



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.

SCHULER-HAAS ELECTRIC CORP.
Respondent

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: OSHRC Docket No. 03-0322
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APPEARANCES:

Scott Glabman, Charles F. James, Joseph M. Woodward, Howard M. Radzely,
Department of Labor, Washington, DC
For the Complainant

Steven R. Semler, Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
Washington, DC
For the Respondent

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Schuler-Haas Electric Corporation (Schuler-Haas) is an electrical contractor with its principal office in Rochester, New York. On July 15, 17, and 19, 2002, a compliance officer (CO) from the Occupational Safety and Health Administration (OSHA) inspected Schuler-Haas's workplace at Cayuga Community College (Cayuga), a multi-employer construction worksite, in Auburn, New York, where numerous contractors and trades were constructing renovations and additions to the campus. As a result of the inspection, the Secretary issued two citations alleging one willful and eight serious violations of OSHA's construction asbestos standard at 29 C.F.R. § 1926.1101. The Secretary proposed penalties totaling \$65,500.

Schuler-Haas contested the citations, and following a hearing, the late Administrative Law Judge Michael H. Schoenfeld affirmed all the citation items as alleged and assessed a total penalty of \$41,000. For the reasons that follow, we affirm the citations, recharacterize the willful item as serious, group the affirmed items for penalty purposes, and assess a single penalty of \$5,000.

BACKGROUND

At the Cayuga worksite, Schuler-Haas was responsible for the installation of light poles, interior lighting, and new fire alarm, security, telephone, and data systems. The contract documents for the renovation project expressly stated that all of the buildings on the Cayuga campus contained asbestos. Beardsley Design Associates (Beardsley) was responsible for coordinating asbestos abatement activities at the worksite and overseeing the work of two other contractors - Excel Insulation (Excel), an asbestos abatement contractor, and TES Environmental (TES), an environmental monitoring company.

In June 2002, Schuler-Haas began installing electrical wiring and fixtures on the third floor of Cayuga's "HBT building," where thermal system insulation (TSI), a friable asbestos insulation, had been blown onto the walls, ceilings, I-beams, pipes, and existing electrical conduit. Schuler-Haas commenced its work with the understanding that asbestos abatement had been completed on the third floor and the area had been "cleared" for its employees to enter without the use of protective clothing or respirators. However, on June 21, 2002, Schuler-Haas employees encountered a "granular, grayish-whitish material" on the third floor that they suspected was asbestos.

Schuler-Haas foreman Jason Bacher immediately complained about these conditions to Thomas McCormack, superintendent for LeChase Construction Services, the construction management company overseeing the Cayuga project. Bacher also notified Schuler-Haas project manager, Slave Jankulosky, who ordered the electricians to leave the third floor. Both Schuler-Haas and LeChase

obtained bulk samples of the debris material, which was subsequently confirmed to contain chrysotile asbestos. Noting the “high health risk due to the disturbance of the asbestos,” Jankulosky informed LeChase that Schuler-Haas had directed foreman Bacher not to reenter the third floor of the HBT building with his crew until environmental tests showed that the asbestos hazards were eliminated.

On June 26, 2002, Schuler-Haas received a copy of a memo from Anthony Shortt, an industrial hygienist for Beardsley, to LeChase, which raised serious concerns about the extent of asbestos “overspray” in the HBT building and the likelihood of contractors disturbing asbestos in areas that were inaccessible to the abatement contractor.¹ Recounting the circumstances involving the disturbance of asbestos by Schuler-Haas’s electricians on the third floor, Shortt noted that there were “many areas that were hard to reach” and also that there had been “difficulty ... removing every last amount of asbestos debris in numerous small and unreachable areas throughout the ceiling deck and wall spaces.” Shortt also stated that a health inspector from the New York Department of Labor had advised him that “if there are a few to several minor areas that need to be re-addressed because these areas were ... inaccessible to the abatement contractor but not other contractors, then these areas could be tented and abated or re-cleaned as a minor abatement project.”

To address the problems raised in Shortt’s memo, officials from Schuler-Haas, LeChase, Beardsley and Excel met on June 26, 2002, and agreed to implement a “marking and special abatement procedure” for the HBT building. This procedure called for abatement contractor Excel to remove or encapsulate the asbestos located in specifically marked areas prior to Schuler-Haas resuming its work in the building. Schuler-Haas agreed that it would try to locate an electrician with asbestos certification to assist with the special abatement procedure, but the

¹ Anthony Shortt was Beardsley’s project monitor and responsible for overseeing the asbestos abatement contractor’s removal work in accordance with specifications and the “abatement design plan” for the project.

company was unsuccessful in finding an electrician with the necessary qualifications. Therefore, foreman Bacher was assigned to mark with spray paint the areas on all three floors of the building that needed removal or encapsulation.

On July 10, 2002, after the “marking and special abatement procedure” was completed and Schuler-Haas employees had returned to work on the third floor of the HBT building, foreman Bacher informed project manager Jankulosky that he still had concerns about asbestos hazards on this floor. According to Bacher, when he confronted two LeChase superintendents on more than one occasion about his concerns, they told him that he had “over exaggerated the situation.” Jankulosky reported the problem to Schuler-Haas vice president Edward Schuler, who visited the worksite and took a bulk sample of debris from ceiling material on the third floor that had been dislodged by work activities on the roof. On July 11, 2002, the results showed that the sampled material contained asbestos. Schuler-Haas electricians were again removed from the third floor.

That same day, CO Holly Ioset opened an inspection of the HBT building in response to a formal complaint made against abatement contractor Excel. During the inspection, foreman Bacher complained to Ioset about dusty conditions and inadequate abatement. After conducting a walk-around of the HBT building, Ioset opened an inspection of both Excel and Schuler-Haas “due to the proximity to asbestos and invasiveness of the work” being performed by those two contractors. At that time, the third floor was closed to all trades.

On the next day, July 12, 2002, foreman Bacher and his crew began work on the second floor of the HBT building. Also on this date, Beardsley’s industrial hygienist Shortt authored another memo, which was distributed on July 15 to all contractors involved in work on the third floor, stating that although the abatement contractor had removed “all accessible blown-on asbestos” on that floor, roofing activities had dislodged “previously concealed and inaccessible asbestos and suspect asbestos containing materials.”

