

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. :
:
TRINITY INDUSTRIES, INC., :
:
Respondent. :

OSHRC DOCKET NO. 05-0773

Appearances:

Judson H. P. Dean, Esquire
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Robert E. Rader, Jr., Esquire
Rader & Campbell
Dallas, Texas
For the Respondent.

Before: G. Martin Bober
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, Trinity Industries, Inc. (“Trinity” or “Respondent”), from March 30, 2005 to April 25, 2005; the site was located in McKees Rocks, Pennsylvania. As a result of the inspection, OSHA issued to Trinity a Citation and Notification of Penalty alleging serious violations of 29 C.F.R. §§ 1926.1101(k)(2)(i), and 1926.1101(k)(2)(ii)(A). Trinity timely contested the citation and the proposed penalty.

By agreement of the parties, and with the approval of the Administrative Law Judge, the parties have submitted this case for a decision on the record pursuant to Commission Rule 61, 29 C.F.R. § 2200.61. Rule 61 provides as follows:

A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof. * * * .

Stipulation of Facts¹

Complainant Secretary of Labor and Respondent Trinity Industries, Inc., make the following stipulations of fact because they believe this case is controlled by an issue of law. Such stipulations are made to avoid the time and expense of an evidentiary hearing and are for the purposes of this proceeding only.

1. Trinity Industries, Inc., is an employer subject to the Occupational Safety and Health Act.
2. The Review Commission has jurisdiction over these proceedings.
3. The citation in this case involves a foundry in McKees Rocks, Pennsylvania. Trinity purchased the McKees Rocks facility from Century America, Corporation in late 1988. The facility was constructed prior to 1980.
4. Shortly before Trinity purchased the McKees Rocks facility, Helmut Hvizdalek, then the plant manager for Century America, negotiated a contract for Salem Furnace Company in Pittsburgh to remove and replace the water system and do related work on a “pusher furnace” in the facility. The work required removing the outer brick wall and the inner insulation blanket, intended to prevent heat loss, all the way down to the metal furnace itself in the area where the piping goes to the furnace.
5. Helmut Hvizdalek contracted with Salem Furnace because Century America had used them in the past and based on their previous work Hvizdalek was confident they were experts in repairing and rebuilding furnaces, including removal of asbestos if necessary.
6. Trinity purchased the McKees Rocks facility after Helmut Hvizdalek negotiated the contract with Salem Furnace but before Salem Furnace began the work. After Trinity purchased the facility, Trinity issued its own purchase order to Salem Furnace to complete the repair work on the furnace previously negotiated by Helmut Hvizdalek. The total price for the work was \$585,000 and Trinity paid Salem Furnace that amount when the work was completed in early 1989. Trinity is

¹The following sets out verbatim the Stipulation of Facts submitted by the parties.

currently the owner of the building/facility, and was the owner at the time of the alleged violation at issue.

7. When Trinity purchased the McKees Rocks facility, Helmut Hvizdalek stayed on at the facility as general manager of Trinity's forged products division. Helmut Hvizdalek is the only person still employed by Trinity with knowledge of the furnace repairs in 1989.

8. When Salem Furnace removed and replaced the insulation blanket in 1989 they did not inform Helmut Hvizdalek or anyone else at Trinity that the inner insulation blanket was asbestos and there was no discussion about the insulation blanket. Mr. Hvizdalek therefore believed either that it was not asbestos or, if it was asbestos, that Salem had properly disposed of it. Either way, at the conclusion of the work Helmut Hvizdalek believed that there was no asbestos in the area where Salem had worked. Trinity does not currently possess any documentation relating to the work performed by Salem Furnace in 1989.

9. In 2005 the outer brick wall in the same area of the pusher furnace needed to be replaced. Trinity could not use Salem Furnace again because in the intervening sixteen years they sold out to another company and are no longer in business. Trinity therefore contracted with Pli-Brico in Salem, Ohio to replace the brick.

10. In the past, whenever Trinity has had repair work performed on furnaces it has tested for asbestos. In this case, however, because of the repair work in 1989 and the belief that any asbestos had been removed by Salem Furnace in the area where Pli-Brico would be working, Trinity did not test or inspect for asbestos before hiring Pli-Brico or at any time before Pli-Brico began the work, and Trinity did not notify Pli-Brico that asbestos was present.

