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. CONTOUR ERECTION & SIDING SYSTEMS, INC., Respondent.	OSHRC Docket No. 06-0792

APPEARANCES:

Lee Grabel, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Jonathan L. Snare, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Thomas A. DeSimon, Esq.; Harris Beach PLLC, Pittsford, NY
For the Respondent

DECISION

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

On April 12, 2006, the Occupational Safety and Health Administration ("OSHA") issued a fourteen-item serious citation to Contour Erection & Siding Systems, Inc. ("Contour") alleging multiple violations of OSHA's asbestos standard, 29 C.F.R. § 1926.1101, and proposing a total penalty of $42,000. The citation items relate to Contour's three days of construction work performed at a worksite in Hamburg, New York, where a building had sustained a partial roof collapse. After a hearing, Administrative Law Judge Covette Rooney affirmed all of the citation items and assessed the total proposed penalty. Contour timely petitioned for review of the judge's decision, and Chairman Thompson directed the case for review. For the following reasons, we affirm all the citation items and assess a total penalty of $31,500.

ISSUES

Under the citation items, the Secretary alleges that Contour failed to provide its employees who were exposed to asbestos with the protections required by the asbestos standard. Contour does not dispute non-compliance with the cited provisions or employee exposure, but claims it lacked knowledge of the cited conditions. The only issue on review is whether Contour had constructive knowledge of the presence at the worksite of Presumed Asbestos Containing Material, or PACM, as defined in 29 C.F.R. § 1926.1101(b).[1]

FINDINGS OF FACT

On November 18, 2005, a portion of the roof at Leisureland Lanes—a combination motel, restaurant, and bowling alley located in Hamburg, New York—collapsed due to a heavy snowfall. The roof collapse caused some of the trusses supporting the roof to break and tilt. The building, constructed in 1960, contained sprayed and troweled-on surfacing material used for sound-suppression and fire-retardant insulation. On November 23, 2005, the building's owner contracted with Jansen-Kiener Consulting Engineers, Inc. ("JKC") to oversee and direct the construction repairs at the site. JKC, in turn, contracted with Contour to conduct the necessary shoring work for the truss system. That same day, JKC's president and Contour's vice president, along with others, met at the worksite to observe the area of the roof collapse and inspect the truss system. Contour's vice president observed that the building was constructed with wooden trusses, which led him to believe that it may have been built in the 1930's. At the time the men inspected the worksite, grayish, white-flaky debris—which included structural and ceiling materials—was scattered everywhere throughout the area of the collapse. In addition, this material was hanging from the ceiling.

On the morning of November 25, 2005, Contour began its work on the project. The majority of Contour's work consisted of shoring wooden trusses and building an enclosure wall. To complete this work, four Contour employees first cleared the area of the collapsed ceiling material, which consisted of a fibrous material on steel mesh. They used a high-speed disc saw to cut and remove the ceiling material, then handed the material down to be further cut, shoveled, dry-swept, and pushed into piles. Contour's vice president visited the site a number of times during the course of

---

[1] Because we conclude Contour had constructive knowledge that the ceiling material in question was PACM, we need not reach the issue of whether Contour had constructive knowledge that the ceiling material did, in fact, contain asbestos.

the three-day project to take tools and other items to his employees. At no point did Contour conduct any testing of the ceiling material to determine whether it contained asbestos.

On November 26, 2005, JKC contracted with Stohl Environmental ("Stohl") in order to have the ceiling debris tested. Stohl conducted the tests on the following day, November 27—the same day Contour's employees finished their work at the site. On November 28, 2005, Stohl provided JKC with its test results, which showed that two of the three samples collected had concentrations of nearly 60 percent asbestos. That same day, work at the site stopped, access was restricted, and the building was closed.

On December 8, 2005, an OSHA industrial hygienist ("IH") inspected the worksite after receiving a referral about the roof collapse and employee exposure to asbestos. On January 5, 2006, the IH took his own sample of the ceiling material, which showed that the material contained more than 90 percent asbestos.

PRINCIPLES OF LAW

To establish that an employer has violated a specific standard, the Secretary must prove, *inter alia*, that the "employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation." *See Diamond Installations, Inc.*, 21 BNA OSHC 1688, 1690 (No. 02-2080, 2006) (consolidated case).[2] The actual or constructive knowledge of a supervisor or foreman—in this case, Contour's vice president and field operations manager—can generally be imputed to the employer. *See Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1631, 2005 CCH OSHD ¶ 32,838, p. 52,781 (No. 04-1665, 2006).

Under the asbestos standard, presumed asbestos containing material (PACM) is defined as "thermal system insulation and surfacing material found in buildings constructed no later than 1980." 29 C.F.R. § 1926.1101(b).[3] The standard specifies that certain materials, including sprayed

---

[2] The Secretary must also prove that the standard applied to the cited conditions, that the employer violated the terms of the standard, and that employees were exposed to the violative conditions. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

[3] The definition of PACM reads as follows:

> *Presumed Asbestos Containing Material* means thermal system insulation and surfacing material found in buildings constructed no later than 1980. The designation of a material as "PACM" may be rebutted pursuant to paragraph (k)(5) of this section.

or troweled on surfacing materials in buildings built prior to 1981, are PACM unless the inspection or testing of the material required by 29 C.F.R. § 1926.1101(k)(5) shows that it does not contain asbestos. 29 C.F.R. § 1926.1101(k)(1). *Odyssey Capital Group*, 19 BNA OSHC 1252, 1253-55 (No. 98-1745, 2000), *aff'd mem.*, 19 BNA OSHC 1735 (D.C. Cir. 2001); *James R. Howell & Co.*, 19 BNA OSHC 1277, 1277-78 (No. 99-1348, 2000).[4]

ANALYSIS

It is undisputed that Contour lacked actual knowledge the building was built prior to 1981 or that the ceiling material was surfacing material as defined in the asbestos standard. However, based

---

29 C.F.R. § 1926.1101(b). The term "surfacing material" is defined as "material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fire proofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, and other purposes)." 29 C.F.R. § 1926.1101(b).

