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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

Docket No. LV 17-1879

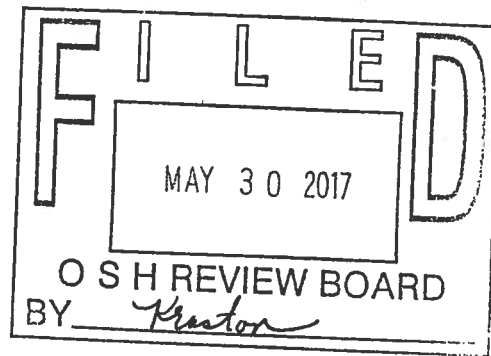
CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY,

Complainant,

vs.

DLP SERVICES, LLC,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of April 2017, in furtherance of notice duly provided according to law, MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA); and MR. GREG CARLSON, ESQ., appearing on behalf of Respondent, **DLP Services, LLC**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Chapter 618 of the Nevada Revised Statutes.

The complaint filed by the OSHA sets forth allegations of violation of the Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1, charges a violation of **29 CFR 1910.1030(c)(1)(i)**: Each employer having an employee(s) with occupational exposure as defined

1 by paragraph (b) of this section shall establish
2 a written Exposure Control Plan designated to
eliminate or minimize employee exposure.

3 NVOSHA alleged that at the time of the opening conference on
4 November 28, 2016 DLP Services, LLC, located at 5113 Alpine Place, did
5 not develop and implement a written Exposure Control Plan for Janitors
6 who clean commercial and industrial properties including medical exam
7 rooms and handling needles or other sharp instrumentation where
8 occupational exposure to blood or other potentially infectious
9 materials (OPIM) may take place. The employer abated this violation
10 during the inspection by providing a correctly written and implemented
11 Exposure Control Plan.

12 The violation was classified as Serious. The proposed penalty
13 for the alleged violation is in the amount of Two Thousand Eight
14 Hundred Dollars (\$2,800.00).

15 **Citation 1, Item 2**, charges a violation of **29 CFR**
16 **1910.1030(f)(2)(i)**: Hepatitis B Vaccination shall
17 be made available after the employee has received
18 the training required in paragraph (g)(2)(vii)(I)
19 and within 10 working days of initial assignment
20 to all employees who have occupational exposure
unless the employee has previously received the
complete hepatitis B vaccination series, antibody
testing has revealed that the employee is immune,
or the vaccine is contraindicated for medical
reasons.

21 Prior to the opening conference on November 28, 2016, DLP
22 Services, LLC, located at 5113 Alpine Place, did not offer the
23 hepatitis B vaccination within 10 working days of employees' initial
24 assignment to job duties cleaning medical exam rooms and handling
25 needles or other sharp instrumentation where occupational exposure to
26 blood or other potentially infectious materials (OPIM) may take place.

27 The violation was classified as Serious. The proposed penalty
28 for the alleged violation is in the amount of Two Thousand Eight

1 Hundred Dollars (\$2,800.00).

2 **Citation 1, Item 3**, charges a violation of **29 CFR**
3 **1910.1030(g)(2)(i)**: The employer shall train each
4 employee with occupational exposure in accordance
5 with the requirements of this section. Such
6 training must be provided at no cost to the
7 employee and during working hours. The employer
8 shall institute a training program and ensure
9 employee participation in the program.

10 NVOSHA alleged that prior to the conclusion of the opening
11 conference on November 28, 2016, DLP Services, LLC, located at 5113
12 Alpine Place, did not provide bloodborne pathogens training to
13 employees whose assigned job duties involve potential exposure to
14 blood and other potentially infectious material (OPIM). Janitors
15 clean commercial and industrial properties including medical exam
16 rooms and handling needles or other sharp instrumentation. No
17 training documents were submitted for any of the 252 employees.
18 Employees have been with the company as little as a few months and as
19 long as over 11 years.

20 The violation was classified as Serious. The proposed penalty
21 for the alleged violation is in the amount of Two Thousand Eight
22 Hundred Dollars (\$2,800.00).