11. In fact the insulation blanket did contain asbestos. Both Pli-Brico and Trinity were surprised that the inner insulation blanket contained asbestos because this was the same area where Salem Furnace did their repair work in 1989. In 1989 Salem had removed the outer brick and insulation blanket all the way down to the metal. Therefore, for there to still be asbestos in that area could only mean that Salem had either replaced an existing asbestos blanket or installed a new asbestos blanket.

12. Trinity was aware at all times before Pli-Brico began the work that the furnace was covered by an insulation blanket located under the outer brick exterior. However, neither Helmut Hvizdalek nor Trinity anticipated that when Salem Furnace replaced that insulation blanket in 1989

that they replaced it with another asbestos blanket. Mr. Hvizdalek, and Trinity, believed that if there had been asbestos in the area of the furnace it had been removed in 1989. Prior to the work performed by Pli-Brico, neither Helmut Hvizdalek nor Trinity had actual knowledge that asbestos was present in the area to be repaired by Pli-Brico.

13. The contractor Pli-Brico began its work on Saturday, March 26, 2005. The asbestos in the insulation blanket beneath the outer brick was not identified until approximately 2:00 p.m. on Monday, March 28, 2005 (no work was performed on Sunday, March 27, 2005), when an employee of the facility observed that some of the insulation blanket material, which had been removed by Pli-Brico and placed in a dumpster, looked like it contained asbestos. At this time, Pli-Brico stopped the work, and Trinity conducted its own testing of the insulation blanket material and determined that it did contain asbestos. The bulk samples conducted by Trinity on March 28, 2005, contained 15% amosite asbestos.²

14. Once it was determined that the insulation blanket material contained asbestos, the area was sealed off and arrangements were made to properly remove and dispose of the asbestos.

15. On March 30, 2005, OSHA conducted an inspection of Trinity's facility in McKees Rocks. The Compliance Safety and Health Officer ("CSHO") collected two bulk samples of the insulation blanket from an area where employees of the contractor (Pli-Brico), including but not limited to Blaine Daugherty, III, and Dan Neely, had been working on March 26, 2005 for a full eight hour shift, and on March 28, 2005 until approximately 2:00 p.m. One sample was found to consist of fiberglass, the second sample contained 5% amosite asbestos. The CSHO also collected a bulk sample of the insulation blanket material that had been removed and placed in the dumpster. That sample contained 3% amosite asbestos.

16. As a result of the inspection OSHA issued a citation for: (1) a Serious violation of 29 C.F.R. § 1926.1101(k)(2)(i) based on the following alleged facts: "Before work was conducted in the Pusher Furnace, the employer failed to determine the presence, location and quantity of asbestos-

²This sentence originally stated that the bulk samples contained "5% amosite asbestos." The Secretary's letter of September 16, 2005 amended the sentence to read "15% amosite asbestos."

containing material. Employees removing fire brick disturbed backing containing 3 to 5%³ amosite asbestos”; and (2) a Serious violation of 29 C.F.R. § 1926.1101(k)(2)(ii)(A) based on the following alleged facts: “Before repair work was done on the Pusher Furnace, the employer failed to notify prospective employers bidding for work whose employees reasonably can be expected to be exposed to areas containing asbestos containing material (ACM) or presumed asbestos containing material (PACM).” The citation proposes a total penalty of 2,000.

Motion to Strike

On August 12, 2005, counsel for the Secretary notified the undersigned that the parties agreed that the “case may be decided on written motions without need of a hearing.” The parties filed a stipulation of facts, briefs and, thereafter, response briefs. However, with her brief filed October 11, 2005, the Secretary indicated she had included the OSHA-1B form from the inspection as Exhibit A to her brief, to support the serious classification of the violations and the proposed penalty.⁴

On October 26, 2005, Respondent filed its Motion to Strike. Respondent asserts that (1) “[t]he parties agreed to submit this case on stipulated facts,” (2) “[t]o that end, the parties negotiated and agreed to a joint Stipulation of Facts in accordance with Commission Rule 61,” (3) the parties agreed on the stipulated facts, signed the stipulation, and filed it with the Commission, (4) the “Stipulation of Facts include[d] ‘all material facts,’” (5) after the Stipulation of Facts was filed, the Secretary submitted, as supplemental evidence, an OSHA-1B as an exhibit to her brief, (6) the OSHA-1B was included in her brief “to support the classification of the citation and the proposed penalty,” and (7) the OSHA-1B should “not be considered by the Judge or the Commission because they are outside the agreed Stipulation of Facts.”

