

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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 09-2129
	:	
CAMBRIA CONTRACTING INC.	:	
	:	
Respondent.	:	
	:	

APPEARANCES:	Suzanne Demetrio, Esquire Allison L. Bowles, Esquire Daniel Hennefeld, Esquire Office of the Solicitor U.S. Department of Labor 201 Varick St. , Room 983 New York, N.Y. 10014 For the Complainant	Robert G. Walsh, Esquire Robert G. Walsh, P.C. 3819 South Park Avenue Buffalo, N.Y. 14219 For the Respondent
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BEFORE:                   G. Marvin Bober,  
                              Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (“the Act”). Cambria Contracting Inc. (“Cambria” or “Respondent”) is a corporation with an office and place of business in Lockwood, N.Y. In May-June 2009, Cambria was contracted to remove asbestos and perform other demolition work at the AM&A warehouse buildings in Buffalo, N.Y. The warehouse was composed of four abandoned multi-storied, inter-connected buildings. (Tr. 189-191, 476, 864-866, 923, Ex. C-19) The project involved the demolition of one of the buildings and the renovation of the other three buildings. (Tr. 476-477). On June 12, 2009 an OSHA inspection was begun by OSHA Compliance Officer Albert Stutz (the “CO”). (Tr. 343) After the inspection was completed, OSHA issued to Cambria

a citation alleging several willful violations of the Act. Item 1 alleges a willful violation of 29 C.F.R. § 1926.1101(e)(1) on the grounds that Cambria failed to establish a regulated area while performing Class I asbestos work. Item 2 alleges that Cambria willfully violated 29 C.F.R. § 1926.1101(f)(2)(i) by failing to conduct an initial asbestos exposure assessment immediately before or at the initiation of its asbestos work. In Item 3, the Secretary alleges that Respondent willfully violated 29 C.F.R. § 1926.1101(g)(1)(i) by not using HEPA<sup>1</sup> vacuums for the collection of all debris and dust containing asbestos-containing materials or presumed asbestos-containing materials. Item 4 alleges that Cambria willfully failed to comply with 29 C.F.R. § 1926.1101(h)(1)(i) by not requiring its basement employees to use respirators. Item 5 alleges that Respondent willfully violated 29 C.F.R. § 1926.1101(i)(1) by not providing adequate protective clothing to its basement employees. In Item 6a, the Secretary alleges that Cambria failed to inform its basement employees of the location and quantity of asbestos-containing material present in the AM&A basement debris and of the precautions to be taken to avoid exposure, as required by 29 C.F.R. §1926.1101(k)(3)(ii)(B). Item 6(b) alleges that Cambria willfully failed to ensure that labels were affixed to all products containing asbestos in violation of 29 C.F.R. § 1926.1101(k)(8)(i). Finally, in Items 7-11, the Secretary alleges that Cambria failed to comply with 29 C.F.R. §1926.1101(k)(9)(i) by not ensuring that each employee who performed asbestos work in the AM&A basement had appropriate asbestos related training. These five items were cited under the Secretary’s “egregious” policy which allows the Secretary to cite each employee exposed to the allegedly violative condition as a separate violation.

## **BACKGROUND**

### **The Relevant Testimony<sup>2</sup>**

#### **1. Secretary’s Witnesses<sup>3</sup>**

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<sup>1</sup> High Efficiency Particulate Air Filter.

<sup>2</sup> In the transcript, the Secretary’s exhibits are denoted as S-#. However, in the file, they are listed as C-# and are so referred to in this decision. The Respondent’s exhibits are designated as R-#.

<sup>3</sup> One of Respondent’s employees [redacted], who was working in the basement, was issued a subpoena to appear as a witness at the hearing. However, he did not respond to the subpoena issued to him because he lived more than 100 miles from the location of the hearing. *See Federal Rules of Civil Procedure* 45(b)(2) and 45(c)(3)(A)(ii). In lieu of his testimony, the Secretary entered into evidence a DVD of the interview conducted with [redacted]. (Tr. 601, 1053-1054, Exhibit C-29(a)). At the hearing, I made it clear that, although I would listen to the recording, I would not consider any written transcript because Respondent did not have an opportunity to verify its accuracy. (Tr. 274-276). There were additional questions regarding the recording. For example, Cambria did not have an opportunity to cross-examine [redacted], and the inability of this Court to observe [redacted] made assessing his credibility

## **Edward Krasinski**

Edward Krasinski has been a senior industrial hygienist with the Asbestos Control Bureau of the NY State Department of Labor in Buffalo, NY, since 1991. (Tr. 28-29). The mission of the Asbestos Control Bureau is to enforce the rules and regulations for the handling and removal of asbestos containing material. (Tr. 28). As a senior industrial hygienist, Mr. Krasinski inspects asbestos projects and investigates complaints that come in to his office regarding the handling of asbestos material. (Tr. 29).

Mr. Krasinski held an Asbestos Supervisor Certificate from 1991 to 2007. (Tr. 315). He testified that to obtain the certificate, he spent a week at Tuft's University, which required four days of training and one day of tests. (Tr. 315). The course work covered every aspect of the asbestos industry, including OSHA requirements, Federal NESHAP<sup>4</sup> requirements, insurance requirements, safety aspects and respirators, and personal protective equipment. (Tr. 316). To maintain the certificate he attended a yearly one-day refresher course. (Tr. 316). The certificate is recognized throughout New York. (Tr. 317-318). He noted that there are several worker classifications below the supervisor. For example, there is an operations and maintenance certificate. The minimum certificate is the handler certificate that has to be held by a worker who is physically working with asbestos or on an asbestos project. (Tr. 319).

Mr. Krasinski testified that, under New York's Industrial Code Rule 56, ten days before starting a project where asbestos work is to be performed, the contractor is required to submit a notification form with the State. (Tr. 30-33, Ex. C-6). This is an internal document and is not sent to OSHA or shared outside his office on a routine basis. (Tr. 35-36). The notification filed in this project listed the starting date of the AM&A warehouse project as June 1, 2009. (Tr. 41). The notification also indicated that the project involved pipe related asbestos work and that 2050 linear feet involved friable material, while 730 feet involved nonfriable material. (Tr. 42, Ex. C-

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problematical. (Tr. 598-599). The Secretary declined, for her own reasons, the opportunity I gave her to seek enforcement of the subpoena. (Tr. 277). Under these circumstances, I informed the parties that I would give [redacted] interview the weight it deserved. (Tr. 601). I informed the Secretary that I would not accept a written transcript of the interview, but I requested that the Secretary provide this Court with a time index of the recording. (Tr. 276, 1051). In response the Secretary submitted the transcript of the interview with appropriate time marks. Respondent now objects to the submission of the transcript and asserts that it violated this Court's declaration that it would not consider a transcript. In my review of this recording, I used the time marks to locate certain statements made by [redacted]. However, I have ignored the Secretary's transcript and relied solely on my own review of the recording. Nonetheless, I find that Cambria's inability to cross-examine [redacted], my inability to assess his credibility and other factors require that I accord this recording little weight. I find that its value lies only insofar as it supports other evidence of record.

<sup>4</sup> National Emission Standards for Hazardous Air Pollutants

6, p.2). Mr. Krasinski explained that pipe thermal insulation usually contains asbestos and is a high priority for inspections. (Tr. 42).

Before he decided to inspect the AM&A project, he reviewed the Pre-Demolition Asbestos Survey (the "Survey") conducted for the project which was received on May 27, 2008. (Tr. 43-44, Ex. C-1). Mr. Krasinski noted that the Survey contained a footnote that said "piping insulation is located in the separate basement structures throughout the basement, the access to some areas was incomplete, and amounts should be verified prior to abatement." (Tr. 48, Ex. C-1).

Mr. Krasinski testified that when he arrived at the AM&A project, he entered the bay in Building D where he could see a decontamination trailer, which was later identified by one of the project managers, Joe Ferrucci, as a remote personal decontamination closure for the tile project that was taking place on the upper floors. (Tr. 57-60, 63). He explained that workers entering an asbestos work area were required to enter the portion of the trailer called the "clean room" where they take off their street clothes and put on personal protective suits, respirators, gloves, and booties. They then enter the work area. (Tr. 61).

Mr. Krasinski saw a bay door in Building C where he saw a dumpster with a large pile of garbage. (Tr. 65). When he learned that there was activity in the basement, he made it a point to go down with a supervisor (Tr. 65). He entered the basement, using stairs located between Building C and Building D. (Tr. 65, Ex. C-19). Upon entering the basement, Mr. Krasinski noticed that immediately by the door there were insulated pipes. There were sections of insulation missing on all the pipes. Also, there was a man sitting inside a Bobcat loader who was grabbing material from a large pile of garbage and pushing it into a holding area in the center of Room D. (Tr. 72-73). He was wearing regular work clothes and was not using any respiratory protection. (Tr. 75). Another employee was in the area. Both employees were part of the non-asbestos certified general crew working for Cambria. (Tr. 76). Mr. Ferrucci confirmed that there was no demolition in the basement, just garbage cleanup. (Tr. 320). Besides the Bobcat and a Dingo, he did not see any other power equipment operating in the basement. (Tr. 135). He observed a large pile of trash, approximately four-five feet high, 10-15 feet wide and 10-15 feet long. (Tr. 157).

Mr. Krasinski testified that there was dust in the area from the manipulation of the garbage. (Tr. 77). The basement was dry, but damp. (Tr. 77). He took photographs of the pipes

in Building D, because, due to the results of the Survey, he was concerned that the pipes had a high potential for containing asbestos. (Tr. 79, 84, Ex. C-14). Because his inspection did not take him to the top of the pipes, he did not take any sample of the insulation material on the pipes. (Tr. 84). He noted that some of the pipe runs appeared to contain all fiber-glass insulation. (Tr. 84). However, he also noted that several of the pipes had “muddled joints.” He explained that “muddled joints” are formed when asbestos is mixed on site with water, then hand formed around the elbows. (Tr. 85-86).

