United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NOS. 00-0918,
	:	00-0921 & 00-0922
MARCELLA NURSING &	:	
REHABILITATION CENTER,	:	
CINNAMINSON NURSING CENTER,	:	
GERIATRIC & MEDICAL SERVICES,	:	
	:	
Respondents.	:	

Appearances:

Marc G. Sheris, Esquire
New York, New York
For the Secretary.

John R. Merinar, Jr., Esquire
David E. Dick, Esquire
Clarksburg, West Virginia
For the Respondents.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted inspections of the three Respondents in this matter (hereafter "Marcella," "Cinnaminson" and "Geriatric," respectively), in late 1999 and early 2000. After the inspections, citations were issued to Marcella, Cinnaminson and Geriatric. OSHA entered into an informal settlement agreement with each facility, resulting in the resolution of all of the citation items except for two as to Marcella and one each as to Cinnaminson and Geriatric.[1] The facilities contested the remaining citations items,

[1]Copies of the subject citations were received in evidence as C-1, C-2 and C-3, and appended to each citation is a copy of the informal settlement agreement relating to that facility. The settled
(continued...)

which allege violations of OSHA's blood borne pathogens standard. Specifically, the two remaining items as to Marcella allege serious violations of 29 C.F.R. 1910.1030(d)(2)(i) and 29 C.F.R. 1910.1030(d)(4)(iii)(A)(1)(i), while the remaining items as to Cinnaminson and Geriatric allege serious violations of 29 C.F.R. 1910.1030(d)(2)(i). The hearing in this matter was held on January 16 and 17, 2001.[2] The parties have submitted post-hearing briefs.

Background

Marcella, Cinnaminson and Geriatric are three nursing homes that are located in the cities of Burlington, Cinnaminson and Pennsauken, New Jersey, respectively. The parent company of the homes is Genesis Health Ventures ("Genesis"), which has approximately 30,000 employees and operates homes in 15 states, in the eastern United States, through its subsidiary Genesis ElderCare. Genesis sets safety policy for its nursing homes through a safety and loss control department.

On October 4, 1999, Genesis announced publicly its decision to convert from using traditional syringes to safety syringes in its nursing homes in order to provide employees a safer work environment. The conversion process involved evaluating safety syringe options, selecting appropriate equipment, and then purchasing and distributing the new equipment and implementing its use. The actual conversion from traditional to safety syringes took place from March 6, 2000 until June 6, 2000, at which time the conversion was complete.

OSHA inspected Cinnaminson from December 10, 1999 through April 21, 2000, Geriatric from December 22, 1999 through April 21, 2000, and Marcella from March 30 through April 20, 2000. During the inspections, OSHA discovered that employees in all three facilities used traditional syringes rather than safety syringes to give intramuscular injections. OSHA therefore cited all three facilities pursuant to 29 C.F.R. 1910.1030(d)(2)(i), which provides as follows:

> Engineering and work practice controls shall be used to eliminate or minimize employee exposure. Where occupational exposure remains after institution of these controls, personal protective equipment shall also be used.

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[1](...continued)
items were also read into the record. (Tr. 6-7).

[2]These three cases were consolidated pursuant to Commission Rule 9, 29 C.F.R. § 2200.9.

OSHA also discovered that Marcella's employees were shaving nursing home residents with disposable razors and that "sharps containers" for disposing of the razors were not located in the immediate vicinity of residents' rooms. OSHA consequently cited Marcella pursuant to 29 C.F.R. 1910.1030(d)(4)(iii)(A)(1)(i), which provides as follows:

> Contaminated sharps shall be discarded immediately or as soon as feasible in containers that are: (i) Closable.

The Parties' Positions as to 29 C.F.R. 1910.1030(d)(2)(i)

The Secretary's position is that the blood borne pathogens standard, which was issued on December 6, 1991, has always required use of syringes with safety features. She points out that the definition of the term "engineering controls" gives as examples both sharps disposal containers and self-sheathing needles. *See* 29 C.F.R. 1910.1030(b). She also points out that safety syringes have been available since the late 1980's and that both of the directives OSHA has issued with respect to the standard have addressed the use of such syringes. Finally, she points to the wealth of information that has been available to the industry in this regard, including OSHA publications and information provided by manufacturers of safer needle devices. The Secretary concludes that Respondents had fair notice of the requirement to use safety syringes and that the Genesis plan to convert to such syringes establishes Respondents' actual knowledge of the requirement.

