United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ARCON, INC. Respondent.	:	OSHRC Docket No. 99-1707

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Arcon, Inc. ("Arcon") is an asbestos abatement contractor based in Norfolk, Virginia. From March 9 to 11, 1999, Arcon was engaged in an asbestos abatement project on the MV Cape Lobos in Wilmington, North Carolina.[1] As a result of an inspection of Arcon's work site, the Secretary of Labor ("Secretary") issued 2 citations alleging four serious and eight willful violations of provisions in the asbestos standard for shipyard employment, 29 C.F.R. §1915.1001. She proposed penalties totaling $108,500. Arcon contested the citations, and a

[1] The Cape Lobos is owned by the United States Department of Transportation's Maritime

hearing was held before Administrative Law Judge Nancy J. Spies, who affirmed two serious and three willful items, affirmed four items as serious instead of willful, and vacated one willful and two serious items.[2] She assessed total penalties of $40,450.

The Commission granted Arcon's petition for review of the following issues: (1) whether the Secretary established the presence of asbestos in the dust and the applicability of the standards involved in the affirmed items; (2) whether the Secretary established noncompliance with the requirements of section 1915.1001(g)(7)(ii) as alleged in Citation 2, Item 2c; (3) whether Fourth Circuit precedent should apply to Arcon's unpreventable employee misconduct defense with respect to Citation 1, Item 2b, and Citation 2, Items 1a, 1b and 2b; and (4) whether the judge's penalty assessments were appropriate. For the reasons that follow, we affirm the judge's decision with respect to all items except Citation 2, Items 1a, 1b, and 2b. We assess total penalties of $36,200.

I. BACKGROUND

Arcon's project on the Cape Lobos involved the removal of 1,500 square feet of joiner bulkhead panels containing asbestos. The panels were located on three decks in the accommodation spaces where the ship's crew lived. Arcon assigned three employees, David Poole ("Poole"), Joe Boone ("Boone") and Daryl Jefferson ("Jefferson"), to perform the work. Poole was designated as supervisor of the project. Arcon also hired Phoenix Envirocorp to conduct air monitoring.

On the first day of work on the boat deck, Poole used a Saws-all, a reciprocating saw, to cut one of the panels away from a pipe. Other panels broke apart as the crew removed

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Administration and operated by American Overseas Marine Corporation ("AMSEA").

[2] In Citation 1, the judge affirmed as serious Item 1 for a violation of section 1915.1001(d)(2) and Item 2b for a violation of section 1915.1001(f)(4)(ii). In Citation 2, she affirmed as willful Item 1c for violation of section 1915.1001(h)(2)(i); Item 2c for a violation of section 1915.1001(g)(7)(ii); and Item 2e for violation of 1915.1001(o)(3)(i). She affirmed as serious instead of willful Citation 2, Item 1a, for violation of section 1915.1001(c)(1); Item 1b, for violation of section 1915.1001(c)(2); Item 2b, for violation of section 1915.1001(g)(2); and

them. According to employee Boone, "if you touch[ed] them, the stuff would just fall out." Air monitoring conducted on the first day by Phoenix Envirocorp's field technician, Warren Plautz ("Plautz"), showed that employee Jefferson's exposure to airborne asbestos fibers during a 30-minute excursion sample was 3.49 fibers per cubic centimeter of air, which is three times more than the permissible exposure limit of 1.0 fibers per cubic centimeter for a 30 minute sampling period. A second sampling showed that Jefferson's exposure to airborne asbestos fibers over an 8-hour time weighted average was .32 fibers per cubic centimeter of air which is 3.2 times the permissible exposure limit for that time period. Plautz informed Poole of the high fiber counts and also telephoned his own supervisor, Phoenix Envirocorp general manager Thomas Green ("Green"), to request assistance. Green contacted Arcon's safety and environmental manager, Cynthia J. Morey ("Morey"), informed her of the high air sampling results and recommended that the boat deck area be contained and cleaned before work proceeded to another area of the vessel. Morey told Green to tell Poole to shut the job down, but Green informed her that Poole was not being cooperative with air monitor Plautz and that Morey should give Poole the instruction herself. Morey notified Arcon president Arthur Hawthorne ("Hawthorne"), who telephoned Poole at the job site. Poole told Morey and Hawthorne that the sampling results were high "because of the way [he] started removing the panels" and that "a chunk" of wallboard probably "fell on the [air monitoring] cassette." Poole did not inform Morey and Hawthorne of the deteriorated condition of the panels or that he used a saw to cut one of the panels away from a pipe.

That night, Poole made a ten-hour round trip to Arcon's office in Virginia to obtain an airless sprayer and negative air unit. The following morning on March 10, 1999, Poole and his crew proceeded with work on the poop deck, which was located below the boat deck. Although Plautz's sampling results did not show excessive levels of airborne asbestos fibers on that date, Green contacted Morey again to report that he was concerned that Poole had not

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Item 2d for violation of 1915.1001(g)(8)(v).

taken appropriate steps to contain and clean the boat deck before proceeding with work on another deck.

The following morning on March 11, 1999, as Arcon was preparing to begin asbestos removal on the upper deck, first assistant engineer Gregory Baccari, the AMSEA official responsible for approving Arcon's work area, told Poole that he would not approve the containment until Arcon corrected the tears, holes and gaps in the polyethylene sheeting that was used to contain the area and covered the open area overhead where ceiling panels had been removed. When Baccari later returned to the work area, he found that Arcon had proceeded with the work without correcting the containment deficiencies. He described the area as "knee deep" in broken panels with visibility so diminished by dust that "it was as if you were looking through a cloud."

Later that same morning, Allen Mosby ("Mosby"), a compliance officer from the North Carolina Department of Health and Human Services, boarded the vessel to investigate an anonymous complaint concerning the manner in which Arcon was performing asbestos removal. Mosby observed and photographed the dust and debris in Arcon's work area and the openings in the polyethylene sheeting that was used to contain the area. He also collected samples of the wallboard debris. Based on his inspection, he ordered Arcon's employees to leave the ship and cited Arcon under North Carolina's Asbestos Abatement Program for failure to obtain appropriate permits and supervisory accreditation to perform regulated asbestos abatement in the state of North Carolina. He also referred the case to the United States Occupational Safety and Health Administration (OSHA) for possible workplace safety and health violations. OSHA compliance officer Andrea Reid ("Reid") conducted an investigation, and as a result of her investigation, the Secretary issued the citations in this case.

II. DISCUSSION

A. *Applicability of the Standard*.

In order to establish a violation, the Secretary must show that the standards applied to the cited conditions. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982) (Secretary must establish applicability of cited standard, noncompliance with its terms, employee exposure to the hazard, and employer knowledge of the hazard). On review, Arcon argues that the Secretary failed to prove the applicability of the cited standards because she failed to show that Arcon was engaged in Class II removal of asbestos containing material (ACM) as defined by the asbestos standard.

Section 1915.1001(b) defines Class II asbestos work as "activities involving the removal of ACM, which is neither TSI or surfacing ACM."[3] ACM is defined as "any material containing more than one percent asbestos." The standard further states that Class II asbestos work includes "the removal of asbestos-containing wallboard." Here, the record shows that Arcon was engaged in Class II work. In this regard, Mosby testified without rebuttal that test results of a sampling of wallboard debris obtained from the site "came back amosite," which is one of the minerals identified in the definition of "asbestos" in section 1915.1001(b).[4] The record also shows that Arcon admitted in its "Responses to Request for

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[3] The standard states in pertinent part:

> **§ 1915.1001 Asbestos.**
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> …
>
> (b) *Definitions.*
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> …
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> *Asbestos-containing material,* (ACM), means any material containing more than one percent asbestos.
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> …
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> *Class II asbestos work* means activities involving the removal of ACM which is neither TSI or surfacing ACM. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics.

[4] The standard states in pertinent part:

> **§ 1915.1001 Asbestos.**
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> …

Admissions" that the wallboard panels contained amosite asbestos. Indeed, throughout the hearing, Arcon's own witnesses, including president Hawthorne, supervisor Poole, and safety and environmental manager Morey, identified the Cape Lobos project as Class II asbestos work. Morey testified that in developing the Work Plan for the Cape Lobos project, she consulted the OSHA standard for asbestos in shipyard employment and concluded that "it [wa]s a Class II project" in accordance with the classification system set out in the standard. The Work Plan described the project as "Class II Asbestos Work" and contained verbatim the OSHA standard's definition of Class II Asbestos Work in section 1915.1001(b). Accordingly, Arcon's argument, which is raised for the first time in its reply brief to the Commission, that the Secretary failed to make this threshold showing is without merit.

We also find no merit in Arcon's argument that the Secretary failed to prove that the standards applied because she did not establish the presence of asbestos dust at the worksite. The argument is not a valid challenge to the applicability of the cited standards, whose applicability does not depend on whether asbestos dust is present.

Four of the standards cited in Citation 2, however, are violated only when employee exposure to asbestos fibers exceeds permissible limits.[5] To establish such exposures, the Secretary relied on air monitoring results obtained by Phoenix Envirocorp's air monitor Plautz, who conducted onsite analysis by using a method called Phase Contrast Microscopy

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> (b) *Definitions.*
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> …
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> *Asbestos* includes chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that has been chemically treated and/or altered.

[5] Item 1a of Citation 2 alleges that employee Jefferson was exposed to an 8-hour time-weighted average ("TWA") of 3.2 times the permissible limit allowed by the standard in section 1915.1001(c)(1); Item 1b alleges that on March 9, 1999, Jefferson's excursion sample was three times the permissible excursion limit in section 1915.1001(c)(2); Item 1c alleges that Arcon failed to provide overexposed employees with adequate respiratory protection in violation of section 1915.1001(h)(2)(i); and Item 2b alleges a violation of 1915.1001(g)(2) for failure to use appropriate controls to achieve compliance with the PEL.

("PCM"). Plautz explained that this method involves cutting a small wedge from the air sampling cassette filter, placing it on a slide under a microscope, prepping it with acetone and triacetin, and counting as an asbestos fiber any fiber at least 5 micrometers with a length-to-diameter ratio of 3 to 1. The PCM method is consistent with the "counting rules" set forth in Appendix A of the standard, which requires employers engaged in asbestos work to monitor employee exposure to asbestos fibers by counting "only fibers equal to or longer than 5 micrometers," and "[i]n the absence of other information, count[ing] all particles as asbestos that have a length-to-width ratio of 3 to 1 or greater."

