

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 CITY OF NEW YORK :
 DEPARTMENT OF JUVENILE JUSTICE :
 Crossroads Juvenile Center, Horizon Juvenile Center, :
 Bridges Juvenile Center, :
 :
 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: :
 Investigative Narrative and Notice to Comply with :
 Section 27-a of the New York State Labor Law, dated :
 October 27, 2008, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent, :
 :
 DISTRICT COUNCIL 37, AFSCME, AFL-CIO, :
 :
 Intervenor. :
 -----X

DOCKET NO. PES 08-011
PES 08-012
PES 08-013

RESOLUTION OF DECISION

APPEARANCES

New York City Department of Juvenile Justice, Herman Dawson, Deputy Counsel for Legal Affairs and General Counsel; Alison Ferrara, Esq., Director of Occupational Safety & Health; Alan Deutsch, Senior Counsel, New York City Department of Citywide Administrative Services, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

Steven Sykes, Assistant General Counsel, District Council 37, AFSCME, AFL-CIO, for Intervenor.

WITNESSES

Lorraine Anderson, Director of Policies and Procedures, Department of Juvenile Justice, for Petitioner.

Tashia Haleem, Associated Industrial Hygienist, Department of Labor, for Respondent.

WHEREAS:

On December 8, 2008, Petitioner City of New York Department of Juvenile Justice (Petitioner or DJJ) filed three Petitions contesting three Investigation Narratives and three Notices to Comply issued by the Respondent Commissioner of Labor (Commissioner) to three of its juvenile detention facilities: Crossroads Juvenile Center, Horizon Juvenile Center and Bridges Juvenile Center. The Commissioner answered the Petitions on February 23, 2009. Petitioner filed a Reply on March 5, 2009. On June 17, 2009, District Council 37, AFSCME, AFL-CIO (DC 37) filed an Application to Intervene in the proceedings. By letter dated July 27, 2009 the application to intervene was granted and the three proceedings were consolidated for hearing.

Upon notice to the parties a hearing was held on September 24, 2009 in New York City before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this matter. Each party was afforded a full opportunity to present evidence, to examine and cross-examine witnesses, to make statements relevant to the issues and to file post-hearing briefs. Post-hearing briefing was completed on January 5, 2010.

PROCEDURAL HISTORY

In October and November of 2006, Tashia Haleem (Haleem), an Associate Industrial Hygienist with the Department of Labor (DOL) Public Employee Safety and Health Bureau (PESH) inspected Crossroads Juvenile Center, Bridges Juvenile Center and Horizon Juvenile Center in response to complaints alleging violations of the OSHA Bloodborne Pathogen Standard (29 CFR 1910.1030). Undisputed is the Petitioner's allegation that the juvenile centers are "secure detention facilities" for alleged and convicted juvenile delinquents and offenders that provide a variety of services "including social programs, education services, health and mental health services, and optional religious-based programs."

Based on Haleem's inspections of the three facilities, in January 2007 PESH issued a Notice of Violation and Order to Comply. Each facility was cited for 8 violations of the Bloodborne Pathogen Standard and given an abatement date of March 14, 2007. Haleem reinspected the facilities in May 2007 and thereafter issued Notifications of Failure to Abate Violation and Orders to Comply to Crossroads Juvenile Center (October 12, 2007), Bridges Juvenile Center (July 30, 2007) and Horizon Juvenile Center (October 3, 2007). Haleem inspected the three facilities again in December 2007 and January 2008.

Follow up Inspection Narratives, issued on or about December 27, 2007, make the following findings:¹

"Citation 1 Item 1-29 CFR 1910.1030(d)(4)(ii)(A)- 'Contaminated work surfaces shall be decontaminated with an appropriate disinfectant after completion of procedures; immediately or as soon as feasible when surfaces

¹ The following quote is from the Inspection Narrative dated December 27, 2007 which was submitted for Bridges Juvenile Center. The Narratives for Crossroads Juvenile Center and Horizon Juvenile Center are almost identical but do have minor differences that do not affect the Board's Decision or Findings herein.

are overtly contaminated or after any spill of blood or potentially infectious materials.’

