SECRETARY OF LABOR, Complainant, v. ODYSSEY CAPITAL GROUP III, L.P., d/b/a CASCADES APARTMENTS, Respondent.	OSHRC Docket No. 98-1745

DECISION

Before: ROGERS, Chairman, VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issue before the Commission is whether the judge erred in affirming ten serious violations of the Asbestos in Construction Standard, 29 C.F.R. § 1926.1101, by the Respondent, Odyssey Capital Group III, L. P. ("Odyssey"), d/b/a The Cascades Apartments ("Cascades"). Cascades argues that it lacked knowledge of the violative conditions because it reasonably relied on two prior environmental studies which indicated that asbestos hazards did not exist at the worksite. For the following reasons, we reject Cascades' arguments and affirm the judge's findings of violations and penalty assessment of $10,500.

In 1991, Odyssey purchased The Cascades apartment complex, which consists of about 146 one- and two-bedroom rental apartments in nine two-story buildings in Pittsburgh, Pennsylvania. In 1998, Cascades' employees performed maintenance work, including scraping and repainting of the ceilings, in various apartments. It is undisputed that Cascades implemented none of the asbestos-related precautions prescribed by OSHA standards. After commencing the work, the employees became concerned about possible exposure to asbestos, and one employee had a sample of ceiling debris tested. That test indicated that the sample contained five percent asbestos, and the employees notified Cascades' project manager of the test results. Although Cascades refused the employees' request for further

testing, subsequent tests by a local television station, the Allegheny County Health Department, and the Secretary's Occupational Safety and Health Administration ("OSHA"), confirmed the presence of asbestos in amounts exceeding OSHA's standard. On September 17, 1998, OSHA issued the citation on review here.

In its defense, Cascades points to a "Phase I environmental study" that was done for Odyssey's financing entity in 1991, and to another such study done in 1995, when Odyssey refinanced The Cascades.[1] Three samples of ceiling surfacing material in the apartments were analyzed for each study, and the reports stated that no sample contained as much as one percent asbestos. The relevant OSHA asbestos standards apply to materials that contain "more than 1 percent asbestos" (asbestos-containing material (ACM)), and to materials presumed to contain asbestos (presumed asbestos-containing material (PACM)).[2] 29 C.F.R. § 1926.1101(b). PACM includes sprayed- or troweled-on surfacing material contained in buildings constructed before 1981. *See also* 29 C.F.R. § 1926.1101(k).[3] It is undisputed that

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[1]Roger Morse, an expert on asbestos issues, testified that the purpose of a Phase I site assessment is to protect a lender from a Superfund action under the Comprehensive Environmental Response and Compensation Liability Act ("CERCLA").

[2]The Preamble to the Asbestos in Construction Standard explains the reason for the presumption that certain materials contain asbestos:

> [I]n the past, employers who were wrongly informed by building owners about the asbestos content of thermal system insulation successfully argued in some cases that they had exercised "due diligence." OSHA believes that the protection of employees must not depend on the good faith of their employers whose information sources may be defective. By requiring that TSI [thermal system insulation] and troweled- and sprayed-on surfacing material be handled as if they contain asbestos, employees will be protected from the consequences of their employers relying on erroneous information about the most risky asbestos materials.

59 Fed. Reg. 40,964, 41,014-15 (1994).

[3]The key provisions state:

(k) *Communication of hazards.* (1) This section applies to the communication

(continued...)

[3](...continued)
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. . . . *Employers and building owners shall identify TSI* [thermal system insulation] *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.* . . . When communicating information to employees pursuant to this standard, owners and employers shall identify "PACM" [presumed asbestos-containing material] as ACM [asbestos-containing material]. . . .

(k)(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. However, in all such cases, the information, data and analysis supporting the determination that PACM does not contain asbestos, shall be retained pursuant to paragraph (n) of this section.

(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

(continued...)

the Cascades Apartments, which were built between 1974 and 1979, contained sprayed-on acoustic paint on the ceilings that Cascades maintenance employees repaired in the apartments at issue.

An employer may overcome the presumption that sprayed- or troweled-on surfacing material in pre-1981 buildings is ACM, if it establishes that an analysis of bulk samples collected in the manner described in 40 C.F.R. § 763.86[4] shows that the surfacing material does not contain more than one percent asbestos. 29 C.F.R. §§ 1926.1101(k)(1), (5). Cascades has not shown that it conducted the prescribed sample collection or analysis, nor does it contend that it had.