On July 15, 2002, CO Ioset returned to the worksite to conduct 8-hour personal air monitoring of Schuler-Haas electricians Craig Schmidt and Dennis Cuff, both of whom were working on the second floor of the HBT building. Monitoring results showed that both employees were exposed to airborne asbestos – Schmidt’s exposure was exactly at the permissible exposure limit (PEL) of .1 fiber per cubic centimeter (cc) of air as an eight hour time-weighted average; and Cuff’s exposure was .037 fiber per cc, one-third of the PEL.²

CO Ioset returned to the site two days later to conduct interviews with foreman Bacher, electrician Schmidt, and Schuler-Haas’s safety consultant for the project, Joel Nasso. At that time, Schuler-Haas electricians were still working on the second floor of the HBT building. When Ioset observed Schmidt “disturbing dusty material” by “pulling conduit up and through a wall,” she obtained a 30-minute excursion sample from him. During the monitoring, Ioset asked safety consultant Nasso what he was going to do about the dusty conditions, and although he initially told her that he did not have authority to do anything, he ultimately ordered Schuler-Haas employees to leave the second floor. The results of Ioset’s testing showed that Schmidt was exposed to an airborne concentration of asbestos of 1.8 fibers per (cc), which is 1.8 times the PEL for a 30-minute excursion period.

On July 19, 2002, when Ioset returned to the site to conduct follow-up interviews, she spoke with two Excel employees, who reported that foreman Bacher and electrician Cuff had entered the asbestos regulated area on the third floor earlier that day. When confronted by Ioset, Bacher admitted that he and employee Cuff had entered the area to disconnect and remove exhaust fans on the roof.

² Schuler-Haas stipulated to the accuracy of the test results relied upon by the Secretary.

DISCUSSION

With regard to whether the Secretary has established the alleged violations, the issues in dispute are whether Schuler-Haas was engaged in Class III asbestos work such that the requirements of the cited asbestos standards applied and whether the company had knowledge of the cited conditions. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982) (Secretary must establish applicability of cited standard, noncompliance with its terms, employee exposure to the hazard, and employer knowledge of the hazard).

Schuler-Haas also argues that it cannot be held responsible for the alleged violations because it made reasonable efforts to prevent employee exposure to airborne asbestos in circumstances where it did not create or control the source of contamination. In addition, Schuler-Haas claims that foreman Bacher's entry into the third floor of the HBT building on July 19, 2002, was the result of unpreventable employee misconduct, and that the judge erred in affirming the violation.

A. Class III Asbestos Work

According to section 1926.1101(a), the construction asbestos standard “regulates asbestos exposure in all work defined in 29 CFR 1910.12(b),³ including ... [c]onstruction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos.” Section 1926.1101(b) defines the term “renovation” as “the modifying of any existing structure, or portion thereof.” It also defines Class III asbestos work as “repair and maintenance operations, where ‘ACM’, including TSI and surfacing ACM and

³ Section 1910.12(b) states in pertinent part:

§ 1910.12 Construction Work. (b) *Definition.* For purposes of this section, *Construction work* means work for construction, alteration, and or repair, including painting and decorating.

PACM, is likely to be disturbed.”⁴ *See also Occupational Exposure to Asbestos Final Rule*, 59 Fed. Reg. 40964, 40990, 41006 (1994) (“Class III work consists of the ‘disturbance’ of all previously installed asbestos-containing building materials and PACM.”); and 29 C.F.R. § 1926.1101(b) (“disturbance” defined as “activities that disrupt the matrix of ACM or PACM, crumble or pulverize ACM or PACM, or generate visible debris from ACM or PACM...”). While the standard does not define the term “maintenance,” it does define “repair” as “overhauling, rebuilding, reconstructing, or reconditioning of structures or substrates...”

Here, Schuler-Haas employees were installing wiring and fixtures in a building that contained blown-on asbestos on the walls, ceilings, I-beams, pipes, and existing electrical conduits. Although another contractor was under contract to remove asbestos before the electricians began work, the record shows that these abatement efforts were not fully successful in inaccessible areas inside walls and ceilings of the HBT building. Personal air monitoring samples of Schuler-Haas electricians showed exposure to airborne chrysotile asbestos fibers, and in one instance, the exposure exceeded permissible limits. This evidence is sufficient to establish that Schuler-Haas was engaged in repair operations where ACM was likely to be disturbed. Accordingly, we find that Schuler-Haas was engaged in Class III asbestos work at the Cayuga worksite.

B. Knowledge

To establish knowledge, the Secretary must prove that an employer knew or could have known with the exercise of reasonable diligence of the “physical conditions constituting the violation.” *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079, 1995 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995), *aff’d without*

⁴ The standard defines “ACM” as “asbestos-containing material containing more than one percent asbestos”; “TSI” (thermal system insulation) as “ACM applied to pipes, fittings, boilers, breaching, tanks, ducts or other structural components to prevent heat loss or gain”; and “PACM” as “presumed asbestos-containing material.” *See* 29 C.F.R. § 1926.1101(b).

published opinion, 78 F.3d 582 (5th Cir. 1996). Schuler-Haas concedes that it was aware of the “potential for asbestos exposure,” but argues that it relied on the “assurances of the asbestos experts on the job that its employees were not being exposed to asbestos hazards” and therefore lacked knowledge of the cited conditions. We disagree and find that Schuler-Haas had constructive knowledge.

The record shows that on July 12, 2002, one day after sampling taken by vice president Schuler established that the “marking and special abatement procedure” had been unsuccessful in removing asbestos from the third floor of the HBT building, Schuler-Haas employees commenced work on the building’s second floor, which had undergone the same abatement procedure. Foreman Bacher testified that he became immediately concerned when he observed dusty conditions on the second floor that were similar to conditions he had observed two days earlier on the third floor. Nonetheless, Schuler-Haas continued to work on the second floor until safety consultant Nasso made the decision to remove the electricians on July 17, 2002, after he and CO Ioset observed electrician Schmidt “disturbing dusty material” when “pulling conduit up and through a wall.” Ioset’s sampling of Schmidt on that date subsequently showed that his asbestos exposure while working on the second floor exceeded permissible limits. Under these circumstances, we fail to see how Schuler-Haas, with the exercise of reasonable diligence, could have lacked knowledge of the physical conditions on the second floor when it assigned employees to work there on July 15 and 17, 2002, the dates on which most of the alleged violations occurred. *Froedtert Memorial Lutheran Hospital, Inc.*, 20 BNA OSHC 1500, 1509, 2002-04 CCH OSHD ¶ 32,703, p. 51,736 (No. 97-1839, 2004) (citing *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1092, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977)) (“the knowledge required to establish a violation is not directed ‘to the requirements of the law, but to the physical conditions which constitute a violation of [the Act]’”).

We also find that Schuler-Haas could have known with the exercise of reasonable diligence of the cited conditions on July 19, 2002, when foreman

Bacher and employee Cuff entered the third floor while the abatement team was conducting environmental clearance testing. According to Foreman Bacher's testimony, at some point before he and Cuff entered the regulated area on the third floor, a TES air monitor had informed him that they were testing the area, and it would not be released until the following Monday. Nevertheless, when he approached the area, according to Bacher, he believed the third floor area was safe for him and Cuff to enter because the abatement contractors appeared to be finished with their work, the door was open, the cautionary tape was down, and the air monitors were "only testing." Based on this evidence, it is clear that Schuler-Haas did not engage in reasonable diligence, such as appropriate training, and, therefore, Schuler-Haas had constructive knowledge of the conditions on July 19, 2002. *See Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992) ("factors indicative of reasonable diligence include ... the formulation and implementation of adequate training programs ... to ensure that work is safe").

