UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. 3 DIMENSION CONSTRUCTION MANAGEMENT, INC., Respondent.	OSHRC DOCKET NO. 15-0625

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For Complainant

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For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Responding to a complaint about asbestos exposure and lack of adequate protection, the Occupational Safety and Health Administration ("OSHA") initiated an inspection of a 3-Dimension ("Respondent") worksite, located at 5860 N. Pulaski, Chicago, Illinois on September 25, 2014. (Tr. 33–34). As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent, which alleges one serious violation of the Act and proposes a penalty of $2,200.00. The Citation was issued on March 13, 2015. Respondent timely contested the Citation.

Trial in this matter commenced on Monday, November 16, 2015, in Chicago, Illinois, and lasted for two days. Four witnesses testified: (1) Compliance Safety and Health Officer (CSHO)

Bogdan Catalin; (2) John Mengel, principal of JSM Venture, which manages the building at issue; (3) Brian Harrington, owner of Respondent; and (4) Matthew Clark, Respondent's project manager. The parties filed post-trial briefs.[1]

II. Stipulations

The parties entered into stipulations prior to the beginning of trial. Those stipulations were introduced into the record as Joint Exhibit No. 1 (hereinafter "Ex. J-1"). In lieu of reproducing them in their entirety, the Court shall make references to the stipulations in the format indicated in the previous sentence.

III. Jurisdiction

Pursuant to the Joint Stipulations, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). (Ex. J-1 at ¶ 1). The Joint Stipulations also state Respondent is engaged in a business affecting interstate commerce and is an employer within the meaning of the Act. (Ex. J-1 at ¶¶ 5–6). *See also* 29 U.S.C. § 652(c).

IV. Factual Background

a. Respondent's Business

According to Brian Harrington, who started the business in 2001, Respondent specializes in converting properties into self-storage facilities. (Tr. 214–15).

Harrington testified that his company is familiar with the entire conversion process, including planning, construction, and implementing environmental controls. (Tr. 216). Approximately 85% of Respondent's business is what Harrington termed "bid to build", which means that the plans, drawings, and environmental aspects have been addressed by the owner.

1. The parties were given until April 30, 2016 to file their respective briefs. Complainant's brief was filed timely. Notwithstanding having five months to compose a brief, Respondent's counsel, after being contacted by the Court's legal assistant, requested a one day extension to complete the post-trial brief, twice. In response, the Court received a brief roughly five pages in length, excluding stipulations, the table of authority, and table of contents. Only three of those pages constitute argument.

All that is left for Respondent is the actual construction/conversion. The remaining 15% of projects constituting Respondent's business are what Harrington referred to as "design build", which includes hiring an architect, designing the facility, performing environmental analyses, and building the self-storage facility. (Tr. 216).

As part of the conversion process, Respondent issues a request for bids. Subcontractors can base their bid on the plans and basic requirements provided by Respondent through an FTP site. (Tr. 217). After receiving bids, Respondent goes through a process of review and ultimately selects the low bidder that is capable of meeting the requirements of the job. (Tr. 218–19). Once an agreement is reached between Respondent and the subcontractor, they have a pre-construction meeting at the worksite. (Tr. 221). This meeting is designed to introduce the supervisors for both Respondent and the subcontractor, allow for a walkthrough of the worksite, and review the worksite expectations. (Tr. 221).

In this case, Respondent hired KIPI to perform demolition services. Respondent was familiar with KIPI based on its work on another self-storage project run by Respondent. (Tr. 230). According to Harrington, a representative of KIPI named "Max" walked through the worksite with Matt Clark, Respondent's project manager. (Tr. 229–30). During that walkthrough, KIPI was informed that it was responsible for removing walls and ceilings, but the utilities should be left alone. (Tr. 229). Harrington also testified that KIPI was "fully understanding" that asbestos abatement was going to occur at some point in the renovation process. (Tr. 229–30). At the time KIPI was hired, however, Respondent did not verify that KIPI was properly qualified to handle demolition in an asbestos environment; instead, Respondent assumed that KIPI was certified to perform such work based on the fact that a demolition

contractor is "typically" fully certified and on KIPI's representation that its employees had taken the OSHA 10-hour course.[2] (Tr. 249).

b. The Worksite

The worksite, as noted above, was located at 5860 North Pulaski Road, Chicago, Illinois. The single-story structure was previously a multi-purpose space that was occupied by a couple of different businesses. (Tr. 116, 224–25). The building itself was comprised of three separate, yet interconnected, large rooms and an office space at the front of the building. (Tr. 42). At the time of the inspection, the building was owned by 5860 Storage Properties, LLC, but managed by JSM Venture, LLC, which is owned by John Mengel. (Tr. 114–15).

c. Sequence of Events

The events that led to the inspection started with John Mengel's purchase of the building in June 2014. (Tr. 116). Mengel intended to convert the building from a multi-tenant space to a self-storage facility. The conversion process began in approximately September 2014, when the remaining tenants vacated the building. (Tr. 116–17). Initially, Mengel hired T2 (also a general contractor) to aid him with the plans and drafting the building permit; however, beyond the initial paperwork, T2 had no further connection to the project. (Tr. 118–19). Shortly thereafter, Mengel hired Respondent as general contractor for the construction project. (Tr. 121).

Although Respondent was hired as the general contractor, Mengel told Harrington that he would be entering into a separate contract for environmental remediation services. (Tr. 124, 225). On September 9, 2014, Mengel had Ed Boomsma of Environmental Emergency Management Systems, Inc., perform a walkthrough of the property, identify asbestos-containing material (ACM) or presumed asbestos-containing material (PACM), and provide a quote for remediation. (Tr. 127, 228, 242–43, 302–303). Clark, Respondent's project manager, walked the

2. Harrington testified under cross-examination that, after this incident, he now requests significantly more certification documentation. (Tr. 249).

worksite with Boomsma and Mengel, during which time Boomsma identified ACM/PACM throughout the building. (Tr. 297–98). Ultimately, however, Mengel opted for the abatement services of Celtic Environmental ("Celtic"), whose quote was half of what Boomsma proposed. (Tr. 135, 298). That quote was premised on the demolition contractor, KIPI, exposing the ACM/PACM prior to abatement taking place. (Tr. 126, 298). Respondent had a representative present during Celtic's walkthrough of the property as well. (Tr. 228).

