

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

The Secretary,

v.

UNITED STATES POSTAL SERVICE,
D/B/A KENTON STATION

Respondent.

OSHRC Docket No. 23-1004

Appearances:

David H. Clark, Esq. and Afroz Baig, Esq., Department of Labor, Office of Solicitor, San Francisco, CA,
For the Secretary

Nadalynn Hamilton, Esq. and Eldrin Masangkay, Esq., Plano TX,
For Respondent

Before: Judge Patrick B. Augustine – U.S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL BACKGROUND.

This matter is before the United States Occupational Safety and Health Review Commission¹ (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). On December 7, 2022, a Compliance Safety and Health Officer (CSHO) initiated an inspection of a United States Postal Service (USPS) facility at Kenton Station located in Portland, Oregon. As a result of that inspection, the Occupational Safety and

¹ “[T]he Commission is responsible for the adjudicatory functions under the OSH Act.” *StarTran, Inc. v. OSHRC*, 290 F. App’x 656, 670 (5th Cir. 2008) (unpublished). Its function is to “act as a neutral arbiter and determine whether the Secretary’s citations should be enforced over employee or union objections.” *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the “adjudicatory powers typically exercised by a court in the agency-review context.” *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 151 (2012).

Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent. The Citation alleged repeat-serious and repeat-other-than-serious violations of the asbestos general industry standard and the hazard communications standard, with total proposed penalties of \$85,942. USPS timely contested the Citation by filing a Notice of Contest.

This case proceeded under the conventional case rules of the Commission. A trial was held on January 27-30, 2025, in Portland, Oregon. The following individuals testified at trial: (1) CSHO Brian Peters; (2) Cecil Tipton, the OSHA Area Director for the Portland area office; (3) Claude Robinson, Physical Scientist at the OSHA Technical Center; (4) Laveda Padilla, Senior Field Safety and Health Specialist for USPS; (5) Cheryl Walton, Shop Steward with the local chapter of the American Postal Workers Union; (6) George Tway, Supervisor at Kenton Station; (7) Nkole Bulbul, USPS Safety Manger; (8) Kaylinn Hoyt, USPS Safety Specialist; (9) Rodman Harvey, USPS's expert witness; and (10) Daniel Crane, the Secretary's expert witness. In addition, designated excerpts from the deposition of Stephanie Cathcart, then-Manager at Kenton Station, were read into the record.

After trial, both Parties timely filed post-trial briefs. The Secretary also filed a *Motion to Strike Discussion of the Affirmative Defense of Infeasibility and Employee Misconduct in Respondent's Post-Trial Brief* (Motion to Strike), which asks the Court to strike USPS's affirmative defenses of infeasibility and employee misconduct, raised for the first time in USPS's post-trial brief. USPS filed an opposition to the Motion to Strike, arguing that it pled "related" defenses encompassing its infeasibility argument, thus putting the Secretary on notice and satisfying due process considerations. USPS also maintained it was not asserting any employee misconduct defense.

The evidence at trial, the post-trial briefs filed, the Secretary’s Motion to Strike, and USPS’s response were considered by the Court in reaching its Decision. Pursuant to Commission Rule 90(a), 29 C.F.R. § 2200.90(a), after hearing and carefully considering all the evidence and the arguments of the Parties, the Court issues this Decision and Order as its findings of fact and conclusions of law. For the reasons that follow, the Court will AFFIRM Citation 1, Items 1 and 2, and AFFIRM Citation 2, Items 1 and 2 IN PART.

II. STIPULATIONS.

The Parties stipulated to the following facts:

1. The Review Commission has jurisdiction over this action and the parties pursuant to Section 10(c) of the Act.
2. USPS is an employer engaged in business affecting commerce within the meaning of Section 3(5) of the Act.
3. USPS operates from thousands of facilities nationwide.
4. Kenton Station, located at 2130 N Kilpatrick St., Portland, OR 97217 is a facility the Postal Service operates from in the Portland, Oregon area.
5. In 2022 and 2023, Respondent conducted postal operations from the Kenton Station facility.

The Joint Stipulations were received and admitted into the record as Joint Exhibit 1. (Tr. 14; Ex. J-1). *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was “plain error” to not accept parties’ stipulation). The Court will refer to the Joint Stipulations as necessary in this Decision.

III. JURISDICTION.

At trial, the Court found the Commission had jurisdiction over this proceeding due to USPS filing its timely Notice of Contest. (Tr. 9; Ex. C-4 (Notice of Contest); *see Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995-1000 (5th Cir. 1975) (describing “Enforcement Structure of OSHA,” noting that once a notice of contest is filed, “the Secretary is required to initiate the administrative hearing by notifying [the Commission]”), *aff’d*, 430 U.S. 442 (1977); 29 U.S.C. §

659(c)). The Court further found, based on USPS's Answer to the Complaint, it was engaged in a business affecting interstate commerce, and was thus an employer within the meaning of the Act. (*See* Tr. 9; *see* 29 U.S.C. §§ 652(3), (5); *see also* Answer at 1). *See also* Exh. J-1, no. 2.

IV. BACKGROUND.

The Kenton Station Facility

Kenton Station is a postal facility located at 2130 N. Kilpatrick Street in Portland, Oregon. (Ex. J-1). At all relevant times, its operations included delivery and collection services, retail services, mail distribution and dispatch, and post office box service. (Ex. C-44). The one-story building was constructed in 1964 and totaled approximately 8,000 square feet. (Ex. C-15 at 5, 12). It had a front lobby, a large workroom floor where mail was processed daily, a loading dock, men's and women's bathrooms, a custodial closet, a manager's office, and a lunchroom. (Tr. 48, 75, 318). Mail processing required employees to use heavy equipment to wheel mail in and out of the workroom. (Tr. 267-68, 328).

Kenton Station Asbestos Survey Report & Asbestos Management

Kenton Station's building materials contained asbestos. (Tr. 319). In 1996, USPS had an asbestos survey conducted at Kenton Station for the purpose of identifying the quantity, location, and condition of asbestos containing material (ACM) and presumed asbestos containing material (PACM). (Ex. C-15 (asbestos survey report)). The asbestos survey report identified asbestos-containing floor planks in the workroom, custodial closet, the lunchroom, and the women's restroom. (Ex. C-15 at 5).

USPS had an Asbestos Management Guide, which required floors with ACM to be waxed and sealed and prohibited custodial workers from engaging in floor care activities that might release asbestos fibers into the environment. (Ex. C-40 at 121). Custodial workers were responsible

for maintaining the floors at Kenton Station, including “cleaning, scrubbing, waxing, and polishing floors” and operating power-driven equipment such as floor waxers. (Ex. C-43).

The custodians at Kenton Station mopped, swept, and vacuumed the floors daily.² (Tr. 298, 403, 521, 523). The custodians would also wax the floors. (Tr. 336, 385). Properly maintained, waxed floors would appear black and shiny. (Tr. 334). Kenton Station management acknowledged, at the times relevant to this Citation, Kenton Station’s floors were dull and showed 40 years of wear and tear. (Tr. 375, 509). Floor waxing, which safely sealed ACM flooring, should have taken place regularly, although how often the floors were waxed varied from every other month to every six months, or longer. (Tr. 332, 385). The Asbestos Management Guide did not include the frequency with which flooring with ACM should be waxed. (Ex. C-40 at 121). According to Union Steward Walton, the floor was not waxed often enough, and she advised Kenton Station management of that deficiency. (Tr. 344). In her view, management lacked an urgent response to her complaints. (Tr. 344-45).

Beginning in mid-to-late 2022, Cathcart was the Station Manager, and Tway was a Supervisor. (Tr. 368-69). Kenton Station had approximately 50 employees, including a custodian that split time between Kenton Station and another USPS facility. (Tr. 370-71, 395, 502). Cathcart and Tway supervised the custodian. (Tr. 521). Tim Watson was the custodial employee for Kenton Station from May 2020 to March 2023. (Tr. 370). Roberto Soriano was the custodial employee for Kenton Station from March 2023 through July 2023, at which time he moved to another postal facility. (Tr. 371). Steve Wolf performed additional overtime custodial work at Kenton Station

² Cathcart, who was the highest-ranking official at Kenton Station during the relevant time period, supervised the custodial employees, meaning she ensured custodians were working and completing tasks each day. (Tr. 521). In her deposition testimony, which was read into the record, she said Kenton Station was mopped every three days and that custodians “lightly” swept the workroom floor. (Tr. 497). However, Cathcart later testified that she ensured custodial employees were sweeping, dusting, and vacuuming daily in 2022 and 2023. (Tr. 521). In light of the testimony provided by other Kenton Station management, the Court concludes that sweeping, mopping, and vacuuming was occurring almost daily at Kenton Station.

between 2020 and 2023. (Tr. 380). After Soriano left the position, no permanent custodian was assigned to Kenton Station; rather, USPS custodial employees would sporadically come to Kenton Station to do overtime hours. (Tr. 372). Management had no control over the frequency of a custodian being dispatched to Kenton Station and simply had to request custodial hours. (Tr. 372).

Asbestos Awareness Training

The Asbestos Management Guide required annual asbestos awareness training for custodial staff. (Ex. C-40 at 58, 62). Custodians completed asbestos awareness training virtually via USPS's HERO system (a virtual training platform). (Tr. 267, 280, 300, 339, 433). Training was also conducted in-person and consisted of stand-up talks occurring multiple times throughout the year. (Tr. 391, 426, 433). Safety Talk 127 specifically addressed asbestos awareness. (Ex. C-19). The content for Safety Talk 127 was provided to local management by a USPS corporate safety manager, and facility management would then read the safety talk materials verbatim to employees. (Tr. 300). Safety talks were lecture-based, and they were tailored to the specific postal facility. (Tr. 291, 438).

Tway recalled giving Safety Talk 127 "dozens and dozens of times." (Tr. 389). He required employees "to sign off that they had attended the talk—or he would pull the employee timesheets to confirm attendance—and that record would be sent to the Learning and Development Department (LD&D) or recorded in HERO. (Tr. 389-90).

L&DD tracked employee training requirements, and it would advise management at each USPS facility which employees required what training. (Tr. 376; *see, e.g.*, Ex. C-53 (asbestos training record)). Management would then ensure the employee completed the training and provide LD&D with documentation. (Tr. 377). Both the facility itself and LD&D maintained a copy of an employee's training records. (Tr. 376-77).

Hazard Communication Policy & Safety Data Sheets

USPS maintained a Hazard Communication Program aimed at informing employees about hazardous chemicals and materials at USPS facilities. (Ex. C-42). The intent of the Hazard Communication Program was to “comply with required elements of the Hazard Communication standard.” (Ex. C-42; *see also* Tr. 285 (Padilla testimony)). The Hazard Communication Program required an inventory of each facility to identify hazardous chemicals. (Ex. C-42). It also required facilities to use safety data sheets to help determine which products should be included on a hazardous chemical list. (Ex. C-42). Padilla testified she was aware of the OSHA requirement that employers provide hazard communications about asbestos to its employees, including safety data sheets. (Tr. 279). However, Padilla testified USPS was unable to obtain a safety data sheet from the manufacturer of the asbestos used in Kenton Station’s building materials because the manufacturer went out of business. (Tr. 276). She believed the asbestos survey report fulfilled the requirements of OSHA’s hazard communication standard. (Tr. 285).

OSHA Investigation & Sample Collection

On December 7, 2022, OSHA conducted an inspection of Kenton Station as a result of a complaint about possible asbestos exposure at the facility (December 2022 inspection). (Tr. 42-45; Exs. C-1 (Notice of Alleged Safety or Health Hazard), C-2 (complaint email)). The complaint alleged the asbestos flooring was coming loose and there were broken tiles in the women’s bathroom.³ (Ex. C-1). The CSHO conducted an opening conference with Cathcart, Hoyt (the USPS safety specialist), and Walton. (Tr. 48-49; Ex. C-6 (Inspection Narrative)). The CSHO toured the building and observed the areas subject to the complaint. (Tr. 50). He saw the flooring looked worn

³ The complaint alleged broken tiles in the men’s bathroom. (Ex. C-1). However, at trial, Walton (who submitted the complaint) clarified the broken tiles were in the women’s bathroom. (Tr. 322).

and believed it was not being waxed frequently enough. (Tr. 50). The CSHO did not see tiles that were detached from the floor in the bathroom, but he did observe dust on the floor, leading him to believe it was mopped and vacuumed infrequently. (Tr. 139-41).

The CSHO did not see, nor was he provided with, a safety data sheet for asbestos or a hazardous chemical list. (Tr. 96-97, 148). The CSHO was told Kenton Station never had a safety data sheet for asbestos due to the manufacturer being out of business. (Tr. 275-76). Instead, the CSHO was told USPS considered the asbestos survey report a “suitable replacement” for a safety data sheet for asbestos because it identified the presence, location, and quantity of asbestos at Kenton Station. (Tr. 277-78, 284-85). A copy of the asbestos survey report was kept in the manager’s office and on the employee safety bulletin board. (Tr. 388, 406, 428). It was provided to the CSHO after the inspection. (Tr. 55).

The CSHO interviewed employees at Kenton Station, who told him they had not received annual asbestos awareness training, and access to online training on HERO was not available due to issues with password expiration. (Tr. 65; Ex. C-6 at DOL000126 (inspection narrative); Ex. C-7 at DOL000131 (violation worksheet)). According to those employees, the process of obtaining a new password was so lengthy they could not find time to do the training. (Tr. 65; Ex. C-6 at DOL000126; Ex. C-7 at DOL000131). The CSHO concluded the December 2022 inspection without receiving maintenance or training documents, and he was not able to interview any members of Kenton Station management at that time. (Tr. 51-52).

