United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-3104

SECRETARY OF LABOR, Complainant, v. VULCAN INDUSTRIAL CONTRACTORS CO., LLC, Respondent.	OSHRC Docket No. 16-0445

DECISION AND ORDER

COUNSEL:

LaTasha Thomas, Attorney, Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Complainant.

Gary W. Auman, Attorney, Dunlevey, Mahan & Furry, Dayton, OH, for Respondent.

JUDGE: Honorable John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Vulcan Industrial Contractors Co., LLC (Vulcan) was issued a citation with a proposed penalty of $3,825.00 under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[1] for an alleged serious[2] violation of OSHA's Asbestos standard, 29 CFR §1926.1101.

[1] The Secretary of Labor (Secretary) delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 65 Fed.Reg. 50017 (2000). The Assistant Secretary has promulgated occupational safety and health standards, *see e.g.*, 29 C.F.R. Parts 1910 and 1926, and has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§666(a), (b), (c). A serious violation is defined in the statute; the other two degrees are not. *Id.* §666(k).

The citation resulted from an OSHA investigation of Vulcan's asbestos abatement work at Alabama Power Company's William Crawford Gorgas Electric Generating Plant (Gorgas Plant), a multi-employer worksite located near Parrish, Alabama. After Vulcan contested the citation, the Secretary of Labor (Secretary) filed a formal complaint[3] with the Commission seeking an order affirming the citation and proposed penalty. A bench trial was subsequently held in Birmingham, Alabama. Pursuant to Commission Rule 90(a), after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings. For the reasons indicated *infra*, the citation and proposed penalty are **VACATED**.

II. BACKGROUND

For approximately two weeks prior to the OSHA inspection, up until October 1, 2015, Vulcan performed asbestos abatement work at the Gorgas Plant, a multi-employer worksite, pursuant to a contract with Alabama Power Company, where it was responsible for removing asbestos-containing material from the boiler pipe during pre-outage work. (Tr. 13, 14, 45-46, 145). There were no other contractors responsible for the asbestos removal or clean-up at the Gorgas Plant other than Vulcan (Tr. 20). In the days leading up to the OSHA inspection, Vulcan had been performing its work in an area of the Gorgas Plant known as Unit 10. (Tr. 47). Vulcan's work in Unit 10 mainly involved asbestos abatement of thermal system insulation that covered certain piping components of a boiler. (Tr. 49). Also as part of its work, Vulcan rented and erected the scaffolding, which was used not only by Vulcan, but was used on other shifts by other contractors at the worksite while performing work in Unit 10. (Tr. 87- 89, 90- 91, 100).

During its work at Unit 10, Vulcan employed specific engineering controls and work practices to remove and contain the asbestos-containing material. At trial, those controls and practices were described extensively by witnesses Allan Smith, Vulcan's Director of Industrial Maintenance, and George Rittenhouse, Vulcan's industrial hygienist at the worksite who maintained an office at the Gorgas Plant.[4] (Tr. 45, 124-125). Rittenhouse visited Vulcan's worksite at Unit 10 every two hours while Vulcan's employees were working on Unit 10. (Tr.

[3] Attached to the complaint and adopted by reference were the two citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d).

[4] Rittenhouse was employed by Safety Environmental Laboratories and Consultants and was hired by Vulcan to conduct industrial hygiene consulting in the area of asbestos (Tr. 116).

124-1257). The Secretary offered no evidence disputing Vulcan's use of the controls and practices to which these witnesses testified at trial, and the Court finds both witnesses were very credible.

According to Smith and Rittenhouse, which the Court credits, Vulcan's controls and practices fully contained and promptly cleaned up all asbestos-containing material that its work generated in Unit 10, without incident and in compliance with OSHA standards. (Tr. 56, 75, 108, 113-114, 125). Vulcan's controls and practices were consistent with Vulcan's overall asbestos abatement program, which Vulcan developed based on OSHA's standards related to asbestos abatement work. (Tr. 24, 56-57*; see also* Resp't's Exs. 1- 5).

