UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 89-287
FOSTER-WHEELER CONSTRUCTORS, INC.,	:	
Respondent.	:	

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

The issue presented to the Commission in this action is whether Commission Administrative Law Judge Paul L. Brady erred in affirming a citation issued by the Secretary of Labor ("the Secretary") to Foster Wheeler Constructors, Inc. ("Foster"), for failing to monitor its employees' exposure to asbestos fibers at the start of an asbestos removal job. The cited standard is found at 29 C.F.R. § 1926.58(f)(2)(i).[1] The specific issues directed for review are whether the judge erred in: (1) finding that Foster's operations were covered by the cited standard; (2) rejecting Foster's claim that any exposure was the result of unpreventable employee misconduct; and (3) classifying the violation as serious under

[1]That standard states:

> Each employer who has a workplace or work operation covered by this standard, except as provided for in paragraphs (f)(2)(ii) and (f)(2)(iii) of this section, shall perform initial monitoring at the initiation of each asbestos job to accurately determine the airborne concentrations of asbestos to which employees may be exposed.

At the time of the alleged violation, the cited standard included the additional terms "tremolite, anthophyllite, or actinolite" after the word "asbestos," each time it appeared. (So did the other provisions of section 1926.58 quoted below.) Those additional terms have since been deleted from those provisions (the terms are included in the definition of "asbestos" in section 1926.58(b)). The language of the provisions at issue here is otherwise essentially unchanged.

section 17(k) of the Occupational Safety and Health Act ("the Act"),[2] 29 U.S.C. § 651-678. For the reasons that follow, we affirm a violation of the cited standard.

BACKGROUND

Foster had entered into a contract to renovate Boiler No. 3 at the Port Everglades electrical power plant of Florida Power and Light Co. ("FP & L"). As part of the contract, Foster subcontracted to Combined Services, Inc. ("CSI"), an asbestos abatement contractor, the responsibility to remove the old asbestos insulation from the boiler. During removal of this asbestos insulation, CSI used plastic enclosures and other precautions to prevent the release of asbestos fibers. The parties dispute whether those precautions were adequate.

Foster employees worked in the area of the boiler at the same time as CSI's asbestos removal operations, because the plan of work was to return the boiler to service as soon as possible since it supplies needed electric power to South Florida. The boiler was about 160 feet high, with a furnace in the center that was surrounded by a network of pipes. The asbestos insulation covered some of the pipes, which were in the open air, and parts of the furnace. The boiler had various levels, composed of steel grating.

Following an employee complaint about possible asbestos overexposure, OSHA industrial hygienist ("IH") Peter Foreman inspected the area of the boiler, beginning on November 15, 1988. The citation at issue resulted from that inspection. After a full hearing on the citations, Judge Brady affirmed a serious violation of the cited provision, and assessed a $640 penalty.[3] Upon Foster's petition, review was directed on the issues stated above.

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[2]Section 17(k) states:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

[3]Judge Brady presided over the second hearing on the merits in this case. An earlier hearing on the merits was held before Commission Judge Joe D. Sparks, who later became ill and retired without issuing a decision. At Foster's request, a new hearing on the merits was held before Judge Brady.

DISCUSSION

1. **Whether the judge erred in ruling that Foster's work operation was covered by the cited standard**

Section 1926.58(a)(3) provides:

> (a) *Scope and application.* This section [§ 1926.58] applies to all construction work as defined in 29 CFR 1910.12(b),[4] including but not limited to the following:
>
> . . . .
>
> (3) Construction, alteration, repair, maintenance, or *renovation of structures, substrates, or portions thereof, that contain asbestos*[.]

(Emphasis added). As the discussion above reflects, it is clear that Foster had a "workplace or work operation covered by this standard" (section 1926.58) because it was engaged in construction work, specifically renovation of a structure (the boiler) that contained asbestos.[5] Foster did not allege or show that it was entitled to either of the exceptions to the initial monitoring requirement at sections 1926.58(f)(2)(ii) or (f)(2)(iii).[6] In addition,

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[4]Section 1910.12(b) provides:

> (b) *Definition.* For purposes of this section [29 CFR Part 1910], *Construction work* means work for construction, alteration, and/or repair, including painting and decorating. See discussion of these terms in § 1926.13 of this title.

