



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

DECISION AND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

In a June 15, 2010 Decision and Order, the Commission affirmed violations of the asbestos in construction standard, 29 C.F.R. § 1926.1101, alleged in a nine-item citation issued to ConocoPhillips Bayway Refinery under the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. §§ 651-678. The Commission characterized these violations as other-than-serious and assessed a penalty of \$350 for each citation item, for a total penalty of \$3,150. The Secretary appealed the case to the United States Court of Appeals for the Third Circuit, challenging the Commission’s characterization of the asbestos violations. The Third Circuit “vacate[d] the Order of the Commission, and remand[ed] to the Commission with the direction that it affirm the citations as ‘serious’ and reconsider the penalt[ies] for the violations in light of this opinion.” *ConocoPhillips Bayway Refinery*, No. 10-2893, slip op. at 18 (3d Cir. Aug. 16, 2011).¹

¹ We note that the Third Circuit identified the Commission as being “part and parcel of the Department of Labor.” *ConocoPhillips Bayway Refinery*, No. 10-2893, slip op. at 2. However, the Commission is an independent adjudicatory agency and, in contrast to the Occupational Safety and Health Administration, is not part of the Department of Labor. 29 U.S.C. § 661; *Martin v. OSHRC*, 499 U.S. 144 (1991).

In accordance with the Third Circuit’s order, we affirm as serious the violations of the asbestos standard alleged in Citation 1, Items 1 through 9. Also, we reconsider the penalties for these serious violations in light of the OSH Act’s statutory factors, which require the Commission to 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).

Here, neither party has disputed 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, the judge found that about twelve employees were exposed to the cited conditions. The judge based her finding on a witness’s testimony that concerned the conditions in existence the day before the events at issue here. This same witness also testified, however, that five or six employees, and two supervisors, worked in or near the excavation on the day in question. Thus, in assessing the gravity factor, we take into account that a total of up to eight employees were working in or near the excavation on that day. We also take into account the Third Circuit’s conclusions regarding the presumption of employee asbestos exposure during Class II work. *ConocoPhillips Bayway Refinery*, No. 10-2893, slip op. at 16-18. Accordingly, we find that \$1,775 is an appropriate penalty for each citation item, for a total penalty of \$15,975.

SO ORDERED.

_____/s/_____
Thomasina V. Rogers
Chairman

_____/s/_____
Cynthia L. Attwood
Commissioner

Dated: October 25, 2011