KIPI began demolition on September 10, 2014, before Mengel had hired Celtic. (Tr. 84; Ex. C-8H). Even though asbestos was previously identified during the walkthroughs with Boomsma and Dave Smrz of Celtic, no exposure assessment was performed and no precautionary measures were implemented prior to demolition beginning. (Tr. 301). Instead, KIPI was instructed by Clark to remove walls and ceiling grids prior to any abatement taking place. (Tr. 229). Further, Harrington testified that KIPI was specifically told that their job was to expose the asbestos-laden pipes in order to allow Celtic to perform remediation services. (Tr. 229, 266). Thus, even though Respondent disclaims specific knowledge[3] regarding the presence of asbestos, it is clear that, based on the walkthroughs, Respondent was generally aware that KIPI would be working in close proximity to asbestos.

Celtic performed an environmental survey on September 15, 2014. (Tr. 137, 159; Ex. C-9d). Celtic's proposal, which was sent to Mengel the same day, identifies asbestos at the worksite as follows:

> The 9X9 asbestos tile and mastic is found in the Pump room area of the property and the North East corner offices of the building as shown.
>
> The asbestos pipe insulation is found *throughout the property* in the warehouse area. [sic] Mezzanine and above the drop ceiling in the finished store front area. An excess of over 2,500 Linear Feet of pipe insulation is estimated to be in the property.

3. Respondent requested from Mengel the Phase I Environmental survey of the property, but did not receive it until long after the demolition job had been completed. (Tr. 227, 267; Ex. C-4). The Phase I survey was performed in September 2013. (Ex. C-4).

(Ex. C-9d) (emphasis added). The key proviso to the agreement was that cost was contingent upon "the entire demo [being] done prior to us starting the abatement . . . ." (*Id.*). Of course this was a near-foregone conclusion—during the interim period between Boomsma's walkthrough and Celtic's proposal, KIPI had been demolishing ceilings and walls for at least 3 days. (Exs. C-8a, C-8h, C-8i). According to the log book filled out by [redacted], Respondent's superintendent, the ceiling tile removal in the office portion of the building was 95% complete on September 12, 2014. (Tr. 86; Ex. C-8i). Celtic was not scheduled to begin abatement until October 1, 2014. (Tr. 82; Ex. C-8f). The log books indicated that KIPI continued to perform demolition for five additional days after Mengel reached an agreement with Celtic. (Ex. C-8).

d. The Inspection(s)

Upon receiving a complaint regarding potential asbestos hazards at the worksite, Complainant sent CSHO Bogdan Catalin to perform an inspection of the premises on September 25, 2014. (Tr. 33–34). As he approached the building, CSHO Catalin observed pipes that appeared to be covered with asbestos insulation. (Tr. 36; Ex. C-7a). On closer inspection, CSHO Catalin saw that the insulation covering those pipes was damaged. (Tr. 36–37). As the CSHO made his way around the building, he introduced himself to [redacted], who identified himself as Respondent's superintendent. (Tr. 39). CSHO Catalin conducted an opening conference with [redacted] and invited him to call all relevant stakeholders. (Tr. 40). CSHO Catalin informed both Respondent and KIPI that he would be opening an inspection of both companies. (Tr. 42). By the close of the opening conference, [redacted] had obtained approval from management to allow the inspection and accompanied CSHO Catalin during his inspection. (Tr. 42).

CSHO Catalin and [redacted] entered the building from the rear and worked forward towards the office portion of the building, which was fronted by Pulaski street. (Tr. 43). After entering the first room, CSHO Catalin observed ducting, ceiling or drywall framing, and piles of

debris on the floor. (Tr. 43; Ex. C-7a at 6). Similar observations were made in the second room from the back of the building. (Tr. 44–45; Ex. C-7a at 9). In the last, big room prior to the front office area, CSHO Catalin saw two scissor lifts, two bucket attachments for a Bobcat, a cordoned-off area that had structural concerns, as well as construction debris. (Tr. 48–49; Ex. C-7a at 10–13). According to KIPI employees, the Bobcats were used to remove the ceiling structure, which CSHO Catalin later confirmed through observation and review of Respondent's log books. (Tr. 48–49, 54–55; Ex. C-8h). Finally, CSHO Catalin approached the last room in the building, also known as the office area. (Tr. 50). The office, which CSHO Catalin had observed from the front of the building, had a pipe elbow with damaged asbestos insulation. (Tr. 50; Ex. C-7 at 15). CSHO Catalin determined that, in the process of removing the surrounding structures, the pipe was impacted and asbestos broke off. The insulation had ragged edges, which indicated that it was not properly removed or stripped. (Tr. 50). The office also had two additional asbestos-lined pipes that had been exposed by removing the ceiling framework.[4] (Tr. 52). CSHO Catalin also found a respirator in the office area, indicating that someone needed to protect themselves against airborne particulate matter. (Tr. 57).

After taking a number of photographs, CSHO Catalin indicated that he would be returning for a second day of inspections. (Tr. 58). He returned to his office, briefed his supervisor, and contacted the City of Chicago Public Health Department due to the potential for asbestos debris and exposure. (Tr. 59–60). From there, CSHO Catalin; John Mengel; Barbara Kay, an inspector with the City of Chicago; Matt Clark and [redacted], representing Respondent; Joe Smrz, owner of Celtic; and Nathan Kestelyn, owner of KIPI, agreed to meet back at the worksite on September 30, 2014. (Tr. 59).

4. CSHO Catalin confirmed that the pipe insulation was asbestos by reviewing the Phase I Environmental survey that was performed the year prior. (Tr. 56; Ex. C-4).

The second inspection was carried out in much the same fashion as the first—the group walked the worksite, starting with the back room and proceeding to the office at the front of the building. (Tr. 62; Ex. C-7b). In the last room prior to the office area, CSHO Catalin photographed an exposed asbestos-insulated pipe that was damaged. (Tr. 63–64; Ex. C-7b at 1). The damage was located at a point in the ceiling where a wall had been removed, as indicated by the overspray of white paint on the exposed ceiling. (Tr. 63; Ex. C-7b at 1–4). CSHO Catalin also photographed other evidence of damaged asbestos insulation. (Tr. 66; Ex. C-7a at 5). Even though CSHO Catalin informed Respondent of his suspicions regarding the presence of asbestos in the initial inspection, it appeared as if the debris piles that had been previously located throughout the building were removed between the first inspection and the beginning of the second inspection, but there was no indication that additional precautions were taken. (Tr. 64). Clark testified that KIPI was responsible for removing debris. (Tr. 311). In response to the conditions at the worksite, Ms. Kay ordered a total cleanup of the worksite, and CSHO Catalin requested air clearance results. (Tr. 71). Celtic began developing an abatement plan that day. (Tr. 70).