Respondents' position is that they did not violate the standard because its terms do not require the use of safety syringes and they were doing what the standard requires. Respondents note that they used sharps containers and universal precautions and that in the three years preceding the inspections Marcella was the only facility of the three that had had a needle stick incident; further, Marcella had had only one such incident. Respondents also note that OSHA's first directive, issued in 1992, made it plain that while OSHA preferred the use of safety syringes it did not require their use; that OSHA's interpretive letters issued after 1992 essentially repeated the language of the first directive; and that it was not until the second directive of November 5, 1999, that OSHA specifically required and began to enforce the use of safety syringes. Respondents contend that OSHA's shift in policy was an unlawful bypass of the rule-making procedures set forth in the Act. Respondents further contend that the Needlestick Safety and Prevention Act of 2000, which clearly requires employers to utilize safety syringes, supports its position that the OSHA standard was unenforceably vague as to the use of safety syringes.

Whether Respondents were in violation of 29 C.F.R. 1910.1030(d)(2)(i)

It is undisputed that at the time of the inspections, the cited facilities did not yet have syringes with safety devices for giving intramuscular injections. As indicated above, Respondents contend that they did not have fair notice of OSHA's change in policy with respect to what the standard requires and that the standard as applied was unenforceably vague. Commission precedent is well settled that the cited employer must have "a fair and reasonable warning" of the required conduct and that "a broad regulation must be interpreted in the light of the conduct to which it is being applied." *See American Bridge Co.*, 17 BNA OSHC 1169, 1172 (No. 92-0959, 1995), and cases cited therein. *See also Dravo Corp.*, 7 BNA OSHC 2095, 2098 (No. 16317, 1980), *aff'd* 639 F.2d 772 (3d Cir. 1980), and cases cited therein. Whether an employer has had fair notice is determined not only from the language of the standard itself, but also from the facts of the particular case. *Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982). A standard is not vague merely because applying it requires the exercise of judgment. *Dravo Corp.*, 7 BNA OSHC at 2098. Moreover, a vague standard "may be cured by authoritative judicial or administrative interpretations which clarify obscurities or resolve ambiguities." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978). Ultimately, the issue is "whether the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (7th Cir. 1976).

The cited standard does not specify the engineering controls employers must use to eliminate or minimize employee exposure, but, as the Secretary notes, the definition of "engineering controls" provides as examples both sharps disposal containers and self-sheathing needles. OSHA's first directive in regard to the blood borne pathogens standard, CPL 2-2.44C, issued in 1992, states in relevant part as follows:

> **Engineering Controls and Work Practices - (d)(2).** This section requires the employer to institute engineering and work practice controls as the primary means of eliminating or minimizing employee exposure. In those circumstances in which occupational exposure remains after institution of engineering and work practice controls, employers must provide, and ensure that employees use, personal protective equipment as additional protection.
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> **INSPECTION GUIDELINES.** The compliance officer shall determine through interviews or observation of work involving the use of needles whether proper

engineering controls and work practices, such as immediate disposal of used needles into a sharps container, are used.

- Most preferable is the use of devices which offer an alternative to needles being used to perform the procedure. Examples of such devices include stopcocks (on-off switch), needle-protected systems or needleless systems which can be used in place of open needles to connect intravenous lines. Other devices which are integral to the syringe, such as self-sheathing needles, allow both hands to remain behind the needle and require very little manipulation to isolate the needle safely....

CITATION GUIDELINES. Section (d)(2) shall be cited for failure to use engineering and work practice controls....

- Citations shall be issued if engineering or work practice controls are not used to eliminate or minimize employee exposure.
- While employers do not automatically have to institute the most sophisticated engineering controls (e.g., needleless IV connectors, self-sheathing needles), it is the employer's responsibility to evaluate the effectiveness of existing controls and to review the feasibility of instituting more advanced engineering controls.

See C-4, pp. 14-16.

In 1993, OSHA issued R-17, a standards interpretation and compliance letter setting out the most frequently asked questions about the standard. On page 9, R-17 provides as follows:

Engineering Controls

Q. What are engineering controls?

A. The term, "Engineering Controls," refers to controls (e.g., sharps disposal containers, needleless systems, self-sheathing needles) that isolate or remove the bloodborne pathogens hazards from the workplace.