Mr. Krasinski testified that he then inspected the basement in Building A. (Tr. 86-88, Ex. C-15, C-16). There, he observed a large missing section of pipe insulation and a large amount of debris on the floor that matched in color and texture the missing sections of insulation. (Tr. 88, Ex. C-16(A) (blue circle)). There was a lot of debris that was scattered around the room. (Tr. 157). Much of the debris was paper, up to a foot deep. (Tr. 158). He also observed two additional employees in the area. (Tr. 88). These employees were also dressed in regular street clothes and were not wearing respirators. (Tr. 88-89). Superintendent Joseph Ferrucci identified them as Cambria employees. (Tr. 89). Mr. Krasinski described Building A as “basement damp,” but there was no pooled water. (Tr. 89). The wood floor was disintegrating and breaking down into “black, mushy stuff.” According to Mr. Krasinski, the missing pipe insulation was not removed by an earlier asbestos abatement. He testified that, had there been abatement, there would be no protruding pieces with jagged edges and pieces would not be hanging down with materials sticking to it. Rather, everything would be encapsulated and the pipes would be free of weight marks because the pipe is preferred to be scraped clean. (Tr. 99, 128).

Mr. Krasinski testified that, after taking the pictures in Building A, he got out of the area as quickly as possible because they were not wearing any personal protective equipment. (Tr. 129). He told Mr. Ferrucci to vacate the area and cordon it off and that they could not continue working in the basement. (Tr. 129, 321). He informed the superintendent that he had to obtain a specific variance from the State to address the contaminated basement. (Tr. 135). He returned to the basement the next day to confirm that they were in compliance with the stoppage order and found them to be in compliance. (Tr. 322-323).

Mr. Krasinski returned to the AM&A warehouse on June 12, 2009 at the direction of his supervisor. (Tr. 325) He saw Mr. Ferrucci, a second superintendent. Eric Sperrazza, and OSHA inspector Al Stutz. (Tr. 136-137). Although his supervisor told Mr. Krasinski that Mr. Stutz

would be at the site, it was not clear when he would arrive. It was coincidental that he and Mr. Stutz were on site at the same time. (Tr. 323, 326). Both Mr. Krasinski and Mr. Stutz put on personal protection equipment (“PPE”), entered the basement at the same time and walked the entirety of Building D. He had a high intensity flashlight with him. (Tr. 137, 332). They walked through the door to Building A and later went into Building B. (Tr. 138-139). He did not have any role in the OSHA inspection, but usually worked within 10-15 feet of Mr. Stutz. (Tr. 139). Both men independently took pictures of the area. (Tr. 139). Mr. Krasinski noted a severely damaged pipe in the doorway between Room C and a passageway that went under the sidewalk. (Tr. 139-140, Ex. C-18). He observed a diamond shaped red label on a pipe that said “asbestos.” (Tr. 144-147, Ex. C-18).<sup>5</sup> Based on having seen this type of material thousands of times, he opined that the material on the pipe was aerosol asbestos insulation. (Tr. 146).

According to Mr. Krasinski, he noticed no changes in the basement between his visits of June 3, 2009 and June 12, 2009. The only thing new that he hadn’t seen on his first visit was the damaged pipes in Building C, which he didn’t inspect on his first visit. (Tr. 156). Also, except for the normal penetrations for the pipes, he did not notice any holes in the ceiling. He pointed out that he looked for holes specifically near a lot of damaged pipe insulation. (Tr. 157). There was no trash in Building C, which had been moved into an elevator shaft. (Tr. 159).

Mr. Krasinski is familiar with 56 Services, who performed the Survey, and considers it to be a credible company. He has found their work to be both valid and accurate. (Tr. 298-299). He testified that an Asbestos Survey is required for all demolitions, remodelings and renovations and is required to be sent to the state by the building owner or its agent. (Tr. 300). In this matter, the Asbestos Survey was prepared for Rocco Termini, the owner of the warehouse. (Tr. 301, Ex. C-1).

Whoever prepares the Survey has to be certified. The owner has a legal responsibility, which can be exercised by a certified asbestos inspector to identify Asbestos Containing Material (“ACM”) or Presumed Asbestos Containing Material (“PACM”). The Survey must identify what it is, where it is, and quantities. (Tr. 303-304). Before he went to the site, Mr. Krasinski was aware of what to expect from the Survey. (Tr. 304).

Mr. Krasinski testified that lab results for bulk materials were from Amersei and ERSCL.

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<sup>5</sup> The writing on the label was not visible in Ex. C-18. However, Mr. Krasinski testified that he had seen this type of label many times before. (Tr. 145).

(Tr. 307). To be credible, labs have to be ELAP (Environmental Laboratory Approval Program) approved, which is a program run by the N.Y. Dept. of Health. If a lab is ELAP approved, New York accepts their documents. (Tr. 308). According to Mr. Krasinski, Amerisei sent their results JMD Environmental, Inc. He was familiar with JMD. They were on the AM&A warehouse job and he met Henry Hawkins, an employee of JMD, who was on the jobsite. (Tr. 308-309).

**[redacted]**

[redacted] has been a Cambria employee for three years. (Tr. 171). He testified that he had asbestos training in 2007 and has an asbestos certification card issued by New York. (Tr. 188). He does Cambria's torch work and operates heavy equipment. (Tr. 171). During May-June 2009 he worked four-five days for Cambria at the AM&A warehouse basement, which he described as damp, moldy and dilapidated. (Tr. 171-172).

He worked in the basement for eight hours a day where he removed various types of construction debris, such as boxes, shelving, steel, wood and fabric. (Tr. 172, 216). To accomplish his tasks, he used a Bobcat and a Dingo. (Tr. 173, 188) He would push the debris to another employee in the doorway between Buildings C and D, who grabbed the debris and pushed it to the elevator shaft with a machine operated by [redacted]. (Tr. 173, 179). From the elevator shaft, the trash was taken to the first floor and then to the dumpsters. (Tr. 174). The area had string lighting that was sufficient to enable the employees to see their work. (Tr. 215).

There were several employees working in the basement with [redacted], including brothers [redacted], and a man named "Steve." (Tr. 174-176). [redacted] testified that he worked in Buildings C and D. The Bobcat was operated in Building D. (Tr. 178). According to [redacted], Building D was a three story building and Buildings A, B, and C were five stories high. (Tr. 189-190).

Nobody from Cambria's management specifically said that there was asbestos in the basement. (Tr. 180-181). However, Eric Sperrazza told them that, along the ceiling, the basement contained asbestos on the pipes. (Tr. 181, 216). All the work was on the ground and none of the employees were required to be near the ceiling when working in the basement. (Tr. 217). Also, there were signs outside that said there was asbestos. (Tr. 181). However, he could not remember if there were asbestos warning signs in the basement. (Tr. 183).

[redacted] further testified that he wore jeans, a T-shirt, work boots, hard hat, safety

glasses and gloves. He wore his own personal clothes. (Tr. 182). He brought his clothes home every day and Cambria never offered to wash clothes for them. (Tr. 182). Cambria did not require the basement crew to change clothes or take showers before they left work. According to [redacted], there was no shower available. (Tr. 182) He never saw [redacted] or [redacted] wear anything but their personal clothes and never saw them change clothing or take a shower before going home. (Tr. 184-185).

Because it was wet and moldy in the basement, [redacted] had a paper dust mask that he wore every day. The mask was given to him by Cambria, but they did not require him to wear it. (Tr. 183). The [redacted] wore dust masks. (Tr. 185). Wearing masks was optional and he opted to wear it. (Tr. 187). He did not see a vacuum in the basement. (Tr. 183).

According to [redacted], the work did not create dust and there was no dust problem. The only reason he wore the dust mask was because of dampness and mold. (Tr. 214). When he left work for the day, there was no dust on his clothes. (Tr. 218).

When the basement was shut down on June 3, he started work cutting rails on the elevator shafts on the upper levels so they could be planked off as a protective measure (Tr. 190). The elevator work took about a week. (Tr. 191). [redacted] testified that the elevators were being used as a draft zone, where they took debris from the upper floors and dropped it down the elevator shafts. (Tr. 190). On the last day of cutting rails, [redacted] was on the first floor in Building A, which is just above the ceiling in the basement. (Tr. 209). He observed a machine running across the floor, getting stuff from the elevator shaft when the back tires of the machine and operator fell partially through the floor and concrete slab. (Tr. 210, 212, 242). As a result the floor buckled. (Tr. 211-212, 242).

[redacted] testified that he smokes a little less than a pack a day of cigarettes. (Tr. 186).

**[redacted]**

[redacted] currently works for Titan Wrecking. (Tr. 259). At the time of the inspection, he worked for Cambria at the AM&A warehouse project. Generally, he cleaned up debris on the first through third floors. However, he worked a few hours in the basement. (Tr. 262). While working in the basement he cleaned up debris such as wood and metal that came from the first through third floors. (Tr. 263). He was piling the debris in two of the four rooms<sup>6</sup> with a Dingo

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<sup>6</sup> Although occasionally described as rooms, these areas actually are located in different buildings.



machine. (Tr. 265).

There were 3-4 other people working in the basement, mostly in Building C and the southern end of Building D. (Tr. 267). He worked only in Building D. (Tr. 268). Eric Sperrazza told him to watch out for the ceiling, apparently because of asbestos. (Tr. 268). However, because the building was 12 feet high, he believed that he had nothing to worry about. (Tr. 268-269). He wore regular work clothes and was not required to either change clothes or shower. He brought his clothes home at the end of the day. (Tr. 269). He did not see any asbestos labels or warning signs in the basement. (Tr. 270). [redacted] testified that he smokes half a pack of cigarettes a day. (Tr. 270).

### **Albert Stutz**

Albert Stutz has been an industrial hygienist and an OSHA Compliance Officer since 1996. (Tr. 340-341). He has a BA in Industrial Technology and an MS in Occupational Health and Safety Engineering. (Tr. 341). Before coming to OSHA, Mr. Stutz worked for ERM monitoring asbestos on jobs and performing inspections for installed asbestos materials. (Tr. 341). He has conducted approximately 40 asbestos inspections. In the majority, bulk samples were taken. Mr. Stutz explained that bulk sampling entails collecting small amount of material that could contain asbestos. (Tr. 342). The materials collected are sent to a lab for analysis of the asbestos content. (Tr. 342-343).