At some point after the second inspection on September 30, 2014, CSHO Catalin interviewed [redacted]. (Tr. 72). At the conclusion of the interview, [redacted] sent CSHO Catalin three photographs illustrating the conditions of the worksite as they existed on September 12, 2014, or roughly two weeks prior to the first inspection.[5] (Tr. 72). The photographs illustrate conditions similar to those observed by CSHO Catalin on September 25, 2014, including debris piles and the same damaged pipe insulation that he observed from outside the building during his inspection. (*Compare* Ex. C-7a to Ex. C-7c).

5. CSHO Catalin testified that the date stamp on the photographs from [redacted] indicated the date of September 12, 2014. Respondent did not put forth countervailing evidence to suggest otherwise.

In addition to reviewing photographs, CSHO Catalin requested and reviewed the daily work logs kept by Respondent. (Ex. C-8). These work logs describe in detail such things as the nature of the workday's operations, equipment used, and problems encountered. One notation in particular caught CSHO Catalin's eye: on September 17, 2014, the log indicates that a pipe was hit by KIPI during demolition of the ceiling in the "West Warehouse". (Tr. 79; Ex. C-8c).[6] According to Harrington and Clark, Respondent cordoned off the area to prevent access and believed that the CMU 3R rated fire wall provided sufficient encapsulation of the asbestos and that tape and spray-painted lines on the floor were sufficient to prevent entry or exposure. (Tr. 253–55, 273–74, 316–17). Interestingly, Harrington did not issue a formal directive to stay away from the pipes until September 22, 2014, or roughly 5 days after a KIPI employee hit the pipe. (Tr. 275–76; Ex. C-9b).

CSHO Catalin also took bulk samples from various debris piles and floor tile, and found that, of his samples, only the floor tile indicated asbestos content. (Ex. C-10). CSHO Catalin did not take samples from the pipes because he did not have appropriate equipment to do so. (Tr. 168). However, even though the specific samples taken by CSHO Catalin did not come back positive, there is no dispute that the pipes identified in the photos contained asbestos. Lending credence to CSHO Catalin's conclusion that his sampling results did not accurately represent the asbestos hazard at the worksite is a Clearance Air Sampling survey performed by Northern Environmental Development, Inc. ("NED") (Tr. 98–99; Ex. C-5). CSHO Catalin testified that he received a copy of the survey from Smrz after Celtic completed the abatement in early October, 2014.[7] (Tr. 95). The NED report indicated that it applied "aggressive air sampling methods in

6. The Court finds that this is damaged pipe is different than the one illustrated in the photos send by [redacted], which were taken on September 12, 2014 and, according to CSHO Catalin's testimony, were in a different room. (Tr. 79).

7. It is not immediately clear whether the air sampling occurred prior to or after Celtic's remediation efforts. CSHO Catalin testified that he received the clearance survey results after Smrz had told him that Celtic completed remediation, not that they were the post-remediation survey results. (Tr. 95). Given that NED observed damaged,

accordance with AHERA", including the use of a leaf blower prior to sampling and the placement of 20-inch box fans that were left running during the sampling period. (Ex. C-5). The results of the survey indicated that the average of the five air samples was more than double the AHERA[8] clearance standard. (Ex. C-5). In addition to asbestos-positive air sampling results, NED observed damaged and friable asbestos pipe insulation still attached to the pipes as well as in piles on the ground. (Ex. C-5). For CSHO Catalin, this survey confirmed what his samples were unable to prove—the entire worksite, including various debris piles, contained asbestos. (Tr. 98).

V. Discussion

The facts of this case are, for the most part, undisputed. The real issue in this case is the application of the cited standard to the facts. The standard describes the general scope of the general contractor's obligations and its obligations vis-à-vis the "asbestos contractor". *See* 29 C.F.R. § 1926.1101(d)(5). Respondent is the general contractor under this set of facts; however, the term "asbestos contractor" is left undefined and thus it is not immediately apparent how that term applies. *See id.* § 1926.1101(b).

Since the term "asbestos contractor" is not defined in the regulation, Complainant argues that the regulation is ambiguous and therefore proposes an interpretation that broadens the concept of an asbestos contractor into virtually any contractor at a worksite that contains asbestos. *See Compl't Br.* at 24–26. As such, under Complainant's interpretation, KIPI would be included within the scope of the term "asbestos contractor".

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friable asbestos both on the pipes and on the ground, the Court infers that the clearance survey was performed pre-remediation, because the results of the survey indicate that remediation had not yet commenced. *See Okland Construction Co.,* 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence). Irrespective of when the survey was performed, however, the conclusion is the same—the worksite was contaminated with asbestos. The only difference is whether KIPI employees were potentially exposed to more than double the AHERA clearance standard during its demolition efforts, or whether the asbestos level was conceivably higher (if we assume that the survey took place *after* Celtic performed remediation).

8. "AHERA" stands for Asbestos Hazard Emergency Response Act. *See generally* 15 U.S.C. § 2641.

Respondent contends that Celtic, not KIPI, was the asbestos contractor and that Mengel's separate contract with Celtic absolved Respondent of its responsibilities under 1926.1101(d)(5).[9] *Resp't Br.* at 9. Respondent premises its interpretation of the standard on the definition found in AHERA. *See* 15 U.S.C. § 2642(1).

Based on what follows, the Court finds that, although Complainant's suggested interpretation of the standard is unduly broad, he nonetheless established that KIPI was performing the duties of an asbestos contractor, that Respondent violated the standard, and that the violation was serious.

a. Legal Standard

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

b. Citation 1, Item 1

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1926.1101(d)(5): As supervisor of the entire project, the general contractor did not ascertain whether the asbestos contractor was in compliance with the asbestos standard, and did not require such contractor to come into compliance with this standard:

9. Respondent proffers one additional, quasi-constitutional argument that, even under the most deferential treatment, is difficult to understand and just plain wrong. As far as the Court can tell, Respondent seems to suggest that cited standard contravenes "construction common law" without making it entirely clear what aspect of the common law is being contravened or how the cited standard conflicts with it. *Resp't Br.* at 8. To the extent that Respondent is suggesting that it is inappropriate to hold a general contractor responsible for ensuring the safe operations of its subcontractors, the Court would note the overwhelming Commission and circuit court precedent to the contrary. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000). To the extent that Respondent's argument implies that the standard contains an exception merely because it states that "the general contractor is not qualified to serve as the asbestos 'competent person'", such an argument is belied by the second sentence of the standard, which clearly expresses the general contractor's obligations with respect to the asbestos contractor. This argument is a reflection of the amount of time the Court perceives Respondent spent drafting its brief. *See* fn.1, *supra*.

