UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR, Complainant, v. DEC-TAM CORPORATION, Respondent.	:	OSHRC Docket No. 88-523

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

I. Introduction

In July and August of 1987, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a worksite the Dec-Tam Corporation ("Dec-Tam") maintained on a ferry boat docked at Newport, Rhode Island. Following the inspection, OSHA issued citations alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"), for failure to comply with provisions of the asbestos standard at 29 C.F.R. § 1910.1001. The facts are largely undisputed. Administrative Law Judge Foster Furcolo affirmed several citation items and both parties petitioned for review. Review was granted on the issues specified below. We affirm the judge's decision as modified below.

II. Was Dec-Tam's Failure to Timely Provide Requested Records Willful?

A. Background

Item 2 of Willful Citation No. 2 alleges that Dec-Tam failed to comply with 29 C.F.R.

§ 1910.1001(m)(5)(ii) and 29 C.F.R. § 1910.20(e)(3)(i)[1] by not immediately providing OSHA upon its request with records of all environmental and personal air samples taken by Dec-Tam during its asbestos removal project aboard the ferry. A penalty of $8,000 was proposed by the Secretary.

The Review Commission's Administrative Law Judge found that these standards require an employer to make available to OSHA, upon request, certain employee exposure and/or medical records. While finding that Dec-Tam had partially complied with the request for materials from OSHA by submitting "some of the requested material," the judge found that Dec-Tam had delayed in submitting other materials. Because certain of the requested information "was not provided within a reasonable time," the judge affirmed a violation of the aforementioned standards. The judge further held that this delay "was the result of an 'obstructionist' attitude, culminating in a knowing, intentional violation of, or indifference to,

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[1] Certain of the provisions of the asbestos standard at section 1910.1001 have been modified since the Secretary of Labor inspected Dec-Tam in 1987. All quoted versions of the standards involved in the Secretary's citations are those in effect at the time of the inspection.

Section 1910.1001(m)(5)(ii) provided:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
> . . . .
> (m) *Recordkeeping.*--
> . . . .
> (5) *Availability.*
> . . . .
> (ii) The employer, upon request shall make any exposure records required by paragraph (m)(1) of this section available for examination and copying to affected employees, former employees, designated representatives and the Assistant Secretary, in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i).

Section 1910.20(e)(3)(i) provided:

> **§ 1910.20 Access to employee exposure and medical records.**
> . . . .
> (e) *Access to records*--
> . . . .
> (3) *OSHA access.* (i) Each employer shall, upon request, assure the immediate access of representatives of the Assistant Secretary of Labor for Occupational Safety and Health to employee exposure and medical records and to analyses using exposure or medical records. Rules of agency practice and procedure governing OSHA access to employee medical records are contained in 29 CFR 1913.10.

the Act." Beyond classifying the conduct of Dec-Tam as obstructionist, no additional rationale was offered by the judge for his findings. The judge affirmed the violation as willful and assessed the maximum penalty permissible under the law, $10,000, which represented an increase in the $8,000 penalty proposed by the Secretary.

Dec-Tam has sought review of the judge's determination of willfulness. The Commission has directed this issue for review. Accordingly, in the absence of a fully delineated rationale for the judge's findings, we must independently determine whether the weight of available evidence justifies the judge's finding that Dec-Tam's conduct was obstructionist, and if not, whether the Secretary has otherwise met her burden of proof in establishing that this particular violation meets the Commission's standard for classification as willful.

B. The Facts

Following inspections of Dec-Tam's workplace on August 7, August 12, and August 13, 1987, OSHA compliance officer Henry E. Meleney verbally requested a wide-range of materials from Dec-Tam's president, Lee Snodgrass, on August 27, 1987. Dec-Tam requested that this verbal request be detailed in writing. OSHA made its request for the information and data by letter dated August 28, 1987.[2] On September 14, 1987, Dec-Tam forwarded all the materials requested by OSHA except the monitoring results (item 1 of OSHA's request) and the sampling and analytical methods used in that monitoring process (item 2). With this transmission of most of the items requested by OSHA, Dec-Tam included a letter in which it notified OSHA that the items not enclosed (items 1 and 2) were not in its possession. Dec-Tam informed OSHA that such materials were in the possession

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[2] The letter requested the following information:

1. Monitoring results taken on the New York Staten Island Ferry, including determinations of 8-hour TWA's.
2. Sampling and analytical methods used.
3. Copy of company's written respirator program which meets 1910.134 sections (b)(d)(e) and (f).
4. Written medical opinion for each employee.
5. Documentation of fit testing for each employee which meets requirements of Appendix C, including type of respirator and dates of fittings.
6. Copy of training program established for each asbestos removal employee and documentation of each employee's training.
7. Name, address and phone number of licensed examining physician, and;
8. The length of employment for each employee.

of EnviroSciences, Inc., ("EnviroSciences") an asbestos consulting firm, which as the judge found, had been hired to ensure that all asbestos was removed completely by Dec-Tam, to conduct clearance air sampling to ensure that no asbestos contamination went outside the regulated areas, and to analyze air samples and air monitoring cartridges (upon which the information requested by OSHA in items 1 and 2 was based). Since part of the information requested by OSHA was therefore in the possession of EnviroSciences, and not Dec-Tam, the company informed OSHA in this letter that it had contacted Bob Jones of Enviro-Sciences and requested the information, and that, as soon as it was received it would be forwarded to Meleney. No evidence appears in the record of any protests having been made by OSHA to this proposed course of action contained in Dec-Tam's letter to OSHA.

From September 1987, the time of Dec-Tam's delivery of most of the information requested by OSHA, until approximately the middle of November 1987, compliance officer Meleney was temporarily assigned from the regional office covering Dec-Tam's workplace to OSHA's California regional office. There is no evidence presented that anyone at OSHA had begun working with the data submitted by Dec-Tam, that any other OSHA official contacted Dec-Tam concerning these materials during this time, or that OSHA's investigation or inspection efforts had been materially hindered or delayed in any way. On December 28, 1987, having returned from California several weeks earlier, Meleney testified that he telephoned Ajay Pathak, Dec-Tam's Director of Industrial Hygiene, and informed him that OSHA had not yet received the remaining requested information. Meleney testified that he asked Pathak to "get the stuff [apparently the originally requested materials] together and send it as soon as possible, but this week." Meleney testified that Pathak said he would do so.

On January 4, 1988, one week after the December 28, 1987 telephone conversation, Meleney testified that he once again called Pathak to inquire about the delinquent materials. During this call, Meleney was informed by another employee of Dec-Tam that Pathak was not in the office, and that in his absence, the message would be sent to company president Snodgrass. When his call was not returned, Meleney testified that he again called Dec-Tam to inquire about the requested materials on January 7, 1988. Meleney testified that "on behalf of Pathak," Snodgrass did return the call the next day, on January 8, 1988, and that during this conversation, Snodgrass told him that "all correspondence that [he] would receive

would be sent by Pathak and that Pathak was the contact person for getting the information." On January 12, 1988, Meleney once again telephoned Dec-Tam's offices and again spoke to Snodgrass. Meleney testified that on this occasion Snodgrass assured him that he would have Pathak get the documents to OSHA, but that Pathak would not be back into the office until January 18, 1988. Meleney testified that soon thereafter, he brought to the attention of OSHA's Area Director the fact that he was having trouble "getting documents." Meleney stated that the next day, January 13, 1988, the Area Director telephoned Dec-Tam's place of business and "talked to the same woman who sent us the letter on September 19th." According to Meleney, the Area Director "requested that this information be sent immediately to [OSHA's] attention or he would issue an administrative subpoena for that information." The next day, on January 14, 1988, the materials were delivered to OSHA. Later in January 1988, OSHA made a further request for additional information which was provided promptly by Dec-Tam in the beginning of February 1988.[3]

C. Arguments of the Parties

Dec-Tam argues that the facts are undisputed and support nothing more than a finding of inadvertent delay. It asserts that simple negligence is not a basis for a willful violation, citing *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It also argues that the judge's factual findings do not establish that the violation was the result of "a conscious, intentional, deliberate, voluntary decision," as is required for proof of a willful violation under *F.X. Messina Constr. Co. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

Dec-Tam contends that it could not forward all the materials when they were first requested and that it therefore advised OSHA in writing that it would provide them when they were received from EnviroSciences, and that OSHA did not object. Dec-Tam argues that the only apparent basis for the judge's statement that it displayed an "obstructionist" attitude is the compliance officer's testimony that he had to call Dec-Tam a number of times in the first two weeks of January 1988 in order to get the requested documents. Dec-Tam

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[3] Although the record is unclear as to the date, Dec-Tam's Pathak testified that at one point he had asked the compliance officer if "he needed any other documentation for the case." Also, apparently, OSHA made at least one other request for information not requested in its letter of August 28, 1987, and such information was timely furnished by Dec-Tam.

points out, however, that its president had returned the compliance officer's calls and advised him that its industrial hygienist had called EnviroSciences and asked for the requested material.

The Secretary of Labor argues that the First Circuit, the court to which she can appeal this case, has affirmed a willful violation even where a pardonable offense is shown, citing *F. X. Messina*. She adds that most courts have found willful violations either where an employer who is aware of a specific standard knowingly violates it, citing *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777 (4th Cir. 1975), or where an employer does not have such specific knowledge but is indifferent to, or carelessly disregards, employee safety, citing *Havens Steel Co. v. OSHRC*, 738 F.2d 397, 401 (10th Cir. 1984).

The Secretary also relies on *Keco Indus.*, 13 BNA OSHC 1161, 1987 CCH OSHD ¶ 27,860 (No. 81-263, 1987) and *Thermal Reduction Corp.*, 12 BNA OSHC 1264, 1984-85 CCH OSHD ¶ 27,248 (No. 81-2135, 1985), cases in which the Commission affirmed willful violations against employers who were aware of their duty to disclose, yet failed to produce occupational injury and illness records. The Secretary contends that although Dec-Tam argues that the records were not in its control, Dec-Tam "cannot shirk its legal duty to provide the information mandated by the law."

D. Analysis of Willfulness

A violation is willful if it was committed with intentional disregard for the requirements of the Act or plain indifference to employee safety. *Keco Indus.*, 13 BNA OSHC at 1163, 1987 CCH OSHD at p. 26,472. Under long-standing Commission precedent, to establish a willful violation, it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or condition and by a state of mind of conscious disregard or plain indifference. *Williams Enterp.*, 13 BNA OSHC at 1256, 1986-87 CCH OSHD at p. 36,589. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Also, a willful violation/charge is not justified if an employer has made a good faith effort to comply with the standard, even though the employer's efforts are not entirely effective or complete. *Id.*, 13 BNA OSHC at 1257,

1986-87 CCH OSHD at p. 36,589. *See, also, R.D. Anderson Constr. Co.*, 12 BNA OSHC 1665, 1669, 1986-87 CCH OSHD ¶ 27,500, p. 35,641 (No. 81-1469, 1986)(numerous steps taken to comply with asbestos standard preclude willful finding).

The two willful recordkeeping cases relied on by the Secretary do not support a finding of willfulness here. In both *Keco Industries* and *Thermal Reduction*, the employers did not suggest that they did not have the records. Rather, they refused to supply them even though they were presented with search warrants. In both cases the employers also attempted to devise an extra hurdle for the Secretary to clear before she could have the records. In *Thermal Reduction*, this consisted of a refusal to disclose the records until the company was given protection against self-incrimination. In *Keco Industries*, the company wanted the compliance officer to provide a signed, written request detailing the reasons why he wished to see the records. Dec-Tam's "mere" neglect of its duty to timely provide documents to the Secretary is in sharp contrast to the intransigence exhibited by the employers in *Keco Industries* and *Thermal Reduction* who consciously, intentionally, deliberately and voluntarily refused to comply with their known duties. We also find the Secretary's citation to the First Circuit's holding in *F.X. Messina* not to be applicable in the case at bar. In that case, which dealt with a violation of a trenching standard and the duty of the employer to shore such a trench to guard against a cave-in, the First Circuit found that the employer had specifically measured the depth of the trench and knew it to require shoring under the standard. Despite this knowledge, the court found that the employer proceeded with the work and thus had made a "conscious, intentional, deliberate, voluntary choice" to violate the standard. In contrast, Dec-Tam, at every juncture, acknowledged its duty and assured OSHA of its intention to comply. That distinction precludes a finding of willful under the legal principles established in *F.X. Messina*.

The willfulness charge relates to the employer's state of mind when it committed the violation. *See General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2069, 1991 CCH OSHD ¶ 29,240, p. 39.168 (No. 82-630, 1991). OSHA's written request for the documents was made on August 28, 1987. In response to that request, Dec-Tam supplied OSHA with six of the eight documents it had requested. Although Dec-Tam failed to provide OSHA with the two documents that are designated in this citation, Dec-Tam wrote OSHA informing OSHA of the reasons for the delay and warranted that it would supply the

other documents as soon as it received them from EnviroSciences. While Dec-Tam's failure to immediately provide all the documents establishes a violation of the Act, it does not suggest either an intentional disregard for the requirements of the Act or a plain indifference to employee safety. Furthermore, by its actions, Dec-Tam clearly acknowledged its duty under the Act and based on these circumstances, this delay does not suggest either an intentional disregard nor a plain indifference. It suggests instead that Dec-Tam made a good faith effort to comply with the standard even though its efforts were not entirely complete. *Marmon Group, Inc.*, 11 BNA OSHC 2090, 2092, 1984-85 CCH OSHD ¶ 26,975, p. 34,643 (No. 79-5363, 1984).

Dec-Tam subsequently -- between the time of its initial response to the document request and December 28, 1987, when compliance officer Meleney called the company and asked for the remaining documents -- did a poor job of keeping track of the status of its request to EnviroSciences for the missing documents in a period when OSHA was not getting back to the company with any further requests for the documents. Under these circumstances, we cannot say that Dec-Tam's failure to seek the records from EnviroSciences more diligently deserves to be described as "obstructionist" or willful. The evidence suggests that Dec-Tam failed to coordinate its recordkeeping and monitoring duties under the standard with the company it hired to carry out those duties. Although such shortcomings clearly indicate that Dec-Tam was neglectful in the way it responded to the Secretary's request, they do not establish willfulness.

Dec-Tam's response to the requests for the documents made between December 28, 1987 and the January 14, 1988 date on which it finally turned over the documents was questionable at best. If this period of delay had continued, we would have found that the violation here was willful. However, because the first part of that period came between the major holidays of Christmas and New Year's Day and the time period that followed was less than two weeks in duration, we do not find the violation willful. Once again, this conduct falls short of an intentional disregard for the Act or a plain indifference to employee safety and health. Moreover, during this time, OSHA requested additional materials from Dec-Tam which the company provided in a timely fashion. Clearly, the weight of the evidence falls far short of establishing "obstructionism."

Although we vacate the willful characterization, we do find that the violation was serious. A serious violation is one that could result in serious damage to the health of employees. ***Phelps Dodge Corp.***, 11 BNA OSHC 1441, 1448-49, 1983-84 CCH OSHD ¶ 26,552, p. 33,925 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237 (9th Cir. 1984). The finding of a serious violation does not require that the harm would have occurred, but that it could have occurred. Here, in contrast to other recordkeeping obligations under the Act, Dec-Tam's delay in timely producing data on the asbestos exposure levels to which its employees were subjected could have delayed the Secretary's efforts at enforcement of the asbestos standard against Dec-Tam, thereby creating the possibility that employees could have suffered exposure to asbestos which in turn could have caused death or serious physical harm to the employees exposed to asbestos. Considering these circumstances in light of the penalty factors enumerated in section 17(j) of the Act, 29 U.S.C. § 666(j), we assess the then maximum penalty for a serious violation of $1,000.