23 The complainant and respondent stipulated to the documentary
24 evidence packet the Division of Industrial Relations identified as
25 Exhibits 1 and 2 which were admitted without objection. Respondent
26 offered no documents at commencement of the hearing, however in the
27 course of the presentation respondent's Exhibits A and B were
28 identified and stipulated for admission.

FACTS

Complainant provided documentary evidence and witness testimony
through CSHO/IH Ms. Crystal Burgess.

1 Nevada OSHA (NVOSHA) conducted a referral inspection at the DLP
2 Services, LLC offices located in Las Vegas, Nevada on November 28,
3 2016. After completion of the investigation and closing conference on
4 December 13, 2016 the respondent representatives were advised by Ms.
5 Burgess of her findings of violations and proposed citations.

6 Ms. Burgess testified with regard to her inspection and the
7 documentary evidence at Exhibits 1 and 2. Respondent is in the
8 business of providing janitorial, and housekeeping/cleaning services
9 to numerous office, commercial and medical facility locations in Las
10 Vegas, Nevada. The facilities presented potential biohazard exposures
11 to employees performing cleaning and housekeeping services through
12 contact with **Bloodborne Pathogens (BBP) or Other Potential Infectious**
13 **Material (OPIM)**.

14 Ms. Burgess testified that she requested an employer's **Exposure**
15 **Control Plan (ECP)** at the time of the inspection. The respondent did
16 not produce an ECP as required by the OSHA standards. **Documentation**
17 **for hepatitis B vaccinations** was requested, but no documents were
18 provided nor submitted to NVOSHA by respondent as required by OSHA
19 standards. No **program or documentation of employee training for**
20 **occupational hazard exposures** were provided by respondent as required
21 by OSHA standards.

22 Witness interviews demonstrated that identified employees had
23 received some training on "how" to clean up blood or other OPIM, but
24 not trained on the minimum protective requirements required by the
25 OSHA standards. Ms. Burgess determined respondent employees had not
26 received BBP training, yet assigned work tasks where required to clean
27 up biohazards as part of their designated job duties which exposed
28 them to the potential of contacting BBP or OPIM.

1 Employee interviews confirmed the employer did not offer
2 hepatitis B vaccinations to some identified employees with potential
3 occupational exposure to BBP or OPIM **within 10 working days** of initial
4 assignment. Where employees reported a refusal to receive the
5 vaccination, no declination letters were produced by respondent during
6 the inspection.

7 Ms. Burgess referenced her reportings at Exhibit 1 and testified
8 she was informed that when biohazard material had been cleaned the
9 waste was ". . . thrown into regular trash." She further testified
10 identified employees received some limited training but **not** prior to
11 commencement of job duties after their respective hiring dates. Ms.
12 Burgess explained NVOSHA requires employers to offer hepatitis B
13 vaccination **within 10 working days of an employees initial assignment**
14 **to job duties**, including cleaning any medical examining rooms,
15 handling needles or other sharp instruments or ". . . working where
16 occupational exposure to BBP or OPIM may take place . . ."

17 CSHO/IH Burgess summarized the testimony of three employees
18 interviewed at the time of her investigation and referenced Exhibit 1,
19 pages 14 through 24.

20 Supervisory employee **Agustin Huizar** reported he was employed by
21 the company on **September 10, 2012** but received BBP training only "a
22 week ago . . ." and offered the hepatitis B vaccination "last week
23 when they did the training . . .". The date of the interview
24 statement is December 13, 2016. Ms. Burgess referenced Mr. Huizar's
25 witness statement and testified ". . . that he does see BBP and OPIM
26 as well as needles (sharps) and observed those approximately three
27 weeks previous . . ." The reported exposure potential, employment
28 hire dates and training references supported recommendation for the

1 citations at items 2 and 3.

2 Ms. Burgess referenced her interview with former employee
3 **Alejardia Avalos**. Exhibit 1 included the dates of her interview
4 statement as December 13, 2016; company records listed her hire date
5 of 09/07/16. Ms. Burgess determined the hire date and statements
6 confirmed Ms. Avalos did not receive the appropriate training or
7 offered a vaccination prior to working under conditions for potential
8 exposure to BBP as required by the OSHA standard. The findings
9 supported recommendation for issuance of citations at items 2 and 3.