Notwithstanding Plautz's adherence to the method prescribed by Appendix A, Arcon suggests that the Secretary was required to conduct her own independent analysis of Phoenix Envirocorp's samples. It relies on Plautz's testimony that PCM does not distinguish between asbestos and non-asbestos fibers that may also meet the same length and length to width requirements. There is no basis for this position. The Commission has held that the "painstaking, microscopic measurement of samples required by Appendix A" is sufficient to establish the level of airborne concentration of asbestos fibers in the work place. *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2084, 1991-93 CCH OSHD ¶ 29,942, p. 40,925 (No. 88-523, 1993). Once the Secretary shows that an airborne contaminant is present at a level exceeding the permissible limit, the burden shifts to the employer to rebut by showing that the results were not reliable. *EBBA Iron, Inc.*, 17 BNA OSHC 051, 1052, 1993-95 CCH OSHD ¶ 30,685, p. 42,585 (No. 92-3189, 1995). The Secretary here presented evidence that Phoenix Envirocorp's sampling and analysis were performed as required by Appendix A of the standard and that the results showed airborne asbestos fibers in excess of permissible limits. The record does not support Arcon's contention that there were "numerous sources" of dust or fibers on the vessel. There is no evidence that the fibers counted in the Phoenix Envirocorp sampling came from any source other than the asbestos panels. Plautz did not state that any of the fibers counted in his sampling were from non-asbestos material. Therefore, we find that the Secretary established exposure to asbestos fibers in excess of

permissible limits.

We also find no merit in Arcon's argument that the judge acted inconsistently by vacating the section 1915.1001(j)(2)(iv) allegation in Citation 1, Item 3, for lack of evidence of asbestos dust and not vacating the other items on the same basis.[6] The item is factually distinguishable. Section 1915.1001(j)(2)(iv) requires that the surfaces of containers filled with ACM be cleaned prior to their removal from a regulated area. To prove a violation, the Secretary relied on Mosby's testimony that he observed and photographed "some type of dust covering the outer shell of the bags" that were sitting inside Arcon's truck in the parking lot outside the Cape Lobos. The judge, however, found that Mosby's testimony did not establish that the dust on the bags was ACM. The judge noted that Mosby did not observe Arcon employees with the bags prior to removal from the regulated area, and there was no evidence to determine when the dust had collected on the bags. Mosby did not test the dust on the bags, and Arcon presented rebuttal testimony by supervisor Poole that he had cleaned the bags before removing them from the regulated area. In contrast, the affirmed items were based on conditions inside Arcon's work area onboard the ship where it was engaged in Class II asbestos work. There is no basis for Arcon's argument that the affirmed items "suffer from the same infirmity" as Citation 1, Item 3.

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[6] The standard provides:

> **§ 1915.1001 Asbestos**.
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> …
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> (j) *Hygiene facilities and practices for employees*.
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> …
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> (2) *Requirements for Class I work involving less than 25 linear or 10 square feet of TSI or surfacing and PACM, and for Class II and Class III asbestos work operations where exposures exceed a PEL or where there is no negative exposure assessment produced before the operation*.
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> …
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> (iv) All equipment and surfaces of containers filled with ACM must be cleaned prior to removing them from the equipment room or area.

B. ***Did the Secretary establish that Arcon failed to use a method prescribed by section 1915.1001(g)(7)(ii) as alleged in Citation 2, Item 2c?***[7]

The Secretary charged Arcon with a violation of section 1915.1001(g)(7)(ii) for failing to use impermeable dropcloths on the surfaces beneath all removal activity and failure to use critical barriers or another method to prevent migration of airborne asbestos from the regulated work area. The judge affirmed the violation based on testimony by Mosby and Baccari regarding gaps and tears in the polyethylene sheeting that Arcon used both to cover the floor and enclose the work area on March 11, 1999.

Arcon argues that the item should be vacated because the Secretary failed to prove that airborne asbestos migrated from the regulated areas. Arcon points to no provision of the standard to support this argument, nor do we find any language that requires such a showing. In fact, the purpose of the standard is "to ensure that airborne asbestos does not migrate from

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[7] The standard provides:

> **§ 1915.1001 Asbestos**.
> …
> (g) *Methods of compliance —*
> …
> (7) *Work practices and engineering controls for Class II work.*
> …
> (ii) For all indoor Class II jobs, where the employer has not produced a negative exposure assessment pursuant to paragraph (f)(2)(iii) of this section, or where during the job, changed conditions indicate there may be exposure above the PEL or where the employer does not remove the ACM in a substantially intact state, the employer shall use one of the following methods to ensure that airborne asbestos does not migrate from the regulated area;
> (A) Critical barriers shall be placed over all openings to the regulated area; or,
> (B) The employer shall use another barrier or isolation method which prevents the migration of airborne asbestos from the regulated area, as verified by perimeter area monitoring or clearance monitoring which meets the criteria set out in paragraph (g)(4)(ii)(B) of this section.
> (C) Impermeable dropcloths shall be placed on surfaces beneath all removal activity;

the regulated area." It applies to all indoor Class II jobs where the employer has not produced a negative exposure assessment in accordance with paragraph (f)(2)(iii),[8] where changed conditions indicate there may be exposure above the PEL, or where the employer does not remove the ACM in a substantially intact state. It was undisputed that Arcon did not produce a negative exposure assessment or remove the asbestos panels in a substantially intact state. The failure to do either of those things requires compliance with the methods set out in the standard:

> (A) Critical barriers shall be placed over all openings to the regulated area; or,
> (B) The employer shall use another barrier or isolation method which prevents the migration of airborne asbestos from the regulated area, as verified by perimeter area monitoring or clearance monitoring which meets the criteria set out in paragraph (g)(4)(ii)(B) of this section.
> (C) Impermeable dropcloths shall be placed on surfaces beneath all removal activity;

Arcon does not dispute that it failed to use impermeable dropcloths on surfaces beneath all removal activity. Therefore, noncompliance with paragraph C is established.

Arcon also does not dispute that it failed to use critical barriers in accordance with paragraph A.[9] Instead, it appears to argue that it complied under paragraph B by using a negative air machine as "another barrier or isolation method." However, the standard requires that when another barrier or isolation method is used in lieu of critical barriers, employers must measure the effectiveness of the alternative method by conducting perimeter area monitoring or clearance monitoring in accordance with paragraph (g)(4)(ii)(B), which states in pertinent part:

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[8] A negative initial exposure assessment under section 1915.1001(f)(2)(iii) requires employers to demonstrate by objective data that employee exposures will be below the PEL. *See e.g., Tierdael Constr. Co.*, 340 F.3d 1110, 1116 (10th Cir. 2003).

[9] Section 1915.1001(b) defines critical barriers as "one or more layers of plastic sealed over all openings into a work area or any other physical barrier sufficient to prevent airborne asbestos in a work area from migrating to an adjacent area."

> [E]mployers shall use another barrier or isolation method which prevents the migration of airborne asbestos from the regulated area as verified by perimeter area monitoring showing that clearance levels contained in 40 CFR Part 763, Subpart E of the EPA Asbestos in Schools Rule are met, or that perimeter area levels, measured by Phase Contrast Microscopy (PCM) are not more than background levels representing the same area before the asbestos work began.

We find no evidence of either type of monitoring. The data from Plautz's PCM analysis of nine air samples obtained at locations inside and outside the regulated area on March 11, 1999, identified no perimeter or clearance monitoring. Arcon does not contend that it conducted the required monitoring, but argues that compliance was met because "exposure levels" were below the PEL and "on-site sample results [were] well within the regulatory requirements." However, the standard's requirements are quite specific. Paragraph B specifies that perimeter or clearance monitoring be conducted to verify the effectiveness of an alternative method. Neither "exposure levels" nor "on-site sample results" are recognized as appropriate means of verifying the effectiveness of a barrier or isolation method under paragraph B. Because the monitoring data recorded by Plautz shows no perimeter or clearance monitoring on March 11, 1999, we find that the Secretary established noncompliance with the requirements of the standard.

The other elements of the Secretary's case were established and are not at issue on review. Accordingly, we affirm Citation 2, Item 2c.

C. *Should Fourth Circuit precedent apply with respect to Arcon's unpreventable employee misconduct defense in Item 2b of Citation 1, Item 1a and 1b of Citation 2, and Item 2b of Citation 2?* [10]

In affirming four of the items cited by the Secretary, the judge found that Poole's actual knowledge of the violative conditions was imputable to Arcon and rejected Arcon's

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[10] In its brief, Arcon also lists Citation 1, Items 1a and 1b, but does so in reference to the judge's decision at page 18 where *Citation 2*, Items 1a and b, are discussed. Citation 1 alleges only Item 1, with no subitems. Arcon's inclusion of Citation 1, Items 1a and 1b , thus appears to be a typographical error.

claim that the violative conditions were the result of Poole's unpreventable employee misconduct. On review, Arcon does not dispute that Poole had actual knowledge of the violative conditions but argues that his conduct cannot be imputed to Arcon because the Secretary failed to show that his actions were foreseeable and preventable. Arcon correctly points out that under Fourth Circuit precedent, in order to impute a supervisor's actual or constructive knowledge where the violation is based on supervisory misconduct, the Secretary must prove that the supervisor's acts were foreseeable or preventable. *L.R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1240 (4th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998); *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396, 401-2 (4th Cir. 1979). Since either party in this case can appeal to the Fourth Circuit because the cited conditions occurred in North Carolina and Arcon's principal offices are located in Virginia, sections 11(a) & (b) of the Act, 29 U.S.C. § 660(a)&(b), we will apply Fourth Circuit precedent in deciding whether the Secretary established that Poole's conduct here was imputable with regard to the four violations. *North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 n. 8, 2001 CCH OSHD ¶ 32,391, p. 49,814 n. 8 (No. 96-0721, 2001) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied that circuit's precedent in deciding a case, even though it may differ from the Commission's precedent").

1. Citation 1, Item 2b: Citation 1, Item 2b, alleges a violation of section 1915.1001(f)(4)(ii), which requires additional exposure monitoring whenever there is a change in process, control equipment, personnel or work practices that may result in new or additional exposures above the PEL or when an employer has any reason to suspect that a change may result in new or additional exposures above the PEL.[11] The Secretary alleges

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[11] The standard states:

> **§ 1915.1001 Asbestos**.
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> ...
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> (f) *Exposure assessments and monitoring* – ... (4) *Termination of monitoring.*

that the violation occurred after the saw and crowbar were used to remove the panels and Arcon was notified that exposures exceeded the PEL.

