United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BEVERLY HEALTHCARE-HILLVIEW, Respondent.	OSHRC Docket Nos. 04-1091 & 04-1092

APPEARANCES:

Howard M. Radzely, Solicitor; Joseph M. Woodward, Associate Solicitor; Charles James, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Mark J. Lerner, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant
Michael S. Glassman, Esq.; Jennifer J. Swartz, Esq.; Dinsmore & Shohl, LLP, Cincinnati, OH
For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY RAILTON, Chairman; THOMPSON, Commissioner:

Beverly Healthcare-Hillview ("Beverly"), a nursing home in Altoona, Pennsylvania, was cited by the Occupational Safety and Health Administration (OSHA) for violating 29 C.F.R. § 1910.1030(f)(1)(ii)(A), a provision of the bloodborne pathogens (BBP) standard. That provision requires employers to make available medical evaluations and procedures *at no cost* to employees.[1] At issue before the Commission is

[1] 29 C.F.R. § 1910.1030(f)(1)(ii)(A) provides:

> (ii) The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are:
>
> (A) Made available at no cost to the employee [.]

whether the phrase "at no cost" requires an employer to pay for an employee's time spent and travel expenses incurred in seeking authorized medical treatment.

Based upon our review of the language, we conclude that the cited provision of the BBP standard is ambiguous. We also conclude that while the Secretary's interpretation of the provision to require payment for employee time and travel expenses incurred in seeking medical treatment is reasonable, Beverly lacked fair notice of this interpretation. Accordingly, we vacate the citation.

Background

Two of Beverly's Licensed Practical Nurses received needle sticks while at work, potentially exposing them to the risk of infectious disease. At the end of their shifts, both employees sought treatment at the medical clinic that treats Beverly's employees, but they scheduled appointments during their non-working hours, in part, because the clinic was not open during their shifts. Beverly paid for both employees' medical treatments, but not for their time and travel expenses incurred in obtaining treatment.

The case was submitted to Judge Covette Rooney on cross motions for summary judgment. Beverly argued that the "at no cost" provision of the BBP standard requires an employer to pay only for the actual medical treatment. The Secretary asserted that the "at no cost" provision requires an employer to pay for the medical treatment, as well as the employee's time and travel expenses incurred in seeking the treatment.

The judge found that the provision "at no cost" clearly and unambiguously required Beverly to compensate its employees for their time and travel expenses. She granted the Secretary's motion and ordered Beverly to reimburse the two employees. The judge further concluded that any ambiguity in the provision was addressed by the Secretary's reasonable interpretation, which she found was entitled to deference.

Discussion

When the meaning of a provision such as "at no cost" is in dispute, the Commission looks first to the text and structure of the standard. *See Unarco Commercial Products*, 16 BNA OSHC 1499, 1502, 1993-95 CCH OSHD ¶ 30,294, at p. 41,732 (No. 89-1555, 1993) (*Unarco*). If the meaning of the language is "sufficiently clear", the inquiry ends there. *Unarco*, 16 BNA OSHC at 1503, 1993-95 CCH OSHD at p. 41,732. If no determination can be reached, we look to the legislative history of the text. *Unarco*,

16 BNA OSHC at 1502, 1993-95 CCH OSHD at p. 41,732. If this inquiry into the meaning of the text is not dispositive, the Commission will defer to the Secretary's reasonable interpretation of standards such as the one at issue here. *Id.*

Ambiguity of the Cited Provision

The standard cited here requires an employer to "ensure that all medical evaluations and procedures … are [m]ade available at no cost to the employee." 29 C.F.R. § 1910.1030(f)(1)(ii)(A). The Secretary would have us define "cost" as, "whatever must be given, sacrificed, suffered, or foregone to secure a benefit or accomplish a result." Webster's Third New Int'l Dictionary (1986). This definition, which essentially requires the removal of all obstacles to reach a goal, contrasts sharply with Beverly's narrow reading of the term, also from Webster's, as only "the amount … charged or engaged to be paid or given for anything bought … ." Indeed, as the Supreme Court has recognized, there are a number of alternative usages of the word "cost." *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 500 (2002) (citing *Strickland v. Comm'r, Maine Dep't of Human Servs.*, 96 F.3d 542, 546 (1996) ("the word 'cost' is a chameleon, capable of taking on different meanings, and shades of meaning, depending on the subject matter and the circumstances of each particular usage.")).