Q. What are some examples of safer devices or alternatives that could be used in lieu of exposed needles?

A. Some examples of such devices or alternatives include stop cocks (on-off switch), needleless systems, needle-protected systems, and "selfsheathing" needles.

Q. Are employers required to provide these needle devices?

A. The standard requires that engineering and work practice controls be used to eliminate or minimize employee exposure. While employers do not automatically have to institute the most sophisticated controls (such as the ones listed in the above question), it is the employer's responsibility to evaluate the effectiveness of existing controls and review the feasibility of instituting more advanced engineering controls.

In October 1997, OSHA issued C-8, entitled "Safer Needle Devices: Protecting Health Care Workers." C-8 discusses the risk of needle stick injuries to health care workers and the fact that most needle sticks can be prevented by using safer needle devices. However, on page 12, C-8 states:

> **Q What is OSHA's position on safer needle devices?**
>
> **A** Section (d)(2)(i) of the Bloodborne Pathogen Standard requires the use of engineering and work practice controls to **eliminate or minimize employee exposure.**
> CPL-2.44C states that **"Section (d)(2) shall be cited for failure to use engineering/work practice controls."**
> CPL 2-2.44C also states that:
> "Most preferable is the use of devices **which offer an alternative to needles** being used to perform the procedure. Examples of such devices include stopcocks (on-off switch), needle-protected systems or needleless systems which can be used in place of open needles to connect intravenous lines. Other devices which are integral to the syringe, such as self-sheathing needles, allow both hands to remain behind the needle and require very little manipulation to isolate the needle safely." In addition, "While employers do not automatically have to institute the most sophisticated engineering controls (e.g., needleless IV connectors, self-sheathing needles), it is the employer's responsibility to evaluate the effectiveness of existing controls and to review the feasibility of instituting more advanced engineering controls."

OSHA issued two more standards interpretation and compliance letters concerning the blood borne pathogens standard, one on February 4, 1998 (R-3) and one on October 5, 1998 (R-4). R-3 contains the following paragraph, and R-4 contains a nearly identical paragraph:

> OSHA's Bloodborne Pathogens standard, 29 CFR 1910.1030, has a section that requires an employer to evaluate medical devices that may eliminate or minimize employee exposure. In accordance with this section, the employer is not automatically required to institute the most sophisticated engineering controls, but it is the employer's responsibility to evaluate existing controls and to review the feasibility of instituting more advanced engineering controls. This section of the standard is performance oriented. That is, OSHA does not mandate what products must be evaluated or purchased. The standard provides the necessary flexibility for the employer to choose the most suitable products to fit the needs of their facility. OSHA requires that employers examine and maintain or replace on a regular schedule, engineering controls to ensure their effectiveness.

I agree with Respondents that a fair reading of the cited standard together with the 1993 directive and the subsequent interpretive letters leads reasonably to the conclusion that while OSHA *preferred* the use of safety syringes, it did not *automatically require* their use; rather, employers were to evaluate the effectiveness of existing controls and to review the feasibility of instituting

more advanced controls. I also agree with Respondents that the 1999 directive was a significant departure from the 1993 directive. The 1999 directive states, in relevant part, as follows:

> **Engineering Controls and Work Practices - Paragraph (d)(2)(i).** This paragraph requires the employer to institute engineering and work practice controls as the primary means of eliminating or minimizing employee exposure. It conforms to OSHA's traditional adherence to a hierarchy of controls....OSHA has always required employers to use engineering and work practice controls. Thus the employer must use engineering and work practice controls that eliminate occupational exposure or reduce it to the lowest feasible extent. It is OSHA's view that preventing exposures requires a comprehensive program, including engineering controls (e.g., needleless devices, shielded needle devices, and plastic capillary tubes) and proper work practices (e.g., no-hands procedures in handling contaminated sharps, eliminating hand-to-hand instrument passing in the operating room). If engineering and work practice controls do not eliminate exposure, the use of personal protective equipment (e.g., eye protection) is required.
>
> The employer must also make changes to its Exposure Control Plan to include these engineering controls....Safer medical devices are generally of two types: needleless systems (e.g., needleless IV connectors) and sharps with engineered sharps injury protection (e.g., self-sheathing needles on syringes). Substitution methods such as the use of plastic (instead of glass) capillary tubes are also available. Appendix B (Safety Evaluation Forms) and Appendix C (Web Site Resource List) have been provided to assist in the evaluation of these devices. OSHA encourages employers to involve employees in the selection of effective engineering controls to improve employee acceptance of the newer devices and to improve the quality of the selection process.
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> **NOTE:** Where engineering controls will reduce employee exposure either by removing, eliminating or isolating the hazard, they must be used. Significant improvements in technology are most evident in the growing market of safer medical devices that minimize, control or prevent exposure incidents. OSHA does not advocate the use of one particular device over another....
>
> OSHA has changed the language of the compliance instruction to clarify the agency's position regarding the use of engineering and work practice controls in light of the increased use and acknowledged feasibility of effective engineering controls, as discussed in the Record Summary....Further, the preamble to the standard supports this change in the instruction. It states that the exposure control plan is to be updated to reflect new technology to control occupational exposure to bloodborne pathogens....

