United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UNITED STATES POSTAL SERVICE, Respondent.	OSHRC Docket No. 14-0691

Appearances:

Norman E. Garcia, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California,
For Complainant

Deborah M. Levine, Esq., United States Postal Service, Denver, Colorado
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to a complaint about the cleanliness of the facility, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's Stateline Post Office, located at 223 Kingsbury Grade, Stateline, Nevada on December 5, 2013.[1] (Tr. 110–11). Based on the observations and investigation of CSHO Tina

1. The Citation and Notification of Penalty refer to the Zephyr Cove Post Office. Because there are two post offices that use the moniker "Zephyr Cove" in their name, the Court will refer to this post office as "Stateline" to avoid

Kulinovich,[2] OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one other-than-serious, three serious, and three repeat violations with a total proposed penalty of $47,500.00. Respondent timely contested the Citation.

On March 2, 2015, Respondent filed its *Withdrawal of Contest of Certain Items and Motion for Summary Judgment on All Remaining Items*. In separate orders, the Court denied Respondent's *Motion for Summary Judgment* and accepted its withdrawal of its Notice of Contest as to Citation 1, Item 1; Citation 1, Item 2; Citation 2, Item 1, and Citation 2, Item 3. Such items are affirmed as final orders of the Commission by operation of law. *See* Order, *infra*; *see also M.V.P. Piping Co., Inc.*, 24 BNA OSHC 1350 (No. 12-1233, 2014) (citing 29 U.S.C. § 659(a)). In addition, during the course of pre-trial litigation, Complainant filed a motion to amend Citation 1, Item 3 to allege, in the alternative, a violation of a different standard. This motion was granted by the Court on January 7, 2015. During the course of the trial, Complainant withdrew the amended, alternative allegation to Citation 1, Item 3, and formally stated its intent to vacate Citation 3, Item 1. (Tr. 130). Accordingly, the only remaining citation items at issue are Citation 1, Item 3 (as originally alleged) and Citation 2, Item 2, which address vermin control and the requirements for including asbestos in a Hazard Communication Program (HCP).

The trial took place on April 22–23, 2015, in Reno, Nevada. Six witnesses testified at trial: (1) Cory Lobato, United States Postal Service ("USPS") clerk; (2) Bruce Cable, customer of USPS Stateline Office; (3) Joy Flack, OSHA Area Director; (4) Martin Petrey, USPS Contracting Officer; (5) Joshua Stanton, Ecolab Technician; and (6) Scott Ross, Industrial Hygienist and expert witness for Respondent. Both parties timely submitted post-trial briefs.

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confusion. (Tr. 21).

2. At the time of the trial, Ms. Kulinovich was no longer an employee of OSHA. (Tr. 174). Accordingly, AD Flack testified on her behalf.

After reviewing the parties' arguments and the record, the Court issues the following Decision and Order.

II. Stipulations[3]

The parties' stipulations are as follows:

> The parties stipulate to the authenticity and admissibility of all of the Complainant's exhibits listed on his exhibit list . . . . The parties stipulate to the authenticity and admissibility of all of the Respondent's exhibits listed on its exhibit list . . . except exhibit R-14. This stipulation means such exhibits will be admissible at the hearing in this matter without the need for an authenticating witness to testify, except that the parties reserve objections to all exhibits based on relevance.

Joint Stipulation Statement at 1–2.

III. Jurisdiction

The Court finds the Commission has jurisdiction over this proceeding and that Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *See also* Postal Employees Safety Enhancement Act, Pub. L. 105-241, 112 Stat. 1572 (including the Postal Service as an employer subject to the Act).

IV. Factual Background

A. The Stateline Facility

Respondent, the United States Postal Service, is a nationwide employer, with multiple locations across the country. The particular office at issue is the Stateline Post Office, which is located in Lake Tahoe, Nevada. As is relevant to this case, Respondent contracts out most of its maintenance and custodial services. (Tr. 220–22). The performance of those contracts is measured by the on-site management at Stateline. (Tr. 228). To the extent that current services

3. The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court on April 10, 2015. These stipulations were read in open court and can be found on pages 9–10 of the transcript. The parties also stipulated as to particular regulations being at issue in this matter. Those regulations can also be found in the parties' *Joint Stipulation Statement*.

are unsatisfactory, or otherwise do not fulfill the needs of a particular location, on-site management is expected to contact Respondent's Supplies and Facility Management team. (Tr. 220).

At some point in mid-2013, Bruce Cable, a customer of the Stateline post office, noted the deteriorating condition of the office and contacted the postmaster, David Cutler, about his concerns. (Tr. 80–81, 87–88). Cutler responded that they were having a difficult time getting their contractors to keep the facility clean and maintained. (Tr. 81). Notwithstanding his discussion with the postmaster, Cable did not see any improvement in the conditions of the office. (Tr. 81). Apparently frustrated by the lack of response, Cable took photographs of the facility, which included multiple windows and corners draped with spider webs and deteriorated ceiling tiles. (Tr. 82–87; Ex. C-25). Cable sent the photographs to his senator, state representative, and the Nevada state OSHA office. (Tr. 82). Because the case involved a United States Post Office, Nevada OSHA sent Cable's complaint to the federal OSHA office in Las Vegas, which initiated an inspection on December 5, 2013. (Tr. 144). Based on the observations of CSHO Kulinovich, Respondent was cited for, amongst other things, failing to adequately control vermin and for failing to include asbestos in its HCP. Even though the evidence suggests that the Stateline facility was in poor shape, Martin Petrey, Respondent's contracting officer, testified that in 2013 his office did not receive any reports of unsatisfactory services, nor did they receive special cleaning requests outside the scope of the existing contracts. (Tr. 229, 231, 233).