The worksite involved demolition type construction work, and the purpose of his visit was to inspect the site for employee exposure to asbestos. (Tr. 343). Mr. Stutz testified that he began his inspection of the basement in the AM&A warehouse on June 12, 2009. (Tr. 343). The inspection was prompted by a referral report received by the NY State Asbestos Control Board on June 11, 2009. (Tr. 700-702, Ex. R-140). He and Mr. Kransnksi agreed to meet at the site on June 12, 2009 at 7 a.m. (Tr. 696). Having been on the site before, Mr. Kransnksi pointed out to him Mr. Sperrazza and Mr. Ferrucci with whom he then held an opening conference. (Tr. 698-699). Neither Mr. Sperrazza nor Mr. Ferrucci denied him entry to the worksite. (Tr. 829).

The CO was on site for 4-5 hours. After the opening conference he conducted a walkaround inspection of the basement, took videos, photos and field notes of the walkaround, collected samples, and conducted employee and management interviews. (Tr. 344). He eventually made four separate inspections of the worksite. He was at the site on June 12, 17, 30,

and July 8. (Tr. 345). On his visit of June 12, he conducted an initial walkaround to see the scope of the inspection with regards to asbestos exposure. He wanted to survey what types of materials were in the basement, the condition of those materials in relation to the work being performed, and where employees could be exposed. (Tr. 348). On the June 17 visit, he took additional bulk samples from the basement, took photos and conducted more interviews. (Tr. 345). On this visit, he was accompanied by a second CO, Dinh Le. (Tr. 345, 725). He was directed to return to the site by his supervisor, Mr. Stratton, for the purpose of taking additional samples. (Tr. 726-727). Both the CO and Mr. Le wore air sampling equipment. (Tr. 732). The results for both were negative for asbestos. (Tr. 733). Mr. Le assisted Mr. Stutz in taking samplings, photos, etc.

On his June 30 visit to the site, Mr. Stutz again conducted air monitoring on himself which also came back negative for asbestos. (Tr. 733-735). On that visit, he was accompanied by his supervisor, Assistant Area Director Mike Stratton, who was there to observe and assist the CO take additional bulk sampling around the basement. (Tr. 346-347). On July 8, he just interviewed employees at street level. (Tr. 346-347). A closing conference with Cambria's attorney, Bob Walsh was held in November 2009. (Tr. 347).

Mr. Stutz testified that, during his opening conference on June 12, Mr. Sperrazza told him that prior to allowing employees into the basement, he conducted a walkaround to assess the area. (Tr. 575-576, 767). The CO learned that Mr. Sperrazza is credentialed as an asbestos supervisor, which means that he is qualified to act as an asbestos supervisor by the New York State Department of Labor. (Tr. 767-768). Mr. Stutz testified that an asbestos supervisor requires, not only comprehensive asbestos training, but also yearly training. (Tr. 768). Mr. Sperrazza told the CO he directed the work and that he was the competent person for asbestos on the worksite. (T. 576). Mr. Sperrazza and Mr. Ferrucci provided the CO with their NY State Dept. of Health Certificate of Asbestos Training and NY State Asbestos Certificate. (Tr. 576-578, Ex. C-26, C-27). Mr. Sperrazza also told him that he was aware that the Asbestos Survey indicated that overhead piping might contain PSI and another type of asbestos. (Tr. 574-575, 768). However, Mr. Sperrazza did not tell him that the Survey warned of any asbestos on the ground. (Tr. 768-769). Mr. Sperrazza told him that the work in the basement had been going on for five days. (Tr. 583). The CO was told that employees used a Bobcat, Dingo, brooms, shovels and wheelbarrows to remove garbage and debris. (Tr. 581). Mr. Sperrazza also told the CO that he had seen the Bobcat and Dingo run over the material on the floor. (Tr. 583, 591). Mr. Sperrazza told the CO

that he did not have any concern for employees working in the basement. (Tr. 769). It was the CO's recollection that Mr. Sperrazza told him that, prior to the work stoppage, there was some demolition activity occurring in the basement. (Tr. 771-772). Mr. Sperrazza specifically mentioned the removal of shelving, but it was not clear whether the shelving was pre-standing. (Tr. 772). After his interview with Mr. Sperrazza, which took place in the basement, the supervisor expressed to the CO a concern about going to jail. (Tr. 776-778). Mr. Stutz replied that the most OSHA would do is issue willful violations, and that OSHA does not get into criminal matters and jail time. (Tr. 778).

The AM&A warehouse basement had four major rooms. He inspected all four areas. The initial walkaround took 45 minutes, not including time for bulk sampling. He observed the conditions of the area, the building, the pipe insulation and the garbage. (Tr. 350). During his inspection of the basement, Mr. Stutz wore a half-mask respirator, PPE, including a Tyvek suit with a hood, a hard hat, gloves and booties. He also took precautions on his subsequent visits. (Tr. 351).

On his initial visit he was accompanied by Ed Krasinski of the NY Asbestos Control Bureau (Tr. 352) and by Mr. Sperrazza. The area was dark, and Mr. Krasinski had a large flashlight. Mr. Krasinski was more familiar with the area because he was there before. (Tr. 352). The structure was in some disrepair. There were piles of garbage in just about every room. The pipe insulation was in various conditions. In some places, it had deteriorated to the point that insulation was missing. There were places where debris on the floor was of the same color and material as that which appeared on the pipes. (Tr. 353, 364). In some instances, that material was directly below pipes that were damaged and missing insulation. In his view, the insulation broke down and spread out or scattered in those areas. (Tr. 355). They looked at a section of pipe insulation in Building C that was in poor condition. (Tr. 585). According to Mr. Stutz, the pipe insulation looked as if the covering was hemorrhaging. There were sections of the insulation that were peeling and coming apart. (Tr. 586). In Building D, he saw floor debris that had a "gray corrugated paper-like appearance of a well-known type of asbestos containing material called Aircell, the trade name for a material that has the potential to contain asbestos fiber. (Tr. 410, 587-588). Although Mr. Stutz did not see this material on the pipes in that location, he found the material on a section of pipes in Building C, which had on it a red label that he recognized to be a label that's typically seen on Aircell, (Tr. 587-588).

Mr. Sperrazza told the CO that the pipe was in fair condition. Later he amended that to say that the insulation was, in fact, poor condition. (Tr. 588). Mr. Sperrazza told him that the wrapping had been coming off and it looked like it had been coming apart on top of the insulation. He also said that it appeared that material had come off the pipes and fallen to the floor below. (Tr. 588). Mr. Sperrazza noted that the debris was the same color as the insulation, although he did not see chunks that would fit back on the pipes. (Tr. 591). Mr. Sperrazza speculated that the material might have taken another form, and told Mr. Sperrazza told the CO that he did not test any of the debris for asbestos content. (Tr. 591-592). He said that they had to get the work done ASAP and that was just the way it was. (Tr. 593). Mr. Sperrazza told the CO that during his initial walkaround the basement the pipe insulation was in the same condition as it was on the day of the inspection on June 12. (Tr. 590). He also told the CO that although there were areas with pipe insulation missing, there were other areas where the insulation was intact. Mr. Sperrazza estimated that 5% of the insulation was missing and 95% was intact. (Tr. 591).

There was a Bobcat in the basement of Room D and a Dingo in the basement of Room C. The Dingo was near an elevator shaft and there was garbage and debris piled in that area of the elevator shaft. (Tr. 354). No work was being performed and all work was taking place on the upper floors. (Tr. 354).

He observed the same conditions on June 30, except that he saw what appeared to be a piece of pipe insulation that he had not noticed previously. (Tr. 355). That material was in the northern section of Building B. (Tr. 356). There were places with scrape marks on the floor that indicated that a Bobcat or Dingo had been in the basement. There were also brooms and shovels in the area. (Tr. 353).

Mr. Stutz agreed that, prior to the June 12 inspection, information about the site was obtained from third parties (Tr. 713). He refused to speculate whether changes in conditions in the basement between May 26 and June 12 could have affected his samples. (Tr.716-717). When he went into the basement on June 12, he wore protective clothing and placed air monitoring equipment on himself and operated it for about 3.5 hours, until he exited the basement. (Tr. 722-724). The air monitoring was for his own exposure record and was not for the purpose of proving a violation against Cambria. (Tr. 829). The air monitoring revealed no detectable asbestos. (Tr. 725).

He conducted bulk sampling on June 12, 17 and 30. (Tr. 364). He particularly sampled

the material from the floor that resembled the color and consistency of the insulation of the pipes throughout the basement. So, if there was a pipe with tan insulation and he observed damage to that pipe or missing insulation, he would look for that type of material on the floor. If there was a piece of material, he would collect a bulk sample of it. There was too much material to sample every such piece of material in the basement. He only needed a sample to determine if there was asbestos. (Tr. 364).

Mr. Stutz described his general procedure for obtaining samples. First, he puts on PPE, including respirators, Tyvek suit and gloves. Then he locates material to sample. He then picks up the material, sprays it with amended water, which is a soapy water used in the field to minimize the risk of generating any additional dust from the sample. (Tr. 365-366, 408). He then places the sample into a 20 mm vial and closes the lid. He makes a field notation on top of the vial using a marker and takes photos of the sample location and the sample container. After making sure that the vial isn't contaminated, he places it in a bag for keeping, then removes or changes his gloves. (Tr. 365-366). He used this technique on each day he took samples. (Tr. 366).

The analysis of the sampling was done in Salt Lake City and was recorded on OSHA 91B's. (Tr. 367, Ex. C-22). The sampling taken on June 12, 2009 revealed asbestos in three of the bulk samples. (Tr. 371, Ex. C-22). The asbestos content of the samples testing positive for asbestos was 20, 25 and 40 %. (Tr. 378-379). The results of samples taken on June 17 are reported on Ex. C-23 and also indicate the presence of asbestos. (Tr. 380). The CO summarized the location of each positive sample on Ex. C-19 which is a floor plan of the AM&W warehouse. (Tr. 385).

