



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.

OSHRC Docket No. 07-1045

CONOCOPHILLIPS BAYWAY REFINERY,

Respondent.

**APPEARANCES:**

Gary K. Stearman, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Carol A. De Deo, Deputy Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Dennis J. Morikawa, Esq.; Thomas Benjamin Huggett, Esq.; Morgan, Lewis & Bockius LLP, Philadelphia, PA

For the Respondent

**DECISION AND ORDER**

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

**BY THE COMMISSION:**

ConocoPhillips Bayway Refinery (“Conoco”) operates a petroleum refinery in Linden, New Jersey. On September 10, 2006, Conoco employees performed work on an underground pipeline and, in doing so, chipped through asbestos-containing material (“ACM”). Thereafter, the Occupational Safety and Health Administration (“OSHA”) inspected the worksite and issued Conoco a serious citation under the Occupational Safety and Health Act of 1970 (“OSH Act” or “Act”), 29 U.S.C. §§ 651-678, alleging that Conoco violated various provisions of the asbestos in construction standard, 29 C.F.R. § 1926.1101. OSHA proposed a penalty of \$2,500 for each of the nine items in the citation, one of which grouped two violations for penalty purposes, for a total proposed penalty of \$22,500.

Following a hearing, Administrative Law Judge Covette Rooney affirmed all of the violations as serious, but reduced the penalty proposed for each citation item to \$1,875, for a total penalty of \$16,875. The only issues on review are whether the judge properly characterized the violations as serious and whether her penalty assessment was appropriate. For the reasons that follow, we reverse the judge's characterization determination, affirm all of the violations as other-than-serious, and assess a \$350 penalty for each citation item, for a total penalty of \$3,150.

### FINDINGS OF FACT

On July 26, 2006, Conoco noticed an oil sheen floating on rainwater that had accumulated on part of its property. Beginning on that date, Conoco excavated sections of its underground pipeline to determine whether there was a leak and, on September 6, 2006, confirmed the existence of a leak in a section of gas line installed during the early 1950's. The gas line was 14 inches in diameter and housed in a carbon steel sleeve, which was 20 inches in diameter and had a tar-like coating along its entire length.

On September 10, 2006, Conoco determined that a section of the sleeve had to be removed in order to install a new pipe into the sleeve. To accomplish this task, Conoco employees chipped a 3- to 5-inch band of the tar-like coating from around the sleeve, and then torch cut through the sleeve at the chipped area. The chipping and cutting operations each required approximately 20 to 30 minutes to complete and involved at least three employees. It is undisputed that the tar-like coating around the pipe's sleeve contained between 2 and 25 percent asbestos.

### ANALYSIS

#### I. CHARACTERIZATION

Section 17(k) of the OSH Act, 29 U.S.C. § 666(k), provides that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result" from the violation. "It is well-settled that . . . 'when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm possible, the employer has committed a serious violation of the regulation.'" *Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007) ("*Trinity*") (quoted case omitted). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1330-31,

2002 CCH OSHD ¶ 32,697, p. 51,645 (No. 97-0469, 2003) (consolidated) (quoted case omitted); *see Trinity*, 504 F.3d at 401. With respect to violations involving exposure to asbestos, the Secretary need not prove actual employee exposure in order to establish a serious violation, but she must demonstrate that the potential for harmful exposure existed. *Trinity*, 504 F.3d at 401 (concluding that Secretary need not show “employees suffered any actual exposure to asbestos . . . in order for the Secretary to show that a serious injury could result”); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2077, 1991-1993 CCH OSHD ¶ 29,942, pp. 40,917-18 (No. 88-523, 1993) (“*Dec-Tam*”) (“The finding of a serious violation does not require that the harm would have occurred, but that it could have occurred.”).

The asbestos in construction standard establishes permissible exposure limits (“PELs”) that trigger certain duties. 29 C.F.R. § 1926.1101(c). However, other duties under the standard—such as training and medical surveillance, as well as the requirement to institute particular work practices—are triggered not by the PELs, but by the type of work and materials involved. Occupational Exposure to Asbestos, 59 Fed. Reg. 40,964, 40,974-75 (Aug. 10, 1994) (final rule). In this regard, the standard divides asbestos work activities into four classes. 29 C.F.R. § 1926.1101(b) (defining each class). On review, it is undisputed that Conoco employees performed Class II work, which the standard defines as “involving the removal of ACM which is not thermal system insulation or surfacing material,” including, but not limited to, “the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics.” *Id.*

Contrary to the judge, we find that the Secretary failed to demonstrate that the violations stemming from the Class II work performed by Conoco employees are serious under section 17(k). To make the required demonstration, the Secretary must show that the work performed on the particular material involved in this case—the sleeve’s tar-like coating—could have generated, and exposed Conoco employees to, a harmful amount of asbestos. Rather than present any case-specific evidence, the Secretary relies exclusively on how the asbestos in construction standard and its regulatory history address Class II work. According to the Secretary, “[t]he asbestos [in] construction standard establishes that work operations involving ACM generate asbestos fibers that are hazardous even at levels that cannot be reliably measured, i.e., at levels below the PEL[s].”

