

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**



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

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
CONOCOPHILLIPS BAYWAY :
REFINERY, :
 :
Respondent. :

OSHRC DOCKET NO. 07-1045

Appearances: Jeffrey S. Rogoff, Esquire
Andrew Karonis, Esquire
Department of Labor
New York, New York
For the Complainant.

Before: Covette Rooney
Administrative Law Judge

Dennis J. Morikawa, Esquire
Thomas Benjamin Huggett, Esquire
Morgan, Lewis & Bockius LLP
Philadelphia, Pennsylvania
For the Respondent.

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s refinery, located in Linden, New Jersey, in September of 2006. As a result of the inspection, on March 8, 2007, OSHA issued to Respondent a Citation and Notification of Penalty alleging a number of serious violations of the asbestos in construc-

tion standard. Respondent contested the citation, and the hearing in this matter was held on May 28 and 29, 2008, in New York, New York. Both parties have filed post-hearing briefs and reply briefs.

Background¹

Respondent, ConocoPhillips Bayway Refinery (“Respondent” or “Bayway”) operates a petroleum refinery in Linden, New Jersey. On July 26, 2006, Bayway noticed an oil sheen on accumulated rain water on a part of the refinery property called the “40 Acre Tank Field” (“the Tank Field”).² From that date through early September, Bayway dug excavations in that area to determine if one of its underground pipelines had a leak. On September 6, Bayway confirmed there was a leak from a section of pipeline called the “Buckeye gasoline line” (“the gas line”). The gas line, which was installed in the early 1950’s, is about a half mile long. It runs above ground to the south end of the Tank Field and then runs adjacent to a concrete vault before going underground. The part of the gas line that had the leak is in an underground section running below the Conrail railroad tracks at the Tank Field; that section is approximately 300 feet long. (SSUF 1-10).

Respondent initiated a project (“the project”) to repair the leak.³ Bayway hired a contractor, LG Excavating, to excavate both ends of the gas line, one on the Tank Field side and one on the “Linden Motor Freight” side of the railroad tracks. From September 6 to 8, various Bayway supervisors went to the site to observe the excavation and to determine the scope and nature of the project; among others, the supervisors included Rocco Gervasi, the first-line

¹The following background is based on the Secretary’s Statement of Undisputed Facts (“SSUF”) and Respondent’s Statement of Undisputed Facts (“RSUF”), which are contained in the parties’ Joint Pre-Hearing Statement. The Joint Pre-Hearing Statement is attached to the Secretary’s post-hearing brief. The background is also based upon other essentially undisputed evidence in the record, as indicated.

²Unless otherwise noted, all dates in this decision will refer to the year 2006.

³Due to the high priority of the project, employees were assigned to 12-hour day and night shifts to complete the project, which started September 9 and ended September 15. (SSUF 27).

supervisor for the project's day shift, Mark Hurler, the first-line supervisor for the project's night shift, and Thomas Mann, the acting second-line supervisor who was overseeing the first-line supervisors on the project. The gas line requiring repair was 14 inches in diameter, and it was housed in a larger pipe ("the sleeve") that was 20 inches in diameter; the sleeve had a tar-like coating along its entire length. (SSUF 11-24).

The first part of the project involved removing the sleeve in order to access and cut the gas line. A contractor named Broadbent cut longitudinal seams in the sleeve with a high-pressure water cutter, and another contractor, Right Works, made circumferential cuts on the sleeve with pneumatic lathe cutters. The contractors' work, which was done on September 8 and 9, caused coating debris to fall from the sleeve into the excavation. The debris was left in the excavation and was not cleaned up. On September 9, several Bayway employees worked in the excavation to remove parts of the gas line and the sleeve. On September 10, Bayway determined that an additional section of the sleeve had to be removed in order to install the new pipe into the sleeve. On the day shift that day, Robert King, a Bayway mechanic, used a hammer and chisel for about 30 minutes to chip an approximately 5-inch band of coating from around the sleeve. A second Bayway mechanic, James Dovel, then used a torch cutter for about a half hour to cut through the sleeve where Mr. King had removed the coating. A third Bayway mechanic, Jonathon Wilk, held the sleeve in a sling while Mr. Dovel cut the sleeve. Messrs. Dovel and Wilk were 3 to 5 feet away in the excavation as Mr. King performed the chipping work, and Messrs. King and Wilk were 3 to 5 feet away in the excavation as Mr. Dovel did the cutting work; Mr. Gervasi and others watched the work from above. The employees' work caused more coating debris to fall into the excavation; this debris, like the other debris, was left in the excavation and was not cleaned up.⁴ The three employees who worked in the excavation did not have on any equipment or special clothing to protect them from exposure to asbestos, and while Mr. Dovel used a respirator as he cut, it protected him from tar fumes but not from exposure to asbestos. After being removed from

⁴The debris in the excavation was cleaned up about a week after the subject project was finished, after Bayway had an asbestos abatement contractor remove the coating from the sleeve of a heating oil line running parallel to the gas line. Bayway had decided to replace the heating oil line because it was the same age as the gas line, and the coating on the heating oil line looked identical to that on the gas line. (Tr. 582-84, 593-95). *See also* CX-1, p. 2.

the excavation, the cut sleeve and line sections were at some point taken to the scrap yard located on Bayway's property. (Tr. 22-23, 33-60, 95-118; SSUF 25-59).

On September 11 or 12, Richard Platt, a Bayway pipe fitter and union steward, told Mr. Mann of concerns raised by an employee that the coating on the sleeve might contain asbestos. Mr. Mann, on September 11 or 12, took three samples at the project and sent them to Andy Papp, Bayway's industrial hygienist ("IH"); one sample was taken from the coating on the sleeve, and two samples were taken from the coating on the gas line. The samples were put together in one mass, and only a portion of the sample was sent to EMSL, the lab Bayway used for analysis. On September 13, EMSL advised Mr. Papp that the sample was 15 percent asbestos, and Mr. Papp, that same day, left a message on Mr. Mann's office phone advising him of the analysis results. However, Mr. Mann did not learn of the results until September 18, at which time the Bayway employees who had worked at the site were told that the sleeve coating contained asbestos.⁵ Respondent had EMSL conduct further analyses of bulk sampling of materials at the work site; a September 26 sampling analysis revealed the presence of 2 and 4 percent asbestos, and an October 2 sampling analysis revealed the presence of 20 and 25 percent asbestos. On September 18, Bayway formed a team to investigate the subject incident. CX-1 is a draft version of the investigation report, and CX-3, dated February 21, 2008, is the final version of the investigation report. (CX-4-6; SSUF 63-73, 97-99).

On September 22, an OSHA compliance officer ("CO") went to the site due to a complaint OSHA had received about the project.⁶ The CO took three samples of the coating, one from the sleeve and two of debris located on the ground at the work site. Two of the samples tested positive for asbestos and one tested negative for asbestos; the two samples that tested positive revealed the presence of 20 and 62 percent asbestos, respectively. On October 16,

⁵Mr. Mann testified he did not receive the message earlier because it was left on his office phone. He explained he was not using his own office during the project as he was "filling in" for his supervisor and was using that individual's office. He also explained that he was using a cell phone during the project and that he had asked Mr. Papp to call him on that phone. (Tr. 596-98).

⁶The CO, Joseph Czapik, testified that the complaint was that the material on the piping in the excavation might have contained asbestos. (Tr. 188-91).

