NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ENFORCEMENT SECTION,
DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS AND
INDUSTRY,

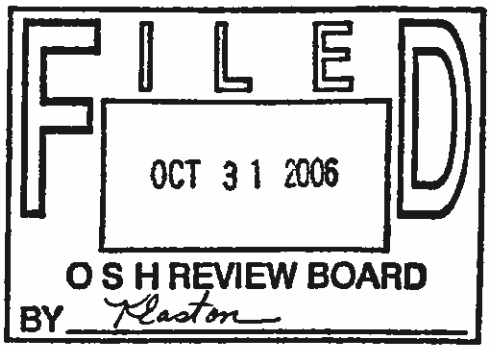
Complainant,

vs.

QUEST DIAGNOSTICS, INC.,

Respondent.
_____/

Docket No. RNO 06-1315



D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing conducted on the 12th, 13th and 14th days of April 2006, in furtherance of notice duly provided according to law, ROBERT KIRKMAN, ESQ. counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Health Enforcement Section, Division of Industrial Relations** (OSHES), and BRENT CLARK, ESQ. and JAMES CURTIS, ESQ., appearing on behalf of respondent, **QUEST DIAGNOSTICS, INC.;** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

The complaint filed by OSHES sets forth allegations of violations of Nevada Revised Statutes as referenced in Exhibit "A," attached thereto. Citation 1, Item 1 charges a violation of 29 CFR

1910.1030(d)(2)(vii)(A). The complainant alleges that on or about October 13th through October 21st 2005 the respondent employer failed to protect employees from exposure to contaminated sharps material and/or needles by allowing phlebotomy employees to remove double-ended needles from B-D Pronto Vacutainer blood tube holders for reuse of the blood tube holders in the work place. The violation was classified as a "Repeat" of a previously cited substantially similar violation issued on September 27, 2005. A proposed penalty for the alleged violation was assessed in the amount of Two Hundred Dollars ($200.00).

29 CFR 1910.1030(d)(2)(vii) and (vii)(A) provide as follows:

> "Contaminated needles and other contaminated sharps shall not be bent, recapped or **removed** except as noted in paragraphs (d)(2)(vii)(A) and (d)(2)(vii)(B) below. Shearing or breaking of contaminate needles is prohibited.
>
> (A) Contaminated needles and other contaminated sharps shall not be bent, recapped or **removed** unless the employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure.
>
> (B) Such bending, recapping or needle **removal** must be accomplished through the use of a mechanical device or a one-handed technique. **(Emphasis added)**

This case arises from a citation issued after inspection of Quest facilities in Carson City and Minden, Nevada. The subject OSHES citation is based upon Quest's use of the Pronto Quick Release reusable blood tube holder (the "Pronto"). Respondent stipulates that its phlebotomists use an Eclipse needle, a Pronto blood tube holder and a number of blood tubes to draw blood. A sheathed needle is first attached to the Pronto blood tube holder. The sheath is

rotated away from the "patient end" of the needle, which is inserted into the patient's vein. A stoppered blood tube is then inserted into the blood tube holder and pushed into the hollow bore "back end" of the needle. Blood then flows into the blood tube. If more blood is required, the blood tube can be removed, and a new blood tube inserted into the Pronto holder. Phlebotomists routinely fill multiple blood tubes during a single draw. Once the blood draw is complete, the needle is withdrawn from the vein and the protective shield is rotated back into place. The needle is then discarded into a container for "contaminated sharps." The Pronto has a one handed "quick release" feature that separates the used needle from the blood tube holder. The phlebotomist presses his/her thumb against the quick release button, and allows the needle to drop into the sharps container. It is undisputed that Quest's phlebotomists discard only the needle, retaining the Pronto blood tube holder for re-use.

OSHES has determined that re-use of blood tube holders through the referenced method of separating or releasing used needles from the blood tube holder exposes health care workers to needlesticks from the contaminated back end of phlebotomy needles.

The respondent, Quest Diagnostics, Inc. ("Quest"), is one of the largest clinical laboratories in the United States. Quest performs phlebotomy services, also known as blood drawing services, for hospitals, nursing homes, patient service centers, and clinics throughout the United States. Nationwide, Quest employees perform approximately 40-50 million blood draws each year. In Nevada Quest employees perform approximately 1.3 million blood draws per year.

