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.

MANSFIELD INDUSTRIAL, INC.,

Respondent.

OSHRC Docket No. 17-1214

ON BRIEFS:

Kristen Lindberg, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Peter J. Gillespie; Laner, Muchin Ltd., Chicago, IL
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

Mansfield Industrial, Inc. performs rust corrosion removal and prevention services on pipes at a Shin-Etsu Silicones of America, Inc. chemical plant in Freeport, Texas. In October 2016, two Mansfield employees were seriously injured when a pipe ruptured, releasing a hazardous chemical. Following an inspection, the Occupational Safety and Health Administration issued Mansfield a two-item serious citation. The first item, grouped for penalty purposes, alleges violations of the Process Safety Management (PSM) and Hazard Communication (HazCom) standards (Citation 1, Items 1a and 1b). The second item alleges a violation of a general industry personal protective equipment (PPE) standard (Citation 1, Item 2).

Following a hearing, Administrative Law Judge Sharon D. Calhoun affirmed all three violations and assessed the proposed $23,350 penalty. For the reasons discussed below, we affirm Items 1a and 1b and vacate Item 2.

BACKGROUND

Shin-Etsu produces organic silanes and their derivatives at its Freeport plant.[1] Because Shin-Etsu's plant is located near a marina, the saltwater in the air causes corrosion and imperfections in the paint on the plant's carbon-based steel pipes, bolts, and flanges.[2] Mansfield's work involves removing rust on the outside of these pipes, bolts, and flanges, as well as painting the pipes.[3] The company employs about 34 employees at the plant, including a safety representative, a site supervisor, sandblasters, painters, and helpers. The site supervisor's job duties include conducting weekly job hazard risk assessments of the work areas. In addition, each day he obtains a work permit from Shin-Etsu for the task his crew is going to perform that day.

One area of the plant has a closed-loop system of tanks and pipes containing trichlorosilane. On October 19, 2016, a two-person Mansfield crew was assigned to clean the carbon-based steel nuts and bolts on a stainless-steel pipe in this system. To perform this work, both employees wore respirators with HEPA filters, safety glasses, long pants, long sleeve shirts, and hearing protection. One of the crew members, who also wore a face shield, was using a power tool, specifically a pneumatic needle gun, to remove rust from a bolt when a portion of the pipe near the bolt ruptured. The pressurized pipe released more than 100 gallons of trichlorosilane into the air, which splashed on the employee's left hand, forearms, and hips. Both the employee and his partner inhaled the chemical as they ran away from the rupture and towards a safety shower. The employee who used the needle gun was evaluated overnight at a medical facility, and the other employee was released after being evaluated. Both employees suffered from inhalation exposure, and the employee splashed with trichlorosilane had chemical burns on several parts of his body.

DISCUSSION

The only issue on review for grouped Items 1a and 1b is whether the judge erred in declining to address Mansfield's argument that the PSM provision cited in Item 1a preempts the

[1] There is no dispute that the plant's processes are covered by OSHA's PSM standard.

[2] Many of the pipes in the plant, including the pipe that ruptured, are made of stainless steel, which does not corrode as much as pipes or components made of carbon-based steel; as a result, the stainless-steel pipes are generally not painted or cleaned by Mansfield, but their carbon-based components (e.g., bolts and flanges) are.

[3] Shin-Etsu contracted with K2 Industrial Services, Inc., for corrosion prevention and removal, and K2 provided its subcontractor, Mansfield, to perform the services. At the time of the hearing, Mansfield had been a contractor at Shin-Etsu's plant for three years.

HazCom provision cited in Item 1b.[4] For Item 2, the only issue is whether the judge erred in concluding that the Secretary met his burden of establishing the alleged PPE violation.

A. Items 1a (PSM) and 1b (HazCom)

The Secretary alleges in Item 1a that Mansfield violated a provision of the PSM standard, 29 C.F.R. § 1910.119(h)(3)(ii), by failing to assure that each of its employees was instructed in the known potential fire, explosion, or toxic release hazards related to the employee's job and the process, as well as the applicable provisions of the emergency action plan. The Secretary alleges in Item 1b that Mansfield violated a provision of the HazCom standard, 29 C.F.R. § 1910.1200(h)(1), by failing to provide its employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area.

In its post-hearing brief to the judge, Mansfield argued for the first time that the PSM provision cited in Item 1a preempts the HazCom provision cited in Item 1b. The judge declined to address this argument based on her finding that Mansfield had "waived its right to present any arguments regarding applicability" because (1) the parties stipulated in their joint pre-hearing statement that "[t]he cited standards are applicable to the worksite and to the work that the employees were doing at the time," and (2) Mansfield did not claim that the stipulation was made in error or that the HazCom provision was not to be part of the stipulation. The stipulation reads, "[t]he cited standards are applicable to the worksite and to the work that the employees were doing at the time [of the chemical release]."

At the outset, we reject the judge's conclusion that preemption cannot be invoked because the parties stipulated to the cited standard's applicability. Indeed, in raising the preemption defense, Mansfield is conceding the cited standard applies, but arguing that another, more specifically applicable standard *also* applies. 29 C.F.R. § 1910.5(c)(1) ("If a particular standard is specifically applicable . . . it shall prevail over any different general standard which might otherwise be applicable . . . ."); *see, e.g.*, *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2183-84 (No. 85-1388, 1989) (and cases cited therein) (explaining that general provision applying to all ladders

[4] Although Mansfield challenged the merits of these alleged violations in its petition for discretionary review, the Commission limited the briefing notice to Mansfield's preemption argument. Accordingly, the merits of Items 1a and 1b are not at issue before the Commission. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4 (No. 86-360, 1992) (consolidated) ("Ordinarily the Commission does not decide issues that are not directed for review.").

used in construction industry is preempted by specific provision applying to ladders used to exit trenches). In other words, as the parties stipulated, there is no dispute that the cited standard applies—the issue, for purposes of preemption, is whether that standard is effectively "displaced" by another standard that is *more* specifically applicable. *Cf. The Davey Tree Expert Co.*, 25 BNA OSHC 1933, 1937 (No. 11-2556, 2016) (vacating citation based on Secretary's failure to prove applicability of cited logging standard to line clearance work performed by employer). Accordingly, we find the judge erred in concluding the pre-hearing stipulation barred Mansfield from raising the preemption defense.