III. Proper Placement of Sampling Equipment

A. Background

The Secretary's Serious Citation No. 1, item 1a alleges that Dec-Tam violated 29 C.F.R. § 1910.1001(c) by exposing three employees removing asbestos from what was referred to as the cascade fire extinguisher hold (the "hold") to airborne concentrations of asbestos in excess of 0.2 fibers per cubic centimeter ("f/cc") of air as an 8-hour, time-weighted average ("TWA").[4] The employees were allegedly exposed to concentrations of asbestos fibers between 0.67 f/cc and 0.88 f/cc for 8-hour TWA's. These exposures were 3.36 to 4.43 times the 0.2 f/cc permissible exposure limit ("PEL"). The citation noted that asbestos exposure can cause lung cancer, mesothelioma, and asbestosis, and proposed a penalty of $720.

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[4] Section 1910.1001(c) provided:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
>
> . . . .
>
> (c) *Permissible exposure limit (PEL).* The employer shall ensure that no employee is exposed to an airborne concentration of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals in excess of 0.2 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average (TWA) as determined by the method prescribed in Appendix A of this section, or by an equivalent method.

B. Judge's Decision

The judge affirmed a serious violation of the standard and assessed a $500 penalty. He found that the results of the Secretary's sampling showed that employees Joe Savio, Jim Riley, and Melbert Heard, who were removing asbestos "lagging" (lining, covering) from the piping system of the hold, were exposed to concentrations of asbestos fibers in excess of the 0.2 f/cc PEL.

The judge rejected Dec-Tam's contention that OSHA's air sampling cassettes should have been placed inside the respirators of the employees. Relying on *Brown Insulating Sys., Inc. v. Secretary of Labor*, 629 F.2d 428, 429 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), the judge found that compliance with the standard was properly determined by measuring the airborne concentration of asbestos fibers with sampling cassettes placed near the chins of employees being sampled.

C. Arguments of the Parties

Dec-Tam argues that the judge erred because the exposure monitoring regulation at 29 C.F.R. § 1910.1001(d)(1) requires that personal samples for determining employee exposure "shall be made from breathing zone air samples" and the breathing zone of the employees in question was inside their respirators. Since the compliance officer did not sample the air inside the employees' respirators, Dec-Tam argues, the Secretary did not produce evidence regarding the levels of asbestos inside the breathing zone of the employees.

The Secretary argues that the method of determining employee exposure under the cited standard is prescribed in paragraph 7 of the mandatory Appendix A which follows the standard: "[P]ersonal samples shall be taken in the 'breathing zone' of the employee," *i.e.*, attached to or near the collar or lapel near the worker's face. She also states that employee exposure is "plainly and unambiguously" defined in subsection (b), *Definitions*, of the asbestos standard as "exposure to airborne asbestos . . . that would occur if the employee were not using respiratory protective equipment." 29 C.F.R. § 1910.1001(b).

D. Discussion on Breathing Zone Issue

The definition of "[e]mployee exposure" at section 1910.1001(b) is "exposure to asbestos . . . that would occur if the employee were not using respiratory protective equipment." This plain statement of what constitutes employee exposure disposes of the

issue before us. The Secretary's placement of the sampling cassettes on the employees' clothing near their chins was proper under the cited standard. The judge was correct in affirming the violation, and Dec-Tam's arguments to the contrary are rejected.

A position essentially the same as that advanced by Dec-Tam was rejected by OSHA when the asbestos standard was adopted. In discussing permissible exposure limits ("PEL's"), OSHA noted that it "has traditionally defined PELs and employee exposures as the airborne concentration of a contaminant measured *without regard to the use of respirators*" (emphasis in the original).[5] It concluded that the "inhaled into the lungs" approach "would necessarily depend on increased reliance on respiratory protection as a line of defense against hazardous workplace exposures, which runs counter to the Agency's stated preference for the traditional hierarchy of controls: the use of engineering and work practice controls as the first line of defense, followed by respiratory protection." 51 Fed. Reg. 22,675-76 (1986).

F. Severity of the Alleged Violation

1. Factual Background

According to the compliance officer, there were visible asbestos fibers throughout the hold during the asbestos removal process. Employee Savio was exposed to 4.43 times the allowable limit for asbestos, employee Riley 3.87 times the limit, and employee Heard 3.36 times the limit.[6] The employees were wearing half-mask respirators that the Secretary concedes were adequate for the circumstances.[7] According to the compliance officer, the respirators were "in good shape," but, he testified, "[a]ny number of things could go wrong that would defeat the purpose of a half-mask" respirator. In particular, he testified that

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[5] The Sixth Circuit's *Brown Insulating* case cited by the judge involved the same issue under an earlier version of the cited standard. The court affirmed a Commission administrative law judge's decision that compliance with the standard was determined by measuring the airborne concentration of asbestos fibers in the working environment, not the concentration of fibers inside a respirator. The judge relied on language in the standard which stated that compliance with the applicable PEL could not be achieved by the use of respirators, except under certain circumstances not pertinent here. *Brown Insulating Sys., Inc.*, 78 OSAHRC 42/E2 (No. 77-787, 1978)(ALJ).

[6] The compliance officer did not conduct sampling on the four other employees who worked in the hold.

[7] According to Table 1, referenced at 29 C.F.R. 1910.1001(g)(2)(i) *infra*, the required respirator for airborne concentrations of asbestos not in excess of 2 f/cc (10 times the PEL) is the half-mask respirator. The Secretary acknowledges in her brief that "the employees working in the ferry's hold happened to be wearing adequate respirators."

employee Heard was wearing a 5- to 7-day growth of beard under his respirator, and he stated that he had read "studies [which] have shown that, even in the first few days of a stubble beard, there will be leakage between the mask and the employee's face if there is facial hair . . . where the respirator comes in contact with the employee's face" and that "[t]he greatest amount of leakage in a [half-mask] negative pressure respirator is in the first three days after an employee has started wearing a beard." However, despite being influenced by his understanding of these studies, the compliance officer testified that he did not perform any type of test on Heard to determine if the seal on Heard's respirator had been affected.

2. Judge's Decision and Arguments of the Parties

The judge affirmed a serious violation of section 1910.1001(c) but failed to explain why he found it serious. Dec-Tam argues that the finding of a serious violation is precluded by the judge's finding elsewhere in his decision (and by the Secretary's concession) that all the employees working in the hold were wearing respiratory protection that was proper for the amount of airborne asbestos measured in the hold. The Secretary disagrees, arguing that any precautions Dec-Tam might have taken against employee injury, such as the use of respiratory equipment, are properly considered in determining the penalty, not in characterizing the degree of the violation, citing *Turner Co.*, 4 BNA OSHC 1554, 1566, 1976-77 CCH OSHD ¶ 21,023, p. 25,283 (No. 3635, 1976), *order set aside and remanded on other grounds*, 561 F.2d 82 (7th Cir. 1977)(precautions taken against injury one of four elements to be considered in determining gravity of a violation for purposes of penalty assessment). The Secretary contends that by violating the standard, Dec-Tam subjected its employees to unacceptably high levels of carcinogenic asbestos contamination with little more protection than what she terms "inherently unreliable respirators." The probability of serious physical harm plainly existed, she argues, because the employees working in the hold were exposed to asbestos fibers.

3. Discussion

Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there is substantial probability that death or serious physical harm could result. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991). Although Dec-Tam violated the cited standard and exposed its employees to asbestos during

their asbestos removal duties, the Secretary concedes that the employees were wearing respirators appropriate for the levels of asbestos measured and that the respirators were "in good shape." There is also no evidence that would establish that the one employee's "stubble beard" caused his respirator to leak. We therefore find that the Secretary failed to prove that there was a substantial probability that death or serious physical harm could result from Dec-Tam's violation of the standard. Accordingly, we affirm the violation as other-than-serious.

IV. Failure to Conduct Full-Shift Monitoring

A. Background

The Secretary alleges in item 1 of Willful Citation No. 2 that Dec-Tam violated 29 C.F.R. § 1910.1001(d)(1)(ii)[8] by failing to obtain representative 8-hour TWA's of the asbestos its employees were exposed to by sampling them for asbestos on a full, 8-hour shift basis between July 29 and September 3, 1987. She proposed a penalty of $8,000.

On July 27 and 28, 1987, Dec-Tam conducted full-shift, 8-hour sampling (monitoring) of its employees while they were removing transite board above deck. Subsequently,

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[8] Section 1910.1001(d)(1)(ii) -- and other pertinent parts of the regulation invoked in the arguments of the parties below -- provided:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
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> . . . .
>
> (d) *Exposure monitoring.*--(1) *General.*
>
> . . . .
>
> (ii) Representative 8-hour TWA employee exposures shall be determined on the basis of one or more samples representing full-shift exposures for each shift for each employee in each job classification in each work area.
>
> (2) *Initial monitoring.* (i) Each employer who has a workplace or work operation covered by this standard, except as provided for in paragraphs (d)(2)(ii) and (d)(2)(iii) of this section, shall perform initial monitoring of employees who are, or may reasonably be expected to be exposed to airborne concentrations at or above the action level.
>
> (ii) Where the employer has monitored after December 20, 1985, and the monitoring satisfies all other requirements of this section, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraph (d)(2)(i) of this section.
>
> (iii) Where the employer has relied on objective data that demonstrates that asbestos, tremolite, anthophylite, actinolite, or a combination of these minerals is not capable of being released in airborne concentrations at or above the action level under the expected conditions of processing, use, or handling, then no initial monitoring is required.
>
> . . . .
>
> (4) *Changes in monitoring frequency.* If either the initial or the periodic monitoring required by paragraphs (d)(2) and (d)(3) of this section statistically indicates that employee exposures are below the action level, the employer may discontinue the monitoring for those employees whose exposures are represented by such monitoring.

Dec-Tam's asbestos removal operations shifted to asbestos removal underneath and around the ferry's pilothouse and then to asbestos removal from the lagging around pipes below deck in the hold. Between July 29 and September 3, 1987, Dec-Tam failed to conduct 8-hour, TWA monitoring that represented the full-shift exposure of its employees to the asbestos they were removing. At most, two 1-hour samples were taken each day during that period. A 1-hour sampling does not indicate what an employee's exposure would be for an 8-hour, on-the-job period. This item was directed for review on the issue of whether the judge erred in affirming the alleged violation either (a) because it is duplicative of the alleged violation of 29 C.F.R. § 1910.1001(d)(5) in citation no. 1, item 2 discussed in Part VII below, or (b) because the Secretary failed to establish noncompliance with the cited standard.

B. Arguments of the Parties

Although Dec-Tam argues that it has been cited twice for not monitoring the exposure levels of employees working in the hold, its primary argument is that it was not required to monitor there in order to meet the additional monitoring requirement of subsection (d)(5). It claims that subsection (d)(5) clearly and unambiguously refers back to subsection (d)(2)(ii), which permits an employer to rely on earlier monitoring. Dec-Tam maintains that it has frequently done such work elsewhere and has taken samples from that work and the work it did removing pipe lagging above deck on the ferry.

According to the Secretary, citation no. 2, item 1 and citation no. 1, item 2 were not combined because she believed that the alleged violation of full-shift monitoring subsection (d)(1)(ii) in citation no. 2, item 1 was willful, while the alleged violation of additional monitoring subsection (d)(5) in citation no. 1, item 2 was not.[9]

The Secretary argues that the compliance officer testified that Dec-Tam conducted initial monitoring on July 27 and 28 during transite board removal, but that during the next six or seven weeks, although different asbestos removal operations were performed aboard ship (asbestos was removed from pipes and from around the pilothouses), only two 1-hour samples were taken daily. The Secretary contends that these changes in Dec-Tam's work

[9] The Secretary acknowledges that it would have been more technically correct if citation no. 2, item 1 had alleged a violation of both subsections (d)(5) and (d)(1)(ii).

operations triggered the requirement in subsection (d)(5) for additional monitoring. Since no monitoring was conducted, the Secretary contends that Dec-Tam violated subsection (d)(5), as alleged in citation no. 1, item 2 and affirmed by the judge. The limited amount of monitoring that Dec-Tam actually did perform, the Secretary continues, also did not comply with the specification in subsection (d)(1)(ii) for 8-hour sampling representing full-shift exposures, and therefore a separate violation of citation no. 2, item 1 is established.

C. *Judge's Decision*

The judge affirmed a violation of section 1910.1001(d)(1)(ii), finding:

> There is no evidence that Dec-Tam performed personnel monitoring in the . . . hold, nor evidence of whether prior similar removal jobs existed, in which representative eight-hour TWA full shift employee exposures were taken, on which to base its decision on the type of respiratory protection and work controls to be implemented in the hold.

The judge noted that compliance officer Meleney testified that the difference between citation no. 2, item 1 and citation no. 1, item 2[10] is that citation no. 1, item 2 concerns Dec-Tam's failure to perform the *additional* monitoring that was required when its asbestos removal operations changed from above deck transite board removal to the removal of pipe lagging in the hold. Citation no. 2, item 1, on the other hand, concerns Dec-Tam's alleged failure to perform that monitoring on the full shift, 8-hour basis required by the standard.

D. *Discussion*

Dec-Tam does not dispute that its 1-hour sampling failed to comply with the requirements of subsection (d)(1)(ii) calling for 8-hour, full-shift monitoring, the issue directed for review. Dec-Tam argues that the *initial* monitoring standard at subsection (d)(2)(ii) permits it to rely on the results of earlier monitoring to avoid the requirements for

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[10] The Secretary alleged in item 2 of Serious Citation No. 1 that Dec-Tam violated 29 C.F.R. § 1910.1001(d)(5) by failing to conduct additional personal monitoring of its employees between August 4 and 19, 1987, after their asbestos removal work changed during this period from transite board removal to pipe lagging removal and their work practices changed from wet methods to dry methods. The proposed penalty was $720. Judge Furcolo affirmed an other-than-serious violation of subsection (d)(5), finding:

> [T]he standard required Dec-Tam to perform additional monitoring in the hold as the shift to removal of asbestos pipe lagging from transite board removal qualified as a change in work process warranting additional monitoring.

The propriety of his finding of a violation was not directed for review, but review was granted on whether he erred in finding the violation to be other-than-serious, rather than serious. See *infra* Part VII.

additional monitoring of subsection (d)(5) when the changes enumerated there occur. Under this theory, the requirement for additional monitoring is eliminated, as is the requirement in subsection (d)(1)(ii) that such monitoring be conducted on an 8-hour, full-shift basis. There are two flaws in Dec-Tam's theory. First, the exception Dec-Tam relies on in subsection (d)(2)(ii) is expressly declared to be inapplicable by the "[n]otwithstanding the provisions of (d)(2)(ii)" language of subsection (d)(5). Second, there is no evidence in the record of the prior monitoring on which Dec-Tam relies. Thus, there is no monitoring on which it can rely to avoid the additional monitoring requirement of subsection (d)(5). Since the monitoring it conducted aboard the ferry between July 29 and September 3, 1987 was indisputedly conducted on only a 1-hour, rather than on an 8-hour, full-shift basis,[11] we find that Dec-Tam violated subsection (d)(1)(ii) and, although it was not in dispute, subsection (d)(5) as well.[12]

Although Dec-Tam could have complied with the requirements of subsection (d)(5) and subsection (d)(1)(ii) by conducting the additional monitoring in the hold on a full shift, 8-hour basis, (subsection (d)(1)(ii)), it is clear that the Secretary is not barred from enforcing both of those standards here. As we stated in *H.H. Hall Constr.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981), "section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard. Thus, there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and where a single action may bring an employer into compliance with the cited standards." (Emphasis in original). *See Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1981 CCH OSHD ¶ 25,728 (No. 76-256, 1981).

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[11] The additional monitoring referred to in subsection (d)(5) was required to be performed when Dec-Tam's asbestos removal work production and processes moved from above deck to the hold and when its work practices in the hold changed from the removal of asbestos by wet methods to the removal of asbestos by dry methods, "[n]otwithstanding the provisions" of subsection (d)(1)(ii), to which Dec-Tam directs us. See 29 C.F.R. § 1910.1001(d)(5), below. Also see Part VI below.

[12] The judge found that Dec-Tam violated subsection (d)(5). Dec-Tam did not petition for review of the judge's action, and the propriety of the judge's action was not directed for review.