> a. The employer, acting as a General Contractor, requested, directed and approved of sub-contractor employee(s) to conduct interior demolition. While demolishing ceiling structures and dividing drywall partitions, subcontractor employee(s) damaged pipe(s) covered with ACM/PACM thermal system insulation. The General Contractor did not require the sub-contractors performing demolition work to come into compliance with 1926.1101 asbestos standard.

(Ex. C-1).

The cited standard provides:

> All general contractors on a construction project which includes work covered by this standard shall be deemed to exercise general supervisory authority over the work covered by this standard, even though the general contractor is not qualified to serve as the asbestos "competent person" as defined by paragraph (b) of this section. As supervisor of the entire project, the general contractor shall ascertain whether the asbestos contractor is in compliance with this standard, and shall require such contractor to come into compliance with this standard when necessary.

29 C.F.R. § 1926.1101(d)(5).

i. The Standard Applies

With respect to the cited standard, Complainant contends that the term "asbestos contactor" should be interpreted as broadly as the scope of the standard itself, which is to say that any contractor performing work at a site with the potential for asbestos exposure is an asbestos contractor. *See Resp't Br.* at 25–26. The question is whether Complainant's interpretation is entitled to deference. "When determining the meaning of the standard, the Commission must first look to its text and structure." *The Davey Tree Expert Co.*, 2016 WL 845440 at *1 (No. 11-2556) (citing *Superior Masonry Builders Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003)). If the meaning of the standard's language is "sufficiently clear" the inquiry ends. *Unarco Comm. Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). However, if "the meaning of the regulatory language is not free from doubt", the standard is ambiguous. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150–51 (1991). Only in that instance will the Commission defer to Complainant's reasonable interpretation of the standard. *See id*; *Unarco*, 16 BNA OSHC at

1502–1503. However, both the courts and the Commission have rejected Complainant's interpretation of a standard when it strains the plain meaning of the regulatory text. *See, e.g., Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, (No. 89-1206, 1993).

"A regulation is 'ambiguous' as applied to a particular dispute or circumstance when more than one interpretation is 'plausible' and 'the text alone does not permit a more definitive reading."' *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 676 F.3d 566, 570 (7th Cir. 2012) (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011)). However, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *see also Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section") (internal quotation marks and citation omitted); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1202–1203, (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), *aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished); *E. Smalis Painting Co*., 22 BNA OSHC 1553, 1580, (No. 94-1979, 2009) (same). As such, the disputed provision should first be read within the context of the asbestos standard as a whole. If the ambiguity cannot be resolved, the Court will defer to Complainant's interpretation of the standard unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519, U.S. 452, 461 (1997).

At the most general level, the asbestos in construction standard applies to the work at the worksite. According to the scope and application paragraph, "This section regulates asbestos exposure in all work as defined in 29 CFR 1910.12(b), including but not limited to the following: Demolition or salvage of structures where asbestos is present . . . ; construction, alteration,

repair, maintenance, or renovation of structures, substrates, or portions thereof that contain asbestos . . . ." 29 C.F.R. § 1926.1101(a)(1), (3). The overwhelming weight of the evidence shows that the worksite was contaminated with asbestos. Further, the work performed by KIPI and supervised by Respondent, whether considered demolition or renovation, is covered by the standard.[10]

Although it is left undefined, the term "asbestos contractor" appears to have a specific meaning; the term is only used twice throughout the entire asbestos standard. *See* 29 C.F.R. § 1926.1101(b). The context in which the term is used, however, indicates that its application was intended to be far more restrictive than the construction Complainant now advocates. This is particularly evident in subsection (d) of the asbestos standard, which is where the provision cited by Complainant is located and the only portion of the standard where the term "asbestos contractor" is used. Subsection (d)(1) provides:

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

Id. § 1926.1101(d)(1) (emphasis added). This section essentially breaks the worksite into two camps: (1) employers whose work with asbestos requires the establishment of a regulated area; and (2) other employers at the worksite. *See id.* The employer whose work requires the establishment of a regulated area, in turn, has an obligation to inform "other employers" of the nature of its work and to take measures to prevent the employees of "other employers" from becoming exposed. Subsection (d)(2) further clarifies that asbestos hazards are to be abated by "the contractor who created or controls the source of asbestos contamination", or the same

10. The Court mentions both renovation and demolition in light of the standard's definition of "demolition", which is defined as the "wrecking or taking out of any load-supporting structural member and any related razing, removing, or stripping of asbestos." 29 C.F.R. § 1926.1101(b). The testimony was unclear as to whether load-supporting members of the building were removed. However, the definition of "renovation" means the modifying of any existing structure, or portion thereof. *Id.* In either case, the standard applies, and, as will be discussed later, under either definition KIPI qualifies as an "asbestos contractor."

contractor whose work requires the establishment of a regulated area. *Id.* § 1926.1101(d)(2). On the other hand, subsection (d)(3) indicates the obligations of "*all employers* of employees" exposed to asbestos hazards, including those working adjacent to a regulated area. *Id.* § 1926.1101(d)(3) (emphasis added). In other words, there are generally applicable obligations for all employers of employees that are potentially exposed to asbestos, and there are more specific obligations for an employer who creates or controls the source of asbestos contamination and thus requires the establishment of a regulated area.

Subsection (d)(4) is the first provision to use the term "asbestos contractor". Specifically, it states:

> All employers of employees working adjacent to regulated areas *established by another employer* on a multi-employer worksite, shall take steps on a daily basis to ascertain the integrity of the enclosure and/or the effectiveness of the control method relied on by *the primary asbestos contractor* to assure that asbestos fibers do not migrate to such adjacent areas.