The parties and judge have not relied on Section 1926.13, and we have found no discussion in it that affects the result in this case.

[5]"Renovation" is defined in the standard as "the modifying of any existing structure, or portion thereof, where exposure to airborne asbestos *may result.*" Section 1926.58(b) (emphasis added).

[6] The first exception, at paragraph (f)(2)(ii), provides:

> The employer may demonstrate that employee exposures are below that action level and/or excursion limit by means of objective data demonstrating that the product or material containing asbestos cannot release airborne fibers in concentrations exceeding the action level and/or excursion limit under those work conditions having the greatest potential for releasing asbestos.

The other exception, at paragraph (f)(2)(iii), provides:

> Where the employer has monitored each asbestos job for the TWA, and where he has monitored after March 14, 1988, for the excursion limit, and the data were obtained during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and

(continued...)

Foster failed to show that it had subcontracted all of the construction work that involved dealing with "structures, substrates, or portions thereof, that contain asbestos."

Foster argues that the cited standard does not apply if its employees work "in a large building complex where at a considerable distance, asbestos abatement is proceeding." However, it is clear that an "asbestos job" includes any new work assignment involving "[c]onstruction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos." Section 1926.58(a)(3). Foster has not presented any evidence that its work fell outside this definition. In fact, the evidence presented indicates that Foster employees were working around asbestos. The boiler as a whole was subject to the standard because it was undergoing general renovation, and asbestos insulation was being removed from various parts of it.

Foster also argues that initial monitoring is required only when there is a "reasonable likelihood [of] exposure to asbestos at excessive concentrations over a harmful period of time." To the contrary, the cited provision requires monitoring "at the initiation of each asbestos job" without affirmative proof that exposure to excessive concentrations of asbestos fibers was likely. Nor is there any minimum acceptable time period of exposure for purposes of avoiding the monitoring obligation.[7]

Furthermore, Foster's arguments find no support in Commission precedent. In one case, the Commission ruled that the employer was not required to initially monitor where the only employee access to asbestos fibers was during a 1-day insulation removal operation, and such an operation was conducted only once every five years. *Duquesne Light Co.*, 11 BNA OSHC 2033, 2037, 1984-85 CCH OSHD ¶ 26,959, p. 34,601 (No. 79-1682, 1984). The Commission held that the provision cited there, the former section 1910.1001(f)(1), did "not contemplate that employers must monitor such sporadic operations." *Id.* However, the

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[6](...continued)
prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraph (f)(2)(i) of this section.

[7]Foster asks that the Commission take "judicial notice . . . of the fact that employees other than those engaged in asbestos abatement are not monitored" in "Federal buildings as in other buildings and worksites." However, Foster has failed to present any evidence in support, and the statement is not the kind of generally known, indisputable fact that would be appropriate for official or judicial notice. *See* Fed. R. Evid. 201(b).

provision cited here requires that the employer perform monitoring "at the initiation of each asbestos job," regardless of duration or frequency. Thus, *Duquesne* does not support Foster's position.[8]

The Secretary argues that under the standard cited here, "the monitoring requirement is triggered when employees, involved in any type of construction activity where asbestos is present, may reasonably encounter exposure to airborne asbestos." Foster knew or should have known that its employees could reasonably encounter exposure to airborne asbestos during the boiler renovation. For example, air samples were taken for Foster in July 1988, a few months before the work began, which showed that asbestos already was in the air within the boiler area.

The samples taken in July that could be read evidenced only low levels, the highest reading being 0.006 fibers per cubic centimeter of air ["f/cc"].[9] By contrast, the permissible exposure limit ("PEL") is 0.2 f/cc as an 8-hour time weighted average ("TWA"). Section 1926.58(c)(1). The action level--the level at which regular air monitoring, medical surveillance and other precautions are required--is 0.1 f/cc as an 8-hour TWA. Section 1926.58(b), (d)(3)-(5), (l). The allowable excursion limit is 1 f/cc as averaged over a 30-minute period. Section 1926.58(c)(2). Because Foster does not suggest and we do not find that it comes within either of the two exceptions to the initial monitoring requirement, Foster was required to initially monitor its own employees' exposure based on the fact that the July samples confirmed that this was an "asbestos job" within the meaning of the standard.