USPS later provided the CSHO with a number of documents, including: the USPS Asbestos Management Plan (Ex. C-13); the asbestos survey report (Ex. C-15);⁴ a document detailing proper maintenance and care of asbestos floors (Ex. C-16); USPS policies for “Managing

⁴ Exhibit C-14, referenced in the CSHO’s testimony, is the bulk sample asbestos analysis that made up a component of the asbestos survey report.

Asbestos in Postal Service Facilities” (Ex. C-17); documentation demonstrating that asbestos training was planned for Custodian Watson on a future date, February 13, 2023 (Ex. C-18); USPS’s Asbestos Safety Talk 127 (Ex. C-19); the Asbestos Management Guide (Ex. C-40); the Hazard Communication Training policy for USPS employees (Ex. C-42); a list of custodial job duties (Ex. C-43); a custodial supervisor’s job description (Ex. C-44); and a list of a building supervisor’s job duties (Ex. C-45).

The CSHO conducted a second inspection of Kenton Station on February 14, 2023 (February 2023 inspection) to collect samples that might indicate the presence of asbestos. (Tr. 68). Bulbul accompanied him during this inspection. (Tr. 69). The CSHO was not permitted to interview management employees during the February 2023 inspection. (Tr. 80).

The CSHO took samples of dust he observed on the floor at Kenton Station. (Tr. 70). In his estimation, the condition of the floors had not significantly changed between the December 2022 inspection and the February 2023 inspection. (Tr. 79). He used a “brush and card” method for collecting the samples, meaning he used a brush to sweep what he characterized as “dust” onto a business card, placed the dust into a glass vial, and sealed the vial. (Tr. 70-71). He used a new brush and a new card for each collection. (Tr. 70-71).

The CSHO took three⁵ samples: (1) the southwest corner of the workroom floor, where the CSHO observed dust and debris; (2) the southeast corner of the workroom floor, near the women’s bathroom, where Walton alleged there had been broken tiles;⁶ and (3) the lunchroom (off the

⁵ Bulbul testified she saw the CSHO take “at least” six or seven samples. (Tr. 430). However, lab records reflect three samples were submitted to the OSHA Technical Center. (Ex. C-11). Accordingly, when the Court refers to “samples” in this Decision, the Court is referring to the three samples submitted to the lab.

⁶ Walton testified there were broken tiles in the women’s restroom. (Tr. 328, 347-48). However, the record is unclear as to whether the CSHO actually saw any broken tiles. The CSHO testified that he did not observe any “detached tiles” in Kenton Station. (Tr. 139). When asked whether he observed any “pulverized tiles,” he responded: “To the extent that wear and tear on the surface is pulverizing, yes, I did.” (Tr. 139).

workroom floor). (Tr. 72-73). The CSHO did not conduct air sampling because it was not indicated by either his observations (i.e., it did not appear to him that asbestos was actively being released into the air) or by Walton's complaint. (Tr. 69-70). After completing the February 2023 inspection, the CSHO sent the samples to OSHA's Technical Center in Salt Lake City for analysis. (Tr. 71; Ex. C-8 (bulk sampling worksheet)).

Lab Testing & Methodology

Claude Robinson, Physical Scientist and Area Expert at the OSHA Technical Center, conducted the analysis of the Kenton Station samples⁷. (Tr. 204). Generally, the testing process for an asbestos sample was conducted as follows. (*See* Ex. C-46 at 8-32 (OSHA's procedures and methodology for asbestos sample analysis)). First, the scientist examines the sample (referred to as a "gross examination") and puts it under a stereoscope to determine whether asbestos fibers are present. (Tr. 206). Then, if the sample requires it, the scientist conducts a gravimetric reduction treatment, such as an acid wash or ashing in a furnace. (Tr. 207). Gravimetric reduction is used to reduce materials in the sample that are not asbestos, which makes it easier to quantify how many asbestos fibers are in the sample. (Tr. 207).

Next, the scientist prepares the slide, which includes placing the sample in refractive index liquid. (Tr. 207). The scientist then uses OSHA's own analytical method to conduct a microvisual estimation. (Tr. 208-10, 643). Microvisual estimation involves identifying the sample's characteristics, such as morphology (shape), birefringence (how the light travels through the sample), and extinction angle (whether the sample disappears when lined up with the direction of the polarizer). (Tr. 208-10, 528-29).

⁷ Mr. Robinson was not offered, or certified by the Court, as an expert witness.

OSHA's analytical method is a hybrid of polarized light microscopy and phase contrast microscopy, which allows the scientist to see any potential fibers which are of the size that could be inhaled if airborne. (Tr. 643, 650-51). To determine the quantity of asbestos in a given sample, the scientist scans different fields under the microscope and sees how many asbestos fibers there are relative to other materials. (Tr. 211; *see also* OSHA Method ID-191, Ex. R-21, App'x B, at USPS-KENTON-000590).

Here, Robinson analyzed three samples collected by the CSHO:

1. Sample 31 (referred to as F22491 in lab documents), taken from the southwest corner of the workroom floor. (Tr. 218; Ex. C-8).
2. Sample 32 (referred to as F22492 in lab documents), taken from the southeast corner near the women's restroom. (Tr. 218-19; Ex. C-8).
3. Sample 33 (referred to as F22493 in lab documents), taken from the lunchroom. (Tr. 219; Ex. C-8).

Robinson documented his analysis on an "Asbestos Bulk Sample Analysis Form," (Ex. C-46 at 41-46) and then documented his findings on another standard form⁸ used by the lab. (Ex. C-9 (lab report)). For Sample 31, Robinson described the sample as "dust" with no preparation (such as ashing) required. (Tr. 221; Ex. C-46 at 41). His analysis of the sample under a polarized light microscope was positive for chrysotile asbestos, which is the most common type of asbestos fiber. (Tr. 221, 614). He ultimately concluded that the sample contained 0.01% chrysotile asbestos, although he admitted the sample was very small, so he was less confident in his result. (Tr. 222, 246; Ex. C-9).

Robinson described Sample 32 as "dust" that required ashing because there was an organic "tar-like" material present in the sample. (Tr. 221-23; Ex. C-46 at 42). His analysis of the ashed

⁸ The header on the form reads "Air Sampling Report." (Ex. C-9). However, the Secretary's expert explained it is a generic form with language that can report the results of bulk sample analysis. (Tr. 701-02).

sample under a polarized light microscope was positive for chrysotile asbestos, and he ultimately concluded the sample contained 13% chrysotile asbestos. (Tr. 224; Ex. C-9). He testified Sample 32 was not prone to sampling bias due to its larger size. (Tr. 249).

Lastly, Robinson described Sample 33 as “dust” that required no preparation. (Tr. 224; Ex. C-46 at 44). The result of his analysis was that asbestos fibers were “ND” or “not detected.” (Tr. 225; Ex. C-9).

The analysis of the three samples was reviewed by a “checker,” who did not make changes or corrections to Robinson’s analysis or conclusions. (Tr. 226; Ex. C-46 at 46). When Robinson was asked why he characterized the samples as “dust” rather than a “bulk sample,” he said there was no significance to his terminology, commenting “we [OSHA] don’t distinguish between the two.” (Tr. 237).

OSHA Citation

OSHA cited USPS for several violations arising out of the CSHO’s December 2022 and February 2023 inspections. (Ex. C-3 (Citation)). OSHA alleged USPS failed to: (1) ensure its custodians received annual asbestos training; (2) maintain surfaces as free as practicable of ACM waste or debris; (3) maintain a list of hazardous chemicals on site; and (4) maintain safety data sheets for employees to review. (*See Citation*). OSHA contends all these violations were repeat violations, resulting in a total proposed penalty of \$85,942.

V. DISCUSSION.

For most standards, including the ones at issue here, the Secretary is not required to prove the existence of a hazard each time a standard is enforced. *Bunge Corp. v. Sec’y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces

constituted a hazard). Instead, the hazard is presumed, and the Secretary's burden is limited to showing: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *6 (OSHRC, Dec. 5, 1994). The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *5 (OSHRC, Sept. 15, 1995).

Citation 1, Item 1 - 29 C.F.R. § 1910.1001(j)(7)(iv)

The Secretary cited USPS for a repeat-serious violation of 29 C.F.R. § 1910.1001(j)(7)(iv), which requires asbestos training in general industry:

The employer shall also provide, at no cost to employees who perform housekeeping operations in an area which contains ACM or PACM, an asbestos awareness training course, which shall at a minimum contain the following elements: health effects of asbestos, locations of ACM and PACM in the building/facility, recognition of ACM and PACM damage and deterioration, requirements in this standard relating to housekeeping, and proper response to fiber release episodes, to all employees who perform housekeeping work in areas where ACM and/or PACM is present. Each such employee shall be so trained at least once a year.

The Secretary described the alleged serious violation as follows:

29 CFR 1910.1001(j)(7)(iv): The employer did not provide an annual asbestos awareness training course covering the requirements specified in this standard related to housekeeping to all employees who perform housekeeping work in areas where ACM and/or PACM is present:

a) On or about 11/29/2022 and at times prior thereto, [s]orting and distribution area of the Kenton Station facility of the U. S. Postal Service located at 2130 N Kilpatrick St, Portland, OR 97217, where floor tiles known to contain asbestos were visibly deteriorated and disturbed by contact with postal transport equipment, employees performing housekeeping work were exposed to asbestos hazards because the employer failed to ensure that they received annual asbestos awareness training containing all of the required elements specified in this standard, including the location of ACM/PACM in the building, recognition of ACM/PACM damage and deterioration, and the requirements of this standard relating to housekeeping.

* * *

(Citation at 7). The Citation Item was classified as a repeat-serious violation, identifying the prior violations which support the repeat classification, as follows:

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1537592, citation number 1, item number 2a and was affirmed as a final order on 09-14-2022, with respect to a workplace located at 3775 Industrial Blvd, West Sacramento CA 95799.

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1567325 citation number 1 item number 1a and was affirmed as a final order on 5/5/2022 with respect to a workplace located at 300 Packerland Drive, Green Bay, Wisconsin, 54303[.]

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1369230 citation number 1 item number 2 and was affirmed as a final order on 11/22/2019 with respect to a workplace located at 11600 E. Washington Street, Cumberland, Indiana, 46229.

(Citation at 7). The Secretary proposed a penalty of \$14,731 for the violation. (Citation at 8).

a. The Standard Applied

The scope and application paragraph of the general industry asbestos standard provides: “This section applies to all occupational exposures to asbestos in all industries covered by the Occupational Safety and Health Act, except as provided in paragraph (a)(2) [construction work] and (3) [shipbreaking and repair] of this section.” 29 C.F.R. § 1910.1001(a)(1). The asbestos standard requires employers to satisfy certain hazard communication and training requirements, and subsection (j) specifically notes “hazard communication provisions will protect employees who perform housekeeping operations.” 29 C.F.R. § 1910.1001(j). Here, USPS does not dispute the asbestos training provisions applied to it as an employer. (*See Resp’t Br.* at 20-23). Moreover, the asbestos survey report (Ex. C-15) confirmed Kenton Station’s building materials, including the

flooring, contained asbestos greater than 1%, thereby meeting the definition of ACM under 29 C.F.R. § 1910.1001(b). (Ex. 15 at 5, 22-25). The Court finds the standard applied.

b. The Standard Was Violated

USPS disputes the standard was violated. Specifically, it argues the Secretary failed to offer any reliable evidence establishing that USPS's custodians did not receive the annual asbestos training. The custodians identified during the inspection and at trial as not receiving the training were Tim Watson and Steve Wolfe. (Tr. 84). USPS claims the Secretary relies on the absence of training records to establish the violation. (Resp't Br. 20-23). Generally, "[t]o establish noncompliance with a training standard, the Secretary must show the employer failed to provide instructions that a reasonably prudent employer would have given in the same circumstances." *Trinity Indus., Inc.*, No. 95-1597, 2003 WL 1961263, at *14 (OSHR, Apr. 26, 2003), *aff'd*, 107 F. App'x 387 (5th Cir. 2004). Here, the cited standard identifies the requirements for training, and USPS contends it had compliant asbestos awareness training in place. However, the issue is whether Custodians Wolfe and Watson were actually given asbestos training on an annual basis⁹ as required by the standard, not whether USPS had an asbestos training program which met the requirements of the standard.

Mandatory training records, as required under USPS policy but not the cited standard, were kept by both LD&D and Kenton Station management, and in the HERO system itself. Tway specifically recalled giving Safety Talk 127, which addressed asbestos awareness, many times, and that he required employees to sign off on receiving the training. While the cited standard does not require asbestos training to be documented, the easiest way for USPS to prove the custodians received the training would be for USPS to produce the documentation it required to be maintained

⁹ The 2022 annual training for Watson and Wolfe are at issue in this case. Both Watson and Wolfe worked as Custodians during 2022. (Tr. 370, 380).

for training. *See Envision Waste Servs., LLC*, No. 12-1600, 2018 WL 1735661, at *10 (OSHRC, Apr. 4, 2018) (holding the respondent’s failure to produce authentic training documents, despite the respondent’s practice of having sign-in sheets for training, corroborated the Secretary’s evidence of training noncompliance). USPS was unable to produce any record demonstrating asbestos awareness training took place in 2022. In fact, the asbestos training documentation¹⁰ provided by USPS reveals no asbestos training was done in 2022. (Tr. 481-82; Ex. C-53; *see also* Ex. C-54 at 6 (USPS’s interrogatory responses)). This is consistent with employees’ complaints to the CSHO that they had not received asbestos awareness training and had issues accessing virtual training, a persistent problem that was confirmed by Tway at trial. The Court finds the Secretary established Watson and Wolfe did not receive asbestos training in 2022.