In such cases, the Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations. "[I]t is appropriate to assess a single penalty for overlapping violations . . . ." *H.H. Hall.* Our discussion of the appropriate penalty to be assessed for the violations of subsections (d)(1)(ii) and (d)(5) appears below under Part VII, where the severity of the subsection (d)(5) violation as well as an appropriate penalty, is addressed.

E. Severity of the Violation

1. Judge's Decision

Although the judge downgraded this alleged willful citation item to serious and assessed a penalty of $500, instead of the $8,000 proposed by the Secretary, he did not explain why he found the violation to be serious. Whether he erred in characterizing the violation as serious is before us on review.

2. Argument of the Secretary[13]

The Secretary emphasizes that the requirements of the asbestos standard are premised on the finding she made when she promulgated the standard that there is a significant risk of death and serious disease resulting from exposure to asbestos. These diseases include asbestosis, an irreversible and terminal scarring of the lung tissue; mesothelioma, a cancer that can be contracted in the pleural lining of the lung or the peritoneum; and lung cancer, particularly among cigarette smokers. The Secretary argues that the exposure monitoring requirement, which is the keystone of the asbestos standard's protection system, is designed to protect employees against these diseases by insuring that their employer knows when to take action to protect them from exposure to asbestos. Without accurate information about employee exposure, the employer cannot properly evaluate whether its engineering and work practice controls are effective or whether respirators are required and, if so, which type of respirator. Without exposure information obtained through monitoring, employees will not know if they are being exposed to harmful carcinogens nor will their physicians have accurate data for treatment, the Secretary adds, relying on the preamble to the asbestos standard. 51 Fed. Reg. at 22,683.

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[13] Although the Secretary did not argue separately on behalf of the seriousness of the full-shift monitoring item, she made the arguments presented in this section, and pertinent to this issue, on behalf of the seriousness of the additional monitoring item, an item that involves the same essential facts.

The Secretary contends that the Commission has not required proof that a violation results in actual overexposure to a toxic material as a prerequisite to a determination that a violation is serious. She relies on *St. Joe Resources Co.*, 13 BNA OSHC 2193, 1989 CCH OSHD ¶ 28,519, p. 37,840 (No. 81-2267, 1989); *rev'd and remanded on other grounds*, 916 F.2d 294 (5th Cir. 1990); *Amax Lead Co.*, 13 BNA OSHC 2169, 1989 CCH OSHD ¶ 28,518, p. 37,833 (No. 80-1793, 1989), *rev'd and remanded on other grounds*, 916 F.2d 294 (5th Cir. 1990); and *Schuylkill Metals Corp.*, 13 BNA OSHC 2174, 2179, 1989 CCH OSHD ¶ 28,520, p. 37,848 (No. 81-856, 1989), three cases in which employers violated the lead standard by failing to pay their employees overtime and shift differential compensation after the employees were transferred to different jobs pursuant to the standard's medical removal protection ("MRP") provision. Although the Secretary did not prove actual exposure to excessive lead, the Commission found serious violations. It reasoned that MRP benefits attack the serious health hazards presented by metallic lead by removing barriers to employee cooperation with medical surveillance and eliminating the possibility that employees would expose themselves to the serious health risks associated with using chelating drugs to reduce their blood lead levels.

The Secretary also cited *Phelps Dodge* where, she contends, the Commission and the Ninth Circuit affirmed a serious violation even though the violation of the arsenic standard did not cause actual employee exposure to excessive amounts of arsenic. The Secretary argues that in *Phelps Dodge*, both the Commission and the court "looked to the harm the cited regulation was intended to prevent" and found the violation serious because the harm was death or serious physical injury. 11 BNA OSHC at 1448-49, 1983-84 CCH OSHD at p. 33,925 and 725 F.2d at 1240. The Secretary contends that the same approach to determining whether a violation was serious was followed in *Anaconda Aluminum Co.*, 9 BNA OSHC 1460, 1476-77, 1981 CCH OSHD ¶ 25,300, p. 31,349 (No. 13102, 1981), where a serious violation was found for an employer's failure to provide a suitable respirator for an employee exposed to carcinogenic coal tar pitch volatiles.

3. Argument of Dec-Tam

Dec-Tam argues that even if the judge was correct in finding a violation, he erred in finding it serious and in assessing a $500 penalty. Dec-Tam claims that, since both these items concern the failure to monitor in the hold, by finding a serious violation here the judge

directly contradicted his finding that the company's violation of subsection (d)(5) for its failure to perform additional monitoring (*see infra* Part VII) was other-than-serious.

Dec-Tam contends that the MRP cases cited by the Secretary in support of her position that the violation was serious are inapposite. Dec-Tam maintains that although a violation of the MRP standard may have a chilling effect by discouraging employees from complying with a medical surveillance provision, a violation of the asbestos monitoring standard does not chill any employee rights. Dec-Tam claims that, at most, such a violation would only cause employees to seek respiratory protection, which was provided here.

4. Discussion

The results Dec-Tam obtained from its daily, 1-hour sampling did not represent the full exposure of its employees to asbestos. In the preamble to the final asbestos standard, the Secretary notes that the primary purpose of employee monitoring is to determine the extent of employee exposure to asbestos:

> Exposure monitoring informs the employer whether the employer meets the obligation to keep employee exposures below the 8-hour TWA exposure limit. Exposure monitoring also permits the employer to evaluate the effectiveness of engineering and work practice controls and informs the employer whether additional controls need to be installed. Furthermore, exposure monitoring is necessary in order to determine whether respiratory protection is required at all, and if so, which respirator is to be selected.

51 Fed. Reg. at 22,683.

By not conducting full-shift monitoring, Dec-Tam was unable to meet *any* of these obligations. The failure to obtain information so critical to the health of its employees can only be categorized as serious.[14] *See Amax Lead, Phelps Dodge*. Accordingly, we affirm the judge's finding that the violation was serious.

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[14] The fact that Dec-Tam's employees who were exposed to asbestos exceeding the PEL while working in the hold were wearing respirators appropriate for use in the circumstances has no bearing on whether the violation is serious. Our inquiry here is into the broader issue of whether Dec-Tam's failure to conduct full-shift monitoring could lead to death or serious physical harm, not -- as was the case in Part III above -- whether the employees' exposure to excessive amounts of asbestos could lead to death or serious physical harm.

V. Proper Protective Equipment

A. Background

The Secretary alleges in item 1 of Serious Citation No. 4[15] that Dec-Tam violated section 1910.1001(g)(2)(i) by failing to require three employees who were exposed to airborne concentrations of asbestos at 8-hour TWA's of ten times the PEL to wear full facepiece, air-purifying respirators equipped with high-efficiency filters, as required by Table 1 of subsection (g).[16]

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[15] Serious Citation No. 4 does not appear in the Commission's official case file. The allegations with respect to item 1 of the citation have been restated from page 15 of the Secretary's complaint.

[16] Section 1910.1001(g)(2)(i) and Table 1 provide:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
>
> . . . .
>
> (g) *Respiratory protection--*
>
> . . . .
>
> (2) *Respirator selection.* (i) Where respirators are required under this section, the employer shall select and provide, at no cost to the employee, the appropriate respirator as specified in Table 1. The employer shall select respirators from among those jointly approved as being acceptable for protection by the Mine Safety and Health Administration (MSHA) and by the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 20 CFR Part 11.

TABLE 1—RESPIRATORY PROTECTION FOR ASBESTOS, TREMOLITE, ANTHOPHYLLITE, AND ACTINOLITE FIBERS

Airborne concentration of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals	Required respirator
Not in excess of 2 f/cc (10 X PEL).	1. Half-mask air-purifying respirator, other than a disposable respirator, equipped with high-efficiency filters.
Not in excess of 10 f/cc (50 X PEL).	1. Full facepiece air-purifying respirator equipped with high-efficiency filters.
. . . .	. . . .

NOTE: a. Respirators assigned for higher environmental concentrations may be used at lower concentrations.

b. A high-efficiency filter means a filter that is at least 99.97 percent efficient against mono-dispersed particles of 0.3 micrometers or larger.

The results of sampling conducted for Dec-Tam by its consultant, EnviroSciences, established that: on July 27, 1987, employee James Wages was exposed to airborne asbestos at an 8-hour TWA of 5.2 f/cc while wearing a half-mask respirator; on July 29, 1987, employee R. McCloud was exposed to airborne asbestos at an 8-hour TWA of 4.0 f/cc while wearing a half-mask respirator; and, on July 30, 1987, employee C. Rivera was exposed to airborne asbestos at an 8-hour TWA of 2.9 f/cc while wearing a half-mask respirator.

OSHA industrial hygienist Frederick Malaby testified that the cited standard requires full face respirators where there are airborne concentrations of asbestos in excess of 2 fibers/cc (but below 10 f/cc). He stated that it is never permissible to wear half-mask respirators at the levels of asbestos that these three employees experienced.

EnviroSciences' president, Theodore Lemek, testified that, even though EnviroSciences' sampling had obtained a TWA result of 5.2 f/cc during transite board removal on July 27, he had recommended that Dec-Tam's employees wear half-mask respirators[17] because "substantial visual and laboratory information" indicated the presence of substantial amounts of non-asbestos material in the air. Lemek admitted, however, that "[w]e made no clear quantification of the amount of material that was asbestos fiber versus non-asbestos fiber" and that it was "a semi-quantitative determination . . . an educated guess so to speak" that led him to suggest that half-mask respirators were appropriate.

Lemek acknowledged in his testimony, as does a "Notice to Dec-Tam Personnel" prepared for Dec-Tam by EnviroSciences and introduced into evidence as Exhibit R-4, that in counting the amount of asbestos fibers in the air -- where different types of fibers are present in the air as well -- it is not permissible under NIOSH rules to differentiate between fiber types. EnviroSciences did follow this notice and counted all fibers as asbestos fibers in assessing the monitoring results obtained here.

B. Judge's Decision

The judge rejected Dec-Tam's reliance on Lemek's "educated guess." He found that because EnviroSciences did not make a precise quantification of the fiber content or "document its vague approximations," he could not conclude that half-mask respirators were

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[17] Lemek also testified that he had explained to the site supervisor that if "any of the workers . . . felt uncomfortable with the situation . . . the site supervisor should not hesitate in giving them additional protection."

appropriate under the circumstances. The judge affirmed the item as serious, but did not discuss why he considered the violation to be serious. He assessed a $50 penalty rather than the $720 proposed by the Secretary.

C. Arguments of Parties on Whether Standard Violated

Dec-Tam argues that its employees used half-mask respirators because EnviroSciences' Lemek had determined that one-half to three-quarters of the total fibers in the sampling results were mineral wool, and therefore recommended the use of those respirators. The company acknowledges that Lemek also testified that NIOSH requires reporting *all* fibers in a sample, even if some are not asbestos.

The Secretary argues that the judge acted properly in finding a violation because Dec-Tam failed to provide full-face respirators for employees exposed to concentrations of asbestos in excess of 2 f/cc. She points out that respirator choices are governed by Table 1 of the cited standard and that Appendix A, paragraph 13(b)[18] of the asbestos standard requires the counting of all particles as asbestos, in the absence of other information. The Secretary contends that Dec-Tam only offered a "vague guess at what constituted its sample," and that the judge properly found such evidence lacked credibility.

D. Discussion

Dec-Tam does not dispute that the sampling conducted for it by EnviroSciences during transite board removal revealed asbestos levels of 5.2 f/cc, 4.0 f/cc, and 2.9 f/cc. Neither does it dispute that the three employees were all wearing half-mask respirators when those results were registered. Under Table 1, referred to in section 1910.1001(g)(2)(i), when the airborne concentration of asbestos is above 2 f/cc (10 times PEL) but not in excess of 10 f/cc (50 times PEL), the required respirator is a "[f]ull facepiece air-purifying respirator equipped with high-efficiency filters." Because the evidence establishes that its employees

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[18] The pertinent appendix section provides:

> APPENDIX A TO §1910.1001—OSHA REFERENCE METHOD—MANDATORY
>
> . . . .
>
> *Sampling and Analytical Procedure*
>
> . . . .
>
> 13. Observe the following counting rules.
>
> . . . .
>
> b. In the absence of other information, count all particles as asbestos, tremolite, anthophyllite, and actinolite that have a length-to-width ratio (aspect ratio) of 3:1 or greater.

did not wear the required full facepiece respirators, Dec-Tam failed to comply with the cited standard.

Dec-Tam's claim that its employees could use noncomplying respirators because EnviroSciences' Lemek believed that there was a substantial amount of non-asbestos-containing fiber material included within those sampling results is completely without merit. Compliance with section 1910.1001(g)(2)(i) is premised on the painstaking, microscopic measurement of samples required by Appendix A of section 1910.1001. These measurements indicated that half-mask respirators were not appropriate. Lemek's "educated guess" should not have been given any consideration. Accordingly, we affirm the judge's action in finding that the standard was violated.

E. Arguments of the Parties on Severity

Dec-Tam argues that there is no proof that the level of protection provided by the half-mask respirators failed to protect its employees against death or serious physical harm, citing *The Shenango Co.*, 10 BNA OSHC 1613, 1982 CCH OSHD ¶ 26,051 (No. 78-4723, 1982). Dec-Tam further relies on *Duquesne Light Co.*, 11 BNA OSHC 2033, 2038-39, 1984-85 CCH OSHD ¶ 26,959, pp. 34,602-03 (No. 79-1682, 1984), where the Commission found an other-than-serious violation because the Secretary did not prove that a serious disease could result from an isolated, one-day instance of asbestos exposure.

The Secretary argues that Dec-Tam chose the least desirable means of protecting its employees and in doing so needlessly exposed them to the risk of contracting asbestos-related disease. In promulgating the asbestos standard, the Secretary argues, she specifically rejected the results of a study by the DuPont company purportedly showing that certain half-mask respirators provide protection for up to ten times the PEL, citing 51 Fed. Reg. at 22,695, 22,697.

F. Discussion

In *Shenango*, the Commission concluded that the cited violation was other-than-serious because wipe samples taken by the compliance officer showed that there was no asbestos present. In this case, during the three sampled days, Dec-Tam's employees were exposed to asbestos fibers at about 14 to 26 times the permissible exposure limit[19] while

[19] The PEL was 0.2 f/cc as an 8-hour TWA. The employees were exposed to airborne asbestos in the amounts of 5.2 f/cc, 4.0 f/cc and 2.9 f/cc as 8-hour TWA's.

wearing half-mask respirators. According to Table 1, half-mask respirators are only appropriate for use in concentrations of asbestos considerably lower than those experienced by the employees, that is, at 10 times the PEL or lower. Therefore, because the employees were exposed to carcinogenic asbestos at 14 to 26 times the PEL while wearing inadequate respirators, we find it clear that the judge properly characterized the violation as serious. *See Anaconda Aluminum*, 9 BNA OSHC at 1477, 1981 CCH OSHD at p. 31,349 (where standard's purpose is to protect employees against contracting life-threatening disease, employer's failure to provide employee with respirator suitable to reduce his exposure to coal tar pitch volatiles to the required limit is serious violation). We further note that *Duquesne Light* on which Dec-Tam relies is inapposite because the asbestos exposure involved here was no isolated instance but was in fact part of the day-to-day duty of the employees of this asbestos removal company.

Penalty Assessment

While affirming the violation as serious, the judge reduced the penalty proposed by the Secretary from $720 to $50 without providing an explanation for his action. We reluctantly affirm the $50 penalty assessed by the judge.

VI. Proper Housekeeping Methods

A. Background

The Secretary alleges in item 5 of Serious Citation No. 1 that Dec-Tam violated the housekeeping standard at 29 C.F.R. 1910.1001(k)(1)[20] by not maintaining the hold as free as practicable of asbestos dusts and wastes from asbestos pipe lining material that was removed without first being wetted and then allowed to accumulate on the floor and ledges. A penalty of $720 was proposed. In item 1b of Serious Citation No. 1, the allegedly duplicative item, the Secretary alleged that Dec-Tam violated 29 C.F.R.

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[20] Section 1910.1001(k)(1) provides:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
>
> . . . .
>
> (k) *Housekeeping.* (1) All surfaces shall be maintained as free as practicable of accumulations of dusts and waste containing asbestos, tremolite, anthophyllite, or actinolite.