On November 9, 2005, the Secretary filed her reply. The Secretary asserts that: (1) “[a]t the outset of litigation, Respondent expressly based its contest of the Citation upon one specific argument: that, under the circumstances, Respondent acted with reasonable diligence in assuming that the area in which Plibrico employees would be working was free of asbestos. Respondent did

³On September 16, 2005, the Secretary, without objection from Respondent, amended the last sentence of paragraph 13. As noted in footnote 2, *supra*, the amendment changed the sentence from “contained 5% amosite asbestos” to “contained 15% amosite asbestos.” No such change was requested for paragraph 16.

⁴Despite the Secretary’s statement in her brief, there was no Exhibit A included with the brief.

not at any time indicate to Complainant that it intended to dispute the proposed penalty;” (2) “the OSHA-1B form had already been produced to Respondent during discovery, and Respondent therefore had full knowledge of the factual basis for OSHA’s proposed penalty at this time;” and (3) admitting the OSHA-1B into the record “would be fair under the circumstances: the accuracy of this information is not disputed by Respondent; the information does not in any way contradict any of the Factual Stipulations already submitted; and the sole reason that not all of the penalty-related information from the OSHA-1B appears in the Stipulated Facts is because Respondent did not disclose its intention to challenge the proposed penalty.”

As Respondent points out, evidentiary stipulations are binding on the parties who make them, including the government. *See Thrash v. O’Donnell*, 448 F.2d 886, 889 n.7 (5th Cir. 1971). *See also Mull v. Ford Motor Co.*, 368 F.2d 713, 716 (2d Cir. 1966). Moreover, “facts agreed to by the parties ... are to be considered facts on the trial, without further evidence....The trial court may not disregard the facts stipulated to by the parties or require evidence to support them.” *U.S. v. Sommers*, 351 F.2d 354, 357 (10th Cir. 1965). In addition, a pretrial stipulation remains binding between the parties during subsequent proceedings unless a failure to modify or set it aside would result in manifest injustice. *Waldorf v. Borough of Kenilworth*, 878 F. Supp. 686, 694 (D. N.J. 1995), *aff’d sub nom. Waldorf v. Shuta*, 142 F.3d 601, 618 (3d Cir. 1998). In this case, when the Secretary entered into stipulation discussions with Trinity, she had in her possession the OSHA-1B at issue. The Secretary should have made the contents of the OSHA-1B a stipulation at that time, particularly since it contained information relevant to the serious classification of the alleged violations and to the appropriateness of the proposed penalty. When she did not do so, she relinquished her legal right to include the contents of the OSHA-1B in the stipulation of facts. Under the circumstances of this case, I find that there is no manifest injustice in not receiving the OSHA-1B in evidence. Trinity’s motion to strike is accordingly granted.

Essential Facts

The essential facts are not in dispute. In 1988, Trinity purchased a foundry, located in McKees Rocks, Pennsylvania, from Century America Corporation (“Century”). The facility was constructed prior to 1980. Shortly before Trinity purchased the facility, Century’s plant manager, Helmut Hvizdalek, contracted with Salem Furnace Company (“Salem”) to work on a pusher furnace at the facility. The contract provided that Salem would remove the outer brick wall and the inner

insulation blanket all the way down to the metal pusher furnace in the area where the piping went to the furnace. When Salem removed and replaced the insulation blanket in 1989, it did not inform anyone at Trinity that the insulation blanket contained asbestos. Trinity issued its own purchase order to Salem, and Salem was paid \$585,000 after the work was completed in early 1989.

In 2005, the outer brick wall in the same area of the pusher furnace needed to be replaced, and Trinity contracted with Pli-Brico to replace the brick. Based upon its belief that Salem would have either informed it of the presence of asbestos or removed any asbestos material from the furnace during the work in 1989, Trinity mistakenly assumed that the area to be worked on contained no asbestos. Trinity, therefore, did not test or inspect the furnace area for the presence of asbestos before Pli-Brico commenced its work. However, the insulation blanket did in fact contain asbestos, and both Pli-Brico and Trinity were surprised to learn that such was the case in light of the work that Salem had done in 1989. Before Pli-Brico performed its work, neither Mr. Hvizdalek nor Trinity had actual knowledge that asbestos was present in the area to be repaired.