C. Efforts to Prevent Exposure

Schuler-Haas argues that it did not create the violative conditions, and that it acted reasonably when encountering and/or disturbing asbestos by stopping work, informing the asbestos experts on the job, and following the "marking and special abatement procedure." As the Secretary points out, this argument is essentially an assertion of the multi-employer worksite defense.⁵ Here, however, the traditional defense must be applied in light of the explicit requirements of the

⁵ The multi-employer worksite defense is an affirmative defense that requires the employer to prove by a preponderance of the evidence that it (1) did not create the hazardous condition; (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard; and (3) took reasonable alternative steps to protect its employees or did not have (and could not have had with the exercise of reasonable diligence) notice that the violative condition was hazardous. *See, e.g., Capform Inc.*, 13 BNA OSHC 2219, 2222, 1987-90 CCH OSHD 28,503, p. 37,776 (No. 84-556, 1989), *aff'd without published opinion*, 901 F.2d 1112 (5th Cir. 1990).

construction asbestos standard. In regulating conditions at multi-employer worksites, the standard expressly requires “*all employers* of employees exposed to asbestos hazards [to] comply with applicable protective provisions to protect their employees,” regardless of whether they create and control the source of contamination. (Emphasis added). *See* 29 C.F.R. § 1926.1101(d)(3). While we do not discount Schuler-Haas’s efforts to deal with the persistent difficulties encountered by the abatement contractors in removing asbestos from the HBT building, we are not persuaded by the company’s claim that these efforts released the company of its responsibility to comply with the requirements of the cited standards.

D. Unpreventable Employee Misconduct

Schuler-Haas claims that foreman Bacher’s actions on July 19, 2002, were the result of unpreventable employee misconduct because Bacher violated a company safety rule prohibiting entry into a regulated area when he entered the third floor of the HBT building.⁶ To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule. *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1863-64 & n.6, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff’d*, 149 F.3d 1183 (6th Cir. 1998).

As stated previously in our discussion of Schuler-Haas’s constructive knowledge on July 19, 2002, the evidence establishes that Schuler-Haas employees lacked sufficient training to understand the hazards associated with entering asbestos regulated areas during environmental testing. Schuler-Haas’s

⁶ Schuler-Haas did not argue unpreventable employee misconduct with respect to employee Cuff’s conduct on July 19, 2002; nor did it argue that the cited conditions on July 15 and 17, 2002, were the result of unpreventable employee misconduct.

failure to provide the appropriate asbestos training under the circumstances here vitiates its unpreventable employee misconduct claim. *See Danis-Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501-03, 2001 CCH OSHD ¶ 32,397, pp. 49,866-7 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003).

E. Willful Characterization

The Secretary alleges that foreman Bacher and electrician Cuff's entry on July 19, 2002, into a regulated area on the third floor without the use of respirators constituted a willful violation of section 1926.1101(e)(4).⁷ A willful violation is one committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1630, 2002-04 CCH OSHD ¶ 32,714, 51,820 (No. 00-1807, 2004) (consolidated) (quoting *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). To establish willfulness, "the Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *Id.* (quoting *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,591 (No. 96-0265, 1999)). Here, the judge concluded that Bacher's willful "state of mind and actions" were attributable to Schuler-Haas and therefore, affirmed the violation as willful.

We find that the record lacks sufficient evidence to support a willful characterization of the violation in question. Foreman Bacher claimed that LeChase superintendent McCormack asked him to "sneak" up to the area to disconnect fans so that roofers could proceed with work during the upcoming

⁷ Section 1926.1101(e)(4) states:

§ 1926.1101(e) Regulated areas. ... (4) Respirators. All persons entering a regulated area where employees are required pursuant to paragraph (h)(1) of this section to wear respirators shall be supplied with a respirator selected in accordance with paragraph (h)(2) of this section.

weekend. Bacher claimed that when he and Cuff approached the area to perform the work, he believed entry would be safe because the door to the area was wide open, barricade tape was down on the floor, and two employees from TES, the environmental testing company, were conducting air monitoring without wearing respirators. It is plausible that Bacher believed the area to be no longer a “regulated area” in light of his lack of training under the standard and the absence of some of the normal indicia that the area was still a “regulated area,” notwithstanding that he knew testing was ongoing. However, testimony from two other witnesses for the Secretary contradicted Bacher’s assertions. McCormack denied directing Bacher to “sneak” into the regulated area on the third floor. Jeffrey Milne, one of the TES employees whom Bacher claims to have seen working in the area with no respirator, testified that both he and the other air monitor were wearing half-face respirators and protective clothing while conducting air monitoring on July 19, 2002.

The judge made no credibility findings to resolve the conflicting testimony of these witnesses. Under such circumstances, the Commission would ordinarily remand the case to the judge to make such findings. *See, e.g., Agra Erectors Inc.*, 19 BNA OSHC 1063, 1066, 2000 CCH OSHD ¶ 32,175, p. 48,607 (No. 98-0866, 2000). In this case, however, the judge who heard the testimony and observed the demeanor of the witnesses is deceased. Therefore, we must resolve this matter based on the record before us. *See Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No.87-2007, 1992) (case not remanded for credibility findings where judge who heard the case had since retired). Given that the Secretary has the burden of proof, we conclude that without credibility findings discrediting Bacher’s testimony that he believed the area to be safe, or his apparent view that the area may no longer have been a “regulated area,” the evidence is insufficient to establish that Bacher possessed a willful state of mind.

Before the judge, the Secretary argued that this violation was also serious. Under section 17(k) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 666(k), a serious violation is deemed to exist when there is a "substantial probability that death or serious physical harm could result" from a condition or practice. This does not mean that the occurrence of an injury must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if injury does occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973). Here, Schuler-Haas employees were working without respirators in a regulated area where abatement contractors had recently been removing blown-on TSI asbestos and air monitors were still testing the area for the presence of airborne asbestos fibers. We find that this evidence establishes the cited conditions constituted a serious violation under the Act, and accordingly, we affirm the violation of section 1910.1101(e)(4) as serious.