To establish that a supervisor's conduct is foreseeable and preventable, the Secretary must show inadequacies in employer's safety program, training or supervision, based on whether the employer had established work rules designed to prevent the violation, adequately communicated those rules to its employees, took steps to discover the violations, and effectively enforced the rules when violations were discovered. *North Landing Line Constr.*, 19 BNA OSHC at 1473, 2001 CCH OSHD at p. 49,814-15. Although the judge did not cite Fourth Circuit precedent, she appeared to address the issues of forseeability and preventability in her finding that Arcon's "prior understanding of Poole's personality and of his response to events on the Cape Lobos" was sufficient to impute Poole's actual knowledge of the violative conditions to Arcon. We cannot agree with the judge's finding.

The evidence does not show that Arcon had a prior understanding of "Poole's personality" that put it on notice that Poole would disregard hazardous conditions on the job. The evidence does show that after the start of the project, information provided to Arcon management from both Phoenix Envirocorp and Poole himself regarding Poole's conduct on the Cape Lobos gave the company sufficient notice that Poole was not conducting the work with sufficient attention to safety. At the conclusion of the first workday on March 9, 1999, Phoenix Envirocorp supervisor Green telephoned Morey to report the overexposures during

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> ... (ii) *Additional monitoring*. Notwithstanding the provisions of paragraph (f)(2) and (3), and (f)(4) of this section, the employer shall institute the exposure monitoring required under paragraph (f)(3) of this section whenever there has been a change in process, control equipment, personnel or work practices that may result in new or additional exposures above the permissible exposure limit and/or excursion limit or when the employer has any reason to suspect that a change may result in new or additional exposures above the permissible exposure limit and/or excursion limit. Such additional monitoring is required regardless of whether a "negative exposure assessment" was

removal on the boat deck. Although Green mistakenly reported that employee Jefferson's excursion sample results showed exposure to 35.5 fibers per cubic centimeter of air, instead of 3.5, both Morey and Green agreed that the decimal point was probably misplaced. Morey testified that she recognized at the time that "even if it was a math error and should [have been] 3.55, it identified that there were dust control problems or something had happened inside the work space." When Morey told Green to tell Poole to shut the job down, Green informed her that Poole was not cooperating with air monitor Plautz and that Morey should give Poole the instruction herself. Morey did not tell Poole to shut the job down nor did she provide him with instructions on how to proceed. She and Arcon president Hawthorne contacted Poole, who reported that he thought the high exposures were caused by "the way [he] started removing the panels" and that "it was probably a chunk that fell on the [monitoring] cassette." Hawthorne testified that Poole also reported that the ship's engineer was "unhappy" with the way Arcon was performing the removal work and had requested that additional safety measures be taken, but that Poole dismissed the requested safety measures as "totally unnecessary." On March 10, 1999, Green again contacted Morey to alert her to Poole's lack of cooperation in following Phoenix Envirocorp's recommendation to contain the boat deck area and install microtraps, a local exhaust ventilation system, to clear the area of airborne asbestos fibers. Morey made no effort to resolve the complaint regarding Poole's lack of cooperation with the air monitor, but instead "assumed that Mr. Poole had met whatever requirements that Mr. Green or Warren Plautz had recommended as a process monitor for him to continue the job."

Arcon argues that the Secretary cannot rely on the communications between Green, Morey, Hawthorne and Poole as a basis for showing that Poole's conduct was foreseeable and preventable because they occurred after Poole had used the saw in violation of a company work rule. However, the violative conduct cited in Citation 1, Item 2b, is not based

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previously produced for a specific job.

on Poole's use of the saw but on Arcon's failure to comply with the standard *after* Poole used the saw and Arcon was notified about overexposures at the work site. We find that the repeated complaints regarding Poole's lack of cooperation with Plautz, as well as Poole's own admissions about the manner in which he was conducting the project, should have alerted Arcon management of the need to do more than just "assume" that Poole would take appropriate safety measures. Based on Arcon's inadequate supervision of Poole in failing to take steps to discover the violative conduct after learning of problems at the jobsite, we conclude that the Secretary has established that Poole's conduct was both foreseeable and preventable. Arcon does not otherwise challenge the violation, and therefore, we affirm item 2b of Citation 1.

2. Citation 2, Items 1a, 1b, and 2b. Citation 2, Items 1a, 1b, and 2b allege violations of sections 1915.1001(c)(1), 1915.1001(c)(2), and 1915.1001(g)(2), respectively.[12]

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[12] The cited provisions of the standard state:

> **§ 1915.1001 Asbestos.**
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> …
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> (c) *Permissible exposure limits (PELS) —*
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> (1) *Time-weighted average limit (TWA).* The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an eight (8) hour time-weighted average (TWA), as determined by the method prescribed in appendix A to this section, or by an equivalent method.
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> (2) *Excursion limit.* The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 1.0 fiber per cubic centimeter of air (1 f/cc) as averaged over a sampling period of thirty (30) minutes, as determined by the method prescribed in appendix A to this section, or by an equivalent method.
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> …
>
> (g) *Methods of compliance —*
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> …
>
> (2) In addition to the requirements of paragraph (g)(1) of this section above, the employer shall use the following control methods to achieve compliance with the TWA permissible exposure limit and excursion limit prescribed by

In Citation 2, Item 1a, the Secretary alleges that Arcon failed to ensure that no employee was exposed to an airborne concentration of asbestos in excess of an 8-hour TWA of 0.1 fibers per cubic centimeter as required by section 1915.1001(c)(1). She alleges in Item 1b that Arcon failed to ensure that no employee was exposed to an airborne concentration of asbestos in excess of 1.0 fiber per cubic centimeter of air over a 30-minute sampling period as required by section 1915.1001(c)(2). In Item 2b she alleges a violation of section 1915.1001(g)(2) for Arcon's failure to use adequate control methods to achieve compliance with the permissible 8-hour TWA and excursion limits.

The judge affirmed all three items based on Phoenix Envirocorp's air-monitoring results showing that on the morning of March 9, 1999, crew member Jefferson's exposure exceeded the permissible 8-hour TWA and 30-minute excursion limits.

In addressing the issue of whether Poole's conduct in violating these three standards was foreseeable or preventable, the parties focus on the question of whether Arcon had a work rule prohibiting the use of a saw to remove ACM. Arcon argues that both its Cape Lobos Work Plan and its Process Control Procedure contained a rule prohibiting the use of

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paragraph (c) of this section;

(i) Local exhaust ventilation equipped with HEPA filter dust collection systems;

(ii) Enclosure or isolation of processes producing asbestos dust;

(iii) Ventilation of the regulated area to move contaminated air away from the breathing zone of employees and toward a filtration or collection device equipped with a HEPA filter;

(iv) Use of other work practices and engineering controls that the Assistant Secretary can show to be feasible.

(v) Wherever the feasible engineering and work practice controls described above are not sufficient to reduce employee exposure to or below the permissible exposure limit and/or excursion limit prescribed in paragraph (c) of this section, the employer shall use them to reduce employee exposure to the lowest levels attainable by these controls and shall supplement them by the use of respiratory protection that complies with the requirements of paragraph (h) of this section.

the saw. The Secretary argues that neither document, nor any other aspect of Arcon's safety program, established or communicated a work rule prohibiting the use of the saw. The presumption underlying these arguments is that a safety rule prohibiting the use of the saw would have prevented the violative conditions. Yet, while it is undisputed that the use of the saw increased the level of dust, the record does not show that the use of the saw was the sole or predominant cause of the excessive exposures. The evidence shows that the deteriorated panels were crumbling and falling apart during removal, and as the judge stated, the high exposure levels resulted not from the use of the saw alone, but "primarily from [Arcon's] failure to anticipate the friable quality of the ACM."

The question of whether Poole's conduct was foreseeable or preventable was answered by testimony Morey gave at the hearing. Morey testified that she conducted a briefing with Poole on February 26, 1999, to review the Cape Lobos Work Plan. She testified that she emphasized to Poole that if the material became friable during the job, he was to stop work and contact her. The Secretary did not address this testimony. Aside from her arguments regarding the lack of a work rule to prohibit the use of the saw, the Secretary did now show any inadequacy in Arcon's safety program, training, or supervision until the end of the first workday when Morey and Hawthorne failed to take appropriate steps to discover violative conditions after being alerted to problems with the Cape Lobos project. These three violations are all alleged to have occurred before Morey and Hawthorne received that information. We therefore find that the Secretary failed to establish that Poole's misconduct was foreseeable and preventable on the first day of work before Arcon's upper management was alerted to problems at the site. Accordingly, we vacate Citation 2, Items 1a, 1b, and 2b, for violations of sections 1915.1001(c)(1), 1915.1001(c)(2), and 1915.1001(g)(2), respectively.

D. ***Whether the penalties assessed by the judge were appropriate.***

In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). Arcon is a small employer with no history of prior violations within the past three years. The judge found good faith was demonstrated by evidence of Arcon's written safety program and employee training program. She found high gravity based on evidence of employee exposure to airborne asbestos and compliance officer Reid's testimony that exposure to asbestos fibers is associated with asbestosis, mesothelioma, and lung cancer.

Arcon does not dispute that exposure to airborne asbestos can cause life-threatening disease. However, it argues that the penalties were improper because the Secretary failed to introduce test results to show that the panels were ACM or that the fibers counted in the samples obtained and analyzed by air monitor Plautz were asbestos fibers. As discussed previously, Plautz analyzed the sampling in accordance with the counting method prescribed by Appendix A of the standard and results showed the presence of asbestos fibers. The record contains no evidence that Plautz's sampling methods and analysis were unreliable. Therefore, Arcon's argument does not provide a basis in general for modifying the judge's penalty assessments.

However, we have reduced the total penalty to reflect the items we have vacated. With respect to grouped items 2b and 2d of Citation 2, where the judge assessed $1900, we have assessed $950 to reflect the vacation of item 2b.

ORDER

Accordingly, we affirm the judge's decision with respect to Citation 1, Items 1 and 2b, and Citation 2, Items 1c, 2c, 2d, and 2e. We vacate Citation 2, Items 1a, 1b, and 2b. We assess a total penalty of $36,200.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: July 1, 2004

)))))))))))))))))))))))))))))))),
Secretary of Labor, *
Complainant, *
*
v. * OSHRC Docket No. **99-1707**
*
Arcon, Inc., *
Respondent. *
)))))))))))))))))))))))))))))))-

Appearances:

Ann G. Paschall, Esq.
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

David H. Sump, Esq.
Guilford D. Ware, Esq.
Crenshaw, Ware & Martin
Norfolk, Virginia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Arcon, Inc., is an asbestos removal contractor based in Norfolk, Virginia. Arcon contests two citations issued to it by the Secretary on September 1, 1999. The citations arose from work Arcon was doing aboard the merchant vessel *Cape Lobos* from March 9 to March 11, 1999.

Citation No. 1 alleges four serious violations of the asbestos standard for shipyard employment, § 1915.1001:

Item 1 alleges a serious violation of § 1915.1001(d)(2), which requires the contractor who creates or controls the source of asbestos contamination to abate asbestos hazards at a multi-employer work site.