[4] Paragraph (k)(5) of § 1926.1101 states, in relevant part:

> (k) *Communication of hazards.*
>
> . . . .
>
> (5) *Criteria to rebut the designation of installed material as PACM.* (i) At any time, an employer and/or building owner may demonstrate, for purposes of this standard, that PACM does not contain asbestos. Building owners and/or employers are not required to communicate information about the presence of building material for which such a demonstration pursuant to the requirements of paragraph (k)(5)(ii) of this section has been made.
>
> (ii) An employer or owner may demonstrate that PACM does not contain more than 1 percent asbestos by the following:
>
> (A) Having a completed inspection conducted pursuant to the requirements of AHERA [Asbestos Hazard Emergency Response Act, 15 U.S.C. §§ 2641 et seq.] (40 CFR Part 763, subpart E) which demonstrates that the material is not ACM; or
>
> (B) Performing tests of the material containing PACM which demonstrate that no ACM is present in the material. Such tests shall include analysis of bulk samples collected in the manner described in 40 CFR 763.86. The tests, evaluation and sample collection shall be conducted by an accredited inspector or by a CIH [certified industrial hygienist]. Analysis of samples shall be performed by persons or laboratories with proficiency demonstrated by current successful participation in a nationally recognized testing program such as the National Voluntary Laboratory Accreditation Program (NVLAP) or the National Institute for Standards and Technology (NIST) or the Round Robin for bulk samples administered by the American Industrial Hygiene Association (AIHA) or an equivalent nationally-recognized round robin testing program.

29 C.F.R. § 1926.1101(k)(5).

on the unrebutted testimony of the IH, statements made to the IH by Contour's vice president, and the vice president's visits to the worksite, including his initial inspection of the roof and truss damage, we conclude Contour had constructive knowledge of these facts. Contour's vice president told the IH that, "he believed that the construction of the building being wooden truss showed that it may have been built back in the 30's . . . [and that] the building at one point may have been an airplane hangar that was used during World War II." Contour's vice president inspected the wooden truss system prior to his employees starting to work. The vice president also admitted that "all of the buildings" built prior to 1970 "used asbestos in just about everything" and, therefore, asbestos was "probably in this building too." The vice president's belief as to the age of the building put Contour on notice that the building was built prior to 1981.

In addition, during his initial walk-through with JKC and his subsequent visits to the worksite, Contour's vice president was able to observe the grayish, fibrous, white-flaky ceiling material ("sprayed, troweled-on" "material" that had been "applied to" the ceiling "surfaces") that was scattered throughout the worksite as a consequence of the roof collapse. Indeed, photographs of the worksite in evidence show that the grayish, white flaky material hanging from the ceiling and scattered everywhere was "readily observable" to anyone visiting the area of the collapse, including Contour's vice president. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1995-96 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996) (holding that "the conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge"); *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (finding constructive knowledge where supervisory employee was in close proximity to readily apparent violation), *aff'd mem.*, 28 F.3d 1213 (6th Cir. 1994) (table).

Based on this imputable evidence, we conclude Contour had constructive knowledge that the ceiling material met the criteria under the asbestos standard for being considered PACM. Because Contour failed to conduct the specific testing required in the asbestos standard that could have rebutted the presumption that the ceiling material contained asbestos, we conclude Contour was in violation of the cited standards and affirm all fourteen citation items as alleged.[5]

[5] Contour does not challenge the serious characterization of the citation items.

PENALTY

Section 17(j) of the Occupational Safety and Health Act, 29 U.S.C. § 666(j), requires the Commission to give "'due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.'" *Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1496, 2005 CCH OSHD ¶ 32,816, p. 52,601 (No. 03-0322, 2006). The penalty factors need not be accorded equal weight, and gravity is generally the primary element for consideration. *Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868, 1999 CCH OSHD ¶ 31,896, p. 47,220 (No. 98-2014, 1999).

In explaining the basis for the $3,000 penalty proposed by the Secretary for each violation here, the IH testified that the violations were considered high gravity because Contour's four employees were exposed to high levels of asbestos for three "long days[.]" The record, however, does not support this characterization of the time Contour's employees spent on asbestos-related work. Contour was hired primarily to construct shoring and secure wooden trusses for the collapsed building. According to a project field report completed by JKC, the cutting and removal of ceiling material was performed by Contour on the first two days of its three-day project, and was only one of approximately fourteen tasks its workers completed on those days. Therefore, based on the reduced exposure time of Contour's employees to asbestos-related work, we find the gravity of the violations to be slightly lessened. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1991-93 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993) (stating that, with regard to gravity, Commission considers several factors including duration of exposure). Accordingly, we find a penalty of $2,250 to be appropriate for each violation, and assess a total penalty of $31,500.

