SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	
ERIC K. HO,	:	OSHRC Docket Nos. 98-1645 & 98-1646
HO HO HO EXPRESS, INC.,	:	
HOUSTON FRUITLAND, INC.,	:	
Respondents.	:	

DECISION

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

BY THE COMMISSION:

These cases arise out of the Secretary's citations charging that Respondents Eric K. Ho ("Ho") and two corporations controlled by Ho — Ho Ho Ho Express, Inc. ("Ho Ho Ho Express") and Houston Fruitland, Inc. ("Houston Fruitland") — violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), at a worksite where employees were exposed to asbestos in the course of a project to renovate a building. The Secretary alleges that Respondents committed willful and serious violations by failing to comply with the construction industry asbestos standard at 29 C.F.R. § 1926.1101 and other construction safety standards in Part 1926. The Secretary also alleges an other than serious violation for failing to report an accident, contrary to section 1904.8. In addition, the Secretary alleges that Respondents willfully violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), the "general duty clause," upon exposing employees to a hazard when Respondents failed to recognize a natural gas line.

Respondents do not dispute the existence of the violations themselves but raise legal issues regarding the application of the Act. For the reasons that follow, the Commission affirms

the judge's conclusion that Ho is engaged in a business affecting interstate commerce and, therefore, subject to the Act. However, the Commission reverses that portion of the judge's decision in which he determined that the two corporate Respondents were properly cited for the violations. We also conclude that the judge erred in affirming violations for failure to comply with certain provisions of the asbestos standard as separate violations for each exposed employee. In addition, we affirm the judge's decision that the violation pertaining to the misidentified gas line was not willful.

BACKGROUND

On October 27, 1997, Ho, acting as an individual,[1] purchased a defunct hospital and adjoining medical office building in Houston, Texas, for the purpose of developing the property as residential housing. There is no dispute that Ho was aware asbestos was present at the site. Ho signed a property disclosure statement which stated that the property contained asbestos, and the broker who handled the transaction gave Ho a copy of a study by an environmental consultant identifying asbestos fireproofing, floor tiles, and other asbestos materials. This report specifically cautioned that "any disturbance or alterations made to asbestos-containing materials must be handled by trained personnel who are licensed and registered with the Texas Department of Health (TDH) using proper procedures and respiratory protection."

Despite this explicit warning, Ho hired two individuals, Manuel Escobedo ("Escobedo") and Corston Tate ("Tate"), who had previously done construction work for him personally or for the respondent corporations, to conduct the renovation work, including the removal of asbestos material from the building. Escobedo in turn hired 11 Mexican nationals who were illegal immigrants to assist with the work, which commenced around January of 1998. There is no dispute that at most, the workers were given dust masks not suitable for protection against

[1]When these cases were originally docketed, they were captioned as "Eric K. Ho, individually and d/b/a Ho Ho Ho Express and Houston Fruitland, and Ho Ho Ho Express, Inc." There is no evidence that as an individual, Ho ever represented himself as doing business under the names Ho Ho Ho Express or Houston Fruitland. Accordingly, we hereby amend the caption to reflect the correct legal designation of the Respondents. *Boise Cascade Corp.*, 14 BNA OSHC 1993 n.2, 1991-93 CCH OSHD ¶ 29,222, p. 39,119 n.2 (Nos. 89-3087 & 89-3088, 1991).

asbestos that they wore only occasionally. They were not issued protective clothing as required by the asbestos standard. Ho also did not do any of the following: provide a respiratory protection program; conduct medical surveillance of the workers; conduct any asbestos monitoring; or implement any of the work practices required by the standard, such as adequate ventilation and debris removal. The workers were not informed of the presence of asbestos, of the hazards associated with it, or of the appropriate work practices. In short, the workers were given no training whatsoever. Conditions at the site also violated other provisions of the standard pertaining to such matters as identification of regulated areas, warning signs, decontamination areas, and pre-work assessments of the amount of asbestos-containing material. Ho visited the site almost every day, and there is no dispute that he was aware of these conditions.

On February 2, 1998, approximately a month after the work started, a city inspector visited the site in response to a complaint of work being performed without a permit. He observed at least ten individuals scraping fireproofing material with visible dust in their breathing area. A few of these workers had dust masks, but none had respiratory protection or protective clothing. The city inspector issued a stop work order citing the possibility of exposure to asbestos, and his order required that city approval be obtained before work could continue. Ho then began negotiating for removal of the asbestos material with Alamo Environmental, a contractor that specializes in asbestos abatement. These negotiations continued until March 27, 1998, when Ho notified Alamo by fax that he agreed to Alamo's proposal.

However, during the period of time that Ho was negotiating with Alamo, he had resumed work at the site under the same conditions with the exception that, following the city inspection, Ho directed that the work be performed at night. Not only did the workers have their meals at the site, some in fact lived at the site. During the night, when they were working, the gate to the property was locked, and the workers were kept inside. There was no portable water available to the workers and only one portable toilet, which never was emptied during the time the workers were using it. Due to the condition of the toilet, most workers wound up

relieving themselves on the ground around the property, or if they wished, Tate would allow them to leave the premises to use the restroom at a nearby commercial establishment. If the employees needed anything, Tate, who had a key to the gate, was given money by the employees, and he would go off the site to make purchases for them. Again, there is no dispute that Ho visited the worksite during this period of time and was aware of these conditions.

The asbestos removal was conducted in this fashion until its completion on March 10, 1998. Having completed this portion of the renovation work, Ho directed that starting March 11, the remaining work would continue during daylight hours. On March 11, an explosion and fire occurred at the worksite, injuring Tate and two workers. The following day, workers were summoned to Ho's office where they were given a release to sign. Under the terms of the release, each worker purported to acknowledge "that such work was performed by him as an independent contractor, and not as an employee of Eric Ho…." In addition to acknowledging receipt of $1000 "as full payment for the work performed by the undersigned," each worker also agreed to accept an additional $100 in exchange for releasing Ho from any claims arising or that might arise as a result of the explosion and fire. These release forms were written in English, but an interpreter was present who read the document in Spanish to the workers.

After the explosion, the TDH conducted an investigation. Samples taken of both debris and the ambient air at the site showed levels of asbestos in excess of limits prescribed by the United States Environmental Protection Agency as well as state standards. The state authorities also notified Ho that the site remained in an unsafe condition and that the building needed to be sealed by qualified personnel. Ho's response was to direct several of the workers to install plywood over the windows. Again, the workers were not given any protective equipment when performing this work. Ho was subsequently convicted of criminal violations of the Clean Air Act, 42 U.S.C. § 7413(c) ("CAA"). The Fifth Circuit recently upheld those convictions. *United States v. Eric Kung-Shou Ho*, 311 F.3d 589 (5th Cir. 2002) ("Ho"), *cert. denied*, 123 S.Ct. 2274 (2003).

APPLICABILITY OF THE ACT

The first issue before us is whether the judge properly concluded that the Act applies to Ho's activities. The Act applies to a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). *See Don Davis,* 19 BNA OSHC 1477, 1479, 2001 CCH OSHD ¶ 32,402, p. 49,896 (No. 96-1378, 2001). Notwithstanding his efforts during the course of the work to treat the workers as independent contractors, Ho neither contends that he is not the employer of the eleven workers, nor does he dispute that he is the employer of Tate and Escobedo. Rather, Ho contends that the Secretary failed to establish that his activities constitute a "business affecting commerce."

We agree with the judge's decision that Ho's activities at the worksite sufficiently affect interstate commerce so as to be subject to the Act. In reaching this conclusion, we rely, as did the judge, on Commission precedent holding that construction work, such as that performed by Ho, necessarily is covered by the Act. *See, e.g., Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1983-84 CCH OSHD ¶ 26,516 (No. 77-3676, 1983) (construction work *per se* affects interstate commerce because there is an interstate market in construction materials and services). We also note that the circumstances here are analogous to those in *Godwin v. OSHRC*, 540 F.2d 1013, 1016 (9th Cir. 1976), in which the employer was clearing land to plant a vineyard with the eventual objective of selling grapes to wineries or producing and selling wine directly. In *Godwin,* the court reasoned that because the clearing of land is an integral part of the process of manufacturing wine, the employer's activities would have an effect on interstate commerce when "*taken together with land clearing by others*" and, therefore, the court concluded that unsafe working conditions at the employer's worksite would thereby affect all other similarly situated businesses. *Id.* at 1016 (emphasis added). As the court stated, "[t]he effect of permitting one business to use cheaper — but more dangerous — work methods will tend to force competitors to cut their land clearing costs similarly." *Id.* (footnote omitted). Thus, the effect on interstate commerce existed. Likewise, by conducting asbestos abatement without contracting for such services, Ho deprived established asbestos abatement specialists of the opportunity to perform the necessary work at his worksite, thereby affecting the interstate

market in asbestos control and removal.

The Fifth Circuit reached the same conclusion when it rejected Ho's claim that Congress lacked constitutional authority under the Commerce Clause to regulate his work activities.[2] The court explained that a regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce. *Ho*, 311 F.3d at 599. As the court noted, this rule has come to be known as the "aggregation" principle. *Id.* at 598-99 (*citing Wickard v. Filburn*, 317 U.S. 111 (1942)). The court expressly held that Ho's failure to use the services of licensed asbestos abatement providers had an effect not only on the providers of such services but also on the commercial real estate market itself. *Id.* at 603-04. Thus, the court determined that Ho "deprived licensed abatement companies of a promising business opportunity." *Id.* at 603. Because "these substantial effects on the asbestos removal market are direct, not attenuated," the court found that the use of the aggregation principle was justified. *Id.* The court further concluded that:

> Ho's illicit asbestos removal project likely would reduce the number of companies providing asbestos removal services. Fewer companies means that conscientious property owners would have more trouble locating licensed abatement companies and likely would have to pay higher prices for the services of remaining companies. Furthermore, Ho would gain a commercial advantage over conscientious property owners who must pay these higher prices for asbestos removal.

Id. at 604. *See also Lacy,* 628 F.2d at 1228 (court held that under statutes such as the Act that

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[2]The issue before the Fifth Circuit was whether the application of the CAA to Ho's activities exceeded Congress' authority under the Commerce Clause, whereas the issue before us is whether Ho's activities come within the coverage of the Act. As several federal courts have previously explained, the language "business affecting commerce," as used in the Act, indicates that Congress intended the coverage of the Act to be as broad as constitutionally permissible. In other words, coverage of working conditions of employees is coterminous with the scope of the Commerce Clause. *See, e.g., Usery* v. *Lacy (Aqua View Apartments)*, 628 F.2d 1226, 1229 (9th Cir. 1980); *Godwin*, 540 F.2d at 1015; *United States v. Dye Constr. Co.*, 510 F.2d 78, 83 (10th Cir. 1975); *Brennan v. OSHRC (John J. Gordon Co.)*, 492 F.2d 1027, 1030 (2d Cir. 1974). We therefore conclude that the Fifth Circuit's discussion regarding the constitutional scope of the Commerce Clause is applicable to the issue before us here.

use the terminology "affect commerce," coverage exists "so long as the business is in a class of activity that as a whole affects commerce").

Based on these authorities, we therefore conclude that the judge properly found Ho to be engaged in a business affecting commerce.[3]

LIABILITY OF THE CORPORATIONS

The primary issue before us is whether the two corporations as well as Ho as an individual can properly be cited for the violations. The judge concluded that the corporations are responsible for the violative conditions under either of two theories that apply Fifth Circuit law: (1) that the respondent corporations are merely the "alter ego" of their shareholder, Ho, and under the "reverse-piercing" doctrine, they are liable for his obligations; or (2) that the respondent corporations constitute a "sham to perpetrate a fraud" and, thus, their corporate fictions should be disregarded in order to hold Ho liable. We conclude that the judge's factual findings are not supported by the evidence and that the judge misconstrued the relationship between Ho and the corporations.

Ho owns 67 percent of the stock of Houston Fruitland and Ho Ho Ho Express. The remaining shares are held by various minority shareholders. Ho is president of Houston Fruitland and his wife, Melissa, is secretary. Ho is both president and secretary of Ho Ho Ho Express. Houston Fruitland has about 20 employees and is a fruit and vegetable wholesaler. Ho Ho Ho Express is an ICC common carrier that does 90 percent of its business providing

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[3]Ho relies on *Austin Road Co. v. OSHRC*, 683 F.2d 905, 907-08 (5th Cir. 1982), in which the cited employer performed construction work solely within Texas but was a subsidiary of an interstate holding company that included other subsidiaries that performed work both within and outside Texas. In *Austin Road*, the Fifth Circuit held that the evidence the cited employer used equipment or vehicles that may have been manufactured in another state was insufficient to establish that the employer's activities affected commerce. The court also dismissed as "speculative and conclusionary" the administrative law judge's finding that while the cited employer did not perform any work in another state, its profits and losses would necessarily affect both its parent company and its sister companies who were engaged directly in interstate commerce. *Id.* at 908.

Although the court in *Austin Road* acknowledged that Congress intended the Act to apply to "the full extent of the authority granted by the commerce clause," and cited many of the same authorities noted above, including *Wickard v. Filburn*, it did not address the aggregation doctrine — though it is not apparent that the parties in that case presented the aggregation principle to the court. *Id.* at 907. In our consideration of the Fifth Circuit's recent criminal case decision concerning Ho, we do not regard *Austin Road* as dispositive of the issue of coverage presented here.

transportation services for Houston Fruitland and has approximately 32 employees.

Ho financed the $700,000 purchase price of the medical and hospital buildings subject to the cited renovation work in the following manner: Ho Ho Ho Express and two other corporations[s] advanced a total of $440,000 to Houston Fruitland, which in turn put up $180,000 of its own funds, $80,000 of which came from the proceeds of the sale of a building owned by Houston Fruitland. This aggregate of $620,000 was recorded on Houston Fruitland's general ledger as a credit due to Houston Fruitland from Ho. An undisclosed "outside source" provided the remaining $80,000. A similar arrangement existed for the payment of wages to the workers and the purchase of supplies and equipment for the renovation work. Generally speaking, these expenses were paid based on invoices submitted to Ho by Tate and Escobedo.

As the principal shareholder, Ho would customarily initiate transfers of funds among himself, Ho Ho Ho Express, and Houston Fruitland. Each such transfer was documented as a debit owed by one corporation to the other or as a debit owed by Ho. There were no loan documents, no interest due, no schedule for repayment, and no representation that Ho ever fully repaid any of his loans. On the other hand, although the record is not completely explicit, there is evidence of some amount of repayment by Ho.

An employee of Ho Ho Ho Express, Melba Gomez, performed services as Ho's assistant, including what she described as Ho's "personal agenda," such as taking personal phone calls, handling certain investments for Ho, and doing some personal errands for Ho. Gomez assisted Ho in his dealings with the real estate broker for the hospital purchase and on occasions when Ho was out of town, she made several visits to the worksite to check whether Tate needed anything. She also wrote in Spanish or translated some documents pertaining to the work at the site.

In holding that the corporations were alter egos of Ho and, therefore, the corporate veil could be "reverse-pierced" so as to impose liability on the corporations, the judge cited *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635 (5th Cir. 1991), which recognizes the concept of reverse-piercing where "a party seeks to hold a corporation liable for the obligations of a shareholder." *Id.* at 643. *Permian* concerned a dispute as to the amount of natural gas that had been delivered pursuant to a contract. The issue before the Fifth Circuit was whether Permian's corporate form should be disregarded for purposes of the contract. Relying on Texas state law, the court concluded that an alter ego relationship exists "where there is such unity between corporation and individual that the separateness of the corporation has ceased." *Id.* According to the *Permian* court, "[w]hether the alter ego doctrine applies

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[4]Funds were received from Foothill Transportation, Inc., which is also owned by Ho, and from Cal-Sierra Produce, Inc. There is conflicting evidence in the record as to whether Ho has any ownership of the latter company. Neither of these two companies were cited, and they are not in issue.

depends upon the following factors:"

> the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.

Id. at 643 (*citing Castleberry v. Branscum*, 721 S.W. 2d 270, 272 (Tex. 1986)).

Relying upon these factors, the judge found that Ho "solely directs the activities of both corporations," and funds are moved between the corporations and disbursed at Ho's direction without the observance of corporate formalities. The judge concluded that Ho Ho Ho Express and Houston Fruitland are "alter egos" of Ho because Ho and the two corporations are "financially interconnected" and Ho would not have been able to conduct his attempted renovation project if he had not had access to the corporate resources. Upon determining that Ho's interests were "indistinguishable" from those of the corporations, the judge found that the Secretary properly treated the corporations as Ho's alter egos.

In addition to *Permian*, the Secretary contends on review that the Fifth Circuit's subsequent decision in *Century Hotels v. United States*, 952 F.2d 107 (5th Cir. 1992), provides additional support for the judge's conclusion that Ho Ho Ho Express and Houston Fruitland were properly treated as alter egos of Ho. In *Century Hotels*, the court upheld a federal tax levy by the Internal Revenue Service under the Internal Revenue Code, 26 U.S.C. § 7426, against family-held corporations for the tax liability of individual family members. In determining whether a corporation is an alter ego of a stockholder, the court held that the "totality of the circumstances" must be taken into consideration. *Id.* at 110. *See also U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 694 n.8 (5th Cir. 1985).

While these Fifth Circuit cases establish that the doctrine of "reverse-piercing" is recognized under Texas state law and may be applied not only in disputes between private parties but also to actions under federal statutes where the federal government or a federal agency is a party seeking to made whole,[5] these precedents do not address the application of the doctrine in the context of remedial social legislation such as the Act. In *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993), however, the court held that individual corporate officers and shareholders could be held liable for civil penalties assessed against a corporation for violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* The court concluded that it was appropriate to pierce the corporate veil after considering such factors as whether corporate formalities were observed, whether the individuals diverted

[5]The *Jon-T-Chemicals* case, for instance, involved prosecution under the False Claims Act for the recovery of funds owed by the individual defendants for the disbursement of agricultural subsidies to which they were not entitled.

corporate funds, and whether corporate and personal funds were commingled. *See also United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998) (corporate veil may be pierced to hold parent corporation liable for actions of a subsidiary in violation of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a)(2)).[6] Insofar as "reverse-piercing" is a corollary principle to piercing the corporate veil, we find that it may have application in the context of determining liability under a remedial statute.