Respondent conducted air monitoring on a mockup intended to replicate, to the extent possible, the working conditions on September 10. According to Bayway's Negative Exposure Assessment describing the results, "[t]he asbestos fibers-in-air sampling resulted in concentrations below the limit of detection." OSHA was not present at Bayway's air monitoring mockup and did no air monitoring of its own at the site. (Tr. 629; CX-7; RX-5-6; SSUF 74-76; RSUF 4-5).

Following his inspection, the OSHA CO concluded Respondent had allowed its employees to perform Class II asbestos work without the required training or protections in place. The CO learned that Respondent was aware that there was asbestos at other locations in the refinery and that asbestos could be present on underground pipes. The CO also learned that Respondent provided general training in asbestos, including how to recognize different types of asbestos, but that the training was inadequate for the work employees had done on the project.⁷ Finally, the CO learned that while several employees at the site, including Messrs. Gervasi, Hurley and Mann, had noticed the coating on the sleeve, none of them had believed that the coating contained asbestos. (Tr. 194-95, 208-14, 241-42, 247-50; CX-18-20; SSUF 61-62, 77-78).

Jurisdiction

The parties have stipulated that Respondent, at all relevant times, was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act. The parties have also stipulated that jurisdiction of this matter is conferred upon the Commission by section 10(c) of the Act. *See* Joint Pre-Hearing Statement, p. 14. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Parties' Positions

The Secretary contends that Respondent allowed its employees to perform Class II asbestos work on the sleeve in the excavation without complying with any of the requirements of the asbestos standard. She asserts that the sampling of materials from the site, including that

⁷Respondent's employees testified that they did not do asbestos abatement; when an employee saw something that could be asbestos he was to tell his supervisor so that the IH Department could have the material tested, and then, if it was asbestos, an outside contractor would perform abatement. (Tr. 60, 68-70, 129, 515-24). The CO testified that he knew that Bayway employees were not responsible for performing asbestos abatement. (Tr. 349-50).

of the CO and Bayway, and the subsequent analysis of those samples, establishes the sleeve contained asbestos; she also asserts that Bayway has admitted in various documents that the sleeve contained asbestos. The Secretary further contends Respondent was aware that there was asbestos throughout the refinery and that asbestos could be present on underground piping. (S. Brief, pp. 2-3, 17-26). She asserts that Bayway's asbestos training was clearly inadequate, in view of the work the employees did at the site and the fact that no one who saw the coating on the sleeve, including supervisors, thought it contained asbestos. (S. Brief, pp. 26-29). Finally, the Secretary contends that Respondent's mock testing was flawed and cannot be used to establish the asbestos levels to which employees were exposed a month before; she also contends that, even if it were reliable, the mock testing would not establish that the violations were not serious. She concludes that the cited conditions were properly classified as serious and that the proposed penalties are reasonable. (S. Brief, pp. 3-4, 50-62).

Respondent contends the Secretary has failed to meet her burden of proving the applicability of the cited standards. It asserts the CO's sampling was flawed, in that the CO could not establish that the materials he took from the site that tested positive for asbestos were from the subject sleeve. (R. Brief, pp. 13-17). It also asserts that the Secretary cannot rely on Bayway's sampling, as she did not show the samples "were collected, transported, or analyzed in a reliable manner consistent with OSHA policies and practices." (R. Brief, p. 17). Respondent further contends that even assuming the Secretary has shown the applicability of the standards, she has not proved the violations were serious. It notes that the Secretary did not present any evidence that its employees were exposed to airborne asbestos and that its own mock testing revealed no detectible levels of asbestos in the breathing zones of the individuals who participated in that testing. Finally, Respondent contends that if it was in violation of the cited standards, the violations should be classified as non-serious or even *de minimis* due to the lack of proof that there was a substantial probability the conditions could have resulted in death or serious physical harm. (R. Brief, pp. 17-21). If, however, the violations are found to be serious, Respondent requests that the penalties be reduced or that the items be grouped with a single penalty. (R. Brief, p. 24).

The Secretary's Citation and Burden of Proof

As noted above, the Secretary's citation in this case alleges a number of serious violations of OSHA's asbestos in construction standard. Specifically, the citation contains nine items and alleges ten violations of the standard's provisions set out in 29 C.F.R. § 1926.1101.⁸ To prove a violation of an OSHA standard, the Secretary must demonstrate by a preponderance of the evidence that (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends that the sampling of the CO and of Bayway of materials from the site, and the analysis of those samples, demonstrates that the sleeve coating contained asbestos. Respondent, however, disputes the reliability of the sampling and analysis results of all the materials from the site and contends that the Secretary has not established the applicability of the cited standards. A discussion in this regard follows.

The Applicability of the Cited Standards

The Secretary contends that Bayway's employees were performing Class II asbestos work on the sleeve in the excavation without following any of the requirements of the asbestos standard.⁹ The standard defines the term "Class II asbestos work" as:

[A]ctivities 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.

See 29 C.F.R. § 1926.1101(b). The standard defines the term "asbestos-containing material," or ACM, as "any material containing more than one percent asbestos." *Id.* Thus, for the cited standards to apply in this matter, the Secretary must show that the sleeve coating contained "more than one percent asbestos."

⁸The citation alleges ten violations because Item 6 has two instances, that is, 6a and 6b.

⁹Respondent's assertion that the employees at the site were performing Class III asbestos work at the site, rather than Class II asbestos work, is addressed *infra*, along with the Secretary's motion to amend in that regard.

The bulk sampling of materials from the site, and the analysis results of those samples, are summarized *supra*. As to OSHA's sampling, CO Czapik testified that on September 22 he obtained one sample from the subject sleeve and two from debris on the ground, *i.e.*, one at the excavation and one from the scrap yard. The CO went first to the work site and asked Mr. Mann for material from the sleeve; Mr. Mann got him a sample from the sloped wall of the excavation. The CO went next to the scrap yard with Thomas Accetta, Bayway's health and safety team leader; the CO himself took a sample off of the sleeve, which Mr. Accetta pointed out to him.¹⁰ The CO then asked Mr. Accetta for another sample from the sleeve, and Mr. Accetta picked up a sample from the ground of the scrap yard, as shown in CX-24, p. 20. The CO said the analysis of the sample he took from the sleeve showed it had no asbestos, while the samples from the excavation wall and the ground in the scrap yard showed asbestos contents of 62 and 20 percent, respectively. He also said the sample he took from the sleeve may have had no asbestos because the coating on the sleeve had two layers; the outer layer was a black tar, the inner layer was a brownish material, and, based on CX-7, the analysis results, the black tar contained no asbestos but the brownish material did.¹¹ The CO noted that it had been difficult for him to scrape the material from the sleeve, and he evidently had not gotten the layer with asbestos in his sample. (Tr. 198-200, 282, 298-310, 345-46, 450-53; CX-7, p. 6).

Respondent disputes the CO's sampling. It notes that the only sample that the CO knew with certainty came from the subject sleeve tested negative for asbestos, as the CO himself conceded. (Tr. 304). It also notes that the sample Mr. Accetta picked up in the scrap yard could have come from another pipe; the CO testified that that sample looked like the coating from the sleeve, but he admitted there were other pipes in the area with similar coating and that it was possible the sample was not from the subject sleeve. (Tr. 299-301). Finally, Bayway points out that the sample Mr. Mann provided the CO from the wall of the excavation could have been from the abatement of the heating oil line sleeve, which took place after the subject project but before

¹⁰The CO indicated that CX-24, p. 25, showed the cut pipe sleeve in the scrap yard, and he noted that the writing on the cut sleeve stated: "DO NOT DISTURB 2 PCS." (Tr. 201-02).