Item 2a alleges a serious violation of § 1915.1001(f)(3)(i), which requires the employer to conduct daily monitoring that is representative of the exposure of each employee who is assigned to work within a regulated area who is performing Class I or II work.

Item 2b alleges a serious violation of § 1915.1001(f)(4)(ii), which requires the employer to institute exposure monitoring whenever there has been a change in process, control equipment, personnel or work practices that may result in new or additional exposures above the permissible

exposure limit (PEL) and/or excursion limit or when the employer has any reason to suspect that a change may result in the PEL and/or excursion limit.

Item 3 alleges a serious violation of § 1915.1001(j)(2)(iv), which requires that all equipment and surfaces of containers filled with asbestos containing material (ACM) must be cleaned prior to removing them from the equipment room or area.

Citation No. 2 alleges eight willful violations of the asbestos standard:

Item 1a alleges a willful violation of § 1915.1001(c)(1), which requires the employer to ensure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an 8 hour time-weighted average (TWA) .

Item 1b alleges a willful violation of § 1915.1001(c)(2), which requires the employer to ensure that no employee is exposed to an airborne concentration of asbestos in excess of 1.0 fiber per cubic centimeter of air (1 f/cc) as averaged over a sampling period of 30 minutes.

Item 1c alleges a willful violation of § 1915.1001(h)(2)(i), which requires the employer to select and provide the appropriate respirator where respirators are used.

Item 2a alleges a willful violation of § 1915.1001(g)(1), which requires the employer to use prescribed engineering controls and work practices.

Item 2b alleges a willful violation of § 1915.1001(g)(2), which requires the employer to use certain control methods to achieve compliance with the TWA PEL and excursion limit prescribed by paragraph (c) of § 1915.1001.

Item 2c alleges a willful violation of § 1915.1001(g)(7)(ii), which requires the employer to ensure that airborne asbestos does not migrate from the regulated area.

Item 2d alleges a willful violation of § 1915.1001(g)(8)(v), which requires that the employer comply with certain work practices when performing Class II removal of ACM for which specific controls were not listed in § 1915.1001(g)(8)(iv).

Item 2e alleges a willful violation of § 1915.1001(o)(3)(i), which requires the designated qualified person to perform or supervise specific duties on all worksites where employees are engaged in Class I or II asbestos work.

A hearing was held in Kenansville, North Carolina, on June 26, 27, and 28, 2000. The parties have filed post-hearing briefs. Arcon argues that the Secretary failed to establish that the

dust present at the worksite was, in fact, asbestos. Arcon also argues that the most of the Secretary's evidence was gathered during the course of an illegal search and improper work stoppage. Arcon contends that any violations of the cited standards resulted from unpreventable employee misconduct.

For the reasons discussed below, all of the items are affirmed, with the exception of item 2a and 3 of citation no. 1, and item 2a of citation no. 2.

Background

In February 1999, general contractor Holmes Brothers Enterprises, Inc., was engaged in bulkhead replacement aboard the *Cape Lobos*, located in Wilmington, North Carolina. Holmes Brothers hired Arcon to remove approximately 1,500 feet of bulkhead panels from the ship. Arcon's president Arthur Hawthorne assumed that the panels were an ACM known as transite and bid the job under that assumption. The removal was to be done on the boat deck, the poop deck, and the upper deck (Exh. R-18; Tr. 122, 445-447).

Arcon assigned three employees to the *Cape Lobos* job: David Poole, Darryl Jefferson, and Joe Boone. Poole was selected as the supervisor (Tr. 451). Arcon hired Phoenix Environcorp to do air monitoring (Tr. 628). Arcon's crew arrived at the *Cape Lobos* on March 8, 1999. They walked the work areas and noticed that there was already a great deal of dust on the surrounding surfaces (Tr. 483-485).

The next day, March 9, the employees began preparing the boat deck for the removal work (Tr. 255-256). Warren Plautz, a field technician for Phoenix Environcorp, conducted air sampling that day and his results showed high fiber counts, including a sample that exceeded the PEL for asbestos (Tr. 200-201).

Plautz told Poole that he was getting high fiber counts (Tr. 202). Plautz also called Phoenix Environcorp general manager Thomas Greene and told him about the high fiber counts (Tr. 162). Greene called Cynthia Morey, Arcon's safety director, and told her that Phoenix had an air sample that exceeded the PEL for asbestos and that Arcon needed to stop the removal process until the airborne fiber was under control (Tr. 163). Greene understood that Morey agreed with him and he assumed that the job would be shut down. Plautz called Greene the next

day and told him that Arcon had not shut down the job and had started removing panels in another area of the ship. Work continued the next day, March 10 (Tr. 164-165).

At approximately 8:30 a.m. on March 11, Arcon began work on the upper deck. Poole asked *Cape Lobos* First Engineer Greg Baccari to inspect the containment area before the panel removal began. Baccari inspected the area and refused to approve the containment because the polyethylene (poly) sheeting used for containment had holes and tears in it and was not adequately secured. Baccari told Poole he needed to correct the containment problems and that Baccari would return in half an hour to reinspect the area. At 9:00 a.m. Baccari returned to the area and discovered that Arcon had done nothing to correct the problem with the inadequate poly sheeting and had begun removing bulkhead panels in that area. The removed panels were breaking into small pieces and the airborne dust was so thick that visibility was clouded (Tr. 113-115).

Someone from the crew of the *Cape Lobos* called the North Carolina Department of Health and Human Services (HHS) that morning and complained about the manner in which Arcon was cleaning up the site (Tr. 126, 129). Later that day, the North Carolina HHS sent Allen Mosby in response to the complaint (Tr. 16).

Mosby is an employee of the State of North Carolina conducting compliance inspections for asbestos and lead removal (Tr. 12). The Environmental Protection Agency (EPA) delegated enforcement of the National Emissions Standards for Hazardous Air Pollutants (NESHAP) in North Carolina to the state's HHS. At the time of the inspection, Mosby had state HHS credentials and credentials from EPA to conduct NESHAP inspections (Tr. 14-15). Mosby had no authority to conduct inspections on behalf of the Occupational Safety and Health Administration (OSHA) (Tr. 12).[1]

Subsequent to Mosby's inspection, North Carolina HHS referred the case to OSHA's Raleigh, North Carolina, office. OSHA compliance officer Andrea Reid conducted an inspection of the *Cape Lobos* on April 6, 1999 (Tr. 296-297).

Constitutionality of Mosby's Inspection

[1] North Carolina adopted its own workplace safety and health "state plan," but OSHA retains jurisdiction over federal enclaves and particular industries, such as shipyards and other maritime activities.

An OSHA inspection may often require an investigation into events which happened in the recent past. If properly admissible, evidence of the occurrence need not be disregarded simply because it was not initially discovered by an OSHA compliance officer. At the same time, appropriate defenses may also be raised challenging how the evidence was discovered.

Arcon contends that Mosby's inspection violated its Fourth Amendment rights and that the evidence gathered during his inspection should be excluded. The Secretary contends that Arcon's Fourth Amendment argument is an affirmative defense that Arcon was required to assert in its answer in accordance with Commission Rule 2200.34(b), and that Arcon's failure to do so constitutes a waiver of the argument.

Arcon's Failure to Raise Affirmative Defense in Its Answer

Commission Rule 2200.34(b)(3) and (4) provides:

> (3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."
>
> (4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

Arcon filed its answer on November 22, 1999, without asserting the affirmative defense that the Mosby's inspection was in violation of its Fourth Amendment rights. Arcon took Mosby's deposition on April 26, 2000. Arcon filed a motion for exclusion of evidence on June 12, 2000.

It is noted that Commission Rule 2200.34(b)(4) does not use mandatory language, but states that the employer "may" be prohibited from raising the defense at later stage in the proceeding. The Judge has the discretion to allow the employer to later raise the defense.

Arcon filed its motion for exclusion 2 weeks before the hearing. The propriety of Mosby's inspection was thoroughly litigated by Arcon and the Secretary at the hearing. The Secretary had adequate notice that Arcon was raising this defense and she has made no showing that she was prejudiced by Arcon's failure to assert the defense in its answer. Under similar circumstances involving adequate notice and lack of prejudice, the Commission has found it appropriate to allow the employer to raise an affirmative defense after it has failed to do so in its

answer. *Westvaco Corp.,* 16 BNA OSHC 1374, 1380, fn. 14 (No. 90-1341, 1993); *Bill C. Carrol Co., Inc.,* 7 BNA OSHC 1806, 1810 (No. 76-2748, 1979). Arcon is not prohibited from raising the defense that Mosby's inspection violated its Fourth Amendment rights.

Mosby's Inspection

The *Cape Lobos* was not seagoing at that time in question and so was in reduced operating status, meaning that it had fewer crew members aboard (Tr. 120). The Chief Engineer was absent from the ship at the time of Mosby's visit, leaving First Engineer Baccari in charge. Baccari welcomed Mosby and told him that he would like Mosby to inspect Arcon's job in progress. Baccari accompanied Mosby to Arcon's worksite on the upper deck (Tr. 104).

Arcon does not dispute that Baccari welcomed Mosby aboard and consented to his inspection of Arcon's worksite. The company contends that its worksite was a regulated area over which it had exclusive control, and that Baccari had no authority to consent to a search of the worksite. Arcon argues that it never consented to Mosby's inspection. Contrary to Arcon's assertion, however, the record establishes that Arcon supervisor David Poole did consent to Mosby's inspection.

Mosby described his first encounter with Poole (Tr. 19):

> [I] met with Mr. Poole, Mr. David Poole. I informed him I was on site to do an investigation, that we had received a complaint. I asked him a few questions, and I informed him I would be going into the work area once they returned from lunch. Mr. Poole asked me for documentation. I had showed him my state and EPA credentials to show that I was an employee with the State of North Carolina. He asked me for documents showing I could enter his work area. I informed him I had no documents; that my credentials gave me authority to be on site and to enter his work area.

Poole and his crew left to go to lunch. Mosby returned to his car to retrieve his respirator and boarded that ship again (Tr. 21). Later, Mosby entered the work area on the upper deck enclosed in poly sheeting, where he encountered Poole for the second time (Tr. 25-26):

> Mr. Poole entered the work area and argued with me that I was inside his area, and I had not produced the documents he asked for. I had not signed a waiver, waiving Arcon of any responsibility for me to enter the work area. I argued with him my point that I had showed him my credentials. I did not have to show him a document, and I would not sign a waiver. I had told him several times that I would sign his visitor log showing I was on site and entered his work area.