“The hygienist observed the spill kits, which are used for decontamination of work surfaces, and found that they were available and not expired. Therefore, this citation has **been abated.**

“**Citation 1 Item 2-29** CFR 1910.1030(f)(1)(i): ‘Procedures had not been implemented to ensure that the hepatitis B vaccine and vaccination series and post exposure and follow up was made available to employees and are offered free of charge, made available at a reasonable time and place, and performed under the supervision of a licensed physician or health care professional.’

“The hygienist received documentation which indicated that employees receive Hepatitis B vaccines at the Bedford Stuyvesant Family health care facility free of charge. Employees who accept the Hepatitis B vaccination series are scheduled for appointments by NYCDJJ-Human Resources department. The hygienist also received information which indicated that employees receive post exposure and follow up after bloodborne exposure incidents through the employee assistance program (EAP). Through interviews with EAP staff it was indicated that employees are verbally screened to determine the type of assistance needed and referred to doctors for social services such as mental and psychological needs. Payments for these services are made through the employee’s health insurance. Procedures were also not able to be identified for ensuring employees receive medical attention from their personal medical provider, when requested, after a bloodborne exposure incident. Therefore, this citation has **not been abated.**

“**Citation 1 Item 3-29** CFR 1910.1030(f)(3)-‘Employees were not given medical evaluations and follow-up immediately after an exposure incident which consists of a confidential medical evaluation, documentation of the routes of exposure, and identification of the source individuals HBV and HIV infectivity through testing, unless prohibited by state or local law.’

“Documentation was made available which stated the post exposure and follow up procedures after an exposure incident and documentation of the routes of exposure. Through interviews it was learned that employees are aware that after a bloodborne incident they are to fill out the exposure reports and will be taken to the hospital if needed. Therefore, this citation **has been abated.**

“**Citation 1 Item 4-29** CFR 1910.1030(g)(2)(vii): ‘The bloodborne pathogen training program was deficient in several areas. The training failed to inform employees about the exposure control plan and the means

employees can obtain a written copy, the medical follow-up that will be made available after an exposure incident, and information on the post exposure evaluation and follow-up that the employer is required to provide to employees following an exposure incident.’

“Information was not received which indicated that the bloodborne pathogen training curriculum included all aspects mandated by the standard, specifically the medical follow-up that will be made available after an exposure incident, and information on the post exposure evaluation and follow-up that the employer is required to provide to employees following an exposure incident. Therefore, this citation has **not been abated**.”

“**Citation 1 Item 5-19** CFR 1910.1030(g)(2)(viii)-‘The person conducting the training shall be knowledgeable in the subject matter covered by the elements contained in the bloodborne pathogen training program.’

“Through interviews it was determined that trainers were not knowledgeable about the post exposure follow up procedures for the facility. Therefore, this citation has **not been abated**.”

“**Citation 2 Item 2-29** CFR 1911.1030 (c)(1)(iii)-‘An exposure control plan was unable to be provided at the facility.’

“The exposure control plan was available at the facility. Therefore, this citation has **been abated**.”

“**Citation 2 Item 3-**“29 CFR 1910.1030(c)(1)(iv)-The exposure control plan was not updated or reviewed annually.

“At the time of the inspection, the exposure control plan was not completely updated because it was not site specific. The plan does not list the duties in various job classifications which put them at risk for exposure to bloodborne pathogens (p.10), does not specify disposal areas for contaminated items (p.16), does not specify who is responsible for examining contaminated equipment and sending it for service (p.13), the cleaning schedule does not indicate the schedule for inspecting and decontaminating bloodborne pathogen waste containers on a regular basis (p.25), mislabels types of controls (eg, work practice, administrative and engineering), does not contain information on the maintenance of a sharps injury log, and does not provide provision for providing the employee with a copy of the evaluating health care professionals written opinion with 15 days after an exposure incident. Therefore, this citation has **not been abated**.”