Standing alone the language of the cited standard does not clearly indicate which sense of the word the Secretary has employed. *See Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) (standard is open to interpretation when alternative dictionary definitions of a word each make sense under the standard). There is also nothing in the remainder of the BBP standard that provides any further clarification of the phrase "at no cost." The phrase does arise five more times in the standard, but none of those instances provide us with any basis from which to choose one definition over another.

The standard's legislative history also fails to resolve the standard's ambiguity. The Secretary claims that two sections in the standard's preamble clearly support her interpretation. However, the language she cites in the "Summary and Explanation" section merely repeats the "at no cost" requirement but does not explain it. *See* Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004, 64,152-153 (Dec. 6, 1991) (codified at 29 C.F.R. § 1910.1030). Information more relevant to an

employee's time and travel expenses is incorporated by reference in the "Costs of Compliance" section, but that data is largely found in an unpublished appendix buried within the chain of rulemaking documents. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 2162, 1993 CCH OSHD ¶ 29,962, at p. 40,995 (No. 87-0922, 1993) ("[t]o expect employers to heed one sentence buried in 30 pages of an interim rulemaking document is unreasonable"). An examination of that material reveals no reference to the expenses associated with an employee seeking medical treatment, nor is "at no cost" otherwise explained. For these reasons, we disagree with the judge and conclude that the phrase "at no cost" in § 1910.1030(f)(1)(ii)(A) is ambiguous.

Reasonable Interpretation

Once a standard like the one at issue here is determined to be ambiguous, the Commission will normally "defer to the Secretary's reasonable interpretation of the regulation that otherwise 'sensibly conforms to the purpose and wording of the regulation []', taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citations,' 'the adequacy of notice to regulated parties,' and 'the quality of the Secretary's elaboration of pertinent policy considerations.'" *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1997 CCH OSHD ¶ 31,445, at p. 44,472 (No. 96-0563, 1997) (citing *Martin v. OSHRC*, 499 U.S. 144, 150, 157-58 (1991)) (*Union Tank*). We consider each of these factors below.

First, we agree with the judge that the Secretary's interpretation of the BBP standard as requiring employees to be compensated for both the time required for treatment and the travel expenses incurred in obtaining the treatment conforms to the purpose and wording of the standard. The standard as a whole is "designed to *ensure* that all medical evaluations and procedures … are [m]ade available at no cost to the employee." Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. at 64,152 (emphasis added). Absent such compensation, the likelihood that an employee will obtain the necessary medical treatment declines. *See Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1983 CCH OSHD ¶ 26,552 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237, 1239 (9th Cir. 1984) (*Phelps Dodge*).

Second, we see nothing in the record to indicate that the Secretary's interpretation here is inconsistent with any of her previous pronouncements. *Union Tank*, 18 BNA at

1069, 1997 CCH OSHD at p. 44,472. In the three instructions in evidence, the Secretary emphasizes that the phrase "at no cost" in the cited provision means that an employee incurs no out-of-pocket expenses. OSHA Instruction CPL 2-2.44C (Mar. 6, 1992); OSHA Instruction CPL 2-2.44D (Nov. 5, 1999); OSHA Instruction CPL 2-2.69 (Nov. 27, 2001). A 1999 letter of interpretation provides that an employee's "out of pocket" expenses include an employee's travel expenses, and that the employee is considered "on-duty" when receiving the vaccine or commuting to have it administered. U.S. Dep't of Labor, Ltr. of Interpretation, International Association of Firefighters (July 7, 1999) (1999 letter).

Third, we find that the Secretary has elaborated pertinent policy reasons for her interpretation. As the preamble to the standard states, "[29 C.F.R. § 1910.1030(f)] is designed to protect employees from infection caused by bloodborne pathogens by requiring the employer to … ensure that the employee receives appropriate medical follow-up after an exposure incident." Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. at 64,152. The preamble also emphasizes that "an important factor in successful vaccination programs was providing the vaccination at no cost to the employee." *Id*. at 64,153. The Secretary's interpretation of the "at no cost" language likely enhances these policy concerns. For all of these reasons, we conclude that the Secretary's interpretation of the standard is reasonable.

