health care workers from viruses, particularly those causing Hepatitis B and AIDS that can be transmitted in the blood of patients.
>
> AIDS is caused by a virus (HIV) that can be transmitted, among other means, by introducing the blood of an infected person into the bloodstream of an uninfected one. If blood of a dental or medical patient who is HIV positive spatters on a health care workers's skin where the skin is cut or abraded, or the worker accidentally sticks himself with a scalpel or hypodermic needle or other medical instrument on which there is fresh blood of an HIV carrier, the worker may become infected--with, so far as anyone knows, invariably fatal results. The AIDS virus is not, however, robust, and is not easily transmitted by the sorts of contact that patients usually have with health care workers. As of 1991, there had been only 24 confirmed cases of U.S. health care workers infected with the AIDS virus by patients since AIDS was first diagnosed in 1981.
>
> Hepatitis B is a far more common disease than AIDS, though less scary, publicized, or stigmatized. The Hepatitis B virus (HBV) produces antibodies that fight the virus but at the same time destroy liver cells in which the virus has lodged. Although most infected persons recover uneventfully, about 1 percent die and about 6 to 10 percent of adult (and a much higher percentage of child) victims of Hepatitis B become carriers. The virus is much more virulent than the AIDS virus, and the introduction of a carrier's blood into another person's bloodstream is a particularly efficient means of transmission. Unlike the AIDS virus, which cannot survive exposure to air, HBV can survive on the surface of a piece of clothing or other material at room temperature for a week and can thus be spread by dirty laundry. Also unlike the AIDS virus, there is a vaccine against HBV, effective in 85 to 97 percent of healthy adults who receive it. Nonetheless, because of the greater virulence of HBV

> and the fact that many health care workers are not vaccinated, patient-communicated Hepatitis B kills about 200 health workers in the U.S. per year--roughly 100 times the number of such workers infected by patient-communicated HIV.
>
> The precautions against infection of health care workers by the two viruses is similar, except that the vaccine against HBV offers a protection that has no counterpart with regard to HIV. OSHA's rule reflects the public-health philosophy of "universal precautions" which means precautions against the blood of every patient, not just the blood of patients known or believed likely to be carriers of HBV or HIV. The precautions are various. They include engineering controls (such as standards of care in handling contaminated sharp instruments, such as needles), requirements for personal protective equipment such as gloves, masks, goggles, and gowns, requirements for housekeeping (covering such things as the cleaning of contaminated waste), reporting requirements, and provisions for medical care. The rule requires the employer to offer employees who are at risk of exposure to the blood of patients the hepatitis B vaccine at the employer's own expense, though it allows the employees to decline to be vaccinated. An employee who is involved in an "exposure incident," such as being stuck with a contaminated needle, must be offered at the employer's expense a confidential blood test for HBV and HIV; that is, only the employee is entitled to the result of the test.
>
> In deciding to impose this extensive array of restrictions . . . OSHA did not . . . compare the benefits with the costs . . . . Instead it asked whether the restrictions would materially reduce a significant workplace risk to human health without imperiling the existence of, or threatening massive dislocation to, the health care industry. For this is the applicable legal standard.

Id., at p. 40,878-40,879. As part of that extensive array of restrictions OSHA in 29 CFR 1910.1030(d)(4)(ii)(E) forbid the practice of allowing employees to reach by hand into containers that contained contaminated sharps. The Preamble to the Standard at page 271 which was submitted by the Complainant as exhibit # 19 states the following:

> Percutaneous injury by a contaminated item is the most efficient occupational method of contracting bloodborne diseases; therefore, at no time should an employee have to place his or her hand into a container which could contain items capable of causing injury (e.g., sharps). With regard to this hazard, paragraph (d)(4)(ii)(E) has been added to the final standard. It states that reusable sharps that are contaminated with blood or other potentially infectious materials, shall not be stored or processed in a manner that requires employees to reach by hand into the containers where these sharps have been placed. This provision will eliminate or minimize the risk of percutaneous injury resulting from reaching into containers of contaminated sharps.

This prohibition against reaching by hand into contaminated sharps containers was also applied to those employees who cleaned reusable sharps container in the mandate of 29 CFR 1910.1030(d)(4)(iii)(A)(4) that reusable sharps containers shall not be opened, emptied or cleaned manually. The Preamble to the Standard at page 276 which was submitted by the Complainant as exhibit # 20 states the following:

> While the proposal specifically required disposable sharps containers, the final standard permits utilization of reusable containers for discarding of contaminated sharps. However, the final standard places restrictions on the processing of these containers to ensure that employees who handle them are not exposed to the risk of percutaneous exposure. As such, paragraph (d)(4)(iii)(A)(4) requires that reusable containers shall not be opened, emptied or cleaned manually or in any other manner which would expose employees to the risk of percutaneous injury.
>
> A number of participants urged OSHA to consider permitting use of reusable containers (citations omitted). CDC/NIOSH commented :
>
> > Paragraphs (d)(4)(iii)(B) and (d)(4)(ii)(B)(2) should be revised so they do not preclude the possibility of employing reusable containers if procedures are devised that do not

> increase the risk of puncture wounds. (Ex. 20-634)

Judith Gordon echoed the above in her written comments, stating:

> In my opinion OSHA should look at other available systems. It may be appropriate to allow the use of sharps containers that are not disposable if their handling does not pose a risk of occupational exposure to the waste handlers. (Ex. 30)

Some participants in the hearing on the Bloodborne Pathogen standard urged a total ban on reusable containers:

> Dr. Michael Decker, representing the Society of Hospital Epidemiologists of America, testified that the Society disagreed with permitting the use of reusable sharps containers. He stated:
>
> > We view the greatest hazards as being sharps and the area where the most rigorous rule making is appropriate is sharps. And we would not encourage anyone to handle any sharp after use. If its reusable, by definition somebody had to clean it out. Nobody should have to do that. We think sharps should go into impervious, relatively crush-proof . . . containers that are never thereafter reopened by anyone until they're terminally destroyed. (Tr. 10/18/89, p352).