¹¹This description, appearing mid-page on page 6 of CX-7, relates to the sample that was 62 percent asbestos.

the CO's arrival. The CO agreed this was possible, noting that the heating oil line ran parallel to the gas line, as shown in CX-24, pp. 1-2.¹² (Tr. 282-87). He also agreed he was told that the coating on the heating oil line sleeve had been abated, that chips from that sleeve had flown "all over the place," so that the contractor was called back to clean them up, and that the coating on the sleeves of the two lines was the same. (Tr. 283-89).

Based upon the foregoing, I find that the Secretary has not shown, by a preponderance of the evidence, that the two samples the CO took from the site that tested positive for asbestos came from the subject sleeve. The CO himself admitted it was possible they were not, and he also admitted that the one sample that he actually took from the sleeve tested negative for asbestos. Although the CO offered an explanation as to why that sample may not have contained asbestos, the fact still remains that the one sample that clearly came from the subject sleeve did not contain asbestos. Furthermore, Mr. Mann testified that the sample he took from the excavation wall was likely from the coating on the heating oil line sleeve, which had been abated after the subject project but before the CO's arrival. He said that Bayway had decided to replace the heating oil line as it was the same age as the gas line and that the heating oil line sleeve was abated because of what had happened with the gas line sleeve and because the coating on the two sleeves looked identical; he also said that the abatement of the heating oil line sleeve had caused coating chips to be strewn around due to the pneumatic equipment the abatement contractor used, such that Bayway had had the contractor return to clean up the coating chips.¹³ (Tr. 582-84, 593-95). Finally, in his deposition, Mr. Accetta indicated that he did not know which pipe the sample came from that he was holding in CX-24, p. 20. *See* CX-10, p. 290.¹⁴

¹²The CO stated that the white pipe, shown on the left in CX-24, pp. 1-2, was the new gas line, while the other line was the heating oil line. (Tr. 283-84).

¹³I have noted Mr. Mann's testimony that the coating on the sleeve on the heating oil line looked identical to that on the gas line. (Tr. 594-95). However, the fact that the coatings looked identical, without more, is no basis for finding that the gas line sleeve coating had asbestos in it.

¹⁴Although Respondent also disputes the reliability of the analysis of the OSHA samples, I need not address that issue due to the finding that the Secretary has not shown that the OSHA samples that tested positive came from the subject sleeve.

Despite the above, I nonetheless find, as the Secretary contends, that other evidence in the record establishes the subject sleeve contained asbestos. As set out *supra*, Mr. Mann, on September 11 or 12, took three samples at the project and sent them to Andy Papp, Bayway's IH; one was taken from the coating on the sleeve, and two were taken from the coating on the gas line. The samples were put together in one mass, and only a part of the sample was sent to EMSL, the lab Bayway used for analysis. On September 13, EMSL advised Mr. Papp the sample was 15 percent asbestos, and Mr. Papp left a message on Mr. Mann's office phone that same day telling him of the results. Respondent had EMSL conduct further analyses of bulk sampling of materials at the work site; a September 26 sampling analysis revealed the presence of 2 and 4 percent asbestos, and an October 2 sampling analysis revealed the presence of 20 and 25 percent asbestos. (SSUF 64-73, CX-4-6).

As to the first sampling, Mr. Mann testified that the sample he took of the sleeve coating was from one of the sleeve pieces that had been removed and was laying off to the side of the excavation; he also testified that he bagged that sample and the sampling from the gas line coating and took the samples to the IH. (Tr. 579-80, 595). Mr. Accetta testified that the three samples Mr. Papp received were "clumped together" and that Mr. Papp, believing the outer material was just protection for the inner material, threw away the outer material, resulting in only the inner material being tested; Mr. Acetta further testified, however, that the material sent to EMSL was the sleeve coating, while the other material was gas line coating. (CX-10, pp. 135, 191). CX-1, Bayway's draft investigation report, confirms Mr. Acetta's testimony. Specifically, CX-1 states, on page 2, that "[d]uring the course of the investigation, it was determined that only one of the three samples went out for analysis; the 20" sleeve mastic." Further, the CO testified that Mr. Acetta told him that the material sampled as set out in CX-4 was the subject sleeve coating.¹⁵ Finally, CX-1 also states, on page 2, in the section entitled "Recommendations," as follows: "Analyze samples from 14" gasoline line. IH – Complete. Both came back no asbestos." (Tr. 197). Based upon the evidence of record, I agree with the Secretary that the analysis of Bayway's first sampling shows the subject sleeve contained asbestos. This is especially true due to the

¹⁵As the Secretary points out, although page 3 of CX-4 describes the material sampled as being from the "14" Gasoline Line," the record establishes the material was from the sleeve.

admissions of Mr. Acetta, a management employee, set out in CX-10 and as reported by the CO. (CX-10, pp. 22-23). It is also true due to the fact that CX-1, the draft report, was largely written by James Gray, Bayway's plant supervisor; the team that investigated the incident and signed CX-3, the final report, consisted of two management employees, including Mr. Gray, and two union employees, including Mr. Platt, the union steward. (Tr. 143-44, 607, 619-20).

As to Bayway's second sampling, CX-5, the analysis results, describes the two samples therein as "Bituminous Mastic – Ground" and "Bituminous Mastic – Pipe." CX-5 shows that the mastics from the ground and the pipe contained, respectively, 2 and 4 percent asbestos. Mr. Accetta testified that while he did not know where the first sample came from, the second sample was from the subject sleeve. (CX-10, pp. 206-12). As to Bayway's third sampling, CX-6, the analysis results, describes three samples, *i.e.*, "20" Sleeve Mastic," "14" Line Wrap," and "Black Iron Pipe Mastic." CX-6 shows that these samples contained 20, zero and 25 percent asbestos, respectively. Mr. Accetta testified that the first two samples came from the subject project, while the third did not, and that the first sample was from the subject sleeve. (CX-10, pp. 212-15). In view of the record, I find that Bayway's second and third samplings provide further proof that the subject sleeve contained asbestos.

In finding that Bayway's own sampling establishes the subject sleeve contained asbestos, I have considered Respondent's arguments to the contrary. First, Bayway urges that "OSHA did not rely on any of these analyses during its investigation or in issuing the Citation." (R. Brief, p. 7, ¶ 19). The CO, however, testified that Bayway's three samplings were in fact relevant to his determination that there were violations at the work site. (Tr. 440-44). Bayway also urges that the Secretary did not show the samples "were collected, transported, or analyzed in a reliable manner consistent with OSHA policies and practices." Bayway cites to my decision in *Contour Erection & Siding Sys., Inc.*, 2007 WL 2285346 (No. 06-0792, 2007), and asserts that the decision held that the "failure to establish reliability of sampling precluded the employer from relying upon its own zero asbestos content sample." (R. Brief, p. 17). In footnote 9 in that decision, I did note that while the IH in that case had learned of a prior asbestos test done at the site that showed no asbestos in the samples, he determined the information in the report was insufficient to conclude the sampling was done properly, particularly since no one involved in the project was aware of the report except for one person who did not know of the test results. Further, the evidence in that

case established that OSHA's sampling and analysis, as well as sampling and analysis by other entities, showed that the ceiling material at issue did in fact contain asbestos. As the Secretary points out, there is nothing in the asbestos standard that prevents an employer from performing its own testing and relying upon its testing results. In any case, I find it interesting that Respondent seeks to discredit its own asbestos sampling on the one hand and on the other seeks to rely on its later air monitoring conducted on a mockup, particularly since EMSL, the lab Bayway regularly used for analysis, performed the analyses for the asbestos sampling and the air monitoring. *See* CX-4-6 and RX-7. I find that the Secretary may rely on the results of Bayway's sampling of materials at the site. Respondent's arguments are rejected.