Nonetheless, we find that Beverly lacked notice of the Secretary's interpretation because neither § 1910.1030(f)(1)(ii)(A) nor the documents the Secretary has published interpreting the standard explain, with "ascertainable certainty", what this standard requires of employers. *See Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)). Although the Secretary's instructions indicate that she has consistently interpreted the cited standard to mean no "out of pocket" expenses incurred by an employee, these instructions fail to inform an employer what is required with the same precision and clarity that the Secretary has summoned up in prosecuting this case. This is also true of the preamble to the BBP final rule, which clearly identifies the goals of disease prevention and vaccine program participation, but falls short of explaining what "at no cost" means.

Nor was notice provided by the Secretary's 1999 letter. Beverly points out that this letter, which states that travel expenses are compensable under the BBP standard and that an employee is considered "on-duty" when receiving the vaccine or commuting to have it administered, is at odds with a 1987 Department of Labor interpretative opinion letter. According to the 1987 letter, which interprets a regulation published under the Fair Labor Standards Act (FLSA), "[for] time spent waiting for or receiving medical attention or treatment to be compensable, the visit to the doctor must be at the direction of the employer and it must occur during the employee's *normal work hours on days when the employee is working*." U.S. Dep't of Labor, Ltr. of Interpretation, Firefighters/Hours Worked (Sept. 19, 1987) (emphasis added). Given these two conflicting positions, we cannot say that an employer in Beverly's position would have been able to ascertain with reasonable certainty what the Secretary claims the BBP standard requires here. *Cf. Gen'l Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995) ("[i]t is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning.").

The chief difficulty we see with the Secretary's claims of notice is that as drafter of the BBP standard and its preamble, she would have been well within her authority to provide language of "ascertainable clarity" that informs an employer exactly what "at no cost" requires. *See Diamond Roofing*, 528 F.2d at 648. Indeed, even if we were to ignore the effect of the FLSA letter, the Secretary has still failed to provide the requisite clarity to her interpretation. After she issued the 1999 letter, she did not formalize the opinion expressed there. Nor did she take the opportunity to restate the opinion despite publishing two more CPLs responding to questions about the meaning of "at no cost." *See* OSHA Instruction CPL 2-2.44D (Nov. 5, 1999); OSHA Instruction CPL 2-2.69 (Nov. 27, 2001). In both CPLs, the Secretary failed to move beyond the studiously vague answer that "at no cost" meant no "out of pocket" expenses. This is in stark contrast to the preamble to the inorganic arsenic standard, which states directly that: "[t]he employer is obligated to pay for the time spent taking the medical examination if it is taken outside normal working hours[.]" Occupational Exposure to Inorganic Arsenic, 43 Fed. Reg. 19,583, 19,621 (May 5, 1978) (codified at 29 C.F.R. § 1910.1018). *See also Phelps Dodge*, 11 BNA OSHC at 1444, 1983 CCH OSHD at p. 33,920. Given the continuing

failure of the Secretary to clearly state in the standard, its preamble, or in her interpretations what she was able to clearly state in prosecuting this case, we conclude that Beverly lacked fair notice of the Secretary's interpretation of § 1910.1030(f)(1)(ii)(A) and vacate the citation.

Conclusion

We hold that the phrase "at no cost" in the BBP standard is ambiguous, but that the Secretary's interpretation that the provision includes an employee's time and travel expenses is reasonable. However, we conclude that Beverly lacked fair notice of the Secretary's interpretation, and therefore we vacate the citation.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Horace A. Thompson, III
Commissioner

Dated: September 18, 2006

ROGERS, Commissioner, concurring in part and dissenting in part:

I concur in the well reasoned analysis of my colleagues with respect to the ambiguity of the cited provision and the resulting deference to the Secretary's reasonable interpretation of it based on the role assigned to us by Congress and the Supreme Court. *Martin v. OSHRC*, 499 U.S. 144 (1991). However, I reluctantly part company on the question of fair notice. While this is a close question, I believe the July 7, 1999 interpretation letter by the Director of Compliance Programs at the Occupational Safety and Health Administration (OSHA) tips the balance in favor of finding fair notice. The letter, which predates the cited conduct, specifically deals with the two questions at issue here – whether Beverly was required to reimburse employees for (1) travel expenses and (2) time incurred in seeking medical treatment under the bloodborne pathogens standard. The letter clearly states that the cost of transportation must be covered by the employer and that time spent receiving the vaccine (including travel) should be considered duty time.