The burden then shifts to USPS to prove asbestos training was provided. USPS could have disputed the Secretary’s claim the custodians did not receive the annual asbestos training in 2022 by; (i) arguing documentation of asbestos training is not required by the cited standard; and (ii) presenting evidence by the person giving the training that Watson and Wolfe were present and received the training. USPS did not provide evidence which affirmatively verified Watson and Wolfe received the training.

Based on the evidence, the Secretary established the standard was violated. USPS failed to provide any evidence to rebut the Secretary’s assertion that asbestos awareness training was not provided in 2022 to the custodians, even though USPS is in the best position to provide that evidence. *See Well Sols., Inc., Rig No. 30*, No. 91-340, 1995 WL 242595, at *4 (OSHRC, Apr. 19, 1995) (holding the Secretary can rely on “best available evidence” to establish lack of training and

¹⁰ USPS argues in its briefing there is no probative value to Exhibit C-53 because there was no testimony about how it was generated or whether the spreadsheet was accurate or complete. (Resp’t Br. 22). However, USPS expressly stipulated to the admission of Exhibit C-53 at the beginning of trial (Tr. 20, 454) and did not challenge the probative nature of the exhibit to the Court or any witness during trial.

that slim showing of *prima facie* case is sufficient absent rebuttal by party who has “full possession of all the facts”); *see also N & N Contractors, Inc.*, No. 96-0606, 2000 WL 665599, at *7 (OSHRC, May 18, 2000) (an employer may rebut the allegation of a training violation by showing that it has provided the type of training at issue; the burden then shifts to the Secretary to show some deficiency in the training provided), *aff’d*, 255 F.3d 122 (4th Cir. 2001).

The Court gives the absence of any asbestos awareness training records for 2022 significant weight, as USPS—per its own witnesses—should have been in possession of the training documents, if they existed. None of the witnesses claimed the training took place but that management perhaps failed to document it. (*See, e.g.,* Padilla testimony, Tr. 302 (“[N]o documentation was available, so I don’t have any evidence that the training was provided.”)). And, although Bulbul opined local management “sometimes” kept records of when employees received asbestos training, no such records were ever introduced into evidence. (Tr. 293-94, 449). Moreover, Kenton Station management stressed it documented all instances of training at the facility. (Tr. 389-90, 392-93, 500-01). The Secretary has met her burden as to the element of noncompliance with the standard.

c. Employees were Exposed to the Hazard

To establish exposure was reasonably predictable the Secretary must “show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Delek Refin., Ltd.*, No. 08-1386, 2015 WL 1957889, at *11 (OSHRC, Apr. 23, 2015) (citation omitted), *vacated in part on other grounds*, 845 F.3d 170 (5th Cir. 2016). The zone of danger is the area surrounding the violative condition that presents the danger to employees. *Boh Bros. Constr. Co., LLC*, No. 09-1072, 2013 WL 949386, at *18 (OSHR CALJ, Mar. 4, 2013).

The evidence establishing exposure was reasonably predictable. Watson and Wolfe were custodians at Kenton Station in 2022. Their job duties included sweeping and mopping the floors multiple times a week, among other tasks. It is undisputed the flooring contained asbestos and the floors were worn and infrequently waxed. Asbestos fibers “could become entrained in the air if they’re disturbed by vacuuming or dry sweeping or any other thing.” (Tr. 617; *see also* 650-51 (“[OSHA’s] goal with using phase contrast in conjunction with a polarized light microscope is to be able to see any potentially -- or any potential fibers which are of the proper size range that if entrained could be breathed in.”)). In other words, Watson and Wolfe would be within the zone of danger while sweeping or vacuuming at Kenton Station.

Asbestos awareness training must include “[t]he quantity” and “location” of asbestos, “the specific nature of operations which could result in exposure to asbestos,” and “[t]he specific procedures implemented to protect employees from exposure to asbestos, such as appropriate work practices.” 29 C.F.R. § 1910.1001(j)(7)(iii)(C), (E). Failure to provide asbestos awareness training to custodians could result in work practices, such as dry sweeping or vacuuming, which could disturb asbestos-containing debris and allow it to become airborne, exposing employees to asbestos. (Tr. 693). It is undisputed “[i]f asbestos is present, it is a hazard.” (Tr. 694). The Secretary proved exposure.

d. USPS had Knowledge of the Violative Condition

“Knowledge of the violative condition, either actual or constructive, is an element of the Secretary’s burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence.” *Ragnar Benson, Inc.*, No. 97-1676, 1999 WL 770809, at *2 (OSHRC, Sept. 27, 1999). “Because corporate employers can only obtain knowledge through their agents, the actions and knowledge

of supervisory personnel are generally imputed to their employers, and the Secretary can make a *prima facie* showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, No. 77-1598, 1984 WL 34912, at *4 (OSHRC, Aug. 3, 1984).¹¹ The Ninth Circuit, to which this case can be appealed, follows Commission precedent on imputation of knowledge.

USPS was aware of the requirement to provide training, as evidenced by its asbestos awareness training program and Safety Talk 127. Its corporate LD&D department was responsible for tracking and keeping records of employees’ training. LD&D was also responsible for alerting local management to the need to train employees. In light of LD&D’s recordkeeping practices and practice of alerting facility management when training was required, USPS should or could have known that Wolfe and Watson had not received the mandated annual asbestos training. Knowledge is established.

e. Classification & Penalty

Citation 1, Item 1 was classified as a repeat-serious violation. A violation is repeated if, at the time of the alleged violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corp.*, No. 16183, 1979 WL 61360, at *3 (OSHRC, Jan. 22, 1979). “Where the citations involve the same standard, the Secretary makes a *prima facie* showing of ‘substantial similarity’ by showing that the prior and present violations are for failure to comply with the same standard.” *Offshore Shipbuilding, Inc.*, No. 97-257, 2000 WL 1182905, at *4 (OSHRC, July 3, 2000). “The burden then shifts to the employer to rebut that showing.” *Id.*;

¹¹ In determining the application of circuit court precedent, the Commission follows *Kerns Brothers Tree Service*, (noting “Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case -- even though it may differ from the Commission’s precedent.”) See *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted).

Stone Container Corp., 14 BNA OSHC 1757, 1762 (No. 88–310, 1990).

The record establishes USPS had, on three previous occasions, been cited for a violation of the same standard (failure to provide annual asbestos training), and those citations had become final orders of the Commission by operation of section 10(a) of the OSH Act, 29 U.S.C. § 659(a) (“If . . . no notice [of contest] is filed . . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission”):

1. In 2022, OSHA inspected a USPS facility in Green Bay, Wisconsin (Inspection No. 1567325), and, on April 8, 2022, issued a citation for a violation of 29 C.F.R. § 1910.1001(j)(7)(iv). (Ex. C-26 at 6 (*see also* Ex. C-25 (abatement)). That citation became the final order of the Commission. (Tr. 112; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).
2. In 2021, OSHA inspected a USPS facility in West Sacramento, California (Inspection No. 1537592), and issued a citation for a violation of 29 C.F.R. § 1910.1001(j)(7)(iv). (Ex. C-24 at 7; *see also* Ex. C-23 (abatement)). That citation became a final order of the Commission. (Tr. 110; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).
3. In 2019, OSHA inspected a USPS facility in Cumberland, Indiana (Inspection No. 1369230), and, on March 8, 2019, issued a citation for a violation of 29 C.F.R. § 1910.1001(j)(7)(iv). (Ex. C-22 at 7; *see also* Ex. C-21 (abatement)). That citation became a final order of the Commission. (Tr. 107; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).

USPS did not rebut this *prima facie* showing of substantial similarity as these final orders involved failure to provide asbestos training. *See Potlatch Corp.*, 1979 WL 61360, at *3 (noting “it may be difficult for an employer to rebut” a showing of substantial similarity when the repeat designation is based on violations of the same specific standard “because in many instances the two violations must be substantially similar in nature to be violations of the same standard”). Accordingly, the Secretary established the violation was repeated.

In addition, the Secretary proved the violation was serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a serious violation is deemed to exist when there is a “substantial probability that death or serious physical harm could result” from a condition or practice. “This does not mean

that the occurrence of an injury must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if injury does occur.” *Schuler-Haas Elec. Corp.*, No. 03-0322, 2006 WL 1355469, at *8 (OSHRC, May 8, 2006).

An employer’s failure to instruct its employees on potential hazards may result in serious injury. *See Pressure Concrete Co.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) (characterizing Section 1926.21(b)(2) violation as serious because “it is abundantly clear that the consequences of [the employer’s] failure to instruct its employees could result in serious harm”). Here, there is no dispute that exposure to asbestos can cause serious and permanent injury. (Tr. 92, 166; *see also* Occupational Exposure to Asbestos, Tremolite, Anthophyllite & Actinolite, 51 Fed. Reg. 22612, 22615 (June 20, 1986) (to be codified at 29 C.F.R. pts. 1910, 1926) (“OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure are life-threatening or disabling. Among these diseases are lung cancer, cancer of the mesothelial lining of the pleura and peritoneum, asbestosis, and gastrointestinal cancer”). USPS’s failure to train its custodians, who sweep and vacuum flooring with ACM or PACM, in the presence and location of asbestos, as well as how to avoid exposure, resulted in a serious violation.

Finally, the Court will evaluate the Secretary’s proposed penalty of \$14,731. When a citation is issued, it may include a penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual (“FOM”) to, among other things, guide its employees in determining what penalty, if any, to propose for violations. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-150, effective April 22, 2011, available at 4 Employment Safety and Health Guide, (CCH), ¶7965, at 12,133, 12,139 (2015). The FOM directs OSHA employees to look at the same four factors the Commission must consider when it assesses penalties. FOM at 6-2; 29 U.S.C. § 666(j). The

penalty amounts proposed in a citation become advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441-42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001).

Section 17(j) of the Act, 29 U.S.C. § 666(j), authorizes the Commission to assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. OSHA determined that even though the hazard itself (asbestos exposure) was high, the severity was low because this was a training violation. (Tr. 167). The probability was determined to be lesser because any asbestos exposure was limited to a small area and no additional work (like construction or demolition) was being done in that area. (Tr. 167-68). The gravity of the violation, i.e., an assessment that considers severity and probability, was found to be low. (Tr. 168). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). Thus, the gravity-based penalty was calculated as \$6,696.

OSHA recommended a 10% increase in penalty due to USPS's citation history with OSHA. (Tr. 169). It also recommended the penalty be multiplied because USPS was a large employer with a repeat violation. (Tr. 169). In accordance with its FOM, OSHA applied a multiplier of two¹² because the violation was a repeat violation by a "large" employer, for purposes of penalty calculations. (Tr. 169). USPS did not refute any of OSHA's evidence on, or its calculation of, the proposed penalty.

"Once a citation is contested, the Commission has the sole authority to assess penalties."

¹² Usually, the penalty would have been multiplied by a factor of five rather than two. However, because this was a training violation, OSHA reduced the multiplier to a factor of two. (Tr. 169).

Valdak Corp., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (citation omitted), *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1581 (No. 94-1979, 2009) (holding the Commission has discretion to assess the penalties it finds appropriate). The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622 (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991). The Court, after evaluating all the evidence, elects to exercise its discretion and will not assess the recommended penalty proposed by the Secretary.

The Court notes the Secretary assigned low ratings to severity, probability, and gravity. Absent any testimony to the contrary, the Court assumed it treated Watson and Wolfe equally in terms of making those determinations. However, the Secretary introduced no evidence as to how much time Wolfe was working at the Kenton facility in 2022, if at all. The only testimony as to Wolfe performing custodian work was he did part-time overtime work at Kenton between 2020 and 2023. It is important for the Court to know the exposure time, as it factors into the gravity element. On that basis, the Court makes a penalty adjustment.

The Court imposes a base penalty of \$3,300. The base penalty will be increased by ten percent (10%) for citation history. The total penalty then becomes \$3,630 before the Court applies a multiplier of two. With the multiplier, the total penalty which the Court will assess is \$7,260.

Citation 1, Item 2 - 29 C.F.R. § 1910.1001(k)(1).

The Secretary cited USPS for a repeat-serious violation of 29 C.F.R. § 1910.1001(k)(1), which sets forth the following housekeeping requirement: “All surfaces shall be maintained as free as practicable of ACM waste and debris and accompanying dust.” The Secretary described the violation as follows:

29 CFR 1910.1001(k)(1): The employer did not maintain all surfaces as free as practicable of ACM waste and/or debris and accompanying dust:

a) On or about 12/7/2022 and at times prior thereto, at the sorting and distribution area of the Kenton Station facility of the U. S. Postal Service located at 2130 N Kilpatrick St, Portland, OR 97217, where floor tiles known to contain asbestos were visibly deteriorated, postal workers were exposed to asbestos hazards because the employer failed to ensure that the floors were as free as possible of asbestos-containing dust.