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[8]The standard at issue here is different in scope from both the former and current general industry initial monitoring requirements for asbestos. Unlike the former § 1910.1001(f)(1), the construction industry standard at issue here does not require proof by the Secretary that asbestos fibers actually are being released. Further, unlike the current general industry provision, § 1910.1001(d)(2)(i), the construction industry standard does not require affirmative proof that the employees may reasonably be expected to be exposed "at or above the action level and/or excursion limit."

[9]Another sample showed 0.004 f/cc. Three other samples showed 0.001 f/cc. Two others were unreadable due to "Filter Covered with Dust," and the other one was unreadable because "Filter melted due to extreme temperature." Heckman testified that the July readings "are not unlike ambient air samples taken on city streets or in any other power house or industrial location." However, Foreman testified that a concentration as little as .001 percent asbestos fibers would be a significant concentration if released into the air.

The evidence presented at the hearing revealed that the asbestos removal operations did not go perfectly, and Foster was on full notice of that fact. For example, it obtained daily readings from Kemron, a consultant hired by CSI, some of which showed more than 0.1 f/cc of asbestos fibers in the air outside the enclosures. Those readings clearly indicated that the enclosures did not ensure containment of all the airborne asbestos.

Further, when Foreman arrived for the inspection, he overheard other contractors telling Foster's jobsite superintendent, Doug Roberts, that there were maintenance problems with the enclosures. In addition, following the Secretary's inspection, Foster's own consultant concluded:

> With the nature of operations being accomplished at this job site, it would be anticipated that asbestos exposure to Foster Wheeler employees would be controlled; however, during this two day survey, *I observed breaches in what would be considered good practice in dealing with asbestos removal. Therefore, I cannot conclude that asbestos exposures are totally controlled.*

(Emphasis added). Foster's safety director, Heckman, testified that in his opinion the enclosures prevented the release of asbestos fibers as far as possible. However, that testimony is not credible in light of both the conclusions of Foster's own consultant and Kemron's readings, mentioned above. Foreman's observations also establish inadequacies in the enclosures.

The Secretary proved the necessary employee access to the hazards. *E.g., Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990) (requisite access to cited hazards exists where employees have been in zone of danger while taking "their normal means of ingress-egress to their assigned workplaces"). For example, the evidence showed that Foster employees walked past unbarricaded areas in the first floor aisleway when going to and from their work stations.[10] Foreman took numerous

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[10]Foster relies on Heckman's testimony that Foster employees would not "have any reason to be in" the aisleway. However, the only reason Heckman gave for that conclusion is that the employees had no work assigned there. He did not contradict Foreman's prior testimony that Foster employees walked through the aisleway to get to and from their work assignments. Heckman testified that the part of the aisleway from which bulk sample 1 was taken "was accessible [to Foster employees], yet restricted [by an enclosure]." Heckman acknowledged that one photograph in evidence showed a Foster employee at work on the ground floor beyond the aisleway, although he estimated that that employee was at least 75 feet away from where another contractor's employee was dry-sweeping dirt.

bulk samples from dirt there during his inspection. Seven of those samples contained asbestos, in amounts ranging from 4 percent down to 0.001 percent asbestos fibers. Foster stipulated that Foreman's samples were properly taken and that the analysis was accurate. Foreman testified specifically as to why Foster employees had access to the asbestos hazards there:

> This was the ground level area where any employee for any contractor would have to work or walk . . . on numerous occasions to get to the other parts of the boilers that were being worked on.

Further, Foreman testified that one of Kemron's air samples was taken in the same general area where he took his bulk samples--the ground floor area, outside the enclosures. That Kemron sample, taken the day before Foreman's inspection began, showed 0.272 f/cc over a 40-minute period. Foster points out that the 0.272 f/cc reading was not a TWA. However, Heckman acknowledged that the reading "indicates the fibers per cc that were found on the sampling membrane." Foster stipulated that Kemron's sampling methods, analysis and custody were valid, and raised no question as to their accuracy. Furthermore, Heckman testified that Foster relied on Kemron's air samples in deciding what the exposures of Foster employees would be.[11]

Foster relies on Commission decisions that vacated citations on factual grounds under the former initial monitoring requirement for general industry, section 1910.1001(f)(1). However, those cases do not support Foster. We have already discussed one of those cases, *Duquesne Light Co.* Another was *Cornell University*, 83 OSAHRC 46/B2 (No. 82-1095, 1983) (ALJ), a decision by a former Commission administrative law judge. Asbestos removal operations were conducted in the university's library. Cornell was cited because, although Cornell employees were not involved in those operations, they worked in an adjacent hall.