Pli-Brico began its work at the facility on March 26, 2005, and continued its work on March 28, 2005.⁵ At about 2:00 p.m. on March 28, an employee of the facility observed that some of the insulation blanket material, which had been removed by Pli-Brico and placed in a dumpster, looked like it contained asbestos. At that point, Pli-Brico stopped its work, and Trinity conducted its own testing of the insulation blanket material and determined that it did contain asbestos. The area was then sealed off and arrangements were made to properly remove and dispose of the asbestos. On March 30, 2005, an OSHA Compliance Officer conducted an inspection of the foundry, and, thereafter, the Citation and Notification of Penalty described *supra* was issued.

The Cited Regulations

Item 1a alleges a violation of 29 C.F.R.1926.1101(k)(2)(i), which provides as follows:

(k) *Communication of hazards.* (2) *Duties of building and facility owners.* (i) Before work subject to this standard is begun, building and facility owners shall determine

⁵As set out in Stipulation 13, *supra*, no work was performed on March 27, 2005, a Sunday.

the presence, location, and quantity of ACM and/or PACM⁶ at the work site pursuant to paragraph (k)(1) of this section.

Item 1b alleges a violation of 29 C.F.R.1926.1101(k)(2)(ii)(A), which states that:

(ii) Building and/or facility owners shall notify the following persons of the presence, location and quantity of ACM or PACM at the work sites in their buildings and facilities. Notification either shall be in writing, or shall consist of a personal communication between the owner and the person to whom notification must be given or their authorized representatives: (A) Prospective employers applying or bidding for work whose employees reasonably can be expected to work in or adjacent to areas containing such material.

The Positions of the Parties

According to the Secretary, the issue in this case is whether Trinity violated the two cited standards by (1) failing to determine the presence, location and quantity of PACM before the contractor began work at the site, and (2) failing to communicate information about the PACM to the contractor hired to perform the work in the area where the PACM was located. The Secretary contends she has met her burden of proof as to all elements of the alleged violations.

According to Respondent, the citation must be dismissed as a matter of law. It notes that there was exposure only to employees of Pli-Brico, a separate employer, and that the Fifth Circuit Court of Appeals has held that an employer cannot be found in violation of a standard if its own employees are not affected by the noncompliance. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981). Trinity points out that it is headquartered in Dallas, Texas, which is located in the Fifth Circuit, and that the Commission must apply Fifth Circuit precedent in this case.

Respondent further contends that even if Trinity had liability for the exposure of Pli-Brico employees, the citation must still be dismissed because the Secretary has not proved knowledge. Trinity notes that the Secretary asserts that the element of knowledge in this case is established by a presumption that the insulation blanket around the furnace contained asbestos as the building was built before 1980; because of this presumption, she argues, Trinity is deemed to have knowledge that

⁶Under the standard, ACM refers to asbestos-containing material, and PACM refers to presumed asbestos containing material. Further, PACM includes thermal system insulation and surfacing material found in buildings constructed no later than 1980. The designation of material as PACM may be rebutted pursuant to paragraph (k)(5) of the standard. *See* 29 C.F.R. 1926.1101(b).

asbestos was present unless Trinity affirmatively proved otherwise by using the specific testing procedures set forth in the standard.

Respondent asserts that the effect of such a presumption is to shift the burden of proof as to knowledge from the Secretary to Trinity and that doing so is contrary to Fifth Circuit precedent. It points out that in that Circuit, the only effect of a presumption is to shift the burden of producing evidence in regard to the presumed fact; it does not shift the burden of persuasion. *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1136 (5th Cir. 1986). It also points out that once a respondent produces evidence challenging the presumed fact, the presumption disappears from the case; the presumption is dispelled upon the introduction of evidence that would support a finding of the nonexistence of the presumed fact. *Id.* at 1136-38. Respondent notes that pursuant to the parties' stipulations, Trinity had no actual knowledge of the presence of asbestos and reasonably believed that any asbestos had been removed by the previous contractor. Respondent argues that, under *Pennzoil*, the presumption that Trinity knew of the presence of asbestos is dispelled by the stipulations showing Trinity's lack of knowledge; thus, the presumption of knowledge disappears from this case, and the Secretary has no evidence to meet her burden of showing knowledge.