F. Penalties

The Commission has wide discretion in penalty assessment. *Orion Construction Inc.*, 18 BNA OSHC 1867, 1999 CCH OSHD ¶ 31,896 (No. 98-2014, 1999). *See also Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621, 1994 CCH OSHD ¶ 30,363, p. 41,881 (No. 88-1962, 1994) (Act expressly grants to the Commission the sole authority to determine penalties). Under section 17(j) of the Occupational Safety and Health Act, 29 U.S.C. § 666(j), the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." These penalty factors need not be accorded equal weight; gravity is generally the primary element. *Id.*

Given the overlapping nature of the affirmed violations – *e.g.*, implementation of a respiratory protection program; provision and use of respirators; use of engineering or work practice controls during Class III work – we find it appropriate to group the serious items for penalty purposes. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394, 2002-04 CCH OSHD ¶ 32,690, p. 51,560 (No. 97-0755, 2003) (as part of its penalty discretion, Commission may find it appropriate to assess a single penalty for distinct but potentially overlapping violations). We also find it appropriate to give Schuler-Haas good faith credit for its attempts to protect its employees from the asbestos hazards encountered in the HBT building. These efforts included stopping work and removing employees from contaminated areas on three occasions, and also attempting to resolve the problem in conjunction with the contractors contractually responsible for asbestos abatement.

Giving due consideration to the remaining section 17(j) penalty criteria, we find it appropriate to group all the items affirmed in this case and assess a single penalty of \$5,000.

ORDER

We affirm the judge's decision with respect to Serious Citation 1, Items 1, 2, 3, and 4. We also affirm Citation 2, Item 1, but recharacterize it as a serious violation. We group these items for penalty purposes and assess a single penalty of \$5,000.

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
Thomasina V. Rogers
Commissioner

Dated: May 8, 2006

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

SCHULER-HAAS ELECTRIC CORP.,

Respondent.

DOCKET No. 03-0322

Appearances: Esther D. Curtwright, Esq.
Office of the Solicitor of Labor
New York, New York
For the Complainant

Margaret R. Lopez, Esq.
Ogletree, Edakins, Nash, Smoak & Stewart, P.C.
Washington, D.C.
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its work site inspected by a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA"), Schuler-Haas Electric Corporation ("Respondent") was issued two citations alleging a total of four serious and one willful violations of the Act. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Rochester, New York. No affected employees

sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

It is undisputed that at the time of this inspection Respondent was engaged in construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Eric K. Ho, Ho Ho Ho Express, Inc., Houston Fruitland, Inc.*, 20 BNA OSHC 1361, (Nos. 98-1645 & 98-1646, 2003), *citing, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529 (No. 77-3676, 1983).

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission (“the Commission”) has jurisdiction over the parties and the subject matter.

DISCUSSION

Generally

During the summer of 2002¹, the “HBT” building on the campus of Cayuga Community College in Auburn, New York was undergoing renovation. Additions were also being constructed. Numerous contractors² involved in the project were well aware far in advance that areas known to contain asbestos were to be demolished or otherwise disturbed and that dust and debris containing asbestos would be spread in the air and on to various surfaces as a result. Respondent had a contract with the college to renovate and install new electrical conduit, wiring, lighting, power systems and other electrical related materials and equipment. Respondent undertook the contract with the knowledge that its work would require operations in areas that had previously contained asbestos but with the belief that all asbestos would be removed before its employees worked in any particular

¹ All relevant dates are 2002 unless otherwise noted.

² In addition to Respondent, the electrical contractor, the cast of contractors includes: LeChase Construction (construction manager) (Tr. 167); Beardsley Design Associates (asbestos abatement design and monitoring) (Tr.9, 12, 26-28, 168, 212); Excel Insulation (asbestos abatement) (Tr. 167); and TES Environmental (environmental testing) (Tr. 12-13, 32, 167-68).

area. Initially, the plans called for Respondent to commence work on the HBT building after asbestos abatement had been completed and Respondent had been informed that the area was “cleared” for entry. (Tr. 10-11, 169, 213-14) It was understood by the participants that “cleared” meant that an area was safe for employees to work in without protective equipment or respirators. (Tr. 169-170). Respondent assigned a project manager, Slave Jankuloski, and a foreman, Jason Bacher, to the job. Jankuloski was not at the site daily, but Bacher was. (Tr. 41, 165, 167, 206-07). During an interview with the CO, Bacher identified Joel Nasso, Respondent’s safety consultant, and Jankuloski as the company officials responsible for safety issues.

Respondent began work on the HBT building on or about June 21. At that time, the third floor reportedly had been cleaned of all asbestos, tested and cleared for work. (Tr. 210-11, 233). On the first day, Bacher expressed concern to Jankuloski that dust or debris on the third floor might contain asbestos. Bacher was reassured by LeChase project manager McCormack that proper abatement had been done. (Tr. 236). Despite the reassurances, Respondent, with the approval of its vice-president, withdrew its employees, notified LeChase that abatement had not been done correctly and had bulk samples taken in the area. (Tr. 236). The bulk samples showed the presence of asbestos. (Tr. 42, 236). In a June 25 letter, Respondent reiterated to LeChase that it would not permit its employees to work on the third floor until it was properly re-cleaned. (Ex. R -8).

Numerous conversations went on between Respondent’s personnel and LeChase regarding the process of demolition, cleanup and electrical work being done. (*e.g.*, Tr. 171-72, 179, 203, 241). The processes of demolition, cleanup and electrical work were discussed at a contractors meeting on June 26. Again, asbestos concerns were raised. There were complaints that the demolition contractor had removed conduit which was supposed to remain in place and had improperly cut off the ends of conduit. It was agreed at the meeting that the following sequence would be instituted. The third floor was to be re-cleaned and retested. If clear on the retesting, Respondent’s electrician would then enter the floor, mark the specific conduit to be demolished and leave. The demolition contractor would then remove only the marked conduit. After that was completed, the area was to be re-cleaned and retested and then Respondent’s employees would reenter to install the new electrical conduits and equipment. (Ex. R-10, Tr. 175-76, 237-38).

Respondent’s employees returned to the HBT building on or about July 1 to work on the third

floor. Bacher had been informed by McCormack that the third floor was cleared (Tr. 239) and Respondent had received copies of test results showing the third floor to be free of asbestos. (Ex. R-11, Tr. 182-83). Upon reentering the third floor, another round of concern and communication began. Respondent's employees again passed along to their management and to LeChase employees Sisson and McCormack, their concern that asbestos was still present. Again, LeChase reassured them. Even so, with Respondent's vice-president's approval, the employees were again removed from the third floor (Tr. 45). Respondent's vice-president went to the site that afternoon and took his own samples which, when tested, showed positive for asbestos. (Tr. 184-85). On July 11, the third floor was again closed for cleaning. (Tr. 240-41).

On that same day, July 11, the CO went to the work site as a result of a complaint claiming that personnel at the site were being exposed to asbestos in the course of their work. The CO held an opening conference which included Mr. Bacher. As the foreman at the site, Bacher was Respondent's only management official there on a daily basis. According to the CO, Bacher spoke of his concerns about asbestos and described several instances of asbestos problems over the course of the preceding weeks, including incomplete abatement and incorrect notices that areas were clear. (Tr. 41-43, 216).