* * *

(Citation at 9). The Citation Item was classified as a repeat-serious violation, identifying the prior final orders of the Commission as follows:

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.1001(k)(1), which was contained in OSHA inspection number 1537592, citation number 1, item number 3a and was affirmed as a final order on 09-14-2022, with respect to a workplace located at 3775 Industrial Blvd, West Sacramento CA 95799.

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1368195 citation number 1 item number 1 and was affirmed as a final order on 11/6/2020 with respect to a workplace located at 5108 West 74th Street Edina, MN 55435.

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1367868 citation number 1 item number 1 and was affirmed as a final order on 11/5/2020 with respect to a workplace located at 4048 Lakeland Avenue North Robbinsdale, MN 55422[.]

(Citation at 9).

a. The Standard Applies

“It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations...” *Precision Concrete Constr.*, No. 99-0707, 2001 WL 422968, at *3 (OSHR, Apr. 25, 2001). Section 1910.1001 is a general industry standard that applies to “all occupational exposures to asbestos in all industries covered by the [OSH Act]” except exposure to asbestos in construction work and exposure to asbestos in

shipbuilding. 29 C.F.R. § 1910.1001(a). It is undisputed custodial employees were engaged in housekeeping activities, including sweeping and vacuuming, and Kenton Station's floors were composed of ACM and there was the presence of PACM. Moreover, section 1910.1001 was specifically intended to cover custodial workers like those employed with USPS. *See Occupational Exposure to Asbestos*, 59 Fed. Reg. 40964-01, 40972-40973 (Aug. 10, 1994) (to be codified at 29 C.F.R. pts. 1910, 1915 & 1926) (noting, in the scope and application section, that custodians were one of the largest groups of workers exposed to asbestos). The standard applies.¹³

b. The Standard was Violated

USPS contends the Secretary failed to meet her burden to prove the standard was violated. First, USPS argues the samples were improperly collected. It also attacks OSHA's analytical method, which it claims is a methodology reserved for bulk samples. USPS also contends Sample 32 was an "intact, three-dimensional chunk" of floor planking, not dust or debris. And, USPS claims the quantification, i.e. the method by which OSHA determined the amount of asbestos in the sample, was deficient, thus rendering the results inconclusive and unreliable. USPS also argues although OSHA alleges USPS failed to ensure the floors were as free as possible of asbestos-containing dust, "there is no evidence that ACM-dust was present at Kenton [Station]." (Resp't Br. 39) (emphasis added). USPS maintains Samples 31 and 32 were true "dust" samples, and neither contained asbestos.

The Secretary contends the three samples were properly collected, properly analyzed as bulk samples, and correctly quantified. The Secretary accuses USPS of playing a game of

¹³ USPS dedicates a significant portion of its post-trial brief to argue the standard does not apply because the Secretary failed to prove a hazard. That argument fails on its face. Moreover, USPS attacks the CSHO's method of sample collection, OSHA's identification of the samples as "dust," and the method by which scientists calculated the quantity of asbestos. These arguments will be addressed by the Court as part of its more comprehensive discussion of OSHA's collection and analysis of the samples in its analysis of noncompliance.

semantics, and she maintains OSHA’s use of the term “dust” is a generic descriptive term that does not foreclose the samples from being tested as a bulk samples.

1. The Brush and Card Method of Collection

The Court must first determine whether the samples taken by the CSHO were properly collected. Resolution of this issue requires the Court to evaluate the testimony of the Parties’ competing expert witnesses. The Secretary designated Daniel Crane as her expert witness, and USPS designated Rod Harvey as its expert witness.¹⁴

Harvey opined OSHA’s method of collection (Method ID-191) was improper under the circumstances of this case. Specifically, his conclusion rests on his belief that Sample 31 and Sample 33 were “true dust samples,” and Sample 32 was a debris or bulk sample. (Ex. R-21 at USPS-KENTON-000554; Tr. 546, 554). According to Harvey, asbestos debris and asbestos dust are different in structure:

Debris is going to be a chunk. It’s going to be three-dimensional . . . it’s going to include binders, it’s going to include fibers, it’s going to include everything else that went into making that product. It’s basically just going to be a small chunk of that material, typically identifiable as to what the source is, but not always. . . . [D]ebris is essentially . . . a chunk of the product that had the asbestos in it.

(Tr. 543). In contrast, the source of dust is often unknown because “dust can contain particulate from hundreds of different sources that led to that dust.” (Tr. 544). According to Harvey, making a distinction between “bulk” and “dust” is standard in the industry, and the American Society for

¹⁴ On November 19, 2024, at the conclusion of a pretrial evidentiary hearing conducted pursuant to Fed. R. Evid. 104, the Court certified both Crane and Harvey as expert witnesses qualified to testify on the following topics: (1) the testing process under OSHA Method ID-191; (2) its interplay, if any, with Environmental Protection Agency regulations; and (3) the difference between dust sample and bulk sample collection and testing. (Nov. 19, 2024 Pre-Trial Hearing Tr. at 73). The CV of each expert, along with their opinions, are part of the formal proceedings of November 19, 2024. The official transcript of that proceeding is part of the record.

Testing Materials specifically defines dust as “material that is smaller than one millimeter in size or at least able to pass through a one-millimeter sieve.” (Tr. 534, 544).

Harvey opined the type of sample (dust versus debris) affects the method of collection. Here, he concluded the brush and card method of collection “is not an approved method for the collection of dust samples.”¹⁵ (Ex. R-21 at USPS-KENTON-000554). Instead, only the “wipe method,” i.e. ASTM D6480, is the consensus standard for collection of dust samples. (Ex. R-21 at USPS-KENTON-000553). The wipe method would have required the CSHO to use a moistened wipe to collect dust from a surface, not a brush and card. (Tr. 536-37). Crane, the Secretary’s expert, testified that using the wipe method at Kenton Station would not have collected all of the potential samples with ACM. (Tr. 681, 683).

Crane further disagreed stating “Using a brush to sweep debris onto a card and then deposit [it] into a container, is consistent with the instructions given to OSHA compliance officers to collect debris samples for bulk analysis.” (Ex. C-49 at 12). Crane’s view is that OSHA Method ID-191 did not preclude methods of collection beyond those expressly listed in the guidance.

Upon review, the Court finds the brush and card method is not precluded under OSHA Method ID-191’s sampling procedures, which state, in relevant part:

2.3. Sampling procedure

Samples of any suspect material should be taken from an inconspicuous place. Where the material is to remain, seal the sampling wound with an encapsulant to eliminate the potential for exposure from the sample site. Microscopy requires only a few milligrams of material. The amount that will fill a 20 mL scintillation vial is more than adequate. Be sure to collect samples from all layers and phases of

¹⁵ Harvey did not testify the brush and card method was improper for the collection of bulk samples of which one of the three samples in this case was classified. For the two other samples which were classified as dust, the Court’s disposition of those samples is discussed below.

material. If possible, make separate samples of each different phase of the material. This will aid in determining the actual hazard.

The use of plastic bags presents a contamination hazard to laboratory personnel and to other samples. When these containers are opened, a bellows effect blows fibers out of the container onto everything, including the person opening the container.

If a cork-borer type sampler is available, push the tube through the material all the way, so that all layers of material are sampled. Some samplers are intended to be disposable. These should be capped and sent to the laboratory. If a non-disposable cork borer is used, empty the contents into a scintillation vial and send to the laboratory. Vigorously and completely clean the cork borer between samples.

(OSHA Method ID-191, Ex. R-21, App'x B at USPS-KENTON-000584-000589).

Although a brush and card method was not listed under “equipment for sampling,”¹⁶ the Court gives greater weight to Crane’s testimony that Method ID–191 did not preclude the use of the brush and card method to collect the samples to be tested. (Tr. 680-81). Crane stressed sample collection was size-dependent. (Tr. 681). And based on a different composition size from the samples collected it logically flows that different collection methods may be used or even required. Crane further testified using a disposable brush and a paper card would not compromise the sample in any way. (Tr. 681).

Harvey limited his opinion to the brush and card method of collection being inappropriate for *dust sample* collection. (Tr. 533 (stating the brush and card method is not appropriate for dust samples), 620 (referencing collection of dust samples)). From this testimony, the Court infers since Harvey did not include debris or bulk samples in his analysis, the brush and card method would be appropriate for debris and bulk samples. *Okland Construction Co.*, 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence). “[T]he Commission may draw reasonable inferences from the evidence[.]” *Fluor Daniel*, 19 BNA OSHC

¹⁶ Equipment for sampling listed a tube or cork borer sampling device, a knife, a 20mL scintillation vial, and a sealing encapsulant. (Ex. R-21, App'x B at USPS-KENTON-000584).

1529, 1531 (Nos. 96-1729 & 96- 1730, 2001) (citing *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159 (No. 90-17427, 1994)). The Court’s conclusion is supported on this point by the testimony Crane who testified “Using a brush to sweep debris onto a card and then deposit [it] into a container, is consistent with the instructions given to OSHA compliance officers to collect *debris samples for bulk analysis.*” (Ex. C-49 at 12) (emphasis added).

The Court finds the brush and card method was a proper method of collection under OSHA Method ID-191 regardless of whether the samples are classified as debris, bulk or dust.

2. Method Used to Analyze the Samples

The next determination the Court must make is whether OSHA’s Method ID-191 was the appropriate method for analyzing the samples. Harvey opined OSHA’s use of polarized light microscopy “is not appropriate for the analysis of asbestos dust samples.” (Ex. R-21 at USPS-KENTON-000555). Instead, he maintains OSHA should have used the industry standard of transmission electron microscopy to analyze Samples 31 and 32. (Tr. 529, 540, 602). According to Harvey, “[a]sbestos structures and fibers in dust typically have gone through a process where they’ve been broken down,” and they break in such a way that they become thinner and thinner, making them difficult to “resolve,” or “see.” (Tr. 541). Transmission electron microscopy does not use a light source to identify the composition of a sample; it uses electrons. (Tr. 539). As a result, transmission electron microscopy magnification is approximately 10,000-20,000 times, and it reports its results as structures per area/size of a two-dimensional surface. (Tr. 539-40). In contrast, “[polarized light microscopy] is done at] about 160 times magnification.” (Tr. 541). According to Harvey, transmission electron microscopy should have been used on the dust samples because polarized light microscopy did not have enough magnification for the analyst to see the thin

asbestos structures in the dust sample, even with OSHA's addition of phase contrast microscopy, which is 400 times magnification. (Tr. 541-42).

Harvey also believed OSHA's method of visual estimation to quantify the percentage of asbestos fibers in a sample lacked precision. Harvey claimed visual estimation was inadequate when trying to determine "that asbestos is present in one in 10,000 pieces of dust." (Tr. 566-67). He testified OSHA should have used "point counting," a method adopted by the Environmental Protection Agency (EPA), "which gives [the analyst] a numerator and a denominator" that is then used to mathematically quantify the percentage of asbestos present in a sample. (Tr. 567). Harvey concluded the results of OSHA's lab testing were erroneous and unreliable.

Crane testified the use of phase contrast polarized light microscopy using OSHA Method ID-191 was accepted methodology. (Ex. C-49 at 6). He conceded asbestos fibers were very small (approximately 500 atoms across), and that a polarized light microscope alone did not see small asbestos fibers. (Tr. 626-27, 643). However, that is why OSHA added a phase contrast microscope—which has additional magnification—to conduct testing on samples that might contain asbestos. (Tr. 643-44). In other words, the benefit of using phase contrast microscope *with* polarizing elements (rather than a standard phase contrast microscope) was that the microscopist could see the asbestos fibers upon which OSHA's permissible exposure limit was based. (Ex. C-49 at 6; Tr. 644). Stated differently, this methodology "reveal[s] asbestos fibers that could be released and pose an inhalation risk." (Ex. C-49 at 6). He countered Harvey's opinion that a transmission electron microscope should have been used because, according to Crane, a transmission electron microscope had too great a magnification and would only see "a miniscule amount" of the sample. (Tr. 685-86). This "microsampling" would, in Crane's view, result in looking at fibers that are so small that they might not have much of a health effect from OSHA's

perspective. (Tr. 685-86, 695-96). And, such enhanced magnification could result in quantification errors (i.e. over-quantification). (Tr. 685-86).

Next, Crane disagreed with Harvey's assertion that point counting should have been used to quantify the asbestos fibers in the samples. (Tr. 679). He noted the EPA instituted the practice of point counting because its lab analysts tended to overestimate the amount of asbestos in samples. (Tr. 634-35). Conversely, OSHA's lab analysts were highly trained. (Tr. 637). Thus, OSHA's method of microvisual estimation was extremely accurate when a senior analyst, like Robinson in this case, was quantifying the sample. (Tr. 636). And, the results in this case were confirmed by a "re-checker," meaning that Robinson used the appropriate techniques, followed the requirements of OSHA Method-191, investigated any problems, and properly documented and transferred the data from his worksheet into the computer. (Tr. 688). In short, Crane concluded the samples taken from Kenton Station were properly collected, analyzed, and quantified.

The Court gives great weight to Crane's testimony that a transmission electron microscope: (i) has too great a magnification where only "a miniscule amount" of the sample would be seen (Tr. 685-86); and (ii) would result in looking at fibers that are so small they might not have much of a health effect from OSHA's perspective. (Tr. 685-86, 695-96). In addition, enhanced magnification could result in quantification errors (i.e. over-quantification). (Tr. 685-86).