On or about October 27, 2008, PESH issued a “Notice to Comply with Section 27-a of New York State Labor Law” (Notice to Comply) to DJJ for each of the three facilities. Each

Notice to Comply included a Penalty Assessment for failure to comply by the abatement date. The Notices state:

“The PER DAY penalty started the day after the abatement day given on the Notice of Violation (NYPESH-2) and will continue to accrue until the violation is complied. All complied violations must be verified by the PESH Bureau.”

The following penalty assessments were issued against the three facilities:

1. Bridges

Violation Number	Start Date	End Date	Per Day Penalty
1910.1030(f)(1)(i) ²	3/15/2007		\$100
1910.1030(f)(3)	3/15/2007	12/27/2007	\$100
1910.1030(g)(2)(vii)	3/15/2007		\$ 50
1910.1030(g)(2)(viii)	3/15/2007		\$ 50
1910.1030(c)(1)(iv)	3/15/2007		\$ 20

2. Crossroads

Violation Number	Start Date	End Date	Per Day Penalty
1910.1030(f)(1)(i)	3/15/2007		\$ 72
1910.1030(f)(3)	3/15/2007	9/05/2007	\$ 72
1910.1030(g)(2)(vii)	3/15/2007		\$ 72
1910.1030(g)(2)(viii)	3/15/2007		\$ 72
1910.1030(c)(1)(iii)	3/15/2007	12/28/2007	\$ 18
1910.1030(c)(1)(iv)	3/15/2007		\$ 18

3. Horizon

Violation Number	Start Date	End Date	Per Day Penalty
1910.1030(f)(1)(i)	3/15/2007		\$ 72
1910.1030(f)(3)	3/15/2007	9/05/2007	\$ 72
1910.1030(g)(2)(vii)	3/15/2007		\$ 72
1910.1030(g)(2)(viii)	3/15/2007		\$ 72
1910.1030(c)(1)(iii)	3/15/2007	11/13/2007	\$ 18
1910.1030(c)(1)(iv)	3/15/2007		\$ 18

On December 8, 2008, DJJ filed three Petitions contesting the October 27, 2008 Notices to Comply and the underlying Investigative Narratives dated December 2007. Petitioner’s main argument is that all violations were abated on or before September 5, 2007 when DJJ adopted and disseminated its updated Exposure Control Plan. In response, Commissioner maintains that four of the violations were continuing.

² All references to the violation number are to 29 Code of Federal Regulations (CFR).

SUMMARY OF EVIDENCE

Lorraine Anderson (Anderson), DJJ's Director of Policies and Procedures and former Deputy Director of the DJJ Staff Education and Training unit (SETA) and training instructor, testified that an Exposure Control Plan (ECP) was adopted and disseminated by DJJ on September 5, 2007. SETA is responsible for training all employees. The ECP explains the procedures and protocol that is in place at DJJ in the event that an employee is exposed to a bloodborne pathogen. Anderson testified that the ECP was put on the DJJ intranet and placed throughout DJJ facilities.

Anderson testified that all of the trainers were trained regarding the ECP in 2007, and then, in turn, all DJJ employees received training from the trainers. Anderson testified that she used the training materials entered into evidence when she was involved in the training. Although DJJ keeps records of who is trained and on what subject, no records were produced at the hearing. Anderson participated in the training of the staff and oversaw implementation of training materials. The trainers would receive annual training from the Department of Citywide Administrative Services (DCAS), then discuss how best to convey materials and then train staff. The ECP was the focal point of the bloodborne pathogen training.

The ECP provides and Anderson testified that if there is exposure to a bloodborne pathogen, the employee is to notify his supervisor who instructs the employee on what to do. The employee then reports to the on-site medical facility, where a medical doctor is located. The medical unit is available 24 hours per day. The employee is then transported to an Emergency Room, if required. The employee is provided with free medical follow up. If an employee chooses to go to his own medical doctor, it is paid for through the workers' compensation system. The employee is also referred to the NYC Employee Assistance Program (EAP) for follow up counseling, if necessary. EAP services are provided free of charge. Pursuant to contract, as of May 24, 2007, the Bedford Stuyvesant Family Health Care Facility provides Hepatitis B vaccines to DJJ employees free of charge. The ECP indicates at various points in the plan that vaccines and follow up medical services are to be provided free of charge.