Long-standing Commission precedent holds, however, that regulatory preemption pursuant to § 1910.5(c)(1) is an affirmative defense that must be pleaded in the respondent's answer. *See, e.g., Spirit Aerosystems*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) ("[P]reemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer.") (citations omitted); *see also Safeway Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004) (explaining that specific standards function as an affirmative defense under the general duty clause); *Brand Energy Solutions LLC*, 25 BNA OSHC 1386, 1388 (No. 09-1048, 2015) (referring to preemption claim as an affirmative defense); *Vicon Corp.*, 10 BNA OSHC 1153, 1157 (No. 78-2923, 1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense), *aff'd*, 691 F.2d 503 (8th Cir. 1982) (unpublished). The Commission's Rules of Procedure also require a respondent to raise any affirmative defense in the answer, or "as soon as practicable," or risk being prohibited from raising the defense at a later stage in the proceeding.[5] 29 C.F.R. § 2200.34(b)(4). "As soon as practicable" means that the issue is raised with enough time for the opposing party to meaningfully respond. *See Field & Assocs., Inc.*, 19 BNA OSHC 1379, 1382 (No. 97-1585, 2001) (agreeing with judge that affirmative defense raised at hearing was not raised "as soon as practicable").

[5] The Commission's current rule governing affirmative defenses was last amended in 1992. At that time, the list of affirmative defenses, which had included preemption, was narrowed to "those most commonly pleaded in Commission proceedings"—namely, infeasibility, unpreventable employee misconduct, and greater hazard—because the Commission determined that "includ[ing] such matters as 'preemption' would heighten the possibility of it being seen as an exclusive listing and would tend only to confuse the *pro se* litigant." Rules of Procedure, 57 Fed. Reg. 41,676, 41,679 (Sept. 11, 1992) (Final Rule) (explaining 29 C.F.R. § 2200.34(b)(3)). While preemption is no longer specifically listed in the rule, the preamble comments demonstrate that preemption is still considered an affirmative defense, as corroborated by the Commission case law cited above.

Here, Mansfield failed to include preemption in its answer and did not raise the argument until its post-hearing brief, which was filed with the judge at the same time as the Secretary's post-hearing brief, with no reply briefs for either side. As such, we find that the company waived its ability to argue that the cited PSM provision preempts the cited HazCom provision.[6] Accordingly, we affirm Items 1a and 1b.

B. Item 2 (PPE)

The Secretary argues Mansfield violated a provision of the PPE standard, 29 C.F.R. § 1910.132(d)(1), because it allegedly failed to assess the Shin-Etsu plant to determine if hazards were present, or were likely to be present, which necessitated its employees' use of PPE. The judge affirmed the violation based on her finding that both Mansfield's site supervisor and its safety manager acknowledged in written statements they gave the OSHA compliance officer during the inspection that they had not done a PPE hazard assessment.[7]

Section 1910.132(d)(1) is a performance standard, which means that rather than specifying exactly what is required, the provision requires the employer "to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings,*

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[6] The parties were asked to brief whether the Commission should revisit its established precedent on regulatory preemption and find that it is similar to statutory preemption under section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1), which two Circuit Courts of Appeals have held is a jurisdictional issue. *See, e.g.*, *U.S. Air, Inc. v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) ("[P]reemption under [s]ection 4(b)(1) is not a matter of affirmative defense but is jurisdictional, properly raisable . . . without regard to whether it was suggested at the administrative hearing on the citation."); *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980) ("[A] section 4(b)(1) [preemption] claim can be raised initially on appeal or by the court sua sponte."). Upon consideration of the parties' arguments, we decline to revisit our established precedent holding that both § 1910.5(c)(1) preemption and section 4(b)(1) preemption are affirmative defenses that must be pleaded in the answer. *See, e.g.*, *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1803 (No. 93-54, 1996) (consolidated) (describing section 4(b)(1) preemption as an affirmative defense to be proved by the employer); *Lombard Bros., Inc.*, 5 BNA OSHC 1716, 1717 (No. 13164, 1977) ("It is well settled that the nature of section 4(b)(1) is not jurisdictional but exemptory and that the affirmative defense permitted by the section cannot be raised beyond the hearing stage of the proceedings."); *see also* Rules of Procedure, 51 Fed. Reg. 32,002, 32,021 (Sept. 8, 1986) (Final Rule) (including "exemption under 4(b)(1) of the OSH Act" in the list of affirmative defenses included in the 1986 revision to the Rules of Procedure).

[7] The site supervisor stated, "We did not do a PPE hazard assessment on this job site, but we've done one on other sites. I don't know why we didn't do one, a PPE assessment." Similarly, the safety manager stated, "We have done PPE hazard assessment[s] but not at this plant. I haven't done a PPE hazard assessment of this plant."

Inc., 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). To assist employers, OSHA has provided nonmandatory compliance guidelines for conducting a hazard assessment in Appendix B to Subpart I—the subpart that covers PPE. This guidance explains that to assess the need for PPE, employers should conduct a walk-through survey of the work areas to identify sources of hazards to employees, estimate the potential for injuries based on the information learned in the walk-through, and then select the appropriate PPE to help guard against possible injuries. *See* 29 C.F.R. pt. 1910, subpt I, app. B.

We find the record establishes that Mansfield did what is recommended in Appendix B. At the hearing, the site supervisor testified that he walks through the plant on a weekly basis to conduct a job hazard risk assessment (JHRA), then walks the facility every morning with a Shin-Etsu representative to look for safety issues before obtaining a work permit from Shin-Etsu for the work to be performed that day. According to the site supervisor, during these walk-throughs, he looks for pipes that are leaking or noisy, visually inspects the pipes, determines whether he can smell smoke or chemicals, listens for sounds that pipes have ruptured, looks for tripping hazards, and assesses whether puddles of water are present. He also explained that after the walk-throughs, he talks to the crew about the tools they have in the area and about wearing respirators and using appropriate cartridges for the work being done. At that point, he obtains the work permit from Shin-Etsu for the task the crew is going to perform.

To resolve the inconsistency between this testimony and the statements the site supervisor and the safety manager (who did not testify at the hearing) previously gave the CO, the judge made a credibility determination in favor of the latter. Based on her observations of the site supervisor's demeanor, she found his testimony unreliable where contradicted by his prior statements and other unspecified evidence in the record. According to the judge, the site supervisor "appeared defensive and very concerned. His testimony was sometimes confusing, as if he were trying to be sure he was saying the right thing to please his employer, or to not be blamed for the incident."