Upon consideration of the relevant precedent and the various factors set forth in these cases, we see no basis to construe the record evidence to impose liability upon the respondent corporations. In reaching this conclusion, we are guided by the holding in the Fifth Circuit that "[t]he corporate form…is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation." *Krivo Indus. Sup. Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973). As Respondents correctly point out in their brief on review, the limited record before us indicates that Ho Ho Ho Express and Houston Fruitland are existing companies that conduct operations and have employees engaged in activities bearing no relationship to the property redevelopment project initiated by Ho. There is nothing in the record to suggest that these freight hauling and produce growing operations, respectively, are not legitimate, ongoing enterprises from which the companies derive the bulk if not the entirety of their revenues. Nor is there anything to suggest that the companies do not exist for the purpose of performing services related to these activities. Notwithstanding the judge's contrary factual finding, there is no evidence regarding the management of these activities or to show Ho's role, if any, in directing the day-to-day conduct of those corporate operations. Moreover, the Secretary has not established on this record that Ho personally has that responsibility. On these facts, we are unable to hold, as did the court in *Century Hotels*, that the corporations in question are "mere business conduit[s] for the purposes of the controlling entity," 952 F.2d at 112. *See Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD ¶ 29,775, p. 40,496 (No. 88-1745, 1992) (two corporations can be "regarded as a single entity where…they share a common worksite, have interrelated and

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[6]While it is clear that the alter ego doctrine can be applied to determine liability under federal statutes, including the Act, the courts acknowledge some question as to whether state or federal common law should be used to determine when the corporate veil may be pierced. *See* discussion in *Bestfoods*, 524 U.S. at 63 n.9. *See also Moore v. OSHRC*, 591 F.2d 991 (4th Cir. 1979) (applying state law to determine the liability of individual corporate officers for violations of the Act occurring during the ongoing operations of a dissolved corporation that was subsequently reinstated). The Fifth Circuit, however, has held that in cases that do not arise under diversity jurisdiction, as a matter of practice it does not distinguish between state and federal law for purposes of veil piercing. *Century Hotels*, 952 F.2d at 110 n.4 (*citing Jon-T Chemicals*, 768 F.2d at 690 n.6 ("federal and state alter ego tests are essentially the same")). In these cases, the parties disagree on whether the judge properly applied the criteria on which he relies but do not contend that the judge should have used different factors in reaching his decision. Therefore, for purposes of these cases, we will apply the criteria as set forth in the relevant Fifth Circuit decisions.

integrated operations, and share a common president, management, supervision, or ownership").

Unquestionably, the casual manner in which funds were routinely transferred amongst Ho and the respondent corporations indicates a somewhat lax attitude toward the corporate structure. However, we cannot find on this record that the corporate formalities were disregarded. Ho Ho Ho Express and Houston Fruitland maintained separate and distinct bank accounts as well as the appropriate corporate ledgers. All disbursements for project expenses were recorded in the corporate ledgers as accounts receivable, and disbursements made directly to Ho were shown as credits due from Ho in a specific shareholder account. There is no contention by the Secretary, nor any evidence to show, that this recordkeeping was in any way inaccurate or misleading. Moreover, while Respondents submitted copies of personal income tax schedules filed by the corporate stockholders for the tax years 1996, 1997, and 1998, the Secretary failed to put in the record any financial statements, corporate tax returns, or any other evidence from which we could determine what proportion of corporate revenues were spent on Ho's redevelopment project. We therefore cannot ascertain whether the expenditures on the project represent a minor or significant amount of corporate resources. Indeed, the record fails to establish even the source of the funds that the corporations disbursed to Ho. While corporate funds were clearly used for payment of expenses relating to the project, including the purchase of the property, the most that we can conclude from that evidence alone is that the corporations had a financial interest in the project. However, as the Fifth Circuit noted in *Krivo*, 483 F.2d at 1104, the mere loan of money by a corporation does not in itself make the lender liable for the actions of the borrower.

Similarly, there is no evidence from which we can determine what assets the companies actually owned, let alone any showing that Ho actually diverted those assets to his personal use. The fact that corporate employees may have performed some personal tasks for Ho, including some activities relating to the work at the site, is in our view insufficient in the totality of the circumstances to establish that the corporate form should be disregarded. In concluding that a corporation was the alter ego of the taxpayer, the court in *Century Hotels* relied in part on facts showing that the taxpayer claimed to own no property, all his personal expenses were paid by the corporation, he lived in a house owned by this and other family corporations, and when the house was sold, he received a portion of the proceeds. Plainly, Ho's relationship with the cited corporations does not rise to the level that the court found dispositive in that case. *Cf. Zahra Spiritual Trust v. United States*, 910 F.2d 240 (5th Cir. 1990) (government filed tax liens against assets of corporations for tax liability of individual taxpayers where corporate funds paid personal expenditures for taxpayers, taxpayers lived in homes owned by corporations with no lease agreement or obligation to pay rent, and one corporation was formed for the sole purpose of holding title to real estate as a nominee of the taxpayers). Accordingly, we find that the judge erred in concluding that the respondent corporations are merely the alter egos of Ho.

We now turn to the second basis for the judge's decision to hold the respondent corporations liable — the "sham to perpetrate a fraud" doctrine. The purpose of this doctrine is to prevent the corporate structure from being used to disguise fraud or illegality or to otherwise

create an injustice. *Permian*, 934 F.2d at 644. The doctrine is broader than that of "alter ego," as it is based on principles of equity, in which the court seeks to determine whether the corporate form breaches "some legal or equitable duty which…the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Id.* (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). *See also Bestfoods*, 524 U.S. at 62. However, the question of whether the corporate form creates an injustice, while equitable in nature, like the alter ego doctrine, depends on the overall factual circumstances and requires the court to find that on the facts of the case, adherence to the corporate form would result in injustice or inequity. *Permian*, 934 F.2d at 644; *Castleberry*, 721 S.W.2d at 273.

In finding this test to have been met, the judge made a factual finding that Ho "commingled" corporate assets with his own and then concluded that Ho sought to invoke the "fiction" of the corporation to "protect" corporate assets. The judge held that Ho's action was fraudulent because it "frustrates the Secretary's ability to enforce the Act through the effective enforcement of civil penalties." In her brief on review, the Secretary similarly argues that the "sham to perpetrate a fraud" doctrine is needed to prevent Ho from "insulating" the corporate assets from liability for OSHA penalties.

As we have already found, the two corporations here are functioning entities having employees and performing work activities of a nature, and at locations, separate and distinct from Ho's redevelopment project. There is no indication on this record that the corporate structure is such as to have a propensity to be deceptive or injurious. *Cf. Permian* (formation of another company performing the same business as its predecessor created confusion as to the amount of gas delivered pursuant to the contract and thereby injured the beneficiary of that contract); *Castleberry* (formation of a new company conducting the same business, furniture moving, as an existing company for the purpose of coercing a major shareholder in the existing company to liquidate his interest). The cases on which the judge and the Secretary rely are distinguishable as they involve either federal statutes whose purpose is the recovery of monies owed to the government or, as in *Permian*, a private cause of action for money due under a contract. In those cases, whether assets were concealed or made unavailable through the corporate structure is of substantive significance.

The Act, on the other hand, is a regulatory statute whose purpose is to prevent employers from exposing their employees to hazardous working conditions. With the exception of one occasion in which a truck belonging to Ho Ho Ho Express was observed at the project, the respondent corporations have no other apparent connection to the worksite, no employees at the site, and, so far as can be determined on the record before us, no obligation to correct or abate the hazardous working conditions in question. There is simply no evidence whatsoever that Ho Ho Ho Express or Houston Fruitland were created for the purpose of concealing, or that they operate to conceal, the identity of the employer of the exposed employees in these cases, or that the corporate structure otherwise hinders or obstructs the corrective purposes of the Act. Accordingly, no safety or health purpose under the Act exists to warrant holding the corporations as citable entities in these cases.

Furthermore, the Secretary has not established that maintaining the corporate form here would work an injustice by rendering corporate assets unavailable for the payment of civil

penalties. In the first place, the Secretary's position is fundamentally inconsistent insofar as she asks us to conclude that the corporations and Ho are merely alter egos in part because Ho uses corporate assets for his personal projects, while at the same time, asks us to assume that Ho would not use corporate assets for the payment of any assessed penalties. In any event, the Secretary's position is totally speculative. There is not even a representation by the Secretary that she has any basis on which to conclude that assets would not be made available for the payment of whatever penalties we might assess in our decision. Moreover, section 17(l) of the Act, 29 U.S.C. § 666(l), affords the Secretary access to the federal district courts to pursue civil actions for the recovery of penalties.

Even assuming that Ho would not be forthcoming with respect to the payment of penalties, the Secretary has failed to show that these penalty collection procedures would not allow her access to the corporate assets or that she would be unable to make to the district court the same arguments she seeks to advance before us at this time. Indeed, the latter was precisely the situation before the Sixth Circuit in *WRW*, where the court upheld a judgment by a district court under 30 U.S.C. § 820(j), the Mine Safety Act's counterpart to 29 U.S.C. § 666(l), which likewise authorizes civil actions in district court for recovery of penalties. In its decision, the court made clear that in a penalty collection action the district court could properly disregard the corporate structure under either an equity or alter ego theory. *WRW*, 986 F.2d at 143. *See also L.R. Willson & Sons, Inc.*, 18 BNA OSHC 1641, 1999 CCH OSHD ¶ 31, 740 (No. 93-0785, 1999) (discussion of proceedings in district court as exclusive forum for raising arguments regarding penalty collection). We therefore conclude that in the circumstances presented here, the Secretary has failed to establish grounds for us to hold the respondent corporations liable under either the "alter ego" or the "sham to perpetrate a fraud" doctrines.

I. PROPRIETY OF CITING VIOLATIONS ON A PER EMPLOYEE BASIS

A. Background to Secretary's per employee citations

The Secretary charges Ho with multiple violations of the respirator and training provisions of the asbestos standard. Specifically, Items 5 through 15 of Citation 2 allege eleven willful violations of the respirator standard, former 29 C.F.R. § 1926.1101(h)(1)(i), on a per-employee basis, and Items 17 through 27 of Citation 2 allege eleven willful violations of the asbestos training standard, 29 C.F.R. §§ 1926.1101(k)(9)(i) and (k)(9)(viii), also on a per-employee basis. Ho does not challenge the judge's decision affirming these items but argues that the respirator items should be grouped into one item and the training items likewise grouped into one item. The Secretary cites prior Commission decisions, including our decisions in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993), and *Hartford Roofing, Inc.*, 17 BNA OSHC 1361, 1995-97 CCH OSHD ¶ 30,857 (No. 92-3855, 1995), for the proposition that our precedents allow per-instance violations and penalties. She asks the Commission to affirm the per-employee citation items issued to Ho and the separate penalties she proposes for those items because in her view both of the standards cited here implicate individual employee protection. While we agree that Ho is one of the worst employers the Commission has had come before it, we cannot allow harsh facts to result in bad law — a result which would clearly follow should we accept the Secretary's proposed penalties.

The law regarding how employers who are considered "bad actors" should be penalized for violations of the Act is still developing. This is evident both from the nature of the cases that have come before us since 1986, as well as from the Secretary's adoption in 1990 of a compliance directive that she characterizes as her "egregious/willful penalty policy." *See* OSHA Instruction CPL 2.80, *Handling of Cases to be Proposed for Violation-by-Violation of Penalties*, 1 BNA OSHR Ref. File 21:9649, 9650, 1990 CCH ESHG New Developments, ¶ 10,662, pp. 13,589-90 (Transfer Binder) (October 1, 1990).[1] Against this backdrop, we consider the Secretary's arguments in support of the per-employee violations alleged here and the separate penalties she has proposed.

B. The Commission's decisions in *Caterpillar* and *Hartford Roofing*

The Commission has taken several steps on the road to assessing individual penalties for per-instance violations of regulations and standards, and we are not persuaded here to depart

[1]This compliance directive modified an earlier version of OSHA's internal instructions as set out in the Field Operations Manual ("FOM"). In pertinent part, those instructions indicated, "in egregious cases [–] i.e., willful, repeated and high gravity serious citations and failures to abate [–] an additional factor of up to the number of violation instances may...be applied." See FOM, Chapter VI, § A.2.i(4), p. VI-8 (September 21, 1987, amended December 31, 1990). The specific approval of OSHA's Assistant Secretary was required in order to propose penalties of this kind.

from those precedents. We note that a review of our prior decisions indicates that the Commission has considered two different aspects of assessing penalties on a violation-by-violation basis: in *Caterpillar*, the violations at issue were cited per-instance and in *Hartford Roofing*, the violations at issue were cited per-employee. The Secretary relies on *Caterpillar* and *Hartford Roofing* as support for her alleged authority to cite Ho on a per-employee basis. However, we fail to see how these cases recognize the authority the Secretary claims here.

In *Caterpillar*, where violations of the recordkeeping standard at section 1904.2(a) were at issue, the Commission held that per-instance violations and penalties are appropriate when the cited regulation or standard clearly prohibit individual acts rather than a single course of action. *Caterpillar*, 15 BNA OSHC at 2172-73, 1991-93 CCH OSHD at pp. 41,005-06. Thus, in *Caterpillar* we concluded it was permissible to assess individual penalties for each instance of violation based on an employer's failure to make a proper recordkeeping entry on its OSHA injury and illness logs. *Id.* We note, however, that our decision was not tied to egregious conduct on the part of the cited employer. Having found that the established violations were not willful, we assessed individual penalties of other than serious violations. *Id.* at 2177-78. *See also Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2000 CCH OSHD ¶ 32,134 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (separate penalties were assessed for individual recordkeeping infractions characterized as both willful and other than serious).[2]

In *Hartford Roofing*, the Commission refused to find individual violations cited on a per-employee basis for an employer's failure to guard a roof perimeter. We concluded that the violations alleged in that case concerned a single work practice or condition:

> Some standards implicate the protection, etc. of individual employees to such extent that the failure to have protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice method or condition affects multiple employees, there can be only one violation of the standard.

Hartford Roofing, 17 BNA OSHC at 1365, 1995-97 CCH OSHD at p. 42,935 (footnote omitted).

In subsequent decisions, the Commission has applied the principle set out in *Hartford Roofing* to assess one penalty for a single violation involving the exposure of multiple

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[2]In *Caterpillar*, the Commission noted that it had assessed per-instance penalties for separate and distinct instances of violative conduct in only one previous case. *Caterpillar*, 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,005-06 citing *Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275-76, 1977-78 CCH OSHD ¶ 22,489 (No. 4182, 1978) (separate penalties assessed where the violative condition occurred on distinct and separate scaffolds). In cases subsequent to *Caterpillar*, the Commission has assessed separate penalties for violations involving separate unguarded floors on a single building (*J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993)) and separate trenches dug on different days (*Andrew Catapano Enterprises, Inc.*, 17 BNA OSHC 1776, 1778, 1995-97 CCH OSHD ¶ 31,180, p. 43,605 (No. 90-0050, 1996) (consolidated)).

employees to a single recognized hazard (*Arcadian Corp*., 17 BNA OSHC 1345, 1995-97 CCH OSHD ¶ 30,856, p. 42,918 (No. 93-3270, 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997)), and to assess multiple penalties for multiple violations of a standard which prescribes conduct specific to individual employees (*Sanders Lead Co.*, 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30,740 (No. 87-260, 1995)). The key to all of these decisions was the language of the statute or the specific standard or regulation cited.[3]

We now turn to the issue of whether the language of the standards cited here deal with a single work practice or prescribe conduct that is unique and specific to each employee.

C. Analysis

1. The per employee respirator charges

As noted above, Items 5 through 15 allege per-employee violations of the respiratory protection standard for asbestos set forth at former 29 C.F.R. § 1926.1101(h)(1)(i).[4] This standard provides:

> (h) *Respiratory protection*. (1) *General*. The employer shall provide respirators, and ensure that they are used, where required by this section. Respirators shall be used in the following circumstances:
>
> (i) During all Class I asbestos jobs.
>
> ….

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[3]As we indicated in *Hartford Roofing*, there is no authority for the Secretary's implicit argument that resolution of the issue regarding whether citing on a per-employee basis is appropriate depends upon the particular facts of the case as opposed to how the standard in question defines the unit of prosecution. Both the majority and dissenting opinions in *Hartford Roofing* made this point abundantly clear. As the majority opinion stated:

> [T]he Secretary has no discretion to decide on a case by case basis, whether to cite violations on a per employee basis or to combine all exposed employees into a single citation. If a work place condition as defined by a standard constitutes a single violation for all exposed employees, the Secretary, under Section 9(a) of the Act would be required to issue a citation for each of the violations….

17 BNA OSHC at 1367. Similarly, Commissioner Weisberg's dissenting opinion observed that "[t]he key to each of the [Commissioner's decisions upholding per-instance citations] is the language of the standard or regulation that has been cited." *Id*. at 1374, 1995-97 CCH OSHD at p. 42,945.

[4]This is the version of section 1926.1101(h)(1)(i) that was in effect at the time the violation was alleged to have occurred, "on or about March 11, 1998." The Secretary mistakenly quotes the amended version of the standard in her brief to the Commission, but it did not become effective until April 8, 1998. 63 Fed. Reg. 1152, 1298 (January 8, 1998).

Item 5 of the citation is typical of the eleven items cited under this standard:[5]

> The employer did not provide respirators and ensure that they were used during all class 1 asbestos jobs:
>
> > (a) at 11101 Bellaire Boulevard, Houston, Texas, during the removal of asbestos contaminating materials (ACM) on or before March 11, 1998, appropriate respiratory protection was not provided to Martin Bernal.
> >
> > ….