§ 1910.1001(f)(1)(i)[21] by failing to implement feasible controls to reduce and maintain employee exposures to below the 0.2 f/cc PEL. Three employees removing asbestos in the hold were allegedly exposed to concentrations of asbestos fibers between 0.67 f/cc and 0.88 f/cc for 8-hour TWA exposures. The citation suggested that asbestos exposure could be reduced by wet asbestos-removal methods, by more careful handling of removed pipe lagging, and by the use of glove bags. A $720 penalty was proposed for that violation also.

B. Judge's Decision

The judge affirmed an other-than-serious violation of the housekeeping standard at subsection (k)(1), and a serious violation of the subsection (f)(1)(i) allegation. He assessed $100 penalties for each of the violations. The judge affirmed a housekeeping violation because:

> Respondent did not attempt, to the extent feasible in this work environment, to keep the surfaces free of debris, and because there was evidence that there would have been less debris had proper wet removal methods been used . . . .

The judge noted that four of the exhibits submitted by the Secretary showed accumulations of dust and waste on the floors and ledges of the hold. He also relied on testimony that asbestos had accumulated on surfaces throughout the hold and that some of the asbestos was capable of being vacuumed.

In affirming a violation of subsection (f)(1)(i), the judge found that the Secretary established that Dec-Tam did not "employ the feasible work practice of wetting removal methods." He based his conclusion on testimony that asbestos lagging must be taken off in layers and re-wet with a wetting agent called amended water[22] as removal continues. The record shows that the three Dec-Tam employees initially in the hold neither used amended water to wet down the pipe insulation before they removed the pipe covering nor continued

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[21] Section 1910.1001(f)(1)(i) provides:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
>
> . . . .
>
> (f) *Methods of compliance.*--(1) *Engineering controls and work practices.* (i) The employer shall institute engineering controls and work practices to reduce and maintain employee exposure to or below the exposure limit prescribed in paragraph (c) of this section, except to the extent that such controls are not feasible.

[22] The judge stated that both compliance officer Meleney and EnviroSciences' Lemek testified that amended water, which is treated with surfactant, will wet asbestos more effectively than plain water.

to wet down the asbestos during the removal process. The judge further relied on testimony that the four or five additional employees who subsequently joined the removal team in the hold did not wet the asbestos prior to its removal and, as a result, a "snowstorm" of airborne dust was generated throughout the room.

C. Arguments of the Parties

Dec-Tam argues that the judge's sole basis for affirming a violation is his finding that wet removal practices were not used in stripping the covering off pipes in the hold to reduce the amount of asbestos debris. It contends that this is duplicative of the affirmed violation of subsection (f)(1)(i) (citation no. 1, item 1b), where the judge also found that it did not use the feasible work practice of wet removal methods.

The Secretary contends that Dec-Tam's failure to use wet removal methods was not the only reason given by the judge for finding that Dec-Tam had violated housekeeping subsection (k)(1). She states that the judge provided two reasons: (1) "[R]espondent did not attempt, to the extent feasible in this work environment, to keep the surfaces free of debris" and (2) "[T]here was evidence that there would have been less debris had proper wet removal methods been used."

The Secretary points out that housekeeping section 1910.1001(k) imposes general requirements on employers for the clean-up of asbestos accumulations -- by practices such as cleaning, *vacuuming*, shoveling and waste disposal -- to minimize sources of exposure that engineering controls generally are not designed to control, citing 51 Fed. Reg. at 22,700. By contrast, she contends, engineering controls and work practices (enumerated in section 1910.1001(f)(i)-(ix)) act on the source of emissions to reduce or eliminate employee exposure and include local exhaust ventilation and wet removal methods, citing *id.* at 22,693.

Therefore, the Secretary argues that even if the judge based his finding of a violation of the housekeeping standard on the company's failure to use wet removal methods, a violation of that standard was also established by the unrefuted evidence that at least some of the asbestos debris was capable of being vacuumed, since vacuuming is one of the housekeeping methods specifically enumerated in subsection (k)(4). Consequently, the Secretary concludes, each violation is based on a separate course of conduct and both the subsection (f)(1)(i) allegation and the subsection (k)(1) housekeeping allegation should be affirmed on the basis of *H.H. Hall.*, 10 BNA OSHC at 1046, 1981 CCH OSHD at p. 32,056.

D. Discussion

Although the Secretary argues that the judge set forth two separate bases for finding that the cited housekeeping standard was violated, the following portion of the judge's decision persuades us that the judge found violations of both standards because Dec-Tam failed to implement wet removal methods:

> [The Secretary] established that proper [wet] removal methods were not being implemented as a feasible engineering control. Thus, because of this, Dec-Tam failed to keep surfaces "as free as practicable" of accumulations of asbestos debris.

(Citations omitted).

Moreover, the Secretary's own citation for violation of the housekeeping standard appears only to be directed at accumulations of asbestos debris resulting from Dec-Tam's failure to use wet removal methods. It provides: "Asbestos pipe covering debris, removed without first being wetted, was allowed to accumulate on the floor and ledges of this hold."

We therefore conclude that Dec-Tam could have complied with both housekeeping subsection (k)(1) and subsection (f)(1)(i) by using proper wet removal work practices.[23] However, under *H.H. Hall*, the Secretary may enforce both standards against Dec-Tam, but we will consider the two citations items together for penalty purposes.[24] The Secretary proposed a $720 penalty for her subsection (k)(1) housekeeping allegation and a combined penalty of $720 for her subsection (f)(1)(i) work practice controls allegation and two other allegations (items 1(a) and 1(c) of citation no. 1). The judge assessed penalties of $100 each for the subsection (k)(1) violation and the subsection (f)(1)(i) violation. After a consideration of the penalty factors enumerated in section 17(j) of the Act, we assess a total

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[23] Although the record shows that amended water is more effective in wet removal than plain water, the housekeeping standard does not require the use of amended water.

[24] That some of the asbestos accumulations could have been vacuumed away and that the work practices standard (subsection (f)(1)(i)) attacks the cited asbestos debris problem at its source, while the housekeeping standard (subsection (k)(1)) attacks it down the line, as the Secretary argues, do not provide any basis for assessing separate penalties under the circumstances here where deficient wet removal practices were responsible for both violations.

combined penalty of $200 for the violations of housekeeping subsection (k)(1) (citation no. 1, item 5) and work practice controls subsection (f)(1)(i) (citation no. 1, item 1b).[25]

VII. Additional Monitoring Violation: Severity and Penalty

A. Background

The Secretary alleges in Serious Citation No. 1, item 2 that Dec-Tam violated 29 C.F.R. § 1910.1001(d)(5)[26] by failing to perform the additional personal monitoring of its employees between August 4 and 19, 1987, after asbestos removal work changed from transite board removal to pipe lagging removal and work practices changed from wet methods to dry methods. A penalty of $720 was proposed.

B. Judge's Decision

The judge affirmed an other-than-serious violation of subsection (d)(5), stating:

> [T]he Secretary failed to prove that serious physical harm could probably result due to its [Dec-Tam's] failure to monitor. There is no evidence in the record from which I can conclude that as a result of this violation employees have been or will be exposed to excessive amounts of asbestos fibers and could subsequently suffer death or serious physical harm. *See The Shenango Company*, 10 BNA OSHC 1613 (1982) (Finding of violation of monitoring standard at 1910.1001(f)(i) is non-serious as no evidence shown that employees have been or will be exposed to excessive amounts of asbestos fibers resulting in death or serious physical harm). *See also Research Cottrell, Inc.*, 9 BNA OSHC 1489 (1981).

The judge explained that exposed employees were wearing half-mask respirators, which the Secretary had agreed constituted proper respiratory protection given the amount of airborne asbestos measured. The judge assessed a penalty of $100.

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[25] If Dec-Tam has already paid the $100 penalty assessed by the judge for its violation of section 1910.1001(f)(1)(i) (citation no. 1, item 1b), the company is entitled to a $100 credit on the combined $200 penalty we now assess.

[26] Section 1910.1001(d)(5) provides:

> **§ 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite.**
>
> . . . .
>
> (d) *Exposure monitoring.*--
>
> . . . .
>
> (5) *Additional monitoring.* Notwithstanding the provisions of paragraphs (d)(2)(ii) and (d)(4) of this section, the employer shall institute the exposure monitoring required under paragraphs (d)(2)(i) and (d)(3) of this section whenever there has been a change in the production, process, control equipment, personnel or work practices that may result in new or additional exposures above the action level or when the employer has any reason to suspect that a change may result in new or additional exposures above the action level.

C. Argument of the Secretary

The Secretary argues that the judge erred when he found that the Secretary failed to prove that serious harm could *probably* result due to Dec-Tam's failure to monitor and that as a result of the violation employees *have been* or *will be* exposed to excessive amounts of asbestos fiber.

She argues that to prove a serious violation she need only show that a violation "*could* result in serious damage to the health of employees," quoting *St. Joe Resources*, 13 BNA OSHC at 2197, 1989 CCH OSHD at p. 37,840 (emphasis added) and citing other cases including *Amax Lead* and *Schuylkill Metals*.

The Secretary further contends that the judge's requirement of proof that the violation *has* or *will* result in excessive employee exposure is erroneous because it assumes that a serious violation may only be found if there is overexposure to asbestos. She argues that the seriousness of an employer's actions is measured by the potential for harm and not simply by whether that harm actually comes to pass.

In addition, the Secretary argues, as detailed above in Part IV, that asbestos can cause death and numerous serious diseases and that exposure monitoring is the keystone of the asbestos standard's protection system.

D. Argument of Dec-Tam

Dec-Tam argues that the Secretary's test for seriousness essentially eliminates the "substantial probability" requirement from the Act. Dec-Tam contends that the judge's finding that the Secretary failed to prove that serious harm to Dec-Tam's employees "could probably" result encompasses the "substantial probability" requirement.

Dec-Tam also contends that the *Shenango* and *Research Cottrell* cases relied on by the judge concern analogous violations of the asbestos monitoring requirement of section 1910.1001(f)(1), as amended by section 1910.1001(d)(2), and are controlling here. It points out that the Secretary concedes that the half-mask respirators worn by its employees provided proper respiratory protection for the amount of airborne asbestos measured in the ferry's hold. As in *Shenango*, therefore, Dec-Tam argues, there is no evidence that employees were exposed to excessive amounts of asbestos fibers. In addition, Dec-Tam relies, as it did in Part V *supra*, on *Duquesne Light*, where the Commission found an other-

than-serious violation because the Secretary did not prove that a serious disease could result from an isolated, one-day instance of asbestos exposure.

E. Discussion

It is unclear whether the judge used the wrong test for proof of a serious violation here when he found that the Secretary failed to prove that serious physical harm "could probably result" from Dec-Tam's failure to monitor. As mentioned above, section 17(k) of the Act states that 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. It is possible that the judge was improperly imposing a stricter test for seriousness than the Act authorizes. It is also possible, as Dec-Tam argues, that the judge merely meant to encompass the terms of section 17(k) in his own language.

Although the judge's intentions are not clear, we find that he erroneously downgraded the severity of this item to other-than-serious. In Part IV *supra*, we affirmed, on essentially the same facts, the judge's finding of a serious violation for Dec-Tam's failure to conduct the full-shift monitoring required by subsection (d)(1)(ii). There, we noted that employees exposed to asbestos face the risk of developing such chronic diseases as asbestosis, lung cancer, pleural and peritoneal mesothelioma, and gastrointestinal cancer. Exposure monitoring is intended as an early warning system to protect employees against these diseases. By failing to conduct additional monitoring in the hold, Dec-Tam failed to inform itself whether it was keeping the exposure of its employees below the 8-hour TWA exposure limit. This left it unable to evaluate the effectiveness of any engineering and work practice controls, or to learn whether additional controls were necessary and whether, and what kind of, respiratory protection was required for its employees.[27] Dec-Tam's violation of the cited standard was, therefore, serious.

The cases cited by the judge in support of his other-than-serious finding are inapposite. In *Shenango*, there was no proof of any exposure to asbestos fibers. Here, EnviroSciences' testing showed that the employees were overexposed to excessive levels of

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[27] For the reasons given above under Part IV where we discussed the severity of Dec-Tam's violation of full-shift monitoring subsection (d)(1)(ii), the fact that Dec-Tam's employees happened to be wearing respirators which were appropriate for the levels of asbestos to which they were overexposed has no bearing on whether the violation of the cited monitoring section was serious. *See supra* note 16.

asbestos. In *Research Cottrell*, the severity of the violations was not an issue. *Duquesne Light* is also inapposite. It dealt with just a single day's exposure to asbestos. The exposure of Dec-Tam's employees in the hold continued for more than three weeks.

F. Penalty Arguments

Arguing in support of her proposed $720 penalty, the Secretary states that at least seven or eight employees working in the hold between August 8 and September 3, 1987 were exposed to airborne asbestos, and that therefore the gravity of the violation was high. In addition, the Secretary argues that although Dec-Tam was in the asbestos removal business, it displayed little or no good faith in complying with the standard because it owned only one device to analyze air samples, and that device was inoperative. The Secretary also points out that Dec-Tam had not asked EnviroSciences to conduct the additional monitoring required by the standard and that Dec-Tam had been cited for failing to accurately monitor personnel exposure to asbestos in 1984 and 1987.

Dec-Tam does not address the penalty.

G. Discussion

As stated in Part IV above, we consider the serious violations of additional monitoring subsection (d)(5) and full-shift monitoring subsection (d)(1)(ii) together for penalty purposes. With respect to subsection (d)(5), the Secretary alleged the violation to be serious and proposed a penalty of $720; the judge erroneously found the violation to be other-than-serious and assessed a penalty of $100. With respect to subsection (d)(1)(ii), the Secretary alleged the violation to be willful and proposed a penalty of $8,000; the judge found the violation to be serious and assessed a $500 penalty. After a consideration of the penalty factors in section 17(j) of the Act, we assess a total combined penalty of $1,000 for separately-cited serious violations of subsections (d)(1)(ii) and (d)(5).

VIII. Order

For the reasons stated above:

We vacate the judge's actions in finding a willful violation of section 1910.1001(m)(5)(ii) (Willful Citation No. 2, item 2) and assessing a $10,000 penalty; we find a serious violation of the cited standard and assess a $1,000 penalty;

We affirm the judge's actions in finding a violation of section 1910.1001(c) (Serious Citation No. 1, item 1a) and in assessing a $500 penalty, but we affirm the violation as other-than-serious;

We affirm the judge's action in finding a serious violation of section 1910.1001(d)(1)(ii) (Willful Citation No. 2, item 1) and we assess a total, combined penalty of $1,000 for the violation of section 1910.1001(d)(1)(ii) and the violation of section 1910.1001(d)(5) (Serious Citation No. 1, item 2) referred to below;

We affirm the judge's action in finding a serious violation of section 1910.1001(g)(2)(i) (Serious Citation No. 4, item 1) and assess a $50 penalty;

We affirm the judge's action in finding a violation of section 1910.1001(k)(1) (Serious Citation No. 1, item 5) and we assess a total, combined penalty of $200 for the violation of section 1910.1001(k)(1) and the violation of section 1910.1001(f)(1)(i) (Serious Citation No. 1, item 1b);

We affirm the judge's action in finding a violation of section 1910.1001(d)(5) (Serious Citation No. 1, item 2), but affirm the violation as serious. As stated above, we assess a total combined penalty of $1,000 for the violation of section 1910.1001(d)(5) and the violation of section 1910.1001(d)(1)(ii) (Willful Citation No. 2, item 1).

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Dated: January 19, 1993

Montoya, Commissioner; Concurring in part and Dissenting in part:

Although I am in agreement with my colleagues as to the other parts of the lead opinion, I disagree with their conclusion that Dec-Tam's failure to furnish OSHA with important monitoring records until it was threatened with an administrative subpoena was only a serious violation of section 1910.1001(m)(5)(ii). In my opinion, the judge's characterization of Dec-Tam's actions as "obstructionist" was correct. Therefore, I would affirm his finding of a willful violation.