On July 12, Respondent's employees began work on the second floor after having been informed that it was cleared for work. Bacher felt it was safe because he had been told it was cleared for work and he was aware that asbestos encapsulation had been done. (Tr. 242-43).

The CO returned to the site on July 15. During this visit she observed an electrician on the second floor run a wire over a beam, which created a "small...dust cloud." (Tr. 46). Samples taken of two of Respondent's employees that day showed asbestos present in amounts equal to or below the permissible exposure limit. ("PEL"). (Ex. C-1, Tr. 47-50). At this time, the third floor remained closed.

The CO returned, once again, on July 17. On that day she conducted air sampling on one employee on the second floor. This test showed exposure to asbestos exceeding the "excursion limit" permissible. (Tr 52-53). On Friday, July 19, the CO again returned to the site. Her stated purpose was to "speak with other contractors." She testified that while present that day, she was told that two of Respondent's electricians had worked in a "regulated area" on the third floor that

morning. She stated that Bacher confirmed that fact to her. (Tr. 56-57).

The Alleged Violations³

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non compliance, and (4) that the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Applicability of cited standards.

All of the citation items appear as construction standards under 29 C.F.R. § 1101. which is applicable to construction work as defined by 29 C.F.R. § 1910.12(b). I find that the work conducted by Respondent's employees, including the removal and installation of wiring and related electrical equipment as part of a renovation and construction project, which also included asbestos abatement and containment, was within the definition of Class III asbestos work.⁴ I thus conclude that the cited standards apply, and Respondent's contention to the contrary is rejected.

Respondent argues that it "did not have the requisite knowledge that the cited asbestos

³ See, Appendix A.

⁴ The following terms, defined by 29 C.F.R. § 1101(b) are relevant.

Class III asbestos work means repair and maintenance operations, where ACM, including TSI and surfacing ACM and PACM, is likely to be disturbed; Asbestos-containing material ("ACM"), means any material containing more than one percent asbestos; Thermal system insulation ("TSI") means ACM applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain; Presumed Asbestos Containing Material ("PCAM") means thermal system insulation and surfacing material found in buildings constructed no later than 1980. The designation of a material as PACM may be rebutted pursuant to paragraph (k)(5) of this section.

standards applied to the work its employees were engaged in on July 15, 17, or 19, 2002.” (R. Brief, p. 3). The actual exposure of Respondent’s employees to asbestos and their removing and installing electrical wiring and equipment in areas known to have been contaminated by asbestos, is Class III asbestos work. Moreover, while the Commission has, at least on one occasion, addressed an argument that an employer “could not have not have known that the [cited] standard applies,” the decision containing the statement, as did the precedent that decision relied on, resolved the issue in terms of whether Respondent knew, or reasonably could have known, that conditions could arise under which the standard would apply. *Montgomery Kone, Inc.*, 18 BNA OSHC 2007, 2009 (Nos. 97-1133 & 97-1135, 1999), *citing Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) and *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016 (No. 90-2668, 1992). Respondent’s knowledge or lack thereof is discussed in some detail, *infra*.

Existence of the Alleged Violative Conditions and Employee Exposure

Citation 1, Items 1a, 1b and 1c.

Citation 1, Items 1a, 1b and 1c refer to the exposure of an employee to airborne asbestos which was measured on July 17 on the second floor. It is undisputed that on July 17, a 30-minute air sampling of one employee (Schmidt), who was working on the second floor, yielded results showing that the asbestos exposure excursion limit had been exceeded. (Tr. 53-54). The requirements imposed by the standards cited in Items 1b and 1c are “triggered” by the fact of exposure. It is also undisputed that at that time Respondent did not provide respirators or have a respiratory protection program in effect at this work site. Accordingly, I find that each of the violative conditions alleged in Citation 1, items 1a, 1b and 1c existed. Similarly, there is no question that an employee of Respondent was exposed to the violative conditions.

Citation 1, Items 2a, 2b and 2c.

Citation 1, Items 2a, 2b and 2c all refer to activities and/or conditions on the second floor on July 15 and 17. It is undisputed by Respondent that asbestos was present and that it did not have in place and in effect engineering or work practice controls on those dates; nor did it provide respirators or asbestos training for its employees at the site; nor were Respondent’s affected

employees working within a “regulated area” at the site. (Tr. 76, 78, 80). As with Items 1a, 1b and 1c, I find that the existence of the violative conditions alleged has been shown. There is no dispute that Respondent’s employees were exposed to the hazards.

Citation 1, Item 3

Citation 1, Item 3 asserts that on all three dates, July 15, 17 and 19, Respondent failed to have a “competent person”⁵ at the site “perform an exposure assessment at the initiation of the operation to ascertain expected exposures” to asbestos prior to doing electrical work.

The preponderance of the evidence of record supports the alleged violations and shows that Respondent did not have an employee at the site qualified as a competent person under the regulations, despite its contractual obligation to do so. (Tr. 90, 119, 138).

Respondent argues, in essence, that it relied on other contractors to fulfill this requirement. Respondent stated that it had no role with regard to asbestos abatement and that its employees were not expected to “work with” asbestos. While the standard does not require that the “competent person” be someone on Respondent’s payroll, it undertook the commitment to do so. Further, Respondent’s asserted reliance on the agreements reached by the contractors that its electricians (and other craft employees) would not enter or work in an area until the area had been “cleared” of asbestos residue and Respondent received notice to that effect from the managing contractor, is insufficient and is rejected. Regardless of the *bona fides* of the individuals from Beardsley, Excel or TES and/or their methodology for abatement and testing, on at least two occasions, there had been incomplete or improper asbestos abatement, cleanup and/or testing of which Respondent was aware. Respondent thus cannot support drawing the conclusion that its reliance was reasonable. It is more reasonable to infer from the totality of the evidence that Respondent should have been alerted when it received test results showing that proper asbestos abatement was not being achieved by the abatement contractor despite the initial reports of lack of asbestos. The fact that testing was being done by both TES and Respondent is clear from this record. The fact that an assessment was done and the presence of asbestos confirmed after Respondent was reassured that the areas were

⁵ See, 29 C.F.R. § 1926.32(f).

being properly cleared, might, by themselves, have called into question the competency of the testers. Having it happen repeatedly would put a reasonable person on notice that the results of their work was questionable, at best. Finally, while the presence of asbestos after abatement attempts by others is not by itself sufficient to carry the Secretary's burden of proving either that no assessment was done or that it was done by a person not qualified as "a competent person" under the standards, Respondent's failure to act in the face of its commitments and awareness of prior asbestos abatement failures demonstrates the necessity for it to have had a competent person of its own at the site. Accordingly, I find that the violative conditions cited in Citation 1, Item 3, were present as alleged.