DISCUSSION

At issue is whether "the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933, 1999 CCH OSHD ¶ 31,935, p. 47,389 (No. 94-3121, 1999).[5] The record shows that Cascades was aware of all the conditions constituting the

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[3](...continued)

round robin testing program.

(Some emphasis added). The cited Asbestos in Construction Standard, 29 C.F.R. § 1926.1101, took effect on October 11, 1994.

[4]Those regulations were promulgated by the U. S. Environmental Protection Agency under AHERA. Both the 1991 and 1995 Phase I studies involved only three samples. Even if the ceiling material were completely homogeneous throughout the nine buildings (a disputed issue at the hearing), there were 17,000 square feet of the material. Thus, at least seven random samples would be necessary under 40 C.F.R. § 763.86(a)(3), in order to rebut the presumption of asbestos-containing material in section 1926.1101(k)(1). The Phase I studies also did not indicate that the samples were collected in a statistically random and representative manner or by an accredited inspector. *Cf.* 40 C.F.R. § 763.86(a) ("*An accredited inspector shall collect*, in a *statistically random manner that is representative* of the homogeneous area, bulk samples from each homogeneous area[, and at least] *seven bulk samples shall be collected from each homogeneous area that is greater than 5,000 ft*^{2}") (emphasis added).

[5]*See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD (continued...)

violation. It knew that the apartment ceilings which its employees maintained and repaired had been constructed before 1981, and that many of them contained sprayed-on surfacing material. It does not dispute that the 1991 and 1995 Phase I environmental site assessment studies on which it relies were not AHERA-compliant, nor did they involve collection of bulk samples in the manner described in 40 C.F.R. 763.86.[6]

Cascades nevertheless argues that it may rely on those studies to establish that it was reasonably diligent in determining that the apartments did not contain sufficient asbestos to trigger application of the cited OSHA standards. In support of this argument, Cascades cites three Commission decisions which found employers' scientific monitoring efforts to constitute reasonable diligence, even though OSHA's subsequent testing showed, contrary to those monitoring results, that employees were exposed to violative levels of hazardous substances. *Milliken & Co.*, 14 BNA OSHC 2079 (No. 84-767, 1991), *aff'd*, 947 F.2d 1483 [15 BNA OSHC 1373] (11th Cir. 1993) (cotton dust); *General Electric Co.*, 9 BNA OSHC 1722, 1727-28 (No. 13732, 1981) (asbestos tubing being cut with table saws); *Dunlop v. Rockwell Int'l*, 540 F.2d 1283 (6th Cir. 1976) (asbestos dust generated by brake grinding operation). Unlike those cases, however, this one involves a standard that in effect *defines* what constitutes reasonable diligence under it. The standard requires the employer to take

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[5](...continued)
¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (listing the four elements of Secretary's prima facie case, the last of which is a showing that the employer either knew or could have known of the condition with the exercise of reasonable diligence), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

[6]In fact, those studies provide specific disclaimers regarding the reliability of their limited asbestos findings. The 1991 study states: "When very small percentages of asbestos are present," the method the study used (Polarized Light Microscopy (PLM)) "can miss detecting asbestos." It further noted that "sampling was limited" and that "[f]urther sampling, and analysis using Transmission Electron Microscopy (TEM) could clarify the percentage of asbestos content[.]" The 1995 study states: "This environmental assessment . . . is intended solely for the information and benefit of [the lender]. It may not be relied upon by you in any other connection." The Phase I studies do not even suggest that they meet any OSHA criteria.

precautions *unless* specific testing, done in a way that was *not* done here, shows that the material involved contains no more than one percent asbestos.[7] As noted, there is no dispute that Cascades did not take the requisite precautions. We therefore find that Cascades knew or reasonably could have known that the ceiling surface material at issue was PACM, and that it failed to conduct the specific testing called for in the Asbestos in Construction Standard or comply with the related requirements of that standard. Thus, the judge did not err in affirming the ten violations.