Besides Bayway's testing, the Secretary asserts that various written admissions also support her position that the subject sleeve contained asbestos. I agree. CX-1, the draft investigation report, states that "[t]he sample [of the mastic taken on September 12] proved to [b]e 15% asbestos." *See* CX-1, p. 2, ¶ 1. CX-3, the final investigation report, states that "[t]he sample [sent to EMSL for analysis on September 12] tested positive for asbestos." *See* CX-3, p. 3, ¶ 6. RX-5, a February 15, 2007, memorandum from Bayway entitled "Negative Exposure Assessment during 40 Acres Pipeline Mock-up," states in the fifth paragraph that "[t]he bulk sample analysis of the piping, mastic, and debris established the presence of asbestos in the range of 2-25% percent." Finally, CX-29, a November 21, 2006 memorandum from Bayway entitled "Possible Asbestos Exposure at 40 Acres Tank Field," states in the second paragraph that "[t]he mastic [from the 20" sleeve] was analyzed and determined to contain 15% asbestos fibers."¹⁶ Based on this evidence, and that set out above, I conclude the Secretary has met her burden of proving that the subject sleeve contained "more than one percent asbestos." She has therefore demonstrated the applicability of the cited standards.

**Whether the Terms of the Cited Standards were Met
and Whether Employees had Access to the Violative Conditions**

As a preliminary matter, I note that Items 1 and 8 of the citation allege that employees were performing Class II asbestos work. During its cross-examination of the CO, Respondent questioned CO Czapik extensively as to why the cited work was not Class III asbestos work. (Tr.

¹⁶This memorandum was provided to Messrs. King, Dovel and Wilks. (Tr. 64, 120-21).

262-64, 402-18, 479-83). At the end of her case in chief, the Secretary moved to amend Items 1 and 8 of the citation to refer to Class II asbestos work, or, alternatively, Class III asbestos work. Respondent objected to the motion. A decision on the motion was reserved, and the Secretary was directed to submit her motion in writing along with her post-hearing brief. (Tr. 484-88). The Secretary has done so, and Respondent has filed its response to the motion.

Class II asbestos work is defined at 29 C.F.R. 1926.1101(b) as:

[A]ctivities 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.

Class III asbestos work, in turn, is defined at 29 C.F.R. 1926.1101(b) as:

[R]epair and maintenance operations, where “ACM”, including TSI and surfacing ACM and PACM, is likely to be disturbed.

CO Czapik testified the work at the site was Class II asbestos work because employees were removing, by chipping and torch cutting, the mastic material that was coating the subject sleeve.¹⁷ He said “removal” under the standard means all operations where ACM or PACM is taken out or stripped from structures or substrates and includes demolition. He also said the work was Class II as the employees were doing construction work, *i.e.*, removing old pipe and installing new pipe, and part of the job required removing a band of mastic from the sleeve; in addition, the material on the sleeve was a construction mastic and specifically included in the Class II definition. The CO noted the work was not repair or maintenance because it was not an operation likely to disturb ACM; rather, it was removal work. He agreed that “classic” removal would be the removal work Bayway’s contractor performed on the heating oil line, but he said the chipping and torch cutting of the sleeve coating was also removal work. (Tr. 213-14, 262-64, 402-11, 417-18, 480-82).

As the Secretary urges, her position that the work at the site was Class II is supported by the fact that the employees were removing, by chipping and torch cutting, the asbestos-containing coating on the gas line sleeve. As she also urges, her position is further supported by the explicit

¹⁷The CO also described the material on the sleeve as asphaltic coating. (Tr. 214, 262-63).

inclusion of “construction mastics” in the definition of Class II asbestos work. Even more significant is the Secretary’s citing to *Tierdael Const. v. OSHRC*, 340 F.3d 1110 (10th Cir. 2003). S. Brief, pp. 21-23. In that case, employees of Tierdael removed an asbestos-containing cement pipe from an excavation. To do so, one employee used a 2-pound hammer to break the pipe while another employee sprayed the pipe. The pipe remained intact, *i.e.*, it did not crumble or become pulverized. The pipe was then lifted out of the trench with a sling and backhoe. Following a complaint about this activity, OSHA inspected the site and, as a result, cited Tierdael for various violations of the asbestos standard at issue here. *Id.* at 1112-13. A Commission judge held that Tierdael’s pipe removal activity was Class II asbestos work, under the plain meaning of the standard, because the pipe was part of a water delivery system and the system was a structure. The judge vacated some of the alleged violations and affirmed others; however, the affirmed items were reclassified from serious to either “other” or “*de minimis*” violations. The judge’s decision became a final order of the Commission, and Tierdael petitioned the Tenth Circuit for review of the judge’s decision. *Id.* at 1113-14.

In deciding whether the activity at the site was Class II asbestos work, the court noted the definition of that term, as set out above. The court also noted the definition of “removal,” as meaning “all operations where ACM and/or PACM is taken out or stripped from structures or substrates, and includes demolition operations.” *See* 29 C.F.R. § 1926.1101(b). The court found that because “the plain and natural meaning of structure covers an underground pipeline,” Tierdael’s pipe-breaking and removal work fell within the definition of Class II asbestos work. 340 F.3d at 1115-16. In so finding, the court pointed out that consulting secondary sources such as OSHA directives or the standard’s preamble was unnecessary because the plain meaning of the regulation encompassed Tierdael’s activity. 340 F.3d at 1115, n.3. The court denied Tierdael’s petition for review.

Based upon the foregoing, I conclude that the plain and natural meaning of the definitions of “Class II asbestos work” and “removal” include Bayway’s work at the site. Stated another way, the chipping and torch cutting, and the actual removal of the cut sleeve and pipe from the excavation, fell within the definition of Class II asbestos work. My conclusion is supported by the court’s finding in *Tierdael, supra*. It is also supported by the specific inclusion of “construction mastics” in the Class II definition. Finally, my conclusion is supported by the fact that, as the

Secretary notes, the asbestos standard's preamble states that removal includes activities "where ACM and/or PACM removal is incidental to the primary reason for the project, as well as where removal of ACM and/or PACM is the primary reason for the project." 59 Fed. Reg. 40964, 40978 (1994). S. Brief, pp. 21-23. In light of my conclusion, the motion to amend Items 1 and 8 of the citation, and the response to the motion, need not be addressed. I turn now to the specific citation items.

Item 1

Item 1 alleges a violation of 29 C.F.R. § 1926.1101(e)(1), which requires all Class I, II and III asbestos work to be conducted within regulated areas. This item alleges that on or about September 10, employees performed Class II asbestos work involving the removal of mastic coating from the exterior of a 20-inch-diameter underground sleeve without the employer having established a regulated area; workers manually chipped and torch cut the mastic, which was later found to contain up to 20 percent chrysotile.¹⁸ The record in this case, as set out *supra*, demonstrates that on September 10, employees at the site were performing Class II asbestos work by removing mastic coating from an underground sleeve later found to contain 20 percent asbestos.¹⁹ The record also demonstrates that Respondent did not establish a regulated area at the work site, which includes demarcating and limiting access to the area, requiring employees in the area to wear appropriate respirators, and prohibiting employees in the area from activities such as eating, drinking and smoking. Thus, Messrs. King, Dovel and Wilk had access to the hazard of exposure to asbestos, as they were not wearing appropriate respirators during the chipping and torch cutting; in addition, Mr. Dovel drank from a water bottle during the cited work. Moreover, because the area was not marked and access was not limited, other employees, such as Mr. Gervasi, had access to the cited hazard. (Tr. 33-60, 100-18, 212-17; CX-1, CX-3). *See also* SSUF

¹⁸All the citation items in this case contain a statement to the effect the mastic was later found to contain up to 62 percent chrysotile. In view of my findings *supra*, the mastic contained up to 20 percent chrysotile. The citation and the complaint are therefore amended, *sua sponte*, to conform to the evidence pursuant to Federal Rule of Civil Procedure 15(b)(2). *See, e.g., New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 104-05 (2d Cir. 1996).