The Commission typically defers to a judge's demeanor-based credibility determination unless it is inconsistent with the record. *See, e.g., L & L Painting Co.*, 23 BNA OSHC 1986, 1990 (No. 05-0055, 2012) (finding no basis to disturb judge's credibility findings because he analyzed witnesses' demeanors, including their facial expressions and body language); *see also Anderson v. Bessemer City, NC*, 470 U.S. 564, 575 (1985) (appellate court can overturn trial court's demeanor-based credibility determinations that are inconsistent with the weight of the

documentary evidence); *Aerospace Testing Alliance*, No. 16-1167, at 6 (OSHRC 2020) (rejecting judge's credibility findings that were not supported by the record). Here, we find the judge's credibility determination is inconsistent with documentary evidence that was not disputed by the Secretary and bears directly on the compliance issue, but was not considered by the judge—the JHRA Mansfield completed for the whole plant on October 17, 2016, and the work permit Mansfield received from Shin-Etsu on October 19, 2016.

The JHRA requires the person completing the form to give a risk rating to applicable items on a list of hazards identified, which includes hazards such as walking/working surfaces, respiratory exposures, and chemical spills, as well as check a list of assessment and hazard controls, which includes PPE such as flame retardant and chemical resistant clothing, safety gloves, safety glasses, and respiratory protection. Each JHRA is signed and dated by Mansfield's site supervisor, as well as each Mansfield employee on each day that the employee worked. We find the JHRA in evidence here—completed in full and signed by the site supervisor just two days before the incident—stands as proof that Mansfield evaluated the hazards present at the plant and determined what PPE was necessary to protect employees against those hazards.

Similarly, the work permit requires the person completing it to check the applicable boxes for required safety equipment, including safety glasses, face shield, and respirator. The permit reflects that its signatures—here, that of the Shin-Etsu supervisor and Mansfield's site supervisor—confirm that "[t]he above job has been reviewed with person(s) accepting this permit and the job site visited by all parties. All personnel assigned to this job understand the above." The language on the permit and the two signatures demonstrate that both supervisors walked the site before checking off which PPE was required. Again, this document—signed on October 19, 2016, the day of the accident—stands as proof that Mansfield, with Shin-Etsu, assessed the hazards of the job and determined what PPE would be required for the work to be performed that day.

In short, both documents not only show that the company did, in fact, assess the worksite to determine if hazards were present requiring the use of PPE,[8] but cast sufficient doubt on the judge's decision to disregard the site supervisor's hearing testimony—which is consistent with

[8] We note that 29 C.F.R. § 1910.132(d)(2), which was not cited by the Secretary here, requires a written certification that a hazard assessment has been performed. This certification must identify the workplace evaluated, the person certifying the performance of the evaluation, and the date of the assessment, as well as identify the document as a certification of hazard assessment. The JHRA appears to satisfy the requirements of this standard.

these documents—based on his demeanor. We therefore overturn the judge's credibility determination. *See, e.g.*, *Anderson*, 470 U.S. at 575; *Aerospace Testing Alliance*, No. 16-1167, at 6 (OSHRC 2020). In addition, we find this documentary evidence sufficient to overcome any weight that might be afforded to the contradictory statements given to the CO.

Accordingly, for the foregoing reasons, we affirm Citation 1, Items 1a and 1b, and vacate Item 2.[9]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: December 31, 2020

[9] Mansfield does not challenge either the characterization of, or the $12,675 penalty assessed for, Items 1a and 1b, and we see no reason to disturb the judge's findings on these issues. *See*, *e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where characterization and penalty were not in dispute).

Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Mansfield Industrial, Inc., Respondent.	OSHRC Docket No.: 17-1214

Appearances:

Josh Bernstein, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Peter Gillespie, Esq.
Laner Muchin, Ltd., Chicago, Illinois
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Mansfield Industrial, Inc. (Mansfield) was engaged to provide rust corrosion removal and prevention services on pipes containing highly hazardous chemicals, gases and flammables at the Shin-Etsu Silicones of America, Inc. (SESA or Shin-Etsu) chemical plant located at 5650 East Highway 332, Freeport, Texas. While removing pipe corrosion on October 19, 2016, two Mansfield employees received chemical burns and inhaled toxic chemicals when the pipe ruptured causing a release of trichlorosilane (TCS). Following the incident, on November 15, 2016, the Occupational Safety and Health Administration (OSHA) initiated an inspection at the jobsite. As a result of the inspection, on April 21, 2017, OSHA issued a Citation and Notification of Penalty (Citation) to Mansfield alleging three serious violations of standards promulgated under the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651 - 678.

The Secretary contends Mansfield violated the standard found at 29 C.F.R. § 1910.119(h)(3)(ii) (Item 1a) by not informing employees of the hazards associated with a covered

process containing over 5,000 pounds of trichlorosilane, and violated 29 C.F.R. § 1910.1200(h)(1) (Item 1b) by not providing employees with effective information and training on hazardous chemicals in their work area. The Secretary also contends Mansfield did not assess the workplace to determine if hazards were likely to be present necessitating the use of personal protective equipment, as required by 29 C.F.R. § 1910.132(d)(1) (Item 2). The Secretary proposed a total penalty of $25,350.00 for the three alleged violations.

Mansfield disputes the allegations, contending its employees received training and information on the chemicals and associated hazards, and that it conducted a hazard assessment.

The Court held a hearing in this matter on November 6, 2017, in Houston, Texas. The parties submitted post-hearing briefs on January 19, 2018.

For the reasons that follow, the Court **AFFIRMS** Items 1a, 1b and 2 of Citation No. 1 and **ASSESSES** the penalty as proposed in the total amount of $25,350.00.

JURISDICTION AND COVERAGE

Mansfield timely contested the Citation and Notification of Penalty on May 16, 2017. The parties stipulate the Commission has jurisdiction over this action and Mansfield is a covered business under the Act (Tr. 14, 17-18). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Mansfield is a covered employer under § 3(5) of the Act.

BACKGROUND

Mansfield performs corrosion removal and prevention services as a contractor at Shin-Etsu's Freeport, Texas plant. At the time of the hearing it had been performing those services at the plant for three years and continued to provide those services through the week of the hearing (Tr. 35). Shin-Etsu produces organic silanes and their derivatives in its chemical plant. The Freeport plant includes several buildings at various locations on the site (Tr. 50-52; Exhs. C-25 and C-25a). The Freeport plant is located in a marina area where salt water in the air causes corrosion and imperfections in the paint on carbon-based pipes, bolts and flanges in the plant (Tr. 45). Shin-Etsu contracted with K2 Industrial Services, Inc. (K2) for corrosion prevention and removal services at the Freeport plant. K2 provided its subcontractor, Mansfield, to perform the corrosion services.