The Chief Administrative Officer through its legal counsel,

Mr. Rob Kirkman, presented testimony and evidence with regard to the alleged violation. Mr. Kirkman noted for the record the formal stipulation of the parties as follows:

> "At the time of the Nevada OSHA inspection(s) that gave rise to the Notice of Violation and Citation, **Quest employees in Quest's Carson City and Minden facilities were, with the employer's knowledge, direction and approval, routinely using the Pronto Quick Release Reusable Blood Tube Holder, with the employer's instructions to actuate the mechanical quick release button with a one-handed technique to separate or release used needles from the blood tube holder** and drop the used needle via gravity into a sharps container." (Emphasis added)

Safety and Health Representative (SHR) Rich Meier testified in furtherance of the OSHES complaint. Mr. Meir testified that two inspections occurred in 2005. The first in Carson City where the SHR found employees of respondent were reusing blood tube holders by a practice of separating them from used needles with a Pronto quick release mechanical device. He issued a citation notwithstanding information that the mechanical Pronto separation device was being utilized. Exhibit 2-B as admitted in evidence through SHR Meir established the initial violation for "Repeat" violation purposes.

Counsel for complainant presented additional witness testimony and evidence through Safety and Health Representatives (SHR) Meir, Welker and Giddings as to the actual inspections and issuance of the subject citation referenced. The SHR testimony, together with the written stipulation of the parties, confirmed actual use of the reusable blood tube holder and the methodology for separating or releasing used needles. The SHR testimony described and demonstrated the act of separating a used needle from the blood tube holder as alleged to be in violation of the standard.

The witness direct examination and cross-examination by respondent counsel, confirmed the core issue of contention to be separation/"removal" of the needle as violative of the standard. Respondent's defensive position centered on its utilization of the "Pronto" quick release device which permits an ejection-type separation/release of the needle attached to the Pronto by single handedly pressing a small button on the blood tube holder causing the needle to mechanically separate from the Pronto. Respondent contends the needle release method is safe and not a "removal" as specifically contemplated and prohibited by the standard.

SHR witnesses Meir, Welker and Giddings' testimony supported the Nevada OSHES position that the procedure of separating or detaching the contaminated needle from the Pronto, despite same being accomplished through a button activating device, constitutes "removal" of the needle as the term is used in the cited standard.

Redirect testimony of SHR Meir established no variance was applied for or requested by respondent.

SHR Welker testified as to the hazard exposure through utilization of the Pronto and double tube holder under the described method to separate the used needles. Ms. Welker testified that used needles could, among other things, fall to the floor requiring retrieval by hand, strike the floor and create a blood splatter, the button on the device could fail requiring hand manipulation, the button could "hang-up" and require shaking or other maneuvers to eject the needle, all resulting in activity which provides **access to the hazard** of needlestick and/or contamination by blood borne pathogens.

Testimonial evidence of the SHRs confirmed that no inspector

actually observed a blood draw but rather determined exposure to the employees of respondent based on utilization of the double tube holders and the admitted Pronto needle separation/removal function and practice. SHR testimony established that the Pronto device and needle separation/removal practice were in use at the inspected facilities with the approval and knowledge of respondents.

At the conclusion of Complainant's case, Respondent moved for a directed verdict under Rule 41(b). Counsel argued that once an agency adopts a rule of general application that reusable blood tube holders are barred, the agency is required to comply with formal rule making procedures, which include, among other things, the conduct of public hearings. Counsel argued that no hearing process or required procedures were undertaken and accordingly the asserted change in OSHES enforcement practice altered Respondent's previously permitted methodology of separating used needles as in conformance with the standard. Counsel contended that the arbitrary enforcement change created a violation of law and therefore the subject citation should be dismissed.

Complainant opposed the motion and argued there was no violation of the rule making procedures due to the original **directive** of Federal OSHA not being a **rule** that would require formal rule procedural action under the Administrative Procedure Act (APA).

After hearing and considering the motion, the board upon discussion and vote, denied respondent's motion to dismiss the citation and respondent was instructed to proceed with its defense to the complaint.