The Facts

Based in New England, Dec-Tam's primary activity is asbestos removal. On August 27, 1987, OSHA compliance officer Henry E. Meleney requested certain documents by telephone from Dec-Tam president Lee Snodgrass, who asked that the request be put in writing. OSHA sent a letter requesting the documents on the following day. By cover letter of September 14, 1987, Dec-Tam forwarded documents that did not deal with asbestos monitoring, and committed itself to forward the remainder "as soon as . . . received" from EnviroSciences, Dec-Tam's subcontractor for asbestos monitoring.

In December of 1987, after returning to New England from a work detail, compliance officer Meleney discovered that Dec-Tam still had not furnished the remaining documents. These documents included the results of monitoring conducted to determine the amounts of asbestos to which Dec-Tam employees were exposed while removing asbestos from the ferry. On December 28, 1987, Meleney telephoned Dec-Tam's industrial hygienist, Ajay Pathak, and once more requested the information. Meleney asked that the material be gathered and sent "as soon as possible, but this week." Although Pathak agreed to send the documents, he did not. At about this time, Meleney also telephoned Theodore Lemek, president of EnviroSciences, who told him that the documents already had been forwarded to Dec-Tam. In fact, Lemek admitted on cross-examination that he "perhaps" told Meleney during this conversation that he had sent the documents to Dec-Tam "a long time ago."

On January 4, 1988, Meleney once more telephoned Dec-Tam to request the documents. That time, he was informed by a company secretary that Pathak was not in the office and that company president Snodgrass would return his call. When Snodgrass had not done so by January 7, 1988, Meleney again telephoned Dec-Tam and was again told that Snodgrass would return his call. Though Snodgrass finally did return the call on January 8,

1988, he merely advised Meleney that industrial hygienist Pathak was the person in charge of forwarding the requested documents and that all further communication regarding the documents should therefore be made through Pathak -- who, of course, was the same person who had assured Meleney on December 28 that the documents would be sent that week. On January 12, 1988, Meleney again telephoned Dec-Tam to request the documents, at which time he was again told by Snodgrass that he would have Pathak get the documents for him. Meleney was also told that Pathak was out of the office and would not return until January 18, 1988.

Meleney then informed OSHA's Providence (Rhode Island) Area Director, Kipp W. Hartmann that he was having trouble getting the documents from Dec-Tam. Hartmann telephoned Dec-Tam on January 13, 1988 and insisted that the information be sent immediately, warning that an administrative subpoena would otherwise be issued. The EnviroSciences documents -- on EnviroSciences' letterhead dated September 30, 1987 -- with a separate cover letter from Dec-Tam's Administrator, were received by OSHA on the following day.

Analysis

Under section 17(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(a), 29 U.S.C. §§ 651-678 (the "Act"), a violation is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." *Keco Indus.*, 13 BNA OSHC 1161, 1163, 1987 CCH OSHD ¶ 27,860, p. 36,472 (No. 81-263, 1987).

With respect to the first element, intentional disregard of a standard may be established by showing that the employer knew of an applicable regulation prohibiting the conduct or condition and consciously disregarded it. *Williams Enterp.*, 13 BNA OSHC 1249, 1257, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). Here, the evidence establishes that Dec-Tam was familiar with the requirements of a nearly identical standard. It was issued a citation less than three months before the Secretary first requested the monitoring records in this case alleging a violation of section 1926.58(n)(5)(ii), a recordkeeping provision of the asbestos standard for construction. The earlier citation alleged a violation for Dec-Tam's failure to assure OSHA *immediate* access to requested records.

Despite this awareness of the requirement that OSHA be given immediate access to asbestos monitoring records, Dec-Tam did not comply with the August 28, 1987 written request for monitoring records until four-and-one-half months had passed. In the interim, OSHA was forced to make repeated requests for the monitoring documents. Industrial hygienist Pathak failed to furnish the documents during the week of December 28, 1987, although he said he would. Company president Snodgrass -- to whom the compliance officer had made his original request for the documents back on August 27, 1987 -- was slow in returning telephone calls from the compliance officer in January of 1988, and, when he did so, it was only to state that someone else, Pathak, was to provide OSHA with the documents, but that Pathak would be out of the office for a week or so. Only when OSHA's area director threatened Dec-Tam with an administrative subpoena was Dec-Tam somehow able to provide OSHA with the documents on the following day. This was so, even though the scheduled return date of the Dec-Tam employee who was supposed to provide the documents was still days away.

Applying these facts to the second element, I find further reason that the violation should be characterized as willful in that Dec-Tam displayed plain indifference to the safety of its employees by failing to immediately provide OSHA with employee asbestos monitoring records.

The sought-after records were critically important for the detection, treatment and prevention of occupational disease. *See* 53 Fed. Reg. 38,162; 45 Fed. Reg. 35,212. Information obtained by monitoring indicates to an employer the levels of asbestos to which its employees are exposed, which in turn enables the employer to decide which engineering, work practice, and/or respiratory devices are required to protect its employees. Thus, the monitoring provisions are the linchpin of the asbestos standard: they are integral to the successful application of this standard.

Dec-Tam's lengthy delay in obtaining the required records from EnviroSciences and turning them over to the Secretary both impaired the company's ability to protect its employees from the life-threatening diseases caused by asbestos exposure and kept the Secretary from pursuing any possible enforcement actions she might have taken under the Act had she obtained the records earlier.

In sum, after making both an oral and a detailed written request for the records, OSHA had to make a total of five further requests for the records, and threaten an administrative subpoena, before it finally got them. In my view, these facts plainly demonstrate that the company intentionally disregarded the requirements of the Act and therefore willfully violated the cited standard. Further, the facts provide no basis to support Dec-Tam's claim that its failure to provide the records was a case of simple negligence. It is not simple negligence to fail to provide OSHA with access to documents, required by regulation to be furnished immediately, until after OSHA has requested them at least seven times and has threatened an administrative subpoena.

The lead opinion rationalizes in part its decision that Dec-Tam's failure to turn over the requested documents for a four-and-one-half month period was not willful on two bases: (1) the Secretary chose not to pursue her request for documents more zealously after she received Dec-Tam's letter of September 14, 1987 stating that the requested documents not forwarded with the letter would be forwarded "as soon as . . . received" from EnviroSciences, and (2) the Christmas and New Year's Day holiday period is not a particularly productive work period. I find these bases unconvincing.

I note, initially, that Dec-Tam's reliance on EnviroSciences is misplaced. An employer may not contract out its OSHA responsibilities. *Brock v. City Oil Well Serv.*, 795 F.2d 507 (5th Cir. 1986). Dec-Tam, not EnviroSciences, was under a continuing obligation to furnish all the requested documents to OSHA from the August 28, 1987 date on which the compliance officer first requested them in writing. Despite this obligation and Dec-Tam's statement in its September 14, 1987 letter to OSHA that it would forward the balance of the documents "as soon as . . . received" from EnviroSciences, there is no evidence that Dec-Tam made any effort to obtain the documents from EnviroSciences before the end of December 1987. EnviroSciences had finished typing those documents by the September 30, 1987 date that appears on them. Also, although business does slow down during the holiday period, that period -- even if it is construed to extend from the week before Christmas to the Monday following New Year's Day -- comprised only about two weeks out of the four-and-one-half month period that Dec-Tam delayed in furnishing the documents.

Penalty

Section 17(j) of the Act provides that the Commission consider the appropriateness of a penalty with respect to the size of the employer, its history of previous violations, good faith, and the gravity of the violation. The parties have stipulated that Dec-Tam employed about 150 people at the time of the citations. Two citations had previously been issued to Dec-Tam. One, also involving the company's failure to turn over asbestos exposure records, was affirmed by settlement agreement. I would find that the company showed bad faith in taking approximately four-and-one-half months to turn over all the requested materials to OSHA and would agree with the judge's characterization of this behavior as "obstructionist." I would also find that the gravity of the violation was high because of the high degree of danger involved with asbestos exposure and the fact that the records requested included important employee monitoring records. I would therefore assess the $10,000 penalty assessed by the judge.

Velma Montoya
Commissioner

Dated: January 19, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 88-0523
DEC-TAM CORPORATION,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on January 19, 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

January 19, 1993
Date

Ray H. Darling, Jr. (SKW)
Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-0523

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Albert H. Ross, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
llth Floor
One Congress Street
Boston, MA 02114

Paul V. Lyons, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109

Office of the
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, N.W
4TH FLOOR
WASHINGTON, D.C. 20006-1246

May 12, 1989

IN REFERENCE TO SECRETARY OF LABOR v.

DEC-TAM Corpration

OSHRC DOCKET NO. 88-0523

NOTICE IS GIVEN TO THOSE LISTED BELOW:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W., Room S4004
Washington, D.C. 20210

Albert H. Ross, Regional Solicitor
Office of the Solicitor, USDOL
John F. Kennedy, Federal Bldg.
Government Center, Room 1803
Boston, MA 02203

Paul V. Lyons
Esquire
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109

Foster Furcolo, Judge
Occupational Safety &
Health Review Commission
McCormack Post Office &
Courthouse
Room 420
Boston, MA 02109-4501

NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on May 12, 1989. The decision of the Judge will become a final order of the Commission on June 12, 1989 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should received on or before June 1, 1989 in order to permit sufficient time for the review. See Commission Rule 91, 29 C.F.R. sec. 2200.91.*

All pleadings or other documents that may be filed shall be addressed as follows:

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

*A copy of any petition for discretionary r must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S Washington, D.C. 20210. If a Direction fo Review is filed the Counsel for Regional T Litigation will represent the Department o Labor.

(1/87)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant	:	
v.	:	OSHRC Docket No. 88-523
DEC-TAM CORPORATION, Respondent	:	

APPEARANCES:

FOR THE COMPLAINANT:

Albert H. Ross, Esq., Regional Solicitor:
ROBERT YETMAN, Esq., of Counsel
U. S. Department of Labor
JFK Federal Bldg. - Room 1803
Boston, Massachusetts 02203

FOR THE RESPONDENT:

PAUL V. LYONS, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109

DECISION AND ORDER

This is a proceeding arising under the provisions of section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq., 84 Stat. 1590 et seq., "the Act") to review citations and proposed penalties issued pursuant to sections 9(a) and 10(c) of the Act. As a result of an inspection of Respondent's workplace, located at Newport Offshore, Ltd., Newport, Rhode Island, on August 7, August 12, and August 13, 1987, Respondent was issued Serious Citation Number 1, Willful Citation Number 2, and Other Citation Number 3, dated February 4, 1988, and Serious Citation Number 4, dated February 19, 1988.

On February 29, 1988, Respondent filed with a representative of the Secretary of Labor a notification of intent to contest all citations and proposed penalties. A hearing on the matter was held on August 15, 16, 17, and 25, 1988.

Respondent, Dec-Tam Corporation, is a corporation with an office and place of business located at 10 Lowell Junction Road, Andover, Massachusetts, and is engaged in the business of asbestos removal. At the time of the citation, Dec-Tam was a medium-sized firm employing approximately one hundred and fifty people (Tr. 3).

Dec-Tam was retained by Newport Offshore, Ltd., to remove asbestos-containing material from an out-of-service Staten Island Ferry (Tr. 8, 511). The removal project involved the elimination of asbestos-containing pipe lagging and transite board from the decks and from the holds below the main deck, and removal of asbestos covering ductwork, between windows, underneath stairways, in gypsum board, and between the car deck and the upper passenger deck (Tr. 569). Both Newport Offshore, the prime contractor for the renovation project, and Dec-Tam, retained the services of Enviro-Sciences, an asbestos consulting firm and environmental laboratory (Tr. 500). Enviro-Sciences was hired by Newport Offshore to ensure that all asbestos was removed completely by Dec-Tam, and to conduct clearance air sampling to ensure that no asbestos contamination went outside the regulated areas. Enviro-Sciences was required by Dec-Tam to analyze air samples and air monitoring cartridges (Tr. 524).

As a response to an employee complaint, OSHA Compliance Officer Henry E. Meleney was assigned to inspect the Newport Offshore shipyard on August 7, 1987. When he arrived, he met and had an opening conference with Dec-Tam's safety director Noel Mann. They later proceeded to the location where the ferry was docked and met with Scott Ladd, supervisor of the removal project for Dec-Tam, and Bob Jones of Enviro-Sciences (Tr. 9, 153). Aside from the work being performed by Dec-Tam and Enviro-Sciences, Meleney observed much activity on the boat, which was generated by numerous contractors who were on board to renovate the ferry as a proposed jail site (Tr. 10, 11, 551).

Meleney went to the main deck on which was a sequestered "regulated area", sealed off by plastic and enclosures, where asbestos was being removed and Dec-Tam employees cleaned up removal debris (Tr. 13). He stayed at the site for three hours and determined that additional inspection time was required.

Meleney returned on August 12, where he found that activity at the site had increased, and the ferry had been moved to a dry dock. He met again with Mann and Ladd and observed removal operations in what he called the "cascade fire extinguisher hold," an enclosed space below deck, where employees removed asbestos pipe lagging (Tr. 15, 150). While in the hold, he conducted air sampling by hanging portable, model G, MSA pumps on the employees' belts while they worked. He calibrated the pumps both before and after testing (Tr. 17). He stayed in the hold for approximately four hours, where he observed asbestos fibers

floating in the air, a scene which he described as resembling a "snowstorm" (Tr. 40).

On the basis of this inspection he recommended to his supervisor that the following citations be issued:

I. Serious Citation Number 1

A. Item 1(a): alleged violation of 29 C.F.R. § 1910.1001(c).

Complainant alleges that 29 C.F.R. § 1910.1001(c)1/ was violated in that, based upon sampling results of three employees who were removing asbestos lagging from the piping system in the hold, the employees were exposed to a concentration of asbestos fibers in excess of 0.2 fibers per cubic centimeter of air as an eight hour time weighted average ("TWA") (Tr. 20). The results of the tests were as follows: Joe Savio was exposed to 0.88 fibers per cubic centimeter (cc), which is 4.43 times the 0.2 exposure limit allowed under the standard (C-2a, C-2b, Tr. 20-22). Jim Riley was exposed to 0.77 fibers per cc, or 3.87 times the allowable limit (C-2c, C-2d). Melbert Heard's results showed an exposure to 0.67 fibers per cc, or 3.36 times the allowable limit for asbestos exposure (C-2e, C-2f). An analysis of a bulk

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1/ (c) Permissible exposure limit (PEL).
The employer shall ensure that no employee is exposed to an airborne concentration of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals in excess of 0.2 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average (TWA) as determined by the method prescribed in Appendix A of this section or by an equivalent method.

sample of asbestos that was being removed from insulation in the cascade hold was found to be 80% asbestos: 55% chrysoltile and 25% amosite (C-2e, C-2g, Tr. 30, 170, 243).

Respondent argues that since the employees were wearing appropriate and properly functioning respiratory equipment, that they were not exposed to airborne asbestos fibers (Tr. 264, 416). Because the sampling cassette was placed on the employees' belts, outside of the employees' breathing zone, respondent argues, the employees had no actual exposure to the measured concentrations of asbestos fibers. The Secretary interprets the standard differently, asserting that the use of respirators is irrelevant under the standard. The Secretary argues that notwithstanding the fact that employees were wearing respirators, the standard limits exposure of employees to an airborne concentration of asbestos fibers to 0.2 fibers per cc, and that "employee exposure" is defined in 29 C.F.R § 1910.1001(B) as "exposure to airborne asbestos...that would occur if the employee were not using respiratory protective equipment." See also, 29 C.F.R. § 1910.1001(f)(i) and (ii). I find the Secretary's position to be correct. Evidence of the employees' actual exposure, based on samples taken inside of their respirators is not relevant to a decision. See, Brown Insulating Systems, 6 BNA OSHC 1802 (1978), affirmed, Brown Insulating Systems v. Secretary of Labor, 629 F2d 428 (6th Cir. 1980). The sixth circuit in Brown affirmed the decision of the Review Commission which held that the lack of

evidence of excessive asbestos contamination inside the respiratory protective mask did not preclude finding a violation of 29 C.F.R. § 1910.1001(b)(2), predecessor of 1001(c), as compliance with the standard is determined by measuring the airborne concentration of asbestos fibers in the working enviroment. I find that, according to the language of the standard, the exposure intended to be proscribed by the standard is that which exists in the working environment: that which would occur if the employee were not wearing respiratory protective equipment.