Indeed, the Secretary stated in her rulemaking that she set both PELs at the lowest limits of feasibility for reliably measuring asbestos levels, and that employee exposure at or below the 8-hour time-weighted average PEL “leaves a remaining significant [health] risk.” Occupational Exposure to Asbestos, 59 Fed. Reg. at 40,966-67, 40,978-82, 41,035-39; Occupational Exposure to Asbestos, Tremolite, Anthophyllite and Actinolite, 53 Fed. Reg. 35,610, 35,611, 35,618, 35,624 (Sept. 14, 1988) (final rules). Nonetheless, the rulemaking did not establish how far below either PEL this risk extends. Moreover, unlike Class I work, which is presumed under the standard to result in employee exposure above the PELs,<sup>1</sup> Class II work is not presumed to generate any particular level of asbestos. Consequently, when considered in the context of this case, the standard and its regulatory history leave open the possibility that the Class II work performed by Conoco employees—chipping the sleeve’s tar-like coating—may not have had the potential to generate, and expose Conoco employees to, a harmful amount of asbestos.<sup>2</sup>

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<sup>1</sup> Class I work is defined as “activities involving the removal of [thermal system insulation] and surfacing ACM and [presumed asbestos containing material].” 29 C.F.R. § 1926.1101(b). According to 29 C.F.R. § 1926.1101(f)(2)(ii), “until the employer conducts exposure monitoring and documents that employees on that job will not be exposed in excess of the PELs, or otherwise makes a negative exposure assessment . . . the employer shall presume that employees are exposed in excess of the [PELs].” In this regard, the Secretary explained in the rulemaking that, “[b]ased on the record, . . . the prevalence of [thermal system insulation] materials and their likelihood of significant fiber release when disturbed, requires rigorous control methods which OSHA has set out in the standards.” Occupational Exposure to Asbestos, 59 Fed. Reg. at 40,976.

<sup>2</sup> In support of her position, the Secretary references the following statement in the final rule’s preamble: “The operations for which mandatory work practices are required would otherwise result in employee exposure that is significant.” Occupational Exposure to Asbestos, 59 Fed. Reg. at 40,969. With respect to the Class II work performed here, several factors preclude our reliance on this statement for the purpose of determining whether the violations are serious under the Act. OSH Act § 17(k), 29 U.S.C. § 666(k). Under the standard, Class II work refers to “activities involving the removal of [any variety of] ACM” except thermal system insulation or surfacing material, “ACM” is broadly defined to include “any material containing more than one percent asbestos,” and “asbestos” is defined as including numerous asbestos types. 29 C.F.R. § 1926.1101(b). Given the wide range of materials covered by Class II work, this singular statement in the preamble does not create a presumption that Class II work always has the potential to generate, and expose employees to, a harmful amount of asbestos. Moreover, as we previously discussed, the rulemaking did not establish how far below the PELs the health risks associated with asbestos exposure extend.

The Secretary maintains that the Commission should affirm all of the violations here as serious based on the Third Circuit's decision in *Trinity*.<sup>3</sup> See *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (noting that where it is probable decision will be appealed to certain circuit, Commission generally applies law of that circuit). The record in *Trinity* established that employees removed a blanket of thermal system insulation containing 5 percent asbestos from a brick wall. *Trinity*, 21 BNA OSHC 1559, 1560-63, 2004-09 CCH OSHD ¶ 32,923, pp. 53,573-76 (No. 05-0773, 2006) (ALJ) (discussing factual circumstances underlying alleged violations), *rev'd on other grounds*, 504 F.3d 397 (3d Cir. 2007). The court characterized the employer's violations of the asbestos in construction standard as serious, concluding that the violations "made it possible that workers could unwittingly stumble into large amounts of asbestos without adequate protection." *Trinity*, 504 F.3d at 401. In contrast to the work that Conoco employees performed on the sleeve's tar-like coating, the work activity at issue in *Trinity* constituted Class I work and, therefore, was presumed to result in employee exposure above the PEL. 29 C.F.R. § 1926.1101(b), (f)(2)(ii). As such, our characterization analysis of the violations stemming from the Class II work that Conoco employees performed is neither directly controlled by, nor at odds with, the Third Circuit's decision in *Trinity*.<sup>4</sup>

In these circumstances, we conclude the Secretary has not established that Conoco's violations of the asbestos in construction standard can be characterized as serious under the Act.