CONCLUSIONS OF LAW

Under these circumstances, we conclude that Contour had constructive knowledge that the ceiling material in question was PACM. Because Contour failed to conduct the specific testing required in the asbestos standard that could have rebutted the presumption that the ceiling material contained asbestos, we also conclude that the judge did not err in affirming the fourteen citation items.

ORDER

We affirm Items 1 through 14 of Serious Citation 1 as characterized and assess a total penalty of $31,500.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: December 13, 2007

SECRETARY OF LABOR, Complainant, v. CONTOUR ERECTION & SIDING SYSTEMS, INC., Respondent.	: : : : : : : : :	OSHRC DOCKET NO. 06-0792

Appearances:

Jeffrey S. Rogoff, Esquire U.S. Department of Labor New York, New York For the Complainant.	Thomas A. DeSimon, Esquire Harris Beach PLLC Pittsford, New York For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site from December 8, 2005 to April 12, 2006; the work site was a building located in Hamburg, New York, where Respondent, Contour Erection & Siding Systems, Inc. ("Respondent" or "Contour"), had been engaged in putting in temporary shoring to support trusses of the building's roof. As a result of the inspection, on April 12, 2006, OSHA issued to Contour a 14-item serious citation alleging violations of OSHA's asbestos standard. Contour contested the citation, bringing this matter before the Commission, and on February 7, 2007, a hearing was held in Buffalo, New York. Both parties have submitted post-hearing briefs.

The Relevant Facts

The facts in this case are essentially undisputed. Those facts show that on November 18, 2005, a portion of the roof of a building located in Hamburg, New York collapsed due to a heavy

snowfall in that area; the building, which was constructed in 1960, was a combination motel, restaurant and bowling alley, and the roof collapse occurred in a portion of the bowling alley.[1] After the collapse, James Eberhardt, a building inspector with the Town of Hamburg, was dispatched to the site at about 4:30 a.m. on November 18 to investigate the situation. Mr. Eberhardt viewed the part of the bowling alley where the collapse had taken place and then went upstairs to the roof structure so that he could look at the truss system and the extent of the damage; while there, he saw that two of the approximately 16 trusses in that area had come down. Later that same day, in the afternoon, a meeting took place at the site. Mr. Eberhardt was there, as were Jay Patel, the owner of the building, and Edward Tredo, an engineer retained by Nova Casualty ("Nova"), the building's insurer. The purpose of the meeting was to discuss what should be done to prevent a further collapse of the building's roof; at no time did anyone at the meeting mention the possibility that the building's ceiling material could contain asbestos. (Tr. 17, 37, 92, 94, 97-100, 108-09, 136-46). *See also* Parties' Joint Pre-Hearing Statement ("Joint Statement"), pp. 6-7, 12.

On November 23, 2005, Mr. Tredo and Paul Freitag, a representative of Nova, phoned Thomas Kiener, another engineer,[2] to tell him about the roof collapse and that they needed someone to determine if the structure was stable, as only the damaged part of the facility was not operating; if Mr. Kiener agreed to become involved, his job would be to determine if shoring was required and to find a company to put in the shoring.[3] After the phone call, Mr. Kiener called Daniel Szvoren, Contour's vice-president and field operations manager, to discuss the job with him; Mr. Kiener had worked on many projects with Contour and believed it was the best company for the job. At about 3:30 p.m. on November 23, Mr. Kiener, Mr. Szvoren and Mr. Tredo met at the site. They looked at the collapsed area, and there was debris containing ceiling material everywhere; they then went

---

[1]The collapse took place over Lanes 10 through 25 of the bowling alley and measured approximately 140 by 40 feet. (Tr. 16, 130). *See also* Parties' Joint Pre-Hearing Statement, p. 6.

[2]Both Mr. Tredo and Mr. Kiener are professional engineers. (Tr. 152-54).

[3]Although the bowling alley was closed for a few days after the collapse, the lanes that were not damaged (Lanes 26 through 50) were reopened and operated November 23 through 27; the building owner apparently put up tarps to separate the damaged area from the other bowling lanes. The motel and restaurant remained open. (Tr. 114, 130-31,161, 173-75, 204-06).

upstairs to view the trusses above the ceiling. Based on what they saw, they concluded the two trusses closest to the two that had fallen required shoring, as there was already snow on the roof and another snowstorm was forecast for the coming weekend.[4] Mr. Kiener and Mr. Szvoren came up with a rough plan for the job at the site, and Mr. Kiener designed the formal plans later that evening. Mr. Kiener arranged for a second company to deliver the truss shoring to the site on November 25, which is when Contour was to begin the job; he also arranged for a third company, Clarence Wall & Ceiling ("Clarence"), to go to the site on November 25 to begin building a shear wall at the edge of the collapsed area.[5] No one involved in the project on November 23, either in phone calls or at the site, discussed the possibility of asbestos in the ceiling material. (Tr. 19, 152-72, 198, 201-11; C-9, C-13). *See also* Joint Statement, pp. 6-7, 12.