B. Item 1(b): alleged violation of 29 C.F.R. § 1910.1001(f)(1)(i).

The Secretary alleges a violation of 29 C.F.R. § 1910.1001(f)(1)(i)2/ in that on August 12, 1987, in the cascade fire extinguisher hold, Dec-Tam did not implement feasible controls to reduce employee exposure to airborne asbestos fibers while removing asbestos pipe lagging. The engineering controls and work practices found by the Secretary to be absent were the proper method of wetting the asbestos before and during its removal and the use of glove bags to prevent the asbestos from becoming airborne.

2/ (f) Methods of compliance. - (1) Engineering controls and work practices. (i) The employer shall institute engineering controls and work practices to reduce and maintain employee exposure to or below the exposure limit prescribed in paragraph (c) of this section, except to the extent that such controls are not feasible.

Theodore Lemek, Jr., president of Enviro-Sciences, testified that as an engineering control, the cascade hold had a negative pressure and negative air device to transfer fresh air into the hold (tr. 503-505). Lemek testified that he would recommend the use of water treated with a wetting agent ('amended water') on amosite, a particular type of asbestos that was found to comprise 25% of the asbestos found in the insulation in the cascade hold (Tr. 170, 243, 554). Plain water, he attested, would "not be totally effective control" (Tr. 555). Further, that the asbestos lagging must be taken off in layers, each layer becoming re-wet as removal continues (Tr. 574). He testified that amended water was used during removal, however, Lemek did not enter the cascade hold during the period of time that asbestos was being removed to see whether amended water was actually used by employees and how the wetting methods were performed (Tr. 575).

At the hearing, Meleney described his observation of the August 12 removal process in cascade hold: initially, three Dec-Tam employees were involved in removing asbestos. One employee used an "exacto"-type knife to cut through the covering placed over the asbestos insulation on the piping, and used tin snips to cut the wires that held the covering on (Tr. 32,35). An employee would remove the asbestos lagging manually, while another employee held a refuse bag underneath the lagging for its disposal (C-3d, C-3e, C-3f, C-3g, Tr. 31). The three employees initially in the hold, Heard, Riley, and Savio, used a water hose to perform some wetting on the insulation prior to the removal of

the covers (Tr. 32, 33, 35; C-3h, C-3i, C-3j, C-3k). Meleney testified that the method of removal in this case was plain water; they wetted down the insulation prior to, but not during the removal (Tr. 36). There was no drenching of the asbestos to the point of saturation (Tr. 268, 269).

Four to five additional employees later entered the hold to aid in the removal work (Tr. 37-38; 165). These employees did not use water to wet the asbestos prior to its removal (Tr. 40, C-8b, C-9c). As a result, Meleney observed that airborne dust was generated throughout the room (Tr. 40, 278) causing what he described as a "snowstorm". These additional four to five employees worked for approximately three to three and one half of the four hours that Meleney observed (Tr. 164). There was no supervisor in the hold during this time (Tr. 166).

There was one water hose provided in the cascade hold for the use of seven employees; the hose would be passed back and forth between two or three employees, so Meleney concluded that there was always a group of employees who were not wetting asbestos at all (Tr. 165). The supervisor had approached Meleney and told him that he had been informed by employees that some of the workers were ripping out asbestos dry, but that since he was not in the hold, he did not realize what was going on (Tr. 167). Meleney discussed the dry removal he observed with Ladd (Tr. 167).

Meleney and Lemek testified, and the Secretary asserts, that

amended water, which was treated with surfactant, will wet asbestos more effectively than plain water. Respondent argues that it required a specific work practice of wetting the asbestos prior to its removal3/ and that Dec-Tam's supervisors did not observe the employees' alleged failure to follow company policy. Respondent thus raises the affirmative defense of isolated employee misconduct, arguing that Dec-Tam cannot be found to have violated the standard because, without its knowledge, some employees failed to heed its policy of wetting down asbestos-containing material before removing it.

In order to establish the isolated employee misconduct defense, the employer must show, after the Secretary has made out a prima facie case of a violation of the Act, that the violation resulted from employee misconduct that contravened a company work rule that was effectively communicated and uniformly enforced. H. B. Zachry Co. v. O.S.H.R.C., 7 BNA OSHC 2202, affirmed, 638 F.2d 812 (5th Cir. 1981); Brock v. L. E. Meyers Co., High Voltage Div., 818 F2d 1270 (6th Cir. 1987) cert. denied, 108 S. Ct. 479 (1987). The rationale for this rule is that the employer has the final responsibility for compliance with the Act, thus, he has the duty to implement, communicate, and enforce feasible work rules in order to avoid liability for the violative conduct of

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3/ See, R-3: Dec-Tam Corporation's "Division 2 Specifications for Proposed Asbestos Work" part 7(e)(6) states, "Before asbestos material is handled, it must be sprayed with water containing a wetting agent to prevent excessive dispersal of asbestos fibers. The sprayed on material should be wetted repeatedly during the work process to minimize asbestos fiber dispersion."

its employees. Danco Constr. Co. v. OSHRC., 585 F.2d 1243 (8th Cir. 1978) ("[Respondent] cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous work practices"); L. E. Meyers, supra, at 1277, citing S. Rep. 1282, 91st Cong, 2d Sess, 10-11, reprinted in, 1970 U.S. Code Cong. & Admin. News 5177, 5182.

The Secretary makes out a prima facie case of an employer's awareness of a potentially preventable hazard "upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions." L.E. Meyers, supra, at 1277, noting Brennan v. OSHRC., 511 F.2d 1139, 1143 n.5 (9th Cir. 1975) and Danco, supra. While Respondent submitted proof of its work rule concerning wetting procedures, and its initial training program of the new Dec-Tam abatement workers, as part of its respirator program, there was no evidence of Dec-Tam's continued enforcement of its work rule (R-6, R-12, p. 482-487). The record shows that while some plain-water wetting was used, some employees used no water at all. It is not evident that Respondent enforced its work rule or properly supervised the implementation of proper wetting methods. This is underscored by the absence of a wetting agent in the cascade hold and the presence of only one hose available for seven employees. "(T)he employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant

behavior of its employees must demonstrate that program's effectiveness in practice as well as in theory." L.E. Meyers, supra, at 1277. Respondent did not meet the burden or proving that its safety program was enforced as written such that the conduct of its employees in violating that policy was "idiosyncratic and unforeseeable." Id.

The Secretary also claims that the use of glove bags was a feasible engineering control which should have been implemented in the cascade hold (p. 42, 45-46; see also, 29 C.F.R. § 1926.58 Apprendix G). The testimony of Lemek tended to establish that because the majority of the piping was in very close proximity to bulkheads, turbines, and the boiler, coupled with the use of the wet removal method, that glove bags would not have been a feasible additional engineering control (p. 508). Similarly, testimony of Ajay M. Pathak, Director of Industrial Hygiene at Dec-Tam Corporation indicated that glove bags are used for small-scale, short-duration activity (p.461, 579). In the tight space of the cascade hold, Pathak did not believe that the two men required to operate each glove bag could properly do so (p.581). Further, that the layers of paint on the pipe lagging would have made the glove bag removal operation infeasible; in the process of removing the pipe lagging under these circumstances, damage to the glove bag would be probable, frustrating the purpose for which it was intended (p. 581). "The question of whether a means of protection is infeasible must be answered in light of the

practical realities of the particular workplace. "Dun-Par Engineered Form Co., 12 BNA OSHC 1949, 1960 (1986). The Secretary failed to present evidence concerning the practical use of glove bags in the cascade hold beyond Meleney's "bare claim" that this type of engineering control was feasible. Dun-Par, supra, at 1960. Dec-Tam presented credible testimony which established that glove bags were infeasible due to the nature of the work space and the type of asbestos removal involved in the hold.

Therefore, while we find that Dec-Tam did not employ the feasible work practice of wetting removal methods, which would have reduced employee exposure to asbestos, it was not required to use glove bags as an engineering control, as such use would have been infeasible.

C. Item 1(c): alleged violation of 29 C.F.R. 1910.1001(f)(2).

The Secretary alleges that Respondent violated 29 C.F.R. 1910.1001(f)(2)4/ in that it did not have a written program to

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4/ (2) Compliance program. (i) Where the PEL is exceeded, the employer shall establish and implement a written program to reduce employee exposure to or below the limit by means of enginering and work practice controls as required by paragraph (f)(1) of this section, and by the use of respiratory protection where required or permitted under this section. (ii) Such programs shall be reviewed and updated as necessary to reflect significant changes in the status of the employer's compliance program. (iii) Written programs shall be submitted upon request for examination and copying to the Assistant Secretary, the Director, affected employees and designated employee representatives. (iv) The employer shall not use employee rotation as a means of compliance with the PEL.

reduce employee exposure to the asbestos Permissible Exposure Limit (PEL). The Secretary claims that the written program was not produced until the hearing, and that the submitted programs failed to fulfill the requirements of the standard (R-3, R-5). The Secretary argues that the standard contemplates a written program to address the "unique hazards present at a particular work site," while the programs submitted by Respondent provide merely a generic substitute.

There is no evidence that the standard requires any more than what was provided by Respondent. Meleney testified that he asked Pathak for a copy of the program by phone after the inspection, in November or December 1987 (p.58). Pathak testified that he provided the program to Meleney in late January or early February of 1988 in response to the telephone conversation between the two (p.464). Respondent's exhibit 3 sufficed as a written program specifying the engineering controls and work practices to be used to reduce employee exposure and Respondent's exhibit 5 satisfied the requirement of a written respirator program in compliance with this standard. Therefore, we find that this item must be vacated.

D. Item 1(d); alleged violation of 29 C.F.R. 1910.1001(g)(3)(i).

The Secretary alleges a violation of 29 C.F.R. 1910.1001(g)(3)(i)5/ in that Respondent failed to implement

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5/ (3) Respirator program. (i) Where respiratory protection is required, the employer shall institute a respirator program in accordance with 29 C.F.R. 1910.134(b),(d),(e), and (f).

its respirator program in accordance with good industrial hygiene practice. Specifically, that on August 7, 1987, Meleney observed employee Heard working in a regulated area with a half mask negative pressure respirator, donning a three to seven day beard growth (Tr. p. 62; C-4a, C-4b). The Secretary asserts that this beard growth adversely affects the protective function of the respirator as it may disturb the proper seal of the respirator. Meleney testified that he did not know whether there was actual leakage in the respirator, but stated that all employees were qualitatively fit tested (Tr. 168). Meleney did not perform qualitative fit testing, positive or negative pressure testing, or any other leakage test on Heard (Tr. p.195, 205). The air sampling results obtained of the work area indicated that employees were exposed to airborne concentrations of asbestos in excess of 0.2 fibers per cc6/.

The testimony of Frederick Malaby, a certified industrial hygienist with the Occupational Safety and Health Administration in Boston, tended to establish that facial hair growth could cause a respirator to become less effective, as it would interrupt the face-to-face piece seal (Tr. 426-428). He presented that one having a beard or facial hair growth must use a non-face-to-face piece seal (Tr. 442-443, C-21,22). Dec-Tam

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6/ Although this conclusion was based on air sampling results conducted upon Joe Savio (C-5a, C-5b), Heard and Savio worked together in the same area on August 7 (Tr. 66, C4b). Thus, Heard had "access" to the same area of exposure as Savio, though no "actual exposure" was proven. Donovan v. Adams Steel Erectors, Inc. F. 2d 804 (3rd Cr. 1985).

argues that since Meleney did not perform any tests to determine the presence of leakage, that the mere presence of beard growth does not presumptively have a negative effect on a face seal. Further, that Complainant's allegation is not supported by the language of the regulation.

29 C.F.R. 1910.134(e)(5)(i) states, in pertinent part:

> Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard....

The Commission has recently interpreted this language to mean that the listed conditions in the standard, which "may prevent a good face seal" namely, in this case, a growth of beard, do not always prevent a good seal. Omaha Steel Castings Company, 12 BNA OSHC 1804 (1986). Thus, in Omaha Steel, the Review Commission vacated a citation for violation of 29 C.F.R. 1910.134(e)(5)(i) when evidence that respirators were not providing good face seals rested soley on the opinions of the industrial hygienist's testimony that, among other things, a growth of beard always prevents a good face seal. In Omaha Steel, there were no tests performed during the inspection to determine whether the respirators worn by employees were leaking. To establish such a violation, the Commission held, the Secretary must prove not only that one of the listed conditions in the standard exists, but also that the condition actually caused air leakage around the face piece. Omaha Steel, supra, at 1807. Because of lack of evidence of the latter, the evidence was found insufficient to

support a violation.6.5/

Because the Secretary in the instant case similarly failed to test for face piece leakage, coupled with employee Heard's training in the use of respirators, and testimony that all Dec-Tam employees were qualitatively fit-tested, she failed to show that Respondent neglected to implement a respirator program in accordance with good industrial hygiene practice. It was not proven that Heard's growth of beard actually prevented a good seal. Accordingly, this part of the citation must be vacated.

The Secretary alleges that Dec-Tam was also in violation of 1910.1001(g)(3)(i) by failing to assure the employees removed contaminated respirator filters before entering a clean change room on August 12, 1987 (Tr. 66). Meleney testified that he observed an employee leave the shower area without first removing the filter from his half-mask respirator. He testified that all pieces of equipment, including all clothing and materials that are to be removed from an asbestos environment, need to be consigned for disposal, bagged, and left within the regulated area (Tr. 68, 186). He stated that the proper technique would be to enter the shower with a respirator on, then wet the filters with water from the shower, remove the filters, put them in the contaminated area, and exit with a washed-off respirator without a filter in it. Meleney did not know whether a shower is considered a regulated (contaminated) area or not (Tr. 182).

6.5/ It must be noted, however, that Dec-Tam's respirator program and procedures require that all employees wearing respirators must be clean shaven (R-5, R-11).

Respondent offered Appendix F to 29 C.F.R. 1910.1001 to show that this practice, described by Meleney, is contrary to OSHA policy (Tr. 188). While only an advisory provision, it suggests, in pertinent part:

> To prevent inhaling fibers in contaminated change rooms and showers, leave your respirator on until you leave the shower and enter the clean change room.

29 C.F.R. 1910.1001, Appendix F, III (B). This section strongly recommends a practice contrary to that suggested by Meleney; its language instructs that the filter remain in the respirator until one enters the clean change room in order to avoid any potential asbestos contamination in the shower area. While Meleney disagreed with this provision, and believed it to be contrary to good industrial hygiene practice, he could offer no counter OSHA policy or provision to substantiate his claim. Neither, as stated earlier, was he certain whether the shower was a regulated area or not. The testimony of Lemek tended to show that the shower is a contaminated area, thus, the respirator must remain on in the shower. As the employee exits the shower into the clean area, Lemek explained, the filters and the respirator are then removed so that the employee may breathe non-contaminated air (Tr. 523). Because this practice is consistent with OSHA policy, this part of the citation must also be vacated.

E. Item 2: alleged violation of 29 C.F.R. 1001(d)(5).

The Secretary alleges that Respondent violated 29 C.F.R.

1910.1001(d)(5)7/ in that it failed to institute additional exposure monitoring required under (d)(3)8/ of that section, where there might have been new or increased exposures above the action level due to a change in work practices. The Secretary asserts that such additional monitoring was required when the process changed from removal of transite board on the main deck of the vessel to removal of asbestos pipe lagging below deck (Tr. 71, 72).