Respondent's counsel, Messrs. Clark and Curtis, Esq., presented extensive witness testimony and evidence to deny the

violation. A core defense proffered by respondent was that no violation of the cited standard occurred because there was no "removal" of contaminated needles, a basic required proof element of the standard, in that the Pronto reusable holder device functioned to safely automatically separate/release the used needle.

Counsel presented direct testimony of Ms. Elaine Phillips, the Quest program director of test assessment who is required to, among other things, standardize procedures for the company. After qualifying Ms. Phillips, counsel offered her testimony that the practice of utilizing the Pronto mechanical device for needle separation was in fact demonstrably safe and in fact a safer practice than needle removal and disposal through use of single use blood holders as currently approved by OSHES. Ms. Phillips provided extensive testimony as to the Federal Blood Borne Pathogen Standard (BBP) the Needlestick Safety and Prevention Act (the Needlestick Act) the Amended BBP and the Needlestick Act, and safety experience from previous use of the Pronto device for separating used needles. Ms. Phillips testified that she was aware of no needlesticks from the back end of a needle when utilizing the double tube holder since adoption of the Quest Pronto device and described practice. She further testified that based upon her extensive experience and background, the methodology as utilized by Quest cited to be in violation of the standard, was the best and safest practice for Quest employees. Ms. Phillips testified that after extensive testing by Quest under her supervision, she found no exposure to the hazard of a needlestick by use of the Pronto release device and therefore no violation of the standard.

Ms. Phillips also testified in rebuttal of Ms. Welker's

testimony as to hazard exposure. Ms. Phillips stated that should there ever be a failure in the release button of the Pronto device, the company training directs the phlebotomist to simply discard the entire device rather than attempt hand manipulation to correct such a failure. She testified that the company Exposure Control Plan requires such action therefore there was no potential for the hazard exposure described by Ms. Welker due to a mechanical failure or different from single use practices.

Ms. Phillips further testified that a single use needle device creates a greater hazard to employees based on extensive testing performed by the respondent under her supervision.

Counsel offered the devices subject of testimony, together with additional materials in evidence, without objection through Ms. Phillips (see transcript of exhibits).

Counsel presented the testimonial evidence of Mr. Mike Williams, the environmental health and safety manager of respondent. After qualification of Mr. Williams, counsel elicited testimony with regard to his observation of needlestick occurrences after adoption of the Pronto needle releasing device. Mr. Williams testified that he saw 40% to 50% greater needlesticks in Nevada with use of single needles as opposed to the Pronto Eclipse system. He testified that the Pronto device and training methodology were found to be safer and accordingly adopted for use in Nevada. Mr. Williams further testified that an inspection in Las Vegas, Nevada occurring February of 2006 did not result in a citation for utilization of the Pronto Eclipse device and related practice now subject of the current citation.

Ms. Debbie Tranchida, a supervisor of field operations for

respondent, provided testimony as an experienced licensed lab assistant/phlebotomist. She testified as to employee training and safe use of the Pronto quick release device. Ms. Tranchida also testified that she evaluated the Pronto device in conjunction with witness Mike Williams. She experienced no back end needlesticks in over 26 years and knows no one who ever experienced same when utilizing the Pronto Eclipse device.

Ms. Andrea Hernandez, the corporate regional health and safety manager for respondent, testified as an expert for the company regarding blood borne pathogens. She testified that the subject standard prohibition as to **removal** does not apply to a one-handed needle separation with a mechanical device.

Terry Jo Gile testified on behalf of respondent as an independent consultant and expert in OSHA training and safety with regard to blood borne pathogens. Ms. Gile testified that the subject Pronto device, along with the training provided by respondent, constitutes a safe practice.

Mr. Clettes Lewis, the National Director of Environmental Health and Safety of respondent, provided evidence and testimony as to the cited standard interpretation. He testified that the word "remove" in the standard does not apply to the subject practice of respondent and that no violation of the standard occurred. Mr. Lewis provided extensive testimony as to standard interpretation, federal rules, previous company practice, the history of the development of the cited standard, and changes in enforcement policy. He testified that federal OSHA has exhibited a consistent position permitting single-handed mechanical device techniques to separate/remove used needles from blood tube holders. Testifying

that the words of the standard have never changed, he stated that interpretation for enforcement by federal OSHA has indeed changed without any basis in fact or law. Mr. Lewis testified that the Arizona State Plan Enforcement Division has permitted use of the Pronto device and formally rejected the current federal OSHA position which treats utilization of the Pronto Eclipse device and methodology to be a violation of the standard.