Mr. Stutz testified that photo Exhibit C-90, taken by Mr. Le, depicts damaged pipe insulation and the ceiling above it. No holes in the ceiling are visible. (Tr. 1267-1270). Similarly, Exhibit S-107 shows damaged pipe with no holes in the ceiling above it. (Tr. 1277, Ex. C-107). Samples taken from below this pipe insulation, tested positive for asbestos. (Tr. 1277).

Mr. Stutz detailed all the samples taken during his various inspections, the dates those samples were taken, and which samples revealed detectable levels of asbestos. (Tr. 646-655, Ex. R-23). Samples taken on June 12, 2009 are circled in blue; those taken on June 17, 2009, are circled in red; and those taken on June 30, 2009 are circled in green. Those samples with no detectable levels of asbestos have their circles filled in yellow, while those samples that revealed

detectable levels of asbestos have their circles filled in orange. (Tr. 651-653, Ex. R-23). Of the 35 samples, twelve tested positive for asbestos. All but ten of those samples came from Building A and two from Building D. No samples tested positive for asbestos from Building B or Building C. (Tr. 654-655).

Mr. Stutz noted that there were sealed tunnels underneath Washington Street to the main building of the AM&A warehouse which fronts Maine St. He was told that, as some point, the tunnels collapsed. (Tr. 656). The CO did not inquire about the tunnels; however he learned from Mr. Sperrazza that there had been an earlier asbestos abatement in and around the sealed tunnels. He observed that there was poly (plastic) near the old tunnels, which usually indicates a prior asbestos abatement. (Tr. 657-658, 667, Ex. R-23).

The CO also reviewed a video of certain areas of the basement he inspected on June 12. (Tr. 394-396, Ex. C-7) At the 3:05 minutes mark to 3:37 minutes, the video shows an area to the left center of Building A. Depicted is a large pipe with damaged and missing insulation. The wrapping was hanging from the pipe and below the pipe was a scattering of debris. Another area is also shown with damaged and missing insulation. (Tr. 394, 396). Mr. Stutz next reviewed another excerpt at the 10:5 minute to 10:29 minute mark, also recorded on June 12 that was taken from Building D, looking into Building C. (Tr. 397). It depicts a large mound of garbage in the passageway between the two rooms and the debris on the floor. A shovel and broom are standing up along the wall. (Tr. 398). Next viewed was a segment taken at the 15:00 to 15:15 mark, also taken on June 12, which depicts debris and damaged pipe insulation in Building C. (Tr. 398-399).

Mr. Stutz testified that Exhibit C-54 is a photograph of damage and missing pipe insulation and floor debris below the pipe in Building A. (Tr. 413). The material on the pipe and the material on the floor below the missing and damaged insulation appeared to have the same color and consistency. He also observed scrape marks and that the material had been scattered, pressed out and pulverized. (Tr. 416, 420). He took a sample (Sample 5) of the material from the floor on June 12, (Tr. 418, 421). Exhibit 56 is a photograph of the vial in which he placed the sample. (Tr. 419). The sample was tested as 20% asbestos. (Tr. 418).

Exhibit C-59 is another photograph of a sample taken from Building A on June 12, 2009. (Tr. 427). Field Sample number 006 (Lab Sample number D62799)<sup>7</sup> was taken because it resembled in color and consistency, the insulation on the pipe above. (Tr. 428, Ex. C-57). The

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<sup>7</sup> The exact location of where these samples were taken are indicated on the schematic of the basement. (Ex. C-19).

sample was taken from material on the floor that was broken down, pulverized, and spread across the area. Testing of that material indicated that it had an asbestos content of 25%. (Tr. 428). Mr. Stutz noted that photo Ex. C-59 shows a boot print within the material. (Tr. 430). Because both he and Mr. Krasinski avoided touching the material, he opined that the footprint was evidence that employees had walked through the debris. (Tr. 430-431).

Ex. C-82 is a photograph taken by Dinh Le on June 17, 2009 of material on the ground that was sampled from a corner of Building A. (Tr. 446-447). Although the photograph was taken on June 17, Mr. Stutz testified that he first observed these conditions on his June 12 inspection. (Tr. 446). The sample was taken because there was missing insulation on the pipe above it, and the material in the debris that was sampled resembled the pipe insulation in color and consistency. (Tr. 447-448). Analysis of this sample, labeled as Field Sample 012 (lab sample D63012), indicated an asbestos content of 15%. (Tr. 447).

Mr. Stutz testified that Ex. C-28 is a list of Cambria employees that were working in the AM&A warehouse basement. (Tr. 569). This list was received by fax from Cambria. (Tr. 569). During his opening conference with Eric Sperrazza and Joe Ferrucci, he was told that there had been work in the basement that involved demolition, and the cleanup of loose debris and garbage. (Tr. 574). Also, there had been work going on in the upper floors that involved the removal of floor tile. (Tr. 574).

Turning to Item 1, Mr. Stutz testified that Cambria was cited for a Willful violation of 29 C.F.R. §1926.1101(e)(1) because employees were exposed to asbestos in the basement and, on June 12, Mr. Sperrazza told him that they did not establish a regulated area which included barriers or cordoned off barriers, or something to represent a regulated area. (Tr. 603). The item alleged that Class I asbestos work was being conducted. (Tr. 780-781). According to the CO, all the employees listed on Exhibit C-28 were exposed to the violation. The violation was classified as Willful and a penalty of \$44,000 was proposed. (Tr. 606). Mr. Stutz testified that the penalty is gravity based. Gravity is based on severity and probability of an accident. (Tr. 606-607). He explained that “severity” is based on the potential results of the hazard. (Tr. 606-607). This violation was determined to be of “high lesser.” (Tr. 607). According to Mr. Stutz, the violation resulted in a severe hazard because employees were exposed to the inhalation of asbestos fibers that can cause lung cancer, asbestosis and death. (Tr. 607). Based on the gravity, OSHA came up with a \$55,000 penalty. (Tr. 608). With only 60 employees, Cambria was considered a small

employer and given a 20% credit for size. (Tr. 608, 610, 814). No reduction was given for history because Cambria had been cited within the previous three years for a serious violation. (Tr. 608). No credit was given for good faith because, under OSHA procedures, no credit for good faith is given for Willful violations. (Tr. 608).

Regarding Item 2, Mr. Stutz testified that Cambria was cited for a violation of 29 C.F.R. §1926.1101(f)(2)(i) because Mr. Sperrazza told him that no asbestos exposure assessment or air sampling had been performed. (Tr. 611-612). Mr. Sperrazza was familiar with the requirements of the standard. The CO determined that all seven employees listed on Ex. C-28 were exposed to the hazard because Mr. Sperrazza told him that those employees were working in the basement. (Tr. 612-613). The CO noted that there was no classification of the type of work involved in Item 2. (Tr. 815). He testified that he considered the same factors in determining that Item 2 was willful as he did for Item 1. (Tr. 815). According to the CO, he considered Mr. Sperrazza to be a competent person, yet he did not conduct an exposure assessment either before or after the operation was performed. (Tr. 817). This violation was cited as Willful and a \$44,000 penalty was proposed. The severity was deemed to be high because of the potential that asbestos would be inhaled which could cause lung cancer, asbestosis and death. (Tr. 613). He explained that without an exposure assessment, there is no knowledge of the level of exposure and no determination can be made to initiate controls if such controls had not been put in place. (Tr. 613). The manner of calculating the penalty was the same as for Item 1. (Tr. 613).

Item 3 alleges a Willful violation of 29 C.F.R. §1926.1101(g)(1)(i) because Cambria did not use HEPA vacuums with HEPA filters to clean up and collect dust and debris containing asbestos. (Tr. 614). Mr. Stutz testified that Mr. Sperrazza told him that the basement cleanup was conducted using brooms, shovels, Bobcat and Dingo loaders. (Tr. 615). Mr. Sperrazza also told the CO that Cambria employees were exposed to the hazard. (Tr. 615-616). Mr. Stutz testified that the term “removal” as used in the standard is misleading. If there is a disturbance or cleanup of asbestos, HEPA Filter Vacuums are required for cleaning up a collection of debris and dust. (Tr. 816). He agreed that if there was no asbestos removal and no disturbance, there would be no cleanup and HEPA Vacuums would not be required. (Tr. 816). OSHA proposed a penalty of \$44,000. Mr. Stutz testified that the penalty was calculated in the same manner as Items 1 and 2. (Tr. 616). The severity of the violation was high and created a severe hazard. As in the first two items, the hazard involved inhalation of airborne asbestos, possibly resulting in lung cancer,



asbestosis and death. (Tr. 616).

Item 4 alleges that Cambria willfully violated 29 C.F.R. §1926.1101(h)(1)(i) because Mr. Sperrazza told him that Cambria's employees working in the basement were not provided with proper respiratory protection when working with asbestos. (Tr. 617). The item relates to Class 1 asbestos work. However, Mr. Stutz could not state whether the employer would be required to provide a respirator if there was no asbestos removal, disturbance or cleanup. (Tr. 819-820). The same seven employees listed on Ex. C-28 were exposed to the hazard. (Tr. 617). The proposed penalty of \$44,000 was computed in the same manner as the prior violations. (Tr. 617). The severity of the violation was considered to be high because the lack of proper respiratory protection could result in the inhalation of asbestos fibers and result in lung cancer, asbestosis and death. (Tr. 618).