Finally, Respondent contends the Secretary has not proved either the serious classification or the appropriateness of the proposed penalty. It notes that the serious classification depends on whether there is a substantial probability that death or serious physical harm could result from the condition. It also notes there is no evidence of how much time was spent actually removing the insulation blanket itself or how much of the blanket was removed before it was identified as possibly containing asbestos; without evidence of exposure, there can be no determination the citation was serious, and the lack of evidence also precludes the determination of an appropriate penalty.

DISCUSSION AND CONCLUSION

To prove a violation of a specific OSHA standard, the Secretary has the burden of proving that the standard applies, that the terms of the standard were not met, that employees had access to the violative condition, and that the cited employer had actual or constructive knowledge (*i.e.*, either knew or could have known with the exercise of reasonable diligence) of the violative condition. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1720 ((No. 95-1449, 1999).

The stipulated facts in this case establish that Trinity was the owner of the subject building and facility, that the building was constructed before 1980, and that in 2005, Trinity contracted with

Pli-Brico to repair the outer brick wall of the building in the area where the pusher furnace was located. The facts also show that the pusher furnace had an insulation blanket over it to prevent heat loss, that at least part of the blanket was removed during Pli-Brico's work at the site, and that testing of the blanket material revealed it contained from 3 to 15% amosite asbestos. Finally, the facts demonstrate that Trinity did not inspect or test for asbestos before hiring Pli-Brico or at any time before Pli-Brico began the work and that Trinity did not notify Pli-Brico that asbestos was present. (Stip. Nos. 3, 4, 6, 10, 13, 15).

OSHA's asbestos standard applies to, *inter alia*, the "[c]onstruction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos." *See* 29 C.F.R. 1926.1101(a)(3). In addition, asbestos-containing material, or ACM, means "any material containing more than one percent asbestos," and thermal system insulation, or TSI, means "ACM applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain." *See* 29 C.F.R. 1926.1101(b). Section 1926.1101(k)(1), which is referred to in the first cited standard, provides as follows:

This section applies to the communication of information concerning asbestos hazards in construction activities to facilitate compliance with this standard. Most asbestos-related construction activities involve previously installed building materials. Building owners often are the only and/or best sources of information concerning them. Therefore, they, along with employers of potentially exposed employees, are assigned specific information conveying and retention duties under this section. Installed Asbestos Containing Building Material. Employers and building owners shall identify TSI and sprayed or troweled on surfacing materials in buildings as asbestos-containing, unless they determine in compliance with paragraph (k)(5) of this section that the material is not asbestos-containing. Asphalt and vinyl flooring material installed no later than 1980 must also be considered as asbestos containing unless the employer, pursuant to paragraph (g)(8)(i)(I) of this section determines that it is not asbestos-containing. If the employer/building owner has actual knowledge, or should have known through the exercise of due diligence, that other materials are asbestos-containing, they too must be treated as such. When communicating information to employees pursuant to this standard, owners and employers shall identify "PACM" as ACM. Additional requirements relating to communication of asbestos work on multi-employer worksites are set out in paragraph (d) of this section.

Based upon the foregoing stipulated facts, the provisions of the asbestos standard set out above, and the language of the cited standards, it is clear the cited standards applied to Pli-Brico's work at the site. It is also clear that Trinity did not satisfy the terms of the standards and that Pli-

Brico's employees had access to the insulation blanket due to Trinity's failure to comply with the standards. As to knowledge, Trinity had no actual knowledge the insulation blanket covering the pusher furnace contained asbestos. However, Trinity, as the building owner, knew the building was constructed before 1980; it also knew an insulation blanket covered the pusher furnace. (Stip. Nos. 3, 4, 5, 12). The asbestos standard plainly requires an employer to identify TSI in buildings constructed no later than 1980 as asbestos-containing unless the employer affirmatively determines that it is not. As Trinity did not do so, the Secretary has demonstrated the knowledge element.