The Court also finds Crane rebutted Harvey's assertion that EPA's method should have been used in place of OSHA Method ID-191. In addition, the Court concludes EPA's method does not set the industry standard for analytical testing methods as EPA has a different focus and charge under its statute than OSHA does under the Act.

In summary, the Court concludes OSHA Method ID-191 was a proper and reliable method to analyze the samples sent to the OSHA Technical Center.

3. Are Dust and Debris the Same

To prove a violation of the housekeeping standard, the Secretary must show all surfaces were not maintained as free as practicable from ACM waste and debris and accompanying dust. 29 C.F.R. § 1910.1001(k). The regulation distinguishes between “dust” and “debris,” but it does not define those terms.¹⁷ It does, however, define “ACM” as “material containing *more than 1% asbestos*.” 29 C.F.R. § 1910.1001(b) (emphasis added).

Throughout the investigation, OSHA used the terms “dust” and “bulk” when referring to Samples 31 and 33. For example, the CSHO used the term “dust” in issuing Citation 1, Item 2, but used a Bulk Sampling Worksheet when submitting the samples to the lab. (Ex. C-8 (Bulk Sampling Worksheet)). He listed the samples on that form as “bulk sampling data,” and then he indicated the “Sampling Type” was “Bulk Unknown.” (Ex. C-8 at 1). Robinson described all three samples as “dust” in his lab report. (*See Ex. C-9*¹⁸ (starting the description of each sample with “This dust contains...”). And when asked whether he considered dust samples to be the same as bulk samples, he responded, “Well, just for our purposes, we don’t distinguish between the two.” (Tr. 237).

Crane disagreed with Harvey’s characterization of Samples 31 and 33 as “dust” samples, stating all three samples were bulk samples. (Tr. 619). He made this conclusion, in part, because the material itself was “visible debris on the floor,” not a nearly invisible layer of dust. (Tr. 619; Ex. C-49 at 10). He also noted OSHA did not have a definition of “dust;” instead, OSHA used the term as a general sampling descriptor that could include small debris. (Ex. C-49 at 5, 10)¹⁹. In his

¹⁷ The Court notes just as the standard distinguishes between dust and debris, the collection methods and methodology of testing discussed above, also make that distinction, i.e. between bulk samples and dust.

¹⁸ The lab report can also be found at Ex. C-46 at 37-38, as well as Ex. C-10 at 3-4 (OSHA letter to Bulbul).

¹⁹ The Court rejects Crane’s conclusion that debris is a form of dust. The regulation clearly states “debris and accompanying dust.” Dust flows from debris being broken down – not the other way around.

estimation, the use of the term “dust” throughout OSHA’s lab documentation meant “the bottle was full of loose debris.” (Tr. 649). In his view, whether the sample was called a dust versus bulk sample was irrelevant; instead, what mattered was the manner in which the samples were analyzed. (Tr. 649). Here, the samples were “properly collected and analyzed as a bulk material.” (Ex. C-49 at 10; Tr. 649).

For the following reasons, the Court rejects Crane’s and Robinson’s testimony that debris, bulk samples, and dust are the same and used interchangeably. The Court gives Harvey’s testimony great weight that the terms “dust” and “debris” have different meanings in the industry over the opinion of Crane who argues “dust” and “debris” mean the same thing and can be used interchangeably.

The distinction is important since, as both experts agree, only bulk samples can be analyzed under the OSHA Method ID-191.

First, the Court concludes OSHA’s own wording in its standard denotes a distinction between “waste and/or debris and accompanying dust.” 29 C.F.R. § 1910.1001(k)(1). If OSHA meant them to mean the same, it would have said so. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1202-03, (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), *aff’d per curiam*, 442 F. App’x 570 (D.C. Cir. 2011) (unpublished). As Harvey noted, making a distinction between “bulk” and “dust” is standard in the industry (Tr. 534, 544) and is consistent with the structure and reading of the standard.

Second, under established Commission precedent, the wording of the standard is clear. The standard does not define “debris” or “dust” (*see* 29 C.F.R. § 1910.1001(b)), although it does include “accompanying dust” within the term “debris” (29 C.F.R. § 1910.1001(k)). “When determining the meaning of a standard, the Commission first looks to its text and structure,” and

“[i]f the wording is unambiguous, the plain language of the standard will govern.” *Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (OSHRC, July 20, 2021) (quoting *JESCO, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013)). Under a plain reading of the regulation, the term “accompanying dust” is included within the broader term “debris.” In other words, dust comes from debris being broken down. The Court concludes by plainly reading the standard, the terms debris and dust are not interchangeable and mean different things.

While the Court could stop its analysis when it has concluded the language of the standard is clear and unambiguous, a resort to the dictionary definition of those terms supports the Court’s findings. *See Roy Rock, LLC*, 2021 WL 3624785, at *2 (“our precedent makes it clear that an undefined term’s meaning can be determined by consulting a contemporaneous dictionary.”). “Dust” means “earth or other matter in a fine, dry particles” or “any finely powdered substance.” *Dust*, *The Random House Dictionary of the English Language* 443 (1971) (definition 1). “Debris” means “the remains of anything broken down or destroyed.” *Debris*, *The Random House Dictionary of the English Language* 373 (1971) (definition 1). Here, the distinction between “dust” and “debris” is thus one of semantics. *See Sorenson v. U.S. Sec’y of Treas.*, 475 U.S. 851 (1986) (construing statute using a “natural” reading of the text and using common sense rules of grammar to avoid strained interpretation); *see also Unarco Comm. Prods.*, No. 89-1555, 1993 WL 522454, at *4 (OSHRC, Dec. 16, 1993) (“It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result.”). Using the common dictionary terms above, debris must be capable of being broken down and dust is a fine powdered substance which results from that breakdown. A bulk sample is a type of debris. (Crane testimony that there is no distinction between the bulk and debris. (Tr. 617)).

In addition, comparing the definitions of “dust” and “debris” under the common dictionary meaning with those definitions used in the industry, also supports the Court’s conclusion. The American Society for Testing Materials specifically defines “dust” as “material that is smaller than one millimeter in size or at least able to pass through a one-millimeter sieve.” (Tr. 534, 544). “Debris is . . . a chunk of the product that had the asbestos in it.” (Tr. 543). A “bulk sample” can be considered a type of debris (Tr. 546, 554, 617). The Court notes the similarity in which the industry and the experts have defined the terms “dust” and “debris” and how the common dictionary defines them.

A proper distinction is important in determining the validity of the sample or the weight the Court gives to the three samples. Both experts agreed that OSHA Method ID-191 could only be used for “asbestos analysis of bulk material” (Tr. 715), and that it could not be used on dust samples. (Tr. 532-33). Crane explained OSHA typically tested for asbestos *via bulk samples*. (Tr. 616). Bulk samples assisted OSHA in determining the presence of asbestos fibers that could become entrained in the air if they were disturbed by vacuuming or dry sweeping. (Tr. 617). The Court concludes there is a distinction between debris and dust as to when OSHA Method ID-191 can be used to analyze the samples. According both experts great weight, the Court finds OSHA Method ID-191 can only be used to analyze debris or bulk samples

4. Are Any Samples Bulk Samples?

Although the Parties vigorously argued over whether Samples 31 and 33 were dust versus bulk, the distinction is irrelevant here because neither sample contained *more than* 1% asbestos. See 29 C.F.R. § 1910.1001(b) (emphasis added). Specifically, Sample 31 contained 0.01% asbestos, and Sample 33 contained no asbestos. (Ex. C-9). In addition, the Court finds Sample 31 may have been too small of a sample size to obtain an accurate result, rendering its analysis

unreliable. Robinson also recognized that Sample 31 may have been too small for his result to be accurate. (Tr. 222, 246; Ex. C-9). Accordingly, Samples 31 and 33 do not assist the Secretary in her burden to prove a violation of the asbestos housekeeping standard. The Court finds Samples 31 and 33 do not support a finding the standard was violated

The experts both agree Sample 32 was properly analyzed as a bulk sample.²⁰ (Harvey Report, Ex. R-21 at USPS-KENTON-000554; Tr. 556; Crane Report, Ex. C-49 at 10). And, there is no dispute that ashing Sample 32 was proper and the sample size was adequate. (Tr. 249). Also, Harvey did not argue the brush and card method was an improper method for collecting bulk samples for testing. Sample 32 was a bulk sample, and USPS did not argue it was improperly analyzed under OSHA Method ID-191. USPS only argued whether OSHA Method ID-191 was the proper analysis medium to conduct the testing—an argument which the Court has dispensed with. Robinson’s analysis of the ashed sample under a polarized light microscope was positive for chrysotile asbestos, and he ultimately concluded the sample contained 13% chrysotile asbestos. (Tr. 224; Ex. C-9).

USPS urges the Court to disregard Sample 32 because it maintains OSHA’s brush and card method of collection was “not identified in or in compliance with [OSHA Method] ID-191” or any other OSHA policy or procedure. (Resp’t Br. 37). Harvey believed the lack of compliance with the collection method rendered the sample unreliable. The Court previously found the brush and card method was a valid method of collection for the samples submitted to the OSHA Technical

²⁰ The experts disagree as to whether Sample 32 is “debris” or “bulk.” Crane claims there is no distinction and argues Harvey “invented terms” due to his employment in “an abatement industry.” (Tr. 617). Harvey, on the other hand, testified that there was “a slight distinction” between the terms. (Tr. 545). He believes Sample 32 was a bulk sample, meaning a collection of a sample directly from a building material. (Tr. 547). Specifically, Harvey believed Sample 32 was a chunk of the floor planking that was present at Kenton Station. (Tr. 555). As noted above, the Court has found that a bulk sample comes from debris and Sample 32 was a bulk sample.

Center. Moreover, Harvey only attacked the brush and card method as being inappropriate for dust samples, not bulk samples.

Finally, USPS, through Harvey, argued OSHA's method of quantifying the amount of asbestos within Sample 32 was erroneous because OSHA should have used the point counting method used by the EPA. However, as previously found, the Court gives greater weight to Crane's testimony that OSHA's microscopists were highly trained and had the experience necessary to minimize the bias that would lead to inaccurate quantification. In fact, the scientist who analyzed the samples at issue had 16 years of experience. (Tr. 669; *see also* Ex. C-46 at 5-7 (Robinson CV)). The Court also finds it significant that OSHA's lab results were reviewed by a senior analyst, who would "sit side-by-side and look field-by-field" along with the microscopist. (Tr. 667-68). As previously found, OSHA's method of quantifying the amount of asbestos within Sample 32 was proper. The Court concludes the finding of 13% asbestos in Sample 32 is valid and reliable.

Since Sample 32 has been found valid, the Court must determine whether the Secretary proved USPS violated the asbestos housekeeping standard. Subsection (k) of 29 C.F.R. § 1910.1001 is a performance standard. *See Dec-Tam Corp.*, No. 88-523, 1989 WL 406324, at *11 (OSHRCALJ, June 12, 1989) ("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."), *aff'd as modified*, 93 WL 27401 (Jan. 19, 1993). "Under Commission precedent, 'because performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable.'" *Cent. Fl. Equip. Rentals, Inc.*, No. 08-1656, 2016 WL 4088876, at *3 (OSHRC, July 26, 2016) (quoting *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007)). The employer is required to assess only those hazards that a "reasonably prudent employer" would recognize. *W.G. Fairfield*

Co., No. 99-0344, 2000 WL 1535922, at *2 (OSHRC, Oct. 16, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002). A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry. *Id.* at *3.

USPS contends the Secretary failed to prove violation of the standard because Sample 32 was a bulk sample, and OSHA cited USPS for failure to ensure the floors were as free of ACM-*dust*. The Secretary, on the other hand, maintains the flooring at Kenton Station was visibly deteriorating, resulting in ACM-debris being left on the floor, in violation of the housekeeping standard.

As noted previously, the asbestos housekeeping standard requires employers to ensure all surfaces are “maintained as free as practicable of ACM waste and debris and accompanying dust.” 29 C.F.R. § 1910.1001(k). Commission precedent makes clear citations are to be liberally construed, even in cases where a citation may be inartfully drafted. *See Lancaster Enters. Inc.*, No. 97-0771, 2000 WL 1086715, at *4 n.12 (OSHRC, Aug. 1, 2000) (interpreting inartfully drafted citation to include unmentioned area without objection). Here, the Citation provided USPS with ample notice of the violative condition such that it could prepare and present a defense. *Babcock & Wilcox v. Sec’y of Labor*, 622 F.2d 1160, 1164 (3d Cir. 1980) (“Citations must give fair notice to the employer so that it understands the charge being made and has an adequate opportunity to prepare and present a defense.”). The distinction between “dust” and “debris” has little significance when reviewed under the lens of fair notice since the standard requires a workplace be kept clear of asbestos whether it is asbestos dust or asbestos debris. The particularity requirement in Section 9(a) of the Act does not require “minute detail,” but it requires that the employer be given “fair notice of the nature of the alleged violation.” *Meadows Indus., Inc.*, 7 BNA OSHC 1709, 1710-11 (No. 76-1463, 1979). To provide fair notice, the citation “must be drafted with sufficient

particularity to inform the employer of what he did wrong, i.e., to apprise reasonably the employer of the issues in controversy.” *Brock v. Dow Chem.*, 801 F.2d 926, 930 (7th Cir. 1986). Citation 1, Item 2 does just that. Additionally, USPS is not prejudiced by the way the Citation Item was written. USPS advances arguments and presented testimony at trial indicating it was aware of what the Secretary said USPS did wrong. USPS also argued dust when it was favorable to them (collection of the sample) and bulk sample when it was favorable (methodology). In the end, USPS was focused on establishing there was no asbestos greater than 1% in the Kenton facility.