> Mr. Poole continued to argue. And, at that point, I told Mr. Poole that we would leave the work area but his employees needed to exit the work area also.
> . . .
> I explained to Mr. Poole the reason I was on site, that there [were] problems and I was on ship to do my inspection; that I do not sign waivers. As officers, we do not sign any waivers. I would be glad to sign his visitor log. He asked to see my credentials again and [I] told him again that I would sign his visitor log showing that I was on site and entered his work area. Mr. Poole said, "Well, that's fine"; just to sign his visitor log. At that time Mr. Poole didn't have his visitor log for me to sign. There was not one on site.

Mosby testified that he then told Poole that he was going to finish the inspection and Poole did not object. Mosby completed his inspection, which included taking photographs and collecting samples of the material being removed by Arcon (Tr. 27).

Mosby's testimony is substantially corroborated by Poole. Poole stated that he became upset when he discovered Mosby was in the work area, not because Mosby was conducting an inspection without Poole's consent, but because Mosby was in the containment area without having signed a waiver (Tr. 531-532).

Poole testified (Tr. 533):

> I don't have a problem with somebody coming in, but I want to see their credentials before they do go in. I need a signed piece of paper stating for our records that he did enter our containment.

Poole reiterated that consent to the inspection was not an issue (Tr. 535):

> After he showed me his credentials and said he represented the State, I had no more arguments with the man. I mean, I was just as nice as I could be with him. I just knew that I did not want to leave a mess on the deck. As far as I'm concerned, he should have stayed right there and watched us clean up the mess that we made.

At the hearing, Poole identified a sign in/sign out sheet dated March 11, 1999 (Exh. R-19). Arcon's counsel questioned Poole about this sheet (Tr. 539-540, emphasis added):

> Q.: I notice you have an entry that states, "NC inspector." Is that "Allen Mosby, Junior."
>
> Poole: Yes, sir, that's "B. Allen Mosby, Junior."

Q.: It says, "no waiver." Could you tell the Court what you mean by that?

Poole: The waiver is that he would not acknowledge my sign-in and sign-out sheet that he entered my containment.

Q.: Then, you have another name there, "Jeff Dillinger"?

Poole: Yes, sir.

Q.: "Jeff Dillinger, NC DHHS." Could you tell the Court what that means?

Poole: That means that this was another representative of North Carolina that came in with Allen Mosby. The way I looked at it, his friend or another co-worker, however you want to look at it, were there. And, they were going in and checking out the contained areas that I have already been in, and he wanted to look at it to take pictures and do his little--

Q.: Were they there over your protest?

Poole: Well, actually, I had a protest being that he didn't want to sign my visitor's log. *Other than that, I didn't have a problem with him being there.*

The testimony of Mosby and Poole demonstrates that the point of contention between the two men was that Poole wanted Mosby to sign a "waiver" regarding his entry into the containment area, and Mosby refused to do so. The two men had a misunderstanding as to the terminology used. Poole wanted the visitor's log signed (which he initially called a waiver). Mosby would sign the visitor's log, but not execute a formal waiver. Poole explicitly states several times that he did not object to Mosby's inspection. Failure to object to an inspection constitutes a waiver of Fourth Amendment rights. *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 581 (D.C. Cir. 1985); *Stephenson Enterprises, Inc. v. Marshall,* 578 F. 2d 1021, 1023-1024 (5th Cir. 1978).

Poole consented to Mosby's inspection. Use of evidence gathered in Mosby's inspection does not violate Arcon's Fourth Amendment rights.

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of the Standard

Arcon contends that the Secretary failed to establish that dust found around Arcon's worksites on the *Cape Lobos* contained asbestos. Arcon argues that the Secretary's failure to establish this crucial element of her case invalidates each of the alleged items and subitems. Arcon states, "[T]he Secretary did not introduce a single test result conclusively identifying the presence of asbestos dust on the vessel or in the filters" (Arcon's brief, p. 2).

It is true that the Secretary did not introduce any test results. However, Arcon is incorrect in asserting that the Secretary failed to establish a *prima facie* case establishing the presence of asbestos. Mosby testified that he collected samples of the material being removed by Arcon, and that the samples were identified as amosite asbestos (Tr. 28). Mosby did not give specifics regarding the laboratory testing of the samples and the Secretary did not introduce the lab reports. The Secretary does not address the issue in her brief.

Mosby's single reference to sample results is the only evidence that the material being removed contained asbestos. The evidence is slight, but Arcon did not rebut it in any way. It is sufficient to establish that the material being removed by Arcon was asbestos containing material (ACM). The sections of the asbestos standard cited in the items and subitems apply to the cited conditions.

Item 1: Alleged Serious Violation of § 1915.1001(d)(2)

The Secretary alleges a serious violation of § 1915.1001(d)(2), which provides:

> Asbestos hazards at a multi-employer work site shall be abated by the contractor who created or controls the source of asbestos contamination. For example, if there is a significant breach of an enclosure containing Class I work, the employer responsible for erecting the enclosure shall repair the breach immediately.

When Mosby boarded the *Cape Lobos* on March 11, he took numerous photographs of Arcon's work areas (Exhs. C-1 through C-15, C-21 through C-27). He observed tears and holes in the poly sheeting used to contain the asbestos fibers and he saw dry broken and crumbled ACM on the bare floors (Tr. 23). The failure to contain the friable asbestos resulted in contamination of non-regulated areas (Tr. 35-36, 52).

Arcon does not dispute that fibers from the removed panels had migrated to other areas, but it argues that work done by the general contractor Holmes Brothers prior to its arrival caused the contamination. The Secretary concedes that Holmes Brothers removed such things as corner pieces and moldings before Arcon arrived, which contributed to the asbestos contamination (Tr. 82).

The standard requires the contractor who "created or controls" the source of asbestos contamination to abate the hazards. While it is a fact that some of the asbestos contamination may have been caused by Holmes Brothers, it was Arcon who was in control of the source of the asbestos contamination at the time of Mosby's inspection. Arcon itself acknowledges that it was responsible for the asbestos removal site at the time of Mosby's visit (Arcon's brief, p. 10):

> Each of the sites inspected by Mr. Mosby on March 11 was within a regulated area established pursuant to 29 C.F.R. § 1915.1001. According to § 1915.1001(e)(3), access to regulated areas is limited to authorized persons. Consequently, Arcon not only had the general expectation of privacy working within a closed workplace, but also had a heightened expectation of privacy within a regulated area in which other workers on the site, including Mr. Baccari, were not authorized to enter without permission. There is no evidence that these decks were the joint workplace of any of the other workers on the vessel. Arcon maintained exclusive control over the regulated areas.

Arcon had been on the *Cape Lobos* for three days when Mosby documented the contamination, and Arcon still had not abated the hazard. The Secretary has established that Arcon violated § 1915.1001(d)(2). She alleges that the violation is serious. In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The

likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Overexposure to asbestos fibers can result in asbestosis, mesothelioma, and lung cancer, all potentially fatal diseases (Tr. 304-305). The violation was serious.

Item 2a: Alleged Serious Violation of § 1915.1001(f)(3)(i)

The Secretary alleges a serious violation of § 1915.1001(f)(3)(i), which provides:

> The employer shall conduct daily monitoring that is representative of the exposure of each employee who is assigned to work within a regulated area who is performing Class I or Class II work, unless the employer pursuant to paragraph (f)(2)(iii) of this section, has made a negative exposure assessment for the entire operation.

The Secretary asserts that Arcon was engaged in Class II asbestos work, which § 1915.1001(b) defines as "activities involving the removal of ACM which is neither TSI [thermal system insulation] or surfacing ACM. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics."

Arcon's Work Plan for the *Cape Lobos* project identifies the work as "Class II Asbestos Work" (Exh. R-29).

The cited standard requires the employer to monitor each employee for the entire time that employee is working within a regulated area unless the employer has made a negative exposure assessment pursuant to § 1915.1001(f)(2)(ii). That standard provides:

> For any one specific asbestos job which will be performed by employees who have been trained in compliance with the standard, the employer may demonstrate that employee exposures will be below the PELs[.]

It is undisputed that Arcon could not demonstrate a negative exposure assessment.

The citation alleges:

> Daily monitoring was not representative of the exposure of each employee performing Class II work on 3/10/99 and 3/11/99 in that employees were not wearing air sampling pumps at all times inside the enclosure while the sample was being taken.

Arcon hired Phoenix Environcorp to perform the air monitoring. Warren Plautz was the Phoenix field technician assigned to the job. Reid testified that this item was cited based on her interview with Plautz regarding his observations aboard the *Cape Lobos* (Tr. 307).

One member of the crew was selected to wear a pump each day. Plautz testified that his normal procedure was to distribute the pumps personally to the employees and then to collect the pumps from them himself at the end of the monitoring period. However, on this project Poole told Plautz that we would distribute the pumps to Jefferson and Boone. At lunch breaks or at the end of the work day, Poole would hand the pumps to Plautz who was standing outside the regulated area where the crew was working. Plautz was concerned because the pumps would be turned off when Poole handed them to Plautz. He explained that the pumps should have been on when he received them (Tr. 211-212).

Plautz also cited one instance when he asked for the personal sampling pump, and through the poly sheeting, he saw David Poole reach up above his head and take the pump down from the ceiling where it was suspended (Tr. 212-213). Plautz stated that if an employee was not actually wearing the pump, it would not sample from his breathing zone and would not be representative of employee exposure (Tr. 213).

The three members of the crew, David Poole, Joe Boone, and Darryl Jefferson, each testified that on the days when Boone and Jefferson were being monitored, they wore the personal sampling pump for the entire work period (Tr. 278-290, 426, 498). Jefferson stated that he would turn the pump off when he removed it to go to lunch (Tr. 426, 430).

Poole stated that he hung a pump for an area sample "from the cribbing that the ceilings [were] screwed to with a piece of duct tape hanging from the ceiling so it would be in like the breathing zone" (Tr. 497). The pump hanging from the ceiling was not intended to take a personal sample.

The Secretary has failed to establish that Arcon did not conduct daily monitoring that was representative of each employee's exposure within a regulated area. The three employees working inside the regulated area testified unequivocally that the employee whose exposure was being monitored wore the pump the entire time he was working. The Secretary's case is based on Plautz's speculation that the employees were not wearing the pumps the entire time they were

working. Plautz never saw the employees without the pumps or with the pumps turned off when they were supposed to be wearing them. Item 2a is vacated.