On the morning of November 25, 2005, Mr. Kiener went to the site and met with the Contour employees who were involved in the project; these included Mr. Szvoren as well as Foreman Richard Chudzik and Ironworkers Robert McNermy, Mark Shanks and William Brown. Mr. Kiener showed his plans to Mr. Szvoren and Mr. Chudzik, and he discussed the job with them. Mr. Kiener then left but returned several times that day and the following two days. Mr. Szvoren also left but returned various times that day and the next to take tools and other items to the workers. Clarence employees also began their job on November 25, and Mr. Kiener and Mr. Szvoren both saw them working at the site. At some point, Mr. Kiener noticed the Clarence employees were wearing dust masks, and, on November 26, he called Stohl Environmental ("Stohl") in order to have the ceiling debris tested. Mr. Kiener met Tony Franjoine of Stohl at the site on November 27; Mr. Franjoine took samples of the debris and left. The Contour employees finished their work by early evening on November 27, but the Clarence employees had not finished their work. Mr. Kiener did not discuss the possibility of the ceiling material containing asbestos with anyone from Contour or Clarence on any of the three

---

[4]Mr. Kiener described the situation as an emergency and indicated the integrity of the building was very questionable; he also advised Mr. Szvoren the situation was an emergency. (Tr. 168-69, 210). *See also* C-9, C-13; Joint Statement, p. 12.

[5]Contour did not begin its work at the site until the 25th because November 24th was Thanksgiving Day. (Tr. 170).

days that Contour worked at the site, and no one from Contour or Clarence raised that concern with him or with Mr. Franjoine. (Tr. 171-81, 214-19; C-9, C-13). *See also* Joint Statement, pp. 7-8, 12.

At about 11:30 a.m. on November 28, 2005, Stohl faxed the test results to Mr. Kiener; the results were that two of the three samples had concentrations of nearly 60 percent asbestos. Mr. Kiener immediately sent a fax to Clarence to advise it to remove its employees from the site due to safety concerns; he did not send a fax to Contour as its work at the site was done. At about 1 p.m. that day, Mr. Kiener met with several individuals at the site, including Mr. Patel and Mr. Freitag. He passed out copies of the Stohl report and stated that the shoring was completed but that Clarence could do no more work because of the asbestos at the site; he also told Mr. Freitag that he should engage Stohl directly for additional testing. After this point, Mr. Kiener had no further involvement in the project. Further testing at the site by Stohl, and subsequent testing by IsleChem and the State of New York, revealed results consistent with Stohl's initial report. Once Stohl finished its testing, it recommended that the entire building be closed; the State of New York also directed the building to be vacated due to the presence of asbestos. The building was in fact closed. (Tr. 180-86; C-1, pp. 4, 9, C-8, C-15). *See also* Joint Statement, pp. 8, 12.

Albert Stutz, an industrial hygienist ("IH") with OSHA, went to the site on December 8, 2005, after his office received a referral about the roof collapse and employee exposure to asbestos. After entering the building, he met first with Roj Patel, Jay Patel's brother. He also met with various other people who were at the site, including Mr. Tredo, Mr. Eberhardt, Pete Cambio, who operated the bowling alley and restaurant, a representative of IsleChem, and two representatives of NFA, the adjuster for Nova.[6] The IH held an opening conference and explained why he was there, after which he learned that Contour and Clarence had worked at the site after the collapse, as had employees of the motel, restaurant and bowling alley; he also learned the State of New York had directed the building to be evacuated, due to the asbestos at the site, upon which he suggested that the meeting be moved to another location. On December 21, 2005, the IH went to Contour's offices and held an opening conference; he spoke to Mark Patton, Contour's president, and he also spoke to Mr.

[6]The IH learned that the various people he met with were at the site to discuss removing the asbestos and continuing the construction work. (Tr. 20-21).

Szvoren, Mr. Chudzik and the ironworkers who had been at the site.[7] The IH learned the dates Contour employees had worked at the site and what they had been doing; he also learned, upon reviewing the various testing reports, that the ceiling material contained asbestos.[8] The IH returned to the site on January 5, 2006, and took his own sampling, and OSHA's lab results of the ceiling material were consistent with those of the other entities that had tested it.[9] In addition, another OSHA inspector who was with the IH took photos that showed the area of the collapse and the ceiling material on the floor.[10] Based on his inspection, the IH determined Contour had not had actual knowledge the ceiling material contained asbestos. The IH concluded, however, that Contour could have known of the presence of the asbestos and that it was therefore in violation of the standards set out in the citation. (Tr. 13-29, 35-90, 94-95, 101-04, 109-10, 114-24; C-1).

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies, (2) the employer failed to comply with the terms of the cited standard, (3) employees had access to the violative condition, and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Whether the Asbestos Standard Applies to Contour's Work at the Site

[7]The IH was unable to reach Mr. Brown and therefore did not speak to him. (Tr. 23).

[8]The IH testified Contour's employees were cutting and removing the ceiling material with a high-speed disc saw and then dropping or handing down the ceiling material; he also testified that they further cut it, shoveled and dry-swept it, and pushed it into piles. (Tr. 35-36).

[9]The IH testified that he learned of a previous asbestos test done at the site that came back showing there was no asbestos in the samples. However, he indicated that the information he saw in the report was insufficient to conclude the sampling was done properly, and no one involved in the project or working at the site was aware of the report; the exception was Mr. Cambio, who evidently knew testing had been done but did not know the results of the testing. (Tr. 125-30).