However, the judge in *Cornell* found as a fact that sufficient precautions had been taken to prevent any escape of asbestos fibers from the library and to warn of the asbestos

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[11]Foster could have relied on Kemron's monitoring as Foster's initial monitoring under the standard if that monitoring: (1) had been contemporaneous with the inception of Foster's work; (2) had been extensive enough to cover all the exposures of Foster employees; and (3) had met the other monitoring requirements of section 1926.58(f)(5). However, no such showing was made. If Foster had established that it could rely on Kemron's monitoring, it would, of course, still be required to take any compliance measures indicated by those readings.

hazards. He also found that no Cornell employees entered the library during the asbestos removal operations, and that they would have no access to it in the course of their work, travel or other job-related activities. By contrast, here the judge found that the precautions against escape of asbestos fibers from the enclosures were inadequate, and that Foster employees had access to areas where asbestos fibers likely were being released. *Cornell* is not analogous to this case. In addition, the judge in *Cornell* rejected the same legal test of when initial monitoring is required that Foster advocates here.

Foster discusses *Goodyear Tire & Rubber Co.*, 5 BNA OSHC 1473, 1475 (No. 13442, 1977). That decision also involved the former general industry standard, and stated the same legal test of when initial monitoring is required as the other Commission decisions involving that general industry standard. *E.g., Shenango Co.*, 10 BNA OSHC 1613, 1615, 1982 CCH OSHD ¶ 26,051, p. 32,728 (No. 78-4723, 1982); *Research Cottrell, Inc.*, 9 BNA OSHC 1489, 1497, 1981 CCH OSHD ¶ 25,284, p. 31,263 (No. 11756, 1981). The citation to *Goodyear* was vacated because there was no evidence that asbestos fibers were released into the air. Here, there was much evidence that asbestos fibers were being released into the air. *Goodyear* is inapposite.

For the reasons discussed above, we conclude that Foster's workplace and work operations were covered by the cited standard. The Secretary also established the other elements of a violation. As mentioned above, it is undisputed that Foster did not comply with the cited requirement, because none of its employees were monitored at the initiation of the asbestos job.[12] Furthermore, Foster's employees had access to the hazards, and it knew of the presence of airborne asbestos in various parts of the boiler where its employees travelled or worked. Thus, the Secretary established all the elements of a violation. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). Based on the circumstances present here, Foster was required to "perform initial monitoring at the initiation of [the] asbestos job to accurately determine the

[12]Foreman testified that the purpose of Kemron's sampling of air outside of CSI's enclosures was "to comply with the monitoring requirements for the OSHA standards for Combined Services employees."

airborne concentrations of asbestos to which employees may be exposed." Section 1926.58(f)(2)(i), *supra* note 1.

2. Whether the judge erred in rejecting Foster's claim that any access by its employees to areas containing asbestos was the result of unpreventable employee misconduct

Foster argues that any activities by its employees that created noncompliance with the standard resulted from unpreventable employee misconduct. To establish that defense, the employer must show that: (1) it had established work rules designed to prevent the violative conditions from occurring; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations of those rules, and had effectively enforced the rules when violations had been discovered. *E.g., Gary Concrete*, 15 BNA OSHC at 1055, 1991 CCH OSHD at p. 39,452.

Foster had a number of relevant work rules. Foster told its employees not to go under a barricade for any reason. Each area where asbestos was being removed was enclosed by plastic, with a barricade around it warning of asbestos hazards. Foster also instructed its employees not to use the elevator, bathrooms, toilets, or canteen areas used by the asbestos abatement workers. Heckman testified at the original hearing that Foster would not work with any insulation that was identified as asbestos.[13]