The CO testified that Item 5, alleging a Willful violation of 29 C.F.R. §1926.1101(i)(1), was cited because Mr. Sperrazza told him that employees working with asbestos did not wear protective clothing, such as Tyvek coveralls. (Tr. 618-619). Mr. Stutz testified that the failure to wear protective clothing could result in asbestos fibers attaching to regular clothing and that fibers attached to such clothing can be carried to locations where they can be inhaled by individuals. (Tr. 620). The CO testified that even if there were no asbestos removal, disturbance or cleanup, there still might be circumstances that would require protective equipment to be worn. (Tr. 820). Mr. Sperrazza told the CO that he was aware of the requirement for protective clothing. (Tr. 624). The potential hazard of this violation is lung cancer, asbestosis and death. (Tr. 620). On this basis, the severity of the violation was deemed to be of high severity. (Tr. 619). The same seven employees listed in Ex. C-28, who were working in the AM&A warehouse basement were exposed to the hazard. (Tr. 619). The \$44,000 penalty proposed for this violation was calculated in the same manner as the previous items. (Tr. 619).

Item 6(a) alleges a Willful violation of 29 C.F.R. §1926.1101(k)(3)(ii)(b) because Cambria did not inform employees of the location and quantity of asbestos containing material in the work area and of the precautions to be taken to insure that the airborne asbestos was confined to that area. (Tr. 620). Mr. Sperrazza told the CO that he only told employees not to make contact with the pipes because they contained asbestos. (Tr. 620). According to the CO, this was not sufficient to inform employees of measures to prevent the generation of asbestos fibers. (Tr. 621). Mr. Stutz testified that the violation presented a severe hazard because, without the

information, employees lack the information necessary to prevent the generation of asbestos fibers. (Tr. 622). Mr. Stutz testified that if there was no asbestos containing material or presumed asbestos containing material in the basement, the cited standard would not have been applicable. (Tr. 821-822). The violation was considered to be of high severity because exposure could lead to lung cancer, asbestosis, and death. (Tr. 622). All of Cambria's employees listed on Ex. C-28 were exposed to the violative condition. (Tr. 621). The penalty of \$44,000 was proposed for the violation was calculated in the same manner as the previous violations. (Tr. 621-622).

The CO testified that Item 6(b) alleged that Cambria willfully failed to comply with 29 C.F.R. §1926.1101(k)(8)(i) because there were no visible asbestos labels in the basement area. Mr. Sperrazza told him that no labels had been put into place. (Tr. 622). Mr. Sperrazza also told him that he was aware of the requirements of the standard. (Tr. 623). Mr. Stutz testified that it is the responsibility of the contractor, not the owner, to install labels on asbestos products. (Tr. 822). The purpose of the labeling requirement is to pre-warn employees so that they can stay away from asbestos products. (Tr. 822). The violation was deemed willful. (Tr. 623). There was no separate penalty proposed for this item, because it was combined with Item 6(a). (Tr. 623).

Items 7-11 all alleged Willful violations of 29 C.F.R. §1926.1101(k)(9)(i) on the grounds that Cambria failed to train the employees who were working with asbestos. (Tr. 624-634). Specifically, the exposed employees were [redacted]. (Item 7); [redacted] (Item 8); [redacted] (Item 9); [redacted] (Item 10); and [redacted] (Item 11) (Tr. 628-633). The CO testified that employees need to be trained on the hazards of asbestos and how to protect themselves to prevent exposure. Without such training, employees can be exposed to asbestos fibers which can be inhaled into the lungs and cause lung cancer, asbestosis, and death. (Tr. 626). For each of the employees cited, the CO testified that he was told by Mr. Sperrazza that they were not trained in asbestos. (Tr. 625, 628, 629, 632, 633).

[redacted] told him directly that he had not received any asbestos training. (Tr. 630). The CO noted that [redacted] had been previously trained in asbestos. He opined, however, that the training was insufficient because it had occurred years before and was not annual or otherwise up to date. (Tr. 626-627). He noted that even where it is ultimately determined that there was no asbestos, the cited standard might apply where the material involved had been presumed asbestos containing material ("PACM"). (Tr. 828). Each item was cited as Willful with a proposed penalty of \$44,000. The penalties were calculated in the same manner as the previous items. (Tr. 626-

633). The CO testified that OSHA proposed a separate penalty for each employee under the OSHA egregious policy. (Tr. 634). The CO noted that the standard requires that each employee who performs asbestos operations be provided training. Therefore, where there is intense or plain indifference, the egregious policy allows each exposed employee to be cited on a “per employee” basis. (Tr. 634-635).

Mr. Stutz also testified that the violations were characterized as Willful largely on the basis of what he was told by Mr. Sperrazza. (Tr. 669). Although he did not get specific, the CO testified that there were other factors that went into the determination that the violations were willful. (Tr. 670). However, on the training violations, he also considered information he received from the employees. (Tr. 671). Mr. Stutz testified that the determination to classify the violations as Willful was made by personnel above him after a group discussion in which he took part. (Tr. 851).

Mr. Stutz explained that Class I asbestos work covers a range of work. (Tr. 789). Here, he determined that the employees were engaged in distributing asbestos containing material. They were distributing and cleaning up the material using a Bobcat Loader, Dingo, shovels, brooms, and walking through it. (Tr. 790). It was his understanding that the work flow involved gathering the debris and garbage and pushing it to Building C to be put into the elevator shaft and then pulled out by a mini-excavator on the first floor. (Tr. 794-795). When asked for the facts that supported the conclusion that Class I work was involved after May 27, Mr. Stutz replied that he had no part in the discussions or the decision making process that led OSHA to its conclusion. (Tr. 797-799). Mr. Stutz testified that the Willful characterization was based on Mr. Sperrazza’s knowledge of the OSHA regulations, his awareness that asbestos was being disturbed and the potential for employee exposure. (Tr. 800).

Mr. Stutz testified that, when in Building A, he looked at the ceiling. He looked up every time he checked the damaged pipes and never saw any holes in the ceiling. (Tr. 357,1264). He saw no wood supports or rebar and saw no wire mesh. (Tr. 1265-1266). He pointed out that he spent about 45 minutes in Building A on both June 12 and 17, and approximately 50 minutes in Building A on June 30. (Tr. 1264-1265).

### **Jonathan Morris**

Jonathan Morris has been a partner in the architectural, engineering and interior design firm of Camina, Wood, Morris, located in Buffalo, NY, for seven years. (Tr. 476-477). His firm

was hired to design the redevelopment of the AM&A warehouse. (Tr. 476). The project involved the demolition of one building, the reconstruction of the remaining three buildings, and the redevelopment of the parcel into commercial office space and the upper four floors into residential apartments. (Tr. 477-478) He was the partner in charge of the project and it was his responsibility to oversee the design work and to manage the personnel in his office that are responsible for developing drawings and specifications. (Tr. 477).

Mr. Morris testified that he had many occasions to visit the warehouse. He identified the plans for the demolition of the basement. (Tr. 491; Ex. C-3, No. DA100). These plans were drawn up under his direction and supervision. (Tr. 492). He noted that, on the plans, there is a star next to the number 12 in each of the rooms. That means that throughout the basement there were pipes, ductwork, various old mechanical systems and infrastructure that were insulated with asbestos-containing materials. (Tr. 547). He further noted that the placement of numbers under the star indicates that it refers to the entire area identified by room name. If the star indicates a specific object or spot, there is an arrow that points to that particular location. (Tr. 549).

Mr. Morris testified that the document, dated May 22, 2009, represents the final plan submitted to obtain permits. However, during construction, things arise that require changes, and the plans were modified several times through August 2009. (Tr. 517-520). The demolition permit was issued on October 28, 2009. (Tr. 521).

He also identified the specifications manual for the demolition portion of the additions and alterations to the AM&A lofts prepared by his firm. (Tr. 531, Ex. C-4). Also dated May 22, 2009, the document contains the pre-demolition Asbestos Survey prepared by 56 Services, Inc., with the testing performed by JMD Environmental Services. (Tr. 531, 539). He noted that the City of Buffalo requires that any demolition project coming before them have an asbestos testing survey performed prior to demolition. (Tr. 532). It is his understanding that a copy of the specifications manual was sent to Cambria in the ordinary course of business. (Tr. 533).

### **Eric Sperrazza**

Eric Sperrazza worked for Cambria from September 2006 through August 2009 where he performed asbestos abatement and demolition. (Tr. 854). Prior to coming to Cambria, he had 16-17 years experience in the asbestos industry. He first received his asbestos supervisor license in 1991. (Tr. 912). He has worked on approximately 50 asbestos jobs. On 70% of those jobs, he was

an asbestos supervisor. (Tr. 913).

While working for Cambria he was an asbestos supervisor and was the “competent person” for asbestos work. (Tr. 855-856). As an asbestos supervisor, he received all documents, ordered and obtained supplies for the job and got the proper equipment. (Tr. 856). To earn the Asbestos Supervisor Certificate, he took an initial 5-day class. To maintain the certificate he was required to take annual 8-hour classes. (Tr. 856). In those classes, he learned the health effects of asbestos. He learned that asbestos could cause mesothelioma, asbestosis, and cancer, mainly through inhalation. Also, he learned that bringing home asbestos fibers on clothing could contaminate the worker’s family. (Tr. 857). He learned about PACM (presumed asbestos containing material). These are materials that have been used and identified as asbestos in various vocations, such as pipe insulation, refractor covering and floor tile. He learned that this material must be treated as containing asbestos unless tested to prove otherwise. (Tr. 858). He was also aware of Thermal System Insulation (TSI)<sup>8</sup> which is asbestos material that comes in different forms of vessel coverings. (Tr. 858). The work practices when working with TSI and TSI debris is to wear PPE. (Tr. 858). He also learned about wet methods and amended water when working with asbestos. He explained that amended water is a solution that is misted. (Tr. 859). He further learned that people who work with asbestos must be licensed asbestos workers, which is different from an asbestos supervisor. (Tr. 859). Asbestos workers cannot supervise an asbestos job. (Tr. 859). To become a Licensed Asbestos Worker, an employee must take a 4-day course that must be renewed annually. (Tr. 859).

PPE includes respirator, protective clothing and disposable clothing, such as a Tyvek suit. (Tr. 860). Mr. Sperrazza testified that there are different types of respirators, such as half-day, full-face, or PAPR (Power Air Purifying Respirator). The decision on which type to use is determined by the asbestos supervisor by using personal air monitoring (Tr. 860). The default choice is PAPR. Also, when working with TSI, protection defaults to the highest level of safety. (Tr. 861).