The judge affirmed these eleven items, relying on the Commission's decisions in *Caterpillar* and *Hartford Roofing*. We find the judge's reliance upon these decisions to be misplaced. The judge cited *Caterpillar* for the proposition that separate penalties may be proposed and assessed for separate violations of a single standard. However, as previously noted, *Caterpillar* did not address the propriety of alleging discrete citation items on a per-employee basis but rather on a per-instance basis. In addition, the judge relied upon the Commission's reference in *Hartford Roofing* to the general industry standard for respiratory protection, section 1910.134, which was not the standard at issue in that case. Specifically, the Commission mentioned the standard in a purely hypothetical context:

> For example, [section] 1910.134 sets forth the requirements for the use of respirators where effective engineering controls are not sufficient to control atmospheric contamination. As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute separate and discrete violations (sic). However, if the employer is able to reduce the level of the air contaminants to acceptable levels, that single action would render the standard inapplicable.

17 BNA OSHC at 1366, 1995-97 CCH OSHD at p. 42,937. Because the Commission's comments regarding the propriety of per-employee citations under the respiratory protection standard were not dispositive to its interpretation of the guardrail standard at issue there, we find this passage to be nothing more than *dicta*.

On review, as noted above, the Secretary relies on the wording of the cited respiratory protection standard to support her position that it prescribes per-employee penalties. However, we find nothing in the plain language of the cited standard, its preamble when promulgated and when corrected, or the Secretary's written interpretations of the cited standard, to support her claim that violations of this standard can be cited per-employee. Nor do we find support for the Secretary's position in her compliance directive on the egregious/willful penalty policy or her practice of issuing citations under the respirator provisions of the cited standard (other than this

[5]Items 6 through 15 differ from Item 5 only as to the name of the employee not provided with a respirator.

case) to support her argument. None of these sources serve to notify the regulated community that this particular standard may be used to penalize employers on a per-employee basis. While some standards must of necessity be individualized — such as recording an entry in an OSHA log, fitting a respirator to an employee, and determining an employee's blood lead level — standards of general prescription, such as the respirator standard cited here, do not by their plain terms provide fair notice that an employer may be penalized on a per-employee basis.

As Ho argues, section 1926.1101(h)(1) imposes different requirements for the provision and use of respirators depending upon the nature of the asbestos work being conducted. To the extent the standard differentiates between employees, it does so based on the nature of the *hazard* to which the employees are exposed and not on personal characteristics peculiar to the employees as individuals. Section 1926.1101(h)(1)(i) does not require any special unique testing of the employee — it simply requires that employers provide respirators and ensure their use during Class I asbestos work, addressing protection of the employees in the group performing the specified work as a whole. The language of this section requiring that employers "ensure that they are used," merely goes to establishing noncompliance with the terms of the standard — in this case, it is undisputed that there was noncompliance with the standard.[6] However, the plain language of the standard addresses employees in the aggregate,

[6]Despite our dissenting colleague's assertion to the contrary, there is no precedent for her position that the language "ensure that they are used" imposes an individualized duty that runs to each employee and, thus, evinces an intent to allow for citing violations of that provision on a per-employee basis. The fundamental flaw in the dissent's analysis is its conflation of the separate provisions of section 1926.1101(h). The dissent's reliance on "numerous detailed and explicit provisions of this standard that prescribe individualized employee-specific actions" are set forth in various paragraphs — (2), (3), and (4) — for which Ho was either not cited on a per-employee basis or not cited at all. The Secretary only cited Ho on a per-employee basis under paragraph (h)(1)(i), which specifies when respirators must be provided depending upon the nature of the asbestos work involved. It is clear from other prosecutions under section 1926.1101 that the Secretary has interpreted the subsections of this regulation as setting forth a series of discrete obligations for which an employer may be separately cited. *See, e.g., Tierdael Construction Co. v. OSHRC*, 340 F.3d 1110 (10th Cir. 2003)(separate violations alleged under (e)(1), (f)(1)(i), (g)(1), (g)(7)(i), (g)(8), (h)(1), (i)(1), (j)(2)(i), (k)(8)(i), (k)(9)(iv)(C) of section 1926.1101, none of which were cited on a per-employee basis). *See also Yellow Freight Systems, Inc.*, 17 BNA OSHC 1699, 1995-97 CCH OSHD ¶ 31,105 (No. 93-3292, 1996)(violations under various subsections of section 1910.134). Insofar as the Secretary may advance interpretations of her regulations through adjudications, there is simply no basis here for concluding that an alleged violation of section 1926.1101(h)(1)(i) necessarily implicated the other provisions of section 1926.1101(h). In sum, the Secretary did not advance the dissent's theory of prosecution, it is inconsistent with her other prosecutions, and it is one for which adequate notice was not given. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 154-55, 157 (1991)(reasonableness of Secretary's

not individually. To prove a violation of the standard, it makes no difference whether one or all eleven of Ho's employees were not provided or using respirators.

Ho's noncompliance with section 1926.1101(h)(1)(i) stems directly from a single act — his failure to provide the appropriate respiratory protection for the type of work performed by this group of employees. *See Hartford Roofing*, 17 BNA OSHC at 1365, 1995-97 CCH OSHD at p. 42,935 (where a single practice method or condition affects multiple employees, there can be only one violation of the standard). Accordingly, we find that the cited respiratory protection standard for asbestos, section 1926.1101(h)(1)(i), is stated in general performance terms which refer to a single course of conduct rather than an individualized duty, and therefore does not provide fair notice to an employer that it may be penalized on a per-employee basis for violations of the standard. For these reasons, we see no basis for citing violations of section 1926.1101(h)(1)(i) on a per-employee basis.

2. The per employee training charges

Items 17 through 27 allege per-employee violations of the employee training provisions of the asbestos standard set forth at 29 C.F.R. § 1926.1101(k)(9)(i) and (k)(9)(viii). These standards provide:

> (k) *Communication of hazards*
>
> ....
>
> (9) *Employee Information and Training.*
>
> (i) 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 insure their participation in the program.
>
> ....
>
> (viii) The training program shall be conducted in a manner that the employee is able to understand. In addition to the content required by provisions in paragraph (k)(9)(iii) through (vi) of this section the employer shall insure that each such employee is informed of the following:
>
> ....

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interpretation measured in part by consistency with the regulatory language and by consistency of application).

It necessarily follows that the dissent's attempt to invoke *Sanders Lead* as binding fails insofar as the respiratory fit-test standard (section 1910.1025(f)(3)(ii), which draws upon the general industry respiratory protection standard set forth in section 1910.134) was at issue. Ho was not cited here for noncompliance with a comparable fit-test requirement made applicable under section 1926.1101(h)(3).

Item 17 of the citation is typical of the eleven items cited under these provisions:[7]

> Citation 2 Item 17a Type of Violation: Willful
> 29 C.F.R. 1926.1101(k)(9)(i): The employer did not institute a training program for all employees who performed Class I through Class IV asbestos operations:
>
> (a) at 11101 Bellaire Boulevard, Houston, Texas. During the removal of asbestos-containing materials (ACM) on or before March 11, 1998, a training program was not instituted for Martin Bernal.
>
> Date By Which Must be Abated: Corrected During Inspection
>
> Proposed Penalty: $49,000.00
>
> Citation 2 Item 17b Type of Violation: Willful
>
> 29 C.F.R. 1926.1101(k)(9)(viii): The employer did not ensure that each employee was informed of recognizing asbestos, including the requirement in paragraph (k)(1) of this section to presume that certain building materials contain asbestos; the health effects associated with asbestos exposure; the relationship between smoking and asbestos in producing lung cancer; the nature of operations that could result in exposure to asbestos, the importance of necessary protective controls to minimize exposure including, as applicable, engineering controls, work practices, respirators, housekeeping procedures, hygiene facilities, protective clothing, decontamination procedures, emergency procedures, and any necessary instruction in the use of these controls and procedures; the purpose, the proper use, fitting instructions, and limitations of respirators as required by 29 C.F.R. 1910.134; the appropriate work practices for performing the asbestos job; medical surveillance program requirements; the content of this standard including appendices; the names, addresses and phone numbers of public health organizations which provide information, materials and/or conduct programs concerning smoking cessation; and the requirements for posting signs and affixing labels and the meaning of the required legends for such signs and labels:
>
> (a) at 11101 Bellaire Boulevard, Houston, Texas, during the removal of asbestos-containing materials (ACM) on or before March 11, 1998, this information was not provided to Martin Bernal.
>
> Date By Which Violation Must be Abated: Corrected During Inspection

In his decision, the judge concluded that a training program would not abate all eleven alleged violations. He acknowledged, however, that a single training program would be sufficient if all eleven of the cited employees attended. The Secretary, in her brief to us, argues: "The provisions state that the instruction shall be directed to the individual employee.

[7]Items 18 through 27 differ from item 17 only as to the name of the employee not trained.

The provisions also require that the employer make individualized determination of the class of work to be performed by the employee."[8]

We discern no basis for citing on a per-employee basis under the cited standard. The language of section 1926.1101(k)(9)(i) clearly refers to the obligation to have "a training program" — one program — for "all employees" who fall into the covered categories. Thus, the focus of the standard is on the employer's duty to train and impart information to employees generally, and the workplace condition to which the standard is directed is the absence of the appropriate training program.[9] Contrary to the Secretary's contention, the mere use of the terminology "each such employee" under (k)(9)(viii) does not demonstrate that these provisions define the relevant workplace conditions in terms of exposure of individual employees. *See Secretary v. Arcadian Corp.*, 110 F.3d 1192, 1198 (5th Cir. 1997) (the phrase "each of his employees" in the Act's general duty clause is an inclusive expression which "means that an employer's duty extends to all employees, regardless of their individual susceptibilities").

Like the general respiratory standard, the training standard is stated in performance terms. Indeed, that is precisely how the Secretary characterizes the standard in its preamble:

> By stating the training requirement in performance-oriented terms, the standard gives each employer flexibility in designing a training course suited to its operation while assuring that each employee receives training that covers all of the asbestos-related tasks that employee performs.

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[8]We note that such an "individualized determination" would not be necessary here since it is undisputed that all eleven of the cited employees were engaged in Class I asbestos operations.

[9]We find our dissenting colleague's claim that "[p]roper abatement requires eleven separate acts tailored to each employee — at a minimum by ensuring each employee's participation in any group training" to be not only inconsistent, but an unreasonably stringent reading of what constitutes compliance under this particular training standard. The first part of the dissent's statement is plainly at odds with the latter part — if abatement under this standard consists of eleven separate acts, then an employer would not be able to comply with the standard's requirements by conducting any sort of group training. The latter part of the dissent's statement suggests that group training *does* in fact remain an option for employers, but compliance with the standard hinges upon the employer's ability to obtain 100% participation from his workforce.

61 Fed. Reg. 43,454, 43,455 (August 23, 1996). The word "each" as used in the training provisions is used in the sense of *inclusiveness* and not in the sense of "per employee." We note also that the 1994 amendments to this standard essentially carried over the requirement of the 1986 standard. Indeed, the language used in section 1926.1101(k)(9)(viii) is almost precisely the language used in section 1926.58(k)(3)(iii)(1986).[10]

Our conclusion that the training standard is written in inclusive terms is supported by other statements made by the Secretary, including OSHA instruction CPL 2-2.63, *Inspection Procedures for Occupational Exposure to Asbestos* (1996). This instruction includes appendices that provide guidelines and clarifications relating to specific provisions of the standard. For example, Appendix B refers to employees collectively rather than individually:

> Training is to be provided:
>
> ….
>
> (2) To all employees exposed at or above the PEL.
>
> (3) To all employees who perform Class I through Class VI asbestos operations.
>
> ….

See Appendix B to CPL 2-2.63. The appendix also states that Class I asbestos operations training is to be equivalent in "curriculum, training and length" to asbestos training requirements specified by the Environmental Protection Agency and should take place over the course of four days. *Id.* (citing 40 C.F.R. part 763, subpart E, appendix C). All of these requirements are directed to the content of the program, not the individual employee.

Appendix B also describes the requirements of paragraph (viii) in terms of content. Under the heading "Unclassified Asbestos Operations," — operations where employees are exposed above the PEL — the instruction states that training "shall meet the requirements of

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[10]That standard provided as follows:

> (iii) The training program shall be conducted in a manner that the employee is able to understand. The employer shall ensure that each such employee is informed of the following:
>
> ….

This language was followed by eight subparagraphs, each of which set forth the components of the training program. The 1994 amendments only added two additional subparagraphs that similarly state the content of the training program.

(k)(9)(viii)," the provisions of which spell out the training course content.[11] *Id.* Accordingly, we find that the training provisions of the asbestos standard, sections 1926.1101(k)(9)(i) and (k)(9)(viii), are stated in general performance terms which refer to employees collectively rather than individually, and therefore do not provide fair notice to an employer that it may be penalized on a per-employee basis for violations of the standard. For these reasons, we see no basis for citing violations of sections 1926.1101(k)(9)(i) and (k)(9)(viii) on a per-employee basis.[12]

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[11]The Secretary's interpretation of the standard as stated in compliance letters is to the same effect. *See, e.g.*, OSHA letter dated April 21, 1998, addressed to Ms. Sally Hagomarisino. *See generally* *http://www.osha.gov/SLTC/constructionasbestos/compliance.html*.

[12]Our dissenting colleague contends that *Andrew Catapano Enterprises, Inc.*, 17 BNA OSHC 1776, 1995-97 CCH OSHD ¶ 31, 180 (No. 90-50, 1996) (consolidated), provides support for interpreting this standard to allow per-employee violations based on the failure to train individual employees. However, our colleague is relying upon *dicta* that we find to be irrelevant to the holding of the case. As the dissent concedes, the employer in *Catapano* was *not* cited for failing to train each employee. Rather, the Secretary, after inspecting seven worksites on different dates, issued seven citations, on a *per-instance* basis, for failing to train a group of employees at each of the cited worksites. Interestingly, the violations were cited in this fashion despite the fact that the standard at issue in *Catapano*, section 1926.21(b)(2), provided that "[t]he employer shall instruct *each employee* in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." (Emphasis added)

The Commission found that neither the cited group of employees nor the working conditions had changed from worksite to worksite; all that distinguished the citations were the dates of the inspections. *Id.* at 1780, 1995-97 CCH OSHD at p. 43, 607. Thus, the Commission concluded that only a single citation and penalty were permitted under the language of the training standard and vacated all but one of the citations. *Id.* The result in *Catapano* is consistent with our determination here.

D. Deference Considerations

Though not expressly argued by the Secretary on review, we note that the Secretary has previously claimed that the Commission must defer to her interpretation of standards, such as those cited here, as defining the unit of prosecution on a per-employee basis. *See, e.g.*, *Hartford Roofing*, 17 BNA OSHC at 1366, 1995-97 CCH OSHD at p. 42,936. In *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 157-158 (1991) ("*CF & I*"), the Supreme Court held that the Commission and reviewing courts must defer to the Secretary's interpretation of an ambiguous regulation only if it is reasonable, taking into account "whether the Secretary has consistently applied the interpretation embodied in the citation," "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." *See Ehlert v. United States*, 402 U.S. 99, 105 (1971); 5 U.S.C. § 706(2)(A). To the extent that our conclusion in this case implicitly raises the issue of deference, we believe that the following considerations would make it difficult, if not impossible, for us to find that the Secretary's interpretation of these standards is reasonable.

First, we note that the Secretary's theory of what actually constitutes an individual violation under the standards cited here remains uncertain even on review. In her opening brief, the Secretary initially refers to the violations in question as "per employee," but later claims with regard to the alleged training violations that "[e]ach time a worker began working without being trained, there would have been a separate violation of the training provisions."[13] This same argument is repeated in her reply brief, but extended to include the alleged respiratory protection violations, *i.e.* that a separate violation occurred "each time an employee began work without respiratory protection." The Commission is left to wonder whether the training and respirator allegations are cited per employee, per-day, or on some other basis? For example, does the Secretary contend that a violation occurred each time an employee returned to work after a break? The Secretary provides no explanation for this inconsistent interpretation. *See CF & I*, 499 U.S. at 157; *Unarco Comm. Prods.*, 16 BNA OSHC 1499,

[13]We note that such an approach exceeds the training standard's own requirements. Under section 1910.1101(k)(9)(ii), an employer must only provide training "prior to the time of initial assignment and at least annually thereafter."

1502-3, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993).

As indicated in our analysis, we fail to see how an employer, much less a conscientious one who attempts to comply with OSHA's regulations, can be said to have notice merely from the language of the cited standards that its failures to provide respirators and the requisite training can result in per-day, per-employee violations. The Secretary has it within her authority to draft standards in such a fashion so as to prescribe individual units of prosecution or penalty units, placing the regulated community on notice that violations can be cited on an individualized basis. As the Fifth Circuit observed in *Diamond Roofing v. OSHR*C, 528 F.2d 645 (5th Cir. 1976):

> An employer…is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

Id. at 649. Where a standard does not provide employers with fair notice, the Secretary has the authority to amend it. As the Eleventh Circuit stated in *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999 (11th Cir. 1994):

> The Secretary, as enforcer of the Act, retains the responsibility to state with ascertainable certainty what is meant by the standards she has promulgated….[A regulation must] give sufficient guidance to those who enforce OSHA penalties, to those who are subject to civil penalties, or to those courts who may be charged to interpret and apply the standards. When a regulation fails [to do this]…, the Secretary should remedy the situation by promulgating a clearer regulation than forcing the judiciary to press the limits of judicial construction.

Id. at 1005-06 (citations omitted). Our decisions subsequent to *Caterpillar* and *Hartford Roofing*, including *Kasper Wire Works* and *Sanders Lead*, affirm this course of action.

Moreover, the Secretary's own policy set forth in her compliance instruction for violation-by-violation penalties indicates that she will interpret certain standards, such as those cited here, as permitting per-employee violations in cases involving "bad actor" employers, but in all other cases, she will cite the same conduct under the same standards as single violations that treat all exposed employees as a group. In other words, the Secretary advances what she

calls different but diametrically opposed "reasonable" interpretations of the same standard. This is wholly inconsistent with her contention that such standards prescribe a per-employee duty.