Item 2b: Alleged Serious Violation of § 1915.1001(f)(4)(ii)

The Secretary alleges a serious violation of § 1915.1001(f)(4)(ii), which provides:

> Notwithstanding the provisions of paragraph (f)(2) and (3), and (f)(4) of this section, the employer shall institute the exposure monitoring required under paragraph (f)(3) of this section whenever there has been a change in process, control equipment, personnel or work practices that may result in new or additional exposures above the permissible exposure limit and/or excursion limit or when the employer has any reason to suspect that a change may result in new or additional exposures above the permissible exposure limit and/or excursion limit. Such additional monitoring is required regardless of whether a "negative exposure assessment" was previously produced for a specific job.

The citation alleges:

> During the period including 3/9/99 through 3/11/99, additional periodic exposure monitoring was not conducted when work practices changed, such as after using a Sawzall to cut panels and crowbars to pry panels out of their metal tracks, and after being notified of exposures exceeding the excursion limit.

The first day that Arcon worked aboard the *Cape Lobos*, Poole used a reciprocating saw known as a Sawzall to remove a portion of an asbestos containing panel that enclosed a pipe in the work area. It is undisputed that this was contrary to the work plan designed for this project by Arcon safety manager Cynthia Morey. That plan called for the panels to be removed intact and in non-friable condition (Exh. R-29).

Poole testified regarding the panel around the pipe that he removed (Tr. 499):

> [The workers who installed the panels] cut holes through the panel and ran a pipe through the panel which meant the panel either had to be cut or broken or we could have taken the pipe out, cut the pipe and slid the pipe out which would have been a real costly job to have it retested and all that just to remove an asbestos panel.
>
> Well, I messed up. I took a saw and cut the panel just as soon as -- within about five to ten minutes after getting there and getting started to work to remove so we could get the panels removed. It was within the excursion.

It is significant that Poole himself was the crew member who used the reciprocating saw. Poole was Arcon's supervisor on the site. Poole had worked in the asbestos removal industry

since 1981 and had attended commercial training courses to maintain his certifications (Exhs. R-19-26, R-28; Tr. 476-480). Morey reviewed Arcon's work plan for the *Cape Lobos* with Poole before he left for the site (Tr. 481). Morey was well aware that Poole was an exceptionally eager employee. At the hearing, Poole's demeanor was consistent with evidence that he was stubborn and quick to anger. He single-mindedly pursued a goal, heedless of the consequences.

Poole would have been aware that the use of the reciprocating saw constituted a change in work practices that would trigger the requirement for additional monitoring. Information Arcon received from Phoenix and from Poole himself was sufficient to put Arcon on notice that Poole was performing the work without a sensitivity to the dangers of working with asbestos. Actual or constructive knowledge can be imputed to the cited employer through its supervisory employee. *Access Equipment Systems, Inc.,* 18 BNA OSHC 1718 (No. 95-1449, 1999). With Arcon's prior understanding of Poole's personality and of his response to events on the *Cape Lobos*, it is appropriate to impute Poole's knowledge of the hazardous conditions to Arcon.

Arcon changed its work practices so that additional exposure to airborne asbestos above the PEL was likely, yet it conducted no additional monitoring as required by the cited standard. The Secretary has established a *prima facie* case with respect to this item.

Unpreventable employee misconduct defense

Arcon argues that its noncompliance with § 1915.1001(f)(4)(ii) was the result of unpreventable employee misconduct on the part of Poole. It is noted that Arcon's affirmative defense focuses on Poole's use of the Sawzall in cutting the asbestos containing panel. The cited standard does not prohibit the use of an electric saw to cut ACM; rather, it requires additional monitoring in the event there is a change in work practices, such as the use of an electric saw when no such use was originally planned. Arcon failed to show that either Poole's use of the Sawzall or his failure to conduct additional monitoring was the result of unpreventable employee misconduct.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has

taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. E.g., *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). Where, as here, the violation was committed by a supervisor, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish because it is the supervisor's duty to protect employee safety. *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991).

Arcon failed to establish the first element of the defense with regard to the Sawzall. It introduced evidence of Poole's extensive safety training and certificates (Exhs. R-20, R-21), but Arcon failed to show that it had an established work rule against using an electric saw to cut an asbestos containing panel. Arcon cites the work plan designed for the *Cape Lobos* project, but the plan does not prohibit employees from sawing the ACM. The only reference to the use of saws comes under the paragraph captioned "Physical Description of the Work Area" (Exh. R-29, p.1; emphasis added):

> Main deck, 01 level, 02 level and Bridge involving various compartments where the Joyner Bulkhead have been determined to contain asbestos and are scheduled to be removed. Total quantity of removal estimated to be 1500 square feet. *Material is considered non-friable if it is taken out intake [sic] and is not sawed, cut, broken or handled in any manner that is likely to release asbestos filters in the air.*

The above-quoted paragraph describes Arcon's planned approach to the project; it does not establish a work rule against using a saw to cut the panels.

Arcon also introduced its "Process Control Procedure for Asbestos Control" which "covers the control of shipboard removal of thermal insulation materials" (Exh. R-32). Thermal insulation systems are expressly excluded from Class II work, which is the class of work being performed on the *Cape Lobos.* Attachment C to that document contains the following paragraph under a section captioned "Control of Regulated Area":

> Arcon, Inc., SHALL NOT USE any power tools on asbestos except as provided for the special operations requiring their use and only if acceptable in the Asbestos Work Plan for that asbestos operation.

Again, this does not establish a specific work rule designed to prohibit the use of power saws on ACM. The paragraph appears in a document addressing the removal of thermal insulation materials and provides an exception for "special operations." Poole's use of the Sawzall was not an act of unpreventable employee misconduct.

The failure to provide additional monitoring when a change in work practices potentially resulted in increased exposure to airborne asbestos above the PEL could lead to employees being overexposed to airborne asbestos. The violation is serious.

Item 3: Alleged Serious Violation of § 1915.1001(j)(2)(iv)

The Secretary alleges a serious violation of § 1915.1001(j)(2)(iv), which provides:

> All equipment and surfaces of containers filled with ACM must be cleaned prior to removing them from the equipment room or area.

The citation alleges:

> During the period including 3/9/99 through 3/11/99, waste containers contaminated with asbestos were not cleaned prior to removing them from the loadout area into the waste truck. Also, the "Sawzall" reciprocating saw was removed from the site with visible white dust on it.

At the hearing, the undersigned dismissed the portion of this item pertaining to the Sawzall being removed from the site with visible dust on it because the record did not support that allegation (Tr. 664).

Mosby took photographs of asbestos disposal bags placed in Arcon's waste truck in the parking lot. Mosby described Exhibit C-19 as a photograph "showing where the bags have some type of dust covering the outer shells of the bags" (Tr. 43). This is the extent of the Secretary's evidence for this item. There is no evidence that the dust on the bags contained asbestos. Mosby did not observe Arcon's employees with the bags prior to their removal from the regulated area. It is not known at what point the dust collected on the disposal bags. The Secretary has failed to establish that Arcon's crew failed to clean the outer surfaces of the disposal bags prior to removing them to the truck. Item 3 is vacated.

Citation No. 2: Willfulness Classification

The Secretary alleges that the violations cited in citation no. 2 are willful.

> A violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

The Commission majority in *Staley* cautioned that, when dealing with multiple charges of willful violations, courts should not consider "general evidence" as supporting a general determination of willfulness as to all of the affirmed items.

> We are unwilling to depart from Commission precedent to find a whole series of disparate violations willful, based on general evidence, where the violations are not part of a pattern, practice, or course of conduct. However, that does not preclude a determination that any individual item was willful in nature. Where the evidence establishes that [the employer] had a heightened awareness of the illegality of the conduct or condition, yet failed to take corrective action, a willful characterization of that item is appropriate.

Staley, 19 BNA OSHC at 1212.

Accordingly, the items cited in citation no. 2 that are affirmed will be considered on an individual basis to determine whether or not they are willful.

Items 1a and 1b: Alleged Willful Violations of §§ 1915.1001(c)(1) and (2)

The Secretary alleges willful violations of §§ 1915.1001(c)(1) and (2), which provide:

> (1) *Time-weighted average limit (TWA).* The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an eight (8) hour time-weighted average (TWA), as determined by the method described in appendix A to this section, or by an equivalent method.
>
> (2) *Excursion limit.* The employer shall ensure that no employee is exposed to an airborne concentration of asbestos in excess of 1.0 fiber per cubic centimeter of air (1f/cc) as averaged over a sampling period of thirty (30) minutes, as determined by the method prescribed in appendix A to this section, or by an equivalent method.

Appendix A provides detailed instructions regarding the procedure for analyzing air samples for asbestos, and the quality control procedures that must be implemented by laboratories performing the analysis. Arcon's compliance with the methods described in Appendix A is not at issue.

The Secretary claims that Arcon failed to ensure that its employees were not exposed to airborne concentrations of asbestos in excess of 1.0 fiber per cubic centimeter of air as an 8-hour TWA (§ 1915.1001(c)(1)) and over a 30-minute sampling period (the excursion limit) (§ 1915.1001(c)(2)).

Plautz took air samples on March 9, 1999 (Exh. C-29; Tr. 196-202). Reid testified that based on Plautz's samples, she calculated that on March 9, Darryl Jefferson was exposed to an airborne concentration of asbestos of .32 fibers per cubic centimeter as a 8-hour TWA, or 3.2 times the PEL (Tr. 323-324).

Reid also calculated that Jefferson's sample for the excursion limit was 3.49 fibers per cubic centimeter, which is over three times the permissible excursion limit (Exh. C-29; Tr. 329).

Arcon does not dispute that it was in violation of §§ 1915.1001(c)(1) and (2), but claims that the overexposure to airborne asbestos was caused by the unpreventable employee misconduct of Poole, when he used the Sawzall power saw to cut into the asbestos containing panel. As discussed under item 3 of citation No.1, *supra,* Arcon cannot establish its defense of

unpreventable employee misconduct with regard to Poole's use of the Sawzall. Further, because of the character of the amosite, using the Sawzall was not the only reason for the high exposure levels. Items 1a and 1b are affirmed.

The Secretary failed to demonstrate that Arcon had a heightened awareness of the illegality of its conduct and a conscious disregard for the safety and health of its employees with regard to these items. Arcon began this project thinking it was working with transite, an nonfriable form of asbestos, and discovered that it was friable amosite only after it began removing the panels. Arcon's violation of items 1a and 1b resulted primarily from its failure to anticipate the friable quality of the ACM. The items are affirmed as serious.

Item 1c: Alleged Willful Violation of § 1915.1001(h)(2)(i)

The Secretary alleges that Arcon committed a willful violation of § 1915.1001(h)(2)(i), which provides:

> Where respirators are used, the employer shall select and provide, at no cost to the employee, the appropriate respirator as specified in Table 1, or in paragraph (h)(2)(iii) of this section, and shall ensure that the employee uses the respirator provided.