(Complainant's Exhibit #20, p277).

It was against this background of information that OSHA relented in its stance that reusable containers should not be allowed and allowed the use of them if their handling did not pose a risk of occupational exposure to the waste handlers and did not increase

the risk of puncture wounds. The solution that was decided on was to allow the use of reusable containers but to absolutely ban the manual opening, emptying and cleaning of the reusable sharps containers. In that manner reusable containers could be allowed and the waste handlers would not have any risk of receiving puncture wounds from the contaminated sharps.

The Respondent's practice of allowing the waste handlers at his facility to manually open, empty and clean the reusable sharps containers shifts the risk of contracting HBV and AIDS and other bloodborne diseases from the health care workers to the persons at the end of the chain of custody, the waste handlers, who are usually the least educated and least able to take precautions to protect themselves. It goes against common sense to have a vast array of restrictions to protect health care workers from the risk of contracting life threatening diseases and to totally suspend those restrictions and allow the waste handlers to manually open, empty and clean the containers as was done in Respondent's facility.

Further support for finding that the Respondent's violation of 29 CFR 1910.1030(d)(3)(i), the personal protective standard and 29 CFR 1910.1030(g)(2)(i), the training standard are serious is found in the federal case law. A search of the federal OSH cases reveals two cases in which serious violations of the personal protection standard and the training standard were found under much less onerous conditions than were found at the Respondent's facility. In Dawson Welltech, L.C. Rig # 387, 1995 OSHD ¶ 30,836 (1995) settlement agreement adopted as order of Review Commission, 1995 OSHD ¶ 30,985 (1996) a serious violation of 29 CFR 1910.1030(d)(3)(i) was affirmed for failure to include disposable gloves in a first aid kit on the reasoning that first aid workers who responded to an accident could have been exposed to bloodborne pathogens such as hepatitis B. and HIV. In Career Training Institute, 1995 OSHD ¶ 30,849 (1995), the original violation for which a failure to abate was cited was a serious violation of 29 CFR 1910.1030(g)(2)(i) for failure to provide the required bloodborne pathogen training for the training of instructors who were occupationally exposed to bloodborne pathogens. If it is a serious violation to not provide gloves in a first aid kit and a serious violation to not provide training to instructors, then it most certainly would be a serious violation to not provide gloves and other personal protective equipment and not to provide bloodborne pathogen training to workers engaged in the manual opening, emptying and cleaning of sharps containers which were full of contaminated, used needles, blood and other potentially infectious materials.

We next turn to the Respondent's contention that the Hearing Examiner committed error in failing to find as a fact that there existed no practical and available means to the Respondent of complying with 29 CFR 1910.1030(d)(4)(iii)(A)(4), the mandate that reusable sharps containers shall not be opened, emptied or cleaned manually. It is well settled law that when a specific standard is cited, the feasibility of compliance is assumed and the burden of proof of infeasibility of compliance is on the Respondent. Nye v. Mitchell Engineering Company., 2 NCOSHD 23, 26 (RB 1976); Brooks v. Austin Berryhill Fabricators, Inc., 102 N.C. App. 212 (1991). Respondent clearly had the burden of proving infeasibility of compliance with the prohibition of manually opening, emptying and cleaning reusable sharps containers. One method of complying with the standard would have been to send the unopened containers to the incinerator as did many of his competitors and another method would have been to have purchased an automated machine for opening and emptying the containers. The Respondent's president's assertion that paying $40,000.00 for a machine that would automatically open and empty the reusable contaminated sharps containers "would be a real problem" certainly fails to meet Respondent's burden of proving infeasibility of compliance. There is substantial evidence in the record that Respondent has failed to meet its burden of proving infeasibility of compliance.

Respondent's last contention is that the penalties were excessive. N.C.G.S. 95-138 states the following with respect to penalty assessment by the Board:

> . . . the Board in case of an appeal, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the following factors:
>
> (1) Size of the business of the employer being charged,
>
> (2) The gravity of the violation,
>
> (3) The good faith of the employer, and
>
> (4) the record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.
>
> . . . the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

After giving due consideration to the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board finds that Hearing Examiner correctly affirmed all of the penalties and that they were fair, reasonable in amount, and assessed equitably and uniformly.

Respondent in its brief requests that it be given two years from the date of the Board's decision in which to abate its violation for the manual opening of the lids of the reusable contaminated sharps containers. The original abatement date set out in the citation was November 24, 1993. The effective date for the Respondent to comply with the Bloodborne Pathogen Standard was March 6, 1992. As of the date of this opinion Respondent, who knew what the standard required and when it took effect has deliberately exposed his employees to the risk of contracting life threatening diseases for approximately four and one half years since the standard took effect. He is now asking to be allowed to expose his employees to life threatening disease for two more years. This request is denied.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's July 24, 1995 Order in this cause be, and hereby is, **AFFIRMED** in all parts and the Respondent is ordered to pay the $18,200.00 in penalties. Respondent is further **ORDERED** to immediately abate the manual opening of the reusable contaminated sharps containers and to immediately abate all other violations not previously abated.

This the 1st day of November, 1996.

_____
ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HENRY M. WHITESIDES, MEMBER