Penalties

Cascades argues that the judge's penalty assessments, which totaled $10,500 for 10 serious violations, are excessive. The Secretary argues that the judge's penalty assessments are "eminently reasonable." The ten violations, and the penalties assessed for each, are summarized in Appendix A (copy attached). Cascades does not dispute OSHA's test results which, as mentioned, showed more than one percent of asbestos content in five of the six bulk samples it took of sprayed-on ceiling material. The judge found all the violations serious, because they may result in asbestosis or mesothelioma, which are debilitating or fatal illnesses.

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[7]Even assuming that Cascades was unaware of the presumption incorporated in section 1101(k), that would be at most ignorance of the law, which is no excuse for its failure to comply. *E.g., Cheek v. United States*, 498 U.S. 192 (1991) (citing *Shevlin-Carpenter v. Minnesota*, 218 U.S. 57, 68 (1910) ("ignorance of the law will not excuse"). *See, also, e.g., Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991) ("Whether or not employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance") (citing *North Ala. Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978)); *United States v. Green Drugs*, 905 F.2d 694, 696 (3d Cir.), *cert. denied*, 498 U.S. 985 (1990) (citing *Shevlin*); *Kenneth P. Thompson Co.*, 8 BNA OSHC 1696, 1704, 1980 CCH OSHD ¶ 24,593, p. 30,179 (No. 76-2623, 1980) ("Respondent is presumed to have knowledge of the cited standard by virtue of its publication in the *Federal Register*.") The judge also relies on the past professional experience of Odyssey's President, John Kirwin, with asbestos litigation as an additional ground for rejecting Cascades' reliance on those studies.

Under the Occupational Safety and Health Act, the Commission must 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." 29 U.S.C. § 666(j). The judge found:

> As to gravity, two, perhaps three employees were exposed intermittently over a period of years prior to the hiring of an independent asbestos removal contractor. The gravity of the violation is not low because exposure was expansive in time although limited as to the number of employees exposed.

The judge gave Cascades no credit for good faith, based on the underlying facts showing a lack of reasonableness in its reliance on the 1991 and 1995 reports, and its refusal to investigate potential asbestos violations even after employees submitted a test showing more than one percent asbestos in its ceiling materials. The judge found "no direct evidence as to the size of the employer's business," and "no history of prior violations." (Cascades represents on review that its annual gross revenue is approximately one million dollars.)

The judge therefore assessed the Secretary's proposed $1500 penalty for Item 1, which involved the violation of permissible exposure limits (PEL) for airborne asbestos. As to the other citation items, he noted that there "is no dispute that Respondent was not in compliance with any of the requirements of the standards cited." Each of those violations arguably could result in increased asbestos exposure of an employee. The judge assessed $1000 for each of them rather than the Secretary's $1500 proposed penalties, in part because he found their gravity lower than that of the PEL violation.

Cascades argues that those penalties are "inappropriate in light of the technicality of Respondent's violation of 29 CFR § 1926.1101(k)(3)(i)" and the other cited provisions. Cascades' violations are not merely "technical," however. They exposed employees to regulated amounts of asbestos, which has been shown to cause death and serious illnesses, and Cascades took no precautions to limit that exposure or protect its employees. Accordingly, the judge's penalty assessments are justified.

Thus, we affirm the judge's findings of violations and the penalty assessments. SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Dated: November 21, 2000

Secretary of Labor v. Odyssey Capital Group III, L.P. d/b/a Cascade Apartments
Docket No. 98-1745

Appendix A
Citation Items, Standards and Penalties

Item	Cited Standard 29 C.F.R. 1926.1101 Subsection	Description of Alleged Violation	Penalty
1a	(c)(1)	Asbestos exposure in excess of permitted 8 hour time-weighted average.	1500
1b	(c)(2)	Asbestos exposure in excess of thirty minute "excursion limit."	
2a	(e)(1)	Class I asbestos work not performed confined to a "regulated area."	1000
2b	(k)(7)(i)	Lack of warning signs demarcating a regulated area.	
3a	(f)(1)(i)	Lack of asbestos exposure monitoring in known asbestos work area.	1000
3b	(f)(2)(i)	Failure to designate competent person to perform asbestos exposure assessment in asbestos work area.	
4a	(g)(1)(i)	Lack of dust collectors with HEPA filters in asbestos work area.	1000
4b	(g)(1)(ii)	Lack of wet methods or wetting agents to control asbestos exposure in asbestos work area.	
4c	(k)(3)(i)	Failure to identify presence, location and quantity of asbestos or presumed asbestos containing material.	
5	(h)(1)(i)	Failure to provide appropriate respirators for work in a Class I asbestos area	1000
6	(i)(1)	Failure to provide appropriate protective clothing for work in a Class I asbestos area.	1000