The Secretary alleges in the citation:

> On 3/9/99, the airborne exposure of asbestos was measured at 3.49 fibers/cc, and the employer continued to allow employees to wear half-face respirators equipped with HEPA filters, which are not adequate for protecting employees over 1 fiber/cc.

Table 1 is captioned "RESPIRATORY PROTECTION FOR ASBESTOS FIBERS," and states that half-mask air purifying respirators are sufficient for airborne concentrations of asbestos not exceeding 1 fiber per cubic centimeter. Plautz took air samples on March 9 and recorded several high fiber counts, in excess of 1 fiber per cubic centimeter (Exh. C-29; Tr. 201-204). He informed Poole of the high fiber counts, and called Phoenix Environcorp president Thomas Green, who visited the site (Tr. 205). Plautz recommended to Poole that Arcon should stop work, but Poole refused to do so (Tr. 202). Poole allowed Arcon's employees to continue using the half-mask respirators instead of the full face piece respirators that Table 1 states are

required for sites where the airborne asbestos measures above 1 fiber per cubic centimeter (Tr. 496, 643).

Arcon argues that it was not provided with the sample reading of 3.49 fibers per cubic centimeter until 2 days after the sample was taken (Tr. 635). Morey testified that she did not believe the initial high counts were accurate. The initial report of the high fiber count had misplaced the decimal point, so that the sample that should have been reported as 3.55 fibers per cubic centimeter was reported as 35.5 fibers per cubic centimeter. Morey stated that the 35.5 measurement was "unreasonable" and she questioned the accuracy of the sample (Tr. 629-630). Nevertheless, Morey ordered Green to shut down the job (Tr. 630). Green stated that he was not comfortable telling Poole to shut down the job, but he would tell Poole to contact Morey (Tr. 631). Morey later had a conference call with Poole and Arcon president Hawthorne (Tr.632). She was assured that the problem would be addressed, but Arcon never shut the site down. Although Poole returned to Arcon's headquarters that night and picked up additional supplies to use the next morning, he did not bring the type of respirators the employees should have used until sampling showed not more that 1 fiber cc of asbestos.

Arcon's argument is disingenuous. It is a fact that the initial high count reported to Arcon was inaccurate, but Morey testified that she realized the decimal point was probably misplaced in the 35.5 reading (Tr. 641). In fact, during Morey and Green's initial conversation, they both concluded that the decimal was probably simply misplaced. Morey conceded that a reading of 3.55 is still well over the PEL and that "[a]ny high count could indicate there was friable material" (Tr. 642). Arcon had sufficient notice that the airborne asbestos exceeded 1 fiber per cubic centimeter, yet chose not to require its employees to wear the respirator required by the standard.

The Secretary has established that Arcon was in violation of § 1915.1001(h)(2)(i).

The Secretary has also established that Arcon had a heightened awareness of the illegality of continuing to use half-face respirators when its monitoring results indicated that full face piece respirators were required, and that it demonstrated a conscious disregard for the safety of its employees. Plautz personally notified Poole of the high fiber counts. Greene came to the site and advised Poole to shut down the site, which Poole refused to do. Poole's superiors,

Hawthorne and Morey, discussed the gravity of the situation with Poole during a conference call. Poole continued to ignore the requirements of the Act despite conversations with Plautz, Green, Morey, and Hawthorne urging him to take corrective action. The latter two were required to assure themselves on the use of appropriate respirators since they elected not to stop the work. Item 1c is willful.

Item 2a: Alleged Willful Violation of § 1915.1001(g)(1)

Section 1915.1001(g)(1) provides:

> The employer shall use the following engineering controls and work practices in all operations covered by this section, regardless of the levels of exposure:
> (i) Vacuum cleaners equipped with HEPA filters to collect all debris and dust containing ACM and PACM, except as provided in paragraph (g)(8)(ii) of this section in the case of roofing material;
> (ii) Wet methods, or wetting agents, to control employee exposures during asbestos handling, mixing, removal, cutting, application, and cleanup, except where employers demonstrate that the use of wet methods is infeasible due to for example, the creation of electrical hazards, equipment malfunctioning, and, in roofing, except as provided in paragraph (g)(8)(ii) of this section; and
> (iii) Prompt clean-up and disposal of wastes and debris contaminated with asbestos in leak-tight containers except in roofing operations, where the procedures specified in paragraph (g)(8)(ii) of this section apply.

The citation alleges:

> During the period including 3/9/99 through 3/11399, the following engineering controls and work practices in accordance with (ii) and (iii), were not used during Class II removal of asbestos:
>
> a. Wet methods were not adequately used to control employee exposure during non-intact removal of asbestos joiner panels, in that pieces of asbestos material were found lying on the deck in a substantially dry, friable state. Dry asbestos material was also found inside the disposal bags on the waste truck.
>
> b. Clean-up and disposal of wastes and debris contaminated with asbestos was not promptly done, in that asbestos contaminated debris was lying on the deck for long periods of time between the removal and disposal.

Mosby testified that he observed dry ACM littering Arcon's worksites during his inspection on March 11, 1999 (Exhs. C-11, C-12, C-13; Tr. 34-46). Mosby wetted some of the

asbestos and took photographs to show the difference in appearance between dry and wet ACM (Exhs. C-12, C-13, C-16, C-17; Tr. 40-42). Plautz testified that he observed an airless water sprayer in the containment, but that "it stayed in the same place the whole time. They were not using wet methods" (Tr. 207).

Compliance officer Reid testified that Arcon was cited for violating this standard because its crew was not using adequate wetting methods and because the ACM was not "promptly cleaned up and disposed of properly." Reid stated that "promptly" means "[w]ithin the work shift" (Tr. 342). Reid later testified that "promptly" meant "immediately" or before the workers move on to remove the next panel (Tr. 394-395). Reid conceded, however, that "OSHA does not have a set time, other than the end of the work shift" (Tr. 396).

The Secretary has failed to establish that Arcon did not promptly clean up and dispose of wastes and debris. Mosby took the photographs after Arcon's crew had returned from their lunch break (Tr. 21-22). The crew was still working its shift. Mosby had photographed sealed disposal bags of ACM in a truck in the parking lot, indicating that Arcon had cleaned up and disposed of debris from previous shifts. Arcon employee Joe Boone testified that Arcon did a daily final cleanup, where they would wrap the large pieces of ACM in poly and bag the smaller pieces of debris (Tr. 272-273). On the day of Mosby's visit, Mosby ordered Arcon's crew to leave the area and refused to allow them to clean up (Tr. 276-277). There is no evidence that Arcon would have failed to clean up the ACM promptly as Reid defines the term.

With respect to the use of wet methods, Boone testified that the Arcon crew wetted the ACM with water bottles and an airless sprayer. He stated that if the material dried out, they would spray it again before bagging it (Tr. 259-261). Poole stated that he used the airless sprayer to wet the ACM, but the amosite panels "just soaked it right up. . . . It was like we never wet it at all. Within two minutes, it had the same appearance before we even wet it with the water bottle, a steady stream of water" (Tr. 519-520). Reid agreed that amosite "dries very, very quickly" (Tr. 395). Poole stated that the airless sprayer was not moved from its location within the containment because it was equipped with a 100 foot hose which made relocating the sprayer unnecessary (Tr. 518).

Arguably, Arcon should have used a great deal more water and equipment with more force and capacity when wetting the amosite containing material. Although Arcon's wetting procedures may have been inadequate, the Secretary failed to establish this by a preponderance of the evidence. Arcon's employees testified without contradiction that they wetted the ACM when it was removed and again before bagging it. Mosby's photographs showing the appearance of ACM immediately after it was wetted does not establish that Arcon was failing to use adequate wet methods. It is undisputed that amosite asbestos dries quickly.

Item 2a is vacated.

Item 2b: Alleged Willful Violation of § 1915.1001(g)(2)

Section 1915.1001(g)(2) provides:

> In addition to the requirements of paragraph (g)(1) of this section above, the employer shall use the following control methods to achieve compliance with the TWA permissible exposure limit prescribed by paragraph (c) of this section:
>
> (i) Local exhaust ventilation equipped with HEPA filter dust collection system;
> (ii) Enclosure or isolation of processes producing asbestos dust;
> (iii) Ventilation of the regulated area to move contaminated air away from the breathing zone of employees and toward a filtration or collection device equipped with a HEPA filter;
> (iv) Use of other work practices and engineering controls that the Assistant Secretary can show to be feasible.
> (v) Wherever the feasible engineering and work practice controls described above are not sufficient to reduce employee exposure to or below the permissible exposure limit and/or excursion limit prescribed in paragraph (c) of this section, the employer shall use them to reduce employee exposure to the lowest levels attainable by these controls and shall supplement them by the use of respiratory protection that complies with the requirements of paragraph (h) of this section.

In the citation, the Secretary alleges:

> On or about 3/9/99, the following control methods were not used to achieve compliance with the TWA permissible exposure limit and excursion limit in accordance with (g)(2)(i)(ii), and (iii):
>
> a. Local exhaust ventilation equipped with a HEPA filter dust collection system was not adequate to reduce employee exposures below the TWA PEL and

excursion limit during the use of a sawzall to cut asbestos-containing joiner panels away from fixed metal piping on the boat deck.

b. The employer did not enclose or isolate the removal activity from adjacent areas including staterooms on the boat deck, poop deck, or upper deck.

c. The employer did not use any ventilation in the regulated area to pull contaminated air away from the breathing zones of employees during the asbestos removal operation on the boat deck after being notified of an exposure which exceeded the excursion limit of 1 fiber/cc.

Reid testified that Arcon's local exhaust ventilation and HEPA filter dust collection units were inadequate to achieve compliance with the TWA PEL and excursion limit. The work area was not adequately enclosed and Arcon did not use ventilation to promote the air flow towards its negative air machine and away from the employees' breathing zones (Tr. 344-345).

Arcon does not dispute the Secretary's allegations, but argues that the high concentration of fibers resulted from Poole's unpreventable employee misconduct when he used the Sawzall to cut the ACM around the pipe. As noted, *supra*, Arcon failed to establish the affirmative defense of unpreventable employee misconduct for use of the Sawzall. Use of the Sawzall was not shown to be the sole reason additional ventilation was required. Arcon should have enforced a workrule requiring its employees to use the controls necessary to bring the employee's exposure to asbestos within the TWA limit. Item 2b is affirmed.

The Secretary has not established that item 2b is willful in character. This violation resulted from the unanticipated friability of the amosite material. Item 2b is serious.