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<sup>8</sup> Under 29 C.F.R. §1926.1101(b):

*Surfacing material* means material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials or surfaces for acoustical, fireproofing, and other purposes).

*Surfacing ACM* means surfacing material which contains more than 1% asbestos.

*Thermal system insulation (TSI)* means ACM, applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain.

*Thermal system insulation ACM* is thermal system insulation which contains more than 1% asbestos.

According to Mr. Sperrazza, New York State Code 56, (the NY asbestos law) is more stringent than the OSHA regulations and requires an Asbestos Survey that that must be performed by someone licensed in New York. (Tr. 915). The Asbestos Survey must identify the type, quantity and location of the asbestos. (Tr. 916). As an asbestos supervisor, he takes the Asbestos Survey, goes to the site and makes his own evaluation based on that survey. (Tr. 916). He made such an evaluation in this instance. (Tr. 916).

Mr. Sperrazza testified that he worked in the AM&A warehouse in May-June 2009. In the first week of June he temporarily left for another Cambria job in Brockport. He was gone for approximately five days, from June 3 to June 8. (Tr. 862-863). During that period, his job was taken over by Mr. Ferrucci. (Tr. 863).

According to Mr. Sperrazza, the first part of the job was to remove garbage from the building, including the basement. (Tr. 863, 866). The AM&A warehouse was five multi-story buildings together. (Tr. 864-865). Until the taking of his deposition, he could not recall ever seeing a floor plan. (Tr. 865). However, he recognized Ex. C-19 as the general layout of the basement level of the warehouse. Non-friable asbestos flooring was present only in the upper floors. (Tr. 867) There were plans to abate the asbestos on the pipes, which included TSI. (Tr. 867-868).

There was an asbestos subcontractor on the site that was subcontracted by Cambria and was to perform the asbestos abatement. (Tr. 868, 938). As an asbestos supervisor, he had the responsibility for telling another contractor where to work and when. (Tr. 868). The sequence of the work was that Cambria employees would remove the garbage and then the subcontractor would come down and perform the abatement. (Tr. 940).

Mr Sperrazza testified that before he started trash removal, he reviewed the Asbestos Survey. (Tr. 869, Ex. C-1). From the Survey, he learned that there was approximately 1500 feet of asbestos covered pipe in the basement. The insulation was TSI and friable. (Tr. 870). He explained that "friable" means that the material can be reduced to powder. (Tr. 870). The Survey did not say where the asbestos pipe was located, only that it was located throughout the basement. Because of the time lapse between the Survey and the onset of work, he walked through the basement to confirm what was in the report. Mr. Sperrazza characterized this as the prudent thing to do, and something that is his practice as an asbestos supervisor. (Tr. 924). He also walked through the entire building to confirm and check the conclusions of the Survey. (Tr.

925). He conducted the walkthrough of the basement, guided by a flashlight because the lights in the basement were not working. (Tr. 871-872). There was nothing in the Survey that talked about asbestos debris on the basement floor. (Tr. 924, Ex. C-1). As an asbestos supervisor, this meant that there was no suspect material in or around the floor of the basement.

Mr. Sperrazza noted that the Survey contained a footnote which stated “Piping insulation is located in separate basement structures though out the basement access to some areas was incomplete and amounts should be verified prior to abatement.” (Tr. 962, Ex. C-1) He testified that he kept this footnote in mind when conducting his walkthrough of the basement. (Tr. 963). He was not able to determine from the Survey, and he did not inquire into which areas of the basement were not surveyed. (Tr. 963-964).

During the walkthrough, he was looking for the asbestos insulated pipes. Mr. Sperrazza recalled that he looked at every room but one. (Tr. 872). He also looked at the trash that was to be removed, which included a multitude of items, including paper, wood, plastics, clothing, boxes and garbage. (Tr. 873, 935). None of the garbage was connected at any point to the ceiling. (Tr. 935).

When he did his walkthrough, he found the asbestos insulation to be tight and intact. (Tr. 874). However, he did notice that in a few areas there was missing insulation. (Tr. 874, 931, 969). Mr. Sperrazza questioned what happened to a missing piece, but did not ask about it. (Tr. 969). He did not observe any pipes on the ground. (Tr. 930). He investigated to see if insulation had fallen off and if it was below or around the pipes. (Tr. 931). He saw none on the ground which was consistent with the Survey. (Tr. 931). He looked for asbestos debris on the floor in those areas that were not covered by garbage and at the top of the garbage. He did not move garbage around because nothing was said about garbage in the Asbestos Survey. (Tr. 875). He was trying to confirm both the linear footage of the pipes and its condition. (Tr. 931). What he found confirmed the Survey. (Tr. 931) In Building D he saw fittings that appeared to be ACM or PACM. (Tr. 965).

Mr. Sperrazza also observed that the pipes in Building D had fiberglass piping. The ceilings in Building A and C were about 10-feet high, and that in Building B was 8-9 feet high. (Tr. 936). The pipes in both Buildings B and C were suspended by hangers. (Tr. 937). He concluded that the garbage could be taken out without impacting the piping. (Tr. 937-938).

Mr. Sperrazza saw an old abatement on the west side of the building by Washington

Street. (Tr. 932, 981). This meant to him that asbestos removal had been performed. (Tr. 931). Apart from the presence of plastic (poly), there was no information about a prior abatement. (Tr. 981). If there had been prior abatement, there would have been both containment and air sampling. (Tr. 931). He explained that containment consists of plastic used to isolate the contaminated area from other areas. (Tr. 933). He could not tell how long the plastic had been there. (Tr. 981). When asbestos is removed, air sampling is required on the air both inside and outside the area. Before abatement, sampling is performed to obtain a baseline that shows any asbestos contamination in the air. (Tr. 933). Post-abatement sampling is performed to demonstrate that the air is cleared of asbestos. (Tr. 933). Although Mr. Sperrazza assumed that air monitoring was performed, he never saw the results of that monitoring and had no idea if it was done correctly, or even done at all. (Tr. 982).

Based on his investigation, he concluded that the Survey was correct and the work could proceed. (Tr. 934). In his opinion, the added presence of a prior abatement compounded the safety of the area to be worked. Therefore, he decided to go ahead and clean the garbage out of the basement. (Tr. 875-876). Mr. Sperrazza stressed that they were just performing housekeeping and that the work required no demolition at all. (Tr. 934). Trash removal lasted 4-5 days, from the last week of May to the first week of June. (Tr. 869).

When first starting the job, Mr. Sperrazza mentioned to the crew that there was asbestos on the pipes. He tried to explain to them the difference between fiberglass and asbestos insulation, but the employees were confused, so he told them to just stay away from all of the insulation. (Tr. 880, 940-941). His warning also meant that the employees were not to touch the pipes. (Tr. 880, 941). To the best of his knowledge, nobody cut the clasps on the pipes. (Tr. 881). He never gave the crew a vacuum, did not set up a containment, and did not provide PPE because they were not doing asbestos abatement. (Tr. 881). Also, the employees were not licensed asbestos workers and were not part of any union of asbestos workers because they were not doing asbestos abatement. (Tr. 882).

Mr. Sperrazza explained how the basement work proceeded. Employees used a Bobcat, Dingo, brooms and shovels. They used the Bobcat and Dingo to push the debris to the elevator shaft. (Tr. 878). When it got to the elevator shaft, it got scooped up with an excavator. (Tr. 879, 951). The Bobcat and Dingo had buckets in front of them. With the buckets down, they pushed the debris and cleared a path. (Tr. 880). There was a separate aisle for the machines to go.



However, they still probably ran over some debris. (Tr. 880). There was hand work involved, moving metal things like racks and anything with metal. (Tr. 879). The metal was separated by hand (Tr. 879). The metals would be segregated to the north side of Building D. Instead of going to the dumpster, they got recycled. (Tr. 956). Building D contained more metal than garbage. (Tr. 957).

The trash removal was interrupted by the New York State Department of Labor who shut down the job. (Tr. 877). The job was resumed after they obtained a variance. (Tr. 878). To the best of his knowledge, Cambria obeyed the shutdown order. After the job was shut down, he did not send employees to the basement and did not go to the basement himself. (Tr. 878).

Mr. Sperrazza kept a log because there was asbestos abatement going on elsewhere on the site. (Tr. 883, Ex. C-121). The maintenance of a log book is a state requirement. (Tr. 883). He did not conduct a negative air assessment in the basement because they were not planning on removing any asbestos at that point. (Tr. 903-904).

Mr. Sperrazza stressed that, if there was asbestos, he would have been exposed. He knows the affects of asbestos and would not have knowingly exposed himself and his family. (Tr. 941-942). He also testified that the presence of asbestos did not affect their compensation. (Tr. 943). Moreover, nobody in Cambria suggested that he “look the other way.” In any event, he would not have ignored the asbestos if asked because it would have put himself and his employees in harm’s way. (Tr. 943). There was no hard deadline for completing the work. (Tr. 944). He never changed his view that it was safe to remove the garbage without treating it as asbestos. If he saw a change in the insulation over the pipes, he would have removed the employees from the basement. (Tr. 947). Had there been a disturbance to the asbestos or a change in conditions, he would have followed the procedures set forth in the Code 56 Regulations. (Tr. 948).

According to Mr. Sperrazza, an incidental disturbance is an unplanned event, such as the asbestos getting hit. Incidental disturbances are covered by Rule 56. (Tr. 948). He has been in situations where there are incidental disturbances. (Tr. 949). Prior to leaving the basement, he was not aware of anything that made him suspect that the pipe insulation had been subject to a disturbance or incidental disturbance. Similarly, before leaving the site, he saw nothing in the garbage that he suspected was from the pipe insulation that contained possible ACM. (Tr. 961). He also noted that the work did not generate dust. The conditions in the basement were damp and

there was water in the basement. (Tr. 949).