While the presence of 13% chrysotile asbestos in an area of the Kenton Station facility would establish USPS had not engaged in proper housekeeping, the Court will analyze other instances raised by the Secretary to establish a violation of the standard. When evaluating noncompliance with the housekeeping standard, the focus of the Court’s inquiry is whether the employer exhausted all feasible or practicable methods to keep surfaces free of asbestos debris or dust. This requires the Court to evaluate the characteristics of Kenton Station (including locations of ACM) and Kenton Station’s housekeeping schedule. Here, the CSHO observed the floors were worn and dull. He noted dust and debris along the edges of the workroom floor. Walton had also observed dust and noted some areas had not been well-swept. And, the CSHO was never provided with a custodial schedule to determine the frequency with which the floors were cleaned and by what method. (Tr. 149).

Management conceded the floors were worn and “rough” and showed 40 years of wear and tear. Management also offered conflicting testimony about the frequency and method of cleaning the floors. (Tr. 375). Padilla testified that mopping, vacuuming, and sweeping should have been completed on a daily basis. (Tr. 293). Cathcart stated Kenton Station was mopped every three days, while sweeping, dusting, and vacuuming occurred daily. (Tr. 497, 521). Tway testified that

mopping, vacuuming, and sweeping was part of the “daily routine.” (Tr. 385, 402). The Court concludes the testimony demonstrates that regular mopping, sweeping, and vacuuming was required of Kenton Station’s custodians and was done.

However, mopping, vacuuming, and sweeping were insufficient to comply with the housekeeping standard. There is ample evidence that dust and debris were visible along the edges of the workroom floor. (Tr. 79, 330-31; Ex. C-12 (photographs)). Walton noted there was “dirt dust” where “someone didn’t sweep really well,” and the CSHO’s assessment of the flooring was that “it was worn and not cared for continuously.” (Tr. 79, 330-31). And, to the extent the floors were vacuumed, there was no evidence that custodians used a HEPA vacuum,²¹ as required by the housekeeping standard. *See* 20 C.F.R. § 1910.1001(k)(8) (“debris and accompanying dust in an area containing accessible ACM and/or PACM or visibility deteriorated ACM, shall not be dusted or swept dry, or vacuumed without using a HEPA filter”).

Moreover, USPS did not ensure waxing was occurring with sufficient frequency to ensure the ACM flooring remained sealed. The flooring at Kenton Station experienced significant wear and tear since heavy carts were frequently wheeled across the workroom. USPS policy required its facilities’ floors to be waxed, but it did not specify the frequency with which waxing should have taken place. (Ex. C-40 at 121). Padilla testified waxing and sealing should have occurred every six months at Kenton Station. (Tr. 293). Tway insisted he had the floor waxed “every other month,” although he noted it was difficult to get proper staff to do the waxing. (Tr. 385, 404). However, there is no documentation of when waxing took place or of any waxing schedule for the

²¹ Counsel for USPS argued in his opening statement (even though the Court does not take those statements as evidence) that USPS “utilized certain measures” to maintain the condition of the floors, including the use of a HEPA filter and vacuum. (Tr. 33; *see also* Resp’t Br. 13 (“Kenton’s floors were regularly mopped, HEPA-filter vacuumed, waxed and sealed section by section.”)). However, there is no evidence in this record that the vacuum at Kenton Station had a HEPA filter.

facility. It was also clear at the December 2022 and February 2023 inspections the floors were worn and dull—not black and shiny—indicating they had not been waxed often enough. Walton complained about the lack of frequent waxing but testified that management did not respond to her complaints.

Upon review, the Court concludes USPS violated the housekeeping standard. There is evidence USPS could have complied with the housekeeping standard by more frequent waxing and the use of a vacuum with a HEPA filter. *Dec-Tam Corp.*, 1993 WL 27401, at *16. The evidence shows Sample 32—which likely originated from the flooring—contained 13% asbestos, and asbestos-containing dust and debris is precisely the type of hazard the standard was designed to prevent. USPS did not keep the floor as free as practicable of ACM-dust and debris, and there was evidence that proper sealing and removal methods would have reduced the amount of ACM-debris and dust on the floor. The Secretary has carried her burden to establish a violation of the asbestos housekeeping standard.

c. Employees were Exposed to the Hazard

Commission case law has consistently found exposure is measured by an employee's access to the hazard. *See Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). “To establish exposure, ‘the Secretary . . . must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.’” *Delek Refin., Ltd.*, 2015 WL 1957889, at *11 (citing *Fabricated Metal Prods., Inc.*, No. 93-1853, 1997 WL 694096, at *3 (OSHRC, Nov. 7, 1997)).

In this case, USPS knew its floors were composed of ACM that needed to be waxed and sealed. USPS also knew custodial employees were responsible for sweeping and mopping those

floors. Custodial employees are at high risk of exposure to asbestos. *See Occupational Exposure to Asbestos*, 59 Fed. Reg. at 41033 (“OSHA estimates that anywhere from 1.1 million to 3.7 million workers are at risk from asbestos exposure during custodial work.”). According to Crane, custodial workers engaged in sweeping and vacuuming could disturb ACM-dust or debris (like Sample 32) and expose the custodian, or other employees if fibers became airborne, to asbestos. (Tr. 705-06). Although USPS claims Sample 32 was an intact, non-friable piece of debris, the Court credits the evidence that when asbestos is crushed, it can become airborne when it is disturbed. (Tr. 271, 617, 698 (opining that the fact Sample 32 was bound in a matrix did not nullify exposure to a hazard)). The Secretary established exposure to a hazard.

d. USPS had Knowledge of the Violative Condition

Finally, the Court turns to the element of knowledge. “In order to establish knowledge, the Secretary must show that [the employer] knew of, or with the exercise of reasonable diligence could have known, of the noncomplying condition.” *Precision Concrete Constr.*, 2001 WL 422968, at *4. In the absence of actual knowledge, “[c]onstructive knowledge is established where the evidence shows that the employer could have known about the cited condition with the exercise of reasonable diligence.” *Greenleaf Motor Express, Inc.*, No. 03-1305, 2007 WL 962961 at *3 (OSHRC, Jan. 29, 2007).

Kenton Station management was aware of the asbestos survey report and knew the floors at the facility were composed of ACM or PACM. Kenton Station management knew the floors were dull and subject to extensive wear and tear. Kenton Station management knew the floors had to be waxed and sealed due to the presence of asbestos in the flooring materials. Kenton Station management also knew that it was responsible for doing walk-throughs of the facility, which included a review of the cleanliness of the facility. (Tr. 471). Yet, the flooring at Kenton Station

was not properly maintained, and management did not conduct inspections to identify broken flooring or debris. Walton brought issues with the flooring to the attention of management. (Tr. 333, 332). Yet, according to Walton, no action was taken to correct the issue. *See Superior Custom Cabinet Co.*, No. 94-200, 1997 WL 603024, at *6 n.9 (OSHRC, Sept. 26, 1997) (discoverability shows lack of reasonable diligence), *aff'd*, 158 F.3d 583 (5th Cir. 1998) (unpublished).

USPS had actual knowledge of the requirements of the housekeeping standard. Padilla, a USPS senior safety and health specialist, was specifically familiar with USPS's asbestos policies, which cited the housekeeping standard. (Ex. C-40 at 42). She knew or should have known the housekeeping standard prohibited sweeping and required a HEPA vacuum to be used by custodial staff at Kenton Station due to the presence of ACM in the flooring. She also knew the floors had to be waxed and sealed. Yet, in 2022 and 2023, the floors were allowed to wear down, and custodians swept and vacuumed the flooring without—based on this record—a HEPA filter.²²

USPS had a duty to anticipate asbestos-related hazards due to the facility's ACM-flooring, and it failed to properly maintain the floors and provide its custodians with necessary cleaning equipment to avoid a violation of the housekeeping standard. *See Pride Oil Well Serv.*, No. 87-692, 1992 WL 215112, at *6 (OSHRC, Aug. 17, 1992) (reasonable diligence includes an employer's obligation to anticipate hazards to which an employee may be exposed and take measures to prevent the occurrence); *see also New England Tel. & Tel. Co.*, No. 80-6519, 1983 WL 23883, at *6 (OSHRC, Apr. 27, 1983) (stating that employer's "own work rules show it had no difficulty understanding the Secretary's standard"). Knowledge is established.

e. Classification & Penalty

Citation 1, Item 2 was classified as a repeat-serious violation. A violation is repeated if, at

²² See Note 17, *supra*.

the time of the alleged violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 1979 WL 61360, at *3. “Where the citations involve the same standard, the Secretary makes a *prima facie* showing of ‘substantial similarity’ by showing that the prior and present violations are for failure to comply with the same standard. *Offshore Shipbuilding, Inc.*, 2000 WL 1182905, at *4. “The burden then shifts to the employer to rebut that showing.” *Id.* (citation omitted).

Here, the Secretary established that USPS had, on three previous occasions, been cited for a violation of the same housekeeping standard and the citations had become final orders of the Commission by operation of section 10(a) of the OSH Act, 29 U.S.C. § 659(a) (“If . . . no notice [of contest] is filed . . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission”):

1. In 2021, OSHA inspected a USPS facility in West Sacramento, California (Inspection No. 153792), and, on August 27, 2021, issued a citation for a violation of 29 C.F.R. § 1910.1001(k)(1). (Ex. C-22 at 9; *see also* Ex. C-21 (abatement)). That citation became the final order of the Commission. (Tr. 114; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).
2. In 2018, OSHA inspected a USPS facility in Robbinsdale, Minnesota (Inspection No. 1367868), and issued a citation for a violation of 29 C.F.R. § 1910.1001(k)(1). (Ex. C-29 at 6; *see also* Ex. C-28 (abatement)). That citation became a final order of the Commission. (Tr. 114; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).
3. In 2018, OSHA inspected a USPS facility in Edina, Minnesota (Inspection No. 1368195), and, on March 22, 2019, issued a citation for a violation of 29 C.F.R. § 1910.1001(k)(1). (Ex. C-31 at 6; *see also* Ex. C-30 (abatement)). That citation became a final order of the Commission. (Tr. 114; *see also* section 10(a) of the OSH Act, 29 U.S.C. § 659(a)).

USPS has not rebutted this *prima facie* showing of substantial similarity. *See Potlatch Corp.*, 1979 WL 61360, at *3 (noting “it may be difficult for an employer to rebut” a showing of substantial similarity when the repeat designation is based on violations of the same specific standard “because in many instances the two violations must be substantially similar in nature to be

violations of the same standard”). Accordingly, the Secretary established the violation was repeated.

In addition, the Secretary proved the violation was serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a serious violation is deemed to exist when there is a “substantial probability that death or serious physical harm could result” from a condition or practice. “This does not mean that the occurrence of an injury must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if injury does occur.” *Schuler-Haas Electric Corp.*, 2006 WL 1355469, at *8. It is widely recognized that asbestos in the workplace may result in serious injury to workers. *See* 51 Fed. Reg. at 22615 (noting the serious nature of asbestos exposure). The Secretary established a serious violation.

Lastly, the Court will evaluate the Secretary’s proposed penalty of \$61,391. *See* 29 U.S.C. § 666(j) (authorizing the Commission to assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations). Here, asbestos is a well-known carcinogen. Exposure to asbestos is likely to lead to permanent illness. (Tr. 171). OSHA properly evaluated the severity, probability, and gravity of the violation. Specifically, OSHA determined the severity of the violation was high since exposure to asbestos leads to mesothelioma or “a myriad of other cancers which are permanent illnesses.” (Tr. 172). OSHA also determined the probability of exposure was lesser due to the small area where asbestos was found. (Tr. 172). And, based on the severity and probability determinations, the gravity of the violation was listed as moderate. (Tr. 172).

OSHA concluded the base penalty to be \$11,162. (Tr. 173). However, it recommended a 10% increase in penalty due to USPS’s citation history with OSHA. (Tr. 172). It also recommended

the penalty be multiplied because USPS was a large employer with a repeat violation. (Tr. 173). In accordance with the FOM, OSHA applied a multiplier of five to the \$11,162 figure because the violation was repeated violation by a “large” employer, for purposes of penalty calculations. (Tr. 173). The proposed penalty is \$61,391. USPS does not refute any of OSHA’s evidence on, or calculation of, the proposed penalty.

The Court, based on the totality of the evidence, will adjust the penalty for the following reasons. When OSHA initially calculated its penalty, it had factored in there was also ACM-debris in the southwest corner of the workroom floor where, presumably, there would be greater traffic than coming in and out of the women’s restroom. (Tr. 218; Ex. C-8). Second, the CHSO’s testimony indicated he did not take any air sampling since he did not see any concern that asbestos fibers had become airborne. A third consideration is the ACM was in the women’s restroom and not in the large work area where traffic was the greatest. All these factors impact the severity, gravity, and probability assessments of the Secretary.

The Court will assess a base penalty and then apply the 10% increase due to past citation history. However, consistent with what the Secretary did in other Citation Items in this case, the Court will apply a multiplier factor of two. The Court assigns a gravity-based penalty of \$6,000. Adding the 10% increase would bring the penalty to \$6,600. After applying the multiplier of two, the Court assesses a penalty of \$13,200.