Item 2c: Alleged Willful Violation of § 1915.1001(g)(7)(ii)

Section 1915.1001(g)(7)(ii) provides:

For all indoor Class II jobs, where the employer has not produced a negative exposure assessment pursuant to paragraph (f)(2)(iii) of this section, or where during the job, changed conditions indicate there may be exposure above the PEL or where the employer does not remove the ACM in a substantially intact state, the employer shall use one of the following methods to ensure that airborne asbestos does not migrate from the regulated area;

(A) Critical barriers shall be placed over all openings to the regulated area; or

(B) The employer shall use another barrier or isolation method which prevents the migration of airborne asbestos from the regulated area, as verified by

perimeter area monitoring or clearance monitoring which meets the criteria set out in paragraph (g)(4)(ii)(B) of this section.
(C) Impermeable dropcloths shall be placed on surfaces beneath all removal activity[.]

The citation alleges:

On or about 3/11/99, the employer did not use any of the following work practices and engineering controls for Class II work, in accordance with (g)(7)(ii), to ensure that airborne asbestos did not migrate from the regulated area:

a. Critical barriers were not placed over all open portholes adjacent to the regulated area and other openings to the regulated area on the upper deck;

OR,

b. Another barrier or isolation method that prevented the migration of airborne asbestos from the regulated area to adjacent areas including staterooms and passageways, was not used, in that the 6 mm polyethylene used did not cover all open areas;

AND

C. Impermeable dropcloths were not used on surfaces beneath all removal activity on the upper deck.

Mosby observed open portholes adjacent to the regulated area (Tr. 51-52). The poly sheeting Arcon used to contain the work area did not completely enclose the regulated areas, especially not the overhead and floor space (Exhs. C-1 through C-10, C-15; Tr. 34-37). Poole asked Baccari to approve the containment on March 11. Baccari testified that he refused to approve the containment because (Tr. 113):

> The plastic being used for the containment had tears and holes. It was not adequately secured, particularly in corners, it had not been adequately taped, and one area that had been ignored would be the area between the finished overhead of the accommodation spaces and the steel of the deck above it.

Despite Baccari's refusal to approve the containment, Poole and his crew proceeded with the panel removal (Tr. 114).The Secretary has established a violation of § 1915.1001(g)(7)(ii).

> [O]ne way in which the Secretary may establish a willful violation is by demonstrating that the employer had such a disregard for employee safety or the requirements of the law generally that it could be inferred that if the employer had known of the conduct or condition, it would not have cared that it was in violation of the Act. *Johnson Controls,* 16 BNA OSHD 1048, 1051, 1993-95 CCH OSHD

¶ 30,018, p. 41, 142 (No. 90-2179, 1993); *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)

Staley, 19 BNA OSHC at 1211.

Poole's conduct with regard to the instant item provides ample support for a finding of willfulness. Having asked for Baccari's approval of the containment, Poole blatantly disregarded Baccari's specific safety complaints and proceeded with the panel removal without taking corrective action. Poole's conduct demonstrates that he did not care that the containment was in violation of the Act. Arcon's other management employees had reason to know how Poole would conduct an asbestos removal job, even without consideration of the fact that the material contained amosite. Item 2c is established as willful.

Item 2d: Alleged Willful Violation of § 1915.1001(g)(8)(v)

The Secretary alleges that Arcon committed a willful violation of § 1915.1001(g)(8)(v), which provides:

> When performing any other Class II removal of asbestos containing material for which specific controls have not been listed in paragraph (g)(8)(iv)(A) through (D) of this section, the employer shall ensure that the following work practices are complied with:
>
> (A) The material shall be thoroughly wetted with amended water prior to and during its removal.
>
> (B) The material shall be removed in an intact state unless the employer demonstrates that intact removal is not possible.
>
> (C) Cutting, abrading or breaking the material shall be prohibited unless the employer can demonstrate the methods less likely to result in asbestos fiber release are not feasible.
>
> (D) Asbestos-containing material removed, shall be immediately bagged or wrapped, or kept wetted until transferred to a closed receptacle, no later than the end of the work shift.

The citation alleges:

> During the period including 3/3/99 through 3/11/99, the following required work practices were not complied with for Class II removal of asbestos, in that:
>
> > a. Asbestos material was not thoroughly wetted with amended water prior to and during its removal on the boat deck, the poop deck, and upper deck.

b. The material was not removed in an intact state during removal on the boat deck, poop deck and upper deck.

c. Cutting, abrading, and breaking of asbestos material was not prohibited during removal on the boat deck, poop deck and upper deck.

d. Asbestos material was not immediately bagged or wrapped after removing from metal tracking on boat deck, poop deck and upper deck.

The allegations asserted in paragraphs a (wetting methods) and d (prompt clean up) were addressed under item 2a of citation no. 1, where the undersigned found that Arcon was not in violation of the § 1915.1001 asbestos standard. The Secretary has failed to prove a violation with regard to those paragraphs.

It is undisputed that the asbestos containing panels were not removed intact, but broke up when Arcon's crew removed them (Tr. 23). It is also undisputed that Poole used an electric saw to cut through the ACM surrounding the pipe (Tr. 499).

The Secretary has established a violation of § 1915.1001(g)(8)(v) with regard to paragraphs b and c of the citation. Those instances are classified as serious. There was no showing that Arcon had a heightened awareness of the illegality of the cited conditions.

Item 2e: Alleged Willful Violation of § 1915.1001(o)(3)(i)

The Secretary alleges that Arcon committed a willful violation of § 1915.1001(o)(3)(i), which provides in pertinent part:

> On all worksites where employees are engaged in Class I or II asbestos work, the qualified person designated in accordance with paragraph (e)(6) of this section shall perform or supervise the following duties, as applicable:
> (A) Set up the regulated area, enclosure or other containment;
> (B) Ensure (by on-site inspection) the integrity of the enclosure or containment;
> . . .
> (D) Supervise all employee exposure monitoring required by this section and ensure that it is conducted as required by paragraph (f) of this section; [and]
> . . .
> (H) Ensure that through on-site inspection, engineering controls are functioning properly and employees are using proper work practices[.]

Poole was Arcon's designated qualified person on the *Cape Lobos* project. It was his responsibility to perform the duties enumerated in § 1915.1001(o)(3)(i). As discussed, *supra*, Poole failed to ensure that the containment was adequate and failed to conduct adequate monitoring. He also failed to ensure that employees were using proper work practices when Poole himself used an electric saw to cut into an asbestos containing panel.

The Secretary has established that Arcon was in violation of § 1915.1001(o)(3)(i). Its designated qualified person failed to adequately perform the specified duties.

Item 2e is classified as willful. This item deals directly with Poole's conduct and his decisions. As supervisor, he was charged with the responsibility for his crew's health and safety. Upon discovering that the ACM was friable amosite, and not, as was initially thought, nonfriable transite, Poole refused to halt work or to implement greater protective measures. Poole forged ahead with the original work plan, despite pleas from Plautz, Greene, and Baccari that he alter his approach to the project. Despite Poole's stubborn refusal to heed these pleas, he cannot be characterized as a rogue employee. Arcon's president and safety director were fully aware that Poole was continuing with the panel removal. The record establishes that, for whatever reason, Poole's superiors were reluctant to directly order him to shut down the job or alternatively to assure that he proceeded in accordance with the standards. Their acquiescence in Poole's obdurate behavior contributed to the overexposure of Arcon's crew (and the employees of other employers) to airborne asbestos.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Arcon employed approximately 45 employees at the time of Mosby's inspection (Tr. 432). It had no history of OSHA violations in the 3 years prior to the inspection (Tr. 307). Arcon has a written safety program and provides extensive training for its employees, demonstrating good faith (Tr. 601-613).

The gravity of each of the violation is high. Reid described the hazards associated with overexposure to asbestos fibers (Tr. 304-305):

> There are some serious diseases commonly associated with asbestos. That would be asbestosis, mesothelioma and lung cancer, and there are also some other cancers as well.
>
> Asbestosis, once you breathe in fibers, the more you're exposed to asbestos, you can get asbestosis. This is a hardening of the lung due to scarring of the lung so each fiber gets lodged into the lung, and the body's response it to protect itself. So it scars tissue over top of that, and then you have a difficult time breathing.
>
> And, there's a thing called rattling of the lungs. When you breathe, you can hear the rattling. This is noncurable, nontreatable and death is imminent. This could take from 10 to 30 or 40 years.
>
> Mesothelioma, on the other hand, is a disease that death can occur within six months to twelve months. It's probably the worst of all of them other than lung cancer. . . . Mesothelioma is where even just one fiber that would be lodged in the pleural cavity of the lungs could cause you to get the mesothelioma and then die.
>
> And, there is also where you can get it in the stomach lining. . . . And, if you smoke, which David Poole does--and I don't know about the other employees--but if you smoke, there is an 80 times more risk working with asbestos and being a smoker of dying of an asbestos-related disease.

Three employees were exposed to high levels of asbestos during the many hours they worked over 3 days. It is determined that the appropriate penalty for item 1 of citation No. 1 is $3,500.00. The penalty for item 2b is $1,750.00. The total penalty for items 1a and 1b of citation No. 2 is $3,300.00. The total penalty for items 2b and 2d (2 instances) is $1,900.00. The penalty for items 1c, 2c, and 2e is $10,000.00 each. It is recognized that grouped penalties were recommended for certain violations, which had the effect of reducing the penalties. The undersigned accepts the Secretary's grouping in arriving at the appropriate penalty. For clarity, certain of the grouped penalties are stated separately.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that the citations be disposed of as follows:

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1915.1001(d)(2)	Affirmed	$3,500.00
2a	§ 1915.1001(f)(3)(i)	Vacated	-0-
2b	§ 1915.1001(f)(4)(ii)	Affirmed	$1,750.00
3	§ 1915.1001(j)(2)(iv)	Vacated	-0-

Citation No. 2

Item	Standard	Disposition	Penalty
1a	§ 1915.1001(c)(1)	Affirmed (Serious)	1a & 1b = $3,300.00
1b	§ 1915.1001(c)(2)	Affirmed (Serious)	
1c	§ 1915.1001(h)(2)(i)	Affirmed (Willful)	1c = $10,000.00
2a	§ 1915.1001(g)(1)	Vacated	-0-
2b	§ 1915.1001(g)(2)	Affirmed (Serious)	2b & 2d = $1,900.00
2c	§ 1915.1001 (g)(7)(ii)	Affirmed (Willful)	2c = $10,000.00
2d	§ 1915.1001(g)(8)(v)	Affirmed (Serious)	(see above)
2e	§ 1915.1001(o)(3)(i)	Affirmed (Willful)	2e = $10,000.00
TOTAL			**$40,450.00**

SO ORDERED.

/s/
NANCY J. SPIES
Judge

Date: January 2, 2001