Finally, we note that the stated purpose of the Secretary's egregious/willful penalty policy is to increase proposed penalties. Proposed penalties, however, are just that, proposals. Under section 10 of the Act, 29 USC § 659, the Secretary has only limited authority concerning imposition of civil penalties.[14] The Commission has the express grant of the *sole* authority to determine *penalties*. Section 17(j) of the Act, 29 U.S.C. § 666(j). *See also Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1784, 1993-95 CCH OSHD ¶ 30,445, p. 42,040 (No. 91-2524, 1994). Congressional intent is thus plainly manifested that the Commission shall be the final arbiter of penalties when the Secretary's proposals are contested. Thus, the Commission is mandated by section 10(c) of the Act to issue an order, based upon findings of facts, affirming, modifying, or vacating the Secretary's proposed penalty.[15] The Secretary's proposed penalty is merely advisory, and it is the Secretary's burden to establish the facts supporting her proposed penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-22, 1993-95 CCH OSHD ¶ 30,363, pp. 41,881-82 (No. 88-1962, 1994) (*quoting Brennan v.*

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[14]The Secretary may propose such penalties, but she has no authority to convert her proposals into a final order of the Commission. Such finality may be achieved only when: (1) the employer consents to the proposed penalties by not filing a notice of contest, in which event the proposed penalties become a final order of the Commission by operation of law in accordance with section 10(a) or 10(b) of the Act; or (2) the employer files a notice of contest to submit the issue of the appropriateness of the proposed penalties for determination by the Commission, in which event the Commission, by virtue of section 10 of the Act, has the exclusive authority to assess the appropriate penalties.

[15]The Commission is granted the power to review either the citation or the proposed penalty or both under section 10(c) of the Act:

> The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance.

§ 10(c), 29 U.S.C. § 659(c).

OSRHC (Interstate Glass Co.), 487 F.2d 438, 442 (8th Cir. 1973)). Upon consideration of the proven facts, the Commission determines the appropriate penalties *de novo*.[16] *See, e.g.*, *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975); *Brennan v. OSHRC*, 487 F.2d 438, 441 (8th Cir. 1973). Accordingly, we do not give deference to the Secretary's penalty directives because we do not view them to be an exercise of the Secretary's delegated lawmaking authority.[17]

E. Conclusion

For all the reasons stated above, we affirm one violation of the Act for Respondent's failure to comply with § 1926.1101(h)(i) and one violation of the Act for Respondent's failure to comply with § 1926.1101(k)(9). As set forth below in our penalty discussion, we assess the statutory maximum penalty of $70,000 for each of these violations.[18]

[16]The Secretary's proposed penalties are not accorded the same deference that her reasonable interpretations of an ambiguous standard must be accorded. *See Martin v. OSHRC (CF & I)*, 499 U.S. 144 (1991). *See also Hern Iron Works*, 16 BNA OSHC at 1621, 1993-95 CCH OSHD at p. 41,881 (rejecting Secretary's contention that his penalty proposals are entitled to "substantial weight"). Rather, it is the Commission's penalty determinations that must be accorded deference. *See generally Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 (5th Cir. 1997) ("[I]f we were to agree with the Secretary's construction of the General Duty Clause and hold that…penalties for violations of the Clause should be fixed on a per employee basis, we would be usurping the Commission's statutorily ordained power to assess "all" penalties.").

[17]The Commission has long held that OSHA's FOM and Field Inspection Reference Manual ("FIRM") contain only guidelines for internal application that do not have the force and effect of law and create no substantive or procedural rights to employers. *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977), a view with which the courts have agreed. *Secretary v. Manganas Painting Co.*, 70 F.3d 434, 437 (6th Cir. 1995) (citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981)); *In re Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334, 339 (7th Cir. 1995) (guidelines not law but show policy determination). In fact, OSHA has included language to this effect on the title page of the FIRM. *Field Inspection Reference Manual*, 4 CCH ESHG ¶ 7960 (OSHA *Instruction* CPL 2.103, Sept. 26, 1994). Similarly, like the FOM and the FIRM, CPLs do not have the force and effect of law. *American Cyanamid Co.*, 15 BNA OSHC 1497, 1503-04, 1991-93 CCH OSHD ¶ 29,598, pp. 40,066-67 (No. 86-681, 1992), *rev'd on other grounds*, 5 F.3d 140 (6th Cir. 1993).

[18]We note that the Commission has considered the gravity of a violation to be the most significant factor in determining an appropriate penalty and the number of employees exposed is one of the elements used to determine gravity. See § 17(j) of the Act; *Hartford Roofing*, 17 BNA OSHC at

WILLFULNESS OF THE GENERAL DUTY CLAUSE VIOLATION

After the workers completed the asbestos removal that they had been doing at night, Ho's next work assignment was to have the building washed. Although Ho declined to make fresh water available to the workers, he had been informed that either the sprinkler system or fire hydrants had not been cut off and thus remained available for use. However, Ho evidently was not aware of where access to the water supply might be obtained. On March 11, at Ho's direction, Tate looked around the building and came upon two valves that he thought might be water lines. When Ho paged Tate to discuss the valves that Tate had located, Ho instructed Tate to open one of the lines to see what it contained.[19] When Tate loosened the valve, it popped open and began venting gas under pressure. Tate asked two of the workers to help him plug the line and then went to move his van that was nearby. When Tate started the engine on his van, the gas ignited causing a fire and explosion, which injured him and the two other workers.[20]

In docket no. 98-1646, the Secretary alleged a willful violation of section 5(a)(1) of the Act in that an employee was required to open a pipe of unknown content. Respondents

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1366. Thus, while we find no basis on which to assess per-employee penalties under the standards cited here, the fact that eleven employees were exposed to the cited conditions nonetheless plays a role in our decision to assess the maximum penalty allowed by the Act for each willful violation.

[19]In their brief on review, Respondents argue that the judge erred in finding a § 5(a)(1) violation because Ho had no knowledge either of the decision to open the valve or that the valve was a gas line. The judge specifically concluded that Ho "knew of the physical conditions cited" based on his counsel's admission at the hearing that tapping into an unmarked line was a recognized hazard. Although Respondents did not petition for review of this issue and the Commission did not include it in the briefing notice, we agree with the judge that knowledge has been established here. *See Trinity Indus. v. OSHRC*, 206 F.3d 539 (5th Cir. 2000). According to the unrebutted testimony of the compliance officer, Ho instructed Tate to open the line in question and insisted that he do so despite Tate's expressed reluctance. Moreover, as the employee assigned by Ho to supervise part of the renovation project including the asbestos removal operation conducted at night, Tate's knowledge with regard to opening the line is properly imputed to Ho. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807 at p. 40,585 (No. 87-692, 1992).

[20]One worker testified that the fire started as Tate and the other workers were trying to use the van to push a cover over or onto the pipe. The judge did not credit this testimony.

stipulated at the hearing that the failure to identify a gas line constituted a recognized hazard under section 5(a)(1).[21] However, the judge declined to find the violation willful on the ground that the Secretary had not introduced evidence to show that Ho had a heightened awareness that instructing Tate to open the pipe might be hazardous, or that Ho consciously disregarded a known safety hazard. We agree.

In order to establish that a violation is willful, the Secretary must show that it was committed voluntarily with an intentional disregard of the Act or plain indifference to employee safety. *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No. 87-2007, 1992). The Secretary does not contend that there is direct evidence to show Ho's state of mind specifically with respect to his instruction to Tate to open the pipe, but she contends that the violation nevertheless should be found willful because Ho generally manifested a disregard of or indifference to employee safety by the manner in which he had the asbestos removal work conducted.

Notwithstanding the Secretary's argument, the authorities she cites to us are all cases in which there is a factual record as to the employer's state of mind *with regard to the specific circumstances of the violation in issue. See, e.g., Central Soya de Puerto Rico v. Secretary of Labor*, 653 F.2d 38, 39-40 (1st Cir. 1981) (repeated warnings of the defective floor in question). In determining an employer's subjective state of mind, the employer's attitude toward compliance can be evaluated only by the external objective evidence and testimony. *Brock v. Morello Bros. Construction*, 809 F.2d 161, 165 (1st Cir. 1987). The Commission has held that an employer can manifest a general good faith but nevertheless be found in willful violation based on the particular circumstances relating to the violation in question. *See Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1923-24, 1999 CCH OSHD ¶ 31,933, pp. 47,377-78 (No. 96-593, 1999), and cases cited therein. However, we find no authority, and none is cited to us, holding the converse — that violations committed by a "bad actor," which is a fitting description of the Respondent in this case, can be presumed willful absent evidence

[21]29 U.S.C. 654(a)(1) requires an employer to provide "employment and a place of employment which are free from recognized hazards which are causing or are likely to cause death or serious physical harm."

specifically addressing the employer's state of mind with *respect to the cited conditions at issue*.[22]

Furthermore, it is well-settled that the Secretary has a more stringent and more difficult burden of proof to show willfulness where the employer is charged with a violation of section 5(a)(1) than she does where failure to comply with a specific standard is concerned. In section 5(a)(1) violations, "a more concrete evidentiary showing is required." *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1131, 1981 CCH OSHD ¶ 25,738, p. 32,106 (No. 76-2644, 1981). The Secretary must not only show that the employer had knowledge that a hazardous condition existed but must also adduce evidence that the employer intentionally disregarded or was indifferent to employee safety with respect to the hazard in question. *General Dynamics Land Sys. Div., Inc.*, 15 BNA OSHC 1275, 1287, 1991-93 CCH OSHD ¶ 29,467, p. 39,759 (No. 83-1293, 1991), *aff'd without published opinion*, 985 F.2d 560 (6th Cir. 1993). *See also George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982-83, 1995-97 CCH OSHD ¶ 31,293, pp. 43,979-80 (No. 93-0984, 1997) (finding section 5(a)(1) violation not willful where evidence failed to show either employer's actual knowledge of the hazard or intentional disregard of or indifference to safety). Plainly, the Secretary's argument in these cases runs counter to this well-settled precedent, and she presents no basis for disregarding our established case law. Accordingly, we conclude that the judge properly found the Secretary failed to prove that the violation of section 5(a)(1) was willful in nature as alleged.

[22]We reject the Secretary's reliance on Ho's failure to testify. Adverse inferences may be drawn *with respect to factual matters addressed in the record* where a party does not testify. *Woolston Constr.Co.*, 15 BNA OSHC 1114, 1122 n.9, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 n.9 (No. 88-1877, 1991), *aff'd without published opinion*, No. 91-1413, 1992 U.S. App. LEXIS 15687 (D.C. Cir. May 22, 1992). In the absence of any affirmative evidence as to Ho's state of mind, we cannot merely infer, as the Secretary contends, that Ho was actually aware that opening the unlabeled valve would be hazardous.

PENALTIES

We turn now to the assessment of appropriate penalties. Under section 17(j) of the Act, 29 U.S.C. § 666(j), penalties are determined based on the size of the employer's business, the gravity of the violations, the employer's good faith, and the employer's history of previous violations. *S & G Packaging Co.*, 19 BNA OSHC 1503, 1509, 2001 CCH OSHD ¶ 32,401, p. 49,893 (No. 98-1107, 2001). The statutory maximum civil penalty is $70,000 for a willful violation and $7,000 for both serious and other than serious violations. 29 U.S.C. § 666(a)-(c).

In addition to the willful violations, the Secretary charged Respondents with eight serious violations in docket no. 98-1645, and four serious and one other than serious violation in docket no. 98-1646. Although the Secretary considered the violations, particularly those involving provisions of the asbestos standard, to be of high gravity, she also determined that Respondents had no prior history of violations, and she regarded them as small employers based on the aggregate number of persons employed both by Ho and the cited corporations — approximately 60 individuals. She therefore proposed penalties — $4,900 for each serious violation and $49,000 for each willful violation — considerably below the statutory maximum for all the violations, including those of the asbestos standard. The judge in turn concluded that the Secretary had overstated the gravity of the violations, and therefore, assessed somewhat lower penalties ranging from $1,900 for the serious violations and $39,000 for each willful violation, except in the case of the other than serious violation of the reporting provision at section 1904.8, for which the judge

assessed the Secretary's proposed penalty of $700. We conclude, for those violations that we affirm, that both the judge's assessments and the Secretary's proposals are inappropriately low.

Under the Act, the Commission has the discretion to assess the penalties it finds appropriate. Section 17(j), 29 U.S.C. § 666(j). In doing so, the Commission may review the judge's assessment *de novo*. *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1993-95 CCH OSHD ¶ 30,516 (No. 91-414, 1994). The Commission, furthermore, may, where appropriate, assess a penalty higher than that proposed by the Secretary. *R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1075, 1993-95 CCH OSHD ¶ 30,682, p. 42,581 (Nos. 91-1873, 1995

(consolidated)). Although gravity normally is the most significant consideration, each factor can be accorded the weight that is reasonable in the circumstances. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006, 1993-95 CCH OSHD ¶ 30,635, p. 42,444 (No. 92-424, 1994).

In these cases, we conclude that Ho's extreme lack of good faith warrants assessment of the statutory maximum penalty. Ho's appalling lack of concern for the health and safety of his employees is well demonstrated by the facts of record. Ho's lack of good faith goes beyond the obvious — he hired inexperienced and untrained employees and knowingly exposed them to a hazardous substance without providing any of the protective measures required by the standards, and he continued to do so even after he was informed that his activities were in violation of local codes and was instructed to stop work. Ho also took advantage of foreign workers who were in the country illegally and therefore were not in a position to exercise their statutory right to a safe workplace. Equally, if not more, significant is the fact that Ho concealed his asbestos removal operation by working at night, behind locked gates with the work crew confined, and conducted and completed the work in this secretive manner at the same time that he was purportedly negotiating a contract with a qualified asbestos abatement contractor as the city inspector had directed. We simply cannot excuse the attitude of an employer that treats matters of health and safety as a game with the apparent objective of circumventing the relevant regulatory authorities. For these reasons, we assess the statutory maximum penalty for each violation. *See Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624-25, 1993-95 CCH OSHD ¶ 30,363, pp. 41,884-85 (No. 88-1962, 1994) (based on the employer's lack of good faith, Commission increases the penalty above that assessed by the judge).

ORDER

For the reasons stated, the citations are vacated as to Respondents Ho Ho Ho Express and Houston Fruitland. As to Respondent Ho, we order the following disposition: in docket no. 98-1645, items 1, 2, 3, 4, 16, and 28 of citation no. 2 are affirmed as willful violations and each is assessed a penalty of $70,000. We affirm one willful violation of former section 1926.1101(h)(1)(i) for which a penalty of $70,000 is assessed. We also affirm one violation of section 1926.1101(k)(9)(i) and (k)(9)(viii), for which a penalty of $70,000 is assessed. Items 1 through 8 of citation no. 1 are affirmed as serious violations, and a penalty of $7000 is assessed for each item. In docket no. 98-1646, citation no. 2, item 1 is affirmed as a serious but not willful violation, and a penalty of $7000 is assessed. Items 1 through 4 of citation no. 1 are affirmed as serious violations, and a penalty of $7000 is assessed for each item. Citation no. 3 alleging an other than serious violation is affirmed and a penalty of $7000 is assessed. The total penalty assessed against Ho is $658,000.

So ORDERED.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: September 29, 2003

ROGERS, Commissioner, concurring and dissenting:

I concur with the majority in finding the Act applicable to the work performed by Eric Ho, and in finding that the Secretary has not met her burden of proof to hold the respondent corporations, Ho Ho Ho Express and Houston Fruitland, liable in this proceeding. I also agree that the Secretary has not established that the violation of Section 5(a)(1) was willful. I must respectfully dissent, however, from the majority's decision today to overturn Judge Barkley's well-reasoned opinion that the Secretary properly cited the violations of the respiratory protection standard, 1926.1101(h)(1)(i), and the employee training standard, 1926.1101(k)(9)(i) and (viii), on a per employee basis.[1] In my view, this disposition constitutes a radical departure

[1]The standards require as follows:

> **1926.1101 Asbestos.**
>
> . . . .
>
> (h) *Respiratory protection.* (1) *General*. The employer shall provide respirators, and ensure that they are used, where required by this section. Respirators shall be used in the following circumstances:
>
> (i) During all Class I asbestos jobs.
>
> . . . .
>
> (k) *Communication of hazards.*
>
> . . . .
>
> (9) *Employee Information and Training.* (i) 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 [permissible exposure limit] and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program.
>
> . . . .
>
> (viii) The training program shall be conducted in a manner that the employee is able to understand. In addition to the content required by provisions in paragraphs (k)(9)(iii) through (vi) of this section, the employer shall ensure that each such employee is informed of the following:
>
> (A) Methods of recognizing asbestos, including the requirement in paragraph (k)(1) of this section to presume that certain building materials contain asbestos;
>
> (B) The health effects associated with asbestos exposure;
>
> (C) The relationship between smoking and asbestos in producing lung cancer;
>
> (D) The nature of operations that could result in exposure to asbestos, the importance of necessary protective controls to minimize exposure including, as applicable, engineering controls, work practices, respirators, housekeeping procedures, hygiene facilities, protective clothing, decontamination procedures,

from settled Commission and court precedent recognizing the Secretary's authority to issue multiple citations for violations of the same standard where the standard can reasonably be read to permit multiple units of violation.

The conduct at issue here is among the worst I have seen in my tenure on the Commission. Eric Ho knowingly and willfully directed eleven employees hired for a building renovation project – apparently undocumented workers from Mexico with little or no English proficiency – to remove asbestos-containing materials without providing them effective protective equipment. None of the eleven workers were provided appropriate respirators or received any training. Neither were the workers informed of the presence of asbestos nor apprised of its dangerous carcinogenic properties. Moreover, Ho persisted in exposing these workers to the risk of fatal lung disease even after a city building inspector shut down the worksite, at which time he began secretly operating at night behind locked gates. In addition to the OSH Act citations here,[2] Ho's actions have led to a Federal criminal conviction under the Clean Air Act and administrative proceedings by the Texas Department of Health.

The Review Commission and the Secretary have specific roles to play under the "split-enforcement" model of the Act. The Commission has the authority to adjudicate various disputes under the Act, including disputes over the Secretary's legal authority to take various

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> emergency procedures, and waste disposal procedures, and any necessary instruction in the use of these controls and procedures. . . .
> (E) The purpose, proper use, fitting instructions, and limitations of respirators. . . .
> (F) The appropriate work practices for performing the asbestos job;
> (G) Medical surveillance program requirements;
> (H) The content of this standard. . . .
> (I) The names, addresses and phone numbers of public health organizations which provide information, materials and/or conduct programs regarding smoking cessation. . . .
> (J) The requirements for posting signs and affixing labels and the meaning of the required legends for such signs and labels.