Item	Cited Standard 29 C.F.R. 1926.1101 Subsection	Description of Alleged Violation	Penalty
7	(j)(1)(i)	Failure to provide a decontamination area for employees working in an asbestos area.	1000
8	(k)(9)(i)	Failure to institute asbestos training program for employees likely to be exposed to asbestos.	1000
9	(l)(2)	Failure to collect asbestos containing scrap in sealed, labeled impermeable bags or containers.	1000
10	(o)(1)	Failure to have a person designated as a competent persons for asbestos work areas.	1000

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v ODYSSEY CAPITAL GROUP III, L.P. d/b/a CASCADE APARTMENTS, Respondent.	OSHRC DOCKET No. 98-1745

Appearances: Anthony G. O'Malley, Esq.
Office of the Solicitor
U.S. Department of Labor
For the Complainant

Daniel J. Sporrer, Esq
Salamon & Sporrer
Pittsburgh, Pennsylvania
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA), Respondent was issued one serious citation containing 10 items alleging various violations regarding protecting employees against overexposure to asbestos. Respondent timely contested. A hearing on the matter took place in Pittsburgh, Pennsylvania on July 14 and 15, 1999. Closing briefs have now been filed by both parties.

Jurisdiction

It is undisputed that at the time of this inspection Respondent was engaged in the ownership and operation of an apartment complex. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[8] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Most simply put, this is a case in which the Secretary showed that asbestos was present in excessive amounts, while the employer had earlier measurements indicating that the asbestos concentration was not excessive. The Secretary, however, has fulfilled her burden of establishing that the employer's failure to discover the excessive asbestos concentrations resulted from a failure to exercise reasonable diligence.

Respondent, Odyssey Capital Group III, L. P. ("Odyssey"), purchased the Cascade Apartments ("the Apartments") in Pittsburgh, Pennsylvania in August 1991; it also began to manage the property at that time. In 1991, when Odyssey bought the property, and again in 1995, when the property was refinanced, a "Phase I environmental study" was done on behalf of the financing entity. See, GX-5 ("1991 report") and GX-6 ("1995 report.") The 1991 report, in part, stated that three samples of building surfacing materials were taken and that testing revealed that "one sample contained less than one percent [asbestos] and no asbestos was found in the other two samples." The 1995 report stated that the samples submitted did not contain asbestos.[9]

In 1998, two employees, whose duties included scraping and removing loose ceiling paints and sealants from water-damaged areas of the apartments, became concerned about possible exposure to asbestos after one of them saw a television documentary about the subject. The employees first raised their concerns with the building manager. Based on her experience as a "certified sales person," she told the employees that she did not feel that the Apartments would have been purchased or refinanced if there were an asbestos problem (Tr. 222). Within a few weeks, the

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[8] *Title 29 U.S.C. § 652(5).*

[9] Appendix C, Table 1 of the 1995 report shows that three samples were tested, which contained less than 1%, less than 5% and 0% asbestos. (GX-6, 7).

employee took his own sample of the debris from the scraping, had it analyzed, and presented the results ("PSI test") to the building manager. The building manager relayed the PSI test results to Odyssey's President, who responded by fax that he had the 1991 and 1995 reports showing that no dangerous levels of asbestos were present (Tr. 226-28. See also, Tr. 61-64; 67-69; 110; 142-43 and 157-58.). The building manager requested of the owner that another asbestos test be performed. The president declined to do so (Tr. 230). The two employees refused to work in the apartments they suspected contained asbestos and they were consequently fired. In addition, there is reliable and creditable evidence in the record that after the two employees were fired, at least one person, who was hired as a supposed independent contractor, continued the removal work in the same manner as the fired employees (Tr. 166; 206 and 234-35). Following the firing of the employees additional asbestos testing by the county health department, a local television station and OSHA all confirmed the presence of asbestos containing materials. (GX-1, GX-7).