As set out *supra*, Trinity argues the Secretary has not proved knowledge in this case, citing to the Fifth Circuit's holding in *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1136 (5th Cir. 1986).⁷ Specifically, Trinity asserts the standard presumes employer knowledge of the presence of asbestos, for situations like the one here, unless the employer proves otherwise by using the testing procedures set forth in the standard; Trinity further asserts the presumption improperly shifts the burden of proof. However, the standard presumes *only the presence of asbestos* in circumstances like those in this case, which the employer may rebut by performing the specified testing. The Commission agreed with this interpretation in *Odyssey Capital Group*, 19 BNA OSHC 1252 (No. 98-1745, 2000). There, the employer's employees were scraping off sprayed-on acoustic paint from apartment ceilings in a building that was built before 1981. The Commission stated, as to the presumption in the standard, as follows:

An employer may overcome the presumption that sprayed- or troweled-on surfacing material in pre-1981 buildings is ACM, if it establishes that an analysis of bulk samples collected in the manner described in 40 C.F.R. § 763.86 shows that the surfacing material does not contain more than one percent asbestos. 29 C.F.R. §§ 1926.1101(k)(1), (5).

⁷The Secretary's suggestion that there is no basis for considering Fifth Circuit precedent in this matter is rejected. Pursuant to 29 U.S.C. § 660(a) and (b), any person adversely affected by an order of the Commission may obtain review in any United States court of appeals for the circuit (1) in which the violation is alleged to have occurred, (2) where the employer has its principal office, or (3) in the Court of Appeals for the District of Columbia Circuit. While the Secretary asserts there is no evidence in the record as to the location of Trinity's principal office, I take judicial notice of the fact that Trinity's web site states the company is headquartered in Dallas, Texas. See www.trin.net/. Trinity has cited to two cases in the Fifth Circuit in support of its position, which persuades me that, if Trinity does not prevail in this case, it is highly probable that Trinity would file an appeal in the Fifth Circuit. See *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 & n.3 (No. 93-3274, 1995).

Id. at 1254. *See also James R. Howell & Co.*, 19 BNA OSHC 1277 (No. 99-1348, 2000). The stipulated facts establish that Trinity did not perform the required testing. (Stip. No. 10). Trinity, consequently, cannot rebut the presumption in the standard.

Moreover, as the Secretary points out, her burden of proof with respect to knowledge in this case is the same as that for all cases, that is, she must show that the employer had actual knowledge of the conditions constituting the violation or that the employer, with the exercise of reasonable diligence, could have known of the conditions. *See, e.g., Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1720 ((No. 95-1449, 1999). As the Secretary also points out, the Commission in *Odyssey Capital Group*, discussed above, stated that the employer there “was aware of all the conditions constituting the violation.” Specifically, it knew that the building had been constructed before 1981, that many of the apartment ceilings had sprayed-on surfacing material, and that no testing under the standard had been done. 19 BNA OSHC at 1254. Odyssey asserted, however, that it was entitled to rely on environmental studies done for its financing entity, showing that no samples of the ceiling material contained as much as one percent asbestos, to establish that it was reasonably diligent in determining the apartments did not contain sufficient asbestos to trigger application of the cited standards. The Commission rejected this assertion, noting that the asbestos standard defined what constituted reasonable diligence; that is, it required the employer to take precautions unless specific testing, done in a way that Odyssey had not done, showed that the material involved contained no more than one percent asbestos. The Commission found that the employer thus “knew or reasonably could have known that the ceiling surface material at issue was PACM and that it failed to conduct the specific testing called for in the [standard].” The Commission therefore agreed with the judge’s having affirmed the cited standards. 19 BNA OSHC at 1254-55. *See also James R. Howell & Co.*, cited *supra*. Trinity’s first argument is accordingly rejected.

Trinity’s other argument, also set out above, is that only Pli-Brico employees had access to the violative condition and that the Fifth Circuit has held that an employer cannot be found in violation of an OSHA standard if its own employees are not affected by the noncompliance. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981). I have reviewed the *Melerine* decision, and it does, in fact, state that “[i]n this circuit, therefore, the class protected by OSHA regulations comprises only employers’ own employees.” *Id.* at 712. However, the court in *Melerine* was addressing a regulation giving OSHA accreditation to certain other regulations also

at issue. Further, the accrediting regulation required “[e]ach employer [to] protect the employment and places of employment of each of *his* employees engaged in ship repair or a related employment....” *Id.* (Citation omitted). (Italics in decision). Thus, the court was not addressing an OSHA standard like the ones cited here, which specifically require building and facility owners to determine the presence, location and quantity of ACM and/or PACM at their work sites and to communicate the existence of such materials to prospective employers applying or bidding for work whose employees reasonably can be expected to work in or near areas containing the materials. I conclude, therefore, that *Melerine* is not relevant to this decision because it does not address OSHA standards like the ones in issue in this case. Trinity’s second argument is rejected, and the Secretary has met her burden of proving violations of the cited standards.