B. Vermin Control

Respondent's issues with vermin were first reported by Cory Lobato on or about June of 2013. (Tr. 41–42). Lobato testified that he observed mice in the Stateline facility approximately "[h]alf a dozen times, maybe a dozen times" before the OSHA inspection in December 2013.

(Tr. 40). In addition, he stated that he found mice feces in his customer service drawer and along the floorboards in multiple locations around the first floor of the facility. (Tr. 43). During his testimony, Lobato used a diagram of the facility and photos taken by CSHO Kulinovich to document where he observed mice feces.[4] (Tr. 73; Ex. C-6 at 2872, C-13). According to Lobato, it took months of complaints before management responded by hiring Ecolab to perform extermination and preventative services in September 2013. (Tr. 40–42; Ex. R-8).

Lobato testified that the signs of mouse presence decreased after Ecolab began its services, and he had only seen one, in November 2013, after the services began. (Tr. 74). Further, the Ecolab service receipts illustrate that Lobato was the USPS representative who signed off on the services performed in the months of September, December, and January. (Tr. 64; Ex. 8). Lobato testified that, during the time he was signing off on service receipts, he did not talk to the exterminator about continuing concerns. (Tr. 65–66). For that matter, according to Ecolab technician Joshua Stanton, there were no additional reports filed by employees of the Stateline office, even though Ecolab left behind a service request log at the facility and was available for on-call services twenty-four hours a day per the service contract. (Tr. 262, 264; Ex. R-8 at 3203).

Although Ecolab started in September 2013, Stanton, who testified at trial, did not begin working at the Stateline office until January 2014. (Tr. 275; Ex. R-8 at 3209). Thus, his knowledge of the conditions at the Stateline office prior to the inspection is premised on the reports, service requests, and receipts generated during the first four months of service and Ecolab's standard practices. (Ex. R-8). According to Stanton, buildings in the Lake Tahoe area,

4. Notably, on cross-examination, Lobato testified that he could not identify any mice feces in the photos taken by CSHO Kulinovich on the day of the inspection, but before a wholesale cleaning of the facility took place. (Tr. 70–72).

where the Stateline office is located, experience significant "rodent pressure" due to their proximity to the forest.[5] (Tr. 259). Due to the rodent pressure, Ecolab places significant emphasis on preventing entry, which involves targeting potential ingress points or structural vulnerabilities with bait stations containing rodenticide.[6] (Tr. 255–56). As part of the process, Ecolab generates a diagram, which shows the location and type of pest equipment. (Tr. 266; Ex. R-8). The diagram is then used by Ecolab technicians, such as Stanton, to evaluate the effectiveness of external bait stations and internal traps.

Based on his review of Ecolab's service history, as well as his own experience at Stateline, Stanton concluded that the extermination program was effective. (Tr. 297). He reached this conclusion based on the following: (1) lack of employee complaints or reports, either directly to the technicians or through the service request log; (2) no mice found in internal traps; and (3) having to replace and increase the amount of rodenticide bait left at the external stations. The combination of missing external bait and no mice found inside the building led Stanton to believe that the external bait stations were serving as an adequate first line of defense. (Tr. 255, 263, 297).

It should be noted that Ecolab also treated for spiders during the first four months of the contract, but treatment was stopped in January 2014. (Ex. C-8 at 3205–3208). Stanton testified that he stopped spraying for spiders due to potential health hazards and because he had not received any additional reports of spiders at the Stateline facility. (Tr. 299–301). He stated that he did not see or receive reports of spider webs in the facility; however, because he did not begin

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5. The need for rodent control services is particularly acute in the Lake Tahoe area. According to testimony from AD Flack, there is a high incidence of Hantavirus amongst the mice population in the forest surrounding the Lake Tahoe area. (Tr. 147). According to reports, from 2011 to 2012, 24 people died due to exposure to Hantavirus, which is typically contracted through contact with mice feces. (Tr. 154; Ex. C-16).

6. Stanton testified that the bait is more attractive to a mouse than cheese or other types of bait. (Tr. 256). Mice die within 24 hours of consuming the rodenticide. (Tr. 257).

his service at Stateline until one month after the inspection, this testimony is of limited value regarding the presence of spider webs prior to the inspection. (Tr. 254). In that respect, Mr. Cable's testimony and photographs are more persuasive.

C. Asbestos Analyses

During the course of the inspection, CSHO Kulinovich observed multiple cracked or missing floor tiles, which had exposed the underlying mastic. (Tr. 127; Ex. C-4). CSHO Kulinovich discovered mail carts, potentially weighing as much as 200 pounds, were pushed over the top of the broken tile and mastic. (Tr. 127, 346–47; Ex. C-4). Photographs revealed dark tracks running over the tiles, indicating that the mastic was sticking to the wheels of the carts. (Ex. C-4). The Stateline facility was built in 1975, which means that certain building materials, such as mastic, are presumed to contain asbestos. *See* 29 C.F.R. § 1910.1001(b). The Stateline facility does not include asbestos in its HCP.