¹⁹This statement applies equally to all of the citation items in this case.

47-58, 91, 93. Based on the record, Respondent did not meet the terms of 29 C.F.R. § 1926.1101(e)(1), and employees had access to the cited hazard.

Item 2

Item 2 alleges a violation of 29 C.F.R. § 1926.1101(f)(2)(i), which requires an employer with a work operation covered by the asbestos standard to ensure that a “competent person” conducted an exposure assessment immediately before or at the initiation of the operation to ascertain expected exposures during that operation. The record establishes that Respondent did not conduct the required exposure assessment before or at the beginning of the cited work. (Tr. 222-24; CX-1, CX-3). *See also* SSUF 79-89. In view of the record, Respondent violated the terms of 29 C.F.R. § 1926.1101(f)(2)(i). In addition, the failure to conduct an exposure assessment, and the further failure to comply with any of the required protective measures of the asbestos standard, caused Bayway’s employees to have access to the hazard of exposure to asbestos.

Item 3

Item 3 alleges a violation of 29 C.F.R. § 1926.1101(g)(1)(ii), which requires the employer to use engineering controls and work practices in all operations covered by this section, regardless of levels of exposure, in the form of wet methods or wetting agents to control employee exposures during asbestos handling, mixing, removal, cutting, application, and cleanup. The evidence of record shows that Respondent did not use wet methods or wetting agents to control employee exposures during the cited work. (Tr. 55, 116-17, 225-26; CX-1, CX-3). *See also* SSUF 90. In light of the record, Respondent did not meet the terms of 29 C.F.R. § 1926.1101(g)(1)(ii). In addition, the failure to use wet methods or wetting agents during the work, such as when Mr. King was chipping the coating, resulted in Bayway’s employees having access to the hazard of exposure to asbestos.

Item 4

Item 4 alleges a violation of 29 C.F.R. § 1926.1101(h)(3)(iii)(A), which requires the employer to provide a half-mask air-purifying respirator, other than a disposable respirator, that is equipped with high-efficiency filters when the employee performs Class II and III asbestos work and a negative exposure assessment has not been conducted. The record demonstrates that Respondent did not provide the employees who were in the excavation performing Class II

asbestos work with the required respirators. (Tr. 43-48, 51-53, 57-58, 227-29; CX-1, CX-3). *See also* SSUF 49, 52-53, 91. Based on the record, Respondent did not meet the terms of 29 C.F.R. § 1926.1101(h)(3)(iii)(A). Moreover, as set out in Item 1, the failure to provide appropriate respirators caused employees to have access to the hazard of exposure to asbestos.

Item 5

Item 5 alleges a violation of 29 C.F.R. § 1926.1101(i)(1), which requires the employer to provide and require the use of protective clothing, such as coveralls or similar whole-body clothing, head coverings, gloves and foot coverings, for employees exposed to airborne concentrations of asbestos or when a required negative exposure assessment is not produced. The evidence of record establishes that Respondent did not provide the employees performing the asbestos removal work in the excavation with the required protective clothing. The record also shows that the coating debris created by the contractors' work on September 8 and 9 was left in the excavation, that Messrs. King and Dovel had to lay down on the excavation's floor, which had debris on it, for a part of their work, and that they and Mr. Wilk stood and stepped on the debris. (Tr. 40-60, 72-74, 106-10, 114-17, 128, 230-32; CX-1, CX-3). *See also* SSUF 29-41, 58, 92. Based upon the record, Respondent violated the terms of 29 C.F.R. § 1926.1101(i)(1). In addition, the failure to provide appropriate protective clothing resulted in employee access to the hazard of exposure of asbestos.

Item 6

Item 6a alleges a violation of 29 C.F.R. § 1926.1101(k)(2)(i), which requires building or facility owners, before beginning work subject to the asbestos standard, to determine the presence, location and quantity of ACM and/or PACM at the work site. The record shows that Respondent did not determine the presence, location and quantity of ACM at the site before allowing employees to perform the chipping and torch cutting of the sleeve coating material. (Tr. 233-35; CX-1, CX-3). *See also* SSUF 79-83. In view of the record, Respondent failed to meet the terms of 29 C.F.R. § 1926.1101(k)(2)(i), and employees had access to the hazard of exposure to asbestos.

Item 6b alleges a violation of 29 C.F.R. § 1926.1101(k)(2)(ii)(B), which requires building and/or facility owners to notify the following persons of the presence, location and quantity of ACM or PACM at the work sites in their buildings and facilities: employees of the owner who

will work in or adjacent to areas containing such material. The record shows that Respondent did not notify employees who performed the asbestos removal work in the excavation of the presence, location and quantity of ACM until September 18. (Tr. 52, 62-64, 110, 115-21, 129-30, 235-37; CX-1, CX-3). *See also* SSUF 85-87. In light of the record, Respondent failed to meet the terms of 29 C.F.R. § 1926.1101(k)(2)(ii)(B), and employees had access to the hazard of exposure to asbestos.

Item 7

Item 7 alleges a violation of 29 C.F.R. § 1926.1101(k)(7)(i), which requires the employer to provide and display warning signs that demarcate the regulated area at each location where a regulated area is required under the standard. The record demonstrates that Respondent did not provide and display warning signs to demarcate a regulated area at the site, as required. (Tr. 54-55, 116, 238-40; CX-1, CX-3). *See also* SSUF 93. Based on the record, Respondent did not comply with the terms of 29 C.F.R. § 1926.1101(k)(7)(i), and employees had access to the hazard of exposure to asbestos.

Item 8

Item 8 alleges a violation of 29 C.F.R. § 1926.1101(k)(9)(iv)(C),²⁰ which requires the employer to provide, for Class II operations, training that includes all the elements included in paragraph (k)(9)(viii) and the specific work practices and engineering controls set out in paragraph (g) of the standard. The record shows that although employees received training that provided basic information about the hazards of asbestos and different types of asbestos, the training was inadequate to prepare employees for performing Class II work operations; the training also did not indicate that underground pipes may contain asbestos. (Tr. 54, 65-67, 116, 121-24, 241-43; CX-1, CX-3). *See also* SSUF 94. In light of the record, Respondent violated the terms of 29 C.F.R. § 1926.1101(k)(9)(iv)(C). Further, the failure to provide proper training caused employee access to the hazard of exposure to asbestos.

Item 9

²⁰As issued, this item alleged a violation of 29 C.F.R. 1926.1101(k)(9)(iv)(A); however, the Secretary's complaint amended this item to allege a violation of the standard noted above.

Item 9 alleges a violation of 29 C.F.R. § 1926.1101(1)(2), which requires asbestos waste, scrap, debris, bags, containers, equipment, and contaminated clothing consigned for disposal, to be collected and disposed of in sealed, labeled, impermeable bags or other closed, labeled, impermeable containers. The evidence of record establishes that Respondent did not perform the cleaning up and disposal of the asbestos waste, scrap, debris and contaminated clothing at the site as required. (Tr. 41, 55-56, 116, 244-46; CX-1, CX-3). *See also* SSUF 95. In view of the record, Respondent was in violation of the terms of 29 C.F.R. § 1926.1101(1)(2). In addition, the failure to comply with the standard resulted in employees having access to the hazard of asbestos.