See C-5, pp. 16-18.

A conclusion that OSHA did not automatically require the use of safety syringes is also supported by how OSHA enforced the cited standard before and after November 5, 1999, the

effective date of the new directive. Mark Santoleri, the senior manager of safety and loss control for Genesis, testified at the hearing that he had utilized OSHA's data base to research the citation history of 29 C.F.R. 1910.1030(d)(2)(i) both nationally and in Region II, where Respondents are located; his findings are summarized in R-6, which was received in evidence without any objection on the Secretary's part. (Tr. 210). R-6 shows that from March 6, 1992, until November 4, 1999, in Region II, OSHA inspected 465 nursing homes and issued 266 citations pursuant to the blood borne pathogens standard; only one citation was for a violation of 29 C.F.R. 1910.1030(d)(2)(i), and Santoleri testified that with the assistance of counsel he had learned that that citation was for the failure of a nursing home in Lake Placid, New York to have a sharps container in its laundry. (Tr. 211-12). R-6 further shows that during that same period, OSHA inspected 4,807 nursing homes nationwide and issued 2,783 citations pursuant to the blood borne pathogens standard. Only nine were for violations of 29 C.F.R. 1910.1030(d)(2)(i), and Santoleri testified that he had been able to verify that the latest five citations, which were issued in 1998 and 1999, all involved sharps containers. (Tr. 213-14). Santoleri said that before November 5, 1999, to his knowledge, only one citation had been issued to a nursing home nationwide under the subject standard for not using "safety sharps." He also said that that citation was later deleted in an informal conference. (Tr. 214).

In contrast to the above, R-6 shows that from November 5, 1999, until January 18, 2001, OSHA inspected 184 nursing homes in Region II and issued 144 citations pursuant to the blood borne pathogens standard; 20 of these were for violations of 1910.1030(d)(2)(i), and Santoleri assumed that all 20 were for failure to have safety sharps as the new directive instructed OSHA compliance officers to cite violations involving sharps containers under 1910.1030(d)(4)(iii)(A). (Tr. 212-13). *See also* C-5, p. 20. R-6 also shows that for this same period, OSHA inspected 1,543 nursing homes nationwide and issued 944 citations pursuant to the blood borne pathogens standard; 105 of these were for violations of 1910.1030(d)(2)(i), and Santoleri again assumed that all 105 were for failure to have safety sharps.[3] (Tr. 215-16).

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[3]Santoleri said that from 1992, when the standard went into effect, until November 1999, when the new directive was issued, OSHA had conducted 67 inspections of Genesis nursing homes and had issued no citations for not using safety syringes. He also said that from November 1999 until June 2000, OSHA had conducted 45 inspections of Genesis nursing homes and had issued five

(continued...)

In addition to the foregoing, the OSHA personnel who conducted the inspections in this case both testified they had not previously issued citations for failure to use safety syringes. Laura Spina, the OSHA industrial hygienist ("IH") who inspected Marcella, testified that Marcella was the first nursing home she had cited in this regard. She said she had been unaware of the safety syringe requirement until February 2000, when she was trained in the new directive, and that although she had inspected two other nursing homes in December 1999 she did not know at that time to look for safety syringe violations.[4] She also said that during her training she was told that the failure to have safety syringes would be cited without exception. (Tr. 31-35). Timothy Louden, the OSHA IH who inspected Cinnaminson and Geriatric, testified that Cinnaminson was the first nursing home where he had asked about whether safety syringes were used. He said that although he was trained in the new directive in February 2000, his supervisor discussed it with him in December before his visit to Cinnaminson. He also said that while he had inspected two other nursing homes previously, one in late November 1999, the safety syringe issue was not something he had looked into.[5] (Tr. 67-70).