Shin-Etsu's processes are covered under OSHA's Process Safety Management Standards (PSM) found in Part 1910, Subpart H- Hazardous Materials, providing in § 1910.119 for process

safety management of highly hazardous chemicals. In order to gain entry onto the Shin-Etsu plant, visitors and employees are required to watch a Safety Orientation Video, complete a Plant Orientation Validation Test answering all questions correctly, and sign a document listing Shin-Etsu's 26 General Safety Rules (Tr. 56; Exhs. C-29, C-30). The Shin-Etsu video describes the chemicals used at the plant and their associated hazards (Exhs. C-29, C-30). Pursuant to Shin-Etsu's policies, Mansfield's employees were required to view the video, successfully pass the test and sign for receipt of Shin-Etsu's safety rules.

The rust corrosion services provided by Mansfield were for the entire plant (Tr. 48). Mansfield was to provide corrosion removal services for rust on the outside of the pipes, bolts and flanges and also paint the pipes. Mansfield's employees did not handle the materials inside the pipes and were not asked to open pipe valves or to do anything involving the operation of the process (Tr. 110). The pipes in the piping system were not labeled to identify the chemicals inside (Exh. C-25). The piping system was not shut down and pipes were pressurized when Mansfield employees removed corrosion (Tr. 62, 63-64). The corrosion removal sometimes required sandblasting, pressure washing, and the use of a needle gun power tool to remove rust from carbon-based pipes and bolts (Tr. 36-37, 42-43; C-25, p. 20).

Mansfield employed approximately 34 employees at the Shin-Etsu plant. These employees included Safety Representative Joseph Ayala, Supervisor Joseph Gonzales, Sandblasters, Painters, and Helpers (Tr. 77; Exhs. C-21, C-22, C-31, C-32).

Gonzales had been employed by Mansfield for approximately ten years and had worked on and off at the Shin-Etsu plant for eight years (Tr. 148, 175; Exh. C-22). His job title is Industrial Sandblaster and Painter Supervisor (Tr. 35). In his statement taken by the CSHO during the inspection, Gonzales said Mansfield had been onsite for two years doing industrial sandblasting, painting and corrosion control; and that he did not inform employees of the types of chemicals on the jobsite or explain the hazards they were exposed to because Mansfield never informed him of them. He did not train employees on Material Safety Data Sheets (MSDS). Gonzales also stated no personal protective equipment hazard assessment was done on the jobsite, although it had been done on other jobsites. His statement further provides that they "never informed the employees not to use power tools, but now we tell them." (Exh. C-22)

Mansfield used two crews supervised by Gonzales, at the plant. Each crew included two employees (Tr. 91-92, 175). The crew which included [redacted], sandblaster and painter, and

[redacted], painter helper, worked at the Shin-Etsu plant at the 100 Tank Farm Area where the incident occurred. [redacted] and [redacted] each provided statements that they were not aware of the chemicals and hazards to which they were exposed on the site (Exhs. C-31, C-32).[10] [redacted] and [redacted] had viewed the Shin-Etsu video, successfully completed the test and signed for receipt of the general safety rules on June 16, 2016, and June 30, 2016, respectively (Exhs. C-30, C-31, C-32). Supervisor Gonzales testified he was familiar with certain chemicals in certain areas, but he did not know what chemicals were inside any specific pipes (Tr. 53-54). He testified he views the Shin-Etsu video every year (Tr. 54).

As a part of his job duties Gonzales conducts weekly job hazard risk assessments (JHRA) of the work areas (Tr. 85, 87). Prior to the incident Gonzales did not include pipe integrity analysis in the JHRA (Tr. 87). Gonzales walked through the Tank Farm Area in the mornings before he handed out assignments (Tr. 160-161). When walking through the work area, according to Gonzales, he looks for pipes that are leaking or are noisy, and for whether he can smell smoke or chemicals and listens for sounds that pipes have ruptured. He also looks for tripping hazards and assesses whether puddles of water are present (Tr. 161). During his visual inspection of the pipes Gonzales assesses the integrity of the pipes by considering for example the thickness of the pipe (Tr. 162). The JHRA he conducted before the accident was done on October 17, 2016 (Tr. 118-119; Exh. C-15).

Gonzales testified that after walking through the facility with the Shin-Etsu representative, visually inspecting the work to be done, and getting the permit at the end of the walk through, he goes to the crew and asks the guys what tools they have in the area where they are working, and once they tell him what they have, he gets a permit for them and then they go to work (Tr. 167, 168). The permit for the work being performed on the day of the incident did not provide for the isolation of energy or hot work (Exh. C-28). Gonzales testified that he talks to the crew about wearing respirators and using appropriate cartridges for the work being done (Tr. 167-168). According to Gonzales, he told [redacted] and [redacted] which tools to use on the day of the accident and did not tell them to use the pneumatic air gun (Tr. 181).

[10] [redacted] and [redacted] did not testify at the hearing, as neither party was able to locate them. The statements of [redacted] and [redacted] taken by Safety and Health Compliance Officer Simon Cabello were offered into evidence by the Secretary and admitted pursuant to Rule 801(d)(2) of the Federal Rules of Evidence, over Mansfield's objection.

On October 19, 2016, [redacted] was cleaning the carbon steel bolts on a pipe with a needle gun when the stainless-steel pipe ruptured (Tr. 94, 163, 163, 164; Exh. C-32). The pipe ruptured two inches above the nameplate (Tr. 165; C-24, p. 3). It was under pressure while [redacted] was cleaning the bolts (Tr. 62, 63-64). When the pipe ruptured, it released tricholorosilane, which splashed on [redacted] causing chemical burns to his left hand, forearms and hips (Exhs. C-2, C-23, C-32). [redacted] and [redacted] fled the area after the rupture (Tr. 94). [redacted] stated that they were getting ready to work and he saw [redacted] running towards him shirtless "and before he reached me, the fog was right behind him and we left the area, and the fog caught up to us and we inhaled it. Next I pulled the safety shower" (Tr. 95-96; Exh. C-23). At the time of the incident, [redacted] was wearing a HEPA filter half-face respirator, safety glasses, a face shield, overalls, long sleeve shirt and hearing protection. (Exh. C-32). [redacted] also used a respirator with HEPA filters and wore gloves, pants, long sleeve shirt, safety glasses and ear plugs (Exh. C-31).