However, Foster did not prohibit employees from using the ground floor aisleway when going to and from their assigned work. As mentioned above, Foreman testified without contradiction that Foster employees, like all employees on the site, had to use that aisleway. Thus, Foster's defense fails, because it did not show that it had a workrule clear enough or broad enough to eliminate employee exposure to asbestos fibers during ingress and egress from the job. *See, e.g., Mosser Constr. Co.*, 15 BNA OSHC 1408, 1415, 1991 CCH OSHD ¶ 29,546, p. 39,906 (No. 89-1027, 1991) (where employer had relevant workrule, but it was not "clear enough or broad enough to eliminate employee exposure" to the specific

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[13]Heckman further testified at that hearing that "[e]mployees were told through an orientation that if they came into an area that they suspected could be asbestos, to inform the supervisor," who would have CSI analyze it. "If it wasn't identified as asbestos, Foster Wheeler would proceed and perform their . . . demolition or construction activities."

violative conditions, workrule was not adequate); *Gary Concrete*, 15 BNA OSHC at 1055-56 1991 CCH OSHD at p. 39,453 (employer's instructions "too general" to inform employee of "how to prevent the violation" of cited standard).

3. Whether the judge erred in classifying the violation, if any, as serious

"[A] serious violation is established if an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *E.g., Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991).[14] The judge found: "[a]sbestos is a well known carcinogen and is especially implicated in lung cancer. The violation was serious, creating a probability of death or serious physical harm."

We hesitate to affirm the judge's decision on this complex and subtle issue, because none of the many measurements that were taken outside the plastic enclosures in the boiler show a violation of the PEL or action level (both of which are 8-hour TWA's), or of the excursion limit. Levels of exposure below those limits are not regulated under the standard. On the other hand, we hesitate to conclude that the initial monitoring violation was other than serious, because the monitoring that was done indicates that airborne asbestos levels were at times above 0.1 f/cc in certain areas of the boiler. To decide all the questions relevant to whether the violation should be classified as serious would involve a remand to the judge for credibility findings. There was conflicting testimony regarding the extent of certain Foster employees' exposure.

We need not and do not resolve whether the violation was serious, as resolution of that issue will not affect the abatement requirements or penalty here, and none of the parties' rights will be adversely affected. The Secretary will not be constrained by this approach. He may propose any appropriate penalty, classification and abatement requirements in future citations, and may rely on the underlying facts found here. Nor will

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[14]The Secretary also must prove that the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the violative conditions. 29 U.S.C. § 666(k). There is no dispute here that Foster knew of the presence of airborne asbestos fibers in the workplace. It obtained the results of all of Kemron's daily air sampling as soon as they became available.

the employer be constrained by our approach here. It will bear no greater burden in a future case than if the violation had been found nonserious. Further, no employee rights under the Act will be prejudiced. (For example, the abatement date is unaffected.) In the circumstances, the Commission exercises its discretion not to decide whether Foster's violation was serious. *See, e.g., General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2071-72, 1991 CCH OSHD ¶ 29,240, p. 39,171 (No. 82-630, 1991) (Commission need not decide whether employer's failure to provide access to exposure records was "serious" under the Act, where no party's rights would be adversely affected).[15]

4. Penalty

The Secretary proposed a $640 penalty and the judge assessed that amount. We believe that a higher penalty is appropriate, based on the severity of the potential consequences of asbestos exposure to levels in excess of permissible exposure levels. Asbestos-related diseases can be fatal, and include mesothelioma, lung cancer and asbestosis. Foster is a subsidiary of Foster Wheeler USA Corp., and had about 200 employees on the jobsite. Also, as discussed above, Foster knew about the presence of asbestos insulation at the boiler all along. In fact, it originally constructed the boiler in about 1958, using asbestos insulation.

To Foster's credit, it had numerous work rules designed to avoid employee exposure to asbestos fibers, and it kept track of Kemron's daily air sampling results regarding CSI's employees. Those results generally showed low levels of asbestos fibers outside the enclosures (less than 10 percent of the action level). The Secretary has not presented a past history of violations. On balance, we assess a penalty of $1000.

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[15]An employer may rebut a showing of seriousness by presenting evidence of other measurements, taken under conditions comparable to those cited, which indicate that all of the employees' exposures were below regulative triggers. If those measurements indicate that no employee was exposed to the action level or excursion limit during the cited work, the failure to conduct full-shift initial monitoring would not contribute to a risk of death or serious physical harm under the standard. Thus, that failure would not be classified as serious. Kemron's measurements here do not make the kind of thorough showing that would disprove seriousness. On the other hand, we cannot find the violation serious based on the limited measurements, as discussed above, so we decline to resolve the issue of seriousness here.