Id. § 1926.1101(d)(4) (emphasis added). By describing the obligations of "all employers of employees" in relation to the work of the "primary asbestos contractor", the standard makes clear that: (1) the "asbestos contractor" is responsible for controlling the migration of asbestos fibers; and (2) all employers with employees that are potentially exposed to asbestos are responsible for ensuring that the control methods implemented by the asbestos contractor are effective insofar as such methods prevent the migration of asbestos fibers into adjacent work areas. *Id.* When read in conjunction with sections (d)(1), (d)(2), and (d)(3), there is a clear dichotomy between asbestos contractors and other employers of employees. There is the contractor who creates or controls the source of asbestos contamination and who, by virtue of such work, is required to establish a regulated area and employ a competent person. *Id.* § 1926.1101(d)(1)–(5). Then, there are all "other employers", whose obligations are triggered by their proximity to regulated areas and the attendant likelihood of asbestos exposure. *See id.* § 1926.1101(d)(1); *see also id.* §

1926.1101(g)(9) ("Class III asbestos work shall be conducted using . . . controls which minimize the exposure to employees performing the asbestos work and to bystander employees.").

The general contractor has obligations with respect to both groups (it is deemed to exercise supervisory authority); however, its obligations vis-à-vis the "asbestos contractor" are more specific and relate to the creation and/or control of asbestos contamination, which requires the employment of a competent person.

According to the standard, a competent person is defined as:

> [O]ne who is capable of identifying existing asbestos hazards in the workplace and selecting the appropriate control strategy for asbestos exposure, who has the authority to take prompt corrective measures to eliminate them, as specified in 29 CFR 1926.32(f): in addition, for Class I and Class II work who is specially trained in a training course which meets the criteria of EPA's Model Accreditation Plan (40 CFR 763) for supervisor, or its equivalent and, for Class III and Class IV work, who is trained in a manner consistent with EPA requirements for training of local education agency maintenance and custodial staff as set forth at 40 CFR 763.92 (a)(2).

Id. § 1926.1101(b). This provision indicates both the general expectations for a competent person, as well as the required core competencies of that person based on the class of work being performed. In addition, section (e), which discusses regulated areas, states that "the employer shall ensure that all asbestos work performed within regulated areas is supervised by a competent person." *Id.* § 1926.1101(e)(6); *see also id.* § 1926.1101(d)(1) ([A]n employer performing work requiring the establishment of a regulated area shall inform other employers on the site . . . ."). The type of work which is required to be performed in regulated areas is Class I, II, III, or "where airborne concentrations of asbestos exceed, or there is a reasonable probability they may exceed a PEL", which covers certain types of Class IV work. *Id.* § 1926.1101(e)(1).[11]

11. Under Complainant's interpretation there would be no need for these four classifications to exist because any contractor working in a building that had asbestos, even though the work they were performing is not asbestos-related, would be an "asbestos contractor." This further convinces the Court that his interpretation is unreasonable since it would repeal important distinctions and requirements of the regulation.

The Court is cognizant of Complainant's motivation to provide the broadest protection possible; however, the protections afforded by the standard do not require expansion of the term "asbestos contractor" in order to assure their effectiveness. Subsection (d) as a whole indicates the manner in which every employer of employees is expected to comply with the asbestos standard. To the extent that the cited provision already requires the general contractor "to exercise general supervisory authority over the work covered by this standard", there is no need to expand the term "asbestos contractor" to include all contractors, regardless of the actual work they perform, on a worksite that contains asbestos. 29 C.F.R. § 1926.1101(d)(5). The cited provision simply makes it clear that even though the general contractor may not employ a competent person, it is still expected to exercise its "supervisory authority" over those employers whose work requires one. As noted above, the type of work that requires a competent person is Class I, II, III, and IV.

Although the term "asbestos contractor" is not specifically defined in subsection (b), it is nonetheless given contour by the standard as a whole. Subsection (d) indicates that an asbestos contractor is a contractor that creates or controls the source of asbestos contamination, which requires the services of a competent person and, in most cases, the establishment of a regulated area. The remainder of the standard confirms that if the work you are performing involves the control or creation of asbestos contamination and requires both the establishment of a regulated area and the employment of a competent person, then you are engaged in one of the work classifications established by subsection (g). *See generally id.* § 1926.1101(g); *see also id.* § 1926.1101(b) (defining "competent person"). Thus, the Court finds, when the regulation is read as a whole, the term "asbestos contractor" is not ambiguous, but rather connotes an employer engaged in Class I, II, III, or IV work as those classes are defined in the regulation. Therefore, Complainant's proposed interpretation is not entitled to deference.

That Complainant's proposed interpretation is overly broad does not end the discussion. Coincident with its proposed interpretation, Complainant contends that the term "asbestos contractor" applies to Respondent's work specifically because it was engaged in demolition operations in an asbestos-contaminated building, which is work covered by the terms of the standard. *See id.* § 1926.1101(a)(1). Utilizing the definition of "asbestos contractor" determined by the Court, the question then becomes: whether the demolition work performed by KIPI constituted Class I, II, III, or IV work? Based on what follows, the Court finds that Respondent was engaged in Class I work, which means that the standard applies as alleged by Complainant.

Based upon the facts presented, the Court finds Respondent was not engaged in either Class II or Class IV work. Class IV work is custodial in nature and involves contact with, but not the disturbance of, ACM and PACM. See 29 C.F.R. § 1926.1101(b) (defining "Class IV asbestos work"). Class II work involves the removal of ACM "which is not thermal system insulation". *Id.* (defining "Class II asbestos work"). Respondent was not merely performing clean-up or maintenance services, and at least some of the ACM involved was TSI. Thus, if KIPI is an asbestos contractor as alleged, it is either a Class I or Class III asbestos contractor.

All of the parties involved in the conversion of the worksite were aware of the scope of the work performed by KIPI. Harrington, Mengel, and Clark testified that KIPI was hired to expose, but not disturb, pipes and other utilities that they knew, or at least should have known, contained asbestos. The demolition work involved the removal of walls, as well as the removal of ceiling tiles and the suspended structure that holds the tiles in place. The walls ran perpendicular to some of the asbestos-covered pipes, and the structure holding the ceiling tiles in place was attached to the solid, structural portion of the ceiling, adjacent to the same pipes. (Ex. C-7c at 3, C-7b). In some instances, the ceiling was removed by using chain come-alongs attached to a skidsteer or Bobcat. KIPI was also required to remove debris from the worksite.

(Tr. 247–48). At no point were precautions taken to protect against asbestos exposure, save for warnings that KIPI should avoid hitting the pipes. (Tr. 291, Ex. C-9b).