At the conclusion of the hearing, counsel for complainant and respondent were directed to file formal closing arguments.

Complainant argued that the formal stipulation executed by the parties and witness testimony legally established a violation of the subject standard. Counsel contended the stipulation alone satisfied core elements of complainant's burden of proof; namely that employees of respondent had access to the hazardous conditions, and that the employer knew the violative conditions routinely occurred in its facilities. Counsel referenced the formal stipulation filed by the parties:

> ". . .Quest employees in Quest's Carson City and Minden facilities were, with the employer's knowledge, direction and approval, routinely using the Pronto Quick Release Reusable Blood Tube Holder, with the employer's instructions to actuate the mechanical quick release button with a one-handed technique to separate or release used needles from the blood tube holder and drop the needle via gravity into a sharps container."

Counsel further argued that the Quest practice violated the standard of which respondent admitted it was aware in furtherance of, among other things, the 2004 Safety & Health Information Bulletin.

Counsel contended that because of the formal stipulation the

only remaining element of proof to satisfy the complaint's burden before the board is the applicability of the standard to Quest's practice of separating or releasing used needles from the blood tube holder. Counsel referenced the words of the standard and argued that Quest's practice constituted "removal of needles." He contended the first and second elements of the established four point burden of proof were also met because the respondent admitted its routine practice in Nevada is in violation of what federal and Nevada OSHA consider a violation of the standard, namely separation or release of used needles from reusable blood tube holders.

Counsel argued that the core of the violation is not the actual reuse of the blood tube holder device per se but rather the act of separating/removing the used needle from the blood tube holder which the standard prohibits. He contended that this procedure facilitates reuse of the Pronto, however the method of separating or detaching the contaminated needle from the Pronto constitutes a violative "removal" of the needle as the term is used in the standard.

Counsel argued that the evidentiary burden of the employer to establish any exceptions under the standard was not met. He referenced the standard and argued that it permits alternatives if there is an established "medical/dental necessity and/or no feasible alternative exceptions . . ." Counsel submitted there was no evidence, testimony or even argument to support the above referenced exceptions or any other exceptions to compliance with the cited standard.

Counsel contended that the Federal OSHA position is clear and that under NRS 618.295(8) all Federal Occupational Safety & Health

Standards promulgated by Congress are deemed Nevada Occupational Safety & Health Standards unless alternative standards have been adopted equal to the protection provided by the Federal Occupational Safety & Health Standards. He argued that Nevada OSHA adopted no alternatives and is mandated to enforce the standard as written under a clear meaning and as adopted and enforced by Federal OSHA.

Counsel argued that respondent presented no recognized defense to rebut evidence of exposure to the hazard. He contended that it is unnecessary for OSHES to independently prove that a codified prohibited practice is a hazard. Counsel argued that the plain meaning of the standard, no evidence of exceptions to applicability and/or enforcement, and the hazard recognition implicit in the standard adoption procedure support Nevada OSHES citation for violation of the standard.

Counsel argued that respondent had the opportunity to apply for a variance but never did so, citing the testimony of complainant's SHR Meir and respondent's Mr. Lewis. He further argued respondent had no legal basis to support the recognized "greater hazard" defense notwithstanding the testimony of various respondent witnesses who testified that use of the double blood tube holder and the Pronto Eclipse device were better and safer than use of the permitted single needle device.

Respondent, in its post hearing closing argument, extensively reviewed various federal standards, guidelines and practices to support its contention that there was no violation of the standard, illegal inconsistency in the federal enforcement practice/ procedures, and no actual exposure of a hazard to Quest employees in Nevada.