[10]C-12, the photos of the site, was admitted based on Mr. Szvoren's deposition testimony, on December 7, 2006, that the photos depicted the site as he had observed it. (Tr. 28-34, 131-33; C-11, p. 10 of 22). Further, Mr. Kiener testified at the hearing that the photos were an accurate representation of the site as he recalled it. (Tr. 188).

OSHA's asbestos standard is set out at 29 C.F.R. 1926.1101 *et seq*. The asbestos standard "regulates asbestos exposure in all work as defined in 29 CFR 1910.12(b), including but not limited to the following: ... (3) Construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos."[11] *See* 29 C.F.R. 1926.1101(a). "Asbestos-containing material" ("ACM") is defined as "any material containing more than one percent asbestos. " *See* 29 C.F.R. 1926.1101(b). "Presumed asbestos-containing material" ("PACM"), on the other hand, is defined as follows:

> [T]hermal system insulation and surfacing material found in buildings constructed no later than 1980. The designation of a material as "PACM" may be rebutted pursuant to paragraph (k)(5) of this section.

Id. Finally, "surfacing material" is defined as:

> [M]aterial that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members, or other material on surfaces for acoustical, fireproofing, and other purposes).

Id.

The parties have stipulated that the ceiling material and debris at the site was PACM as defined by 29 C.F.R. 1926.1101(b). *See* Joint Statement, p. 13, ¶ E. The parties have also stipulated that the asbestos-containing material at the site was sprayed on and troweled on and used for sound insulation and fire insulation. *Id*., p. 8, ¶ 26. Further, the parties have stipulated that Contour's employees handled the ceiling material, that they cut through and removed sections of the ceiling material with a saw, and that they dry-swept and shoveled the ceiling material. *Id*., p. 8, ¶¶ 19-21.[12] The IH testified that Contour's employees were performing "Class I asbestos work" as their work involved removing surfacing ACM and PACM, and his testimony matches the definition of "Class I asbestos work" set out in the standard. (Tr. 40-41). *See also* 29 C.F.R. 1926.1101(b).

Based on the foregoing, and the relevant facts set out *supra*, I find that the asbestos standard applies to the work Contour's employees were doing at the site. They were performing construction work and, in so doing, were removing and handling asbestos-containing material. They were also

---

[11]Section 1910.12(b) defines "construction work" as "work for construction, alteration, and/or repair, including painting and decorating."

[12]*See also* footnote 8, *supra*.

performing "Class I asbestos work" because they were removing surfacing ACM and PACM. The Secretary has accordingly met her burden of proving the applicability of the asbestos standard.

Whether Contour Failed to Comply with the Cited Standards

The parties have stipulated that Contour did not take any of the regulatory actions required by the standards cited in the citation and complaint while Contour employees were working in the presence of asbestos at the site; Contour asserts, however, it had no knowledge of or reason to know of the asbestos at the site. *See* Joint Statement, p. 13, ¶ D. The cited standards are set out below, along with the particular Joint Statement paragraph specifically relevant to each cited standard.[13] The transcript cites of the testimony of IH Stutz relative to each item are also set out below.

Item 1

Item 1 alleges a violation of 29 C.F.R. 1926.1101(d)(1), which provides that:

> On multi-employer worksites, an employer performing work requiring the establishment of a regulated work area shall inform other employers on the site of the nature of the employer's work with asbestos and/or PACM, of the existence of and requirements pertaining to regulated areas, and the measures taken to ensure that employees of such other employers are not exposed to asbestos.

Page 9, ¶ 46 of the Joint Statement states that:

> Prior to completing work on November 27, 2005, Respondent did not inform employees of other employers at the worksite (e.g. Clarence Wall and Ceiling) about the work that Respondent was doing in the presence of asbestos or potentially asbestos-causing materials.

The testimony of the IH as to Item 1 appears at pages 39-46 of the transcript.

Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.1101(e)(1), which states, in pertinent part, that:

> All Class I, II and III asbestos work shall be conducted within regulated areas.

Page 10, ¶ 47 of the Joint Statement provides that:

> While working at the worksite, Respondent did not establish a specific area where Respondent's employees working in the presence of asbestos were supposed to work.

The testimony of IH Stutz in regard to this item is at pages 50-53 of the transcript.

---

[13]Contour does not dispute the Secretary's facts set out in the Joint Statement, except to the extent the statements imply that Contour knew or should have known there was asbestos at the work site. *See* Joint Statement, pp. 11-12, ¶ B.

Item 3

Item 3 alleges a violation of 29 C.F.R. 1926.1101(f)(1)(i), which states as follows:

> Each employer who has a workplace or work operation where exposure monitoring is required under this section shall perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.

Page 10, ¶ 48 of the Joint Statement provides that:

> Prior to completing work on November 27, 2005, Respondent did not perform exposure monitoring at the worksite to determine the airborne concentrations of asbestos to which its employees might be exposed.

The testimony of the IH as to Item 3 is at pages 54-56 of the transcript.

Items 4a and 4b

Item 4a alleges a violation of 29 C.F.R. 1926.1101(g)(1)(ii), which requires the use of:

> Wet methods, or wetting agents, to control employee exposures during asbestos handling, mixing, removal, cutting, application, and cleanup....

Page 9, ¶ 49 of the Joint Statement provides as follows:

> While working at the worksite, Respondent's employees did not use wet methods or wetting agents to control employee exposure while working in the presence of asbestos.