10 Ms. Burgess also testified with regard to the interview statement
11 signed by employee **Victor Ruiz**, a ten year supervisor with the
12 company. The statement showed he received training by video on January
13 2016 for BBP and not offered any hepatitis B vaccination. The company
14 records listed his hire date as 01/07/13. Mrs. Burgess testified the
15 time lapse between the written interview statement for training and
16 hire date confirmed violations of the standards cited at Items 1 and
17 2.

18 In continued testimony, CSHO/IH Burgess testified her findings
19 establish the statutory proof elements for citations of standard
20 applicability, violative conditions, potential employee hazard
21 exposure and employer knowledge for the cited violations. The
22 standards were applicable based upon the services provided by DLP as
23 published by the company which referenced professional janitorial
24 housekeeping cleaning services by over 200 employees throughout the
25 United States. DLP also provides services to various industrial and
26 healthcare properties, including medical examination room facilities
27 where employees must handle or encounter needles or other sharp
28 instruments. She determined employer knowledge and employee exposure

1 existed because some BBP/OPIM training was offered to employees,
2 through a video presentation; and the company described its scope of
3 services to encompass office complex areas which include restrooms and
4 medical facilities where potential BBP contact is typical and
5 anticipated to occur.

6 Ms. Burgess explained the applicability of the cited OSHA
7 standard for a company **Exposure Control Plan (ECP)** required at 29 CFR
8 1910.1030(c)(1)(i) based upon the company and employee description of
9 the services rendered by DLP. The respondent was unable to produce an
10 adopted and implemented plan, but did furnish a sample exposure
11 control plan from the State of Montana which listed 1910.1030
12 standards. Further, there were no hepatitis B vaccination records,
13 declination forms nor proof of training provided as required by the
14 cited standards at Items 2 and 3. The employer representative
15 responded that the company was currently in the process of setting up
16 new and/or updated BBP training for all DLP employees. The employer
17 provided a plan during the inspection to abate any continued violative
18 conditions under Item 1.

19 Ms. Burgess testified further as to the proof element of employee
20 exposure. She noted at Exhibit 1, page 69, the "sharps" injury log
21 reflected six incidents of respondent employees coming into contact
22 with syringes/needles while removing trash or cleaning of the
23 facilities.

24 Respondent counsel conducted cross examination of CSHO/IH
25 Burgess. She responded to questions regarding the interview
26 statements taken from the witness employees and whether her
27 explanations of BBP, OPIM and hepatitis B vaccinations were
28 understood. Ms. Burgess referenced specific statements made in the

1 three employee interviews of Messrs. Huizar, Ruiz and Ms. Avalos. She
2 testified they all spoke to her in English and confirmed potential and
3 actual exposures, lack of timely training, and either no hepatitis B
4 vaccination offers or no written declinations signed. She testified
5 the statements and the document records in evidence established the
6 non-compliant conditions confronted by the witnesses at Exhibit 1,
7 pages 14-24.

8 Respondent referenced and offered for admission in evidence
9 respondent's Exhibits A and B identified as federal OSHA
10 interpretation letters. Exhibit A was identified as the United
11 States Department of Labor, Occupational Safety and Health
12 Administration Interpretation Letter dated January 3, 1992. Counsel
13 requested the witness read the first line of the third paragraph at
14 Exhibit A with regard to the responsibility of an employer performing
15 general janitorial or maintenance work for compliance with the cited
16 standards. Ms. Burgess read the letter and testified that while
17 maintenance and janitorial staff in non-healthcare facilities, are not
18 **generally** subjected to BBP occupational hazard exposures, it is the
19 **"employer's responsibility"**, as provided in the letter, to determine
20 which job classifications or specific tasks or procedures involve
21 potential BBP exposure.