Supervisor Gonzales was not at the site when the incident occurred (Tr. 67, 68). He had gone to the Shintech site located in front of Shin-Etsu (Tr. 68). According to Gonzales, there was no visual indication prior to [redacted] beginning work that the pipe would rupture (Tr. 166). He testified the pipe rupture was determined to be a result of [redacted] beating on the pipe with the pneumatic tool with a PSI of 128 (Tr. 166).

Shin-Etsu prepared an Event Observation Report relating to the incident. The report provides in relevant part:

> At 9:12 a.m. Robert Allen called in on the radio a vapor cloud release from the tank farm and observed a contract employee getting in the safety shower. The release was determined to be TCS (trichlorosilane) from the level indication gauge on TK-1052 . . . After evaluation onsite, two Manfields [sic] (K2 Industrial services) contract employees were transported to medical: first individual had chemical exposure to left arm and hip area with possible inhalation concerns. He was decontaminated in a safety shower for – 20 minutes. The second employee expressed concerns of possible inhalation exposure and was also transported to medical. (Second employee was not decontaminated in safety shower) . . .
>
> Mansfield employees were in the process of preparing piping in the area around TK-1052 for painting when the release occurred. The location of the release was on a level indication gauge (Schedule 10 stainless steel pipe). The Mansfield employee was working with an air tool (needle gun) in the area where the leak occurred.

(Exh. C-23, p. 1). [redacted] was evaluated overnight at a medical facility and [redacted] was released after being evaluated. Shin-Etsu notified OSHA of the incident on October 19, 2016 (Exh. C-23, p. 1).

OSHA Safety and Health Compliance Officer Simon Cabello[11] was assigned by his supervisor to conduct the inspection relating to the October 19, 2016, incident. His inspection began at the site on November 15, 2017. Cabello spoke with both Shin-Etsu and Mansfield personnel. He conducted a walk-around inspection, went to the site of the incident, spoke to employees and managers and requested documentation. He conducted a closing conference with Shin-Etsu and Mansfield and when finished left the site (Tr. 185-187). As a result of his inspection, Cabello determined Mansfield had violated the regulations found at 29 C.F.R. §§ 1910.119(h)(3)(ii), 1910.1200(h)(1), and 1910.132(d)(1), and recommended the issuance of the Citation at issue in this matter. The Citation was issued to Mansfield on April 21, 2017, six months and two days after the incident.[12]

DISCUSSION

Citation

The Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to

[11] Mr. Cabello has a Bachelor's degree in environmental science and an Associate's degree in general arts. He took numerous safety courses in the military and as a civilian. When he started with OSHA in 2013 at the Houston South Area Office he took numerous classes in safety and health (Tr. 185).

[12] In its Answer Mansfield asserts as an affirmative defense that the Citation at issue is barred by the statute of limitations by not having been issued within six months of the employees being exposed (Answer). During its opening statement at the hearing in this matter, Mansfield again stated that the Citation was barred by the statute of limitations (Tr. 22). Before the hearing was adjourned, the Court advised the parties, "Any issues not briefed will be deemed abandoned. My briefing notice will say that in a footnote. So please keep that in mind, if something is important to you, make sure to brief it."(Tr. 235) On November 21, 2017, the Court issued its Notice of Receipt of Transcript and therein provided notice to the parties that "Issues not briefed will be deemed abandoned." (*See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130)

Mansfield did not address the statute of limitations issue in its post-hearing brief. As Mansfield was twice put on notice that failing to brief issues would result in those issues being deemed abandoned, the Court concludes that since Mansfield did not brief the issue it no longer intends to pursue that issue. *See Charles W. Mason, DDS*, 25 BNA 1792, n.4 (No. 10-2313, 2015). Therefore, the Court finds Mansfield has abandoned its statute of limitations defense and the Court will not rule on the issue.

> the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The parties stipulated that the cited standards are applicable to the work site and the work that the employees were performing at the time (Tr. 14). Accordingly, applicability for each Citation item alleged violated is established.

Item 1a: Alleged Serious Violation of § 1910.119(h)(3)(ii)

Item 1a of Citation No. 1 alleges:

> 29 CFR 1910.119(h)(3)(ii): The contract employer did not assure that each contract employee was instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan:
>
> a) At the 100 Tank Farm Area, the employer did not inform employees of the hazards associated with a covered process containing over 5,000 pounds of trichlorosilane.

Section 1910.119(h)(3)(ii) provides:

> (3) *Contract employer responsibilities.*
> (ii) The contract employer shall assure that each contract employee is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan.

Violation of the Terms of the Standard

Rather than informing its employees working in the 100 Tank Farm Area of the known fire, explosion or toxic release hazards and emergency action provisions related to the job the employees were to perform, Mansfield relied on Shin-Etsu's orientation provided to visitors and employees to inform its employees of the hazards on the jobsite and what to do in an emergency. Because its employees received this orientation, Mansfield asserts it complied with the cited standard. Mansfield argues that the responsibility for providing the required training pursuant to the standard was that of host employer, Shin-Etsu.

The Secretary contends the information provided by Shin-Etsu was only a site orientation which advised Mansfield employees that the pipes in the plant contained highly hazardous chemicals, gasses and flammables, but did not advise Mansfield employees which pipes contained which chemicals. The Secretary argues that the site orientation was not specific to provide Mansfield's employees information on the hazards and precautions and emergency actions necessary for the work they were providing in the plant. Further, the Secretary argues the

orientation provided by Shin-Etsu does not relieve Mansfield of its responsibility to provide a safe environment for its employees to work in (Tr. 24). The Court agrees.

At its Freeport, Texas plant, Shin-Etsu uses and produces many chemicals which can be grouped into three categories:

1. Chlorosilanes- silicon tetrachloride, trichlorosilane, methydichlorosilane, and chlorosilane intermediates;
2. Gases- hydrogen, hydrogen sulfide, trifluoropropene, nitgrogen, steam, compressed air, and natural gas;
3. Flammable liquids- allylchloride, propylene oxide, methanol, ethanol, and acrylonitrile and some chlorosilanes

(Exh. C-29).