[2]The Secretary cited Ho for a number of violations, including eleven separate violations of both the employee respirator standard and the employee training standard at issue here, one violation for each of the eleven employees involved.

enforcement actions. The Secretary enforces the Act and, as such, is charged with making prosecutorial decisions within the bounds of her legal authority. By their decision in this case, however, my colleagues have exceeded the scope of the Commission's authority. In seeking to disallow the Secretary of Labor's lawful exercise of her prosecutorial discretion to issue per employee citations for Eric Ho's flagrant and egregious violations of federal law, the Commission runs afoul of the statutory scheme.

The Supreme Court has ruled that "enforcement of the Act is the sole responsibility of the Secretary" and that "only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions. . . ." *Cuyahoga Valley R. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (citations omitted). In contrast, the Court found that "[t]he Commission's function is to act as a neutral arbiter" and noted that for "the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute" would be "a commingling of roles that Congress did not intend." *Id.* at 7. The Court later explained that "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. OSHRC (CF&I),* 499 U.S. 144, 154 (1991)(*"CF&I"*). Thus, while the Secretary possesses the "power to render authoritative interpretations of OSH Act regulations," "the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Id.* at 152, 154-55.

Heretofore, the Commission has addressed per instance and per employee citation authority in numerous cases, evaluating the Secretary's exercise of her discretion pursuant to the "consistency with the regulatory language" and "reasonableness" guidelines articulated in C*F&I*. In *Caterpillar Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-0922, 1993)(*"Caterpillar"),* where the Secretary issued per instance citations for violations of the recordkeeping standard, the Commission held that the "test of whether the Act and the cited regulation permits multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action." *Id.* at 2172, 1991-93 CCH OSHD at p. 41,005 (citation omitted). Affirming separate violations for each of Caterpillar's 167 failures to record, the

Commission concluded that a regulation that requires an employer to "enter each recordable injury" "can reasonably be read to involve as many violations as there were failures to record. . . ." *Id.* at 2173, 1991-93 CCH OSHD at p. 41,006. *Accord Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2001, 1995-97 CCH OSHD ¶ 31,301, p. 44,011(No. 89-0265, 1997) (affirming 176 recordkeeping violations); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2185, 2000 CCH OSHD ¶ 32,134, p. 48,410 (No. 90-2775, 2000) (affirming 357 willful recordkeeping violations), *enf'd*, 268 F.3d 1123, 1130 (D.C. Cir. 2001) ("the availability of [section 17(a)] penalties is consistent with the general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty").

Similarly, in *Sanders Lead Co.*, 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30,740 (No. 87-260, 1995)("*Sanders Lead"*), the Commission considered whether the Secretary properly cited the employer on a per employee basis for its failure to comply with a respirator fit-test standard that required employers to "perform either quantitative or qualitative face fit tests at the time of initial fitting and at least every six months thereafter for each employee wearing negative pressure respirators." *Id.* at 1203, 1993-95 CCH OSHD at p. 42,695. Upholding the Secretary's per employee citations, the Commission found that the "standard requires the evaluation of individual employees' respirators under certain unique circumstances peculiar to each employee," and "conclude[d] that the language of the respirator fit-test standard permits a per-instance assessment." *Id.* In addition, in determining that violations of a medical removal protection standard could also be cited separately, the Commission emphasized that it "is not the single decision by an employer not to remove employees, but the language of the standard that is determinative." *Id.* at 1200, 1993-95 CCH OSHD at p. 42,692.

While a divided Commission later rejected the Secretary's issuance of per employee citations for a roofing contractor's violation of a guardrail standard, stating that "a single practice, method or condition [that] affects multiple employees . . . can be only one violation of the standard," the majority noted that "[s]ome standards implicate the protection . . . of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis." *Hartford Roofing Co.*, 17

BNA OSHC 1361, 1365, 1995-97 CCH OSHD ¶ 30,857, p. 42,935 (No. 92-3855, 1995)("*Hartford Roofing*"). The majority cited as an example of permissible per instance citations the violation of a standard requiring respirator use where engineering controls are insufficient, noting that "[a]s long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violation." *Id.* at 1366, 1995-97 CCH OSHD at p. 42,937. The Commission explained that the "condition or practice at which the standard is directed, within the meaning of section 3(8) of the Act" is "the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator."[3] *Id.* at 1366-67, 1995-97 CCH OSHD at p. 42,937. The Commission also emphasized the Secretary's discretion, under a standard which allows "the Secretary to consider each failure to comply with a standard as a discrete violation," to either cite the failures to comply separately or group them "as if they were one violation" for penalty purposes. *Id.* at 1367, 1995-97 CCH OSHD at pp. 42,937-38.

In the only case yet to consider multiple citations issued under a training standard, the Commission stated that the language of a training standard providing that "'[t]he employer shall instruct each employee' – clearly may be read to permit the Secretary to cite separate violations based on the failures to train individual employees." *Andrew Catapano Enterp. Inc.*, 17 BNA OSHC 1776, 1780, 1995-97 CCH OSHD ¶ 31,180, p. 43,607 (No. 90-0050, 1996)(consolidated)("*Catapano*"). The Commission affirmed but a single citation in *Catapano*, however, because the number of citations was based on the number of inspection days the same group of untrained employees worked, rather than on the number of employees who Catapano failed to train. As the Commission noted, "[o]nly the date changed[--] [a]s far as this record establishes, the employees did not change, and the working conditions and applicable regulations did not change." *Id.* The Fifth Circuit, in which the case before us

[3]While my colleagues here correctly note that the discussion of respirator standards in *Hartford Roofing* is *dicta*, the discussion was central to the Commission's efforts to compare and contrast standards which allow per instance citation (a respirator standard) with those that do not (a guardrail standard). By sweeping this discussion – and distinction – away, the majority is implicitly reversing *Caterpillar* and its doctrinal foundation.

arises, has also posited that an individual employee may be a "unit of violation" where the "regulated condition or practice is unique to the employee (i.e., failure to train or remove a worker)." *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1198-99 (5th Cir. 1997) (affirming Commission decision rejecting per employee violations of general duty clause for single hazardous condition) ("*Arcadian*").

Here, the Secretary cited Ho for violations of the asbestos standard, 29 C.F.R. § 1926.1101, for failing to provide and ensure the use of respirators and to provide required information to each of the eleven employees. In my view, the numerous detailed and explicit provisions of this standard that prescribe individualized employee-specific actions make clear that the violations here are "individual acts" that may be prosecuted on a per employee basis. Under the cited standards, the violative conditions are the failures to provide respirators to each employee (and ensure their use by each employee) and the failures to train each employee, with each failure constituting a discrete violative instance.[4]

The respirator provision that Eric Ho violated specifically requires the employer to "provide respirators, and ensure that they are used, where required by this section." 29 C.F.R. § 1926.1101(h)(1). The plain language of this standard imposed a duty on the employer both to provide a respirator to each of the eleven exposed employees and to ensure the respirator's use by each of the eleven exposed employees. The employer could not comply by merely providing a few respirators or ensuring that only *some* of the employees use respirators. Rather, the standard imposes on the employer an individualized duty that runs to each employee. *See Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001) ("the availability of [section 17(a)] penalties is consistent with the general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty"). These requirements, as noted by the Commission in *Hartford Roofing*, provide for the type of

[4]The majority's strained and artificial attempt to distinguish *Caterpillar* because it dealt with "per-instance" violations while this case deals with "per-employee" violations thus falls flat on its face. Here, because of the language of the respective standards, each failure to provide respirators to each employee and each failure to train each employee is a separate violative instance. In *Caterpillar*, each failure to record a recordable employee injury was a separate violative instance.

individualized protection that would authorize per employee citations. *Hartford Roofing*, 17 BNA OSHC at 1366, 1995-97 CCH OSHD at p. 42,937.

Moreover, the requirements to "provide respirators, and ensure that they are used" do not exist in a vacuum. These requirements - and the nature of the duty they impose - must be viewed in the context of the asbestos respiratory protection standard as a whole. For example, the standard goes on to require, in section 1926.1101(h)(4), fit testing. The fit testing required under this standard is analogous to that found by the Commission in *Sanders Lead* to have been properly cited on a per employee basis, as it "requires the evaluation of individual employees' respirators under certain unique circumstances peculiar to each employee." *Sanders Lead*, 17 BNA OSHC at 1203, 1993-95 CCH OSHD at p. 42,695.

Furthermore, the standard prescribes a list of respirators from which employers must choose based on the concentration of asbestos exposure, but limits the employer's options where an individual employee chooses a powered air-purifying respirator instead of a negative-pressure respirator. Section 1926.1101(h)(2). The asbestos standard also requires institution of a respirator program and provides that "[n]o employee shall be assigned to tasks requiring the use of respirators if, based on his or her most recent examination, an examining physician determines that the employee will be unable to function normally wearing a respirator, or that the safety or health of the employee or of other employees will be impaired by the use of a respirator." Section 1910.1101(h)(3)(iv). Under this scheme, respiratory protection is dependent on consideration of individual employee health conditions and choices – the antithesis of a "one size fits all" approach. Accordingly, no single act of abatement could cure the deficiencies here. Proper abatement would have required that Eric Ho evaluate the health condition and personal preferences of each of his eleven employees in order to determine the proper respirator protection that should have been provided to each of them. In any event, one respirator would not suffice for compliance; eleven were required.

In light of these detailed employee-specific provisions, it strains credulity for the majority to claim "no basis" to read the standard as imposing "individualized dut[ies]."[5] It is

[5]The majority makes much of the fact that all eleven of the employees here were engaged in Class I asbestos work. Yet the majority itself acknowledges, citing *Hartford Roofing*, that "there is no

one thing for the majority to disregard *dicta* in *Hartford Roofing*; it is quite another to ignore binding Commission precedent in *Sanders Lead* and to effectively overrule *Caterpillar*.

Of course, even if the standard's wording did not so clearly require individualized respiratory protection, we must defer to the Secretary's interpretation that individualized protection is required unless that interpretation is not reasonable.[6] *CF&I*, 499 U.S. at 154-55. The Secretary here interprets her regulation as imposing individualized duties running to each

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authority" for the argument that the propriety of per-employee citation "depends upon the particular facts of the case as opposed to how the standard in question defines the unit of prosecution." Similarly, the majority argues that Ho s noncompliance with the respiratory protection standard "stems directly from a single act - his failure to provide the appropriate respiratory protection for the type of work performed by this group of employees." Yet the fact that Ho s violations happened to result from a single act or decision is irrelevant under *Sanders Lead*. *Sanders Lead*, 17 BNA OSHC at 1200, 1993-95 CCH OSHD at p. 42,692.

Two other points bear noting. The majority argues that the language of the standard requiring employers to "ensure that they are used" "merely goes to establishing noncompliance with the terms of the standard." But those words are there for a purpose - to ensure that the respirators are actually used, in this case, by eleven separate individuals. *See Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984)(the term "provided" means make available, and could not be read as requiring use). *See also Stahl Roofing Inc*., 19 BNA OSHC 2179, 2183-84 n.5, 2002 CCH OSHD 32,646, p. 51,220 n.5 (No. 00-1268, 2003)(consolidated).

The majority also argues that to "prove a violation of the standard, it makes no difference whether one or all eleven of Ho's employees were not provided or using respirators." But that is equally true of a standard such as the recordkeeping standard, which the Commission has determined is susceptible to per-instance citations and where a violation can be proven if the employer fails to record even one injury. *See Caterpillar*, 15 BNA OSHC at 2172-73, 1991 CCH OSHD at p. 41,005. Here, the employer's duty extends to ensuring use of a respirator by *each* employee just as in the recordkeeping context, it extends to recording *each* recordable injury.

[6]By citing violations of a standard on a per-instance basis and litigating the issue before the Commission, the Secretary is interpreting the standard as imposing individualized duties and thus exercising her "delegated lawmaking powers" described in *CF&I*. *CF&I*, 499 U.S. at 157. As a result, the majority's argument that the Commission does not give deference to the Secretary's penalty directives, such as CPL 2.80, misses the mark because it is her interpretation reflected in the citation that we must consider for deference, not a penalty directive. *See* OSHA Instruction CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties* (October 21, 1990)("*CPL 2.80"*). As the majority concedes, CPL 2.80 is merely internal guidance that helps guide the Secretary s use of her prosecutorial discretion.

employee, an interpretation that is at least *consistent* with the standard's wording and with the Commission's analysis in *Hartford Roofing* (which predates both the violative conduct and the citation in this case). In these circumstances the Secretary's interpretation is plainly reasonable and, accordingly, one to which the Commission must defer.

The majority also argues that Ho somehow lacked notice that the respirator standard could be cited on a per-employee basis, an argument that Ho himself does not make before us.[7] However, in my view, there is no doubt that Ho was provided fair notice that the respirator standard was susceptible to per-employee or per-instance citation through Commission decisions such as *Caterpillar, Sanders Lead* and *Hartford Roofing*. *See Corbesco Inc. v. Secretary of Labor*, 926 F.2d 422, 428 (5th Cir. 1991) (notice is provided through Commission decisions). Additionally, contrary to the majority's claim, the Secretary's 1990 directive on the egregious willful policy *specifically* discusses the asbestos in general industry respiratory protection standard, 29 C.F.R. § 1910.1001(g)(1) – whose operative language, both at the time of the 1990 directive and at the time of the violative conduct, was *identical* to the cited asbestos in construction respiratory protection standard - in a context which makes clear that the Secretary views that standard (and thus the cited standard) as susceptible to per-employee citation. *CPL 2.80*, section H.3.d.(2)(b). Certainly, in light of these decisions and *CPL 2.80*, Ho had sufficient fair notice that the standard here could be so cited such that if he had any doubt, he "had a duty to at least inquire. . . ." *See Corbesco*, 926 F.2d at 428.

Even if requisite notice were somehow found to be lacking for the Secretary's reasonable interpretation in *this* case, the interpretation would apply prospectively, holding the current respondent harmless for the lack of notice. *See Diebold v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978).[8]

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[7]There is no dispute that Ho had fair notice and "fair warning of the conduct [the standard] . . . require[d]" – to provide individual respirators to each of the eleven employees. *See Diamond Roofing v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

[8]The majority really seems to be taking issue with the Secretary's exercise of prosecutorial discretion. *See infra* note 13. But Ho cannot complain about the fact that the Secretary exercised her discretion here by citing him on a per-employee basis or his lack of notice as to how the Secretary intended to exercise that discretion here. As Judge Posner pointed out in the criminal

Ho was also cited under 29 C.F.R. § 1926.1101(k)(9)(i) and (viii), with the two provisions grouped under one separate item, for his failure to provide required information to each of the eleven employees. The provision at subsection (i) requires the employer to institute a training program for all employees in certain categories and, of particular importance, to "ensure their participation in the program." It is not enough for the employer just to institute a training program. The employer has a discrete and affirmative obligation to determine which individual employees meet the criteria in the standard and then ensure that each individual receives the required training. The employer's duty thus runs to each employee. Moreover, subsection (viii) further requires that the training program "be conducted in a manner that the employee is able to understand" and requires the employer to "ensure that each such employee is informed" of a number of specific topics. These duties are unequivocally directed separately to each affected employee.[9]

Despite these explicit mandates, the majority inexplicably fails to perceive the individualized nature of the duty. Contending that the duty owed under the asbestos training standard is not focused on individual employee protection, my colleagues refer to the August 23, 1996 amendment to section 1926.1101(k)(9), where the Secretary explained that:

> By stating the training requirement in performance-oriented terms, the standard gives each employer flexibility in designing a training course suited to its operation while assuring that each employee receives training that covers all of the asbestos-related tasks that employee performs.

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context, "The risk of such variance [in severity of enforcement] is inherent in the decision to commit a crime. . . ." *Prater v. U.S. Parole Commn.*, 802 F.2d 948, 952 (7th Cir. 1986)(en banc). *Accord Lawrence v. U.S.*, 179 F.3d 343, 348 (5th Cir. 1999), *cert. denied*, 528 U.S. 1096 (2000)("We allow the government discretion to decide which individuals to prosecute, which offenses to charge, and what measure of punishment to seek."). And Ho does not allege that the exercise of discretion here was somehow based on impermissible grounds. *See id.* at 349.

[9]The majority patently misreads the nature of an employer's obligation under the cited training standard by suggesting, in footnote 15, that an employer could comply with the standard, which requires the employer to "ensure their [all employees who perform certain asbestos operations] participation in the program," even when not all such employees have participated. While group training would be permissible, the standard still requires that the employer ensure each such employee participates "prior to or at the time of initial assignment." Section 1926.1101(k)(9)(ii).

61 Fed. Reg. 43,454, 43,455 (August 23, 1996). Earlier in the preamble, the Secretary emphasized the individualized nature of the employer's obligation:

> Proper training is vital to assure that workers who remove or disturb asbestos-containing materials are aware of the hazards of asbestos exposure and understand the requirements of the standard that, if followed, will minimize such exposure. The standard's training provisions are designed to assure that *each employee* receives a degree of training appropriate to the nature of the asbestos-related tasks *that employee performs.*

Id. (emphasis added). My colleagues argue that the standard is "stated in general performance terms which refer to employees collectively rather than individually. . . ." But without first analyzing the tasks of each employee, the employer simply cannot determine what training is appropriate *for that employee.*[10] Moreover, the Secretary reiterated that the training provisions were designed to "assure" that "each employee" received appropriate training. Here again, the employer's duty is employee-specific.[11]

Furthermore, the Secretary goes on to explain that "all training must be conducted in a manner that is comprehensible to the employee . . . [--] [a] worker's ability to obtain a timely response to questions he or she may have about the content of the training is also a key to

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[10]As with the respiratory protection standard, the majority makes much of the fact that all of the eleven employees here were engaged in Class I asbestos operations. That particular fact is of no moment, however, for the reasons explained in note 5, *supra*.