22 Counsel further referenced the similar federal OSHA
23 interpretation letter dated January 25, 1992 at Exhibit B. Counsel
24 directed Ms. Burgess reference to the guidance letter as to exposure
25 of employees involved in janitorial work to bloody materials in
26 restrooms and/or other portions of a facility. Ms. Burgess testified
27 it is the **"employer's responsibility"** as provided in the federal OSHA
28 guidance letter to determine which job classifications are subject to

1 protection on a "**case-by-case basis.**"

2 On redirect examination IH Burgess testified the standards and
3 interpretation letters require employers be knowledgeable in whether
4 their employees will have occasional contact with, and therefore be
5 trained in BBP. She further responded to questioning that the
6 exposure logs of incidents of needle contact at Exhibit 2 demonstrates
7 the existence of employee exposure which informs and requires the
8 employer to engage in inquiry to assure its employees are protected.

9 Complainant introduced testimonial evidence from Mr. John
10 Hutchison, the IH supervisory at NVOSHES. He testified as to the
11 elements of employer knowledge, standard applicability, potential of
12 employee exposures, violative **conditions**, as well as the
13 classification thresholds and appropriateness of the proposed
14 penalties.

15 On cross-examination Mr. Hutchison testified there is no NVOSHES
16 established numerical level for determination of "isolated incidents."
17 He received no information from the respondent on the number or
18 limitation of potential employee exposures. Mr. Hutchison testified
19 the incidents of needle sticks in the employer logs at Exhibit 2 were
20 sufficient to establish the **applicability** of the cited standards to
21 respondent and the **exposure potential** of its employees. The ". . .
22 **logs alone confirmed employer's knowledge** and duty of inquiry for
23 employee protection from BBP and OPIM hazards . . ."

24 Mr. Hutchison responded to questions referencing the report in
25 Exhibit 1 and testified to support the elements of violations under
26 the criteria and assessments for **probability, gravity and severity** as
27 well as the **appropriateness of the penalties.**

28 Complainant presented witness testimony of the three respondent

1 witnesses who submitted interview statements at Exhibit 1, pages 14-
2 20. The three witnesses testified through a Spanish to English court
3 certified translator. **Employee supervisor Huizar** testified
4 equivocally and with some contradiction to his written statement at
5 Exhibit 1, page 14. However he confirmed his employment commencement
6 date of **four years** previous, but testified he received training "just
7 one week ago . . ." The interview statement date was December 13,
8 2016. Mr. Huizar testified he was offered a hepatitis B shot at the
9 **same time he was given the training** through a video by the respondent
10 (1 week prior to December 13, 2016). Mr. Huizar further testified
11 that he observed blood and sharps ". . . three weeks ago . . ." but
12 trained "one week ago . . .".

13 **Employee Victor Ruiz** identified himself as a supervisory employee
14 for the company over a **ten year period**. He confirmed his written
15 interview statement and testified he is required to clean up blood.
16 The testimony included some equivocation with his written statement.
17 On continued direct examination Mr. Ruiz testified that he did clean
18 up blood three months ago, as indicated in his written statement dated
19 December 13, 2016. He testified that he formerly cleaned doctor's
20 offices but does not do so now. He further testified that he was
21 trained in January 2016 in furtherance of his written statement; and
22 confirmed that he was "not offered" the hepatitis B shot.

23 At the conclusion of presentation of complainant's case,
24 respondent presented no witness testimony or other evidence.

25 Complainant presented closing argument. Counsel referenced the
26 burden of proof was established as to each of the cited violations
27 based upon the preponderant evidence offered.

28 At **Citation 1, Item 1, referencing 29 CFR 1910.1030(c)(1)(i),**

1 counsel noted there was no question the employer had no plan.
2 Respondent offered no evidence to support compliance of the ECP
3 requirement prior to the inspection.

4 At **Citation 1, Items 2 and 3**, counsel referenced the Exhibit 1
5 evidence and witness testimony. She asserted employer logs at Exhibit
6 2, page 69, confirmed six (6) "needle sticks" had occurred in the
7 course of the employment for employees working in merely the most
8 recent period of time. The log references alone demonstrate the
9 exposure hazards to respondent employees and employer knowledge of
10 requirements for protection under the cited standards for BBP and
11 OPIM. Counsel referenced the federal OSHA guidance letters at
12 Exhibits A and B, and noted both place "responsibility on the employer
13 of a case by case basis," even if dealing primarily in non-medical
14 facility housekeeping work in restroom areas where BBP and OPIM is
15 common. Precautions and protection must be taken for compliance if
16 exposure can be "reasonably anticipated" to BBP and OPIM. Certainly
17 the log of needle sticks demonstrated proof of employer notice and
18 knowledge.