Messrs. Clark and Curtis contended that respondent's use of the Pronto quick release reusable blood tube holder is a safer medical device as defined in Congress' amendments to the BBP Standard through the Needlestick Safety and Prevention Act, 29 CFR 1910.1030(c)(1). Counsel contended that Federal OSHA's recent reinterpretation of the BBP Standard renders illegal Quest's practice of using the Pronto reusable blood tube holders, despite Federal OSHA openly endorsing the use of the devices for 12 years as BBP Standard compliant. Counsel submitted the action to be contradictory because Congress recently amended the BBP standard to require employers to evaluate and select safer medical devices such as the Pronto. Counsel argued that Nevada OSHES' new position on this issue violates the Administrative Procedure Act, is inconsistent with Congress' amendment to the B.P. Standard through the Needle stick Act, is inconsistent with the meaning of the term "remove" as used in 1910.1030(d)(2)(vii) and would require respondent to use a medical device that it has determined to be less safe than the Pronto.

The Nevada Occupational Safety & Health Review Board (Board) in considering the pleadings, testimonial evidence, exhibits, and arguments of counsel, reviewed the elements required to prove a violation under established occupational safety and health law first, based upon the statutory burden of proof and competence of evidence.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (NAC 618.788(1).
>
> To prove a violation of a standard, the Secretary must establish (1) the applicability of the standard, (2) the

existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).

A respondent may rebut allegations by showing:

1. That the standard was inapplicable to the situation at issue;

2. That the situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The burden of proof in the subject case can be substantially assessed by reference to the formal written stipulation of the parties filed with this board. The parties stipulated as follows:

"At the time of the Nevada OSHA inspection(s) that give rise of the Notice of Violation and Citation, **Quest employees in Quest's Carson City and Minden facilities were, with the employer's knowledge, direction and approval, routinely using the Pronto Quick Release Reusable Blood Tube Holder, with the employer's instructions to actuate the mechanical quick release button with a one-handed technique to separate or release used needles from the blood tube holder and drop the needle via gravity into a sharps container" (emphasis added).**

It is clear that the stipulation filed by the parties and approved by the board, without even considering the witness testimony at the time of the hearing, satisfied certain essential elements of complainant's burden of proof. Employees were exposed

to recognized hazards, had access to violative conditions, and the employer had knowledge of the non-complying violative conditions.

Respondent admitted the violative employee practice is routine in its phlebotomy procedure thus admitting exposure through access to the violative condition. To prove **reasons** that a particular practice is a hazard in addition to exposure directly or through "access" in each case of alleged violation would go beyond that which is required for meeting the statutory burden of proof.

The board then turned its examination to remaining elements of the burden of proof, namely applicability of the standard together with the employer's alleged failure to comply with the terms of the standard. The threshold issue centered upon the first element of the burden of proof, i.e. whether the standard applies to Quest's practice of separating or releasing used needles from the blood tube holder to constitute needle "removal" as proscribed. To interpret the standard as codified in 29 CFR 1910.1030(d)(2)(vii) and subsection (A) the Board recognizes its mandate under NRS 618.295(8) which provides:

> **"All federal occupational safety and health standards which the Secretary of Labor promulgates, modifies, or revokes, and any amendments thereto, shall be deemed Nevada occupational safety and health standards** unless the division, in accordance with federal law, adopts regulations establishing alternative standards that provide protection equal to the protection provided by those federal occupational safety and health standards" (**emphasis added**).

Nevada has not adopted any standard as an alterative to 29 CFR 1910.1030(d)(2)(vii)(A).

The cited standard, 29 CFR 1910.1030(d)(2)(vii)(A) a subsection of 29 CFR 1910.1030(d)(2)(vii) provides:

"Contaminated needles and other contaminated sharps shall not be bent, recapped or **removed** except as noted in paragraphs (d)(2)(vii)(A) and (d)(2)(vii)(B) below. Shearing or breaking of contaminate needles is prohibited.

(A) Contaminated needles and other contaminated sharps shall not be bent, recapped or **removed** unless the employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure.

(B) Such bending, recapping or needle removal must be accomplished through the use of a mechanical device or a one-handed technique (**emphasis added**).

The written stipulation of the parties and the witness testimony of both complainant and respondent demonstrated that used needles were being separated/released from the Pronto device. A plain meaning of the separation/release of the needle is in fact a "removal" proscribed under the standard. Respondent admitted, and witness testimony confirmed, that it is a routine practice of respondent to separate or release used needles from reusable blood tube holders. The corporate regional safety and health manager of respondent, Andrea Hernandez, testified that Federal OSHA and Nevada OSHES interpretation of the standard, prohibits respondent's utilization of the reusable blood tube holder as violative of the standard. The Board, in its analysis, review and interpretation, finds no other plain meaning of the word "remove" than that which both evidence, testimony and logic would mandate. The board also finds remaining elements of the burden of proof satisfied. The standard applies to the Quest practice and the employer failed to comply with the terms of the standard as written.