Item 4b alleges a violation of 29 C.F.R. 1926.1101(g)(5), which states that:

> In addition, Class I asbestos work shall be performed using one of more of the following control methods pursuant to the limitations stated below: (i) Negative Pressure Enclosure (NPE) systems ... (ii) Glove bag systems ... (iii) Negative pressure glove bag systems ... (iv) Negative pressure glove box systems ... (v) Water spray process system ... (vi) A small walk-in enclosure ... (mini-enclosure)....

There is no Joint Statement paragraph specifically relevant to this particular standard; however, as noted above, the parties have stipulated that Respondent did not comply with any of the standards set out in the citation and complaint. *See* Joint Statement, p. 13, ¶ D. The testimony of IH Stutz with respect to Items 4a and 4b appears at pages 56-61 of the transcript.

Item 5

Item 5 alleges a violation of 29 C.F.R. 1926.1101(g)(3)(i), which prohibits the use of:

> High-speed abrasive disc saws that are not equipped with point of cut ventilator or enclosures with HEPA filtered exhaust air.

Page 10, ¶ 50 of the Joint Statement provides as follows:

While working at the worksite, Respondent's employees used a high-speed disc saw which was not equipped with point-of-cut ventilators or charcoal HEPA filter exhaust air.

The testimony of the IH relating to this item is at pages 61-63 of the transcript.

Item 6

Item 6 alleges a violation of 29 C.F.R. 1926.1101(g)(3)(iii), which prohibits:

Dry sweeping, shoveling or other dry clean-up of dust and debris containing ACM and PACM.

Page 10, ¶ 51 of the Joint Statement provides that:

While working at the worksite, Respondent's employees removed dust and debris at the worksite by pushing aside the debris into piles without using wet methods.

The testimony of IH Stutz as to Item 6 appears at pages 63-65 of the transcript.

Item 7

Item 7 alleges a violation of 29 C.F.R. 1926.1101(g)(4)(i), which provides that:

All Class I work, including the installation and operation of the control system shall be supervised by a competent person as defined in paragraph (b) of this section.

Page 10, ¶ 53 of the Joint Statement states as follows:

While working at the worksite, Respondent did not employ a competent person who was capable of supervising employees who were working in the presence of and/or handling and removing asbestos.

The testimony of IH Stutz regarding Item 7 is at pages 65-69 of the transcript.

Items 8a and 8b

Item 8a alleges a violation of 29 C.F.R. 1926.1101(h)(1)(i), which states that:

For employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph. Respirators must be used during: (i) Class I asbestos work.

Page 10, ¶¶ 60 and 61 of the Joint Statement provide that:

60. While working at the worksite, Respondent did not provide its employees with respirators.

61. While working at the worksite, Respondent's employees did not use respirators.

Item 8b alleges a violation of 29 C.F.R. 1926.1101(h)(2)(i),[14] which states as follows:

The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

Page 10, ¶ 56 of the Joint Statement provides that:

While working at the worksite Respondent did not implement a respiratory protection plan which complied with the OSHA asbestos standards.

The testimony of the IH as to Items 8a and 8b is set out at pages 69-74 of the transcript.

Item 9

Item 9 alleges a violation of 29 C.F.R. 1926.1101(i)(1), which states that:

The employer shall provide or require the use of protective clothing....

Page 10, ¶ 57 of the Joint Statement provides that:

While working at the worksite, Respondent did not require each employee working in the presence of asbestos to use any special clothing protections for asbestos.

The testimony of the IH in regard to this item is at pages 74-77 of the transcript.

Item 10

Item 10 alleges a violation of 29 C.F.R. 1926.1101(i)(3), which states as follows:

Contaminated clothing shall be transported in sealed impermeable bags, or other closed, impermeable containers, and be labeled in accordance with paragraph (k) of this section.

Page 10, ¶ 58 of the Joint Statement provides that:

While working at the worksite, Respondent did not require each employee working in the presence of asbestos to transport clothes in labeled and sealed impermeable bags or other labeled and closed containers.

The testimony of IH Stutz relating to this item appears at pages 77-80 of the transcript.

Item 11

Item 11 alleges a violation of 29 C.F.R. 1926.1101(j)(1)(i), which provides that:

The employer shall establish a decontamination area that is adjacent and connected to the regulated area for the decontamination of such employees. The decontamination area shall consist of an equipment room, shower area, and clean room in series.

---

[14]This item, which initially alleged a violation of 29 C.F.R. 1926.1101(h)(2)(ii), was amended in the complaint to allege a violation of 29 C.F.R. 1926.1101(h)(2)(i). (Tr. 71).

The employer shall ensure that employees enter and exit the regulated area through the decontamination area.

Page 11, ¶ 59 of the Joint Statement states that:

While working at the worksite, Respondent did not establish an area with a shower and a clean room for decontamination of workers, material, and equipment that were contaminated with asbestos.

The testimony of the IH as to Item 11 is set out at pages 80-83 of the transcript.

Item 12

Item 12 alleges a violation of 29 C.F.R. 1926.1101(k)(3)(i), which states as follows:

Before work in areas containing ACM and PACM is begun; employers shall identify the presence, location, and quantity of ACM, and/or PACM therein pursuant to paragraph (k)(1) of this section.

Page 9, ¶ 36 of the Joint Statement provides that:

Prior to completing work on November 27, 2005, Respondent did not determine whether there was asbestos or potentially asbestos containing materials at the worksite.