My colleagues refer to a 1987 interpretation letter under the Fair Labor Standards Act (FLSA), which came to an opposite conclusion with respect to duty time as the 1999 OSHA letter, as possibly creating confusion. My colleagues then cite to *Gen'l Elec. Co. v. EPA (GE)*, 53 F.3d 1324 (D.C. Cir. 1995), which found a lack of fair notice when there were conflicting interpretations between different divisions of the *same* agency (EPA) of the *same* regulation under the Toxic Substances Control Act. However, in contrast to the situation addressed by *GE*, the FLSA letter addresses an interpretation by *another* agency within the Department of Labor of a *different* regulation under a *different* statute, the FLSA. Even if one accepts the notion that the two interpretation letters at issue here may have created some measure of confusion on the part of Beverly, the latter interpretation letter by OSHA interpreting the regulation at issue here as least gave Beverly enough notice such that it should have inquired of OSHA. *See Corbesco Inc. v. Secretary of Labor*, 926 F.2d 422, 428 (5th Cir. 1991).

Accordingly, I would find that Beverly had fair notice and I would affirm the citation.

/s/_____
Thomasina V. Rogers
Commissioner

Dated: September 18, 2006

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR,

Complainant,

v.

BEVERLY HEALTHCARE - HILLVIEW,

Respondent.

OSHRC DOCKET NOS. 04-1091 and 04-1092

DECISION AND ORDER

These cases are before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Beverly Healthcare-Hillview ("Respondent") owns and operates a nursing home facility in Altoona, Pennsylvania. The Occupational Safety and Health Administration ("OSHA") conducted two different inspections of Respondent's facility, one in July 2003 and one in January 2004; as a consequence, OSHA issued Respondent serious and other-than-serious citations. Each inspection resulted in an other-than-serious citation item for an alleged violation of 29 C.F.R. § 1910.1030(f)(1)(ii)(A), a provision of the bloodborne pathogens ("BBP") standard that requires that employers make available "at no cost to the employee" medical treatment required as a result of a needle stick.[1] Item 1 of Citation 2, in OSHRC Docket No. 04-1091 (Inspection No.

[1] Section 1910.1030(f)(1)(ii)(A) provides:

> (ii) The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including

306957770), involves a needle stick incurred by Respondent's employee Darryl Kosanovich on January 4, 2004. Item 2 of Citation 1, in OSHRC Docket No. 04-1092 (Inspection No. 306902644), involves a needle stick incurred by Respondent's employee Vicki Pacovsky on December 18, 2002. Respondent timely contested the citations, and, following the filing of a complaint and answer in each docket number, the parties entered into a settlement agreement disposing of all citation items except for the aforementioned items.[2] The parties have filed motions for summary judgment with respect to these two citation items.

Jurisdiction

Complainant alleges and Respondent admits that it is an employer engaged in the operation of a nursing home at the above-noted location. Respondent admits that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).

Discussion

In the absence of a specific Commission rule as to summary judgement, Rule 56 of the Federal Rules of Civil Procedure applies by virtue of Commission Rule 2, 29 C.F.R.§ 2200.2. The Federal Rule provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

> prophylaxis, are: (A) Made available **at no cost** to the employee.... (Emphasis added).

[2] The record indicates that the parties have agreed to a settlement of the remaining items in Docket No. 04-1091. A stipulation of partial settlement with the Commission. Docket No. 04-1092 was originally the subject of Docket No. 03-1840. The parties entered into a Stipulation of Settlement for Citation 1, Items 1, 3, and 4, and a Consent Order Approving Settlement was entered on August 17, 2004. The remaining item, Citation 1, Item 2, was transferred to Docket No. 04-1092 and was consolidated with Docket No. 04-1091 by Order dated August 6, 2004.