Chlorosilanes react readily with water to produce hydrochloric acid even when exposed to air, and with the exception of silicon tetrachloride, are flammable liquids. They can irritate the eyes, nose, throat and skin, and could cause visual impairment or loss, severe pulmonary or lung edema, laryngeal spasm, death, skin irritation and severe burns. Gases when released displace oxygen and could cause difficulty breathing, ringing in the ears, dizziness, nausea and death. Flammable liquids are volatile in that they can form an ignitable vapor cloud and flash back to its source. If ignited flammable liquids can produce carbon monoxide (Exh. C-29).

The chlorosilane chemical released in the incident was trichlorislane. The MSDS for trichlorosilane provides that it is harmful if swallowed, causes severe skin burns and eye damage and is toxic if inhaled. It further provides that a positive pressure air supplied respirator should be used if there is a potential for uncontrolled release, and flame retardant antistatic protective clothing and impervious protective clothing should be worn to protect the skin (Exh. C-13, p.8).

Undoubtedly, the chemicals at the plant were extremely hazardous and if released could result in serious and even catastrophic injuries to those exposed. The CSHO testified that serious injuries or death could result from exposure (Tr. 207-209). A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

The responsibility for ensuring Mansfield employees were properly trained regarding the potential toxic release hazards of the chemicals they were working with fell on Gonzales (Tr. 118).

Yet Gonzales testified he did not know until after the incident that the pipes which [redacted] and [redacted] worked on contained a chlorosilane or that chlorosilanes reacted readily with water (Tr. 59-61). Gonzales also testified he was not familiar with which zones in the plant are manufacturing or utilizing which chemicals and flammables:

> Q. In other words, if you were walking in the F area, you would know that this is the area that contains these chemicals, and if you're walking in the 200 area, that's the area that contains these, and if you're walking in the T area, that contains a different set. You don't have that level of knowledge; is that correct?
>
> A. Yes sir. We watch a video, but I don't know exactly like what pipes - - you know, what chemicals are in what pipes, but I am familiar with certain chemicals in certain areas.
>
> Q. Okay. But - - okay. So as you're walking through this plant on any given day, if you were in this zone or that zone, you don't know what's inside any of the pipes?
>
> A. No sir.
>
> Q. Is that correct?
>
> A. Yes Sir.

(Tr. 53-54).

Gonzales's testimony demonstrates the ineffectiveness of the orientation video as a means of informing Mansfield's employees of the hazards in their work area. The Court finds Mansfield's reliance on that orientation to be misplaced. Shin-Etsu's orientation was not specific to the work Mansfield employees were performing and did not specify the chemicals present in the pipes where the employees were working. As such, the Court finds it insufficient.

Mansfield's efforts at the hearing to show that it supplemented the orientation with information provided by Gonzales fails. At the hearing Gonzales testified:

> As far as training, I assess them every day and let them know that there's a possibility that you know they can be exposed to chemicals, and I reference them to doing their part as far as go to a safety shower or go up- or crosswind.

(Tr. 113-114).

Gonzales admitted in his statement, however, he did not inform employees of the types of chemicals on the jobsite or explain the hazards they were exposed to and that he did not train employees on the MSDS (Exh. C-22).

The Court observed Gonzales during his testimony. He appeared defensive and very concerned. His testimony was sometimes confusing, as if he were trying to be sure he was saying

the right thing to please his employer, or to not be blamed for the incident. The Court finds Gonzales's trial testimony to be unreliable where it is contradicted by his prior statement and other evidence in the record. Both [redacted] and [redacted] provided statements that they were not aware of the chemicals they could be exposed to, and [redacted] stated he was not informed by any management of hazards (Exhs. C-31 and C-32). The Court therefore credits Gonzales statement that he did not provide training and information to the employees as required by the cited standard and places no weight on his trial testimony in this regard.

The Court finds Mansfield did not provide any information to its employees regarding the chemicals and hazards in their specific work area or what emergency procedures should be followed if necessary. The Secretary has established the terms of the standard were violated.

Employee Access to the Violative Condition

> To establish access under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448, p, 24,425 (No. 504, 1976)).

S & G Packaging Co., LLC, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001).

On the day of the incident [redacted] and [redacted] were tasked with removing corrosion from pipes located in the 100 Tank Farm Area of the plant. [redacted]'s statement provides he "was cleaning the bolts on the pipe with a needle gun (pneumatic tool) when the pipe ruptured." (Exh. 31) Trichlorosilane was released from the pipe causing chemical burns to [redacted]'s left arm and hip area. Both [redacted] and [redacted] were concerned they had inhaled the released chemical (Exh C-23, C-31 and C-32).

The record establishes employee exposure to the hazardous chemicals.

Employer Knowledge

Site Supervisor Gonzales was tasked with the responsibility of training employees and informing them of the hazards associated with their work environment. He did not provide the required information to the employees on the jobsite. As a supervisory employee, Gonzales's actual knowledge is imputed to Mansfield. *See W.G. Yates & Sons Construction Co., Inc. v. OSHRC,* 459 F.3d 604, 607 (5th Cir.2006) ("[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is

reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate.")

In imputing a supervisor's knowledge to the employer when it is knowledge of his own violative conduct and no other employees are involved, the Fifth Circuit imposes an additional burden on the Secretary to show that the supervisor's violative conduct was foreseeable by the employer.

> [A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. As with each element required to establish a violation, employer knowledge must be established by the Secretary, as an element of § 666(k). *Trinity Indus., Inc. v. OSHRC,* 206 F.3d 539, 542 (5th Cir.2000) (citing *Carlisle Equip. Co. v. Sec. of Labor,* 24 F.3d 790, 792-93 (6th Cir.1994) ("Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations."))

W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 608-09 (5th Cir. 2006) (emphasis in original).

Gonzales was not the only employee involved in the violative conduct here. He was not the only one tasked with providing safety information to the employees. Ayala also was responsible for providing safety information (Tr. 118; Exh. C-21). His statement provides:

> We don't train [employees] on the specifics on the chemicals they are working on because I'm not here. I have other facilities to go to. Yes, it's one of my responsibilities to ensure [employees] know the chemicals they are working with. No, I've not trained [employees] on MSDS specifically on the chemicals they are working with. We have done ppe hazard assessment but not in this plant. I haven't done a ppe Hazard assessment of this plant.

(Exh. C-21). Therefore, the Secretary is not required to prove that Gonzales' conduct was foreseeable in order to impute knowledge.