19 Counsel argued that while the testimony of the three witnesses
20 was somewhat equivocal, they ". . . all clearly demonstrated the type
21 of work each encountered to establish the potential for exposure
22 . . ." Further, the evidence shows only two of the employees
23 referenced in the inspection were offered a hepatitis B shot, yet the
24 logs at Exhibit 2 confirm four to six employees of respondent had
25 needle stick incidents. While the statements were partially
26 controverted or somewhat equivocal, the hire dates shown from
27 employer's own records reflect that the training and offering of
28 hepatitis B vaccinations were not done under timelines required by the

1 standards. The objective written evidence of hiring dates at Exhibit
2 2 and just the unrebutted part of testimony given at the time of the
3 hearing as to each employee's hire date, demonstrate the employee
4 exposure and lack of compliance under Citation 1, Item 2.

5 At Citation 1, Item 3, employee Ruiz, a supervisor, had a hire
6 date of January 7, 2013, yet testified he received training only in
7 January 2016. This unequivocal record evidence and the employer's
8 lack of furnishing any evidence of training establish the violation
9 for lack of the training as required by the standard.

10 There was no testimony nor evidence that any of the needle sticks
11 were **isolated incidents**. The logs at Exhibit 2 and testimony of the
12 employee witnesses described their job work, and potential exposures.
13 Together they show exposure potentials that which might be "reasonably
14 anticipated" for protection as provided under the federal OSHA
15 guidance.

16 Counsel submitted the burden of proof had been met unequivocally
17 as to Citation 1, Item 1, regarding the non-existence of a plan prior
18 to the inspection. It is undisputed that no plan existed prior to the
19 time of inspection. As to Citation 1, Item 2, ". . . whether the
20 employee accepts the vaccination or not, there must be a declination
21 letter and none were provided." Similarly, the documentary evidence
22 and a weight of all witness testimony demonstrate a lack of compliance
23 with both the training and the vaccination provisions at Citation 1,
24 Items 2 and 3. Further, as to Citation 1, Item 3, ". . . no training
25 records were submitted for any of the employees of the company and
26 notably none for those who provided the witness statements or
27 testified at the time of the hearing."

28 Counsel for respondent provided closing argument and asserted the

1 burden of proof is upon OSHA to establish the violations. He further
2 argued the case was replete with contradictions between the employee
3 witness testimony and the written statements in evidence. Counsel
4 asserted that the "reasonable anticipation of employee exposure . . ."
5 as provided in the federal OSHA letter guidance was not established by
6 the evidence for the respondent company.

7 Respondent asserted lack of **applicability** of the standard at
8 Citation 1, Item 1, so no ECP was required. Counsel argued the
9 company is ". . . **primarily** a janitorial company without all employees
10 assigned to working in medical facilities; and those that were so
11 assigned had been protected under cited standards" "**Isolated**
12 **incidents**" or even some "needle sticks" do not show a trend or
13 violative workplace conditions. Counsel further asserted there was no
14 evidence of "**employer knowledge**," but merely arguments and inferences
15 regarding employer knowledge because some training had been performed.

16 **APPLICABLE LAW**

17 In all proceedings commenced by the filing of a
18 notice of contest, the **burden of proof rests with**
19 **the Administrator.** (See NAC 618.788(1)).

20 All facts forming the basis of a complaint must be
21 proved by a **preponderance of the evidence.** See
22 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
23 ¶16,958 (1973). (Emphasis added)

24 NRS 233B(2) "**Preponderance of evidence**" means
25 evidence that enables a trier of fact to determine
26 that the existence of the contested fact is more
27 probable than the nonexistence of the contested
28 fact.