Whether the Employer had Knowledge of the Violative Conditions

As noted *supra*, to prove knowledge, the Secretary must show that the employer had actual knowledge of the violative condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The record establishes that the employees who saw the sleeve coating thought it was a tar coating and that no one believed it was asbestos. (Tr. 55, 70, 99-100, 110, 127-28, 504-05, 527-28, 573, 586, 591). *See also* SSUF 80. However, the Secretary contends that “Respondent could and should have known that the tar-like coating on the sleeve probably contained asbestos.” S. Brief, p. 25. I agree.

First, Bayway’s Asbestos Management Procedure, issued in March 2006, states that “[m]any areas within [the refinery] have [ACM] in place...” (Tr. 532; CX-22, p. 1, ¶ 2.0). *See also* SSUF 77. As the Secretary notes, CX-22 devotes 17 pages to asbestos hazards, and Bayway has an asbestos abatement contractor on call to deal with the problem of asbestos at the refinery. (Tr. 180, 407-08, 506). Second, Bayway was aware underground pipes often contain asbestos. The refinery’s 2005 and 2006 asbestos hazard fact sheets both state that “[i]n the refinery, asbestos can still be found as a corrosion resistant coating on underground pipes....” (CX-19-20). The fact sheets also state that “[w]henever work includes the possibility of disturbing ... asphaltic

pipe-wrap²¹ ... contact IH for testing.”²² *Id.* Third, Bayway’s asbestos training states that asbestos was widely used between 1940 and 1975, and the subject sleeve was known to have been installed in the 1950’s. *See* CX-18, p. 2; SSUF 5. The coating on the sleeve was easily visible, and although neither Mr. Gervasi nor Mr. Mann believed it was asbestos, both advised Mr. Dovel to use a respirator when he cut the sleeve as they were not sure what was in the coating. (Tr. 30, 97, 100, 109-10, 505, 528, 574, 586-88). In addition, Mr. Gervasi testified the material on the sleeve was a protective coating, and Mr. Mann testified it was “[t]o keep that sleeve from rotting or rusting away.” (Tr. 505, 529, 572). Thus, despite the inadequacy of Bayway’s asbestos training, the supervisors nonetheless should have suspected that the sleeve coating could have contained asbestos and, as a consequence, had it tested.

Finally, the preamble to the asbestos standard, 59 Fed. Reg. 40964,41028, states as follows:

Coatings and sealants. Asbestos fiber is used as a filler and reinforcer in asphalt and tar-based surface coatings. These products are then used as ... protective coatings for underground pipelines....

Employers are presumed to be aware of the hazards at their workplaces and the standards that address those hazards. As the Secretary points out, Respondent had a duty to determine whether the sleeve coating contained asbestos instead of just assuming it did not. Based on the record, I find that the Secretary has shown that Respondent had constructive knowledge of the violative conditions.

Whether the Violations were Serious

A violation of a health or safety standard is “serious” if there is a substantial probability that death or serious physical harm could result from the violative condition. *See* section 17(k) of the Act, 29 U.S.C. § 666(k). As the Secretary notes, the courts and the Commission have construed the “substantial probability” requirement of the Act to refer to the degree of harm that may result from an accident or disease if one were to occur and not to the likelihood of the

²¹As noted above, the CO described the sleeve coating as both a mastic and an asphaltic coating. (Tr. 213-14, 262-63).

²²The record indicates that these sheets were not given to employees until after September 2006. (Tr. 66-67, 124-25, 147-48).

accident or disease occurring in the first place. *Secretary of Labor v. Trinity Indus.*, 504 F.3d 397, 401 (3d Cir. 2007). The Secretary points out that “the court looks to the harm the regulation was intended to prevent, and if that harm is death or serious physical injury, a violation of the regulation is serious *per se*.” *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). The Secretary also points out that when an OSHA standard regulates exposure to a toxic substance, such as asbestos, a violation that causes an exposure will be found to be “serious” if the evidence shows that the preventative measures are designed to prevent death or serious disease. *See, e.g., Dec-Tam Corp.*, 15 BNA OSHC 2072, 2077 (No. 88-523, 1993). S. Brief, pp. 50-51.

The Secretary notes that “OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure.”²³ She further notes that exposure to asbestos can result in diseases such as asbestosis, mesothelioma, lung cancer and gastrointestinal cancer, all of which create a substantial probability of death or serious harm.²⁴ The Secretary contends that Bayway’s violation of the standards set out above were properly classified as serious, in that each caused employees to be exposed to an asbestos hazard. She asserts that Bayway’s mock testing after the fact, which showed airborne concentrations of asbestos below the permissible exposure limit (“PEL”),²⁵ is legally irrelevant and contrary to the remedial purpose of the standard. She also asserts that the employer’s obligation to implement the safeguards in the standard is triggered by the class of asbestos work performed, not by exceeding the PEL. S. Brief, pp. 52-54. In this regard, she points to the standard’s preamble, which states as follows:

The 0.1 f/cc level leaves a remaining significant risk. However as discussed below, and in earlier documents, OSHA believes this is the practical lower limit of feasibility for measuring asbestos levels reliably. However the work practices and engineering controls specified below for specific operations and required respirator

²³Preamble to the Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite Final Rule, 51 Fed. Reg. 22612, 22615 (1986).

²⁴*Id.*

²⁵The PEL in the standard is an airborne concentration of asbestos in excess of 0.1 fibers per cubic centimeter of air (“f/cc”). 29 C.F.R. 1926.1101(c)(1). *See also* 29 C.F.R. 1926.1101(e).

use will in OSHA's view further reduce the risk....**A significant risk remains at the PEL of 0.1 f/cc, and it is feasible to attain lower levels for some workers exposed to asbestos.** OSHA has therefore considered whether to establish different PELs for different operations based on the lowest exposure limits that can feasibly be achieved in those operations and that are needed to eliminate significant risk. OSHA has decided not to do so because the operation-specific work practices mandated in the standard will be a most cost-effective means of assuring that significant risk is eliminated to the extent feasible....**PELs lower than 0.1 f/cc would be particularly unsuitable as compliance criteria because it is difficult to reliably measure lower levels.** Because such measurements are unreliable, if lower PELs were established, measurements taken by employers and by OSHA would provide an uncertain basis for determining whether employers have fulfilled their compliance duties....Therefore, rather than set operation-specific permissible exposure limits, OSHA proposed to further reduce risk by requiring certain work practices. **The operations for which mandatory work practices are required would otherwise result in employee exposure that is significant.** OSHA believes that these controls are feasible, reasonable, and necessary.

59 Fed. Reg. 40964, 40967-69 (1994) (emphasis added). The Secretary concludes that, in light of the above, the PEL set out in the standard does not represent a benchmark of safety, but of measurement. In other words, the 0.1 f/cc PEL is a level of exposure that can be measured reliably; it is not a level at which exposure is safe. S. Brief pp. 54-55.