Under 29 C.F.R. § 1926.1101, the OSHA standard regulating asbestos exposure in construction work, any material containing more than 1 percent asbestos is classified as "asbestos containing material (ACM)."[10] The employees' activities in scraping and removing "ACM" was "Class I asbestos work."[11] Where "Class I asbestos work" is being performed, until the employer demonstrates otherwise, employees are presumed to have been exposed to asbestos in amounts exceeding the permissible exposure limits under both the eight hour time-weighted average and the thirty minute "excursion" limit requirements.[12]

The central dispute here is whether Odyssey's reliance on the 1991 and 1995 reports, which it reads as demonstrating that no ACM was present, thus justifying its taking no asbestos precautions at the Apartments, is reasonable.[13] If Odyssey's reliance on the 1991 and 1995 reports was

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[10] See, Title 29 C.F.R.§ 1926.1101(b). It is also noted that since the apartments were constructed no later than 1980, any "thermal system insulation and surfacing material" in the buildings is "presumed asbestos containing material."") PACM *Id.*

[11] *Id.*

[12] Title 29 C.F.R. § 1926.1101(f)(2)(ii)

[13] As Respondent stated in its pre-trial statement:

> [t]he primary legal issue in the instant action is whether Respondent was justified in its reliance upon two (2) separate Phase I environmental studies, performed in 1991 and 1995, respectively by qualified firms, that indicated there was not

(continued...)

reasonable, it did not and could not have reasonably known of the violative condition at least until it was confronted with 1998 test data.[14]

According to the Secretary, the 1991 and 1995 reports could not reasonably have been relied on to show that he materials being scrapped and removed at the Cascade Apartments in 1998 contained less than 1 percent asbestos. The Secretary maintains that the 1991 and 1995 reports would have put a reasonably diligent employer on notice that further inquiry into asbestos presence was warranted at that time. She claims that further testing would have revealed the presence of asbestos in excess of 1 percent, as did the tests conducted by the County Department of Health on June 26, 1998 and by OSHA on July 10, 1998. See, GX-1 - 3.

Several Commission decisions are apropos. The Commission has held that the Secretary fails to prove the "knowledge" element of an alleged violation where the employer had conducted earlier atmospheric tests that did not show that employees were exposed to excessive levels of airborne contaminants. *North American Rockwell Corp.*, 2 BNA OSHC 1710 (Nos. 2692 and 2875, 1975), *affirmed sub nom Dunlop v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976). *See Miliken & Co.*, 14 BNA OSHC 2079, 2083 (No. 87-0767, 1991). Prior testing cannot, however, rise to the level of a defense unless the data is reliable. Even where the data is reliable, the prior testing cannot constitute such a defense unless the employer's reliance on the data is reasonable. *Id.*

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[13](...continued)

ACM (Asbestos Containing Material) at The Cascades Apartments.

The United States Court of Appeals for the Sixth Circuit rejected the Secretary's contention that whether an employer has been reasonably diligent within the meaning of § 17(k) of the Act is a question of law noting that what an employer knows and what actions it took are questions of fact. *Dunlop v. Rockwell International*, 540 F.2d 1283, 1288 (6th Cir. 1976).

[14] There can be no serious violation of the Act as alleged unless the employer knew or using "reasonable diligence" could have known of the existence of the violative condition. See, Act, § 17(k), 29 U.S.C. § 666(j). In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) the employee exposure or access to the hazard created by the non-compliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

For the following reasons, based upon all of the facts and circumstances in this case, I find that the record demonstrates that Odyssey's lack of knowledge as to the presence of asbestos containing materials at the Apartments was due to its failure to act in a reasonable and diligent manner.