Respondent had two different asbestos-related surveys performed on the Stateline facility, in 1996 and again in 2009. (Ex. C-1, R-1). In 1996, the survey was comprehensive, and took into account all potential asbestos containing material (ACM). The results of that survey indicated that nearly all of the suspect materials in the building contained only trace amounts of asbestos (less than 1%), including the floor tiles. (Ex. C-1). However, the 1996 report also indicated the mastic associated with the floor tiles (sometimes referred to as "black mastic") contained anywhere from 1–5% asbestos, which placed it within the category of materials regulated as ACM. *See* 29 C.F.R. § 1910.1001(b). In 2009, another test was performed, this time focused specifically on the tile and associated mastic. (Ex. R-1). As compared to the 1996 survey, Scott Ross testified that the survey he performed in 2009 was more of a "targeted sampling effort", which involved 5 samples of tile and an aggregated mastic sample from a

smaller, targeted area. (Tr. 339; Ex. R-1). The 2009 report revealed that both the tile and mastic contained less than 1% asbestos. According to Ross, the difference in result can be explained by improvements in the testing methods, which had become more accurate and refined since the initial survey was performed. (Tr. 333).

The determination of whether asbestos is present at a level within statutory parameters in the Stateline facility's building materials impacts whether Respondent is obligated to include asbestos in its HCP. The parties disagree as to whether the mastic that is run over by the mail carts is capable of becoming airborne such that Respondent's employees would be exposed to harmful levels of asbestos. AD Flack testified the grinding action of the cart wheels could cause asbestos particles to become airborne (also known as "friable"); however, Ross testified that there was insufficient data to conclusively determine whether employees were exposed to airborne asbestos. (Tr. 128, 347). This was due, in part, to the fact that neither Respondent nor Complainant performed air sampling to determine exposure. (Tr. 177). Notwithstanding the lack of available data, Ross testified he did not believe the carts were capable of producing airborne asbestos sufficient to require its inclusion in the HCP. (Tr. 347, 354).

V. Discussion

A. Applicable Law

To establish a violation of an OSHA standard, Complainant must establish: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

B. Citation 1, Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> 29 CFR 1910.1001(j)(1)(iii): Employer(s) did not include asbestos in the hazard communication program established to comply with the Hazard Communication standard (HCS) (29 CFR 1910.1200). Employer(s) did not ensure that each employee had access to labels on containers of asbestos and to safety data sheets, and was trained in accordance with the requirements of HCS and paragraph (j)(7) of this section.
>
> (a) At the Zephyr Cove Post Office, asbestos was not addressed in the hazard communication program and employees were not trained on the health hazards and potential for exposure to asbestos from deteriorating floor tiles and mastic containing 0.25 to 0.50 percent asbestos.

Citation and Notification of Penalty at 7.

The cited standard provides:

> Employers shall include asbestos in the hazard communication program established to comply with the HCS (§ 1910.1200). Employers shall ensure that each employee has access to labels on containers of asbestos and to safety data sheets, and is trained in accordance with the requirements of HCS and paragraph (j)(7) of this section.

29 C.F.R. § 1910.1001(j)(1)(iii).

There is no dispute that Respondent failed to include asbestos as part of its hazard communication program. Thus, the operative question is whether Respondent was required to include it in the first place. Based on what follows, the Court finds that Complainant failed to prove Respondent was required to comply with 1910.1001(j)(1)(iii) at the time the inspection took place in December 2013.

i. The Standard Does Not Apply

According to the scope and application paragraph of the general industry asbestos standard, "This section applies to all occupational exposures to asbestos in all industries covered by the . . . Act, except as provided in paragraph (a)(2) [construction work] and (3) [shipbreaking and repair] of this section." 29 C.F.R. § 1910.1001(a)(1). The term 'asbestos' includes

"chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered." 29 C.F.R. § 1910.1001(b). Building materials that contain more than 1% of these minerals are defined as 'asbestos-containing materials' or ACM.[7] *Id.* Further, due to concerns regarding how to positively identify previously installed ACM, "OSHA proposed to require employers to presumptively identify certain widely prevalent and more risky materials. These are thermal system insulation, and sprayed-on and troweled-on surfacing materials, in buildings built between 1920 and 1980." Occupational Exposure to Asbestos, 59 Fed. Reg. 40,964, 41,014 (August 10, 1994). Such materials are referred to as 'presumed asbestos containing material' or PACM. *See* 29 C.F.R. § 1910.1001(b); *see also id.* § 1910.1001(j)(2).

Paragraph (j) of general industry asbestos standard, of which the cited standard is a part, states that "[t]his section applies to the communication of information concerning asbestos hazards in general industry to facilitate compliance with this standard." *Id.* § 1910.1001(j). Based on the narrative of the citation, Complainant appears to suggest that any amount of asbestos in a building material is sufficient to activate Respondent's obligation to include asbestos in its HCP. *See* Citation and Notification of Penalty at 7 (citing Respondent for floor tiles and mastic containing 0.25–0.5% asbestos). Alternatively, Complainant argues that the samples taken in the 1996 survey are more representative of the asbestos hazard present at the Stateline facility and that the 2009 survey results (which are documented in the Citation narrative) are not adequate to rebut the conclusions of the 1996 survey. Respondent, on the other hand, contends that Complainant failed to prove that the mastic contained the threshold level of

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7. At trial, the terms ACM and ACBM were used interchangeably—the only difference is that the 'B' in ACBM stands for "building".

asbestos, as defined by 29 C.F.R. § 1910.1001(b), to qualify as ACM. Thus, Respondent concludes it was not required to include asbestos in its HCP.