Mr. Sperrazza testified that during his walkaround with Mr. Stutz, he found that there was a room that he missed under sidewalk area one. He did not recall Mr. Stutz being critical for his having missed that room. (Tr. 959, 960).

### **Daniel Thomas Crane**

Mr. Crane testified as the Secretary's expert witness on asbestos. (Tr. 1059, 1060, 1088, 1089, 1090, 1091). He is the lead physical scientist for the Methods and Investigations group of the Salt Lake Technical Center. (Tr. 1056). He has been with the Center since 1977. (Tr. 1056). Mr. Crane has a BS in physics, a BS in material science and engineering, and a Masters of Engineering and Material science from the University of Utah. (Tr. 1056-1057). He was involved in writing and developing the technical parts of the 1984 OSHA asbestos standard, particularly the appendices A, B, K, and parts of the preamble. (Tr. 1057). He has done work characterizing the microstructure of asbestos and how it reacts in particular materials. (Tr. 1057). He also worked on or developed directly the testing methods used in industry, both light microscopy and electron microscopy. (Tr. 1057-1058). He has published scientific papers on asbestos and microscopic methods, and has authored a chapter of a textbook on asbestos as well as an encyclopedia article (Tr. 1058). Mr. Crane has testified before as an expert on asbestos. (Tr. 1058-1059). This expert testimony occurred more than five years ago. (Tr. 1062). Mr. Crane's CV was entered into evidence as Ex. C-46. (Tr. 1060, 1069).

Mr. Crane explained that the "asbestos" is a commercial term, not a mineralogical term. It encompasses several minerals and their fibers. These minerals exhibit a growth form called "asbestiform." (Tr. 1069). The minerals are chrysotile, cummingtonite-grunerite (also known as amosite), crocidolite, riebeckite, tremolite, actinolite, and anthophyllite. (Tr. 1070). Asbestos fibers are long and thin and have a long aspect ratio (meaning length to width). They are easily parted, but very strong along their length, which makes them an ideal additive in a composite material. (Tr. 1070). Also, they are very thin and made up of fibrils that can be as thin as 500 atoms across. (Tr. 1070). They are not subject to corrosion, are fire proof and do not decay. (Tr. 1071). While along its length it is stronger than a mild steel, it can be easily parted sideways. (Tr. 1071).

Asbestos is added to a whole variety of materials, including vinyls in flooring, magnesia

in spread insulations, cotton fabrics, papers, and glue materials. According to Mr. Crane, there are tens of thousands of different uses for asbestos and each one calls for a different matrix<sup>9</sup> or material into which it's added. (Tr. 1071)

Mr. Crane testified that asbestos can become airborne when a gust of air blows it into the air, or by overhead vibration or when it's moved. (Tr. 1072). Whether an asbestos matrix can become airborne depends on the nature of the matrix. (Tr. 1072). Also, the condition of the matrix matters. If the matrix tightly bonds the asbestos fibers or if it is covered over in some way, the fibers won't be released in any significant numbers. However, if the matrix is loosely bonded to the asbestos and it decays, it is more easily released into the environment. (Tr. 1073).

Based on the settling velocity of various sizes of fibers, it can be calculated that fibers may take days or even weeks to settle down. However, because the fibers are so small, there are air currents that can keep them suspended indefinitely. Smaller particles stay suspended in the air longer than the larger fibers. (Tr. 1074). However, even the tiniest particles can cause harm and can be measured through air monitoring. (Tr. 1074). To be seen and measured, the tiniest particles usually require an electron microscope. (Tr. 1074-1075).

According to Mr. Crane, humidity does not really affect asbestos. (Tr. 1075). Asbestos fibers are hydrophobic, which means that they hate water. Therefore, they are difficult to wet. To be wetted a surfactant is used. (Tr. 1075). When wetted in a matrix, the wetted material will help a lot of particles stay in place. As a result, when thoroughly wetted with an amended water solution, fewer fibers are measured. (Tr. 1075-1076).

Mr. Crane explained that there are three primary effects of asbestos exposure are lung cancer, brochogenic cancer, mesothelioma, and asbestosis. According to Mr. Crane, asbestosis is a non-cancer result of exposure, characterized by a stiffing of the lungs. Its hallmark is pleural plaques, which are whitish plates on the lungs that can be seen in X-rays. In asbestosis, the lungs become inelastic, unable to expand and take in air, causing a decrease in the amount of oxygen available to the body. (Tr. 1076). Lung cancer refers to cancer inside the lung and is caused by the fiber itself. (Tr. 1076). Mesothelioma is cancer of the lining of the lung. (Tr. 1077). According to Mr. Crane, these are progressive diseases. Once exposure occurs the diseases progress, even in the absence of further exposure. (Tr. 1077). The onset of the disease can be

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<sup>9</sup> Mr. Crane explained that a "matrix" is a material into which asbestos is added. In the aggregate its all of the things except the asbestos. (Tr. 1071-1072).

anywhere from 30-50 years after exposure. (Tr. 1077).

At the current Permissible Exposure Level (PEL), a person exposed would have an excess death rate of six per thousand. (Tr. 1078). Higher exposure levels would result in a higher death rate. (T. 1078). Smoking increases the severity of the diseases anywhere from 50-90 times. (Tr. 1079). Records upon which quantitative risk assessments are based have exposures as short as one day. However, two weeks is not uncommon in the database. (Tr. 1079).

Mr. Crane testified that in 1986, OSHA imposed the requirement of negative air areas where asbestos fibers would be contained into the work area. Also, special clothing was to be provided and material wetted to lower the amount of asbestos in the air. Additionally, a variety of work practices were imposed by the new OSHA standard. (Tr. 1082). Before 1986, the high levels of aggregate exposure without controls in the demolition industry ran 80-90 fibers per cc of air. (Tr. 1082, Ex. C-47at p. 18). The average was 1.2 fibers per cc, which is about 12 times the current PEL. (Tr. 1082-1083). Even with current work practices, OSHA still sees a significant number of exposures in the demolition industry above the PEL. (Tr. 1083).

Samples reviewed from the AM&A warehouse worksite were consistent with commercial asbestos insulation materials. (Tr. 1086). Based on the photographs, the samples presented, the representation that there was dust and a disturbance of asbestos containing materials, he concluded that there was a reasonable expectation that employees might be exposed to asbestos above the PEL. (Tr. 1091-1092, 1094). Mr. Crane testified that the absence of dust would not necessarily alter his conclusion. (Tr. 1095). He explained that dust can be too small to be seen. Thus, visible dust is not a prerequisite for measuring a positive result for asbestos. (Tr. 1095).

The photos showed that the insulation on the pipes was deteriorated. (Tr. 1095). There was a potential for building and traffic vibrations that could shake down material. Unless it has been cleaned up, there would be material on the floor that came from above. (Tr. 1095). It was his opinion that the photographs showed material on the floor that appeared to have come from above. The disturbance of either the pipes or the material on the floor could result in asbestos fibers getting into the air. (Tr. 1095). He could not tell if the presence of a lot of trash or debris in the room had any effect on his conclusion. (Tr. 1095).

Mr. Crane testified that every personal air sample taken by COs Le and Stutz came out negative for asbestos. This result did not affect his conclusion regarding asbestos in the basement. He noted that the sampling occurred after the active work happened and is not

reflective of asbestos fibers that could have been in the air when work was progressing. (Tr. 1107).

Mr. Crane never went to the site, and all the information he relied on was outside his personal knowledge. (Tr. 1097). He knew nothing of the competency of the person who took the samples. (Tr. 1098-1099). He noted that asbestos is ubiquitous and was used in most buildings more than 50 years old. (Tr. 1101).

## **2. Respondent's Witnesses**

### **Dinh Le**

Dinh Le is an industrial hygienist with OSHA. (Tr. 1118-1119). On June 17, 2009, he accompanied Mr. Stutz in the basement of the AM&A warehouse. He had a camera and took pictures at the site. (Tr. 1119). He testified that he took pictures of the site while Mr. Stutz took samples. (Tr. 1131). Looking at the floor plan of the basement with the location and number of the samples indicated, Mr. Le testified that on June 17, in Building A, only four samples were taken (sample #s 012, 013, 014, and 015). (Tr. 1133). Photo exhibit R-149 shows the location where samples 014 and 015 were taken. (Tr. 1134). He agreed that photo exhibit R-148 was taken in the same general location. (Tr. 1137).

### **William Eichorn**

William Eichorn is currently the estimator project manager for Cambria. (Tr. 1140). He testified that someone in the field requested a variance for incidental disturbance. As a result he contacted Raj Chopra to prepare the variance. (Tr. 1142). He identified Exhibit C-9 as the variance application sent to him from Raj Chopra on June 4, 2009. (Tr. 1141-1142). He could not prepare the variance application himself because, under NY State DOL rules, only a project designer can apply for a variance. (Tr. 1142). The variance was requested because a New York DOL inspector stopped the job because he perceived that there was an incidental disturbance of asbestos on the site and he would not let work proceed until they applied for a variance. (Tr. 1143). Mr. Eichorn explained that, that his understanding is that an "incidental disturbance" occurs if asbestos is disturbed in the course of work or if there is previously undiscovered asbestos; for example, behind a wall, and the wall is torn down and asbestos is discovered. (Tr. 1144).

He could not recall making any comment about page 2 of the variance application (Ex. C-9) which states that the project consists of the cleanup of friable asbestos containing materials in the basement that had degraded over the past 10 years and had 750 square feet of contaminated debris and 1500 linear feet of piping, (Tr. 1148).

Mr. Eichorn testified that he did not test the materials identified as containing asbestos because there was no point in testing. Once the State says that a variance is required to continue work, there is no other option but to petition for a variance. (Tr. 1143). He pointed out that filing for a variance does not mean that Cambria was in agreement with the State. (Tr. 1145).

Mr. Eichorn testified that he does not have any asbestos certification and did not make an independent determination if there had been an incidental disturbance. (Tr. 1146).