The testimony of the IH in regard to this item is at pages 83-85 of the transcript.

Item 13

Item 13 alleges a violation of 29 C.F.R. 1926.1101(k)(9)(i), which provides that:

The employer shall, at no cost to the employee, institute a training program for all employees who are likely to be exposed in excess of a PEL and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program.

Page 10, ¶ 52 of the Joint Statement states that:

Prior to completing work on November 27, 2005, Respondent's employees were not trained how to recognize asbestos or implement asbestos controls.

The testimony of IH Stutz with respect to this item is at pages 85-88 of the transcript.

Item 14

Item 14 alleges a violation of 29 C.F.R. 1926.1101(l)(4)(ii),[15] which requires waste and debris containing surfacing ACM/PACM to be:

[15]This item, which initially alleged a violation of 29 C.F.R. 1101(l)(4)(i), was amended in the complaint to allege a violation of 29 C.F.R. 1101(l)(4)(ii). (Tr. 88).

[P]romptly cleaned up and disposed of in leak tight containers.

Page 11, ¶ 62 of the Joint Statement provides as follows:

While working at the worksite, Respondent's employees did not dispose of debris in leak-tight containers.

The testimony of IH Stutz as to Item 14 appears at pages 88-90 of the transcript.

In view of the foregoing, the Secretary has met her burden of demonstrating that Contour failed to comply with the terms of all of the cited standards.

Whether Contour's Employees had Access to the Violative Conditions

It is clear from the Joint Statement and the relevant facts of this case, set out *supra*, that Contour's employees had access to the violative conditions while working at the site. The Secretary has thus met her burden of showing the employee access element of her case.

Whether Contour had Knowledge of the Violative Conditions

There is no dispute that Contour did not have actual knowledge that there was asbestos in the building and that, consequently, it was required to comply with the cited standards. *See* the relevant facts, set out above. *See also* Joint Statement, p. 9, ¶¶ 35-45, p. 12, ¶¶ 2-12, p. 13, ¶ D. The issue, therefore, is whether Contour had constructive knowledge, that is, whether it could have known of the asbestos in the building and the cited conditions with the exercise of reasonable diligence. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends Contour could have known of the asbestos in the building, based on the building's age, the ceiling debris at the site, and the language of the asbestos standard. Contour contends, however, that it had no reason to know about the asbestos in the building. It points out that neither it nor anyone else involved in the project had any knowledge of the asbestos in the building. It further points out that it is an erection contractor and does not work with asbestos-containing materials.

IH Stutz testified that Contour could have known there was asbestos in the building due to the presence of the ceiling debris, a white flaky material that could be seen throughout the work area; he agreed, however, that non-asbestos sprayed-on ceiling material has the same appearance. He further testified that it was apparent the building was older and that older buildings typically contain asbestos; Contour could have asked the owner the building's age, done an internet search, or gone to the assessor's office in Hamburg, or Contour could have had the ceiling material tested. The IH

noted that Mr. Szvoren had told him he thought the building was older due to its wooden trusses, something that is not seen in more recent construction; in fact, Mr. Szvoren told him he believed the building could have been built in the thirties and that it might have been an airplane hangar that was used during World War II. (Tr. 38-39, 124-25).

Mr. Szvoren testified that he never asked about asbestos at the site because Contour is a steel erection company and does not deal with asbestos; he indicated that in any project involving asbestos, the owner or general contractor advises Contour in advance, any asbestos work is taken care of by another contractor, and Contour has nothing to do with it. Mr. Szvoren also testified that Mr. Kiener told him the project was an emergency because people were in the building and another heavy snowfall could cause a further roof collapse. He noted that the subject of asbestos never came up at the site and that he was not aware of the Stohl report until he was deposed before the hearing. He agreed he had said at his deposition that there is a higher likelihood of asbestos in buildings built before 1970 as asbestos use then was prevalent. (Tr. 201-02, 205, 208-10, 214-19, 221-24).

I find that Contour, through Mr. Szvoren, could have known of the presence of the asbestos at the site with the exercise of reasonable diligence. Commission precedent is well settled that "[r]easonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.'" *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992), citing to *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Moreover, in other cases similar to this one that involved exposure to health hazards, where the employer argued it had no reason to know of the cited hazard, the Commission found that the employer could have known of the hazard had it exercised reasonable diligence. *See, e.g., Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872, 1874-75 (No. 03-1305, 2007); *Continental Elec. Co.*, 13 BNA OSHC 2153, 2154 (No. 83-0921, 1989); *Hermitage Concrete Pipe Co.*, 10 BNA OSHC 1517, 1518-19 (No. 4678, 1982); *Mahone Grain Corp.*, 10 BNA OSHC 1275, 1277, 1278-79 (No. 77-3041, 1981).

Here, Mr. Szvoren knew the building was older, based on what he told the IH; he also knew there was a higher likelihood of asbestos in older buildings.[16] (Tr. 38, 224). Further, at the subject

[16]As the Secretary points out, Mr. Szvoren testified at his deposition that, while Contour does not perform such work itself, asbestos abatement "happens constantly on [Contour's] bridge

site, Mr. Szvoren saw ceiling debris hanging "everywhere" in the area of the collapse. (Tr. 207). As the IH indicated, the presence of the debris should have alerted Mr. Szvoren to the possibility of the ceiling material containing asbestos, especially since Mr. Szvoren knew the building was older; in my view, that non-asbestos sprayed-on ceiling material has the same appearance does not excuse an employer, in these circumstances, from investigating further. In addition, Mr. Kiener testified that he saw Clarence employees using dust masks while working at the site, which caused him to contact Stohl to test the ceiling material; as Mr. Kiener put it, "I wanted to know what it was for myself." (Tr. 178). Mr. Szvoren also testified that he saw the Clarence employees working when he visited the site, and it is reasonable to infer that he saw them wearing dust masks; this observation should have prompted him to ask questions about the ceiling material's contents. (Tr. 216-18).