Citation 1, Item 4

Citation 1, Item 4 alleges that despite the fact that Respondent's employees were engaged in Class III asbestos work, it failed to provide the required asbestos training to employees who worked on the second floor on July 15 and 17 and on the third floor on July 19.

As with Citation 1, Item 2, Respondent's employees were engaged in Class III asbestos work. Admittedly, they never received specialized asbestos training. (Tr. 157). Respondent's contention that it did not provide the training because it did not anticipate they would be working in an asbestos hazard environment is addressed elsewhere. I find that the evidence establishes the existence of the violative conditions alleged.

The Knowledge Element

An essential issue in this case from Respondent's viewpoint is whether it knew or reasonably should have known that its employees would be doing the Class III asbestos work which, in fact, they did. For the following reasons, I find that Respondent, if not actually aware of it, should have known.

The evidence showing that Respondent knew or should have known that its employees were going to be working in the presence of asbestos begins with the knowledge of all contractors prior to and during the work at the site that demolition and asbestos abatement would be part of the project. Hence, Respondent was required to have a competent person at the site. In addition, a June 25 memo from Beardsley (the asbestos abatement monitor) put Respondent on specific notice that

its employees would be exposed to asbestos. (Ex. R-9). I find that the memorandum is clear enough to raise the possibility of such exposure in the mind of a reasonable participant. Even though not addressed to Respondent, the construction manager made a point of sending it to Respondent attached to the results of testing for asbestos conducted in June. The memorandum addresses areas which will be found to be dusty, dirty or covered in varying degrees with debris revealed by “other trades,” including electricians, after an area has been cleaned.

Respondent’s argument that its electricians “were never supposed to have to work with asbestos on this job” (R. Brief, p. 22) misses the point. Merely because Respondent was not under any contractual obligation to actually perform any asbestos abatement or cleanup work itself, it was not precluded from performing any Class III asbestos work, which includes any construction work in the area or immediate vicinity of asbestos which is likely to be disturbed. Thus, simply because Respondent declined to supply an electrician who had the specialized training to perform asbestos-related work within a regulated area, does not negate the fact that its employees did work in and around areas likely to and actually found to contain asbestos.

Respondent’s other actions are consistent with an awareness of the problems with the effectiveness of the protocol and the accomplishment of asbestos removal, cleanup and testing. Even after Respondent’s management attended the construction meeting of June 25, at which it was assured that asbestos abatement would be completed prior to having its employees enter areas, Respondent’s electricians found what they suspected was asbestos on beginning their work on the second floor and withdrew their employees. (Tr. 234-36). On July 17, when the CO was concerned about a “small dust cloud” in the vicinity of an electrician, Respondent’s management needed “several, essentially coaching statements” before it withdrew the electrician. (Tr. 52-53) The testing on that employee on the second floor that day revealed exposure above the PEL. In light of the above, I find that the preponderance of the evidence on this record demonstrates that Respondent should have reasonably known of the conditions which gave rise to the violations alleged.

In a more general vein, Respondent argues that knowledge of the conditions giving rise to the violations alleged in Citation 1 should not be imputed to it because it took all reasonable steps under the circumstances. In essence, Respondent is attempting to show that, in fact, it had an effective safety plan and approach to this particular work site. Respondent maintains that it never

believed its employees would be working with asbestos, a claim rejected elsewhere in this decision. Also, Respondent argues that it acted appropriately in withdrawing its employees a number of times and taking actions in attempting to get areas re-cleaned. Respondent points to visits to the site by its vice president and safety coordinator and its taking its own asbestos samples. Respondent's actions are considered to be less persuasive in light of the fact that it took the very same actions after a number of examples of the weaknesses or failures of the abatement activities at the site came to its attention. After repeated incidents an employer must take stronger and more effective actions to prevent its employees from work in suspect areas. Here, the conditions did not significantly improve and exposures to asbestos of Respondent's employees occurred repeatedly as time progressed. Contrary to Respondent's assertion otherwise, as time went on Respondent was confronted with more and better reasons to believe that its employees were going to be exposed to asbestos. Respondent's argument is rejected.

For the above reasons, Citation 1, Items 1, 2, 3 and 4 are AFFIRMED.

Citation 2, Item 1

Citation 2, Item 1 alleges a willful violation of the Act in that on the third floor on July 19, Respondent failed to comply with the standard requiring the wearing of appropriate respirators by all employees entering a regulated area.

A willful violation is committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade, Inc.*, 13 BNA OSHC 1019 (No. 83-1189, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered a conscious disregard or plain indifference to the standard, *i.e.*, *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated); *Williams Enterprises Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). This test describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.*, 595 F.2d 309, 318 (5th Cir. 1979); *Ensign - Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983).

The Commission has identified the employer's state of mind as the "focal point" for finding

a violation willful. The Commission stated that there are two ways in which the Secretary can establish willfulness. First, the employer “knows of the legal duty to act,” and, knowing an employee is exposed to a hazard, nonetheless “fails to correct or eliminate the hazardous exposure.” Second, the employer’s state of mind was “such that, if informed of the duty to act, it would not have cared.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No.98-0752, 2000).

Moreover:

[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.

Dover Elevator Co., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (Additional citations omitted.) (“*Dover*”). Not only is the state of knowledge of a supervisor imputed to the employing entity, but the Commission has also held:

“[w]illful **conduct** by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer unless the supervisory employee’s misconduct was unpreventable.” *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (“*VIP*”).

(Emphasis added.) Here, it is undisputed that Respondent’s foreman, Bacher, and another employee (Dennis Cuff) at his direction, entered the third floor without respirators on July 19 to work assisting roofers despite Bacher’s knowledge that the area had not yet been “released” for entry by electricians. According to the CO, Bacher conceded that he knew at the time he sent an electrician, Dennis Cuff, into the area that entry to the third floor was prohibited. (Tr. 86-87) Bacher maintained that he thought it was safe because he believed that cleanup and testing had been completed and that clear results and re-opening of the area were imminent. He stated that the door, which had been sealed, was open and that closing tape and warning signs were there, but not in place.⁶ He also stated

⁶ Two evidentiary disputes, whether Bacher was asked by McCormack or the roofers to enter the third floor area and whether the door, signs and tape indicating the perimeter of the regulated area were in their appropriate place, need not be resolved with specificity in light of the undisputed fact that the area was still a regulated area and that Bacher knew that entry was still improper.

that when he got to the third floor, employees of Excel and TES were there without respirators or protective clothing. Bacher's testimony is that while he believed that abatement had been done and "they were only testing," he knew that the area had not been cleared for work. (Tr. 245). He conceded that he understood at the time that if the testing being done were to come back positive for asbestos presence, his entry to the third floor was going to place him in danger. (Tr. 257). I find that despite the other indications that the area might have been "safe," Bacher's specific knowledge that the area had not yet been approved for work to other trades is determinative and persuasive as to the issue of whether he should have known that it was improper for him or any other electrician to work there at that time.