Between November of 2006 and September of 2007, there were no incidents of bloodborne pathogen exposure. Anderson did not know of any incidents where an employee was required to use their own health insurance for post-exposure follow up.

Associate Industrial Hygienist Haleem testified on behalf of the Commissioner that based on complaints and an interagency referral she conducted a health and safety inspection on DJJ's compliance with the OSHA bloodborne pathogen standard (29 CFR § 1910.1030). She conducted an opening conference at each facility with representatives of management and the union representing DJJ employees, completed her inspection and interviewed employees. A Notice of Violation and Order to Comply was issued to each of the three facilities in January 2007. The initial notices and accompanying narrative reports differed from the October 2008 narrative report quoted above. The initial violations included a citation for failure to review and update their ECP at least annually and make it available at each facility. At the hearing, Haleem testified that all violations were abated by DJJ except for the following:

1. Post-exposure medical services are not offered to DJJ employees free of charge in violation of 1910.1030(f)(1)(i).
2. DJJ failed to provide training material which included post exposure/medical follow up procedures in violation of 1910.1030(g)(2)(vii).
3. Trainers are not knowledgeable of the subject matter in violation of 1910.1030(g)(2)(viii).
4. The ECP was not fully updated in that it was not site-specific in violation of 1910.1030(c)(1)(iv).

Haleem testified that the first violation was based on the fact that although the ECP states that medical services would be offered free of charge, it does not indicate how this would happen, especially in a case where an employee went to his/her private doctor and the doctor was not covered under workers' compensation. Haleem inquired during her interviews what would happen in such a case and no one knew. Thus, according to the Commissioner, DJJ's program was deficient when it came to communicating to the employees that any medical treatment for bloodborne pathogen exposure would be paid for by DJJ. However, Haleem knew of no cases where an employee incurred actual expenses.

With regard to the violation concerning training material, Haleem testified that she requested training records and training curriculum and DJJ failed to provide her with the material. However, on further questioning, Haleem admitted that she was provided with training records for one of the facilities for one year and she was given training curricula and transparencies to review. She was also invited to sit in on a training, which she did not do.

Haleem testified that the violation for the finding that the trainers were not knowledgeable in bloodborne pathogen procedures was based on DJJ's failure to provide training records to show that the trainers were trained and that a trainer who was interviewed, asked what an ECP was.

The violation for failure to annually update the ECP was for failure to make the ECP site specific, i.e. identify the employees in the facilities, what their job duties are, location of appropriate waste receptacles and each facility's cleaning schedule. During the inspection, Haleem was told that DJJ was in the process of making the ECP site specific but she was never given an updated plan.

STANDARD OF REVIEW

When a petition is filed, the Board reviews whether the Commissioner's Order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]:

“The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

PUBLIC EMPLOYEE SAFETY AND HEALTH (PESH) ACT

The PESH Act requires that DOL adopt, by rule, all safety and health standards promulgated under OSHA (Labor Law § 27-a [4] [a]). DOL has adopted the federal OSHA standards, including the General Industry Standards found in Part 1910 (29 CFR 1910) by regulation found at 12 NYCRR § 800.3. Pursuant to its State Plan and federal regulations (29 CFR § 1956.51 [j]) DOL has also adopted and publishes a Field Operations Manual (FOM) for its PESH program, which sets forth DOL’s policies and procedures regarding conducting inspections, issuance of violations and other PESH activities.

Every public employer has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3]). PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that “[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated”

Labor Law § 27-a (6) (2) requires that an Order to Comply issued pursuant to PESH “describe particularly the nature of the violation including a reference to the provision of this section, standard, regulation or order alleged to have been violated.” The requirement of particularity serves two purposes: (1) it informs the employer specifically of the PESH violation so that it may be abated; and (2) it provides the employer with fair notice of the violation so that it is able to defend. *See KS Energy Services, Inc.*, 2008 OSHRC LEXIS 39 (2008).