There is a further reason for finding that Contour had constructive knowledge of the asbestos at the site. The asbestos standard states at section 1926.1101(k)(1) as follows:

> *Communication of hazards*. (1) This section applies to the communication of information concerning asbestos hazards in construction activities to facilitate compliance with this standard. Most asbestos-related construction activities involve previously installed building materials. Building owners often are the only and/or best sources of information concerning them. Therefore, they, along with employers of potentially exposed employees, are assigned specific information conveying and retention duties under this section. Installed Asbestos Containing Building Material. Employers and building owners shall identify TSI and sprayed or troweled on surfacing materials in buildings as asbestos-containing, unless they determine in compliance with paragraph (k)(5) of this section that the material is not asbestos-containing. Asphalt and vinyl flooring material installed no later than 1980 must also be considered as asbestos containing unless the employer, pursuant to paragraph (g)(8)(i)(I) of this section determines that it is not asbestos-containing. If the employer/building owner has actual knowledge, or should have known through the exercise of due diligence, that other materials are asbestos-containing, they must be treated as such. When communicating information to employees pursuant to this standard, owners and employers shall identify "PACM" as ACM.

As I read the foregoing, the standard requires building owners and employers of potentially-exposed employees to identify certain materials (including sprayed- or troweled-on surfacing materials) in buildings built before 1981 as asbestos-containing, *unless* the building owner or employer shows, pursuant to section 1926.1101(k)(5), that the PACM does not contain asbestos;

---

jobs and everything else." (C-11, pp. 14-15).

section 1926.1101(k)(5) requires this showing to be made by a "completed inspection" pursuant to 40 C.F.R. Part 763, subpart E, or by testing pursuant to 40 C.F.R. 763.86, that demonstrates the material is not ACM. Stated another way, the standard creates a presumption that certain materials in buildings built before 1981 are asbestos-containing unless inspection or testing of the materials as required shows they do not contain asbestos. The Commission has upheld the presumption, finding in a decision issued in 2000 that, because the employer did not perform the required testing or inspection of the PACM to rebut the presumption the cited material contained asbestos, the employer violated the cited standards. *Odyssey Capital Group*, 19 BNA OSHC 1252 (No. 98-1745, 2000). *See also James R. Howell & Co.*, 19 BNA OSHC 1277 (No. 99-1348, 2000).

The building in this case was built in 1960, creating a presumption that the ceiling material contained asbestos. No testing of the material was done until after Contour finished its work at the site; therefore, Contour was required to comply with the cited standards. Based on the facts of this case, the language of the standard and the Commission precedent set out above, I find that Contour had constructive knowledge of the asbestos at the site.[17] I further find that, as the Secretary has shown employer knowledge, the final element of her case, Contour was in violation of the cited standards. In so finding, I have considered Contour's arguments that no one involved in the project knew there was asbestos in the building and that, as an erection contractor, it does not deal with asbestos at its work sites. These arguments do not change the fact that Contour's employees were exposed to asbestos at the site and that, under the standard and Commission precedent, Contour could have known of the asbestos with the exercise of reasonable diligence. Items 1 through 14 of Citation 1 are affirmed. The items are affirmed as serious violations in light of the serious illnesses, and even death, that can result from exposure to asbestos. (Tr. 44).

Penalty Determination

The Secretary has proposed a penalty of $3,000.00 for each of the 14 citation items. In assessing penalties, the Commission is required to give due consideration to the gravity of the

[17]Mr. Szvoren, a supervisor for Contour, had constructive knowledge of the asbestos and violative conditions at the job site. Commission precedent is well settled that either the actual or constructive knowledge of a supervisor can be imputed to the employer. *See, e.g., Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001).

violations and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and the gravity of the violations is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). IH Stutz testified the violations were considered to have high gravity due to Contour's employees being exposed to asbestos for three full days at the site; in addition, no control measures or precautions were taken, and the asbestos content of the ceiling material was high. The IH said the unadjusted base penalty was $5,000.00 and that a 40 percent reduction was given for the employer's size, resulting in a proposed penalty of $3,000.00 for each item; however, no reduction was given for history because of the serious citations Contour had received in the past three years, and no reduction for good faith was given because of the lack of any control measures or precautions to protect employees. (Tr. 44-50; C-17-22). In view of the testimony of IH Stutz, I find that a penalty of $3,000.00 for each citation item, resulting in a total penalty of $42,000.00, is appropriate. The total proposed penalty of $42,000.00 is accordingly assessed.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ORDERED that:

Items 1 through 14 of Serious Citation 1, alleging violations as set out in the body of this decision, are AFFIRMED. A penalty of $3,000.00 is assessed for each item, resulting in a total assessed penalty of $42,000.00.

/s/
Covette Rooney
Judge, OSHRC

Dated: April 16, 2007
Washington, D.C.