Even if the facts were to be construed that Gonzales was the only one who engaged in the violative conduct, the record establishes that Gonzales' conduct was foreseeable. Mansfield's safety policies are generic rather than site specific. It had no process in place for verifying employees' knowledge of their understanding of the hazards in the workplace. It did not have its own emergency action plan and did not require its employees working in the Tank Farm Area to wear at a minimum, antistatic impervious protective clothing. Mansfield permitted its employees to work on live pipes with power tools. It knew the pipes in the plant were not labeled with the

chemicals contained therein. Mansfield provided only general training of its employees and there is no evidence that employees were disciplined for safety violations.

The Secretary has established actual knowledge of the violative condition.

The Secretary charges the violation as serious. An employee exposed to a hazardous chemical for which he had not received adequate information regarding the chemicals in his work area and the hazards associated with those chemicals, and what procedures should be implemented in case of an emergency would not know the appropriate precautions to take. The employee could sustain serious injuries due to his lack of information. The violation is serious.

Item 1(a) is affirmed.

Item 1b: Alleged Serious Violation of 29 C.F.R. § 1910.1200(h)(1)

Item 1b of Citation No. 1 alleges:

> 29 CFR 1910.1200(h)(1): Employees were not provided effective information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard that the employees had not been previously trained about was introduced into their work area:
>
> a) At the 100 Tank Farm Area, the employees were not provided with information on operations in their work areas where hazardous chemicals were present. The employees were not trained on the methods and observations used to detect the presence or release of hazardous chemicals in the work area; the physical and health hazards of chemicals in the work area; and appropriate protective measures. Employees were potentially exposed to hazardous chemicals such as, but not limited to, trichlorosilane.

Section 1910.1200(h)(1) provides:

> (h) *Employee information and training.*
>
> (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical specific information must always be available through labels and safety data sheets.

Applicability of the Standard

As set forth above, the parties stipulated at the hearing that the cited standards are applicable to the work site and the work that the employees were doing at the time (Tr. 14). Nonetheless, Mansfield argues in its brief that this standard does not apply, asserting it is preempted by process safety management standard 1910.119(h)(3)(ii), cited in item 1(a) (Mansfield's brief, pp. 11-12). Mansfield does not represent that the stipulation was made in error, or that the cited regulation was not to be a part of the stipulation. By entering into this stipulation, Mansfield waived its right to present any arguments regarding applicability. To now give this argument consideration, when the Secretary relied on the stipulation would be fundamentally unfair. The Court therefore will not consider Mansfield's argument that the standard is not applicable.

Violation of the Terms of the Standard

The terms of the standard require that an employer provide employees with *effective* information and training on the hazardous chemicals in their work area *at the time of their initial assignment and when a new hazard is introduced into the work area.* Mansfield asserts it provided its employees the information as required, and informed them where to find the MSDS on the chemicals if they wanted to look at them (Tr. 172-173). It also contends its employees did not handle trichlorosilane or any of the other chemicals at the plant, pointing out that the processes occurring at the plant were in a closed loop system, seemingly suggesting that no access to the chemicals was possible in a closed loop piping system (Tr. 28, 211). It is not disputed that the Mansfield employees received information in the Shin-Etsu site orientation at least approximately four months before the incident. However, as the Secretary contends, that information did not specify at the time the employees were assigned to work on the pipes in the 100 Tank Farm Area, the type of chemicals in the pipes where the employees were assigned to work on the day of the incident (Tr. 22, 24).

Gonzales and Ayala admitted in their statements they did not inform employees of the types of chemicals on the jobsite or explain the hazards they were exposed to, and did not train employees on the MSDS for the chemicals at the plant (Exhs. C-21 and C-22). Gonzales testified he had never reviewed the MSDS for the chemicals at the plant and had not done so at the time of the hearing (Tr. 133). Neither [redacted] nor [redacted] were aware of the chemicals that they could be exposed to, and [redacted] stated he was not informed by any management of hazards (Exhs. C-31 and C-32).

The Secretary has established the terms of the standard were violated.

Employee Access to the Violative Condition

As set forth above in item 1(a) Mansfield's employees were removing corrosion from pipes located in the 100 Tank Farm Area of the plant when a pipe ruptured causing the release of trichlorosilane. They were not aware of the chemicals in their work area and received no training from Mansfield regarding the chemicals they were exposed to in their work area. Supervisor Gonzales and Safety Representative Ayala admit they did not provide information regarding the chemicals and hazards Mansfield's employees (Exhs. C-21 and C-22).

Employee exposure is established.

Employer Knowledge

Gonzales and Ayala admit they did not train employees on the chemicals in their work areas. As set forth above in item 1(a) their actual knowledge is imputed to Mansfield. *See W.G. Yates & Sons.*

The Secretary has established actual knowledge of the violative condition.

The Secretary charges the violation as serious. An employee exposed to a hazardous chemical for which he had not received training would not know the appropriate precautions to take and could be seriously injured as a result. The violation is serious.

Item 1(b) is affirmed as serious.

Item 2: Alleged Serious Violation of 29 C.F.R. § 1910.132(d)(1)

Item 2 of Citation No. 1 alleges:

> 29 CFR 1910.132(d)(1): The employer did not assess the workplace to determine if hazard are present, or are likely to be present, which necessitate the use of personal protective equipment:
>
> a) At the 100 Tank Farm Area, Tank TK1052, the employer did not assess the workplace to determine if hazards were likely to be present necessitating the use of personal protective equipment.

Section 1910.132(d)(1) provides:

> (d) *Hazard assessment and equipment selection*. (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
>
> (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(ii) Communicate selection decisions to each affected employee; and,

(iii) Select PPE that properly fits each affected employee.

Violation of the Terms of the Standard

Mansfield contends it conducted assessments of the worksite to determine the appropriate personnel protective equipment for employees to use in the plant. [13] The Secretary disputes that the required assessment was conducted by Mansfield. The Secretary also asserts that Shin-Etsu's orientation did not provide information to Mansfield employees regarding the appropriate personal protective equipment to use and when it should be used.

Mansfield's Safe Code Practice Handbook provides information about the types of PPE and how to clean and maintain it. However, it was not specific to the Shin-Etsu jobsite and did not specify the type of personal protective equipment which should be used on that site (Tr. 130). Mansfield had no other document relating to assessment of the type of personal protective equipment to be used around the chemicals at the plant (Tr. 131). Gonzales testified they have had only general discussions, not specific to the job, about personal protective equipment (Tr. 145).