As noted above, Respondents contend that the Needlestick Safety and Prevention Act, Pub. L. No. 106-430, 114 Stat. 1901 (2000) ("the NSPA"), supports its position that the cited standard was unenforceably vague as to the use of safety syringes. The NSPA, which was signed into law on November 6, 2000, required OSHA to make various revisions to the blood borne pathogens standard. One of these was to modify the definition of "engineering controls" to include as examples "safer medical devices, such as sharps with engineered sharps injury protections and needleless systems." *See* 66 Fed. Reg. 5319 (2001). In its Final Rule making the required revisions, OSHA

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[3](...continued)
citations for not using safety syringes; of these, three were the subject citations, and the other two, issued by a Pennsylvania OSHA area office, were deleted in an informal conference. (Tr. 208-10).

[4]IH Spina indicated that before her training, she had not even been aware that there were syringes with safety features. (Tr. 34).

[5]The nursing home Louden inspected in November 1999 was also a Genesis facility. (Tr. 67).

itself noted that this particular change "clarifies that safer medical devices are considered to be engineering controls under the standard."[6] *Id*. OSHA further noted, on the very same page, that:

> The expanded definitions reflect the intent of Congress to have OSHA amend the BBP standard to clarify
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> > *** the direction already provided by OSHA in its Compliance Directive; namely, that employers who have employees with occupational exposure to bloodborne pathogens must consider and, where appropriate, use effective engineering controls, including safer medical devices, in order to reduce the risk of injury from needle sticks and from other sharp medical instruments *** (Ex. 5-3).
>
> Thus, the revised definitions do not reflect any new requirements being placed on employers with regard to protecting workers from sharps injuries, but are meant only to clarify the original standard, and to reflect the development of new safer medical devices since that time.

In my view, it is significant that OSHA used the word "clarify" three times in two successive paragraphs to explain the revision to the term "engineering controls." I also consider it significant that the two OSHA officials the Secretary presented in support of her position both agreed the NSPA was the first federal law specifically requiring employers to use safer medical devices. (Tr. 114-15; 142). These witnesses also indicated that safety syringes have been available since the late 1980's, that the intent has always been that employers would use both safety syringes and sharps disposal containers, and that a sharps container, although an engineering control, does not prevent a needle stick injury during the actual injection.[7] (Tr. 91; 97; 112; 121-22; 126-28; 133-34). It is clear that sharps containers do not protect against needle sticks during the actual giving of injections. However, the issue here is not what OSHA intended or the fact that Respondents knew of the existence of safety syringes, but, rather, what OSHA actually said in the standard, directives and interpretive letters and whether Respondents had fair notice of what was required. Based on the evidence of record and the circumstances of this case, I conclude that Respondents did not have fair

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[6]The requirements set out in the Final Rule, published in the Federal Register on January 18, 2001, went into effect on April 18, 2001. 66 Fed. Reg. 5318 (2001).

[7]One witness said the "expectation" has always been that safety syringes are to be used, while the other stated that use of such syringes has always been "required." (Tr. 112; 126-28; 133-34).

notice that they were required to use safety syringes. I also conclude that the 1999 directive and OSHA's ensuing enforcement of the standard were an abrupt departure from the agency's prior policy such that Respondents were not in violation of the standard. This conclusion is bolstered by the cases cited by Respondents, in which Commission decisions upholding the citations were reversed because, according to the Circuit Courts, the employers had not had fair notice of the required conduct. *F.A. Grey, Inc. v. OSHRC*, 785 F.2d (1st Cir. 1986); *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119 (7th Cir. 1981); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157 (3d Cir. 1978); *Hoffman Constr. Co. v. OSHRC*, 546 F.2d 281 (9th Cir. 1976); *Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor*, 524 F.2d 1337 (7th Cir. 1975); *Cape & Vineyard Div. of New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975).