According to the preamble to the revised asbestos standards, "OSHA has taken a different approach to protecting workers exposed to levels of asbestos below the PEL. Instead of a numerical action level, employer duties involving training and medical surveillance are triggered by exposure to ACM or PACM or by the type of work being done." 59 Fed. Reg. at 40,974. Thus, Respondent's obligation to train, notify, and monitor are contingent upon whether its employees are exposed to ACM or PACM. *See, e.g.*, *Odyssey Capital Group III, LP*, 19 BNA OSHC 1252 (No. 98-1745, 2000) ("The standard requires the employer to take precautions *unless* specific testing . . . shows that the material involved contains no more than one percent asbestos."); *see also* Interpretation Letter from Charles N. Jeffress, Assistant Secretary of Labor, to Edwin G. Foulke, Jr., Asbestos: Notification Requirements and Exposure Monitoring (May 19, 1999) *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22740 ("The condition that determines whether employee training is required is the presence of ACM or PACM in the area where the employee performs housekeeping operations . . . ."). In the case of PACM, an employer can rebut the presumption "by demonstrating that PACM and flooring material do not contain asbestos by complying with paragraph (j)(8)(iii) of this section." 29 C.F.R. § 1910.1001(j)(2); *see also id.* § 1910.1001(b) ("The designation of a material as "PACM" may be rebutted pursuant to paragraph (j)(8) of this section."). Paragraph (j)(8)(iii) states, "The employer and/or building owner may demonstrate that flooring material including associated mastic and backing does not contain asbestos by a determination of an industrial hygienist based upon recognized analytical techniques showing that the material is not ACM." *Id.* § 1910.1001(j)(8)(iii).

The Stateline facility was constructed prior to 1980, which, according to the standard, means that certain building materials are presumed to contain asbestos. In an attempt to rebut that presumption, Respondent hired contractors, who performed two separate asbestos surveys at the Stateline office—in 1996 and in 2009. (Ex. C-1, R-1). As noted above, the 1996 survey, which was more comprehensive in terms of scope, indicated that the mastic contained approximately 1–5% asbestos. (Ex. C-1). In other words, from 1996 to at least 2009, Respondent was on notice that the mastic at the Stateline facility was ACM.[8] In 2009, however, a targeted sampling was performed on the tile and associated mastic. (Ex. R-1). The individual tile samples revealed a composition of less than 0.25% asbestos. Six separate mastic samples were gathered and combined, and the aggregate sample revealed a composition of 0.5% asbestos. (Ex. R-1 at 2916). As a result, Scott Ross, the Certified Industrial Hygienist who performed the survey, concluded "that the tiles and associated mastic are not regulated asbestos containing materials." (*Id.* at 2902).

Complainant's rationale for concluding Respondent violated the standard is convoluted. AD Flack testified that she determined a citation should issue based on the conclusions of the 1996 report. (Tr. 117–18). She concluded that the 1996 report was more comprehensive in that multiple samples had been obtained and tested pursuant to AHERA sampling standards. (Tr. 119–20). *See* 29 C.F.R. § 1910.1001(j)(8)(ii)(A). She discounted the 2009 survey, which established that the tile and mastic were not ACM, because she concluded it was too limited in scope and was not performed according to acceptable sampling protocol. (Tr. 119–20). Complainant, however, does not attempt to make such a distinction in its brief; instead, Complainant relies on the fact that "[a]lthough the subsequent 2009 report found that the level of

8. Thus, as far as the mastic was concerned, it was no longer PACM, because there were definitive results indicating that it was, in fact, asbestos-containing.

asbestos in the mastic was 0.25 to 0.5 percent (rather than the one to five percent found in 1996), this did not change the fact that asbestos was present." *Resp't Br.* at 10. In other words, Complainant contends that any concentration of asbestos requires its inclusion in the HCP, even at levels below what the standard defines as ACM. The Court shall address each of these issues.

First, irrespective of the sampling method for the survey results, Complainant's Citation narrative is facially invalid. As noted by the Commission, as well as the authors of the 1996 report, an employer is required to take precautions "unless specific testing . . . shows that the material contains no more than one percent asbestos." *Odyssey*, 19 BNA OSHC 1252; *see also* Ex. C-1 at 2819 ("If renovation plans call for disturbance of these materials, it is recommended that point counting be performed to determine if these materials are regulated ACBM."). In order to be regulated ACM, a material has to contain at least 1% asbestos. *See, e.g.*, 29 C.F.R. § 1910.1001(j)(6)(2) ("The provisions for labels and safety data sheets required by paragraph (j) of this section do not apply where . . . [a]sbestos is present in a product in concentrations less than 1.0%."). It is not enough for a material to merely contain asbestos; in order for it to be covered by the standard, it must meet the 1% threshold.[9] In the preamble to the final rule, OSHA made a conscious choice to reject an earlier iteration of the standard, which established an action level that premised employer obligations on monitoring results. *Compare* 59 Fed. Reg. at 40,974, *with* 51 Fed. Reg. 22612, 22677–22681 (June 20, 1986). Instead, it established a fairly simple guideline for responding to a potential hazard—materials containing greater than 1.0% asbestos (ACM) or specified building materials that were manufactured prior to 1980 that were presumed to contain at least 1.0% asbestos (PACM). If that guideline is met, then an employer is obligated

9. When compared to the facts of the *Odyssey* case, this conclusion is even stronger here. In *Odyssey*, the employer was engaged in construction activities, which involved scraping asbestos-laden ceiling tile. Although the employer did not prevail, it appears the Commission would have concluded that, had the ceiling tiles contained less than 1% asbestos, the employer would not have been required to implement the necessary precautions. In this case, the only disturbance of the tile and mastic involved mail cart travel.

to comply with additional notification, training, and monitoring requirements. *See* 29 C.F.R. § 1910.1001(c)(2). Thus, if Respondent was required to include asbestos in its HCP, such a conclusion can only be supported by the assessment of 1–5% asbestos content in the 1996 report.