The record established that transite board removal was performed on July 27, 1987 above deck, and continued until approximately August 7, 1987 (Tr. 402, 518, 519; C-19). Transite board is cement board which contains chrysotile asbestos and mineral wool (Tr. 518, 519, 560). Various open removal took place below decks between August 8, 1987 and September 3, 1987 (Tr. 402, C-19). Removal of asbestos pipe lagging in the cascade hold was observed by Meleney on August 12. Complainant's

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7/ (5) Additional monitoring. Notwithstanding the provisions of paragraphs (d(2)ii) and (d)(4) of this section, the employer shallinstitute the expsore monitoring required under paragraphs (d)(2)(i) and (d)(3) of this section whenever there has been a change in the production, process, control equipment, personnel or work practices that may result in new or additional exposures above the action level or when the employer has any reason to suspect that achange may result in new or additional exposures above the action level.

8/ Monitoring frequency (periodic monitoring) and patterns. After the initial determinations required by paragraph (dx2xi) of this section, samples shall be of such frequency and pattern as to represent with reasonable accuracy the levels of exposure of the employees. In no case shall sampling be at intervals greater than six months for employees whose exposures may reasonably be foreseen to exceed the action level.

exhibit 6, a report of personnel monitoring on the ferry by Enviro-Sciences, reveals that no personnel samples were taken between August 8, 1987 and August 19, 1987 (Tr. 75, 293). Meleney testified that because removal operations changed from transite board to pipe lagging, such additional monitoring is required under the standard to ensure that the proper respiratory protection is being used, and to determine whether engineering controls are adequate (Tr. 76). Meleney testified that whenever there is a change in work practices in which it should be expected that exposure would be above the action level, additional eight hour TWA's are required.

Respondent argues that there was no change in work practices or in the production process to warrant additional monitoring. In the alternative, Respondent contends that removal of pipe lagging did not require new testing because Enviro-Sciences and Dec-Tam already possessed testing data from previous removal projects, and from eight-hour TWA's taken on the upper deck, obviating the need to perform such additional tests (Tr. 511). Lemek testified that there was no reason to perform any other eight-hour TWA samplings because it was a "continuous job": removal on a vessel (Tr. 511). However, Lemek also testified that transite board removal is different from pipe lagging removal in some ways (Tr. 561).

While Enviro-Sciences performed some personnel sampling, the record shows that none were taken in the cascade hold on the day that removal changed from above to below deck. Further, it was

the responsibility of Dec-Tam, the employer, not Enviro-Sciences, to monitor employee exposure under the Act (Tr. 534, 553). While Enviro-Sciences had some testing responsibilities, for both Dec-Tam and Newport Offshore, Ltd., it is ultimately the responsibility of the employer to ensure that such testing is performed.

I find that the standard required Dec-Tam to perform additional monitoring in the hold as the shift to removal of asbestos pipe lagging from transite board removal qualified as a change in work process warranting addditional monitoring. Respondent offered no evidence that previous monitoring of this type of work process had been performed, and it is not clear, in absence of such data, whether it would be sufficient under the standard.

Respondent argues that, if affirmed, this item should be reduced to other-than-serious. Section 17(k) of the Act provides that,

> 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 violation.

29 U.S.C. § 666(j). Thus, to sustain a serious violation, the Secretary must prove that the employer has actual or constructive knowledge of the hazardous condition, Brennan v. O.S.H.R.C. & Raymond Hendrix, 511 F 2d 1139 (9th Cir. 1975), and that exposure

to this condition could result in the substantial probability of death or serious physical harm. Bunge Corp. v. Secretary of Labor, 638 F.2d 831 (5th Cir., Unit A 1981).

The knowledge element for a serious violation refers to knowledge of the physical conditions, not to knowledge of the applicable OSHA standard. Southwestern Acoustics & Specialty, 5 BNA OSHC 1091 (1977). Respondent had knowledge of the conditions in the hold as well as the standard requiring monitoring of employees removing asbestos. Dec-Tam is engaged in the business of asbestos removal, and its duty to perform personnel monitoring is essential to the protection of its employees.

However, the Secretary failed to prove that "serious physical harm could probably result due to its failure to monitor. There is no evidence in the record from which I can conclude that as a result of this violation employees have been or will be exposed to excessive amounts of asbestos fibers and could subsequently suffer death or serious physical harm. See, The Shenango Company, 10 BNA OSHC 1613 (1982) (Finding of violation of monitoring standard at 1910.1001(f)(i) as non-serious as no evidence shown that employees have been or will be exposed to excessive amount of asbestos fibers resulting in death or serious physical harm). See also, Research Cottrell, Inc. 9 BNA OSHC 1489 (1981). Therefore I find that this citation must be affirmed as other-than-serious.9/

9/ While OSHA's Field Operation Manual instructs compliance officers to cite a specific condition as "serious" where the condition could result in, inter alia, "Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the

F. Item 3: alleged violation of 29 C.F.R. § 1910.1001(g)(4)(i).

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.1001(g)(4)(i)10/ in that it failed to ensure that a negative pressure respirator was properly fitted on employee Melvin Heard, who wore a half-mask respirator while not clean shaven (Tr. 79). Further, that Respondent was cited for the same condition on June 23, 1987, under 29 C.F.R. § 1926.58(h)(4) at its University Heights Shopping Center project (Tr. 79, 81, C-7). As noted in the discussion of the alleged violation of 29 C.F.R. § 1910.1001(g)(3)(i), the Commission has held that the presence of a beard does not presumptively prevent a good face seal in absence of field test data for face piece leakage (see. pp. 13-15, supra). Omaha Steel Castings Company, 12 BNA OSHC 1804 (1986). Employees were instructed and trained to perform a

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9/cont. asbestosis, byssinosis, hearing impairment, central nervous system impairment and visual impairment." FOM ch.IV,B.1.b(3)(a)1-2 (October 21, 1985), cited in BOKAT, STEPHEN A. THOMPSON, HORACE A., OCCUPATIONAL SAFETY AND HEALTH LAW (BNA, Washington D.C. 1988). There was no connection established here, however, between the cited standard and the probability of harm. Employees were wearing half-mask respirators, which the Secretary agrees was proper respiratory protection given the amount of airborne asbestos measured in the cascade hold. There is little question that the contraction of cancer or asbestosis is a serious physical harm, yet there is a question about whether the evidence demonstrates the possibility that the violation could cause such harm to employees.

10/ (4) Respirator fit testing. (1) the employer shall ensure that the respirator issued to the employee exhibits the least possible facepiece leakage and that the respirator is fitted properly.

qualitative fit test each time the respirator was to be used (R-5, R-6, R-7, R-11, R-12). Because of these reasons, and in light of the earlier discussion with respected to 29 C.F.R. § 1910. 1001(g)(3)(i), this item must be vacated.

G. Item 4: alleged violation of 29 C.F.R. § 1910.1001(h)(1).

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.1001(h)(1)11/ in that employees working in the cascade hold on August 12, 1987 were not wearing proper personalinappropriate head covering, and two had open coveralls to their waists, exposing their t-shirts, while removing asbestos pipe lagging, unnecessarily exposing them to airborne asbestos fibers (C-8a).

Respondent incorrectly argues that coveralls and head coverings are not required under this standard. See, 1910.1001(h)(1)(i) and (ii). More persuasive is Respondent's affirmative defense that this was an instance of isolated employee misconduct.

It is clear from the record that this standard was violated. It was also established that Respondents had a written work rule requiring the wearing of "special whole body clothing, head and foot coverings" (R-3, p.1, 4(b)) and that other employees at the observed site complied with this practice (C-8b). The employer had the duty to communicate and enforce its work rules in order to avoid liability for the violative conduct of its employees.

11/ (h) Protective work clothing and equipment-(1) Provision and use. If an employee is exposed to asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals

Danco Constr., supra. Evidence of such enforcement was manifest in Dec-Tam's written warnings to employees, leading to possible suspension or termination, concerning violations of this company policy (R-8, R-10). A warning to Domenic Savio on August 3, 1987, for example, concerned his failure to wear proper protective clothing and exhibited Dec-Tam's effort to enforce this work rule at the Newport site. The violation was an instance of isolated employee misconduct and this item must be vacated.

H. Item 5: alleged violation of 29 C.F.R. § 1910.1001(k)(1).

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.1001(k)(1)12/ in that surfaces in the cascade hold were not maintained as free as practicable of accumulations of asbestos waste and dust. Complainant's exhibits 9a through 9d illustrate the accumulation of dust and waste on the floors and ledges of the hold (Tr. 86,88). Meleney testified that he observed asbestos collecting on surfaces throughout the hold, especially on hull surfaces (Tr. 88-90). He testified that in areas where

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11/cont. above the PEL, or where the possibility of eye irritation exists, the employer shall provide at no cost to the employee and ensure that the employee uses appropriate protective work clothing and equipment such as, but not limited: (i) Coveralls or similar full-body work clothing: (ii) Gloves, head coverings, and foot coverings; and (iii) Face shields, vented goggles, or other appropriate protective equipment which complies with § 1910.133 of this Part.

12/ (k) Housekeeping. (1) All surfaces shall be maintained as free as practicable of accumulations of dusts and waste containing asbestos, tremolite, anthophyllite, or actinolite.

wet removal methods were used, less asbestos debris gathered as compared to those areas where dry removal methods were used (Tr. 338). Feasible engineering controls, he testified, would have limited the amount of debris to a lesser degree than the extent shown. (Tr. 333). Lemek testified that he saw debris in the cascade hold: paint husks, general non-specific debris, and specifically, asbestos debris, some of which was capable of being vacuumed (Tr. 555,556). There was some asbestos-containing debris on the vessel found during a New York inspection, which predated the ferry's arrival in Rhode Island (Tr. 512, 541, 560-561). Lemek did not observe the removal process in the hold (Tr. 575).

While the Secretary did not prove the feasibility of using glove bags in the hold, she established that proper west removal methods were not being implemented as a feasible engineering control (Tr. 36-40, 165, 268, 269, 278, 555, 575). Thus, because of this, Dec-Tam failed to keep surfaces "as free as practicable" of accumulations of asbestos debris.

The respondent argues that the housekeeping standard is so vague as to render it unenforceable. Respondent argues that the standard, particularly the phrase "as free as practicable" requires "men of common intelligence to guess at its meaning" such that they may differ as to its application. Culberson Well Services, Inc., 12 BNA OSHC 1535 (1985). Respondent notes that an employer and an OSHA compliance officer may disagree as to what constitutes a surface that is "as free as practicable" of asbestos debris.

In determining the constitutionality of a standard, courts have held that,

> [W]e must consider the statue "not only in terms of the statue'on its face' but also in light of the conduct to which it is applied."...So long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster.

Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230,233 (5th Cir. 1974), cited in Vanco Constr., Inc. v. Donovan, 723 F.2d 410 (5th Cir. 1984). The Vanco Court, in reviewing the constitutionality of the standard, 29 C.F.R. § 1926.102(a)(1), also employed the Review Commission's objective, reasonably prudent person testinto the standard. Vanco, supra, at 412-413. See also, Research Cottrell, 9 BNA OSHC 1489 (1981). The question thus becomes whether a "reasonable person" in light of common understanding and practices could ascertain whether all surfaces were maintained as free as practicable of accumulations of asbestos dust and debris.

A reasonable person, familiar with industry practices with respect to asbestos removal and cleanup, could deduce that these surfaces were not kept "as free as practicable" of these accumulations. The focus of our inquiry is on whether the employer exhausted all feasible or practicable methods to keep surfaces free of asbestos debris. The standard gives specific reference to certain feasible controls to be used to accomplish this purpose, including wet methods. 29 C.F.R. § 1910.1001(f)(1)(i) through (f)(1)(ix). Further, Respondent's asbestos abatement program specifically refers to the types of

controls recognized by the industry (R-3, R-5). Because the standard affords a reasonable warning of the proscribed conduct, in light of industry practice, it cannot be deemed uncontitutionally vague. Because Respondent did not attempt, to the extent feasible in this work environment, to keep the surfaces free of debris, and because there was evidence that there would have been less debris had proper wet removal methods been used, the Respondent is found to be in violation of this standard.

While it is found that Dec-Tam had knowledge of this condition, the Secretary failed to prove that exposure to accumulations of asbestos debris under these circumstances could result in the substantial probability of death or serious physical harm. Bunge Corp., at 831. There is no evidence from which it can be concluded that as a result of the housekeeping violation, employees were actually exposed to excessive amounts of asbestos fibers from which they could suffer death or serious physical harm. Therefore, I find that this violation must be affirmed as other-than-serious.

I. Item 6: alleged violation of 29 C.F.R. § 1915.77(c).

The Secretary alleges a violation of 29 C.F.R. 1915.77(c)13/ in that Respondent did not provide scaffolds or ladders to employees working five feet or more above solid surfaces in the cascade hold. Meleney testified that he observed employees

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13/ (c) When employees are working aloft, or elsewhere at elevations more than 5 feet above a solid surface, either

climbing around on the pipes, at least ten feet above the floor, with no support system to prevent them from falling during the asbestos removal operation (Tr. 92; C-10a). The measurement from the ceiling of the hold to the floor varied, as the floor was the sloping hull of the ship (Tr. 92). In one instance, an employee braced himself between an approximately one foot wide platform and an I-beam, by placing one foot on each, at least ten feet above the ground, while removing pipe laging (Tr. 94, C-10c, C-10g, C-10h). Employees supported their weight on ceiling structures and pipes, in various bodily contortions, while engaged in the removal process (Tr. 95; C-10e, C-10f, C-10h). In each of Complainant's photographs, there were no scaffolds or ladders, to protect employees from the risk of a fall of ten feet or greater on to a steel floor structure with protruding I-beams (Tr. 96).

Meleney described the possible methods of constructing such a support system: for example, a planking system buttressed by catwalks in the hold, or a horizontal scaffold system supported by guardrails (Tr. 340-345). While Meleney did not actually measure the distance from floor to ceiling, Meleney's estimation was accurate. The exhibits clearly depict a measurement of

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13/cont. scaffolds or a sloping ladder, meeting the requirements of this subpart, shall be used to afford safe footing, or the employees shall be protected by safety belts and lifelines meeting the requirements of § 1915.154(b). Employees visually restricted by blasting hoods, welding helmets, and burning goggles shall work from scaffolds, not from ladders, except for the initial and final welding or burning operation to start or complete a job, such as the erection and dismantling of hung scaffolding, or other similar, nonrepetitive jobs of brief duration.

approximately two and one half man-lengths, a distance of ten feet or more (Tr. 347).

Respondent's argument that it did not have knowledge of the violation because no supervisor was present in the cascade hold on this day has no merit. Respondent was aware of the construction and layout of the hold; it was Dec-Tam's responsibility to provide ladders or scaffolding under these circumstances. Respondent cannot fail to provide proper equipment and supervision of employees and "then hide behind its lack of knowledge concerning their dangerous work practices." Danco Constr., supra. Therefore item 6 must be affirmed as serious.

II. Willful Citation Number 2

A. Item 1: alleged violation of 29 C.F.R. 1910.1001(d)(1)(ii).

The Secretary alleges a willful violation of 29 C.F.R. § 1910.1001(d)(1)(ii)14/ in that Respondent failed to conduct representative eight-hour TWA employee exposures at this work site after July 28, 1987. Specifically, she charges that no personnel sampling was conducted in the cascade hold when asbestos lagging removal took place. Meleney testified that Dec-Tam provided sample results which indicated that eight-hour TWA's were taken only on July 27 and 28, 1987 during transite board removal, while removal operations continued through the beginning of September (Tr. 98, 515; C-6). Meleney testified that such

14/ (ii) Representative 8-hour TWA employee exposures shall be determined on the basis of one or more samples representing full-shift exposures for each shift for each employee in each job classification in each work area.

sampling was necessary in order to determine the appropriate respiratory protection for employees and the type of engineering controls to be used (Tr.99). He and Lemek testified that it is always the employer's responsibility to assure that his employees are monitored according to the standard (Tr. 107, 534). Larry Hill of Dec-Tam did not ask Enviro-Sciences to take personnel samples, nor was it the contractual responsibility of Enviro-Sciences to do so (Tr. 534, 553). The samples taken by Enviro-Sciences were those of air samples outside the controlled areas to determine if there was any release of asbestos fibers (Tr. 557).