John P. Kirwin, Odyssey's president, made the relevant determinations and decisions for Respondent regarding the operation of the Apartments. (Tr. 427-432). It is clear from the testimony and evidence that he made the decision to dismiss the complaints and asbestos test results the employees gave him and to maintain, in the face of contrary evidence, that there was no asbestos problem at the Apartments. Based upon his education and experience, I find untenable his claim that before learning of 1998 asbestos test results, the 1991 and 1995 reports gave him no cause to further investigate possible asbestos problems that would arise from the scraping and removing of insulating paints and sealants at the Apartments. The information and inferences that may be gleaned from documents such as the 1991 and 1995 reports depend, in significant part, upon the education and awareness of the reader. And Mr. Kirwin's claimed naivete in interpreting the reports is totally inconsistent with his background. Mr. Kirwin is an experienced real estate dealer who has been a practicing lawyer with specific experience in asbestos litigation. He is also involved in the purchase of a number of properties, and he has had at least one prior involvement is a property purchase with similar asbestos issues (Tr. 441). Mr. Kirwin testified that he was "surprised" when the 1991 report "did not show thresholds of asbestos." (Tr 455). He also testified that he had examined the property and he in effect, conceded that he anticipated that the 1991 report would raise asbestos issues. When it did not, he simply ignored his own background, preferring to accept at face value a report he had reason to question since this might have raised difficulties in the purchase of the property.

In addition to the above, the 1995 report states that the sampling was "limited" and that "further sampling and analysis using Transmission Electron Microscopy (TEM) could clarify the percentage of asbestos content." (GX 5). If the authors of the 1995 report were satisfied that the asbestos testing was adequate and the results clear, there would have been no need to suggest additional sampling and another testing technique. Mr. Kirwin's background, along with his understanding of the high degree of danger associated with asbestos exposure, is inconsistent with his testimonial insistence that the 1991 and 1995 reports in no way raised any question that further testing might be required. Moreover, in assessing his testimony I have taken into account Mr. Kirwin's financial interest in maintaining and increasing the value of the Apartments (See, Tr. 399-400) as well as his demeanor as a witness. At the outset, Mr. Kirwin clearly tried to give the impression of being a sincere businessman, but one with far less sophistication than his age and

experience would suggest. As his examination went on, however, his extensive real estate experience and legal background became apparent in his choice of language and use of technical and legal terms. In short, his testimony was that of a person being less than fully candid until it became necessary to do so and the overall impression was one of false sincerity.

Finally, in addition to the above, I give full credit and significant weight to the testimony of Roger Morse. He opined that Respondent's reliance on the 1991 and 1995 reports as showing a lack of asbestos at the Apartments was unreasonable in terms of the knowledge and general principles of the real estate industry (*e.g.*, Tr. 401) even taking into account that the reports were somewhat "atypical." (Tr. 416-20).

Citation 1, Items 1 and 1b - - 29 C.F.R. § § 1926.1101(1)(c)(1) and 1101(c)(2)

For the above reasons, Respondent's reliance on the 1991 and 1995 reports was unreasonable and it thus knew or reasonably should have known that the paint scraping activities would produce asbestos containing materials and thus is presumed to have had employees exposed to asbestos in amounts exceeding the permissible exposure limits under both the eight hour time-weighted and the thirty minute "excursion" limit requirements. Respondent was thus in violation of the standards at 29 C.F.R. § 1926.1101(c)(1) and 1101(c)(2) as alleged in Citation 1, Items 1a and 1b. Accordingly, Citation 1, items 1a and 1b are AFFIRMED.

There is no doubt that exposure to asbestos in levels exceeding the threshold limit value for an eight hour time-weighted average and for a thirty minute "excursion limit" are both "serious" within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j), of the Act. They may be the cause of asbestosis or mesothelioma which are debilitating or fatal illnesses. *Dravo Corp.,* 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied,* 639 F.2d 772 (3d Cir. 1980). Accordingly, Citation 1, Items 1a and 1b are found to be serious.

In determining appropriate penalties for violations, including those classified as willful, "due consideration" must be given to the criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include; the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of a violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." *J.A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) In this case, the evidence is no direct evidence as to the size of the employer's business. As to gravity, two, perhaps three employees were exposed intermittently over a period of years prior to the hiring of an independent asbestos removal contractor. The gravity of the violation is not low because exposure was expansive in time although limited as to the number of employees exposed. Respondent has no history of prior violations. Finally, for all of the reasons discussed regarding its lack of reasonableness in relying on the 1991 and 1995 reports, I find that Respondent cannot be credited with good faith. Under these circumstances, I find that the penalty of $1500 as proposed by the Secretary for Citation 1, Items 1a and 1b is appropriate.