THE BLOODBORNE PATHOGENS STANDARD

The Bloodborne Pathogens Standard (29 CFR § 1910.1030) was promulgated by the Secretary of Labor in 1991 “pursuant to a specific Congressional directive aimed at combating ‘occupational exposures to the hepatitis B virus, the human immunodeficiency virus and other bloodborne pathogens’” (*Secretary of Labor v Beverly Healthcare-Hillview, OSHRC*, 541 F 3d 193, 195 [3d Cir. 2008]). The basis for promulgation of 29 CFR § 1910.1030 is further set out at 56 Fed Reg 64404:

“Based on a review of the information in the rulemaking record, OSHA has made a determination that employees face a significant health risk as a result of occupational exposure to blood and other potentially infectious materials because they may contain bloodborne pathogens, including hepatitis B virus which causes Hepatitis B, a serious liver disease and human immunodeficiency virus, which causes Acquired Immunodeficiency

Syndrome (AIDS). The Agency further concludes that this exposure can be minimized or eliminated using a combination of engineering and work practice controls, personal protective clothing and equipment, training, medical surveillance, Hepatitis B vaccination, signs and labels, and other provisions.”

FINDINGS

1. Citation re 1910.1030 (f) (1) (i) – DJJ’s Exposure Control Plan provides that vaccines and follow-up are provided free of charge.

“**Citation 1 Item 2-29 CFR 1910.1030(f)(1)(i):** ‘Procedures had not been implemented to ensure that the hepatitis B vaccine and vaccination series and post exposure and follow up was made available to employees and are offered free of charge, made available at a reasonable time and place, and performed under the supervision of a licensed physician or health care professional.’

“The hygienist received documentation which indicated that employees receive Hepatitis B vaccines at the Bedford Stuyvesant Family health care facility free of charge. Employees who accept the Hepatitis B vaccination series are scheduled for appointments by NYCDJJ-Human Resources department. The hygienist also received information which indicated that employees receive post exposure and follow up after bloodborne exposure incidents through the employee assistance program (EAP). Through interviews with EAP staff it was indicated that employees are verbally screened to determine the type of assistance needed and referred to doctors for social services such as mental and psychological needs. Payments for these services are made through the employee’s health insurance. Procedures were also not able to be identified for ensuring employees receive medical attention from their personal medical provider, when requested, after a bloodborne exposure incident. Therefore, this citation has **not been abated.**”

Various sections of DJJ’s ECP state that vaccines and post exposure medical follow up are provided free of charge either through DJJ’s provider or through worker’s compensation. In addition, there has been no instance of an employee having to pay for medical costs. The investigative narrative is inaccurate because the post exposure evaluation is not done through the EAP, it is only the follow-up counseling aspect that is arranged by EAP. An employee is given a workers’ compensation packet if he goes for outside medical care, including a letter that states:

“Due to the nature of the incident, this matter is to be treated as a Workers’ Compensation case where the employee is not responsible for any payment for medical evaluations that are provided.”

The Commissioner argues that the ECP is not specific enough regarding how the medical procedures and vaccines will be provided free of charge and therefore, an employee may be hesitant about going to a doctor for treatment. Based on this, the Commissioner argues that DJJ has not adequately communicated to employees that post-exposure follow up would be paid for by DJJ.

However, everyone that Haleem interviewed appeared to be knowledgeable that the medical treatment and vaccines were free. It was only when confronted with the question of what would happen if workers' compensation refused to pay that the employees were unsure of what would happen. Given the fact that the ECP is clear that the medical follow up is free and no employee is out of pocket on any medical costs, this violation was abated when the ECP was adopted on September 5, 2007.

2. Citation re 1910.1030(g)(2)(vii) – Training records provide that required subjects are covered in training.

“Citation 1 Item 4-29 CFR 1910.1030(g)(2)(vii): The bloodborne pathogen training program was deficient in several areas. The training failed to inform employees about the exposure control plan and the means employees can obtain a written copy, the medical follow-up that will be made available after an exposure incident, and information on the post exposure evaluation and follow-up that the employer is required to provide to employees following an exposure incident.