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<sup>3</sup> In addition to *Trinity*, the parties were asked in the briefing notice to consider the Commission's decision in *Duquesne Light Co.*, 11 BNA OSHC 2033, 2038-39 (No. 79-1682, 1984), and the Ninth Circuit's decision in *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). Discussion of the latter two cases is unnecessary in order to resolve the issue before us.

<sup>4</sup> The Secretary's reliance on the Commission's characterization in *Dec-Tam* of an asbestos monitoring violation as serious is similarly unpersuasive. That case was decided under an earlier version of the general industry asbestos standard, 29 C.F.R. § 1910.1001 (1987), and the material being removed was thermal pipe insulation described as asbestos-containing "pipe lagging." *Dec-Tam*, 15 BNA OSHC at 2078, 2080, 1991-93 CCH OSHD at pp. 40,918, 40,920. The monitoring results in *Dec-Tam* established that employee exposure exceeded the PEL, essentially foreshadowing evidence cited in the rulemaking for the current asbestos in construction standard showing that removal of asbestos-containing pipe lagging may generate asbestos levels above the PEL and comprises what is now considered Class I work. *Id.* at 2078-79, 1991-93 CCH OSHD at pp. 40,918-19; Occupational Exposure to Asbestos, 59 Fed. Reg. at 40,997.

In reaching our conclusion, we acknowledge the Secretary's statement 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." Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22,612, 22,615 (June 20, 1986) (final rules); *see Bldg. & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988). But for the reasons discussed above, we are compelled by the particular facts of this case and the standard's regulatory history to affirm these citations as other-than-serious.<sup>5</sup>

## II. PENALTY

A penalty "of up to \$7,000" may be assessed for a violation "specifically determined not to be of a serious nature." OSH Act § 17(c), 29 U.S.C. § 666(c). In assessing a penalty, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." OSH Act § 17(j), 29 U.S.C. § 666(j). When evaluating gravity, typically the principal factor, the Commission considers "the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201, 2004-09 CCH OSHD ¶ 32,880, p. 53,231 (No. 00-1052, 2005).

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<sup>5</sup> Following OSHA's inspection in this case, contractors hired by Conoco conducted mock testing intended to replicate the working conditions that existed on September 10, 2006. Conoco argues that this mock testing established that "no breathing zone exposure to any [asbestos] fibers occurred." However, the Secretary challenges whether the mock testing performed for Conoco accurately reflected the working conditions that existed on the day in question. Given the Secretary's failure to make a *prima facie* case for characterizing the violations as serious, we need not address these arguments.

Commissioner Thompson agrees that it is not necessary to reach the issue of the validity of the mock testing. Assuming the tests are valid, out of the nine air monitoring samples taken during the mock testing, the four personal breathing zone samples measured no quantity of asbestos fibers above the limit of detection, and only one of the five area samples measured a quantity of fibers that was narrowly above the limit of detection. This sample converted to a measurement of 0.007 fibers/cc over a 30-minute period, which may not even exceed ambient background levels. *See* OSHA Interpretation Letter from Assistant Secretary Charles N. Jeffress to William L. Dyson (July 23, 1999) (stating "the Agency cannot make the general statement that any exposure above ambient background levels presents a significant risk").

Neither party disputes the judge's determination that Conoco is not entitled to a reduction in penalty for business size or prior history but is entitled to a reduction for good faith. With respect to gravity, we note the judge found that about twelve employees—three of whom worked in the excavation—were exposed on September 10, 2006 to the cited conditions. The judge, however, appears to have based this finding on testimony that discussed the number of employees working near the excavation on the preceding day. This same witness later testified that five or six employees, and two supervisors, worked in or near the excavation on September 10, 2006. Accordingly, in assessing the gravity factor, we take into account that (1) a total of five or six employees, as well as two supervisors, were working in or near the excavation on the day in question; and (2) the Secretary failed to provide any evidence that, under the specific facts of this case, the employees in or near the excavation could have been exposed to harmful amounts of asbestos. Having considered all of the section 17(j) factors, we find that a penalty of \$350 for each citation item is appropriate.

ORDER

We reverse the judge's characterization determination, characterize each of the violations affirmed under Citation 1, Items 1 through 9 as other-than-serious, and assess a penalty of \$350 for each citation item, for a total penalty of \$3,150.

SO ORDERED.

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Chairman

/s/ \_\_\_\_\_  
Horace A. Thompson III  
Commissioner

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

Dated: June 15, 2010