Second, with respect to the quality of the two reports at issue, the Court is not convinced by AD Flack's characterization. According to Brown & Root Environmental, which performed the 1996 survey, "These concentrations were not confirmed using point counting techniques. Until point counting confirms asbestos concentrations to be less than one percent, these materials should be treated as ACBM." (Ex. C-1 at 2819). The 2009 survey, in accordance with the recommendations of the 1996 survey, used point counting techniques to determine asbestos concentration. (Tr. 333; Ex. R-1). According to Ross, who is a certified industrial hygienist, although both assessments used Polarized Light Microscopy (PLM), the point counting method is more accurate and removes a significant amount of subjectivity from the analysis. (Tr. 333–35). Further, Ross testified that the 2009 samples were subjected to further refinement through what is known as gravimetric reduction, which eliminates interfering fibers and minerals that can look similar to asbestiform fibers. (Tr. 335–37). An additional point of distinction is the fact that the 1996 survey only tested one of the mastic samples. (Ex. C-1 at 2843). According to Ross, this was likely due to the fact that the tested mastic sample confirmed the presence of greater than 1% asbestos and was deemed to be homogeneous with the remaining mastic samples. (Tr. 369). The 2009 survey, however, involved the collection of five individual samples and testing of one aggregate sample. (Tr. 340; Ex. R-1 at 2916). In both surveys, the entire floor, inclusive of tiles and mastic, was considered to be a homogeneous area. (Tr. 328; Ex. C-1 at 2835–36). *See* 29 C.F.R. § 1910.1001(b) ("*Homogeneous area* means an area of surfacing material or thermal system insulation that is uniform in color and texture.").

The question remains, however, whether the testing performed in 2009 was sufficient to rebut both the presumption that the materials were asbestos-containing, as well as the results of the 1996 survey. The Court finds that it is. AD Flack testified that the 2009 survey did not comply with the EPA sampling requirements referenced in 1910.1001(j)(8)(ii)(B). In particular, Flack focused on the section of the standard addressing *surfacing material*, which required a minimum number of samples to be taken, depending on the size of the homogeneous area. *See* 40 C.F.R. § 763.86(a). The problem, however, is that there are multiple sampling methods described within § 763.86(a), depending on which material is at issue. Surfacing material is defined in both the EPA and OSHA regulations as "material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, and other purposes)." 29 C.F.R. § 1910.1001(b). While not immediately clear within the general industry standard, a review of its companion—the construction standard—and the EPA sampling regulation, reveals that the tiles and associated mastic are not considered "surfacing materials". *See, e.g.*, 29 C.F.R. § 1926.1101(b) ("Class II asbestos work means activities involving the removal of ACM *which is not thermal system insulation or surfacing material*. This includes, but is not limited to, the removal of asbestos-containing wallboard, *floor tile and sheeting*, roofing and siding shingles, and construction *mastics*.") (emphasis added); 40 C.F.R. § 763.83 ("*Miscellaneous material* means interior building material on structural components, structural members or fixtures, such as floor and ceiling tiles, and does not include surfacing material or thermal system insulation."). As such, the general industry, construction, and EPA standards provide a different method by which flooring and its associated mastic can be analyzed for the purpose of rebutting the presumption of asbestos content. *See* 29 C.F.R. § 1910.1001(j)(8)(iii);

29 C.F.R. § 1926.1101(g)(8)(i)(I); 40 C.F.R. § 763.86(c). In each case, the only requirement is that an industrial hygienist (or, in the case of the EPA regulations, an inspector) makes a determination based on recognized analytical techniques showing that the material is not ACM. This divergence of method is likely due to the fact that floor tiles and mastic are presumed to be homogeneous across an entire facility, both in terms of content and manner of application. The same, however, cannot be said of sprayed-on, or troweled-on surfacing material, such as acoustical or fire-proofing material or TSI.

With respect to Ross, whom the Court qualified as an expert in the area of asbestos, the Court finds that his testimony regarding the conditions at the Stateline office was credible and convincing. (Tr. 325–326). Insofar as the standard for rebutting the presumption (or previous conclusion) of asbestos content is concerned, the Court finds that Ross is a Certified Industrial Hygienist and the methods he employed were consistent with EPA 600/R-93/116, which was the same method employed in the 1996 survey. (Ex. C-1; R-1). Additionally, the 2009 survey can be seen as a logical extension of the 1996 survey. First, the 2009 survey applied the specific methodology (point-counting) that was not applied in 1996.[10] (Ex. C-1 at 2819; Ex. R-1 at 2916). Second, that methodology was applied to the only material that was identified as ACM in the 1996 inspection—the floor tile and mastic. Finally, the results of the 2009 survey showed that individual tile samples only reflected an asbestos content of 0.25% and that the composited mastic samples measured only 0.5% asbestos.[11] (Ex. R-1). According to 1910.1001(b), the asbestos content of the samples indicate that neither the tile nor the associated mastic is ACM. Accordingly, pursuant to the standard, Respondent effectively showed that the tile and associated

10. Although point-counting was not performed in 1996, the drafters of that report recommended that point-counting should be performed prior to beginning any remediation activities. (Ex. C-1 at 2819; Ex. R-1 at 2916).