ORDER

For the reasons given above, the Commission affirms a violation of § 1926.58(f)(2)(i) and assesses a $1000 penalty.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: August 23, 1993

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-1412
FOSTER-WHEELER CONSTRUCTORS, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on August 23, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

August 23, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-287

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Secretary of Labor,
Complainant,

v.

Foster Wheeler Constructors, Inc.,
Respondent.

Docket No. 89-287

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 12, 1991. The decision of the Judge will become a final order of the Commission on October 15, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary **on or before October 2, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 12, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-287

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 89-287
	)	
FOSTER WHEELER CONSTRUCTORS, INC.,	)	
	)	
	)	
Respondent.	)	

APPEARANCES:

Donald R. McCoy, Esquire, Associate Regional Solicitor, U. S. Department of Labor, Fort Lauderdale, Florida, on behalf of complainant.

John E. Wilson, Esquire, Foster Wheeler Corporation, Clinton, New Jersey, on behalf of respondent.

DECISION AND ORDER

BRADY, Judge: Foster Wheeler Constructors, Inc., (Foster) was under contract to renovate a large boiler at the Port Everglades electrical power plant of Florida Power and Light Company. Foster was hired to dismantle the existing boiler, to install new components, and to handle the "mechanical aspects" of the boiler reconstruction (Tr. 176).

Pursuant to an employee complaint, OSHA industrial hygienist Peter Foreman conducted an inspection of the work site beginning on November 15, 1988 (Tr. 22). As a result of the inspection, the Secretary issued to Foster two citations. Citation No. 1 alleges the serious violation of 29 C.F.R. §1926.58(f)(2)(i) for failure to conduct initial monitoring at the beginning of an asbestos job to determine the airborne concentration of asbestos. Citation No. 2 alleges an "other" violation of 29 C.F.R. § 1910.20(g)(2) for failure to make readily available to its employees a copy of the Secretary's standard which explains how employees may obtain access to their medical and exposure monitoring records.

A hearing was held in this case on February 6 and 7, 1990, presided over by Judge Joe D. Sparks. Subsequent to Judge Sparks' retirement, the case was reassigned to the undersigned. The parties were offered the opportunity to request a hearing de novo, which Foster elected to do. Foster requested the hearing de novo based on Foster's belief that the previous hearing had raised questions regarding the credibility of two of the Secretary's witnesses, Lance and Kirk Shier (Tr. 5-7). On December 4 and 5, 1990, a second hearing was held.

The Port Everglades Power Plant is owned and operated by Florida Power and Light Company (Florida Power) at Fort Lauderdale, Florida. The plant provides electric power for

South Florida. Florida Power undertook to revamp the boilers to increase the efficiency of its power generating operations.

Boiler No. 3 is approximately 160 feet high. It is an open structure with several levels, staircases, and floors made of metal grating (Ex. C-1, Tr. 39-40, 43). Foster was contracted to rebuild certain sections of Boiler No. 3 at the same time as Combined Services, Inc. (Combined), an asbestos abatement subcontractor, was conducting asbestos removal (Tr. 176-177). Approximately 200 Foster employees were employed on the Port Everglades project. Combined was "working around the clock" to remove "tons of asbestos" from the boilers (Tr. 31-32). Another contractor, Kemron, was retained to monitor the asbestos exposure of Combined employees. It is undisputed that no Foster employees were monitored, either by Kemron or Foster (Tr. 32).

During his inspection, Foreman observed that plastic enclosures sealed with duct tape had been erected in an attempt to control the asbestos fibers (Tr. 38). Foreman observed that "the doors of the enclosures were in very poor condition; that they were deteriorated; that the plastic was blowing in the breeze; that the doors were open; that the duct tape [was] falling off; and that there were actual holes in the plastic wall on the outside" (Exs. C-3 - C-7, Tr. 45).

Foreman took bulk samples from the workplace floor, and also sent for analysis two samples of the insulating material which Kemron obtained for him. Foster stipulated that the

sampling results presented at the hearing were correct and that the proper procedure was followed in taking the samples (Ex. C-9, Tr. 48).