The Board finds no evidence or testimony of an exception to

the standard to permit other methods of needle removal based upon non-feasibility alternative or medical necessity.

The plain meaning of a word must be recognized and if needed, ascertained by considering first its commonsense meaning. General Motors Corp., 17 OSHC 1217 (1995), affirmed, 89 F.2d 313 (1996). Respondent witness Lewis testified that the ordinary understanding of the word "removal" supports separation of a needle from the Pronto device as constituting removal. (4/14/06 Tr. P. 5, p. 66.)

The Board observed the demonstrative evidence and heard sworn testimony at the time of the hearing to reach its factual determination that respondent's practice does indeed constitute "removal" within both the ordinary plain meaning of the word and as contained in the cited standard. Interpreting the word "removal" to support respondent's position would render the standard meaningless and in fact syllogistic to suggest that separation/ejection are not forms of "removal."

While the board gives due consideration to the extensive and capable scholarly arguments of respondent as to what may be considered inconsistencies in enforcement, mistakes or misreference as to directives, and questions with regard to federal or other state practices (Colorado or Arizona) those references and contentions do not constitute **defenses** to violation of the standard under recognized occupational safety and health law.

The issue that begs question is - why the respondent did not apply for a variance. The unequivocal evidence and testimony established that respondent did not apply at the federal or state level. See Tr. 4/14/06, p. 92. Accordingly the recognized defense of greater hazard cannot be asserted or established.

> In order to establish the affirmative defense of greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. See Walker Towing Corp., 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p.39, 161 (No. 897-1359, 1991).

The Board finds that there was and is a clear, well-established and lawfully recognized process for respondent to resolve what these hearings indicate are major safety, financial and practical considerations, by simply applying for and vigorously pursuing a variance. By so doing the respondent might have avoided the extensive hearing process here as well as the scrutiny and citations resultant from blatant acts of violation, albeit done with apparent good faith belief in the safety of its Pronto device. Again, respondent's action begs the question as to why no variance was pursued if indeed the argued clarity for respondent's position is so manifest.

The board duly notes, and takes administrative notice, of the extensive case law presented by both parties; but none supports the position of respondent with regard to the inapplicability of the subject standard to the practice of removing used needles with the Pronto device. Indeed, the recent decision of Secretary of Labor v. MetWest, Inc., a subsidiary of Quest Diagnostics, Incorporated, d/b/a/ Quest Diagnostics, OSHRC Docket No. 04-0594 decided April 24th, 2006 supports the current federal prohibition against utilization of the same Pronto device and methodology cited as violative of the standard in Nevada subject of this action. While respondent argues that the MedWest is on appeal, nevertheless that

case, and no other case to the contrary, holds the action similar to that cited in Nevada by OSHES to be violative of the standard.

> "The records in evidence clearly document the Secretary's consistent interpretation of the cited standard. The plain language of §1910.1030(d)(2)(vii) prohibits, and has always prohibited the removal of contaminated needles unless no feasible alternative is available. The Secretary has never suggested, in any of its many BBP publications, that it intended to limit the term "removal" to "two-handed or hand-toward-hand removal." As noted by Complainant, such a reading would render subparagraphs (A) and (B) meaningless. The Supreme Court has held that 'the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.' Martin v. OSHRC, 499 U.S. 144, 154, 111 S.Ct. 1171, 1179 (1991). Where, as here, the Secretary's interpretation literally tracks the standard's language, there appears to be no need for further inquiry."

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1910.1030(d)(2)(vii)(A). The violation charged is a "Repeat" of a previous violation. The proposed penalty in the amount of Two Hundred Dollars ($200.00) is confirmed and approved.

The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within thirty-five (35) days from date of decision. After five (5) days time for filing any objection, the final

Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 30TH day of OCTOBER 2006.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Tom B Watters

TOM B. WATTERS, CHAIRMAN