“Information was not received which indicated that the blood borne pathogen training curriculum included all aspects mandated by the standard, specifically the medical follow-up that will be made available after an exposure incident, and information on the post exposure evaluation and follow-up that the employer is required to provide to employees following an exposure incident. Therefore, this citation has **not been abated.**”

Although Haleem initially testified that she was not provided with training curricula or materials, she later admitted that she was provided with the training transparencies and power points produced by DJJ. Anderson testified that these materials were distributed with the training, and covers post-exposure procedures. As argued by DJJ, this finding is supported by the fact that DOL found that the employees were aware of post-exposure procedures when it found that the citation relating to 1910.1030(f)(3) was abated. Therefore, this citation was abated as of September 5, 2007 when the ECP was adopted and Anderson testified that it then formed the basis of the DJJ training.

3. Citation re 1910.1030(g)(2)(viii) – There is a lack of evidence that trainers are knowledgeable.

“Citation 1 Item 5-19 CFR 1910.1030(g)(2)(viii)-The person conducting the training shall be knowledgeable in the subject matter covered by the elements contained in the bloodborne pathogen training program.

“Through interviews it was determined that trainers were not knowledgeable about the post exposure follow up procedures for the facility. Therefore, this citation has **not been abated.**”

There was no evidence that trainers attended training sessions. DJJ said that it kept records of training for trainers and employees which included the subject matter of the training and who attended. However, none of that evidence was produced at hearing. It was DJJ’s burden to prove that its trainers had the necessary expertise in the subject matter. This could have been shown by producing the records showing satisfactory completion of relevant training courses by the trainers. Anderson’s general testimony that all trainers participated in training was insufficient. Haleem testified that she asked for the training records and received records for only one facility for 2005. This was insufficient. DJJ has not proven that this violation has been abated.

4. Citation re 1910.1030(c)(1)(iv) – Exposure Control Plan was not fully updated.

“Citation 2 Item 3-“29 CFR 1910.1030(c)(1)(iv)-The exposure control plan was not updated or reviewed annually.

“At the time of the inspection, the exposure control plan was not completely updated because it was not site specific. The plan does not list the duties in various job classifications which put them at risk for exposure to bloodborne pathogens (p.10), does not specify disposal areas for contaminated items (p.16), does not specify who is responsible for examining contaminated equipment and sending it for service (p.13), the cleaning schedule does not indicate the schedule for inspecting and decontaminating bloodborne pathogen waste containers on a regular basis (p.25), mislabels types of controls (eg, work practice, administrative and engineering), does not contain information on the maintenance of a sharps injury log, and does not provide provision for providing the employee with a copy of the evaluating health care professionals written opinion with 15 days after an exposure incident. Therefore, this citation has **not been abated.**”

DJJ was initially cited for not updating the ECP on an annual basis in January 2007. Again, in its Narrative accompanying the Failure to Abate Notifications issued in July 2007, DOL noted that the ECP was not completely updated although DJJ was currently in the process of preparing an update. DJJ’s updated ECP was issued on September 5, 2007. After reviewing the ECP, DOL found that the citation had still not been abated because the ECP failed to contain all required elements and was not site specific. DJJ argues that it was unreasonable for DOL to cite DJJ under 1910.1030(c)(1)(iv) for failure to have an updated plan when in fact DOL has

found DJJ failed to include all required elements in its ECP as required by 1910.1030(c)(2)(i), thus citing the wrong statute.

In *Matter of Department of Transportation*, PES 06-004 (December 17, 2008), the Board held that the Labor Law § 27-a (6)(a) (2) requirement that an Order to Comply issued pursuant to PESH “describe particularly the nature of the violation including a reference to the provision of the section, standard, regulation or order alleged to have been violated” may be met by other factors as long as the employer receives sufficient notice of the violation:

“Although other factors, such as the Narrative, may be used to provide further specificity and particularity to support the adequacy of the Notice to the employer, the citation must still comply with Labor Law § 27-a (6) (a), inform the employer of the standard violated and provide some indication of how it was violated.”