The photographs taken by CSHO Catalin and [redacted] illustrate the results of KIPI's demolition work: multiple locations where the asbestos surrounding a pipe was damaged and in a friable condition, and multiple piles of debris that, upon further inspection by NED, were identified as containing asbestos. (Ex. C-5, C-7). Further, the results of the survey performed by NED showed that the average of the five air samples taken was more than double the AHERA clearance standard. (Ex. C-5). The Court concludes that KIPI was engaged in work covered by the standard—it performed demolition services in a building, known by Respondent to contain asbestos, and damaged multiple asbestos-insulated pipes in the process.

According to the standard, "demolition" is defined as "the wrecking or taking out of any load-supporting structural member and any related razing, removing, or stripping of asbestos." *Id.* § 1926.1101(b). Though there was not explicit testimony on the issue of whether load-supporting structural members were removed during the process of converting the building, both parties have characterized KIPI's work as demolition.[12] (J-1 at ¶4). The asbestos that KIPI damaged during the process was identified as thermal system insulation, or TSI. (Tr. 135, 204; Ex. C-4).

The standard defines a Class I asbestos work as "activities involving the removal of TSI and surfacing ACM and PACM." *Id.* "Removal" is further defined as "all operations where ACM and/or PACM is taken out or stripped from structures or substrates, *and includes demolition operations*." *Id.* (emphasis added).[13] This understanding of demolition as Class I

12. The Court makes note of the definition of demolition to point out that KIPI's work, to the extent that it did not involve the removal of a structural member, could also just as easily be characterized as "renovation", which the asbestos standard defines as "the modifying of any existing structure, or portion thereof". 29 C.F.R. § 1926.1101(b); *see also id.* (defining "repair").

13. The preamble expands on this definition: "'Removal' means all operations where ACM and/or PACM is removed from a building component, regardless of the reason for the removal. It includes those maintenance, repair,

asbestos work is supported by the preamble to the asbestos standard: "Exposures to asbestos in the construction industry were classified into six activity categories: . . . Demolition—involving[14] asbestos removal prior to the demolition of all or part of a building or industrial facility that contains asbestos materials. *Demolition falls under asbestos work Class I as defined in the revised standard*." 59 Fed. Reg. at 41,041 (emphasis added); *see also id.* (discussing building renovation and remodeling, including the demolition of drywall, as covered by classification standard).

The clear import of the foregoing passages is that demolition, whether partial or total, is characterized as Class I asbestos work. This stands to reason because, as this case illustrates and the preamble discusses, demolition is a destructive activity. Tearing down walls and removing structural components in close proximity to asbestos creates a strong likelihood of the creation of, and exposure to, damaged or friable asbestos. *See* 29 C.F.R. § 1926.1101(a)(1). In this case, such exposure occurred as evidenced by the damaged pipe sections photographed by CSHO Catalin and [redacted] and the air sampling results performed by NED. Subsequently, the asbestos that was damaged and, in some cases, fell to the ground, was removed from the worksite by KIPI. Based on the foregoing, the Court finds that KIPI was engaged in Class I asbestos work. Accordingly, the Court finds that Complainant properly characterized KIPI as an asbestos contractor.

Prior to moving on, the Court would like to address the arguments of Respondent regarding the application of the cited standard. First, Respondent seems to suggest that because

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renovation and demolition activities where ACM and/or PACM removal is incidental to the primary reason for the project, as well as where removal of ACM and/or PACM is the primary reason for the project. Removal should be distinguished from "disturbance" which includes "cutting away" a small amount of ACM or PACM." Occupational Exposure to Asbestos, 59 Fed. Reg. 40,964, 40,978 (August 10, 1994); *see also id.* at 40,990 (Class I asbestos work consists of the "removal" of asbestos-containing TSI and surfacing material and of PACM, *including demolition operations involving these materials*.").

14. The Court highlights this word to point out that it appears to be a typo. In the other five "activity categories" mentioned in the preamble, all of the subsequent explanations begin with the word "including" to indicate that the explanation that follows the activity category is an example of that type of activity. *See* 59 Fed. Reg. at 41,041.

Complainant failed to introduce evidence that indicated KIPI was a certified asbestos contractor, the Court cannot find that KIPI was an asbestos contractor. *Resp't Br.* at 9. Whether KIPI was a certified asbestos contractor has no bearing on whether Respondent had a responsibility, as general contractor, to ensure that KIPI was complying with the requirements of the asbestos standard. The determining factor is the type of work that KIPI was performing, not the manner in which the parties characterized its work pursuant to this particular building contract. *See, e.g., GEM, Inc.*, 22 BNA OSHC 1843 (No. 1924, 2009) (ALJ Spies) ("[C]ontract designations are private agreements; their terms are not controlling."). As the Court concluded above, KIPI performed demolition operations in a building contaminated with asbestos, which the standard characterizes as Class I asbestos work. In order to perform Class I asbestos work, KIPI is required to have a competent person certified pursuant to 40 C.F.R. § 763. Regardless of whether KIPI was certified, however, it was incumbent upon Respondent to ensure that KIPI adhered to the requirements for Class I asbestos work.[15] *See* 29 C.F.R. § 1926.1101(d)(5).

Second, there is nothing in the Act to suggest that the "asbestos contractor" be a singular entity, as Respondent seems to argue. Clearly, Celtic was *an* asbestos contractor; however, as the tier system suggests, different entities, depending on the type of work they are performing, could conceivably be asbestos contractors. *See generally* 29 C.F.R. § 1926.1101(g). Further, the use of the term "primary asbestos contractor" contemplates that more than one asbestos contractor may be on site at any given time. *See id.* § 1926.1101(d)(4). For example, in an interpretation letter issued by Complainant, the Director of Enforcement Programs stated that "if you use a separate crew of workers for doing final cleanup at the demolition site, the standard's training requirements for performing Class IV asbestos work apply for those workers." Richard E. Fairfax, "Application of Asbestos Standard to Demolition of Buildings with ACM in Place"

15. Ensuring that KIPI had a properly certified competent person would have been one of those requirements.

(August 26, 2002).[16] Again, as noted above, the Court is not bound by the terminology used in the various contracts entered into by the parties—while Celtic may have been *an* asbestos contractor, there is nothing in the standard to prevent KIPI from also being an asbestos contractor.