Citation 1, Items 2a, 2b, 3a, 3b, 4a, 4b, 4c, 5, 6, 7, 8, 9 and 10. -- Various sub-sections of 29 C.F.R. § 1926.1101[15]

Each of the remaining items and sub-parts of the citation issued to Respondent allege violations of the Act for the failure to comply with various sub-sections of the standard at 29 C.F.R. § 1926.1101 which, as a whole, regulates asbestos exposure in construction. There is no dispute that Respondent was not in compliance with any of the requirements of the standards cited.

Once asbestos exposure is established (in this case, by the presumption under 29 C.F.R. § 1926.1101(f)(2)(I)), the employees must have the full panoply of asbestos exposure protection. Here, it is undisputed that Respondent had the belief, albeit in error, that was no asbestos containing materials at the site so as to trigger the need for an entire asbestos protection program. Citing the absence of separate, distinguishable elements of a complete asbestos protection program as separate violations is, however, not a redundancy, where, as here compliance with one of the standards does not necessarily result in compliance with the others. Under Commission precedent citations are duplicative where they involve substantially the same violative conduct. *Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2057 (No. 90-2873, 1992). Two citations have been found to have been duplicative where compliance with one necessarily resulted in compliance with the other. *Capform*, 13 BNA OSHC 2219 (No. 84-0556, 1989). Although they are separate violations, Items 2 through 10 flow from Respondent's reliance on the 1991 and 1995 reports and are thus integrally related. Moreover, the gravity of each of the violations in items 2 through 10 is lower than that of item 1 which deals with the actual overexposure to asbestos. All else remains the same. As such, they do not warrant separate penalties of $1500 each. Under these circumstances, I find that a penalty of $1000 each for items 2,3,4,5,6,7,8 ,9 and 10 is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

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[15] See Appendix A, Attached.

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Citation 1, Items 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

4. Each and every one of the violations of the Act found above was serious.

5. A civil penalty of $1,500 is appropriate for Item 1.

6. A civil penalty of $ 1000 is appropriate for each of the violations in Items 2, 3, 4, 5, 6, 7, 8, 9 and 10.

ORDER

1. Citation 1, Items 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 are AFFIRMED.

2. A civil penalty of $ 10,500 is assessed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: 11-29-99
Washington, D.C.

Secretary of Labor v. Odyssey Capital Group III, L.P. d/b/a Cascade Apartments
Docket No. 98-1745

Appendix A
Decision and Order
Itemization of Citation Items, Standards and Proposed Penalties

Item	Cited Standard 29 C.F.R. 1926.1101 Subsection	Description of Alleged Violation	Proposed Penalty
1a	(c)(1)	Asbestos exposure in excess of permitted 8 hour time-weighted average.	1500
1b	(c)(2)	Asbestos exposure in excess of thirty minute "excursion limit."	
2a	(e)(1)	Class I asbestos work not performed confined to a "regulated area."	1500
2b	(k)(7)(I)	Lack of warning signs demarcating a regulated area.	
3a	(f)(1)(I)	Lack of asbestos exposure monitoring in known asbestos work area.	1500
3b	(f)(2)(I)	Failure to designate competent person to perform asbestos exposure assessment in asbestos work area.	
4a	(g)(1)(I)	Lack of dust collectors with HEPA filters in asbestos work area.	1500
4b	(g)(1)(ii)	Lack of wet methods or wetting agents to control asbestos exposure in asbestos work area.	
4c	(k)(3)(I)	Failure to identify presence, location and quantity of asbestos or presumed asbestos containing material.	
5	(h)(1)(I)	Failure to provide appropriate respirators for work in a Class I asbestos area	1500
6	(I)(1)	Failure to provide appropriate protective clothing for work in a Class I asbestos area.	1500

Item	Cited Standard 29 C.F.R. 1926.1101 Subsection	Description of Alleged Violation	Proposed Penalty
7	(j)(1)(I)	Failure to provide a decontamination area for employees working in an asbestos area.	1500
8	(k)(9)(I)	Failure to institute asbestos training program for employees likely to be exposed to asbestos.	1500
9	(l)(2)	Failure to collect asbestos containing scrap in sealed, labeled impermeable bags or containers.	1500
10	(o)(1)	Failure to have a person designated as a competent persons for asbestos work areas.	1500