Vulcan used a process known as "glove bag removal," which involved several steps to ensure containment of any asbestos-containing material. Vulcan workers adhered to the process despite dealing with high temperatures that required Vulcan's workers to wear a great deal of specialized personal protective equipment. (Tr. 122). Because of the different levels of elevation involved at Unit 10, Vulcan had to do much of its work from a scaffold, one level at a time. Vulcan performed its Unit 10 abatement work during a day shift that lasted from approximately 6:30 a.m. to 4:30 or 5:00 p.m. (Tr. 76).

At the beginning of each shift, the first step in Vulcan's glove bag removal process was the creation of a containment barricade around the specific areas of piping that it would be working on. (Tr. 52-54). In the second step, as an extra precaution, Vulcan covered and sealed in two layers of 6-mil polyurethane sheeting ("poly sheeting") everything inside the barricade, including any scaffold components such as floor planks, walls, and handrails. (Tr. 52-54, 113-114). Vulcan's use of the poly sheeting to cover everything essentially created a box of poly sheeting in which Vulcan's workers performed the abatement work during each shift. (*Id.*) In addition to the box it created at the level on which it was performing abatement work, Vulcan also used the poly sheeting to cover each level of the scaffolding planks, from the regulated area[5] all the way down to the bottom of the scaffolding. (Tr. 120).

In the third step, Vulcan attached and sealed the high-temperature glove bags to the specific areas of piping on which its workers would be working within the contained work area,

[5] "*Regulated area* means: an area established by the employer to demarcate areas where Class I, II, and III asbestos work is conducted, and any adjoining area where debris and waste from such asbestos work accumulate; and a work area within which airborne concentrations of asbestos, exceed or there is a reasonable possibility they may exceed the permissible exposure limit." 29 CFR §1926.1101(b).

which permitted Vulcan's workers to remove asbestos-containing material insulation from two to three feet of piping at a time. (Tr. 50-51, 108). All the necessary tools were also contained within the glove bags. (Tr. 123- 124). In the fourth step, all the actual removal activity was done inside of sealed bags. (Tr. 122-124). The glove bags also contained air-tight disposal bags, so that the asbestos-containing material would drop into the disposal bag, which was sealed before the glove bag was removed from the piping. (*Id.*) There was no opening to the outside air during removal of the debris bags from the glove bags or of the glove bags themselves. (*Id.*) Additionally, before removing the glove bags from the piping or taking away any debris bags, Vulcan's workers HEPA-vacuumed the inside of the glove bags and the pipe itself to ensure that all debris—no matter how small—was trapped and contained as required. (*Id.*)

At the fifth and final step, when Vulcan's work was finished at the end of each shift, Vulcan's workers deregulated the work area they had created at the beginning of the shift on each level of scaffolding. (Tr. 129- 130). This involved unsealing and removing any remaining glove bags, HEPA vacuuming the regulated work area and the materials used therein, as Vulcan's workers finished with each area. (Tr. 125-126, 129-130). It also involved folding, double-wrapping, sealing, and HEPA-vacuuming the poly material. (Id.) The wrapped and sealed material with the asbestos-containing material was then lowered—not dropped—to the floor below for disposal. (Tr. 126). The result was that Vulcan's controls and practices prevented any asbestos-containing material that might have somehow gotten outside the glove bag from escaping outside of the regulated area that Vulcan created and worked in on any given day. (Tr. 56).