The Commission has long recognized that summary judgment is not appropriate where material facts are in dispute. *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157 (No. 87-214, 1989). In the subject cases, each party maintains that it is entitled to a judgment as a matter of law.

The issue presented concerns the provision of the BBP standard, which requires that medical evaluations and procedures and post-exposure medical treatment be provided to an affected employee "at no cost" to the employee. The Secretary has interpreted the "no cost" provision to include employee wages for time spent during non-working hours receiving post-exposure evaluation and follow-up, and mileage for driving to the location where post-exposure evaluation and follow-up were made available. Respondent construes the "no cost" provision as being limited to the cost of the actual medical treatment provided. Alternatively, Respondent argues that the Secretary's interpretation of the standard violates due process and is therefore unconstitutional because Respondent was never given adequate notice of what the law requires. The parties have filed pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, which reveal that there are no material facts which are disputed with regard to the issue presented. The two items at issue involve needle sticks sustained by two of Respondent's employees, Vicki Pacovsky and Darryl Kosanovich. It is undisputed that both Pacovsky and Kosanovich received their post-exposure evaluation and follow-up during their non-working hours. It is also undisputed that Respondent paid HealthForce, a medical facility available to provide health care services for Respondent's employees, 100% of the cost of Pacovsky's and Kosanovich's medical evaluations and procedures, including post-exposure evaluation and follow-up.[3]

Standards and regulations under the Act are to be broadly and reasonably construed to effectuate the Act's express purpose, which is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-13 (1980).The BBP standard does not define the term "at no cost." However, the preamble to a regulation may be consulted in determining the administrative construction and meaning of the regulation. *Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993). The preamble to this standard stresses the critical importance of

[3] HealthForce's hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday.

medical evaluations and post-exposure medical treatments being available "at no cost" to the employee, and it cites comments that providing vaccinations "at no cost" is important to having a successful program.[4] Employee participation "at no cost" to employees is key to reducing the risk of infection and the prevention of further transmission of infection.

The word "cost" encompasses several common meanings. *Webster's Third New International Dictionary* (1986) defines "cost" in broad terms with a number of meanings, including "the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered ... whatever must be given, sacrificed, suffered, or forgone to secure a benefit or accomplish a result ... **the expenditure or outlay of money, time or labor**...."(Emphasis added). An employee certainly incurs a "cost" when using his own time to obtain medical services, and an employee also incurs a "cost" upon paying for his own transportation to obtain those services. I therefore agree with the Secretary's determination that Respondent's employees incurred a cost when they expended their own time to secure post-exposure medical treatment. I also agree that the employees incurred an additional cost when they paid for their own transportation in order to travel

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[4] The preamble states that:

> This paragraph of the standard is designed to protect employees from infection caused by bloodborne pathogens by requiring the employer to … ensure that the employee receives appropriate medical follow-up after an exposure incident. Early intervention, including testing, counseling, and appropriate prophylaxis can reduce the risk of infection, and prevent further transmission should infection occur....
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> Paragraph (f)(1)(ii)(A) states that the employer shall ensure that all medical evaluations and procedures, including the Hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are made available at no cost to the employee....The wording in this paragraph was changed from "provided" in the proposed rule to "made available" in the final rule to emphasize the employee's optional choice to participate in the programs. To those employees who consent to participate, the employer will provide Hepatitis B vaccination and post-exposure evaluation and follow-up at no cost to the employee.
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> 56 Fed. Reg. 64004, 64152 (Dec. 6, 1992).

to secure such treatment. The failure to reimburse them for these costs would operate as a disincentive to their participation in this optional program.[5]