The Secretary cites to a number of cases in support of her position, three of which I find dispositive. In *Tierdael Constr. v. OSHRC*, discussed above, the court noted that "compliance with the OSHA Asbestos Standard for Class II asbestos work does not rest upon whether there was hazardous exposure, i.e., exposure which exceeded the PEL, but on whether Class II activity occurs." 340 F.3d 1110, 1115 n.2. (10th Cir. 2003).²⁶ In *Dec-Tam Corp.*, also discussed above, the Commission upheld a citation for failure to monitor the level of asbestos to which employees were exposed as "serious," even though the employees wore respirators that protected them from overexposure. 15 BNA OSHC 2072, 2083 (No. 88-523, 1993). In so doing, the Commission noted that the proper inquiry was whether "Dec-Tam's failure to conduct full-shift monitoring

²⁶The Secretary notes that Bayway does not cite to the appellate decision in *Tierdael* but to the judge's decision, where the judge affirmed some of the violations as "other" and others as *de minimis*. The Secretary points out that the classification of the violations was not appealed and that the judge's decision in that regard was based upon the fact that the pipe there was removed essentially intact, unlike the circumstances in this case. S. Brief, p. 12 n.13.

could lead to death or serious physical harm.” *Id.* at 2083 n.14. The Commission also noted that the monitoring requirement was designed to inform the employer whether work practice controls were effective and whether “respiratory protection is required at all, and if so, which respirator is to be selected.” *Id.* at 2082-83, quoting 51 Fed. Reg. at 22683. The Commission then concluded that, by not conducting full-shift monitoring, “Dec-Tam was unable to meet [its] obligations. The failure to obtain information so critical to the health of its employees can only be described as serious.” *Id.* at 2083.

The Secretary also cites to *Secretary of Labor v. Trinity Indus.*, 504 F.3d 397 (3d Cir. 2007). There, Trinity, the foundry owner, hired Pli-Brico, a contractor, to work on a furnace which, unknown to Trinity, contained ACM. Trinity had not performed any tests to determine the presence of ACM before hiring Pli-Brico. While Pli-Brico was working on the furnace, a Trinity employee noticed an insulation blanket in a dumpster and suspected it might contain asbestos. Trinity stopped the work, had the blanket tested, and learned it contained 5% asbestos. OSHA cited Trinity for serious violations of 29 C.F.R. 1926.1101(k)(2)(i) and (k)(2)(ii)(A), for failing to determine the presence, location and quantity of ACM and/or PACM at the site and for failing to notify prospective employers bidding for work whose employees reasonably can be expected to work in or adjacent to areas containing ACM or PACM. *Id.* at 399-400. A Commission judge affirmed both violations but reclassified them as “other” with no penalty because the Secretary had not shown “any significant exposure to asbestos.” *Id.* at 400. On appeal, the Third Circuit disagreed and reversed, stating that:

Trinity violated the statute by failing to test for asbestos and notify Pli-Brico of the results. Given this failure, Pli-Brico and its employees could not adequately prepare for the job or arrange for protection to guard against the threat of asbestos exposure. This is the failure which forms the basis for the violations, and not the subsequent exposure suffered by Pli-Brico’s employees. As such, the question is whether, as a result of the failure to test and notify, it was possible that an accident could occur in which it was substantially probable that death or serious physical harm would result. [Citations omitted]. Given that the violations made it possible that workers could unwittingly stumble into large amounts of asbestos without adequate protection, there was no need to show that Pli-Brico employees suffered any actual exposure to asbestos, much less the “significant exposure” that the ALJ required, in order for the Secretary to show that a serious injury could result. Given the “detrimental health effects” that can result from exposure, 51 Fed. Reg. 22,612, 22,615 (June 20, 1986), the failure to test for asbestos in those situations in

which it is presumed to be present (and, given the failure to test, the concomitant failure to communicate the results of any tests) is unquestionably a “serious” violation.

Id. at 401 (emphasis added).

Based upon the foregoing, I find that the violations in this case were serious, notwithstanding Bayway’s after-the-fact mock testing and the results of that testing. In reaching this finding, I have carefully considered Respondent’s arguments and the cases it has cited. However, I agree with the Secretary that Bayway’s reliance on the cases it cites is misplaced. S. Reply Brief, pp. 15-19. I also agree with the Secretary that Bayway’s attempts to distinguish *Trinity*, and its request that the holding in that case be “narrowly construed,” should be rejected. S. Reply Brief, pp. 13-15. Moreover, I disagree with Respondent’s suggestion that *Dec-Tam* does not support the Secretary’s position. R. Reply Brief, pp. 7-8. In view of the evidence of record, and the cases and statements from the standard’s preamble cited by the Secretary, the violations in this case are affirmed as serious. The parties’ arguments with respect to Respondent’s mock testing and the results of that testing are addressed *infra*, as I find that testing to be relevant to the penalties to be assessed in this matter.

Whether the Proposed Penalties are Appropriate

The Secretary has proposed a penalty of \$2,500.00 for each citation item, with a grouped penalty of \$2,500.00 for Items 6a and 6b, for a total proposed penalty of \$22,500.00. The Commission is the final arbiter of penalties, and, in determining an appropriate penalty, the Commission must give due consideration to the gravity of the violation and to the employer’s size, history and good faith. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). The gravity of the violation is generally the most important factor. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation’s gravity depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood any injury would result. *J.A. Jones Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

As to the likelihood of injury, Respondent points to its mock testing as evidence that the cited work resulted in no exposure to asbestos. The Secretary disputes the validity of the testing, noting the testimony of Mr. Gray, Bayway’s plant supervisor. Mr. Gray testified that he was on the team that investigated the asbestos incident and that he and the rest of the team decided to

conduct the mock testing of the subject sleeve; this resulted from a September 28 meeting at which the team members and Messrs. King, Dovel and Wilk discussed the incident.²⁷ Mr. Gray also testified he coordinated the testing and developed a protocol based on the activities that occurred and on his consultations with Bayway's IH, with New States (the refinery's on-site asbestos abatement contractor), and with Tiger Environmental (the entity that monitors air quality when New States performs abatement work). Mr. Gray described the testing itself, which took place in an open field. The sleeve was set on "pipe horses" 2 to 3 feet off the ground, and scaffolding was set up around the work area, which was then wrapped completely in thick plastic and treated as a regulated area. Roy Tarnowsky, a Bayway soldering supervisor, showed the New States employees how to operate the equipment they used before the testing began.²⁸ During the testing, one person used a hammer and chisel to chip the mastic, to simulate Mr. King's work. After a pause of 15 minutes, another person used a pneumatic saber saw, or reciprocating saw, to simulate the cutting work the contractors did. After another 15-minute pause, a third person used a torch to cut the sleeve, cutting on both the chipped area of the sleeve and the coating material, to simulate Mr. Dovel's work. Each individual wore a monitor as he worked, and, for each activity, a second and a third monitor was set up inside and outside the enclosure, respectively. Each activity was monitored for 30 minutes, and the New States employees all used appropriate PPE to perform the mock testing work. (Tr. 607-35; CX-2; RX-5, p. 2, RX-7, p. 5).

The Secretary's concerns about the mock testing are set out in her briefs. S. Brief, pp. 59-60, S. Reply Brief, pp. 19-20. I have considered them all and am not persuaded the mock testing was invalid. For example, the Secretary notes that Bayway presented no one with first-hand knowledge of the testing.²⁹ However, Mr. Gray interviewed Messrs. King and Dovel about the work they did, and he consulted with Bayway's IH and with New States and Tiger

²⁷CX-2, Mr. Gray's notes from the meeting, shows the individuals who were present and indicates the work activities Messrs. King, Dovel and Wilk had performed. Mr. Gray testified he interviewed both Mr. King and Mr. Dovel about their work activities. (Tr. 627).

²⁸New States employees performed the work activities during the mock testing. (Tr. 613).

²⁹Mr. Gray believed Mr. Tarnowsky was present for at least part of the mock testing, but he could not "say with 100 percent certainty" that was the case. (Tr. 623-27).