Under the facts of this case, I thus find that Respondent's foreman, Bacher, voluntarily made the decision to enter the third floor knowing that it was "off-limits" to him and his electricians. His knowledge of the status of the area as not yet opened for work is sufficient "scienter" in that his decision to do work there constituted a determination to undertake an activity which he knew to be incompatible with the asbestos requirements in general, even if he did not know of the standard's specific requirements. Bacher's knowledge, state of mind and actions are attributable to Respondent in the absence of a showing that his conduct was "unpreventable." *V.I.P., supra*.

Unpreventable Employee Misconduct

Because the alleged willful violation and the asserted affirmative defense is limited to the facts of the July 19 entry into a regulated area, the following discussion is narrow in scope.⁷

Under *Dover, supra*, it is inferred that Respondent's safety program was not fully adequate. Nonetheless, Respondent has raised the claim that Bacher's action in entering the third floor regulated area without appropriate protective equipment was an act of unpreventable employee misconduct, an affirmative defense long recognized by the Commission.

The elements of the unpreventable employee misconduct affirmative defense are relatively well defined. The burden of proof is on the employer to show that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated

⁷ See, Respondent's Brief, p. 29.

the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). Respondent has the burden of proving each of the four elements. *See, Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276, *cert. denied*, 484 U.S. 989 (1987). Evidence that a foreman or supervisor has violated a standard permits an inference that the employer's safety program has not been adequately enforced. *See, Brock v. L. E. Myers Co.*, at 1277. While it is difficult to parse these elements into separate considerations, they provide a framework within which an assessment of the claim of unpreventable employee misconduct may be considered in an orderly fashion. Thus, a detailed discussion here of Respondent's overall safety program is not in order. The alleged affirmative defense is considered within the narrow confines of the nature of the alleged violation that is, entry into a regulated area without appropriate respirators,

(1) Respondent's work rule regarding entry into regulated areas. Consistent with its assertion that it does not generally do nor did it expect to do asbestos work on this project, Respondent points to no general safety rule it had regarding employee entry into regulated areas. Its safety manual does have extensive material regarding the use of respirators or protective equipment under various conditions. (Ex. R-3, pp. 6-19). The record contains undisputed evidence that Bacher was specifically told on more than one occasion by several people, including Respondent's vice-president and its project manager, not to enter regulated areas. He was also kept informed of the closed status of the third floor. (Tr. 198, 216-19). Bacher knew of the rule. (Tr. 244). He also attended job conferences and received notices as to the status of the work and the areas closed. The Secretary presented no specific contrary evidence. As an isolated single element of the affirmative defense, Respondent has shown that it had a "rule," the intent of which was to preclude its employees from entering into regulated asbestos areas.

(2) Communication of the rule to employees. Bacher's testimony that he knew that he was not to enter regulated areas leaves little doubt that the rule was "communicated" to him. The Secretary, however, challenges the effectiveness of the communication. She does so by relying on Bacher's actions after he received those instructions, *i.e.*, he entered the third floor anyway. There can be little or no doubt that the instruction not to enter regulated areas was received by Bacher, but, as the Secretary argues, Bacher's action in the face of such instructions is evidence that the

communication was not “effective.” In general, Respondent appears to have arranged the more usual “tool-box” talks on a regular basis. At least one such talk referred to respirators. (Tr. 159) There is also evidence that Respondent held two foremen meetings per year described by its vice president as “safety meetings.” (Tr. 158) The description of the semi-annual meetings reveals nothing about the syllabi, identity of instructors or attendees of the meetings. This evidence is of little weight.

(3) Steps to discover incidents of noncompliance. This record contains no evidence of any entry into regulated areas by Respondent’s employees before July 19. Respondent’s vice president and its safety manual addressed the general proposition that its managers with safety responsibility visit work sites and are to report safety difficulties and employee misconduct “immediately.” (Tr. 152) There is no showing by Respondent that it conducted unscheduled safety audits (as opposed to general visits) of its work sites, or that it had mandatory safety checklists.

(4) Enforcement of the rule. In the absence of any prior incidents of Respondent’s employees entering a regulated area, the Secretary argues that weaknesses in Respondent’s overall safety program and its asserted failure to properly train Bacher amounted to its passive condonation of his action. (S. Brief, pp. 24-26). Other than matters discussed herein, no examples were provided. And, other than a general description of a “disciplinary policy,” there is no record of action taken with regard to employees who failed to follow Respondent’s rules. (Tr. 157-58). The Secretary’s portrayal of Respondent as taking no significant action in the face of its knowledge that asbestos abatement was being done poorly at best is somewhat hyperbolic. Respondent, however, did not take actions commensurate with the situation its employees faced at the site.

In sum, because Respondent’s actions were insufficient under the circumstances of the conditions at the site, given the multiple examples of improper asbestos abatement, cleanup and/or testing, I find that it has not sustained its burden of proving that the actions of its foreman on July 19 in entering a regulated area without appropriate protection was an unpreventable employee incident. Accordingly, the alleged failure to comply with the standard as alleged in Citation 2, Item 1 is found to be a willful violation of the Act as alleged.

Classification as Serious and Appropriate Penalties

The Secretary has alleged that all the violations are serious within the meaning of

Section 17(k) of the Act. Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from the violative condition rather than the likelihood of the condition arising, which is considered in determining whether a violation is serious. *See, Dravo Corp.*, 7 BNA OSHC 2095, 2101 (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3d Cir. 1980). It is not necessary for the harm or death to actually occur. It is sufficient if the result is possible and that result would be serious injury or death. Given the significant well-known health hazards resulting from exposure to asbestos, the violations here are properly classified as serious.

The Commission has long ago and since then frequently held that in determining appropriate penalties for violations, “due consideration” must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include the size of the employer’s business, the gravity of the violation, and the employer’s good faith and prior history. The Commission also recognizes that the factors are not necessarily accorded equal weight. *Nacierma Operating Co.*, 1 BNA OSHC 1001 (No. 0004, 1972). Other than seeking vacation of the alleged violations, Respondent does not argue that the proposed penalties are improper or inappropriate. Nonetheless, it is the Commission’s obligation to assess contested penalties.⁸

The record introduced by the Secretary in support of the appropriateness of the proposed penalties is meager but not unwarranted in light of the positions taken by Respondent. Mere reliance on formulas by OSHA in calculating proposed penalties leaves little room for consideration of specifics in each case. In this case, each of the actual exposures to asbestos were brief. The longest shown exposure to any amount exceeding a permitted level was 30 minutes. But that exposure was limited to that time only by prompting of the CO. There is evidence of the presence of a small dust cloud of presumed asbestos material, the amount of which remains undocumented, and exposure to some asbestos which was measured to be below permitted levels. It is important to note that Bacher and Cuff’s entry into the regulated area of the third floor (Citation 2, Item 1) was not shown to have resulted in exposure to any asbestos. The Secretary’s characterization of that incident, as resulting