Citation 2, Item 1 - 29 C.F.R. § 1910.1200(e)(1)(i).

The Secretary cited USPS for a repeat other-than-serious violation of the hazard communication standard (HCS), which requires the employer to “develop, implement, and maintain at each workplace, a written hazard communication program.” 29 C.F.R. § 1910.1200(e)(1). Subsection (e) requires an employer’s hazard communication program to

include “[a] list of the hazardous chemicals known to be present,” which “may be compiled for the workplace as a whole or for individual work areas.” 29 C.F.R. § 1910.1200(j)(1)(i).

Citation 2, Item 1 described the other-than-serious violation as follows:

29 CFR 1910.1200(j)(1)(i): The employer did not compile a list of the hazardous chemicals known to be present using a product identifier that was referenced on the appropriate safety data sheet.

a) On or about 12/7/2022 and at times prior thereto, at the sorting and distribution area of the Kenton Station facility of the U. S. Postal Service located at 2130 N Kilpatrick St, Portland, OR 97217, where floor tiles known to contain asbestos were visibly deteriorated, postal workers were exposed to asbestos hazards because the employer did not include asbestos on a list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet, such as CAS 1332-21-4.

* * *

(Citation at 10). The Citation Item was classified as a repeat other-than-serious violation, identifying the former violations as follows:

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1584087 citation number 1 item number 2 and was affirmed as a final order on 8/11/2022 with respect to a workplace located at 2650 Richmond Highway, Stafford, [VA] 22554[.]

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1595750 citation number 1 item number 4a and was affirmed as a final order on 8/8/2022 with respect to a workplace located at 2100 16th St., Great Bend, KS 67530.

(Citation at 10).²³ The Secretary proposed a penalty of \$4,910 for the violation. (Citation at 10).

USPS argues the standard does not apply because its workers did not engage in asbestos removal, nor did they handle, package, remit, or transfer asbestos. (Resp’t Br. 43-44). USPS also argues the Secretary “offered absolutely no evidence demonstrating that asbestos was not identified on Kenton’s hazardous chemical list.” (*Id.*). The Secretary maintains USPS knew its

²³ The Court includes in brackets the corrected typo in Citation 2, Item 1.

employees could be exposed to asbestos, which is a hazardous chemical, and were required to keep a hazardous chemical sheet for all chemicals, including asbestos, known to be present at Kenton Station. (Sec’y Br. 50).

a. The Standard Applied

“The test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations where applicability is questioned.” *Unarco Com. Prods.*, 1993 WL 522454, at *5; *Precision Concrete Constr.*, 2001 WL 422968, at *3. Here, the Secretary cited USPS for violating 29 C.F.R. § 1910.1200(e)(1)(i), which lists various hazard communication program requirements. The cited standard is within Subpart Z, which addresses Toxic and Hazardous Substances.

USPS argues the cited standard does not apply because it is not an “employer” under 29 C.F.R. § 1910.1200(c), which defines an “employer” as a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution. USPS argues it is not a business engaged in the use, production, or distribution of chemicals. The Secretary disagrees, arguing asbestos is a chemical present at the Kenton facility; therefore, the HCS applies.

At first blush, USPS’s arguments seem persuasive given the narrow definition of “employer” found in the HCS. And, the Secretary offered no evidence that USPS used, distributed, or produced asbestos. However, reading the HCS and the asbestos standard together, the Court concludes the HCS applies to USPS by way of the asbestos standard’s hazard communication provisions.

A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See Am. Fed’n of Gov’t Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) (“regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section”) (internal quotation marks and citation omitted). The

asbestos standard includes requirements for hazard communication. Specifically, those provisions facilitate “communication of information concerning asbestos hazards in general industry.” 29 C.F.R. § 1910.1001(j). The standard cross-references the HCS as follows: “Chemical manufacturers, importers, distributors, and *employers* shall comply with all the requirements] of the Hazard Communication Standard (HCS) (§ 1910.1200) for asbestos.” 29 C.F.R. § 1910.1001(j)(1) (emphasis added). It is clear by this language that any employer covered under the asbestos standard must comply with the HCS provisions.

USPS is an “employer” covered by the asbestos standard. Specifically, since the asbestos standard does not define “employer,” the standard definition of “employer” set forth in Subpart A of the Act would apply. *See* 29 C.F.R. § 1910.2 (setting forth definitions). An “employer” under that Subpart A means “a person engaged in a business affecting interstate commerce which has employees but, does not include the United States or any State or political subdivision of a State.” 29 C.F.R. § 1910.2(c). USPS admitted in its Answer and Stipulations it was an employer covered under the Act. The Court finds that, under this definition, USPS is an employer for the purposes of the asbestos standard. And, as an employer covered by the asbestos standard, the plain language of the standard requires USPS to comply with the provisions of the HCS. Again, the asbestos standard expressly states: “employers shall comply with *all the requirements* of the Hazard Communication Standard (HCS) (§ 1910.1200) for asbestos.” 29 C.F.R. § 1910.1001(j)(i) (emphasis added). In using this language, the regulation makes clear that HCS’s substantive requirements—not the definition section—apply to employers like USPS regarding asbestos hazard communication. Thus, USPS’s argument the HCS does not apply because USPS is not an “employer” as defined by the HCS fails.

Moreover, reading the standard as promoted by USPS would bring forth an absurd result.

The asbestos standard, which has broader applicability, expressly made the communication standards contained in the HCS apply to employers. It would defy reason for OSHA to indicate the HCS applied to an employer by way of one regulation, i.e., the asbestos standard, but then limit the applicability to the employer by way of the very same regulation it has just explicitly made applicable. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (“Statutes should be interpreted to avoid . . . unreasonable results whenever possible.”); *Unarco Com. Prods.*, 1993 WL 522454, at *5 (“It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result.”). The Court concludes the HCS cited by the Secretary in this Citation Item is applicable to USPS and the cited hazardous condition.

b. Standard was Violated.

USPS argues the Secretary failed to prove the standard was violated because the Secretary “offered absolutely no evidence demonstrating that asbestos was not identified on Kenton’s hazardous chemicals list.” (Resp’t Br. 47). The Secretary argues USPS never offered any evidence it had a hazardous chemical list at Kenton Station at the time of the first inspection, and USPS admitted in its discovery responses the only hazardous chemical list it could locate at Kenton Station was dated December 1, 2023, after OSHA’s inspections.

Here, the CSHO testified he requested a copy of the hazardous chemical list during his first inspection of USPS. He did not receive one. Later, he received a copy of a hazardous chemical list dated December 2023, but no list covering 2022. As a result, he inferred Kenton Station did not have a hazardous chemical list at the time of the inspections. It appears USPS management is unclear on the party responsible for maintaining the hazardous chemical list. In its Hazard Communication Program, USPS identifies “the facility safety coordinator” as the individual responsible for maintaining the hazardous chemical inventory. (Ex. C-42). But, at trial, USPS

witnesses testified local management was responsible for maintaining a hazardous chemical list at each facility. Padilla testified “the local manager” was responsible for maintaining the list. (Tr. 275). Tway similarly testified “the manager is responsible for making sure that the hazardous chemical list is updated.” (Tr. 386). Yet, Cathcart—then-Manager at Kenton Station—was under the impression that “facilities” was responsible for maintaining and updating the list, although she did not elaborate on who was specifically charged with its maintenance. (Tr. 511-13). In short, the testimony and evidence presented by USPS regarding the person responsible for maintaining the list is inconsistent. And, as relevant to the Court’s decision here, USPS offered no evidence to rebut the CSHO’s inference that a hazardous chemical list was not kept on site at Kenton Station in 2022. *See Baker Tank Co.*, No. 90-1786-S, 1995 WL 216828, at *4 (OSHRC, Apr. 10, 1995) (“Although we find the Secretary’s *prima facie* showing to be limited, it is unrebutted. Baker was in a position to know what instructions had been given the employees.”); *see also Astra Pharm. Prods., Inc. v. OSHRC*, 681 F.2d 69, 74 (1st Cir. 1982) (“The ‘evidence a reasonable mind might accept as adequate to support a conclusion’ is surely less in a case like this where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight.”). No one was able to verify that a hazardous chemical list was present at USPS, and no list of hazardous chemicals present at Kenton Station in 2022 was ever entered into evidence. Accordingly, the Secretary met her burden to show a violation of the HCS.

c. Exposure

“In order to meet her burden of establishing the exposure element of her *prima facie* case under the Act, the Secretary must show that it is reasonably predictable, either by inadvertence or otherwise, that employees have been, are, or will be in the zone of danger.” *A.E. Staley Mfg. Co.*,

91-0637, 2000 WL 1535899, at *9 (OSHRC, Oct. 18, 2000) (consolidated), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). The HCS was “designed to enhance employer and employee awareness of the safety and health hazards associated with chemical substances.” Hazard Communication, 48 FR 53280-01, 53327 (Nov. 25, 1983) (to be codified at 29 C.F.R. pt. 1910). This would “increase employee awareness of the potential health hazard and safety risks associated with industrial chemicals . . . [and] should result in increased worker use of personal protective devices [and] improved work practices.” *Id.* at 53328. Here, custodians who regularly cleaned flooring with ACM were not provided with a hazardous chemical list that included asbestos, thus limiting their ability to know and avoid hazards associated with exposure to asbestos. The Secretary established exposure.

d. Knowledge

“Knowledge of the violative condition, either actual or constructive, is an element of the Secretary’s burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence.” *Ragnar Benson, Inc.*, 1999 WL 770809, at *2. “Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a *prima facie* showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 1984 WL 34912, at *4.

Here, USPS management was aware of what a hazardous chemical list was and it must be available at each USPS facility, although they disagreed about who was responsible for its maintenance. (*See supra*). USPS does not argue it was unaware of the HCS. In fact, USPS had a formal hazard communication program that required each facility to maintain an updated inventory

of hazardous chemicals and required a copy of the inventory to be available to employees. (Ex. C-42). The evidence demonstrates USPS, through its own policies and management employees, knew, or with reasonable diligence could have known, that the hazardous chemical list was not present at Kenton Station. The Secretary established knowledge.

e. Classification & Penalty

OSHA classified this Citation Item as a repeat, other-than-serious violation. The other-than-serious classification reflected the violation may not have a direct impact on employee safety and health. (Tr. 174). The severity was deemed minimal with a probability of greater due to the presence of ACM. (Tr. 174-75). OSHA recommended a penalty increase of 10% due to the violation being repeated, with a proposed multiplier of two because the violation was “a paperwork requirement.” (Tr. 175). OSHA proposed a penalty of \$4,910. (Tr. 175-76).

The Court will adopt OSHA’s proposed classification of the Citation Item as other-than-serious. However, after careful review of the prior citations upon which the repeat classification was based, the Court finds the Secretary failed to overcome the argument of USPS that the prior citations were sufficiently similar to warrant a repeat classification. Specifically, none of the prior citations involved a failure to include asbestos in USPS’s hazardous chemicals list. Inspection No. 1584087 resulted in a citation for failure to ensure a list of hazardous chemicals was present at the worksite when “employees had access and exposure to cleaning and sanitizing chemicals.” (Ex. C-34 at 7). Likewise, Inspection No. 1595750 resulted in a citation for failure to update its hazardous chemicals list with “one corrosive chemical and one toxic chemical” found at the workplace. (Ex. C-36 at 9). Neither of these violations involved the failure to include asbestos in a list of hazardous chemicals. *See Monitor Constr. Co.*, No. 91-1807, 1994 WL 39006, at *6 (OSHRC, Feb. 8, 1994) (holding “the disparity of the hazards . . . leads us to find that the present

violation was not repeated”).

Asbestos is central to the violative condition here, particularly given the fact that the asbestos regulation itself renders the HCS applicable under the facts of this case. *See* 29 C.F.R. § 1910.1001(j). And, although the abatement is the same (inclusion of the hazardous chemical in the hazardous chemical list), method of abatement does not control. *See UHS of Westwood Pembroke*, No. 17-0737, 2022 WL 774272, at *12 (OSHRC, Feb. 28, 2022) (concluding the “similarity of abatement is not the criterion for finding a repeat violation; it is whether the two violations resulted in substantially similar hazards . . . to determine whether the hazards are substantially similar, the Commission looks to the circumstances surrounding the violation,” *aff’d*, No. 22-1845, 2023 WL 3243988 (3d Cir. May 4, 2023) (unpublished).

Accordingly, the Court will not classify the violation as repeated. Instead, the Court will affirm Citation 2, Item 1 as an other-than-serious violation and assess a base penalty of \$1,500. The Court will not apply a multiplier since the prior citations cited as final orders to support a repeat classification are not applicable and thus there is no prior history of citations which violate this standard in evidence. The Secretary’s penalty applied a multiplier due to the repeat classification. Since the Court has concluded the violation is not repeated, the penalty is reduced to \$1,500 to factor those considerations out of the penalty. In addition, USPS, as well as its employees, knew about the presence of asbestos in the Kenton facility as the asbestos survey was posted on the safety board.

Citation 2, Item 2 - 29 C.F.R. § 1910.1200(g)(8).

The Secretary cited USPS for another repeat other-than-serious violation of the HCS, this time for 29 C.F.R. § 1910.1200(g)(8), which requires the employer to “maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall ensure that they

are readily accessible during each work shift to employees when they are in their work area(s).” A safety data sheet must include, *inter alia*, identification of the chemical, identification of the hazard, composition and information on ingredients, first aid measures, handling and storage, exposure controls and personal protection, and first-aid measures. 29 C.F.R. § 1910.1200(g)(2).