[11]As further support, the majority quotes from Appendix B to OSHA Instruction CPL 2-2.63, *Inspection Procedures for Occupational Exposure to Asbestos* (1996), claiming the appendix refers to employees collectively rather than individually. The quote from the majority is as follows:

> Training is to be provided:
> ....
> (2) To all employees exposed at or above the PEL.
> (3) To all employees who perform Class I through Class IV asbestos operations.
> ....

However, the majority s selective quote has left out the next item, as follows:

> (4) Prior to or at the time of initial assignment and at least annually thereafter.

This can only refer to the initial assignment of *an individual employee. See also* section 1926.1101(k)(9)(ii).

worker comprehension." *Id.* This focus on the individual employee and the need to ensure that each worker has the opportunity to have his or her questions answered underscores the recognition that without adequate training, an individual employee is unable to effectively protect him or herself from workplace hazards. This focus also underscores the clear mandate of this standard as one that prescribes "individual acts." For, as with the respirator violation, no single act of abatement could cure the full training deficiencies here. Proper abatement requires eleven separate acts tailored to each employee – at a minimum by ensuring each employee's participation in any group training. In light of these detailed employee-specific provisions establishing duties that run from the employer to each individual employee, it is incredible that my colleagues claim to find nothing in the language of the standard to require consideration of any factors "unique to individual employees."

Even if the wording of the training standard did not plainly lead to the conclusion that the Secretary could cite on a per employee basis, we must defer to the Secretary's contention that the standard supports that interpretation if it is reasonable. The Secretary here interprets her training standard as imposing individualized duties running to each employee. Her interpretation is consistent with both the Fifth Circuit's analysis in *Arcadian* and the Commission's analysis in *Catapano* (which both predate both the violative conduct and the citation in this case), where the court viewed a failure to train as a condition or practice "unique to the employee" and the Commission viewed a training standard as subject to per employee citation.[12] In these circumstances, it is difficult to imagine how the standard could not

[12]As with the respiratory protection standard, the majority argues that Ho somehow lacked notice that the training standard could be cited on a per-employee basis, an argument that Ho himself does not make before us. The notice argument is unavailing for the reasons discussed *supra*. And there is no dispute that Ho had fair notice and "fair warning of the conduct [the standard] . . . require[d]" – to provide training to each of the eleven employees. *See Diamond Roofing v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). Furthermore, as noted above, the Fifth Circuit has previously suggested that an individual employee may be a unit of violation in the case of a failure to train. *Arcadian*, 110 F.3d at 1198-99. While that suggestion was in the nature of *dicta*, it certainly provided notice that a training standard could be so interpreted. *Accord Catapano*, 17 BNA OSHC at 1780, 1995-97 CCH OSHD at p. 43,607.

"reasonably be read to involve as many violations as there were failures to" provide training.[13] *See Caterpillar*, 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,006.

In light of established Commission and court precedent, I simply cannot fathom my colleagues' conclusion here that the Secretary lacks the authority to issue per employee citations for Ho's violations of the cited respirator and training standards. Each of the standards requires the employer to perform duties specifically for the benefit of each employee, the satisfaction of which for any one employee would do nothing for the others. Surely, at a minimum, the language and intent of these standards *reasonably* can be read to prohibit individual acts. By ignoring this truth, my colleagues are implicitly overruling *Caterpillar* and *Sanders Lead*. In so doing, they upset the balance between the Secretary and the Commission so carefully drawn by the Court in *CF&I*.[14] Accordingly, because I believe we must abide by

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[13]The majority argues that the Secretary "advances what she calls different but diametrically opposed 'reasonable' interpretations of the same standard." They point out that sometimes the Secretary will cite "single violations that treat all exposed employees as a group." But, as the Commission acknowledged in *Hartford Roofing*, where the standard allows the Secretary to cite on a per-instance basis, she "also has the discretion to group them for penalty purposes as if they were one violation." *Hartford Roofing*, 17 BNA OSHC at 1367, 1995-97 CCH OSHD at pp. 42,937-38. The majority's seeming insistence that the Secretary must always exercise her prosecutorial discretion in exactly the same manner regardless of the facts - or else be accused of inconsistency – would effectively strip her of her discretion and either punish well-meaning but negligent employers or eliminate an important tool to deal with "bad actor" employers. In any event, the Secretary's discretion to cite on a "per employee" basis here is strictly cabined by the number of employees whom Ho failed to train or provide respirators for.

The majority also claims that the Secretary suggests that per-day citation would also be appropriate. It is not even clear that is what the Secretary is suggesting, since the discussion cited by the majority arose in the context of the Secretary's argument in her briefs that the employees worked on different dates. In any event, any such suggestion was implicitly rejected by the Commission in *Catapano* and is not reflected in the citations before us here. The majority assiduously avoids, however, the real question under our precedent – can the standards here "reasonably be read" to allow per-employee citation where the standards impose employee-specific duties? Any fair reader must answer yes.

[14]The Review Commission, as an administrative agency, is generally entitled to reconsider its precedent as long as the rationale for the change is well-explained and not precluded by the Act or controlling court precedent. *See Brock v. Dun-Par Engd. Form Co.*, 843 F.2d 1135, 1137-38 (8th Cir. 1988)("While the Commission may change its position, it must give adequate reasons for

clear and well-developed precedent, and because

I see no valid basis upon which to deprive the Secretary of her authority to effectively enforce the Act, I vigorously dissent.

/s/
Thomasina V. Rogers
Commissioner

Date: September 29, 2003

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doing so.").

The majority's decision here, by *sub silentio* reversing Commission precedent, reminds me of the comment of the Court of Appeals for the Seventh Circuit in *Butler Lime & Cement Co. v. OSHRC*, 658 F.2d 544 (7th Cir. 1981), "[t]he change of personnel which obviously precipitated a change in decision calls to mind a frequent theme of Law Day observances – one applicable not only to courts but to administrative bodies – that decisions should result from a rule of law and not of men." *Id.* at 550 n.2.

SECRETARY OF LABOR, Complainant, v. ERIC K. HO individually, d/b/a HO HO HO EXPRESS, HOUSTON FRUITLAND, HO HO HO EXPRESS, INC. and HOUSTON FRUITLAND, INC. and its successors, Respondent.	OSHRC DOCKET NO. 98-1645 and 98-1646 (CONSOLIDATED)

APPEARANCES:

For the Complainant:
Mary Schopmeyer, Esq., Suzanne Dunne, Esq., Office of the Solicitor, Department of Labor, Dallas, Texas

For the Respondent:
Tom M. Davis, Jr., Esq., Rhett Phares, Esq., Davis & Shank, Houston, Texas; Lee Hamel, Esq., Houston, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the AAct@).

The Secretary maintains that Respondents, Eric K. Ho individually, d/b/a Ho Ho Ho Express, Houston Fruitland, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc. and its successors, at all times relevant to this action maintained a place of business at 11101 Bellaire, Houston, Texas, where they were engaged in construction.

On March 12 through August 31, 1998, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Ho=s 11101 Bellaire, Houston, Texas work site. As a result of that inspection, Respondents were issued citations alleging violations of the Act together with proposed

penalties. By filing a timely notice of contest Respondents brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 27-29, 1999, a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Jurisdiction

Respondent Erik K. Ho admits he was the employer at the work site, but denies he is an employer engaged in a business affecting commerce and subject to the requirements of the Act. Respondent maintains that Ho Ho Ho Express, Inc., and Houston Fruitland, Inc. were not employers at the work site and asks that they be dismissed from the case.

Facts

Houston Fruitland, Inc. is a privately owned corporation established in 1984 (Exh. C-47, p. 9). Eric K. Ho owns a 66.667% share of the corporation. The remaining shares are owned by Ho=s family members (Exh. C-47, p. 9). Ho is the president and CEO of Houston Fruitland, and directs its day to day activities. Ho=s wife, Melissa Ho acts as secretary. Mr. and Mrs. Ho are the only officers of the corporation (Exh. C-47, p. 12).

Ho Ho Ho Express, Inc., also a privately held corporation, was established in 1991 (Exh. C-47, p. 10). Until January, 21, 1998 Eric Ho owned 100% of Ho Ho Ho Express; in January 1998 33.333% of the corporation=s shares were transferred to a family member (Exh. C-47, p. 10). Eric Ho acts as both president and secretary of the corporation, and directs its day to day activities; there are no other officers (Exh. C-47, p. 12).

Debbie Chan testified that she worked for Eric Ho from November 1994 to March 31, 1998. For the first two years she was listed as an employee of Norris Produce; after that she was formally employed by Houston Fruitland (Tr. 623-24). Chan stated that she was an account clerk in charge of payroll and month end financial reports (Tr. 624). In addition to Houston Fruitland, Inc., Chan also balanced checkbooks for Ho Ho Ho Express, Cal-Sierra, Foothill and Norris (Tr. 624-25).

Chan testified that Eric and Melissa Ho, Eric Ho=s wife, had sole authority to sign checks for Houston Fruitland (Tr. 625). Chan stated that when there was an insufficiency of funds to cover a check for Houston Fruitland, Mr. Ho would transfer money into the account from Ho Ho Ho Express (Tr. 626). Chan testified that monies transferred to Houston Fruitland were not repaid to Ho Ho Ho

Express, however, if Ho Ho Ho Express later needed cash, Eric Ho would transfer funds into its account from Houston Fruitland=s (Tr. 628).

Eric Ho admits that he paid bills including wages, using the accounts of his different businesses interchangeably (Tr. 626). Chan testified that Corston Tate, who worked for Eric Ho as a carpenter for approximately 5 years, and worked at the Bellaire hospital site beginning in December 1997 (Tr. 246-47, 252), was paid out of both Houston Fruitland=s or Ho Ho Ho Express= accounts (Tr. 629, Exh. C-38). Scaffolding for use on the Bellaire project was rented by and paid for by Ho Ho Ho Express, Inc. (Tr. 241-42). Eric Ho authorized Manuel Escobedo to hire Mexican laborers to work at the Bellaire site, and issued Escobedo checks drawn on Ho Ho Ho Express Inc.=s account to pay their wages (Tr. 425-31; Exh. C-3). Bill Golding, the loss prevention manager for the rental company, Betco Scaffolding, testified that the company, Ho Ho Ho Express, Inc., had to open an account, fill out a credit application and pass a credit check before it could rent equipment (Tr. 241-43; Exh. C-43). Ho Ho Ho Express had a contract with USA Waste Services (USA) to haul away non-hazardous wastes from the Bellaire site; Ho Ho Ho Express was invoiced, and paid for USA=s services by checks issued on their account (Exh. C-1).

Chan testified that she recorded monies borrowed by Eric Ho from Ho Ho Ho Express and/or Houston Fruitland under a ledger entry labeled Adue from shareholder@ (Tr. 629-31). Chan stated that Ho took out money whenever he wanted to, that no other approval was required, and that no loan documents were drawn up (Tr. 630). Chan stated that the debts were not repaid by Ho (Tr. 630).

Eric Ho contracted to buy the Bellaire hospital which is the subject of this action, and provided $10,000.00 earnest money in the form of a check drawn on Houston Fruitland, Inc. (Tr. 39, Exh. C-21). Chan noted that Ho Ho Ho Express= January 1999 ledger page contains an entry indicating that Eric Ho owed the company the sum of $619,620.00 which was paid to Stewart Title for the Bellaire property (Tr. 634; Exh. R-2, p. 10).

Discussion

Respondent argues that Eric Ho, individually owned the Bellaire hospital property and was the employer of Manuel Escobedo and Corston Tate, whom he hired to conduct clean up operations at the property. Ho=s operations, described fully in the record below, included Aalteration@ of the cited property, an activity which falls under OSHA=s construction standards at 29 CFR '1926, *See* '**1926.1 Purpose and Scope**. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529,

1983 CCH OSHD &26,516 (No. 77-3676, 1983). Respondent Eric Ho, therefore, is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Respondent admits that Eric Ho used Ho Ho Ho Express= checking account to Afacilitate@ his payment of wages, worker expenses, vendors and suppliers (Respondents= post-hearing brief at p.3). Respondent maintains, however, that neither Ho Ho Ho Express, Inc., nor Houston Fruitland, Inc. were the employers of the exposed employees, and so are not liable for any of the alleged OSHA violations.

The Fifth Circuit, in which this case arises, has recognized that the corporate form may be disregarded under the Aalter ego@ doctrine in cases where Athere is such unity between corporation and individual that the separateness of the corporation has ceased@ *Permian Petroleum Co. v. Petroleos Mexicanos (Permian),* 934 F.2d 635, 643 (5th Cir. 1991), citing *Castleberry v. Branscum* 721 S.W.2d 270 (Tex. 1986). Whether the doctrine applies depends on:

> . . .the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.

Id. The court went on to state that the Aalter ego@ doctrine may be applied in cases where a party seeks to hold a corporation liable for the obligations of a shareholder.

It is clear that the interests of Eric Ho, Houston Fruitland, Inc. and Ho Ho Ho Express, Inc., are indistinguishable. Eric Ho is the primary shareholder in both corporations, and was the sole shareholder in Ho Ho Ho Express until immediately before the OSHA inspection. Ho solely directs the activities of both corporations. Funds are moved from corporation to corporation, and disbursed at Ho=s direction; no corporate formalities are followed. Ho uses corporation employees to perform personal chores and corporation assets to finance his own projects, *i.e.* the Bellaire hospital.

In this case the Complainant has properly included the corporations named in the caption of this citation, in that those corporations are merely the alter egos of Eric K. Ho.

Furthermore, in *Permian* the Fifth Circuit recognized a separate doctrine under which a party may hold a corporation liable for a shareholder=s obligations, *i.e.* the Asham to perpetrate a fraud doctrine.@ *Id.* The court held that the purpose of the doctrine is to prevent the use of the corporate entity as a cloak to work injustice; moreover, Athe sham to perpetrate fraud doctrine does not require proof of actual fraud, the party invoking the doctrine must only demonstrate constructive fraud. *Id.* at 644. The court noted that the state of Texas has defined constructive fraud as Athe breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its

tendency to deceive others, to violate confidence, or to injure public interests. *Id.* citing*; Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex.1964).

In this case Ho contrives to injure the public=s interest in safe and healthful working conditions assured under the Act. After comingling corporate assets with those of his own to fund the Bellaire project, Ho now invokes the corporate fiction to protect corporate assets, the very assets which were used in furtherance of the project giving rise to the cited violations.

Ho=s attempt to shield the corporate assets constitutes constructive fraud, in that it frustrates the Secretary=s ability to enforce the Act through the effective assessment of civil penalties.

This judge finds that Ho Ho Ho Express, Houston Fruitland, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc. and its successors are properly named as Respondents in this matter pursuant to the Asham to perpetrate a fraud doctrine@ set forth in *Permian, supra.*

Statement of Facts

Roy Elledge, Jr., a commercial real estate broker, negotiated the sale of the Bellaire Boulevard hospital property to Eric Ho (Tr. 31-32, 51). Elledge testified that the prior owners, AMA Holding, USA, provided him with a Phase One environmental report that had been completed on the property (Tr. 34, C-17). The report indicated that the Bellaire hospital building was likely to contain asbestos, which was widely used in fire resistant construction prior to 1978 (Tr. 36). Elledge testified that he gave Eric Ho a copy of the site assessment in October, 1997 (Tr. 36). The report states, *inter alia*, that a limited site inspection was conducted by CON-TEST on May 6, 1994, and that:

The following ACBMs were identified during the inspection of the subject site:

* Friable Materials - Spray Applied Fireproofing
* Potentially Friable Materials - Black Mastic
* Non-Friable Materials - Floor Tiles

The report refers the reader to Appendix F for recommended response actions (Exh. C-17, Sec. V). At ' '1.D.3. and 1.F., respectively, Appendix F notes that:

> Asbestos-containing spray applied fireproofing is friable and can cause significant damage if accidentally disturbed. Extreme caution needs to be used when working around non-friable asbestos-containing fireproofing materials.
>
> * * *
>
> Before renovation occurs thoroughly inspect for and test suspect materials that may not have been previously sampled. Any disturbance or alterations made to asbestos-containing materials

> must be handled by trained personnel who are licensed and registered with the Texas Department of Health (TDH) using proper procedures and respiratory protection.

Elledge testified that his discussion of the report with Mr. Ho was cursory, but that he did tell Ho that there was asbestos in the building, and recommended that Ho obtain a Phase Two assessment to ascertain the severity of the asbestos contamination (Tr. 37).

Elledge testified that on October 27, 1997, Eric Ho contracted to buy the Bellaire hospital (Tr. 39, Exh. C-21). On that same date, Ho signed a Commercial Property Condition Statement, stating that he was aware of the presence of both friable and non-friable asbestos on the site (Tr. 41-43; Exh. C-19). The sale of the hospital property was finalized on December 8, 1997; payment was in the form of a wire transfer from Houston Fruitland (Tr. 40).

Corston Tate testified that for approximately five years prior to the relevant period, he worked for Eric Ho as a carpenter, remodeling the facilities at Ho Ho Ho Express, Houston Fruitland and Cal-Sierra Produce (Tr. 246-47, 250, 300). Tate testified that Ho assigned projects to him, and would check his work, though he generally worked without supervision (Tr. 248-49). Tate testified that he was paid by check; the checks were drawn on Ho Ho Ho Express= account (Tr. 249). Tate stated that he first began work at the Bellaire property in November or December of 1997 (Tr. 252). Tate initially worked days in the professional building, tearing out cabinets and carpet (Tr. 255-56, 258). Tate testified that he put the debris into dumpsters (Tr. 257). Approximately twice a week, when the dumpsters were full, he would call Ho Ho Ho Express, and they would send out a truck to empty the dumpster (Tr. 257-58).

Tate testified that around January 1998, work began in the hospital building; Ho sent in workers to began tearing out sheetrock walls, and scraping the asbestos containing fireproofing they found behind it (Tr. 259-63). Tate stated that he and Manuel Escobedo would pick up the workers, all of whom were Mexican nationals, and bring them to the site in Tate=s van (Tr. 275). Tate testified that Eric Ho came out to the site every day to inspect the work (Tr. 262-63).