11. According to Ross, the detection limit of the particular method employed in 2009 is "arguably 0.25%". (Tr. 341).

mastic did not contain asbestos at a level sufficient to trigger regulatory requirements. *See* 29 C.F.R. § 1910.1001(j)(8)(iii).

Though not addressed by the parties, the Court would like to address an additional issue as it relates to Respondent's responsibilities in the face of the 1996 report. Although Respondent's employees were arguably exposed to asbestos pursuant to the conclusions of the 1996 report, the Court finds that those conclusions, insofar as the floor tile and mastic was concerned, were superseded by the conclusions of the 2009 asbestos survey. Thus, any obligation to include asbestos in its HCP, or to provide communications, training, or monitoring, was extinguished. Likewise, Complainant's ability to cite Respondent for those past failures was also extinguished, because the statute of limitations had clearly run as regards conduct occurring prior to 2009. *See* 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation.").

ii. Complainant Failed to Prove Employees were Exposed

"To establish exposure, 'the Secretary . . . must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *Delek Ref., Ltd.*, 25 BNA OSHC 1365 (08-1386, 2015) (citing *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). *See also Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976).

In this case, Complainant asked the Court to find a violation of the standard based on the mere presence of asbestos, notwithstanding the fact that the standard clearly establishes a minimum level at which exposure to asbestos is presumed to be harmful. Even though Complainant did not meet that burden (save for an outdated and, in the Court's view, superseded survey), he appears to argue that Respondent is obligated to affirmatively establish that its

employees are not exposed to a hazard. This misinterprets the structure of the asbestos regulations—in 1994 the standard was revised and the concept of an action level based on exposure monitoring was removed and supplanted with a system whereby protections were premised on the known or presumed presence of asbestos. *See* 59 Fed. Reg. at 40,974, *supra*. The new "action level", as it were, was premised on the asbestos content of a particular material. Whether based on presumption or knowledge, the baseline for asbestos content sufficient to activate hazard protection requirements was clearly established at 1%. To the extent that employees knowingly handle or are exposed to these materials or an employer simply chooses to assume that its pre-1980 facility contains them, that is the point at which an employer is obliged to take precautions, including communicating hazards, training, and monitoring. If CSHO Kulinovich had performed airborne exposure monitoring, perhaps we would be having a different discussion; however, she did not, and the Court is therefore confined by the evidence presented, which does not establish that Respondent's employees were exposed to asbestos.

Based on the foregoing discussion, the Court finds that Complainant failed to prove a violation of the cited standard. Accordingly, Citation 1, Item 3 is hereby vacated.

C. Citation 2, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.141(a)(5): Enclosed workplaces were not so constructed, equipped, and maintained to prevent the entrance or harborage of rodents, insects, or other vermin. A continuing and effective extermination program was not instituted where their presence is detected.
>
> (a) At the Zephyr Cove Post Office, throughout the first and second floor including the customer service area, hallways, mechanical room, sorting area and break room employees are potentially exposed to hantavirus from rodent droppings along the floor edges and in the top drawers in the customer service counter and live mice have recently been observed in the building.

(b) At the Zephyr Cove Post Office, north storage room and in hallway there were spider webs near the exit door and along the hallway above the package lockers and employees were potentially exposed to spider bites.

> The U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1910.141(a)(5), which was contained in OSHA inspection number 914348, citation number 1, item number 2c and was affirmed as a final order on November 19, 2013, with respect to a workplace located at 2701 Midway Dr., San Diego, CA 92110.

Citation and Notification of Penalty at 9.

The cited standard provides:

> *Vermin Control*. Every enclosed workplace shall be so constructed, equipped, and maintained, so far as reasonably practicable, as to prevent the entrance or harborage of rodents, insects, and other vermin. A continuing and effective extermination program shall be instituted where their presence is detected.

29 C.F.R. § 1910.141(a)(5).

i. The Standard Applies

According to 29 C.F.R. § 1910.141(a)(1), this section applies to "permanent places of employment." The Stateline office is a permanent place of employment. Thus, the cited standard applies. With respect to the cited standard, to the extent that its application is premised on the presence of vermin, the facts clearly establish that prerequisite.

ii. Whether the Terms of the Standard Were Violated

The cited standard imposes two separate obligations on employers: (1) an initial and continuing obligation to ensure that the workplace is "constructed, equipped, and maintained" to prevent the "entrance or harborage" of vermin; and (2) to institute an "effective extermination program" where (and when) their presence is detected. 29 C.F.R. § 1910.141(a)(5). Respondent was cited for two separate conditions that Complainant contends are violations of the standard: the presence of mice and mice feces and the presence of spider webs. Complainant, for the most part, premised those allegations on the second obligation—that the extermination program,

although instituted, was somehow ineffective. In response, Respondent contends that the evidence shows that the extermination program was effective, that it took proper precautions, and that Complainant cited the wrong standard. The Court shall address each instance as alleged in the Citation.

a. Mice Feces and the Presence of Mice

There is no dispute that mice feces were found around the facility, including, most notably, inside of Lobato's customer service drawer, which he used on a daily basis. The question, however, is whether the presence of mice feces, coupled with Lobato's testimony that he saw a mouse in November 2013, is sufficient evidence to uphold a violation of the standard. The Court finds that it is not.