29 NAC 618.788 (NRS 618.295) In all proceedings
30 commenced by the filing of a notice of contest,
31 the **burden of proof rests with the Chief.**
32 (Emphasis added)

33 NRS 618.625 provides in pertinent part:

34 ". . . a serious violation exists in a place of

1 employment if there is a **substantial probability**
2 **that death or serious physical harm could result**
3 **from a condition** which exists, or from one or more
4 practices, means, methods, operations or processes
5 which have been adopted or are in use in that
6 place of employment **unless the employer did not**
7 **and could not, with the exercise of reasonable**
8 **diligence, know** of the presence of the violation."

6 To **prove a violation** . . . complainant must
7 establish (1) the **applicability of the standard**
8 **(regulation)**, (2) the **existence of noncomplying**
9 **conditions**, (3) **employee exposure or access**, and
10 (4) that the **employer knew or with the exercise of**
11 **reasonable diligence could have known of the**
12 **violative condition**. See *Belger Cartage Service,*
13 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
14 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
15 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
16 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
17 (No. 76-1408, 1979); *American Wrecking Corp. v.*
18 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
19 2003). (Emphasis added)

13 A respondent may rebut allegations by showing:

- 14 1. The standard was inapplicable to the
15 situation at issue;
- 16 2. The situation was in compliance; or
17 lack of access to a hazard. See
18 *Anning-Johnson Co.*, 4 OSHC 1193, 1975-
19 1976 OSHD ¶ 20,690 (1976).

18 **29 CFR 1910.1030(c)(1)(i)**: Each employer having an
19 employee(s) with occupational exposure as defined
20 by paragraph (b) of this section shall establish
21 a written Exposure Control Plan designated to
22 eliminate or minimize employee exposure.

21 **29 CFR 1910.1030(f)(2)(i)**: Hepatitis B Vaccination
22 shall be made available after the employee has
23 received the training required in paragraph
24 (g)(2)(vii)(I) and within 10 working days of
25 initial assignment to all employees who have
26 occupational exposure unless the employee has
27 previously received the complete hepatitis B
28 vaccination series, antibody testing has revealed
29 that the employee is immune, or the vaccine is
30 contraindicated for medical reasons.

27 **29 CFR 1910.1030(g)(2)(i)**: The employer shall
28 train each employee with occupational exposure in
29 accordance with the requirements of this section.
30 Such training must be provided at no cost to the
employee and during working hours. The employer

1 shall institute a training program and ensure
2 employee participation in the program.

3 **DECISION**

4 In reviewing the facts, testimony and documentary evidence, the
5 Board must review the citations and allegations of the complaint under
6 the statutory requirements for preponderant evidentiary proof of
7 violations.

8 The Board finds a violation at **Citation 1, Item 1**, based upon the
9 un rebutted evidence of non-compliance with the requirement of the
10 cited standard for development and implementation of a written
11 Exposure Control Plan (ECP) prior to the time of the inspection.
12 Respondent did abate the violative condition during the inspection
13 through modification of a sample form from another state to adopt and
14 implement the ECP in Nevada going forward. The unrefuted documentary
15 evidence and testimony confirmed that some respondent employees
16 performed janitorial services in commercial, industrial and medical
17 facilities in the State of Nevada. These facts clearly establish the
18 basis for "reasonable anticipation" on the part of a prudent employer
19 in the subject field for a need to protect its employees from
20 potential exposures to BBP and OPIM. Reasonable inference from the
21 federal OSHA guidance interpretation letters at respondent's A and B,
22 indicates that a **reasonably prudent employer should anticipate** that
23 housekeeping services employees working at healthcare facilities, as
24 well as other commercial industrial complexes brings employees into
25 potential contact with restrooms as well as other areas where BBP and
26 OPIM can be encountered. Clearly, restrooms in office complexes which
27 are not in medical facilities are areas where employees potentially
28 encounter blood or materials containing BBP or OPIM. Further, the

1 preponderant evidence demonstrated various workplaces involving the
2 employee witnesses who testified, resulted in actual contact and/or
3 potential exposure to BBP. This evidence coupled with the documentary
4 information at Exhibit 1, and the respondent incident logs at Exhibit
5 2 for exposure to syringes and other blood containing material,
6 established the **applicability** of the standard to the respondent
7 employer. There was no evidence submitted by respondent of any plan
8 (ECP) prior to the inspection to prove compliance with the standard **at**
9 **Citation 1, Item 1.** Clearly the preponderant evidence established
10 that janitorial services in office complexes as well as medical
11 facilities did result in DLP employees to encounter some degree of
12 contact with potential exposures to BBP and OPIM.