Tim Stewart, a structural inspector for the City of Houston (Tr. 56), testified that on February 2, 1998, he received and investigated a complaint that work was going on at the Bellaire Boulevard property without a permit (Tr. 57). Stewart testified that when he arrived on the site, approximately 10 workers were demolishing partition walls, and using putty knives to scrape fireproofing off the beams, the columns and the pin deck, *i.e.* the bottom of the second floor decking above the decorative ceiling (Tr. 58, 60, 73). Stewart stated that some workers were on scaffolds scraping immediately over their

heads, and that he observed dust falling into their breathing zones, onto their shoulders and hair (Tr. 74). Stewart testified that a few of the workers had on white paper dust masks, *see* Exh. C-2, but that most were not wearing any kind of personal protective equipment [PPE](Tr. 59, 73).[15] Rather they were dressed in dust covered street clothes (Tr. 71-72). The building was not sealed or any of the scraping areas contained (Tr. 77).

Stewart testified that he spoke to Ho=s representative, Corston Tate, about permits for the ongoing work (Tr. 62). Because no permits were produced, Stewart issued a stop work order, citing a possible asbestos abatement violation, and red tagged the property (Tr. 63, 75-76).

Tate admitted that the inspector ordered them to stop work and to board up the hospital building or face a $500.00 apiece fine (Tr. 264). Tate stated that he accepted the paperwork the inspector gave him and called Ho (Tr. 265). Tate testified Ho had him bring the paperwork to him; that Ho read the documents and laughed and joked about them (Tr. 266). Tate testified that work stopped at the hospital, and that some of the men who had been working there came over to the professional building and helped with the work there for a while (Tr. 268).

Don Weist is the operations manager at Alamo Environmental (Alamo), which specializes in asbestos abatement (Tr. 78). Weist testified that in February, 1998, Eric Ho asked Alamo to provide him with an estimate for the removal of asbestos fireproofing at the Bellaire hospital site (Tr. 79-80, 85). Weist met Ho at the site on February 10, 1998, at which time he examined the building and took photographs (Tr. 80-81, 271-72; Exh. C-28). Weist prepared a bid for $159,876.00 and on February 13 faxed it to Ho at Houston Fruitland, the business address provided by Ho (Tr. 86-87; Exh. C-23).[16]

Ho did not hire Alamo, however, and work resumed in the hospital building shortly thereafter. Corston Tate testified that work started up again approximately a week after the city inspection (Tr. 268). Tate testified, however, that when work resumed, Ho wanted the men to work at night (Tr. 268). Tate stated that a crew began scraping fireproofing off the beams in the hospital building under the

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[15] The white dust masks are clearly labeled A*Not a respirator, *Not government approved, *Not to be used when dust concentrations exceed appropriate government exposure limits. !WARNING Using this mask against asbestos, silica, grain dust, spray paints or other harmful substances may result in sickness or death. If you are around harmful substances, use the proper government approved respirator.@

[16] The business card Ho gave to Weist lists not only Houston Fruitland Inc., but Ho Ho Ho Express Inc., and Cal-Sierra at the same address, phone and fax location (Exh. C-31).

direction of a Jaime [Contreras] (Tr. 272).[17] Tate testified that Ho inspected the work when he was in town, and that his Secretary, Melba, would come out to the site when Ho was away (Tr. 274-75).[18] Late in February, Ho became dissatisfied with the progress of the work and entered into an agreement with Tate, under which Tate would receive $100.00 a day to stay on the site at night and supervise the progress of the removal of the fireproofing (Tr. 276-78; Exh. C-37). Tate spoke no Spanish, however, and so provided no supervision other than to tell Ho how many men showed up for work at night and to go into the building with Melba, who was afraid to go into the dark hospital alone (Tr. 280-81, 284). In addition, Tate would go to Home Depot to buy additional tools, scrapers and dust masks (Tr. 283-84). Tate was reimbursed for the supplies by Ho Ho Ho Express, Inc. (Tr. 284). The remainder of the time Tate stated that he would sleep in his van (Tr. 285).

Saul Martinez Manzano, a 27 year old laborer from San Luis de la Paz, Guanajuato, started work at the Bellaire hospital site on December 23, 1997 (Tr. 116-17). Manzano, who speaks only Spanish, was recruited by a Manuel Escobedo, but understood that the Bellaire work was done for the benefit of Mr. Ho, and considered Ho his employer (Tr. 117-19). Manzano testified that he worked three or four days scraping asbestos fireproofing from a ladder at the Bellaire hospital site prior to the state inspector visiting the site on February 2, 1999 (Tr. 118-21; Exh. 28, #4). Manzano stated that he sometimes wore a white dust mask, but not usually; no one told him he had to wear the mask (Tr. 120; Exh. C-2).

Manzano testified that after the inspector closed the hospital site down, Manuel sent him to a different building, where he tore out carpeting for about a week (Tr. 121-22). Manzano stated that after about a week, he was sent back to the hospital to resume asbestos removal at night (Tr. 122-23). Manzano stated that he worked all night, all week (Tr. 123). The night work was supervised by Jaime Contreras, and Manuel Escobedo (Tr. 123, 125); Manzano was paid in cash from funds Contreras got from Eric Ho (Tr. 133-34). Manzano worked with other young men in their 20's, some of whom he grew up with, including Armando Manzano, Able Manzano, Miguel Trejo, Frederico and Martin Contreras, and a worker named Carlos (Tr. 129-30). In all, Manzano stated there were ten men on the

[17] Tate testified that Manuel Escobedo did not supervise the laborers after they started working nights, as he had become ill and had been in and out of the hospital (Tr. 273).

[18] Melba Gomez testified that she worked for Ho Ho Ho Express as Eric Ho=s assistant from September 1997 until May 1998 (Tr. 403, 407). Gomez would handle the inventory, and take care of Ho=s personal agenda, answering his phone, buying his fish food (Tr. 404).

crew (Tr. 129). Mr. Ho occasionally came by the site and, through an interpreter, directed the crew to be sure to thoroughly clean the asbestos fireproofing off the beams (Tr. 125-26). Manzano stated that the crew was paid $50.00 per cleaned section (Tr. 132).

As before, Manzano worked in his street clothes; he no longer bothered with a mask, because he couldn=t stand it in the heat; there was no ventilation on the site (Tr. 128, 134). After scraping the beams Manzano stated that the powder was swept up and placed in bags (Tr. 124). The crew was directed not to place the bags in the dumpsters because of Athe hazard,@ though Manzano was not told what the hazard was (Tr. 124, 139). Manzano testified that he did not know that the powder contained asbestos, or that breathing the powder was hazardous (Tr. 131). There were no warning signs in the building; no medical exams were provided for the workers (Tr. 134). Manzano testified that the workers ate and drank on the site (Tr. 134). There was no running, or potable water provided by Ho, though some of the workers lived on site; Manzano stayed on site for about a week (Tr. 137). If the workers wanted something to drink, they gave money to Corston Tate, who would leave the site to buy water and/or soft drinks (Tr. 134). There was one portable bathroom on the site; Manzano testified that the toilet was full, and was not cleaned during the period he worked on the site (Tr. 133-37). The site was fenced and the gate locked with the workers inside; Jaime Contreras had a key (Tr. 138).

Miguel Trejo and Benjamin Mendez Contreras, called Minico, both testified, through an interpreter, that they are each 24 years old and come from San Luis de la Paz, Guanajuato (Tr. 167, 196). Minico and Trejo confirmed Manzano=s testimony, stating that they worked under the direction of Jaime Contreras or Corston Tate for a Chinese man (Tr. 171-72, 206). Both Trejo and Minico identified Eric Ho, who was in the courtroom, as their employer (Tr. 171, 176, 203). Minico stated that Ho would check the work from time to time to ensure that the job was being completed satisfactorily (Tr. 173-74, 176). Trejo and Minico testified that they worked at the hospital from about 6:00 p.m. to 6:00 a.m., scraping dry Asheetrock@ from pipes and collecting the powder it created into garbage bags (Tr. 168-70, 180, 197-201; Exh. C-28, #4). Trejo and Minico testified that he and the other workers, who were identified only as Saul, Miguel, Able, Martin, Jaime, Martin, Carlos, Hugo and Armando, filled about a hundred bags at the site (Tr. 170, 178, 201).

The work was not performed in a contained area (Tr. 179-80). No special clothing was provided, and no shower facilities were available (Tr. 178). Both Trejo and Minico stated that at the end of a working day his face and street clothes were completely white, Minico testified that he had trouble breathing through the powder that fell on his cheeks and upper lip (Tr. 174-75, 200). Minico

testified that he was never asked to wear any type of monitoring device (Tr. 179). Minico stated that the dust masks available didn=t do any good and that he and the other workers took them off (Tr. 175; Exh. C-2). No one ever told Minico that he was scraping asbestos, or that it was dangerous (Tr. 176).

Minico testified that the work site was locked; only Tate or Jaime had a key (Tr. 183). Minico further stated that there was nothing to drink on the site unless the workers brought it, or gave Tate money to buy it for them (Tr. 183, 185, 192). Minico testified that the single bathroom facility was unusable because it was so dirty, and that the workers relieved themselves in the surrounding fields (Tr. 183).

Corston Tate confirmed the dangerous and unsanitary conditions described by the Mexican laborers, stating that the men worked twelve hour shifts, seven days a week, with no running water (Tr. 286, 288). Tate would take the laborers money and buy them water and/or soft drinks if they asked him (Tr. 321); if the men did not want to relieve themselves outdoors, they had the option of using the bathroom of a filling station or Jack-in-the-Box off the seven to eight acre site (Tr. 321-22, 331). Fireproofing was collected in unlabeled bags (Tr. 282). No means were used to collect the dust created by scraping; the workers left covered with the dust (Tr. 282, 287). Dust masks were not used because the workers could not breathe in them (Tr. 289). Tate testified that he and Escobedo had discussed masks, but because they had no training in asbestos, they did not know what kind the men needed (Tr. 291-92, 299).

Tate testified that on March 11, 1998, Ho told him that there was a water line somewhere on the site that was still turned on (Tr. 293). Ho wanted to use the water to wash the building down inside, and directed Tate to open up the first of two lines he had located and see whether it was a water line (Tr. 294). Tate testified that he did not immediately comply, but that later Ho paged him, and Ajumped on my case and told me, you know, to get on it@ (Tr. 294). Tate testified that he tried to crack the bolts on the pipe slightly, but that the line was pressurized and the pipe popped open (Tr. 295). The line was in fact a natural gas line (Tr. 552). When the pipe opened, pressurized natural gas began escaping (Tr. 295).

Tate stated that he panicked at that point and with Jaime Contreras and Martin Bernal tried to plug the pipe (Tr. 295). Tate testified that his van was in the way, and that when he turned the ignition the gas from the pipe exploded (Tr. 296). Tate stated that all three men were burned, Contreras had been hit and had blood running down his face (297). Tate testified that his hands, face, and ears were

burned, all the hair was burned off of his head; he spent three days in intensive care, two or three more days in the hospital, and was still under a doctor-s care at the time of the hearing (Tr. 298).

The testimony of Martin Bernal, who was burned in the March 11, 1998 explosion corroborates, in material detail that of the other witnesses (Tr. 357-63). Bernal spent from three to five days in the hospital (Tr. 364).

Able Manzano Diaz testified that he worked in the hospital building, and slept on site beginning on December 23, 1998 (Tr. 333, 341-42). Diaz worked days, and then switched to nights after the city inspector closed down the work site (Tr. 342-43). Diaz- testimony of the working conditions corroborates that of his fellow workers (Tr. 344-347, 350). In addition, Diaz testified that on the day following the explosion, he and his fellow laborers were called into Ho-s office, and were given a paper to sign (Tr. 348-49). Diaz testified that the paper was in English, but that there was a translator present who read the document to the men present (Tr. 349, 354-55). Diaz signed the paper, which identifies the signatory as an independent contractor, and in return for a one time payment of $1,000.00 purports to release Eric Ho from all future claims or causes of actions attributable to the March 11, 1998 explosion and fire (Tr. 353-55; Exh. C-39).

Nine employees, Saul Martinez, Carlos Manuel Ortiz, Armando Manzano Gonzales, Hugo Ledesma, Miguel Trejo, Martin C. M., Abel Manzano Diaz, Benjamin Mendez, and Jaime Contreras Mendez signed releases in both Spanish and English (*See*, Tr. 182, 353-55; Exh. C-39).

Don Weist testified that he received a response to his February 13 asbestos removal bid in March, at which time Ho got in touch with him, indicating that he wanted to proceed with the project, with some modifications (Tr. 89). Ho signed the modified proposal, and faxed the acceptance to Alamo on March 27, 1998 (Tr. 91-92; Exh. C-25). Weist testified that approximately four to five days later he received a call from Catherine McLain from Professional Service Industries, an environmental consultant firm (Tr. 93, 500). McLain asked Weist to meet her and the Texas Department of Health on the site on April 3, 1998 to investigate a possible disturbance of the asbestos on the site (Tr. 93-94). Weist testified that when they arrived on the site they found that the bulk of the asbestos containing materials had been removed from inside the building, including fireproofing from beams (Tr. 94, 96; Exh. C-29, #2). Dust from the fireproofing lay on the floor and was anywhere from a sixteenth to a quarter of an inch thick (Tr. 95; Exh. C-29, #1). Unlabeled black garbage bags contained dry asbestos fireproofing and sheetrock (Tr. 98-99; Exh. C-29, #6).

Catherine McLain testified that she took tape samples of powder on window sills, counter tops, etc, and bulk samples from Asuspect materials@ inside the building on April 10, 1998 (Tr. 508; Exh. C-35, p. 4). The majority of the samples contained chrysotile asbestos in amounts greater than 1%, the upper limit prescribed by the Environmental Protection Agency (EPA) and the Texas Department of Health, for unprotected demolition work (Tr. 509-10; Exh. C-35, p. 9). Random air sampling results were: #1--1,275 S/mm^2 [structures per millimeter squared]; #2--unanalyzable because particulate loading of the filters exceeded 25% of the total; #3--3,400 S/mm^2 (Tr. 515-16; Exh. C-35). Air samples exceed the EPA=s Asbestos Hazardous Emergency Response Act=s clearance criteria of 70.0 S/mm^2 .

James T. Hendrix is a former asbestos consultant, who now works for the Texas Department of Health (Tr. 464). Hendrix testified that on March 13, 1998, he visited the Bellaire hospital site and took photographs of the site and samples of suspected friable asbestos fireproofing from inside the building, Hendrix sampled material from the numerous black garbage bags on the site (Tr. 466, 469; Exh. C-33), in addition to obtaining samples from the fire damaged area and the mechanical room close to the emergency room entrance (Tr. 474). Hendrix testified that all the samples of fireproofing contained between 7 and 10% chrysotile asbestos (Tr. 475, 497; Exh. C-34). Samples of floor tile contained 2-3% chrysotile asbestos (Exh. C-34). Vinyl flooring samples were found to contain no asbestos (Exh. C-34).[19] Upon receiving the sampling results, Hendrix called Ho Ho Ho Express and spoke with their attorney (Tr. 479). The Texas Department of Health notified Eric Ho at Ho Ho Ho Express of the sampling results, and advised him that the building was unsafe and should be sealed by licensed asbestos personnel (Tr. 479-81; Exh. C-32). Hendrix testified that on March 25 he returned to the site; at that time he observed a workman sitting in a second floor windowsill boarding windows without any PPE of any kind (Tr. 482-83).

Miguel Trejo and Saul Manzano admitted that after the explosion they returned to the site; both stated that they spent three or four days boarding up the windows of the hospital without the benefit of PPE (Tr. 154-55, 223-24).

Don Nguyen, the OSHA Compliance Officer responsible for investigation of the fire and explosion on the Bellaire site, testified that Ho had no hazard communication program for the Bellaire

[19] Of three additional samples of debris taken from the second floor of the building on May 5, 1998, one contained 20% chrysotile asbestos, one contained 2% and one contained no asbestos (Tr. 488-95; Exh. C-34).

work site (Tr. 553). Nguyen stated that Ho did not ascertain the contents of the pipe he had Tate open before having the exposed employees work on or in the area of the pipe (Tr. 552). Nguyen testified that there was no emergency communication system on the site; Corston Tate told Nguyen that he had to go to a nearby service station to use their phone (Tr. 537, 539, 544-45). Nguyen stated that there was no means of transporting injured workers from the site (Tr. 540). Nguyen admitted, however, that Tate=s van could have been used for that purpose, when the van was on site, before it was destroyed in the explosion (Tr. 542-43). Nguyen testified that Ho never reported the explosion to OSHA as required under '1904.8 (Tr. 576).

DOCKET NO. 98-1645

The Violations

Serious citation 1 of the citation docketed at OSHRC No. 98-1645, alleges that Respondents violated eight standards governing engineering and work practice controls mandated under 1926.1101 *et seq.* for the removal of ACM. Willful citation 2 of that docket number alleges 28 violations including violations of the monitoring, respiratory, and training requirements set forth at '1926.1101 *et seq.* The Awillful@ violations are cited on an employee by employee basis. Respondents received 11 citations for failure to provide respirators, naming each exposed employee separately; and 11 citations for training and notification violations.

Respondents do not contest the existence of the cited violations as established in the Secretary=s *prima facie* case; at hearing Respondents stated that the bases of their defense[20] were the jurisdictional questions addressed above, and the appropriateness of the proposed penalties (Tr. 24-27). Respondents adduced no evidence to challenge the Secretary=s case in Docket No. 98-1645 at the hearing, and Respondents do not challenge the existence of any of the violations alleged in that matter in their post-hearing brief, which addressed only the jurisdictional and penalty issues.

The violations have been established.

Willfulness

[20] At hearing Respondents= counsel stated that the violations were not at issue with Asome exceptions,@ but declined to identify which citations were contested until after seeing the Secretary=s *prima facie* case. In their brief, Respondents address the merits of Docket No. 98-1646, Willful citation 2, item 1, alleging violation of '5(a)(1). This judge concludes, therefore, that that item is the exception to which Respondent referred at hearing.

Respondents maintain that there is no evidence that any of the Respondents were aware of any OSHA asbestos standards or that they exhibited an intentional disregard for employee safety. This judge disagrees.