Gonzales also testified he conducts weekly assessments of the work areas to determine whether leaks or ruptures of the pipes are present (Tr. 161). When finished with his assessment, Gonzales talks to the crew about wearing respirators with appropriate (Tr. 167-168). His statement to the CSHO during the inspection, directly contradicts his testimony. During the inspection, Gonzales stated:

> We did not do a ppe Hazard assessment on this jobsite, but we've done one on other sites. I don't know why we didn't do one, a ppe assessment.

(Exh. C-22, p. 2) Jose Ayala, Safety Manager for Mansfield did not testify at the hearing, however he gave a statement during the OSHA inspection. His statement provides "We have done ppe

[13] Mansfield also argues that it was not reasonably foreseeable that there would be a release from the containerized piping that would necessitate the use of additional personal protective equipment. Mansfield makes note that there had not been a release in the plant in the eight years Gonzales had worked there (Mansfield's brief, pp. 14-16; Tr. 26-27). The Court finds Mansfield's argument to be without merit. It is not disputed that highly hazardous chemicals were processed at the plant. Shin-Etsu and its contractors working onsite were subject to the Process Safety Management Standards because of the hazardous nature of the chemicals in the plant. Shin-Etsu had a specific protocol in place for entry onto the plant regarding its hazardous chemicals. That no release had occurred in eight years does not mean that the potential for a release was non-existent.

hazard assessment but not in this plant. I haven't done a ppe Hazard assessment of this plant." (Exh. C-21).

As set forth above, the Court finds Gonzales's trial testimony to be unreliable where it is contradicted by his prior statements and other evidence in the record. The Court therefore credits Gonzales's statement that Mansfield did not do a personal protective equipment hazard assessment on the jobsite and gives no credit to his trial testimony on this issue.

The Court finds Mansfield did not conduct an assessment to determine if hazards are present or are likely to be present which necessitate the use of personal protective equipment.

The Secretary has established the terms of the standard were violated.

Employee Access to the Violative Condition

Mansfield's employees [redacted] and [redacted] were removing corrosion from pipes located in the 100 Tank Farm Area of the plant when a pipe ruptured causing the release of trichlorosilane. The piping system upon which they worked was pressurized (Tr. 62, 63-64). At the time of the incident, [redacted] was wearing a HEPA filter half-face respirator, safety glasses, a face shield, overalls, long sleeve shirt and hearing protection (Exh. C-32). [redacted] also used a respirator with HEPA filters and wore gloves, pants, long sleeve shirt, safety glasses and ear plugs (Exh. C-31). Neither were wearing flame retardant antistatic and impervious protective clothing as required by the MSDS for the chemical they were exposed to.

Employee exposure is established.

Employer Knowledge

Mansfield allowed its employees to work on a pressurized piping system (Tr. 62, 63-64). Employees were also permitted to used power tools to remove the corrosion (Tr. 36-37, 43). Although Gonzales disputed knowing the employees were to use such tools, his testimony on this point was not credible. He appeared very nervous and uncomfortable when testifying about this. Gonzales knew hazardous chemicals were used at the jobsite; he knew that the system was pressurized while the employees worked on it; and he knew employees had access to power tools. Both Avaya, Safety person and Gonzales were aware that no hazard assessment was done to determine if hazards were present or were likely to be present which necessitated the use of personal protective equipment (Exhs. C-21, C-22).

As set forth above regarding item 1a the actual knowledge of Gonzales and Ayala is imputed to Mansfield. *See W.G. Yates & Son.* The Secretary has established actual knowledge of the violative condition and has met his burden.

Item 2 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

In considering these factors, the Court finds that Mansfield employed 35 employees at the jobsite and 500 employees company-wide. The CSHO testified that no reduction for size was given because the number of employees in the company exceeded the number needed to get a size reduction (Tr. 203). Mansfield had been inspected within five years prior to the inspection at issue in this case, therefore no reduction for history was allowed. No reduction for history is allowed by OSHA if citations were issued to an employer within the five year time period (Tr. 204). Mansfield did not receive a reduction for good faith because the violations were determined to be high/greater citations (Tr. 204).

The CSHO noted in his inspection narrative that Mansfield had a good safety and health program, however, it did not follow its procedures (Exh. C-2, p. 1). Mansfield did not provide information and training to its employees regarding hazardous chemicals in the workplace. Nor did it conduct a hazard assessment to determine whether hazardous conditions present in the workplace necessitating the use of personal protective equipment. These factors weigh against good faith for Mansfield. The Court weighs favorably that following the incident Mansfield discontinued its practice of allowing employees to work on pressurized pipes with power tools (Tr. 62-63; Exhs. C-21, C-22). However, the court agrees with the Secretary's determination as to size, history and good faith because the hazardous nature of the chemicals at the plant could result in catastrophic consequences in the event of a release.

In addition to size, history and good faith, the Court also must consider the gravity of the violations in assessing the penalty. "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196,

2201 (No. 00-1052, 2005).

Two employees were exposed for a short period of time, however only minimal precautions against injury were taken. The CSHO determined that all three cited violations were of high severity because the hazards associated with the process within which the employees were working could result in chemical burns, eye damage, pulmonary conditions and injuries involving permanent disabilities and death. He determined a greater probability of injury could result because Mansfield did not inform and train its employees in the hazards in their workplace and did not conduct a hazard assessment to determine whether personal protective equipment was necessary for the hazards present (Tr. 202-209; Exhs. C-3, C-4, C-5).

Based on the evidence that the Mansfield's employees were using power tools when working on live pipes containing hazardous chemicals and were provided no information or training on those hazards, and the worksite was not assessed to determine the need for personal protective equipment, the Court determines that the gravity of the violations was high. Therefore, the Court finds the penalties proposed by the Secretary are appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby **ORDERED**:

1. Items 1a and 1b of Citation No. 1, alleging serious violations of §§ 1910/119(h)(3)(ii) and 1910.1200(h)(1) respectively are **AFFIRMED** and a penalty in the total amount of $12,675.00 is assessed for the grouped items;

2. Item 2 of Citation No. 1, alleging a serious violation of § 1910.132(d)(1), is **AFFIRMED** and a penalty in the amount of $12,675.00 is assessed for this item.

SO ORDERED.

Date: October 17, 2018

/s/

Sharon D. Calhoun
Administrative Law Judge
Atlanta, Georgia