First, the standard requires an employer to institute an effective extermination program "when [vermin's] presence is detected." 29 C.F.R. § 1910.141(a)(5). Though the timeline regarding the presence of the mice was not entirely clear, and management's response to the problem was somewhat slow, Respondent nonetheless instituted an extermination program in September 2013, when it hired Ecolab. (Tr. 185; Ex. R-8). According to Lobato, the conditions around the office improved, though he noted that clean-up of the feces was lacking. (Tr. 73–74). In fact, as noted above, Lobato signed off on the services provided by Ecolab, and yet he testified he never expressed any concerns to the Ecolab technician, nor did he report any problems in the Ecolab service log, which was left next to the break room on the second floor of the facility. (Tr. 265). Objectively, if the individual who initially complained about the mice testifies that the conditions improved and simultaneously failed to report any subsequent issues, it stands to reason that the extermination program was, to some extent, effective. This conclusion is buttressed by the testimony of the Ecolab technician, Stanton. Stanton testified that the lack of

mice found in the traps located inside the building, coupled with the need to refill the bait stations outdoors, indicates that the extermination program was effective. (Tr. 297). He also testified he did not see any evidence of mice making it into the building, nor do the service logs indicate such activity. (Tr. 263). Finally, Stanton testified that, even under the most rigorous extermination program, the conditions around Lake Tahoe are such that complete elimination of the vermin problem is nearly impossible given the heavy rodent pressure stemming from the Stateline office's location at the urban interface with the forest. (Tr. 259, 291–92).

The Court finds that Complainant failed to prove a violation of the standard as to instance (a). Admittedly, the presence of mice feces is some evidence of vermin infestation; and, in the absence of remedial actions taken by an employer, perhaps mice feces is the best evidence to show a failure of vermin control. However, in this case, Respondent hired an exterminator, and all objective indications, including Lobato's own testimony, point to an effective program. The problem at Stateline appears to be a failure of housekeeping, the standard for which is part of the same subpart as the cited standard. *See* 29 C.F.R. § 1910.141(a)(3) ("All places of employment shall be kept clean to the extent that the nature of the work allows."). According to the record, it does not appear that anyone made an earnest attempt to clean the feces until after the inspection, which makes it exceedingly difficult for the Court (or the parties) to discern whether the feces observed at the time of the inspection were the same as the ones left behind months before and, therefore, solid evidence of a continuing problem.

Based on the foregoing, the Court finds Complainant failed to provide sufficient proof of a violation of the cited standard. Accordingly, as to instance (a), Citation 2, Item 2 is VACATED.

b. Spider Webs

This instance of the cited violation is premised on the observations of Mr. Cable, who complained about the overall conditions at the Stateline office, but was specifically concerned about the overabundance of spider webs throughout the facility.[12] Cable testified that he observed spider webs at the Stateline office for a period of 6 to 12 months. (Tr. 87–88). Apart from the webs themselves, there was no evidence indicating the presence of spiders in the facility. (Tr. 99, 186). Further, as with the mice, Ecolab was hired to spray for spiders within the facility. (Ex. R-8). The treatments were applied for a period of four months until Stanton terminated them in January over health concerns from repeated pesticide spraying. (Tr. 300; Ex. R-1).

The spider webs were clearly a problem—both Cable and the initial Ecolab technician observed spider webs throughout the facility and they had been there for at least 6–12 months. Although Stanton testified that he did not see any spiders or spider webs, this stands to reason because he did not begin working in the Stateline office until January 2014, which was one month after the inspection took place and after Respondent had abated the cited conditions. The Court was persuaded, however, by Stanton's testimony about the most effective method of preventing spiders. According to Stanton, spiders are able to enter the building in so many different ways that cannot be completely protected by pesticide. (Tr. 298). This is because Ecolab is restricted as to where the pesticide can be sprayed—Stanton testified that spraying upward can cause the pesticide to drift into human-occupied areas, which he is obligated to prevent. (Tr. 300). Thus, Stanton testified that "[t]here's really no product that's going to stop

12. The photographs introduced into evidence are not great representations of the problem; however, nobody disputed the presence of the spider webs in the locations identified by Cable.

spiders continuously. The best thing to do is knock down the webs and to basically take away their home, and that way they don't live there." (Tr. 298).

Contrary to the Court's finding in instance (a), the Court finds that Complainant established a violation of the cited standard in instance (b). The first part of the cited standard requires an employer to construct, equip, and maintain its workplace, so far as reasonably practicable, to prevent the entrance or harborage of vermin. *See* 29 C.F.R. § 1910.141(a)(5). Though the term 'harborage' is not defined in the regulations, the Court finds that it is proper to ascribe the term its normal and accepted meaning. According to the dictionary, 'harborage' is defined as "SHELTER, HARBOR". Webster's Seventh New Collegiate Dictionary at 378 (1969). 'Shelter' is further defined as "something that covers or affords protection . . . ." *Id.* at 800.