Finally, Respondent appears to suggest that it should not be held responsible for the acts of the asbestos contractor because Mengel contracted separately with Celtic. Regardless of whether Respondent was a party to the environmental remediation contract with Celtic, the standard nonetheless imposes a duty upon Respondent to ensure that asbestos contractors comply with the terms of the standard. *See Central of Georgia R. Co.* v. *OSHRC*, 576 F.2d 620, 624 (5th Cir., 1978 ("[A]n employer may not contract out of its statutory responsibilities under OSHA."). Even assuming that Respondent did not have a duty to ensure Celtic's compliance, it still had a duty to ensure that KIPI complied with the terms of the asbestos standard.

Though Complainant's proposed expansion of the term "asbestos contractor" is unduly broad, the foregoing discussion illustrates that, in this case, such an expansion is unnecessary. The work of KIPI, regardless of how it may have been characterized by Respondent, Mengel, or Smrz, was the type of work that the asbestos standard categorizes as the work of an asbestos contractor. Regardless of whether KIPI was a *certified* asbestos contractor (there is no evidence of this either way), it was performing a job that required such certification. There is no need to expand (d)(5)'s application to contractors whose employees may be exposed to, but do not directly work with, asbestos. *See generally* 29 C.F.R. § 1926.1101(d). Those employers are already under the umbrella of a general contractor's "supervisory authority". A plain reading of the standard as a whole makes it clear that KIPI was performing the work of an asbestos

16. That same interpretation letter also discussed the application of the proper asbestos standard in the context of building demolition without first removing ACM. *See* Fairfax, *supra*. According to that interpretation, "Demolition of a building with ACM left in place falls under the definition of removal of installed ACM. . . . If any asbestos-containing thermal system insulation or surfacing material is left installed in the building, then the work being performed is Class I asbestos work." *Id.*

contractor and that Respondent, as general contractor, had an obligation to ensure that KIPI complied with applicable provisions of the standard "even though [Respondent] is not qualified to serve as the asbestos 'competent person'". *Id.*

ii. The Terms of the Standard Were Violated

Respondent failed to ensure KIPI's compliance with the asbestos standard. There is nothing in the photographs, testimony, or documentary evidence to suggest that KIPI implemented even the most basic asbestos control measures during the eight documented days of work between the start of the job and the inspection by CSHO Catalin. Respondent was represented on the worksite every day by [redacted], who observed KIPI's work and filled out the daily reports. (Tr. 39; Ex. C-8). Respondent was aware that KIPI was hired to perform demolition, but only to the extent that it exposed asbestos-laden pipe. Nevertheless, having been informed of the asbestos content of the building, Respondent did not ascertain whether KIPI was in compliance with the asbestos standard (it was not) and did not require KIPI to "come into compliance" when it was apparent that such precautions were necessary. Accordingly, the Court finds Respondent violated the terms of the standard.

iii. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

"To establish knowledge, Complainant must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Jacobs Field Svcs. N.A.*, 2015 WL 1022393 at * 3 (No. 10-2659, 2015) (citing *Contour Erection & Sliding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007)). To determine reasonable diligence, the Court considers several factors, including "an employer's obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately supervise employees, and implement adequate work rules and training programs." *Id.* (citations omitted); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000).

"The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981). It is the substance of the delegation of authority, not the formal title of the employee having such authority, that determines whether a person is properly characterized as a supervisor. *Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993). *See Diamond Installations*, 21 BNA OSHC 1688 (No. 02-2080, 2066) (permitting imputation of knowledge to employer based on temporary delegation of authority). The Commission has also held that an individual empowered to take corrective action, or is responsible for ensuring that work is done safely, can be considered a supervisor for the purposes of imputing knowledge to the employer. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003); *Kern Bros. Tree Svc.*, 18 BNA OSHC 2064 (No. 96-1719, 2000).

Although Respondent made multiple attempts to disclaim knowledge of asbestos contamination at the worksite, there are ample counterexamples throughout the record: (1) Harrington walked the worksite with Mengel to discuss the scope of the project, during which time Mengel informed Harrington about the presence of asbestos and that he was hiring an outside contractor for environmental remediation; (2) Respondent's Project Manager, Matt Clark, did a walkthrough of the worksite with Ed Boomsma, who identified ACM in the building and provided Mengel with a quote for remediation services; (3) Respondent directed KIPI to remove the drop ceiling, but to avoid hitting the asbestos-laden pipes that rested above it; and (4) two days after the walkthrough with Boomsma, Respondent participated in another walkthrough with Dave Smrz from Celtic, who specifically directed Respondent to expose the affected areas,

but not to go any further. (Tr. 223–29). Thus, through Harrington and Clark, Respondent had actual knowledge of the presence of asbestos throughout the worksite. Since both Clark and Harrington are members of management, the Court finds that their knowledge is properly imputable to Respondent.

For the sake of argument, however, if we assume that Respondent was somehow unaware of the presence of asbestos at the worksite, the Court would still find that Respondent had constructive knowledge of both the presence of asbestos and its attendant duty to ensure KIPI complied with the standard. Harrington testified that approximately 15% of the conversions that Respondent performs involve the entire process, including environmental remediation. (Tr. 216). Respondent's experience in this area means that it is familiar with the rules regarding "presumed asbestos containing material" or PACM. According to the standard, any TSI or surfacing material found in buildings constructed prior to 1980[17] will be presumed to contain asbestos unless "rebutted pursuant to paragraph (k)(5) of this section." 29 C.F.R. § 1926.1101(b). As the evidence shows, there was nothing to rebut the presence of asbestos; rather, the observations of environmental remediation experts and subsequent analysis of the materials *confirmed* the presence of asbestos in the areas indicated by Boomsma and Smrz. Thus, it was incumbent upon Respondent to presume that the material on the pipes was asbestos-containing.

Under this set of facts, the Court finds that Respondent failed to exercise reasonable diligence in both identifying and responding to a known hazard. Harrington testified that he relied on the representations of Mengel as to the nature and extent of the asbestos hazard, notwithstanding that: (1) it was directly aware of the extent of the asbestos contamination through the various walkthroughs that Respondent's representatives participated in during the initial stages of the job; and (2) Respondent should have operated under the assumption that

17. Testimony established that Respondent was aware the building was constructed prior to 1980. (Tr. 277–278).

asbestos was located throughout the building based on its age and the materials present throughout. Even though Respondent has performed (or contracted for) asbestos remediation services during these self-storage conversion projects, and even though Respondent knew that asbestos hazards were present, no additional measures were taken. Even if the Court were to accept (which it does not) that Respondent did not actually know that there was a hazard, then these facts illustrate that Respondent should have. Whether it was the age of the building and the built-in presumption regarding the asbestos content of certain building materials or the fact that the scope of work was explicitly described as demolition without disturbing asbestos, Respondent cannot credibly disclaim knowledge of violative conditions. Accordingly, the Court finds Respondent had both actual and constructive knowledge of both the extent and nature of the asbestos contamination.

iv. Respondent's Employees Were Exposed to the Hazard

The Commission does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)).