Sample A-1, a bulk sample of the insulating material which was being removed from the boiler penthouse, contained 15% asbestos. Sample A-2, the pipe insulation material, contained 10% asbestos (Tr. 50).

Foreman obtained Bulk Sample No. 4 about a foot outside a ground-level enclosure. It contained 4% asbestos (Ex. C-10, Tr. 52). This bulk sample was taken from a ground-level area where any employee could walk through the area to get to other parts of the boiler. The area was commonly used to cross the north side of the lower level of Boiler No. 3 (Tr. 53).

Bulk Sample No. 1 contained .001% asbestos fibers. It was taken 10 to 15 feet away from the enclosure, in an area that was described as heavily traveled by Foster's employees (Ex. C-11, C-12; Tr. 55, 162).

Foreman found concentrations of asbestos in samples of dirt that had settled on the flat surfaces of the "hazvac" and HEPA machines at ground level (Tr. 56-59). Foreman observed a worker dry sweeping dirt and debris in the area where he obtained Bulk Sample No. 7. The dirt the employee was sweeping contained .01% asbestos (Tr. 58). Foster's employees had access to the area, and Foster's safety director identified a Foster employee in the area in Exhibit C-16 (Tr. 215). A wipe sample from the top of a drinking water

container at ground level contained .001% asbestos (Ex. C-18, Tr. 62).

All of the bulk and wipe samples that Foreman took except one mineral wool sample contained asbestos. All except the representative insulation samples, A-1 and A-2, were obtained outside the regulated areas at ground level, in areas where Foster employees worked or walked (Tr. 64). The results taken by Kemron showed airborne concentrations of asbestos above the background levels throughout the boiler area outside of the enclosures (Ex. R-1, Tr. 67).

The results for November 9, 1988, include a sample which contained .191 fibers per cubic centimeter of air which was taken from the roof of Boiler No. 3, outside the regulated area, almost twice the action level of .1 fibers per cubic centimeter (Tr. 71-71). Many of the sampling results show "overloads" in which the material was deposited on the filter so heavily that a visual count of the fibers could not be conducted (Tr. 73-74).

On November 14, 1988, an area sample taken at ground level showed .272 fibers per cubic centimeter, which exceeds the PEL. On November 17, 1988, an area sample inside the northeast hatch of the penthouse was .209 fibers per cubic centimeter, also exceeding the PEL (Tr. 78).

Kemron's sampling results were furnished to Foster as soon as they were obtained (Tr. 78). Foster's employees received no training in asbestos safety, except a warning not

to go into the asbestos enclosures (Tr. 117). Workers were also instructed to withdraw if they saw falling white powder (Tr. 82).

In July, 1988, before the work at the Port Everglades plant began, Foster conducted testing which showed "background" levels of airborne asbestos of .001-.006 fibers per cubic centimeter. Many of the Kemron results taken after the work was in progress during the period from October 2, 1988, through January 11, 1989, showed higher amounts (Tr. 181). Robert Heckman, Foster's corporate safety and health director, stated that approximately 120 of the daily samples were taken outside the enclosures and that four or five exceeded the action level of the asbestos standard (Tr. 181).

Foster was aware when the project was in its planning stage that asbestos was contained in the insulation material in the boiler (Tr. 272-273). Foster had some bulk sampling done in July, 1988, to determine where the asbestos was located. Two of four bulk samples taken from the insulation material while it was in place on the boiler showed asbestos fibers (Tr. 274). Foster decided to treat all of the insulation as if it contained asbestos (Tr. 277). Foster took no other steps to determine the levels of asbestos to which its employees might be exposed (Tr. 310).

CITATION NO. 1

Item 1: 29 C.F.R. § 1926.58(f)(2)(i)

29 C.F.R. § 1926.58(f)(2)(i) provides:

> Each employee who has a workplace or work operation covered by this standard, except as provided for in paragraphs (f)(2)(ii) and (f)(2)(iii) of this section, shall perform initial monitoring at the initiation of each asbestos, tremolite, anthophyllite, or actinolite job to accurately determine the airborne concentrations of asbestos, tremolite, anthophyllite, or actinolite to which employees may be exposed.[1]

Foster argues that it was not required to perform initial monitoring for asbestos because its employees were not regularly exposed to airborne asbestos. Their employment did not require them to work with asbestos. The Secretary does

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[1] 29 C.F.R. § 1926.58(f)(2)(ii) provides:

> The employer may demonstrate that employee exposures are below that action level and/or excursion limit by means of objective data demonstrating that the product or material containing asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals cannot release airborne fibers in which concentrations exceeding the action level and/or excursion limit under those work conditions having the greatest potential for releasing asbestos, tremolite, anthrophyllite, or actinolite.