My conclusion that Respondents did not violate the cited standard is further bolstered by the actions Genesis took with respect to the issue of employee exposure to blood borne pathogens and the results of those actions. Pursuant to the testimony of the IH's who conducted the inspections, Marcella was the only facility of the three that had had a needle stick incident in the prior three years, and Marcella had had only one such incident. (Tr. 37; 72). The IH's also testified that all three facilities were using sharps containers to dispose of used sharps and that they were also using universal precautions such as "red bagging" waste materials. Both IH's indicated that they were generally impressed with the facilities. (Tr. 35-36; 71-72).

In addition, Mark Santoleri testified about the steps Genesis took to convert to safety syringes. C-6, his memo to management recommending the transition, was dated July 9, 1999.[8] He then made a presentation to the company's safety committee, and he later made presentations to small groups of clinical senior management, which formed teams to oversee the selection and evaluation of products. Vendors were chosen and products were selected for evaluation, and, at this point, Genesis issued R-16, the press release of October 4, 1999, announcing its decision. The next step was evaluation and selection, which the teams performed by "piloting" products in their regions. At the end of this phase in December 1999, Genesis contacted the selected vendors and developed a plan to ensure the timely distribution of the products in its 340 operations. Santoleri

[8]Although C-6 refers primarily to safety syringes, Santoleri testified that the conversion actually included all "sharps." (Tr. 216)

identified R-7 through R-15 as the various documents Genesis generated during the conversion. He said that the transition cost about $265,000, that it was completed by June 6, 2000, and that Genesis was the first long-term care company to make the transition to safety syringes.[9] He also said that the decision to make the transition was based on a conclusion that "it was time" to do so.[10] (Tr. 216-21; 224-26).

On the basis of the evidence of record, and for all of the reasons set out above, Respondents were not in violation of the cited standard. The alleged violations of 29 C.F.R. 1910.1030(d)(2)(i) are accordingly VACATED.

Whether Marcella was in violation of 29 C.F.R. 1910.1030(d)(4)(iii)(A)(1)(i)

As indicated *supra*, the basis of this item was OSHA's determination that the disposable plastic razors Marcella employees used to shave residents were not disposed of in sharps containers "immediately or as soon as feasible." Pursuant to the record, Marcella is a two-floor facility with a nurses' station at a central point on each floor. Although the licensed professional nurses ("LPN's") sometimes shave the residents, the certified nursing assistants ("CNA's") usually do this work, generally in the residents' rooms but occasionally in the shower rooms on the floors. Sharps disposal containers are located on the "med carts" the LPN's utilize for dispensing medications, and the med carts, when not in use on the floors, are at the nurses' stations. Thus, the med carts might not always be near the areas where the residents are shaved, and employees at times might have to walk some distance to dispose of the used razors. (Tr. 13-15; 165-69; 177; 244).

IH Spina testified she learned employees walked a minimum of 10 to 15 feet and a maximum of 120 feet to dispose of used razors at the nurses' stations; she also learned residents are sometimes

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[9]Santoleri stated that the cited facilities already had safety lancets and needleless IV systems in place at the time of the inspections. (Tr. 216). In addition, his statement that Genesis was the first long-term health care facility to convert to safety syringes is supported by one of the above-noted OSHA officials, who agreed that of the health care facility inspections she was aware of, safety syringes were not being used. (Tr. 132).

[10]Santoleri agreed that the decision was influenced by the fact that several states in which Genesis operated had proposed legislation requiring the use of safety syringes in health care facilities and the fact that New Jersey had already passed such a law. (Tr. 236-38).

nicked during shaving, which can result in blood on a razor.[11] Spina said an employee carrying a used razor could be cut on the way to a sharps disposal container. She explained that an employee could be distracted or could run into another employee or a resident while carrying a razor. She further explained that some residents in nursing homes can be combative, which could also cause an employee to be cut by a used razor. Spina opined that carrying a razor even 1 foot outside of a resident's room was a hazard and a violation of the standard, that the hazard could be abated by employees taking mobile sharps containers with them into the residents' rooms, and that a sharps container could also be put in the shower room of each floor. Spina conceded that she had never heard of an employee being cut by a razor in the manner she described. (Tr. 15-25; 38).