Environmental, the companies Bayway normally used, to develop a protocol for the mock testing. Further, while the mock testing work was done above ground, and not in an excavation, the mock testing area was enclosed totally in plastic; this persuades me, as Mr. Gray indicated, that any levels monitored in the enclosure would likely have been higher due to the enclosure.³⁰ (Tr. 635). As to the use of a saber saw, Mr. Gray testified that saw created “more aggressive” results than the milling machine used by the contractor would have as a milling machine is a slow-rotating device. (Tr. 610, 615). The Secretary also notes there was no debris on the ground during the mock testing, like in the excavation, and that Mr. Gray was unaware Messrs. King and Dovel had to lay down in the excavation to do part of their work. (Tr. 41-42, 114, 628, 633). While it is possible these factors might have affected the results, I am not convinced they are sufficient to render the testing invalid. *See* footnote 32. I am also unconvinced that the testing results were affected by the possibility that the torch cutting on the sleeve might not have been all the way around the sleeve. (Tr. 630). The mock testing cutting was done for the same amount of time as the cutting work in the excavation, and the mock testing cutting was also done on both the coating and the chipped area of the sleeve, as occurred in the excavation. (Tr. 613-14).

In addition to the above, I observed the demeanor of Mr. Gray on the witness stand, and I found him to be credible and convincing. His testimony was also supported by other evidence in the record. For example, Messrs. King, Dovel and Platt all indicated they had been at the September 28 meeting, as shown by CX-2 and as Mr. Gray stated, and Mr. King said he had discussed his work at the site at that meeting. (Tr. 63-64, 85-87, 130, 178-79). Further, Mr. Gray testified that he sent out RX-6, an e-mail about the proposed mock testing, to a number of people and asked for their comments and suggestions; Mr. Platt agreed he had received the e-mail but said he had provided no input. (Tr. 144-46, 179, 610-12). Finally, the reports of the results set out the work activities and time periods Mr. Gray described. *See* R-5, R-7. I credit Mr. Gray’s testimony about the mock testing.

Turning to the results themselves, page 1 of RX-5, Bayway’s February 15, 2007 Negative Exposure Assessment, states that “[t]he asbestos fibers-in-air sampling resulted in concentrations

³⁰I am not persuaded that the mock testing was affected by the fact that the part of the sleeve used in the testing had been left exposed in the scrap yard until the test. (Tr. 634).

below the limit of detection.” Respondent contends the testing results proved that asbestos fibers could not be released from the sleeve coating. R. Brief, pp. 20-21, R. Reply Brief, pp. 7-8. However, as the Secretary notes, Bayway itself admits that one area sampled showed a detectible level of fibers. R. Brief, p. 21. Specifically, page 3 of RX-5, which contains the analysis results from EMSL, shows 7.64 fibers/mm³ detected during the chipping work.³¹ Page 3 of RX-5 also states, at the bottom of the page, that the limit of detection is 7 fibers/mm³. Bayway notes that “because the detectible fiber count was so low, it was never determined if these fibers were actually asbestos.” R. Brief, p. 21. I agree with the Secretary that Bayway’s failure to determine whether the fibers were asbestos, particularly since the sleeve coating was found to contain asbestos, is no reason to conclude that no asbestos was released during the cited work and that there was no exposure to asbestos fibers. Respondent’s contention is rejected, and I find it more likely than not that asbestos fibers were released during the cited work and that exposure to asbestos occurred.³²

Due to the low levels of fibers detected, I find that the likelihood of injury was low. As to the other gravity factors, it is clear from the record that no precautions were taken against injury; it is also clear the cited work was for a relatively short period, *i.e.*, about a half hour for the chipping work and another half hour for the torch-cutting work. As to the number of employees, the three employees working in the excavation on September 10 were plainly exposed to the cited conditions, as were others in the immediate area at that time; according to Mr. King, the total number of employees, including supervisors, was about 12. (Tr. 31-32). I therefore agree with the

³¹The EMSL results show a very small amount of fibers/cc for all of the monitored areas; however, the bottom of the report states that “[t]he laboratory is not responsible for data reported in fibers/cc, which is dependent on volume collected by non-laboratory personnel.”

³²In so finding, I have considered Bayway’s argument that the sleeve coating here is the same material as that exempted from coverage; 29 C.F.R. 1926.1101(a)(8) exempts “asbestos-containing asphalt roof coatings, cements and mastics.” R. Brief, p. 19, R. Reply Brief, p. 8. However, nothing in the record supports a conclusion that the sleeve coating is “the same” as the exempted roofing materials; in this regard, I note that the proponent of an exemption must prove that it applies. There is evidence that tar-like materials and mastics do not release asbestos fibers as easily as other materials that contain asbestos (*see, e.g.*, Tr. 355-56; CX-18, p. 4). Regardless, the coating in this case did release asbestos fibers, based on my findings *supra*.

CO that although the severity of the violations was high, in that employees were exposed to asbestos and no precautions were taken, the probability of injury was “lesser,” due to the short amount of time the work occurred, the relatively few employees exposed, and the low levels of fibers detected.³³ (Tr. 217-19). I also agree with the CO that no adjustments should be made for size or history; the employer has over 250 employees, and it had received serious citations within the past three years. (Tr. 220-22).

As to good faith, it is clear that Bayway failed to test the sleeve coating before proceeding with the work at the site. However, the record shows that the failure to test the coating was due not to any intent to evade the standard’s requirements but to a lack of training that would have alerted employees that coating on underground pipes can contain asbestos. (Tr. 65-70, 122-28, 149, 505, 534, 574, 586, 591-93). The record also shows that Bayway had procedures in place that required New States, its abatement contractor, to abate any asbestos found on its premises that could pose a hazard to employees. (Tr. 69, 506, 518-19, 524, 586). Further, I find that, if Bayway had provided the proper training, its employees would have been able to identify the sleeve coating as possibly containing asbestos and Bayway would have had the coating tested and had New States abate the condition before work on the sleeve began. (Tr. 69, 540-41, 556-57, 586). This finding is supported by the fact that, after learning the subject sleeve coating contained asbestos, Bayway had New States remove the coating on the heating oil line that ran parallel to the gas line because the two coatings looked the same. (Tr. 536, 582-83, 594-95). Finally, I note that after the gas line sleeve coating incident, Bayway investigated the incident and arrived at certain recommendations, such as the need for further training as to identifying ACM and testing unknown materials; it also conducted its mock testing in a good faith effort to determine if employees had been exposed to asbestos and to allay concerns in that regard.³⁴ (Tr. 609; CX-1, CX-3). On the basis of the record, I conclude that Respondent is entitled to credit for good faith in

³³The CO’s specific testimony was that because no contemporaneous air monitoring was done, OSHA used its discretion and determined the probability to be “lesser.” (Tr. 219).

³⁴CX-3, the final version of the investigation report, indicates that additional training in identifying materials that may contain asbestos has occurred at the refinery. *See* CX-3, p.5.

this matter.³⁵ I find, accordingly, that a penalty of \$1,875.00 for each citation item is appropriate. A penalty of \$1,875.00 for each item is therefore assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Items 1 through 9 of Serious Citation 1 are AFFIRMED as serious violations. A penalty of \$1,875.00 is assessed for each item, for a total penalty of \$16,875.00.

/s/
Covette Rooney
Judge, OSHRC

Date: October 27, 2008
Washington, D.C.

³⁵An employer is entitled to credit for good faith where it has taken steps to provide a safe work environment. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1083 (No. 99-0018, 2003).