"[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'" *McDevitt Street Bovis*, 19 BNA OSHC 1108 (97-1918, 2000) (quoting *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976)). "An employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory

authority and control over the worksite."' *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010) (quoting *McDevitt* at 1109). According to the cited standard, Respondent (as general contractor) is "deemed to exercise general supervisory authority over the work covered by this standard . . . ." 29 C.F.R. § 1926.1101(d)(5).

KIPI was hired to perform demolition throughout the entire worksite. As a condition of Celtic's contract with Mengel, it was understood that KIPI was hired to expose, but not remove, asbestos. According to multiple sources, the building had roughly 2500 linear feet of asbestos-lined pipe. During the course of the demolition process, pipe insulation was damaged, hanging from the ceiling, and ultimately observed in debris piles on the floor of the building. Additionally, subsequent air testing revealed an airborne asbestos concentration more than double the accepted clearance rate. (Ex. C-5).

The damaged insulation, coupled with the aforementioned test results, show that KIPI employees were exposed to asbestos contamination during the demolition process. According to the cited standard, Respondent is deemed to exercise general supervisory authority over the worksite and, as such, "could be reasonably expected to prevent or detect and abate violations due to its supervisory authority and control . . . ." *McDevitt*, 19 BNA OSHC at 1109. Based on that authority and control, Respondent is obligated "to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'" *See id.*, *supra*. Respondent and KIPI were engaged in the common undertaking of preparing the worksite for environmental remediation and, eventually, conversion to a self-storage facility. Thus, the Court finds that Respondent was obligated to supervise and protect KIPI's employees as if those employees were its own. In addition, Respondent's worksite superintendent, [redacted], was present at the worksite every day, supervising KIPI's work, which means he was also exposed to the

contamination caused by KIPI's demolition activities. (Tr. 262). Accordingly, the Court finds that Respondent's employees were exposed to the hazard.

v. The Violation was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *See Trinity Industries, Inc.*, 504 F.3d 397, 401 (3d Cir. 2007).

In *Trinity Industries*, a foundry owner hired a contractor to perform work on a furnace. *Id.* at 399. During the course of the work, an employee of the contractor identified an insulation blanket that was later determined to contain 5% amosite asbestos. *Id.* Trinity was cited for failing to determine the location and quantity of asbestos and failing to notify the contractor regarding the same. *Id.* The Administrative Law Judge determined that the violations were not serious because the Secretary failed to meet her burden of showing "any significant exposure to asbestos". *Id.* The Commission did not direct the case for review. On appeal, the Third Circuit Court of Appeals reversed. The Third Circuit held:

> [T]he question is whether, as a result of the failure to test and notify, it was possible that an accident could occur in which it was substantially probable that death or serious physical harm would result. *See, e.g., Phelps Dodge Corp.*, 725 F.2d at 1240; *Secretary of Labor v. Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557 (O.S.H.R.C.1996); *Secretary of Labor v. Dec–Tam Corp.*, 15 BNA OSHC 2072 (O.S.H.R.C.1993). Given that the violations made it possible that workers could unwittingly stumble into large amounts of asbestos without adequate protection, there was no need to show that Pli–Brico employees suffered any actual exposure to asbestos, much less the "significant exposure" that the ALJ required, in order for the Secretary to show that a serious injury could result.

> Given the "detrimental health effects" that can result from exposure, 51 Fed.Reg. 22,612, 22,615 (June 20, 1986), the failure to test for asbestos in those situations in which it is presumed to be present (and, given the failure to test, the concomitant failure to communicate the results of any tests) is unquestionably a "serious" violation.

Id. at 401.

The facts presented in this case are not substantially different. Respondent's failure to adequately supervise KIPI made it possible for those employees to be exposed to asbestos during demolition operations. This is only exacerbated by the fact that Respondent was expressly told that the purpose for conducting the demolition was to expose asbestos-covered pipes for subsequent environmental remediation. Respondent's failure to ensure that KIPI complied with the appropriate standards exposed both KIPI's employees and other contractor employees to asbestos, which was confirmed by the airborne testing conducted by NED. The Court sees no reason to depart from the holding of the Third Circuit, which held that exposure to asbestos can cause serious health problems. *See id.* (Tr. 108). Accordingly, the Court finds the violation was properly characterized as serious.

At bottom, Respondent abdicated its duty to ensure asbestos contractors, such as KIPI, complied with applicable regulations. Irrespective of how the various contracts were structured, the cited standard is clear that, as general contractor, Respondent had an obligation to ensure KIPI's compliance with the asbestos standard. Subsection (d) illustrates the different types of exposure that may occur on a construction site and the respective obligations of each employer. As the general supervisory authority on the worksite, Respondent was expected to ensure that asbestos contractors complied with the terms of the standard, not only for the protection of KIPI, but for every other employee on the worksite that may be incidentally exposed to improperly contained asbestos. Respondent failed to comply with that obligation. Thus, the Court finds that

Complainant established that Respondent violated 29 C.F.R. § 1926.1101(d)(5), and that the violation was serious. Accordingly, Citation 1, Item 1 shall be AFFIRMED.

VI. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Complainant has proposed a penalty of $2,200. The proposed penalty is based on the following: (1) a reduction of 60% due to Respondent having fewer than 25 employees; (2) an increase of 10% based on Respondent's violation history; (3) a determination that the potential injuries were of high severity; and (4) that the probability of injury was lesser, due to the uncertainty regarding the length or location of exposure. (Tr. 108–110). Although the airborne exposure survey performed by NED seems to indicate regular and pervasive exposure to asbestos at the worksite, the Court does not see any compelling reason to depart from Complainant's assessment. Accordingly, a penalty of $2,200 shall be ASSESSED.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED, and a penalty of $2,200.00 is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: July 22, 2016
Denver, Colorado