The Court accepts Stanton's testimony that preventing vermin from entering the building can be a difficult exercise, especially given the Stateline office's location near the forest. That said, the Court also finds that Respondent failed in its obligation to prevent the harborage of spiders at the Stateline office. For a period of no less than six months, Respondent allowed spider webs to accumulate in the corners, windows, and doors of the Stateline office. Although Ecolab treated for spiders, Stanton testified that this, in and of itself, is not sufficient to eliminate the problem; rather, the most effective method is to get rid of their homes.[13] As with the mice feces, Respondent did not make the necessary effort to clean up the problem, instead placing blame on the idiosyncrasies of its housekeeping contracting process. In this instance, however, Respondent's failure to clean up had a direct impact on its ability to control vermin (as opposed to cleaning up after them). Accordingly, the Court finds that Respondent failed to maintain its

13. Stanton testified that leaving spider webs around for three to four months would contribute to a spider infestation. (Tr. 299).

workplace to prevent the harborage of spiders. Thus, Respondent violated the terms of the standard.

iii. Exposure

The Court finds that, as to instance (b), Respondent's employees were exposed to potential spider bites. As stated by Stanton, leaving spider webs around for three to four months would contribute to a spider infestation and that the only way to effectively prevent such exposure is to remove the spider webs/homes from the affected area. Based on the photographs taken by Cable, and considering the length of time the webs were left in the office, it appears as if employees would be exposed to the hazard of spider bites in just about every location in the office. (Tr. 83–88; Ex. C-25).

iv. Knowledge

The Court also finds that Respondent had actual knowledge of the violation. Cable took photographs of the spider webs in just about every publicly accessible location within the Stateline office. Not only that, but Cable reported his concerns and observations to Postmaster Cutler nearly six months before the inspection took place. Notwithstanding Cable's report, spider webs were observed by CSHO Kulinovich during her inspection. Therefore, the Court finds that Respondent was directly aware of the presence of spider webs and did nothing to get rid of them.

v. Characterization

Complainant characterized Citation 2, Item 2 as a repeat violation. According to the Commission, "A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Hackensack Steel Corp.*, 20 BNA OSHC 1387

(No. 97-0755, 2003) (citing *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167–68 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3rd Cir. 1994)). The Commission has also held that "an employer's attitude (such as his flouting of the Act), commonality of supervisory control over the violative condition, the geographical proximity of the violations, the time lapse between the violations, and the number of prior violations do not bear on whether a particular violation is repeated, although these matters will be considered in assessing a penalty." *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). This determination is based on the following:

> We do not adopt the view that the same supervisors must control two violative conditions for the subsequent one to be repeated. A corporation as an entity is put on notice of a violation of the Occupational Safety and Health Act by issuance of a citation (and its becoming final), and is obligated to abate cited hazards wherever they may occur in its place or places of business. Corporations commonly administer other aspects of their business and control policy in several or many locations, and we see no reason why compliance with this statute should be fragmented. We recognize that supervisors are key personnel, but they are normally not the policy makers of a corporation, and we do not believe adherence to safety standards by a corporation should depend on localized administration by less than high echelon officials. In short it is not unrealistic to require that an employer observe the law (as with any other statute) in all locations where it transacts business. Finally, as noted by the Fourth Circuit in Hyman, basing the classification of repeated upon personal knowledge or ability to control conditions would serve to encourage employers to allocate compliance responsibilities among their supervisors and foremen. Slip op. at 16 n.14. As with evidence of respondent's attitude, however, we believe that evidence regarding commonality of supervision and an employer's internal distribution of safety responsibility may be indicative of its good faith. Thus, such evidence would be cognizable in assessing an appropriate penalty.

Id.

The violation underlying the repeat allegation was issued to Respondent's Midway Carrier Annex in San Diego, California. (Ex. C-22 at 123). The citation was issued pursuant to the exact same standard (29 C.F.R. § 1910.141(a)(5) and for the exact same condition (spiders nests). (*Id.*). Further, the underlying citation became a final order on November 19, 2013, nearly one month prior to the inspection at issue in the present case. *See Hyman Constr. Co.*, 582 F.2d

834, 841 (4th Cir. 1978) ("[B]efore a repeated violation may be found it is essential that the employer receive actual notice of the prior violation. For unless the employer has previously been made aware that his safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the Act."). As noted above, neither the geographical proximity nor commonality of supervisory control impact whether a citation item is repeated; rather, such considerations impact the penalty. Accordingly, as to instance (b), Citation 2, Item 2 is AFFIRMED as a repeated violation of the Act.

VI. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

The Court finds that the violation established by Complainant in instance (b) of Citation 2, Item 2 was of low gravity. There was scant testimony regarding the types of injuries, other than spider bites, that an employee could suffer as a result of being exposed to spiders. There was no testimony regarding what types of spiders were present, whether they were poisonous,

and what impact, if any, such a spider bite would have. Similarly, the violation which forms the basis of the repeat was characterized as "other-than-serious" and was only one sub-item of a four-item citation that was initially assessed a penalty of $3,300.[14] (Ex. C-22 at 123). Further, in terms of penalty, the Court would note that the underlying citation was issued only one month prior to the instant citation and to a post office that was located in another state. *See Potlatch Corp.*, 7 BNA OSHC 1061, *supra*. Based on the foregoing, the Court finds that a penalty of $1,800.00 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED, and a penalty of $4,400.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED, and a penalty of $3,300.00 is ASSESSED.
3. Citation 1, Item 3 is VACATED.
4. Citation 2, Item 1 is AFFIRMED, and a penalty of $200.00 is ASSESSED.
5. Citation 2, Item 2 is AFFIRMED as to instance (b), and a penalty of $1,800.00 is ASSESSED.
6. Citation 3, Item 1 is AFFIRMED, and a penalty of $1,100.00 is ASSESSED.

SO ORDERED

/s/
Peggy S. Ball
Judge, OSHRC

Date: April 22, 2016
Denver, Colorado

14. The Citation item was eventually settled for $1,650.00. (Ex. C-22 at 121).