On October 2, 2015, an OSHA inspection was conducted by Alpha Davis, an OSHA Compliance Safety and Health Officer, at the Gorgas Plant, after OSHA's Birmingham Area office received a complaint alleging the glove bags used by Vulcan were not adequate to contain and prevent the asbestos-containing material from migrating into the adjacent work area, allegedly exposing subcontractors working in the area of Unit 10 on the tenth floor of the facility (Tr. 13, 14) OSHA focused its inspection on Unit 10, where Vulcan had been performing work. As of October 2, Vulcan had removed and abated all but a very small section of the insulation with asbestos-containing material that was included within its scope of work at Unit 10. (Tr. 69). On the day of the inspection, Vulcan had not performed any work on Unit 10 since it cleaned up its work area and deregulated the area in which it had been working at approximately 5:00 p.m.

the day before. (Tr. 76). Between the conclusion of Vulcan's work on October 1 and the inspection on October 2, another contractor performed a full power wash-down of Unit 10. (Tr. 76-82). Vulcan had no employees performing any removal of asbestos-containing material during this period. The wash-down was not within the scope of Vulcan's work in Unit 10. (*Id.*)

The wash-down involved using a two-inch, high-pressure fire hose to spray the boiler, the boiler piping, and other boiler equipment also covered with thermal insulation with asbestos-containing material. (Tr. 76-82). A water nozzle was hooked to the hose, making the spray so strong that laborers performing the wash-down had to hold the nozzle over their shoulder and wrap the hose around their legs to control it and prevent it from whipping away. (*Id.*) The wash-down was performed on the boiler, all the piping around the boiler, and the floor below it, starting from the roof to the basement of Unit 10. (*Id.*) Not surprisingly, such wash-downs generate debris. Since the boiler piping and other boiler equipment being washed down was covered with thermal insulation with asbestos-containing material, the Court finds the preponderance of evidence shows the wash down debris included asbestos-containing material.

Further, the area was opened to other contractors, as well as Alabama Power, the entire evening of October 1 and in the hours prior to the inspection on October 2. (Tr. 89, 107). Thus, any debris generated in the area during that timeframe—i.e., from when Vulcan stopped work on October 1 and was no longer in control of the area after it had deregulated it—to when the OSHA inspection began on October 2—was not from Vulcan's work. (Tr. 89).

On the morning of the inspection, Vulcan's work was delayed because the Unit 10 boiler had been taken offline during the night of October 1. (Tr. 76, 80). Davis admitted there was no asbestos removal or clean-up work occurring when she arrived at the Gorgas Plant (Tr. 22). Therefore, Davis never identified any alleged deficiencies in the specific controls and practices that Vulcan indisputably employed while performing its abatement work in Unit 10 of the Gorgas Plant. (Tr. 20, 26).

Upon her arrival at the Gorgas Plant, Davis observed the scaffold that the crew had used the day before and noticed a small piece of debris that was embedded on one of the planks at one of the lower levels of the scaffolding (Tr. 13-14, 18). Davis, along with George Rittenhouse, collected three bulk samples, which were split between Vulcan and Davis (Tr. 13-14, Comp. Ex. 2). Davis sent the three bulk samples to the laboratory for testing (Tr. 19). The lab reported that

one sample labeled VI-2 was identified as 10% amosite, which is an asbestos-containing material (Tr. 19).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1), and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654(a)(2). Pursuant to that authority the Secretary promulgated the standard at issue in this case. However, "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir. 1978).[6]

Under the law of the Eleventh Circuit, the jurisdiction in which this case arose,[7] the Secretary will make out a prima facie case for the violation of an OSHA standard by showing "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (*citing ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013));

[6] The United States Court of Appeals for the Eleventh Circuit was established on October 1, 1981 pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995, when the United States Court of Appeals for the Fifth Circuit was divided into two circuits, the Eleventh and the Fifth. Immediately after the split, the Eleventh Circuit held in *Bonner v. City of Prichard, Alabama* that any opinion issued by the Fifth Circuit "as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit[.]" *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981). Therefore, *Central of Ga. R.R. Co.* is binding as precedent in the Eleventh Circuit.