29 C.F.R. § 1926.58(f)(2)(iii) provides:

> Where the employer has monitored each asbestos, tremolite, anthophyllite, or actinolite job for the TWA, and where he has monitored after March 14, 1988, for the excursion limit, and the data were obtained during work operations conducted under workplace conditions, closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employee's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraph (f)(2)(i) of this section.

not dispute the fact that Combined, rather than Foster, removed the asbestos insulation and did most of its work inside enclosures which were intended to prevent asbestos fibers from escaping.

The record establishes that the containment enclosures were not effective and that significant amounts of airborne asbestos were released into the outside air, concentrations which exceed the action level of .1 fibers per cubic centimeter of air, or even the PEL of .2 fibers per cubic centimeter which would be invisible to the workers (Tr. 82). Foster's employees were exposed to airborne asbestos, even if they were not required to actually handle the insulation.

The standard requires that an employer who has a "work operation covered by this standard ... shall perform initial monitoring at the initiation of each asbestos ... job" (emphasis added). Foster's work operation (the renovation of the boiler) was covered by the standard at issue. Section 1926.58(a)(3) provides:

> This section applies to all construction work as defined in 29 C.F.R. § 1910.12(b), including but not limited to the following:
>
> * * *
>
> (3) Construction, alteration, repairs, maintenance, or renovation of structures, substruts, or portions thereof, that contain asbestos...

Foster did not demonstrate that it was exempted from complying with the standard by fitting into either of the exceptions provided for in paragraphs (f)(2)(ii) and

(f)(2)(iii)(allowing for proof that the asbestos-containing material cannot release airborne fibers in which concentrations exceeding the action level, and reliance upon earlier monitoring, respectively).

Foster was engaged in a work operation covered by the standard, and Foster did not fall within either of the two exceptions to the standard. The standard required that Foster perform initial monitoring at the initiation of the job, which Foster concedes it did not do. Foster was in violation of 29 C.F.R. § 1926.58(f)(2)(i).

The testimony of Lance and Kirk Shier was not necessary to establish the Secretary's allegation that Foster violated the cited standard. Therefore, there is no need to make a determination of these witnesses' credibility.

Asbestos is a well-known carcinogen and is especially implicated in lung cancer. The violation was serious, creating a probability of death or serious physical harm.

CITATION NO. 2

Item 1: 29 C.F.R. § 1910.20(g)(2)

29 C.F.R. § 1910.20(g)(2) provides:

> Each employer shall make readily available to employees a copy of this standard and its appendices, and shall distribute to employees any informational materials concerning this standard which are made available to the employer by the Assistant Secretary of Labor for Occupational Safety and Health.

During his inspection, Foreman asked Arthur Punsky, Foster's safety supervisor, for a copy of 29 C.F.R. § 1910.20 and its appendices. He did not receive a copy of the standard until several days after he left the work site (Tr. 80).

Foster argues that the standard could have been made "readily available" to any employee who asked for it, by faxing the employee a copy from headquarters to the work site. Faxing a document from a location distant from the work site is not what the standard contemplates when it provides that the employer "shall make readily available" to its employees a copy of the standard. "Readily available" means having a copy of the standard on the work site. Foster was in violation of 29 C.F.R. § 1910.20(g)(2).

PENALTIES

The Commission is the final arbiter of penalties in all contested cases. Secretary v. OSAHRC and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principle factor to be considered. Nacirema Operating Co., 72

OSAHRC 1/B10, BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (No. 4, 1972).

Upon due consideration of the relevant factors, it is determined that the appropriate penalty for Citation No. 1 is $640.00, and for Citation No. 2 is no penalty.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

(1) That Item 1 of Citation No. 1 is affirmed and a penalty in the amount of $640.00 is hereby assessed, and

(2) That Item 1 of Citation No. 2 is affirmed and no penalty is assessed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: September 4, 1991