Based on the foregoing, I find that the term "at no cost to the employee" is clear and unambiguous. I further find that the Secretary's interpretation of the term conforms to the language and purpose of the cited standard and that it also expresses the intent of the standard as set out in the preamble.[6] Having found the standard unambiguous, however, I note that any ambiguity alleged is certainly addressed in the Secretary's interpretations of the cited standard. In interpreting OSHA's regulations, the Commission adheres to the general rule that the Secretary's interpretation is entitled to substantial deference if the interpretation is reasonable. *Martin v. OSHRC,* 499 U.S. 144, 151 (1991); *Martin v. Amercian Cyanamid,* 5 F.3d at 144. The agency's interpretation is "reasonable … so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC,* 499 U.S. at 151; *Whirlpool Corp.* v. *Marshall,* 445 U.S. at 11. "A reviewing court may certainly consult [the Secretary's informal interpretations] to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position." *Martin v. OSHRC,* 499 U.S. at 157.

The Secretary's interpretation of the "at no cost" provision is found in three OSHA directives, dated 1992, 1999 and 2001, which have consistently provided a clear interpretation of the regulation indicating that the "at no cost" provision means at no expense to the employee and includes out-of-pocket expenses. These directives provide notice regarding the Secretary's interpretation of her regulations. *See Martin v. OSHRC,* 499 U.S. at 158; *Martin v. American Cyanamid,* 5 F.3d at 146. In 1992, following publication of the BBP standard, OSHA published the first directive--CPL 2-2.44C--to

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[5] The Ninth Circuit Court of Appeals recognized the broad sense of the word "cost" in *Phelps Dodge Corp. v. OSHRC,* 725 F. 2d 1237 (9th Cir. 1984), finding that a similar provision ("without cost to the employee") in the inorganic arsenic standard was violated when employees were not compensated for their time and costs associated with medical exams during non-working hours.

[6] The Supreme Court has made clear that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Ass'n,* 310 U.S. 534, 543-544 (1940).

establish policies and provide clarification to ensure uniform inspections to enforce the standard. With respect to paragraph (f)(1)(ii)(A), the directive states that the "term 'no cost to the employee' means among other things no 'out of pocket' expense to the employee." In 2001, OSHA published another directive, CPL 2-2.69, which repeats the language from the 1992 directive."[7]

In using the term "among other things," the directive clearly intended to assign a broad meaning to the "at no cost to the employee" provision. The preposition "among" is used to refer to three or more things, persons or choices. "Out of pocket expenses," *e.g.*, co-payments, are in addition to other costs associated with obtaining the vaccine. It is apparent from the directive that "among other things" contemplates a broad range of "costs" and not the narrow meaning Respondent attributes to the word.[8] Moreover, the Secretary also communicated her view of the "at no cost" provision of the BBP standard in the 1999 directive, which was actually a letter of interpretation dated July 7, 1999,

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[7] CPL 2-2.69, which contains the enforcement procedures for occupational exposure to bloodborne pathogens, provides as follows:

> Paragraph (f)(1)(ii)(A). The term "no cost to the employee" means, **among other things**, no "out of pocket" expense to the employee. (Emphasis added). The employer may not permit the employee to use his/her healthcare insurance to pay for the series unless the employer pays all of the cost of the health insurance and unless there is no cost to the employee in the form of deductibles, copayments, or other expenses. Even partial employee contribution to the insurance premium means the employee could be affected by a rise in the total premium caused by insurance company reaction to widespread hepatitis B vaccinations and is therefore unacceptable. Likewise, any use of a spouse or other family member's insurance plan to provide vaccination would not be considered "at no cost" to the employee. The employer may not institute a program in which the employee pays the original cost of the vaccine and is reimbursed by the employer if she/he remains employed for a specified period of time. An "amortization contract which requires employees to reimburse the employer for the cost of the vaccination should they leave his/her employ prior to a specified period of time is similarly prohibited." A waiver of liability for any harm caused by the vaccine is also prohibited.

[8] The undersigned has noted that the directive also states that paragraph (f)(1)(ii)(B) requires that the medical procedures and evaluations "must normally be offered during employees' scheduled work hours, and that employers must bear the cost of travel away from the worksite." I find that while travel expenses are not specifically set out in the standard, such expenses are clearly among those contemplated by the standard.

from Richard Fairfax, OSHA's Director of Compliance Programs, to Alfred Whitehead, General President of the International Association of Fire Fighters. In response to an inquiry as to whether an employer must provide or pay for transportation to and from the site where the vaccination is administered, the letter clarifies that employees undergoing post-exposure medical procedures required by the BBP standard may incur "no out of pocket expense" and that the employer must cover the costs of transportation to and from the site of vaccination.[9] This letter further exemplifies the broad meaning of the word "cost" and shows that it includes transportation.