⁸ Respondent’s Notice of Contest raised the issue of the appropriateness of the proposed penalties.

in exposure to “unknown” amounts of asbestos is inaccurate without evidence that any asbestos was present, despite peripheral evidence that some PACM materials were dislodged by the roofers. In addition, OSHA’s blanket policy of allowing no good faith “deduction” for willful violations is misdirected where, as here, the acts of a particular employee have been imputed to Respondent’s higher management. The record as a whole, as discussed above, does not warrant the severe penalty proposed here. Accordingly, while I find that the proposed penalties of \$4,000 for each of the serious violations (which each contained a number of sub-items and/or instances) are appropriate, I find that a civil penalty of \$ 25, 000 is appropriate for the one instance of willful violation.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made within the text above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).
2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.
3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Citation 1, Items 1, 2, 3 and 4 and Citation 2, Item 1.
4. Each and every one of the violations of the Act found above was serious within the meaning of the Act.
5. The violation as alleged in Citation 2, Item 1 was willful within the meaning of the Act.
6. A total civil penalty of \$ 4,000 for each of the violations affirmed in Citation 1 is appropriate, as is a penalty of \$ 25,000 for the willful violation in Citation 2.

ORDER

1. Citation 1, Items 1,2, 3 and 4 and Citation 2, Item 1 are AFFIRMED.
2. A total civil penalty of \$ 41,000 is assessed.

/s/ _____
Michael H. Schoenfeld
Judge, OSHRC

Dated: May 17, 2004
Washington, D.C.

SCHULER-HAAS ELECTRIC CORP., No. 03-0322
APPENDIX A
TABLE OF ALLEGED VIOLATIONS AND CITED STANDARDS

Citation 1, Items 1a, 1b and 1c

Citation 1, Item 1a, alleges that on or about July 17, an employee on the second floor was exposed to airborne concentrations of asbestos in excess of the permitted limits which constitutes a failure to comply with the standard at 29 C.F.R. §1926.1101(c)(2). The standard, in pertinent part, provides:

The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an eight (8) hour time-weighted average (TWA), as determined by the method prescribed in Appendix A to this section, or by an equivalent method.

Citation 1, Item 1b alleges that on or about July 17, Respondent did not provide a respirator to an employee on the second floor who was exposed to airborne asbestos in excess of the permitted limits, which constitutes a failure to comply with the standard at 29 C.F.R. §1926. 1101(h)(1). The standard, in pertinent part, provides:

For employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph. Respirators must be used during:

* * *

Work operations covered by this section for which employees are exposed above the TWA or excursion limit.

Citation 1, Item 1c alleges that on or about July 17, Respondent did not have a respiratory protection plan in effect when an employee on the second floor was exposed to airborne asbestos in excess of the permitted limits which constitutes a failure to comply with the standard at 29 C.F.R. §1926.1101(h)(2)(I). The standard, in pertinent part, provides:

The employer must implement a respiratory protection program in accordance with 29 C.F.R. §§ 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

SCHULER-HAAS ELECTRIC CORP., No. 03-0322
APPENDIX A
TABLE OF ALLEGED VIOLATIONS AND CITED STANDARDS

Citation 1, Items 2a, 2b and 2c

Citation 2, Item 2a, alleges that on or about July 15 and 17, Respondent failed to implement applicable alternative protective provisions for employees exposed to asbestos hazards on the second floor which constituted a failure to comply with the standard at 29 C.F.R. § 1926.1101(d)(3). The standard, in pertinent part, provides:

[A]ll employers of employees exposed to asbestos hazards shall comply with applicable protective provisions to protect their employees.

Citation 1, Item 2b, alleges that on or about July 15 and 17, Respondent failed to assure that Class III asbestos work on the second floor was conducted solely within regulated areas which constituted a failure to comply with the standard at 29 C.F.R. § 1926.1101(e)(1). The standard, in pertinent part, provides:

All Class I, II and III asbestos work shall be conducted within regulated areas.

Citation 1, Item 2c, alleges that on or about July 15 and 17, Respondent's Class III asbestos work was conducted on the second floor without using engineering or work practice controls to minimize employee exposure to asbestos which constituted a failure to comply with the standard at 29 C.F.R. § 1926.1101(g)(9). The standard, in pertinent part provides;

Class III asbestos work shall be conducted using engineering and work practice controls which minimize the exposure to employees performing the asbestos work and to bystander employees.

SCHULER-HAAS ELECTRIC CORP., No. 03-0322
APPENDIX A
TABLE OF ALLEGED VIOLATIONS AND CITED STANDARDS

Citation 1, Item 3

Citation 1, Item 3, alleges that on or about July 15 and 17 on the second floor and again on July 19 on the third floor, Respondent did not ensure that a “competent person” performed an asbestos exposure assessment prior to work starting which constitutes a failure to comply with the standard at 29 C.F.R. § 1926.1101(f)(2)(I). The standard, in pertinent part, provides;

Each employer who has a workplace or work operation covered by this standard shall ensure that a "competent person" conducts an exposure assessment immediately before or at the initiation of the operation to ascertain expected exposures during that operation or workplace.

Citation 1, Item 4

Citation 1, Item 4, alleges that on or about July 15 and 17 on the second floor and on July 19 on the third floor, Respondent’s employees, without proper training, performed Class III asbestos work which constituted a failure to comply with the standard at 29 C.F.R. § 1926.1101(k)(9)(v). The standard, in pertinent part, provides:

Training for Class III employees shall be consistent with EPA requirements for training of local education agency maintenance and custodial staff as set forth at 40 C.F.R § 763.92(a)(2). Such a course shall also include "hands-on" training and shall take at least 16 hours. Exception: For Class III operations for which the competent person determines that the EPA curriculum does not adequately cover the training needed to perform that activity, training shall include as a minimum all the elements included in paragraph (k)(9)(viii) of this section and in addition, the specific work practices and engineering controls set forth in paragraph (g) of this section which specifically relate to that activity, and shall include "hands-on" training in the work practices applicable to each category of material that the employee disturbs.

SCHULER-HAAS ELECTRIC CORP., No. 03-0322
APPENDIX A
TABLE OF ALLEGED VIOLATIONS AND CITED STANDARDS

Citation 2, Item 1

Citation 2, Item 1, alleges that on or about July 19, on the third floor, an employee entered an asbestos regulated area without having been supplied with or wearing a respirator which constituted a failure to comply with the standard at 29 C.F.R. § 1926.1101(e)(4). The standard, in pertinent part, provides;

All persons entering a regulated area where employees are required pursuant to paragraph (h)(1) of this section to wear respirators shall be supplied with a respirator selected in accordance with paragraph (h)(2) of this section.