13 The Board finds violations of the standards at **Citation 1, Item**
14 **2 and Citation 1, Item 3.** The testimonial and documentary evidence
15 presented through IH Burgess was clear, convincing and credible. The
16 weight of preponderant evidence met the burden of proof to confirm the
17 cited violations.

18 The DLP employee witnesses who testified with the assistance of
19 an interpreter did equivocate or contradict **some** of the written
20 portions of their statements. However the unequivocal and/or
21 unrebutted testimonial evidence to support the violations from
22 employee witness statements and testimony was corroborated through the
23 written documents in evidence at Exhibits 1 and 2. The employee
24 witness hire dates from the employer records at Exhibit 2, pages 71-
25 76, corroborated the employee testimony and written interview
26 statements at Exhibit 1 of their training time frame periods.
27 Respondent offered no written documents or witness testimony to
28 support training as required by the specific standards nor hepatitis

1 B shot declination letters.

2 Respondent provided video and some other limited employee
3 assistive training, however the timelines based upon the hire dates
4 from the employer records at Exhibit 1 together with witness
5 statements, regardless of some equivocation as to other facts,
6 established the element of employer knowledge. Additionally, as to
7 the hepatitis B vaccinations, the respondent did not provide
8 declination letters, nor did the hiring dates of the employees
9 compared to their testimony and written statements comport with
10 vaccination offers being timely made as required by the standard.

11 Clearly DLP is a major employer in the business of providing
12 housekeeping, janitorial and cleaning services for commercial,
13 industrial and medical facilities. A reasonably prudent employer,
14 with individuals employed in the described janitorial field of work,
15 must "reasonably anticipate" potential contact of employees with
16 infectious materials governed under the BBP standards.

17 Further to the element of employer knowledge, the well
18 established applicable occupational safety and health law governing
19 the burden of proof has long recognized that an employer ". . . need
20 **only have knowledge of the conditions** under the regulation, **not the**
21 **actual violative facts.**"

22 The element requires OSHA to establish the
23 employer's actual **or constructive knowledge** of the
24 physical circumstances that comprise the
25 violation. **OSHA is not required to show that an**
26 **employer knew the conditions violated the Act or**
27 **posed a hazard to employees.** *Southwestern*
28 *Acoustics & Specialty Inc.*, 5 OSH Cases 1091 (Rev.
Comm'n 1977) (employer need be shown **only** to have
had **knowledge of "physical conditions which**
constitute a violation," not that the condition
was prohibited by law). (Emphasis added)

28 The overall quantum of preponderant evidence established DLP knew

1 or ". . . with the exercise of reasonable diligence could have known
2 of the violative condition." (*American Wrecking, supra*, at page 10.)

3 **FINAL DECISION**

4 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
5 **REVIEW BOARD** that violations of Nevada Revised Statutes did occur as
6 to Citation 1, Item 1, 29 CFR 1910.1030(c)(1)(i), Citation 1, Item 2,
7 29 CFR 1910.1030(f)(2)(i) and Citation 1, Item 3, 29 CFR
8 1910.1030(g)(2)(i). The classifications were appropriately classified
9 as "Serious" and the proposed penalties in the total sum of Eight
10 Thousand Four Hundred Dollars (\$8,600.00) confirmed.

11 The Board directs counsel for the complainant, to submit proposed
12 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
13 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
14 within twenty (20) days from date of decision. After five (5) days
15 time for filing any objection, the final Findings of Fact and
16 Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL**
17 **SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the
18 Findings of Fact and Conclusions of Law signed by the Chairman of the
19 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute
20 the Final Order of the **BOARD**.

21 DATED: This 30th day of May 2017.

22 NEVADA OCCUPATIONAL SAFETY AND HEALTH
23 REVIEW BOARD

24 By /s/
25 JIM BARNES, CHAIRMAN
26
27
28