This judge notes that an employer has a duty to inquire into the requirements of the law. *Peterson Brothers Steel Erection Company*, 16 BNA OSHC 1196, 1991-93 CCH OSHD &30,052 (No. 90-2304, 1993), *aff-d.* 26 F.3d 573 (5th Cir. 1994). Moreover, the record adequately establishes that it is likely Eric Ho was aware of OSHA asbestos standards. During his May 22, 1998 deposition, Ho admitted he is a trained chemical engineer with a masters in chemical engineering (Exh. C-46, p. 195). Ho stated that his company, Ho Ho Ho Express, Inc., was licensed to haul hazardous waste materials, and that he personally was aware of the need to comply with government regulations (Exh. C-46, p. 20). Ho admitted that he knew that Texas regulated asbestos removal work (Exh. C-46, p. 94-95).

Finally, proof of Ho=s actual knowledge of the OSHA asbestos standards is not necessary to a finding of willfulness where there is evidence of such reckless disregard for employee safety or the requirements of the law that generally one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD &27,893 (No. 85-355, 1987). *See also Brock v. Morello Bros. Constr.,* 809 F.2d 161 (1st Cir. 1987). The record is replete with evidence of Ho=s indifference to the safety of his employees.

Ho knew that there was ACM in the Bellaire hospital building when he purchased it. The previous owners= site assessment indicated, *inter alia,* that the asbestos containing fireproofing was friable and could cause significant damage if disturbed. The assessment provided Ho with notice that such ACM must be removed by trained and licensed personnel, using proper procedures and respiratory protection. Ho signed a property disclosure form indicating that he had been made aware of the presence of friable asbestos in the building. Nonetheless, with full knowledge of the conditions and the need for professional removal of the ACM, Ho began asbestos removal with untrained, unprotected Mexican nationals, none of whom spoke English or understood the hazards associated with asbestos.

Ho=s disregard for the law is evidenced by his failure to obtain work permits for the site, as required by the City of Houston and his surreptitious removal of asbestos after the City attempted to close down the site. When the ongoing work was discovered by an inspector for the City of Houston the Bellaire site was red tagged for probable violations of asbestos abatement requirements. Ho was

ordered to cease its demolition operations. However, the City=s attempt to close down Ho=s worksite failed. After soliciting a bid for asbestos removal from a certified asbsestos abatement contractor, Ho chose to recommence removal operations under cover of darkness with the same untrained, unprotected laborers, rather than engage the qualified contractor at the named bid price of $172,266. Ho retained the qualified abatement contractor to complete the asbestos abatement only after the March 11, 1998 explosion brought his nighttime activity to light and the Texas Department of Health onto the site.

Not only does the evidence specifically demonstrate Ho=s disregard for his employees= exposure to asbestos, the record contains ample additional evidence of Ho=s indifference to those same workers= general health and welfare. Ho=s laborers worked 12 hour shifts 7 nights a week under substandard conditions: the workers were locked inside the Bellaire site; they worked without electricity or ventilation; adequate sanitary facilities were not available; no potable water was provided.

The record contains abundant evidence of Ho=s reckless disregard for employee safety and for the requirements of the law generally. The citations were correctly classified as Awillful.@

Citation Per Employee

As noted by the Secretary in her reply brief, the Commission has held that separate penalties may be proposed and assessed for separate violations of a single standard. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD &29,962 (No. 87-922, 1993). In *Hartford Roofing Co., Inc.*, 17 BNA OSHC 1361, 1995 CCH OSHD &30,857 (No. 92-3855, 1995), the Commission went on to state that Asome standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per instance basis.@ The Commission explained that the Secretary=s discretion is limited only by the language of the standard itself. *Id.* at 1366.

> For example, 29 C.F.R. '1910.134 sets forth the requirements for the use of respirators where effective engineering controls are not sufficient to control atmospheric contamination. As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violations (sic).. . . *Id.* at 1366.

It is clear under the test set forth by the Commission in *Hartford,* as well as in the example specifically used in their discussion in that case, that per employee citations for violation of the respirator standards

are within the Secretary=s discretion. Accordingly Respondents were correctly cited for each employee who was not provided with a respirator.

In regard to the training violations, the Commission in *Hartford* suggested that where the employer=s compliance with the Secretary=s suggested abatement for any one of the cited violations would not necessarily abate the others, citation on a per instance basis is proper. *Id.* at 1366-67. *See also, Arcadian Corporation,* 17 BNA OSHC 1345 (No. 93-3270, 1995); *affd.* 5th Cir. 4/28/97. It is clear that the adoption of a training program, in itself, would not abate the 11 cited violations of '1926.1101(k)(9)(i) and (viii)[21], unless and until all 11 employees had been through any program instituted. I find that it was within the Secretary=s discretion to cite the Respondent in this case on a per instance basis for violations of the training standards for each employee not trained.

Penalty

Gravity. In determining the gravity of a violation, the Commission has held that the judge must consider (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD &25,738 (No. 76-2644, 1981).

Eleven employees were exposed to the asbestos violations for between four and six weeks. No precautions were taken against injury.

Dr. George Delclos, a specialist in internal medicine, pulmonary medicine and occupational medicine (Tr. 644-46; Exh. C-44), testified that the employees engaged in the removal of asbestos containing material (ACM) at the Bellaire site were subjected to intense asbestos exposures due to: 1) the employer=s use of dry methods for removal of the sprayed ACM; 2) the laborers= increased breathing patterns, resulting from the sustained physical demands of their work; 3) the failure to promptly dispose of ACM after removal; 4) poor housekeeping practices; 5) the absence of appropriate

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[21] '1926.1101(k)(9)(i) 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.*

'1926.1101(k)(9)(viii) The training program shall be conducted in a manner that the employee is able to understand. In addition to the content required by provisions in paragraphs (k)(9)(iii) through (vi) of this section, *the employer shall ensure that each such employee is informed of the following:. . .*

ventilation and air filtration, showering and washing facilities, and appropriate respiratory protection (Tr. 661-62, 674-76, 696-99; Exh. C-44, p. 3-4). Based on their high levels of daily exposure to asbestos, Delclos concluded that the laborers had a greatly increased risk of developing pleural thickening, pleural effusions and/or mesothelioma (Tr. 663, 668-71; Exh. C-44, p. 4).

Thickening of the lining of the lung, pleural thickening, can limit the lungs ability to expand, resulting in shortness of breath (Tr. 668). Pleural effusions, accumulations of fluid around the lung, can result in chest pain and shortness of breath, and though they resolve spontaneously may result in scarring (Tr. 668). Mesothelioma is a rare, but invariablly fatal cancer of the lung pleura (Tr. 669, 674; Exh. C-44, p. 1). Delclos testified that because there is a 30-40 year latency period between asbestos exposure and the exposed worker developing mesothelioma, the majority of the exposed workers, who were in their mid-20's, were exponentially more likely to develop the fatal cancer in their mid fifties or thereafter, than the non-exposed population (Tr. 673-74).

Delclos admitted that it was true that the majority of asbestos-exposed workers do not subsequently develop disease, and that he could not, therefore, testify that the workers exposed in this case would, more probably than not, develop an asbestos related disease (Tr. 672, 706). Delclos maintained, however, that compared to the non-exposed population, the exposed workers= increased chance of contracting an asbestos related disease was statistically significant (Tr. 672, 703-06). Delclos testified that of the approximately 1,500 cases of mesothelioma reported every year, 80-100% are found in people with an occupational exposure to asbestos (Tr. 702).

Conclusion. The Secretary proposed a penalty of $4,900.00 for each of the Aserious@ violations and $49,000.00 for each of the Awillful@ violations. The Secretary took into account Respondents= size, aggregating the employees of Ho at the Bellaire site and the employees of Ho Ho Ho Express. Respondent is a small employer, with less than 100 total employees (Tr. 558). None of the Respondents had a history of prior serious OSHA violations, and CO Nguyen recommended a full 10% reduction for history (Tr. 558). Eric Ho, as an individual, claims that the proposed penalty is burdensome, but this issue is not raised by the corporate Respondents.

Clearly Eric Ho, a man of education and experience in toxic waste, made the calculated decision to expose these employees to a known carcinogen, without protection, a carcinogen that can produce a lethal, non-treatable, non-operable cancer. Ho exposed these employees to save himself $172,266, the cost to retain professionals to safely remove the asbestos. The final consequences of that decision will not be known until the latency period runs its course. However, the gravity of the

violations, and the concommitant penalties must be established on the basis of the best information available today.

The gravity based penalties, prior to adjustment for size, good faith (or lack thereof) and history, were set at the statutory maximum, $7,000.00 for the serious violations, and $70,000.00 for the willful violations. The penalties were then adjusted for size, good faith and history. The resulting penalties were $4,900.00 and $49,000.00 respectively.

The statutory maximum penalty must be reserved for only the most egregious of circumstances, circumstances that resulted in a death or permanently disabling injury. The gravity of these violations is difficult to establish, but was best described by the Secretary=s expert witness, Dr. Delclos. It is clear that the risk of harm to these workers is grave; the disease they were at the greatest risk of developing, mesothelioma, is an invariably fatal cancer. The seriousness of the possible consequences must be weighed, however, against the probability of harm. Delclos described the results of the exposure as significantly increasing the risk of contracting mesothelioma, but stated, nonetheless, that it was unlikely that the exposed employees would contract mesothelioma.

Based on Dr. Delclos= testimony, I find that the Secretary overstated the gravity of the asbestos violations. I otherwise find the Secretary=s adjustments for size, good faith and history to be appropriate. Reducing the gravity based penalty for the asbestos violations, and applying the Secretary=s other adjustments, I find that $3,900.00 for the serious violations and $39,000.00 for the willful violations constitue an appropriate penalty.

DOCKET NO. 98-1646

Docket No. 98-1646 alleges four Aserious@ items relating to the: 1) lack of proper equipment to transport injured employees; 2) failure to provide potable water; 3) absence of adequate toilet facilities; and 4) failure to inform employees of the hazards of unlabled pipes in their work areas. The citation alleges one Awillful@ violation based on the explosion and fire which resulted from breaking into the unidentified gas line. Finally, the Secretary cites, as Aother than serious@ Respondents= failure to report the accident on the Bellaire work site to OSHA.

The Violations

Ho contests only the merits of Awillful@ citation 2, item 1, which alleges a violation of '5(a)(1) of the Act, *i.e.* for failure to furnish its employees a place of employment which was free from recognized hazards which were likely to cause death or serious physical harm:

> Hazards of opening a pipe containing an unknown substance. On or about March 11, 1998, at the jobsite at 11101 and 11105 Bellaire Boulevard where an employee was required to open a

pipe of unknown content. A fire and explosion occurred when the pipe that an employee was instructed to open released natural gas.

Ho maintains only that there is no evidence in the record showing that Respondent was aware of any recognized hazard.

The Secretary, however, need not establish that the employer had actual knowledge that a condition was hazardous. The Secretary=s burden is met if she shows that a practice, procedure or condition under the employer=s control is known to be hazardous constructively, i.e. by the industry in general. *Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD &27,605 (No. 82-388, 1986). The evidence must show only that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions= existence. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD &29,617 (Nos. 86-360, 86-469, 1992).

Respondent admitted at the hearing that tapping into an unmarked line on a demolition site is a recognized hazard (Tr. 567). It is undisputed that the employees suffered serious physical harm as a result of the hazard, and that a feasible means existed to eliminate or materially reduce the hazard, *i.e.* ascertaining the contents of the line. The evidence shows that Ho knew of the physical condition cited. The Secretary has, therefore, made out a violation of '5(a)(1). *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD &29,617 (Nos. 86-360, 86-469, 1992).

Willfulness

Don Nguyen testified, without contradiction, that Ho instructed Corston Tate to open the unmarked line (Tr. 570). Nguyen stated that Tate had no experience in procedures for ascertaining the contents of an unmarked line (Tr. 570). Though Tate was reluctant to open the line, Ho insisted (Tr. 571).

In a recent case, *Propellex Corporation (Propellex)*, No. 96-0265, slip op. at 14 (March 30, 1999), the Commission found that neither negligence nor the exercise of poor judgment demonstrates the heightened awareness of illegality required to establish willfulness. *Id.* at pp. 14-15.

While Eric Ho=s directions to Tate to open the unknown pipe demonstrated poor judgment and/or negligence, the Secretary has not proved by a preponderance of the evidence that Ho possessed a heightened awareness of the illegality of his conduct, or that he consciously disregarded a known safety hazard. *Id.* The Secretary has not shown that Ho=s conduct here was Awillful,@ as contemplated by the Act. Accordingly this item is not a willful violation.

Penalty

As above, for the Aserious@ and Awillful@ citaitons, the Secretary proposed the statutory maximum gravity based penalties, *i.e.* $7,000.00 for the Aserious@ items and $70,000.00 for the Awillful.@ After reductions for Respondent=s size and history, penalties of $4,900.00 were proposed for each of the four Aserious@ violations at citation 1. A penalty of $49,000.00 was proposed for citation 2.

CO Don Nguyen testified that the failure to provide potable water on the Bellaire work site could lead to dehydration, hospitalization and/or death (Tr. 548-49). Nguyen testified that Ho=s failure to provide a sanitary portable toilet could result in the employee=s contacting human waste, and contracting diseases, specifically Hepatitis A, which may require hospitalization and can lead to serious liver problems (Tr. 551). Three employees were burned in the explosion and fire resulting from tapping into an unmarked line (Tr. 574).[22] Nguyen testified that Respondents= employees were exposed to a number of dangerous conditions that could result in serious injuries, and that the absence of a communication system, and readily available transportation could hinder any attempt to get medical attention for laborers (Tr. 557).

The Secretary has established that the violations cited at citation 1 were Aserious,@ as defined by the Act. Nonetheles the Secretary did not show that the gravity of these violations was as great as the employee exposure to a known carcinogen cited at Docket No. 98-1645, for which identical penalties were proposed. The gravity of the cited violations is overstated, therefore, though the other adjustment factors are appropriate.

I find an appropriate penalty for items 1 through 3 to be $1,900.00. A penalty of $2,900.00 is appropriate for item 4, which relates indirectly to the fire and explosion. Citation 2, item 1, though not found to be Awillful@ is affirmed as a Aserious@ violation. The serious injuries caused by the cited violation resulted in the hospitalization of three employees, as described above. A penalty of $4,400.00 is deemed appropriate, and will be assessed for this item.

A $700.00 penalty was proposed for Aother than serious@ citation 3. The penalty was not contested, and is deemed appropriate.

ORDER

[22] Where the Secretary alleges that a violation is willful but fails to prove willfulness, a serious violation may be found where the parties have expressly or impliedly consented to try the issue of whether the violation was serious. *Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD &29,439 (No. 87-619, 1991). Respondent=s neither objected to, nor rebutted the Secretary=s evidence showing the serious injuries resulting from this violation.

Docket No. 98-1645

1. Serious citation 1, item 1, alleging violation of '1926.1101(e)(1) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

2. Serious citation 1, items 2a through 2f, alleging violations of '1926.1101(g)(1), (3)(iii), (4)(ii), (4)(iv), (4)(vi), and (5) are AFFIRMED, and a combined penalty of $3,900.00 is ASSESSED.

3. Serious citation 1, item 3, alleging violation of '1926.1101(h)(3)(i) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

4. Serious citation 1, item 4, alleging violation of '1926.1101(i)(1) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

5. Serious citation 1, item 5, alleging violation of '1926.1101(j)(1)(i) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

6. Serious citation 1, item 6, alleging violation of '1926.1101(k)(3)(i) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

7. Serious citation 1, item 7, alleging violation of '1926.1101(k)(7)(i) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

8. Serious citation 1, item 8, alleging violation of '1926.1101(m)(1)(i)(A) is AFFIRMED, and a penalty of $3,900.00 is ASSESSED.

9. Willful citation 2, item 1, alleging violation of '1926.1101(f)(1)(i) is AFFIRMED, and a penalty of $39,000.00 is ASSESSED.

10. Willful citation 2, item 2, alleging violation of '1926.1101(f)(1)(ii) is AFFIRMED, and a penalty of $39,000.00 is ASSESSED.

11. Willful citation 2, item 3, alleging violation of '1926.1101(f)(2)(i) is AFFIRMED, and a penalty of $39,000.00 is ASSESSED.

12. Willful citation 2, item 4, alleging violation of '1926.1101(g)(4)(i) is AFFIRMED, and a penalty of $39,000.00 is ASSESSED.

13. Willful citation 2, items 5 through 15, alleging 11 violations of '1926.1101(h)(1)(i) are AFFIRMED, and a penalty of $39,000.00 for each of the violations is ASSESSED.

14. Willful citation 2, item 16, alleging violation of '1926.1101(k)(3)(ii)(B) is AFFIRMED, and a penalty of $39,000.00 is ASSESSED.

15. Willful citation 2, items 17a through 27(b), alleging 11 violations of '1926.1101(k)(9)(i) and (k)(9)(viii) are AFFIRMED, and 11 combined penalties of $39,000.00 each are ASSESSED.

16. Willful citation 2, items 28(a) and 28(b), alleging violations of '1926.1101(k)(8)(i) and (l)(2) are AFFIRMED, a combined penalty of $39,000.00 is ASSESSED.

Docket No. 98-1646

17. Serious citation 1, item 1, alleging violation of '1926.50(e) is AFFIRMED, and a penalty of $1,900.00 is ASSESSED.

18. Serious citation 1, item 2, alleging violation of '1926.51(a)(1) is AFFIRMED, and a penalty of $1,900.00 is ASSESSED.

19. Serious citation 1, item 3, alleging violation of '1926.51(c)(1) is AFFIRMED, and a penalty of $1,900.00 is ASSESSED.

20. Serious citation 1, item 4, alleging violation of '1926.59(e)(1)(ii) is AFFIRMED, and a penalty of $2,900.00 is ASSESSED.

21. Willful citation 2, item 1, alleging violation of '5(a)(1) of the Act, is AFFIRMED as a Aserious@ violation, and a penalty of $4,400.00 is ASSESSED.

22. Other than serious citation 3, item 1, alleging violation of '1904.8 is AFFIRMED, and a penalty of $700.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: September 2, 1999