Citation 2, Item 2 described the other-than-serious violation as follows:

29 CFR 1910.1200(g)(8): The employer did not ensure that Safety Data Sheets were readily accessible during each work shift to employees when they were in their work area(s):

a) On or about 12/7/2022 and at times prior thereto, at the sorting and distribution area of the Kenton Station facility of the U. S. Postal Service located at 2130 N Kilpatrick St, Portland, OR 97217, where floor tiles known to contain asbestos were visibly deteriorated, postal workers were exposed to asbestos hazards because the employer did not include asbestos, CAS 1332-21-4[,] among the safety data sheets provided for employee use at the worksite.

* * *

(Citation at 11). The Citation Item was classified as a repeat other-than-serious violation, identifying the former violations as follows:

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1584087 citation number 1 item number 3b and was affirmed as a final order on 8/11/2022 with respect to a workplace located at 2650 Richmond Highway, Stafford, [VA] 22554[.]

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 1595750 citation number 1 item number 4b and was affirmed as a final order on 8/8/2022 with respect to a workplace located at 2100 16th St., Great Bend, KS 67530.

The U. S. Postal Service was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number [1527873] citation number 1 item number 1b and was affirmed as a final order on 6/30/2021 with respect to a workplace located at 5801 Technology Boulevard, Sandston, [VA] 23150.

(Citation at 11).²⁴

a. Standard Applied

For the reasons set forth above in the Court’s discussion of Citation 2, Item 1, the provisions of the HCS apply to USPS.

b. The Standard Was Violated

USPS argues the HCS was not violated because “it was technologically infeasible for Respondent to obtain SDS for asbestos at Kenton because the manufacturer no longer existed at the time OSHA promulgated the regulation at issue.” (Resp’t Br. 49). USPS claims it provided an alternative means—by way of the asbestos survey report—of alerting employees to the presence, quantity, potential health effects, storage, and emergency procedures related to asbestos in the facility. The Secretary argued the standard was violated because the undisputed evidence was that a safety data sheet for asbestos was not kept at Kenton Station. The Secretary also filed a Motion to Strike any affirmative defense of infeasibility, arguing the affirmative defense was not asserted in USPS’s Answer to the Complaint and was thus waived. USPS in its response to the Motion to Strike argued the Secretary “had an abundance of notice on Respondent’s infeasibility argument,” citing testimony elicited at trial about USPS’s inability to obtain an asbestos safety data sheet.²⁵

Commission precedent is clear: “Failure to plead an affirmative defense excludes that issue from the case.” *Spancrete Ne., Inc.*, No. 86-521, 1991 WL 126565, at *3 (OSHRC, Apr. 30, 1991). The Commission’s Rules of Procedure also require a respondent to raise any affirmative defense in the answer, or “as soon as practicable,” or risk being prohibited from raising the defense at a later stage in the proceeding. 29 C.F.R. § 2200.34(b)(4). “As soon as practicable” means the issue

²⁴ The Court includes in brackets the corrected typos in Citation 2, Item 2.

²⁵ USPS contends it is not asserting an employee misconduct defense, so the Court does not reach the merits of the Motion to Strike as to that affirmative defense.

is raised with enough time for the opposing party to meaningfully respond. *See Field & Assocs., Inc.*, No. 97-1585, 2001 WL 392475, at *4 (OSHRC, Apr. 17, 2001) (agreeing with judge that affirmative defense raised at hearing was not raised “as soon as practicable”).

Here, USPS never moved to amend its Answer to include the affirmative defense of infeasibility. It did not raise the issue at the beginning or at the conclusion of trial. In fact, the defense was never formally raised to the Court until USPS submitted its post-trial brief, which was filed at the same time as the Secretary’s post-trial brief, depriving the Secretary of the opportunity to respond. Moreover, the Court rejects any argument infeasibility was tried by consent. Although testimony at trial reflects that USPS viewed the asbestos survey report as a suitable replacement for the asbestos safety data sheet, this does not put the Secretary on notice that USPS intended to raise a formal affirmative defense of infeasibility.

The Court can summarily reject USPS’s argument that the affirmative defense of infeasibility was encompassed within other affirmative defenses it pled in its Answer. Under Commission Rules, an affirmative defense must specifically be pled in the Answer or within a reasonable time. USPS did not specifically plead infeasibility. *Spancrete Ne., Inc.*, No. 86-521, 1991 WL 126565, at *3. In addition, to adopt the position of USPS the infeasibility defense was encompassed in other affirmative defenses raised in the Answer would operate to deprive the Secretary of fair notice. In short, the Court concludes USPS waived the affirmative defense of infeasibility. *See Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *3 (OSHRC, Dec. 31, 2020) (finding affirmative defense raised for the first time in post-trial brief was waived).

Even if the infeasibility affirmative defense was properly before the Court, USPS would not prevail on the defense. The defense of infeasibility requires an employer to prove: (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or

necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection or an alternative method of protection was used. *V.I.P. Structures, Inc.*, No. 91-1167, 1994 WL 362276, at *2 (OSHRC, July 8, 1994); *A. J. McNulty & Co.*, No. 90-2894, 2000 WL 1490235, at *10 (OSHRC, Oct. 5, 2000). USPS would have the burden of proving infeasibility of compliance. *State Sheet Metal*, No. 90-2894, 1993 WL 132972, at *6 (OSHRC, Apr. 27, 1993). While USPS could prevail in establishing literal compliance with the terms of the cited standard was infeasible because the manufacturer who would have issued the safety data sheet for the asbestos product in Kenton Station was no longer in business, USPS, as discussed below, cannot establish the alternative measure it used contained comparable information to the safety data sheet. *Westvaco Corp.*, No. 90-1341, 1993 WL 369040, at *7 (OSHRC, Sept. 14, 1993).

Here, it is undisputed there was no asbestos safety data sheet at Kenton Station. Therefore, the Court must determine whether the asbestos survey report was a “suitable alternative replacement,” i.e., an effective alternative means of compliance with the cited provision. Under the express terms of section 1910.1200(g), safety data sheets must include, *inter alia*, identification of the hazardous chemical, its composition and ingredients, first-aid measures, fire-fighting measures, accidental release measures, handling and storage, exposure controls and personal protection, physical and chemical properties, stability and reactivity information, toxicological information, and disposal considerations, among others. 29 C.F.R. § 1910.1200(g)(2). If there is no relevant information, the safety data sheet must expressly indicate that no applicable information was found as to that category. 29 C.F.R. § 1910.1200(g)(3).

Here, the asbestos survey report includes information about the location of asbestos, the amount of asbestos in ACMs, and asbestos disturbance potential. This, however, does not cover

all the topics identified in the regulation, nor was it intended to. Instead, the express purpose of the survey was “to determine the quantity, location, and condition of all friable and non-friable [asbestos containing building materials] or suspect [asbestos containing building materials],” as well as identifying recommended response actions. (Ex. C-15 at 7). And, even if the information was contained in the report, it would not comply with the purpose of the HCS, which “provide[s] each worker with the hazards of the chemicals, as well as the means to protect themselves.” Hazard Communication, 59 Fed. Reg. 6126-01, 6127 (Feb. 9, 1994) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926 & 1928).

The Court also finds the regulation does not permit alternative means of providing the information, as OSHA expressly rejected proposals for various alternative methods for their failure to provide adequate information. *See, e.g., id.* at 6150 (“OSHA has decided not to adopt the proposed modification in the final rule. It is clear from the comments of worker representatives and others that the proposed alternative does not provide adequate information and is not as effective as having [safety data sheets].”). In conclusion, since the standard cannot be read to permit a substitute method of compliance, USPS would have had to properly plead the infeasibility defense in its Answer and then prove the elements of the defense. As found above, USPS could not prevail on either of those arguments. *See R & R Builders, Inc.*, No. 88-0282, 1991 WL 11668265, at *10 (OSHRC, Nov. 25, 1991) (“If a specifications standard does not provide for any alternative form of compliance, the fact that the employer has implemented an alternative measure instead of the specified measure cannot, in itself, justify vacating a citation.”). The Secretary has established USPS violated the cited standard.²⁶

²⁶ USPS did not provide any evidence that it applied for a variance. OSHA regulations provide a structured process for employers to seek variances from general industry standards. The process involves submitting a written application to the Assistant Secretary for Occupational Safety and Health, detailing the proposed alternative means of compliance,

c. Exposure

The Secretary proves exposure by showing that it was “reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods.*, 1997 WL 694096, at *3. “[O]ne of the fundamental principles upon which the HCS is built is that employees are entitled to information regarding any chemical which is hazardous and to which they are potentially exposed.” 59 Fed. Reg. at 6150. Here, the lack of an asbestos safety data sheet means that custodians, as well as the rest of the employees working at Kenton Station, did not have access to the information they needed to identify the location of ACM or what personal protective equipment may be available to avoid exposure to asbestos. Yet, custodians were required to clean and maintain flooring with ACM. Exposure is established.

d. Knowledge

“To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation.” *Jacobs Field Svs. N. Am.*, No. 10-2659, 2015 WL 1022393, at *3 (OSHRC, Mar. 4, 2015). Here, the record shows USPS management was aware of the HCS. USPS management also knew there was no asbestos safety data sheet at Kenton Station. Yet, USPS management failed to ensure the asbestos survey report complied with the provisions of the HCS such that it could serve an alternative means of compliance under a properly plead affirmative defense. With the exercise of reasonable diligence, USPS could have known the asbestos survey report did not meet the

and demonstrating that they provide equivalent protection to the OSHA standard. Employers must also notify employees of the variance application and their right to participate in the process. The application must include information such as the name and address of the applicant, the address of the places of employment involved, and a detailed statement of the reasons for seeking a variance. *See* sections 6 and 16 of the Act, and the implementing rules contained in the Code of Federal Regulations (29 C.F.R. §§ 1905 and 1904.38).

requirements of the standard and constituted a violation of the HCS. Knowledge is established.

e. Classification & Penalty

Citation 2, Item 2 was classified as a repeat other-than-serious violation. OSHA determined the severity of the violation was minimal because it was not likely to lead to serious injury or illness. (Tr. 177). However, the probability was greater due to the presence of ACM in the building and the lack of an asbestos SDS at the facility. (Tr. 177). OSHA proposed a penalty increase of 10% because USPS had been cited with a violation within the previous five years. (Tr. 177). And, OSHA recommended a multiplier of two for the violation, resulting in a proposed penalty of \$4,910. (Tr. 178).

The Court will adopt OSHA's proposed classification of the Citation Item as other-than-serious. However, like Citation 2, Item 1, the Court finds the Secretary failed to overcome the argument of USPS the prior citations were not sufficiently similar to warrant a repeat classification. Here, none of the prior citations involved an asbestos safety data sheet. Inspection No. 1584087 resulted in a citation for failure to maintain a safety data sheet for various cleaners like stain remover and bleach. (Ex. C-34 at 9). Inspection No. 1595750 resulted in a citation for failure to maintain a safety data sheet for "Portion Pac 201N corrosive floor cleaner or for Raid Ant & Roach insect killer." (Ex. C-36 at 10). And, Inspection No. 1527873 resulted in a citation for failure to maintain a safety data sheet for chemicals used for cleaning. (Ex. C-39 at 7). Failure to provide an asbestos safety data sheet was not at issue in these prior violations. *See Monitor Constr. Co.*, 1994 WL 39006, at *6 (holding "the disparity of the hazards . . . leads us to find that the present violation was not repeated"). As noted *supra*, asbestos is central to the violative conditions in this case. *See* 29 C.F.R. § 1910.1001(j). Accordingly, the Court will not classify the violation as repeated. Instead, the Court will affirm Citation 2, Item 2 as an other-than-serious violation, assess a penalty

of \$500, and incorporate by reference its findings on the penalty calculation consideration it used for Citation 2, Item 1 as applicable to this Citation 2, Item 2. The Court has assessed the penalty it has recognizing the violation is a record keeping violation. Also, the Court has addressed the factor of good faith in complying with the standard. USPS believed the asbestos survey to comply with the standard, even though its belief was found mistaken. Here USPS did not do nothing. It paid to have an asbestos survey done to comply since it could not get a SDS from the manufacturer who went out of business and it posted it on the safety board for employees to see. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013). Good faith can be a mitigating factor, even if mistaken. See e.g., *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955 (No. 3788, 1997).

ORDER

The foregoing decision constitutes the Court's Findings of Fact and Conclusions of Law in accordance with Commission Rule 90(a), 29 C.F.R. § 2200.90(a). Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

Citation 1, Item 1, alleging a repeat serious violation of 29 C.F.R. § 1910.1001(j)(7)(iv), is AFFIRMED, and a penalty of \$7,260.00 is assessed.

Citation 1, Item 2, alleging a repeat serious violation of 29 C.F.R. § 1910.1001(k)(1), is AFFIRMED, and a penalty of \$13,200.00 is assessed.

Citation 2, Item 1, is AFFIRMED as an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1)(i), and a penalty of \$1,500 is assessed.

Citation 2, Item 2, is AFFIRMED as an other-than-serious violation of 29 C.F.R. § 1910.1200(g)(8), and a penalty of \$500 is assessed.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: March 16, 2026
Denver, Colorado