Jo Bohony, Marcella's director of nursing, testified that in her opinion, mobile sharps containers were a very bad solution. She explained that taking anything from one room to another created an infection control problem and that employees would have to be trained to clean the mobile containers between rooms.[12] She further explained that monitoring the mobile sharps containers would be another issue, since sharps containers have to be emptied when full, and the facility would also have to keep track of where all the mobile containers were so that demented residents or visitors such as children could not get into them. Bohony believed that the facility's practice of having the sharps containers on the med carts was much better because the LPN's monitored them for overfilling and always knew where they were. Bohony identified R-1 as the type of razor used at Marcella. She said that employees were instructed to replace the plastic guards on used razors before leaving residents' rooms and to immediately take the razors to a sharps container; she also said that to her knowledge, employees followed those instructions. Bohony was aware of the provision in the standard prohibiting the recapping of contaminated sharps. (Tr. 167-71; 176-77).

Mark Santoleri testified that he agreed with Bohony's statements about cross-contamination and tampering if mobile sharps containers were used. He further testified that his biggest concern

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[11]IH Spina spoke to Susan Stow, Marcella's administrator, to Jo Bohony, the director of nursing, and to an employee who job included shaving the residents. Spina said that this latter employee told her that she once had to walk 30 feet to dispose of a used razor. Spina also said that the 120-foot distance, which was the distance from one of the nurses' stations to the room farthest away, was measured by the director of maintenance. (Tr. 14-17).

[12]As an example, Bohony said linens cannot be taken from one room to another. (Tr. 168).

about this citation item was that it would be a massive transition for the company if all Genesis facilities were required to use mobile sharps containers. Santoleri said that one other Genesis facility, located in Pennsylvania, had been cited in this regard, and that that citation, issued in 1999 or 2000, was deleted in an informal settlement. He also said he had done a hazard assessment of an employee walking 30 feet to dispose of a used razor and that, in his opinion, he did not feel the situation was a danger to employees or residents. Santoleri noted that in his entire professional career, he had never heard of an employee being injured while carrying a razor to a sharps container. (Tr. 231-34; 243).

In view of the evidence of record, I conclude that Marcella was not in violation of 29 C.F.R. 1910.1030(d)(4)(iii)(A)(1)(i), the cited standard. First, I found patently unreasonable IH Spina's opinion that carrying a used razor even 1 foot outside of a resident's room was a violation, and she and Santoleri both testified that they had never heard of an employee being injured in this manner. Second, Bohony's concerns about mobile sharps containers were persuasive and supported by the testimony of Santoleri, and I agree with her opinion that Marcella's practice of having the containers on the med carts is the sounder one. Third, I also found persuasive Santoleri's testimony about his assessment of the hazard of carrying a used razor 30 feet to dispose of it, and his concerns about Genesis having to institute the use of mobile sharps containers in all its facilities were well founded.

In support of her position that Marcella violated the standard, the Secretary notes Bohony's testimony that employees were instructed to replace the guards on used razors before leaving the residents' rooms and her agreement that 29 C.F.R. 1910.1030(d)(2)(vii)(A) prohibits the recapping of contaminated sharps. (Tr. 170-71; 176). The Secretary also notes the testimony of an OSHA official who stated that putting a guard back on a used razor was recapping a sharp and a violation of the standard. (Tr. 161-63). It would appear that replacing a guard on a used razor would in fact violate the terms of 29 C.F.R. 1910.1030(d)(2)(vii)(A). However, as Marcella points out, the facility was not cited in this regard, but, rather, with respect to disposing of used razors in sharps containers. Moreover, the OSHA official herself agreed that keeping track of sharps containers was important so as to avoid the hazards of overfilling and tampering. (Tr. 158-59). Regardless, for the reasons set out above, I conclude Marcella did not violate the cited standard. This item is therefore VACATED.

Conclusions of Law

1. Respondents, Marcella, Cinnaminson and Geriatric, are engaged in a business affecting commerce and have employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

1. Respondents Marcella, Cinnaminson and Geriatric were not in violation of 29 C.F.R. 1910.1030(d)(2)(i).

3. Respondent Marcella was not in violation of 29 C.F.R. 1910.1030(d)(4)(iii)(A)(1)(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. In Docket No. 00-0918 (Marcella), Items 1 and 2 of Serious Citation 1 are VACATED.

2. In Docket No. 00-0921 (Cinnaminson), Item 2 of Serious Citation 1 is VACATED.

3. In Docket No. 00-0922 (Geriatric), Item 2 of Serious Citation 1 is VACATED.

/s/

Irving Sommer
Chief Judge

Date: 17 May 2001