Respondent argues that it had extensive experience with similar operations, including the performance of eight-hour TWA samples, as did Enviro-Sciences. However, not only did testimony establish that Enviro-Sciences took no personnel samples, Meleney testified that only the initial monitoring requirements of this standard are satisfied if the employer uses sampling results taken after December of 1985, and they satisfy all other requirements of the standard (Tr. 308). 29 C.F.R. § 1910.1001(d)(2)(ii).15/ There is no evidence that Dec-Tam performed personnel monitoring in the cascade hold, nor evidence of whether prior similar removal jobs existed, in which representative eight-hour TWA full shift employee exposures were taken, on which to base its decision on the type of

15/ Meleney testified that the difference between this citation and serious citation number 1, item 2, is that the latter concerns additional monitoring required during different operations; the former indicates that when such monitoring was required, it was not done in accordance with the standards's requirements (Tr. 366).

respiratory protection and work controls to be implemented in the hold.

The Secretary seeks to sustain this citation as willful because Respondent was cited for the same type of violation on two previous occasions which became final orders of the Review Commission (Tr. 100-103, 353, 586-596; C-11, C-12, C-13)16/ In addition, the Secretary finds that this is willful because of the serious potential consequences of asbestos exposure.

To prove "willfulness," the Secretary has the burden of proving that "the Respondent knew of the standard, and its violation was voluntary or intentional or with plain indifference to the Act." Brock v. Morello Brothers Const., Inc., 809 F.2d 161, 164 (1st Cir. 1987). Although the Secretary succeeded in showing Dec-Tam's knowledge of the standard due to previous similar citations it received, she fell short of establishing the state of mind necessary to sustain a willful characterization of this item. The fact that Dec-Tam was formerly cited for similar violations of this standard is not reason enough to impute intentional disregard of the Act. The Respondent is found in serious violation of the standard at C.F.R.§1910.1001(d)(1)(ii).

16/ On June 28, 1987, Respondent was issued a citation for a violation of 29 C.F.R. 1926.58(f)(1)(ii): "Determinations of employee exposures were not made from breathing zone samples that were representative of the eight-hour Time Weighted Average for each employee," as air samples were taken for only two hours (C-11). On October 19, 1984, Respondent was issued a citation for a violation of 29 C.F.R. 1910.1001(f)(2)(i) in that "proper samples were not collected from the breathing zones of employees when determining exposure to airborne asbestos fibers." (C-12).

B. Item 2: alleged violation of 29 C.F.R. § 1910.1001(m)(5)(ii)

The Secretary alleges a willful violation of 29 C.F.R. § 1910.1001(m)(5)(ii)17/ in that requested records were not provided to the Secretary within a reasonable time after the request for access was made pursuant to 29 C.F.R. § 1910.20(e).

Meleney's first request for these records was made on August 27, 1987 of Dec-Tam president Lee Snodgrass, followed by a written request to Snodgrass on August 28 (Tr. 111-113; C-15). Dec-Tam responded through Betty Lacharite by letter dated September 14, 1987, which enclosed all items except monitoring results and sampling and analytical methods used which, Dec-Tam stated, would be later supplied by Enviro-Sciences (Tr. 112, 113, 381, C-2, R-2).

Meleney was in California from September 1987 through the middle of November of 1987 (Tr. 388-389). He called Pathak on December 28 concerning the information not yet received. Meleney called again on January 4, 1988 and January 7, 1988 to get these results from Snodgrass, who returned his call on January 8. Snodgrass informed him that all further communication regarding the results should be made through Pathak (Tr. 116).

17/(ii) The employer, upon request shall make any exposure records required by paragraph (m)(1) of this section available for examination and copying to affected employees, former employees, designated representatives and the Assistant Secretary, in accordance with 29 C.F.R. § 1910.20 (a)-(e) and (g)-(i).

Meleney called again on January 12 and spoke with Snodgrass who told him that Pathak would be away from the office for a few days (Tr. 117). Meleney told the Providence Area Director, Mr. Hartmann, that he was having trouble getting documents from Dec-Tam. Hartmann called Dec-Tam's Ms. Lacharite on January 13, 1988 and requested that the information be sent immediately or else an administrative subpoena would issue. Dec-Tam provided such records on January 14, 1988, which included written medical opinions, fit testing results on certain employees, and air monitoring done by Enviro-Sciences (Tr. 370; C-6 pp. 1-4, C-17).

At the end of January, Meleney requested personnel sampling results and other information which were provided promptly by Dec-Tam in the beginning of February (Tr. 390; C-6 p.5).

Meleney classified this alleged violation as willful because of the four and one half month delay in receiving the material. In addition, Dec-Tam had been previously cited on June 23, 1987, for a similar violation, 29 C.F.R. § 1926.58(n)(5)(ii), in that no exposure records were provided on request (C-16).

Lemek had received a call from Meleney in late December or early January concerning Meleney's difficulty in obtaining documents from Dec-Tam. Lemek told him that he had already sent this information to Dec-Tam (Tr. 573-574). He also testified to receiving a call from Pathak in late December who was looking for results of personnel sampling and any other information relevant to the Staten Island Ferry project (Tr. 521). While the first four pages of personnel sampling results are dated September 30,

1987 (C-6; p. 378), there was no indication in Enviro-Sciences' files as to when the material was actually sent to Dec-Tam (Tr. 521-522).

The evidence establishes that the transmittal of some of the requested material, namely the report of personnel monitoring, was untimely; and I find that such delay was the result of an "obstructionist" attitude of Respondent, culminating in a knowing, intentional violation of, or indifference to, the Act. I therefore affirm this item as a willful violation.

III. Other-than-Serious Citation number 3

A. Item 1: alleged violation of 29 C.F.R. 1910.1001(i)(2)(ii).

The Secretary alleges a violation of 1910.1001(i)(2)(ii)18/ in that Dec-Tam did no provide soap and hot water in its shower facilities. Meleney testified that he took a shower at the site on August 12, in a facility he described as a hose with a spray nozzle inside of aplastic two-by-two-foot enclosure, rather than a portable shower stall, with no hot water and no soap available (Tr. 121, 122). He was the first person to shower and did not ask anyone for soap or inquire as to why there was no hot water (Tr. 394).

18/ (ii) The employer shall provide shower facilities which comply with § 1910.141(dx3) of this part.
The relevant affected sections are: (d)(3)(iii) Body soap or other appropriate cleansing agents convenient to the showers shall be provided...(iv) Showers shall be provided with hot and cold water feeding a common discharge line.

Lemek testified that there was a shower and clean change room in each controlled area (Tr. 523, 576). When Lemek took a shower at the work site, both soap and hot water were available (Tr. 576). He testified that there was a hot water heater at the shower area which was able to be turned on or off (Tr. 577).

The rebuttal testimony presented by Lemek indicates that there may have been circumstances which would cause Meleney's experience to be a unique one. The hot water heater may have been turned off, and the soap available in a specified location. At any rate, Meleney made no further inquiry of the shower conditions and did not observe other employees experience the same conditions. In that state of the evidence, it cannot be concluded that soap and hot water were not available to employees. Therefore this item must be vacated.

IV. Serious Citation Number 4

A. Item 1: alleged violation of 29 C.F.R. § 1910.1001(g)(2)(i).

The Secretary alleges a violation of 1910.1001(g)(2)(i)19/

19/ (2) Respirator selection. (i) Where respirators are required under this section, the employer shall select and provide, at no cost to the employee, the appropriate respirator as specified as specified in Table 1. The employer shall select respirators from among those jointly approved as being acceptable for protection by the Mine Safety and Health Administation (MSHA) and by the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 C.F.R.Part 11.
(ii) The employer shall provide a powered, air-purifying respirator in lieu of any negative pressure respirator specified in Table 1 whenever: (A) An employee chooses to use this type of respirator; and (b) This respirator will provide adequate protection to the employee.

in that Respondent failed to provide proper respiratory protection for its employees. Specifically, she charged that Respondent failed to provide and require employees to wear full face piece air purifying respirators with filters from July 27, 1987 to July 31, 1987 when they were exposed to airborne concentrations of asbestos in excess of 2 fibers per cc. The four affected employees described by Meleney were:

19/(cont.) Table 1 - Respiratory protection for asbestos, tremolite, anthophyllite, and actinolite fibers.

Airbone concentration of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals	Required respirator
Not in excess of 2 f/cc (10 x Pel)	1.Half mask air-purifying respirator, other than a disposable respirator, equipped with high efficiency filters.
Not in excess of 10 f/cc (50 x Pel)	1. Full facepiece air-purifying respirator equipped with high efficiency filters.
Not in excess of 20 f/cc (100 x Pel)	1. Any powered air-purifying respirator equipped with high-efficiency filters. 2. Any supplied-air respirator operated in continuous flow mode.
Not in excess of 200 f/cc (1000 x Pel)	1. Full facepiece supplied-air respirator operated in in pressure demand mode.
Greater than 200 Voc (> 1,000 x Pel) or unknown concentration	1. Full facepiece supplied air respirator operated in pressure demand mode equipped with an audinary positive pressure self-contained breathing appeendus.

NOTE: a. Respirators assigned for higher environmental concentrations may be used at lower concentrations. b. A high-efficiency filter means a filter that is at least 99.97 percent efficient against mono-dispersed particles of 0.3 micrometers or larger.

absence of such figures, given the monitoring results, it cannot be concluded that half-mask respirators were appropriate under these circumstances.

Respondent argues that serious Citation IV, Item 1 should be vacated because it was issued after the six month limitation period prescribed by §9(c) of the Act. The information had been requested in August and December of 1987 and January of 1988; part of the information on which the citation was based was sent in January and February of 1988 (C-6). While the original citations were issued on February 4, 1988, Citation Number IV, Item 1 was issued on February 19, 1988. Respondent filed its notice of contest on February 29, 1988 and did not challenge the timeliness of the citation in its Answer.

Section 9(c) of the Act provides an absolute limitation of six months within which a citation may be issued. Citations issued six months after the last instance of violative conduct have been vacated because they have been barred by the statute of limitations. Wean United, Inc. 7 BNA OSHC 2086 (1979); Phelps Dodge Corporation, 12 BNA OSHC 1390 (1985) (Respondent's last violative conduct occurred in January of 1984, therefore citation issued on August 14, 1984 was barred by the six month statute of limitations); Sun Ship, Inc. 12 BNA OOSHC 1185 (1985) (Citation was time-barred when OSHA was aware of facts constituting violation for at least eight months, thus citation must issue within six month of occurrence of violation, and not when the Occupational Safety and Health Administration decides its investigation is complete).

However, the Commission in both Sun Ship and Phelps Dodge recognized precedent indicating that the statute of limitations does not run until OSHA discovers or reasonably should have discovered a violation. In Yelvington Welding Service, 6 BNA OSHC 2013 (1978) the Commission held that section 9(c) of the Act does not bar the issuance of a citation more than six month after the occurrence of a violation if the Secretary's failure to discover the violation within the statutory time frame was due to the employer's failure to report an employee fatality as required by OSHA regulations. The Commission reasoned that the policy of repose intended to be ensured by the statute of limitations would not be undermined by tolling the statute in this case, as the "policy of repose frequently is outweighed...where the interests of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights but was prevented from asserting them." Yelvington, supra, citing Burnett v. New York Cent. R. Co., 380 U.S. 424, 429 (1965).

In the instant case, Meleney requested information from Respondent in August of 1987, but was not provided with it until five months later. The pause, however inadvertent, prevented OSHA from issuing its supplemental citation. Further, the fourth citation was issued approximately two weeks after the original citation and receipt of additional information from Dec-Tam. The Respondent was fully apprised of the facts and allegations of the fourth citation before it filed its notice of contest. The Respondent has not demonstrated prejudicial delay under these

1. J. Wages on July 27, was exposed to 5.2 fibers per cc, or over ten times the permissible limit allowed by the standard, wearing a half-mask respirator (C-6).

2. R. McCloud on July 29 was exposed to airborne concentrations of asbestos at eight hour TWA's of 4.0 fibers per/cc while wearing a half-mask respirator (C-6; Tr. 134).

3. On July 30, C. Rivera was exposed to airborne concentrations of asbestos at an eight hour TWA of 2.9 fibers per cc while wearing a half-mask respirator (C-6, Tr. 135).

Meleney testified that under these circumstances, the employees should have been wearing either a powered air purifying respirator, a full-faced respirator, an air purifying respirator, a continuous flow respirator, or a self-contained breathing apparatus (Tr. 133).

The sample monitored results represented fibers per/cc, but the type of fibers in the sample were not identified (Tr. 396). In this case, Meleney assumed that these measurements were comprised wholly of asbestos fibers. He did not remember asking Dec-Tam whether it differentiated between fibers, but he recalled that at the informal conference, Dec-Tam felt that there was a possibility that not all fibers that were counted were asbestos (Tr. 399-400). The method used to calculate the TWA's are the NIOSH analytical Methods, Method 7400-A Rules, which specifies that all fibers within a particular size range must be included in the measurement (C-6; Tr. 516).

Lemek testified that while the measurements were not limited to asbestos fibers, "(Enviro-Sciences) made no clear

quantification of the amount of material that was asbestos fiber versus non-asbestos fiber." He continued to explain that there was a "strong indication" that there was non-asbestos fiber in that sample based on visual inspections of the ship during the removal process and physical lab testing (Tr. 517). They made an "educated guess" that more than half of the fibrous material consisted of non-asbestos fibers, particularly mineral wool (Tr. 519). Enviro-Sciences recommended the use of half-mask respirators based on this assumption, but instructed that if employees wanted additional protection, site supervisors should afford it (R-4, Tr. 520).

OSHA industrial hygientist Frederick Malaby testified that in excess of 2 fibers per cubic centimeter of airborne concentrtions of asbestos, the standard requires a full face piece respirator, which can be used up to 10 fibers per cc of air or fifty times the PEL (Tr. 423). He stated that it is never permissible to wear a half-mask respirator over 2 fibers per cc of exposure (Tr. 426).

Respondent argues that because the measurements reflected the total fiber representation during transite board removal, not exclusively asbestos fibers, that the citation is inappropriate. It argues that because Lemek concluded that asbestos fibers comprised only approximately half of the total fiber, that half-mask respirators were appropriate.

Enviro-Sciences did not make a precise quantification of the fiber content, nor did it document its vague approximations. In

circumstances.

For the foregoing reasons, I have found that:

ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C. section 666(j), it is ordered

Citation number 1, Item 1a [1910.1001(c)] is affirmed as serious, and a penalty of $500 assessed.

Citation number 1, Item 1b [1910.1001(f)(1)(i)] is partially affirmed as serious, and a penalty of $100 assessed.

Citation number 1, Item 1c [1910.1001(f)(2)] is vacated.

Citation number 1, Item 1d [1910.1001(g)(3)(i)] is vacated.

Citation number 1, Item 2 [1910.1001(d)(5)] is affirmed as other-than-serious, and a penalty of $100 assessed.

Citation number 1, Item 3 [1910.1001(g)(4)(i)] is vacated.

Citation number 1, Item 4 [1910.1001(h)(1)] is vacated.

Citation number 1, Item 5 [1910.1001(k)(1)] is vacated as serious and affirmed as nonserious, and a penalty of $100 assessed.

Citation number 1, Item 6 [1915.77(c)] is affirmed as serious, and a penalty of $50 assessed.

Citation number 2, Item 1 [1910.1001(d)(1)(ii)] is vacated as willful and affirmed as serious, and a penalty of $500 assessed.

Citation number 2, Item 2 [1910.1001 (m)(5) (ii)] is affirmed as willful, and a penalty of $10,000 assessed.

Citation number 3, Item 1 [1910.1001 (i)(2) (ii)] is vacated.

Citation number 4, Item 1 [1910.1001(g)(2)(i)] is affirmed as serious, and a penalty of $50 assessed.

So ordered.

Foster Furcolo

FOSTER FURCOLO
Judge, OSHRC

Dated: May 9, 1989
Boston, Massachusetts