It would place form over substance to find that DJJ complied with the requirement of annually updating its ECP even though it issued a non-compliant ECP. The December 2007 Narrative, which is the subject of the Petition, is very specific as to the failings of the ECP and gives DJJ sufficient notice of the violation. The ECP produced by DJJ at hearing does not satisfy ECP requirements as detailed by the December Narrative. Therefore, this violation has not been abated.

PENALTIES

Petitioner raises the issue of the reasonableness and validity of the daily penalties for the first time in its Closing Brief. It argues that it should be penalized only one time for each violation as opposed to one time for each facility since the violations related to the failings of its central facility only. In addition, it argues that the penalties are unreasonably high and there is no explanation for the difference in amounts among the three facilities. However, by failing to raise these issues in its petition or even at hearing, DJJ has waived these challenges to the Orders to Comply. Labor Law § 101 provides that: “Any objections to the rule, regulation or order not raised in such appeal shall be deemed waived.”

ABATEMENT DATE

Based on the testimony of Anderson, the citations which were abated by promulgation and distribution of the ECP were abated as of September 5, 2007.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Narratives and Notices to Comply be modified as follows:

The citations for violation of 29 CFR §§ 1910.1030(f)(1)(i), 1910.1030(f)(3), 1910.1030(g)(2)(vii), and 1910.1030(c)(1)(iii) were abated as of September 5, 2007; and the citations for violation of 29 CFR §§ 1910.1030(g)(2)(viii) and 1910.1030(c)(1)(iv) are continuing.

a. Bridges

Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iv)	3/15/2007	

b. Crossroads

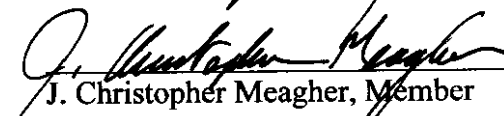
Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iii)	3/15/2007	9/05/2007
1910.1030(c)(1)(iv)	3/15/2007	

c. Horizon

Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iii)	3/15/2007	9/05/2007
1910.1030(c)(1)(iv)	3/15/2007	

2. The Petitions are otherwise denied.


 Anne P. Stevason, Chairman


 J. Christopher Meagher, Member


 Jean Grumet, Member


 LaMarr J. Jackson, Member

Dated and signed in the Office
 of the Industrial Board of Appeals
 at New York, New York, on
 September 22, 2010.

 Jeffrey R. Cassidy, Member

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Narratives and Notices to Comply be modified as follows:

The citations for violation of 29 CFR §§ 1910.1030(f)(1)(i), 1910.1030(f)(3), 1910.1030(g)(2)(vii), and 1910.1030(c)(1)(iii) were abated as of September 5, 2007; and the citations for violation of 29 CFR §§ 1910.1030(g)(2)(viii) and 1910.1030(c)(1)(iv) are continuing.

a. Bridges

Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iv)	3/15/2007	

b. Crossroads


Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iii)	3/15/2007	9/05/2007
1910.1030(c)(1)(iv)	3/15/2007	

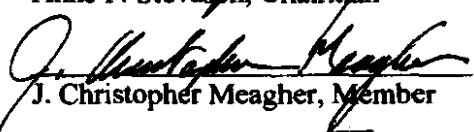
c. Horizon


Violation Number	Start Date	End Date
1910.1030(f)(1)(i)	3/15/2007	9/05/2007
1910.1030(f)(3)	3/15/2007	9/05/2007
1910.1030(g)(2)(vii)	3/15/2007	9/05/2007
1910.1030(g)(2)(viii)	3/15/2007	
1910.1030(c)(1)(iii)	3/15/2007	9/05/2007
1910.1030(c)(1)(iv)	3/15/2007	

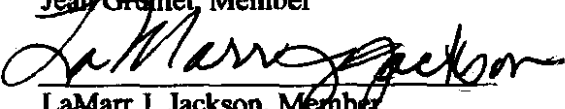
2. The Petitions are otherwise denied.


Dated and signed in the Office of the Industrial Board of Appeals at New York, New York, on September 22, 2010.


 Anne P. Stevason, Chairman


 J. Christopher Meagher, Member


 Jean Gromet, Member


 LaMarr J. Jackson, Member


 Jeffrey R. Cassidy, Member