Trinity’s final argument is that the Secretary has not shown the violations were serious or that the proposed penalty is appropriate. As set out *supra*, the OSHA-1B, which contained information about the serious nature of the violations and the appropriateness of the proposed penalty, was not admitted into evidence, and there was no other evidence as to these two issues. According to the record, the bulk samples taken by OSHA and Trinity show the insulation material contained from 3 to 15 percent amosite asbestos; further, two Pli-Brico employees were working in the area of the furnace for a full eight-hour shift on March 26, 2005, and for an unspecified amount of time on March 28, 2005, but in any case no later than 2:00 p.m. (Stip. Nos. 13, 15). However, as Trinity points out, Pli-Brico’s first task was to remove the outer brick wall, and it could well be that this task took all day on March 26 and most of the employees’ workday on March 28. It could also well be that, after removing the brick wall, the only exposure the employees had to the insulation material was when one or both of them pulled off a portion of the material and placed it in the dumpster. This activity could have taken just minutes and could have occurred right before the Trinity employee discovered the material in the dumpster and reported it, at which point Pli-Brico ceased its work. As Trinity notes, the Secretary cannot seriously contend that a single exposure to the insulation material of as little time as 15 minutes, for example, could be classified as a serious violation.

I am aware of the cases the Secretary cites stating that, to show a serious violation of a health standard, the question is whether a disease could result from the violative condition and whether there is a substantial probability of death or serious physical harm if the disease does occur. *Kaiser Aluminum & Chem. Co.*, 10 BNA OSHC 1893, 1897 (No. 77-699, 1982); *Anaconda Aluminum Co.*,

9 BNA OSHC 1460, 1474-77 (No. 13102, 1981). I am also aware that overexposure to asbestos can result in diseases such as asbestosis and mesothelioma. *See, e.g., Dec-Tam Corp.*, 15 BNA OSHC 2072, 2081-82 (No. 88-523, 1993). However, it is the Secretary's burden to present evidence in support of the classification of her citations, and here, there is no evidence to show any significant exposure to asbestos. Under the limited circumstances of this case, I find the Secretary has not met her burden of proving the violations were serious. She has likewise not met her burden of showing the proposed penalty is appropriate. Consequently, Items 1a and 1b are affirmed as "other," or non-serious, violations, and no penalty is assessed.⁸

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1a and 1b of Serious Citation 1, alleging violations of 29 C.F.R. §§ 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii)(A), respectively, are AFFIRMED as "other," or non-serious, violations. No penalty is assessed for either violation.

/s/

G. Marvin Bober
Judge, OSHRC

Dated: February 13, 2006
Washington, D.C.

⁸I have disposed of this matter pursuant to the relevant Commission precedent, *i.e., Odyssey Capital Group*, 19 BNA OSHC 1252 (No. 98-1745, 2000). However, had the Commission not already decided *Odyssey*, and had Trinity directly challenged the validity of the presumption in the standard, I would have found the presumption invalid because, in my opinion, it turns the burden of persuasion "on its head" by requiring the non-proponent to prove a negative rather than requiring the Secretary to meet her burden by a preponderance of the evidence, in violation of section 7(c) of the Administrative Procedure Act and section 10(c) of the Act. *See also Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 2259 (1994) (holding that the "true doubt rule" used by Administrative Law Judges to decide cases arising under both the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act impermissibly shifted the burden of persuasion so as to permit a claimant to prevail despite failing to prove entitlement by a preponderance of the evidence). I would also have found the Secretary's assertion of jurisdiction over building and facility owners, as set out in the cited standards, as invalid. In this regard, I note the Secretary used the term "building owners who are statutory employers" in her proposed rule, set out at 55 Fed. Reg. 29712, 29729 (July 20, 1990), but not in her final rule, set out at 59 Fed. Reg. 40964, 40970-40972, 41132 (August 10, 1994), and that she offered no explanation for her change in terminology.