[7] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Alabama, which is in the Eleventh Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court therefore applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

Florida Lemark Corp. v. Sec'y, U.S. Dep't of Labor, 634 F. App'x 681, 685 (11th Cir. 2015); *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Eller-Ito Stevedoring*, 567 F. App'x 803 (*citing ComTran Grp.*, 722 F.3d 1308).

Alleged Violation

The citation alleges Vulcan committed a serious violation of OSHA's Asbestos standard when "asbestos containing debris was identified on a scaffold after a removal activity had been completed." (Compl., Ex. A.) The cited provision of that standard mandates that employers engaged in asbestos abatement work use shall use the enumerated "engineering controls and work practices in all operations covered by this section, regardless of the levels of exposure[,]" including "[p]rompt clean-up and disposal of wastes and debris contaminated with asbestos in leak-tight containers except in roofing operations[.]" 29 CFR §1926.1101(g)(1)(iii).

Applicability of Standard

The Asbestos standard regulates asbestos exposure in all work as defined in 29 CFR 1910.12(b), including but not limited to the following:

> (1) Demolition or salvage of structures where asbestos is present;
> (2) Removal or encapsulation of materials containing asbestos;
> (3) Construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos;
> (4) Installation of products containing asbestos;
> (5) Asbestos spill/emergency cleanup; and
> (6) Transportation, disposal, storage, containment of and housekeeping activities involving asbestos or products containing asbestos, on the site or location at which construction activities are performed.

29 CFR §1926.1101(a). Vulcan does not dispute the applicability of the standard, which the Court concludes applies to the cited conditions.

Alleged Violation of Standard

Although one of the samples taken during the inspection tested positive for asbestos, that sample came from a small piece of debris that was embedded on one of the planks at one of the lower levels of the scaffolding, which had been covered and sealed in two layers of 6-mil poly sheeting while Vulcan was performing its asbestos abatement work at the Gorgas Plant. However, during the periods when Vulcan was not performing its asbestos abatement work, the

planks were uncovered and used by other contractors at the Gorgas Plant, including during the wash-down on the evening of October 1 and in the hours leading up to the inspection on October 2. Therefore, the Secretary has failed to establish by a preponderance of evidence that the sample with the asbestos-containing material came from Vulcan's asbestos abatement work. Thus, the Secretary has failed to prove by a preponderance of evidence that Vulcan was the employer that violated the cited standard.

Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "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, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). See also *Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). As the Commission noted in *Gilles & Cotting*, 3 BNA OSHC at 2003, the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. Here, the zone of danger presented was the exposure to the asbestos-containing material, which is undisputed. Further, Vulcan's work crew assigned by Vulcan to remove the asbestos as well as other trades were exposed to the asbestos-containing material. Therefore, the Secretary has established employee exposure to the cited conditions.

Alleged Knowledge of Violation

"The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (citing *ComTran* at 1307). "First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (citing *ComTran* at 1307–08). "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.* at 803-04 (citing *ComTran* at 1308).

Here, the Secretary has failed to establish that a Vulcan supervisor had either actual or constructive knowledge of the violation and failed to establish that Vulcan implemented an inadequate safety program. The Secretary argues with the exercise of reasonable diligence, Vulcan could have known that asbestos-containing debris was not being properly contained since the debris found by Davis in the work area was in plain sight. However, the Secretary failed to offer any evidence that the asbestos-containing material was in plain site after Vulcan deregulated its area of the worksite. To the contrary, the preponderance of evidence shows the asbestos-containing material resulted from the power washing that occurred after Vulcan deregulated the area and left the worksite. Therefore, the Secretary has failed to establish knowledge of the violation.

Thus, the Court concludes the Secretary failed to make out a prima facie case for the violation of the cited standard since he failed to show the cited standard was violated by Vulcan and failed to prove Vulcan knowingly disregarded the Act's requirements. *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED** and no civil penalty is imposed. **SO ORDERED**.

/s/
JOHN B. GATTO, Judge

Dated: March 7, 2017
Atlanta, GA