The Secretary has made all of the above-noted documents available to the public through OSHA's website. Based on these documents, the preamble to the standard, and the language of the standard itself, I find that that the term "at no cost" is clear enough that people of common intelligence would not have to guess at its meaning. Accordingly, I find no merit in Respondent's assertion that the Secretary failed to give constitutionally-adequate notice that the standard requires payment for expenses other than charges for medical evaluations and procedures.[10]

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[9] The letter provides, in pertinent part, as follows:

1. Must the employer either provide or pay for transportation to and from the site where the Hepatitis B vaccination will be administered?

According to the standard, "the employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are: (A) Made available at no cost to the employee; (B) Made available to the employee at a reasonable time and place." Employees may incur "no out of pocket expense" for the vaccine and vaccination series. While transportation may not need to be provided by the employer, its cost must be covered by the employer.

2. Are all activities associated with obtaining a Hepatitis B vaccination, in fact, work functions and, consequently, is all time associated with receipt of the vaccination work time?

The current directive specifically states in Section (f)(1)(ii)(B) that "[t]he term 'reasonable time and place' requires the medical procedures and evaluations to be convenient to the employee. They *shall be offered during normally scheduled work hours.* If participation requires travel away from the worksite, the employer must bear the cost." Plainly, this would mean that when receiving the vaccine or commuting to have it administered, employees must be considered "on-duty."

[10] Also persuasive is the Secretary's argument that her interpretation of the "at no cost" provision in the cited standard is consistent with how the agency has interpreted comparable

I find that Respondent has imposed costs on the affected employees and has violated the cited standard. Respondent did not pay the employees for time spent traveling back and forth to the treatment site or for time spent in receiving the treatment; likewise, it did not pay them for their transportation expenses. Accordingly, Respondent must compensate them as required by the standard.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

Conclusions of Law

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent's Motion for Summary Judgement is DENIED.

4. The Secretary's Motion for Summary Judgement is GRANTED.

5. In Docket No. 04-1091, Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1030(f)(1)(ii)(A), as alleged in Citation 2, Item 1. The violation was other than serious. A civil penalty of $ 0.00 is appropriate.

6. In Docket No. 04-1092, Respondent was in violation of section 5(a)(2) of the 2Act in that it failed to comply with the standard at 29 C.F.R. § 1910.1030(f)(1)(ii)(A), as alleged in Citation 1, Item 2. The violation was other than serious. A civil penalty of $ 0.00 is appropriate.

7. Pursuant to section 10(c) of the Act, Respondent shall reimburse employees Darryl Kosanovich and Vicki Pacovsky for wages for time spent during non-working hours to receive post-

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provisions of other substance-specific health standards set out at 29 C.F.R. § 1910.1000 *et seq.* The Secretary cites the Ninth Circuit's decision in *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237 (9th Cir. 1984), discussed in footnote 6, *supra*. The Court upheld the Commission's finding that the term "without cost" requires that employees be compensated for their time when taking examinations during non-working hours and for transportation costs incurred to attend medical examinations.

exposure evaluation and follow-up and for mileage for driving to the location where post-exposure evaluation and follow-up were performed.

ORDER

1. Item 1 of Citation 2, in Docket No. 04-1091, 1 is AFFIRMED as an other-than-serious violation. A civil penalty of $ 0.00 is assessed.

2. Item 2 of Citation 1, in Docket No. 04-1092, is AFFIRMED as an other-than-serious violation. A civil penalty of $ 0.00 is assessed.

3. Respondent shall reimburse Darryl Kosanovich and Vicki Pacovsky for their non-working time spent and for travel expenses incurred in receiving post-exposure evaluation and follow-up.

/s/

COVETTE ROONEY
Judge, OSHRC

Dated: March 28, 2005
Washington, D.C.