### **Joseph Ferrucci**

Joseph Ferrucci is a field superintendent for Cambria, and was a superintendent on the AM&A warehouse project. (Tr. 1152). He identified a "Notice of Asbestos Abatement" that was placed on doorways. (Tr. 1153). This particular notice was posted at the AM&A warehouse building and lists the asbestos materials that were to be abated in the building. (Tr. 1153). There were several such notices posted at the warehouse on exterior doorways entering the building. (Tr. 1155). He explained that they were posted on exterior doorways to inform people that there is asbestos on the site. (Tr. 1155-1156). He testified that he saw a similar notice on a doorway on the ground floor above the basement level on the west side of the warehouse by the sealed tunnel. (Tr. 1156). The doorway was used for employee ingress and egress. (Tr. 1156).

He testified that the New York Dept. of Labor stopped the work in the basement at approximately 7:00 a.m. on June 3, 2009. (Tr. 1158). They immediately stopped work and ribboned off the area with caution tape. (Tr. 1159). At that point, no employees were allowed into the basement area. (Tr. 1159). Once work was stopped in the basement, they worked on the first floor, above the north side of the basement, above Building A. (Tr. 1160). Mr. Ferrucci testified that the floor in Building A was disrupted. There was floor tile in a small area. (Tr. 1161, Ex. R-152 in document DA-101, marked with green hash mark). The tile was asbestos floor tile and it was treated like asbestos. (Tr. 1183). Underneath the floor tile was tongue and groove sheeting. The wood was about  $\frac{3}{4}$  to one inch thick. (Tr. 1166). Because of its condition, they began to remove the flooring. They used a small Bobcat skid-steer machine and tried to lift the

tongue and groove flooring off the concrete floor. (Tr. 1167). They ran into a problem when the Bobcat began breaking through the floor. (Tr. 1167). Mr. Ferrucci went down into the basement to assess the condition of the concrete. He was concerned about the ability of the floor to support the machine. (Tr. 1168). He noted a disturbance in the concrete. It was flaking and falling off in pieces in the area he was working. (Tr. 1169). Pieces of concrete had fallen to the floor. (Tr. 1172). Before this incident, he did not see pieces of concrete on the basement floor. (Tr. 1175). He saw exposed concrete with visible rusted wire mesh. (Tr. 1169). He tried using a lighter machine, but it still was too heavy for the floor, and there was more crumbling and deterioration of the floor. (Tr. 1169).

The Secretary introduced Ex. C-121(b). This is part of Mr. Ferrucci's job log and indicates that work on tile removal began on June 23, 2009, after the inspection in this matter. Mr. Ferrucci suggested, however, that the log referred to other floors in Building A and to other buildings. (Tr. 1187). When pressed to produce a log book for the June 3 period, he explained that his other log was in his car which had been stolen. (Tr. 1192).

In portions of his deposition admitted into the record, Mr. Ferrucci testified that he was not aware of any deadlines for the job. (Ex. R-127 at p. 55). He also testified that he did not remember seeing any dust in the basement. (Ex. R-127 at p. 122)

### **John Schenne**

John Schenne is self-employed and runs the consulting firm of Schenne Associates Consulting Engineers and Geologists. (Tr. 1215-1216). Mr. Scheene has three degrees. One is a Bachelor's Degree in Civil Engineering received from Clarkson University in 1975. He also holds a Structural Major Master's Degree in Civil and Environmental Engineering from Clarkson University, and a Bachelor's Degree in Geology from the State University of New York at Potsdam, received in 1976. Finally, Mr. Schenne has 150 credits towards a Bachelor's Degree and Master's Degree in Architecture at the State University of New York at Buffalo. (Tr. 1218-1219).

Mr. Schenne is a licensed Professional Engineer in New York and Florida. (Tr. 1218-1219). He holds inactive licenses as an Engineer in Texas and as a Civil Engineer in the State of Washington. (Tr. 1219). He is also a licensed Sprinkler Contractor in Florida. (Tr. 1219).

Mr. Schenne testified that he was hired by the architectural firm of Carmini Woods-

Morris to be the electrical/mechanical and plumbing engineer on the AM&A warehouse project. (Tr. 1219-1220). He visited the site several times in May 2009 to prepare plans for a City Building Permit for the job. (Tr. 1224). Mr. Schenne testified that he could not see the structural floor in Building A because it was hidden by oak flooring and debris. (Tr. 1225). The oak flooring was to be removed. The roof had been leaking and there was mold growing all over. The floor was rotted in places and broken in other places. According to Mr. Schenne, there was nothing that could be salvaged. (Tr. 1226).

It was their intent to remove the flooring and leave the concrete slab that was there alone. (Tr. 1226). The project was budgeted to leave the slab in place. (Tr. 1227). That plan was altered in early June, when he saw that the concrete was in very bad condition and was unsafe. (Tr. 1227, 1231).

There were cracks and a two foot by three foot hole in the floor of Building A that a man could fall through. (Tr. 1227). He saw at least six other holes scattered in different areas of the floor. The holes were punched in the floor slab and he could see the basement below. (Tr. 1230). According to Mr. Schenne, a couple of the holes dropped concrete onto the basement floor below. Some others were a punch type failure and the concrete was broken loose, but still held in the floor. (Tr. 1231). The floors were reinforced by some mesh that had badly deteriorated. This mesh managed to hold the broken pieces in place. (Tr. 1231).

Mr. Schenne testified that the concrete was low quality. When he rubbed his hand across the surface of the concrete, bits of grit and concrete would actually erode. (Tr. 1227). As a result, he called the owner and told him that they needed to replace the concrete floor. (Tr. 1228). He finished his plans for the new floor on June 28, 2009. (Tr. 1228). According to Mr. Schenne, this additional work added a lot of money to the job. (Tr. 1228-1229). The owner was upset that they had to put in a new floor. (Tr. 1235). There was no contractual relationship with Cambria regarding these changes and he had no verbal or written correspondence with them. (Tr. 1235).

The new slab was poured over the existing slab. (Tr. 1232) It was about four inches thick and reinforced with wire bars about 16 inches on center. (Tr. 1233).

### **Francis Barone**

Francis Barone is the President and founder of Cambria. (Tr. 1240). He testified that he had discussions with the warehouse owner, Rocco Termini, who wanted Cambria to be part of



the demolition project. (Tr. 1240). Mr. Termini wanted Cambria to clean out the building, take the five story building down to the superstructure and tear down the three story building next to it. (Tr. 1241). He had done deals before with Mr. Termini, mostly on a handshake basis. This was the first job that involved a working contract. (Tr. 1241). The final amount the parties agreed to was \$611,000. (Tr. 1244). This dollar amount was a starting point and could increase with extra work. (Tr. 1243-1244).

Portions of Mr. Barone's deposition were admitted into evidence. (Ex. R-126). In his deposition, Mr. Barone testified that Eric Sperrazza was the supervisor on the site, and that Joe Ferrucci was there for support. (Ex. R-126 at 127). He did not speak with Mr. Sperrazza about safety inspections on the site and was not sure if safety inspections were conducted on the job. (Ex. R-126 at 189). He also testified that he was assured by Mr. Sperrazza that, although there were pipes in the basement, Cambria employees could work down there. (Ex. R-126 at 166). Mr. Sperrazza also told him that there was no visible debris on the basement floor. ( Ex. R-126 at 167).It was also his belief that [redacted] and [redacted] and [redacted] previously had asbestos abatement cards. (Ex. R-126 at 175).

### **3. Secretary's Rebuttal Witnesses**

#### **Tracy Krug**

Ms. Krug is an inspector for the city of Buffalo, NY. (Tr. 1253-1254). She has been inspecting buildings for 10-12 years. She is familiar with the AM&A warehouse. (Tr. 1254). She testified that the variance granted by the State of New York in September 2008 resulted from an emergency situation where the tunnel underneath Washington Street was collapsing. The variance was granted to allow asbestos removal so the tunnel could be filled with flowable fill. (Tr. 1254-1255, Ex. R-146)<sup>10</sup>. The area was contained with poly. (Tr. 1256). She testified that poly is a 6 millimeter plastic that is taped to the wall to contain asbestos. (Tr. 1261). The opposite end of the tunnel also had poly. (Tr. 1256). The September 2008 project did not involve asbestos abatement in any other area of the warehouse. (Tr. 1257). Air clearances were required for the project. However, although she signed the certificate of abatement, she was never given any of the air clearances. (Tr. 1258, Ex. R-146).

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<sup>10</sup> The area is on the left side of Ex. C-19, in the area marked "sealed tunnel." It is the lower of the two sealed tunnel areas. (Tr. 1256).

#### **4. Deposition Witness**

##### **Lawrence Michael Stratton**

Mr. Stratton is the Assistant Area Director. Before the hearing, Mr. Stratton was injured and unable to testify. (Tr. 1208). The parties agreed that his deposition be admitted into the record as Exhibit ALJ-9<sup>11</sup>. (Tr. 1209).

Mr. Stratton testified that he was a chemist at Nuclear Fuel Services. He then worked for National Gypsum where he became an Industrial Hygienist. (Exhibit ALJ-9 at 15). After two years as an Industrial Hygienist, he went to work for OSHA. (Exhibit ALJ-9 at 16). He is currently the Assistant Area Director for Health. He assigns, and evaluates work, reviews files, and issues and signs citations. (Exhibit ALJ-9 at 18). He also does performance appraisals for the Industrial Hygienists in his office. (Exhibit ALJ-9 at 18). He has held his current title for seven years. (Exhibit ALJ-9 at 18).

Mr. Stratton also testified that he goes on inspections on a case-by-case basis. Since becoming an Assistant Area Director he has gone on 50-100 inspections. (Exhibit ALJ-9 at 19). Approximately 20 inspections were conducted with CO Stutz. (Exhibit ALJ-9 at 20).

Mr. Stratton recalled that OSHA contacted the New York Industrial Control Board as a result of an informant's tip. (Exhibit ALJ-9 at 21-22). OSHA received information that the Asbestos Control Bureau had been at the AM&A warehouse and stopped operations a few days earlier because one of their agents believed there was asbestos in the basement. (Exhibit ALJ-9 at 24). The information from the informant was not substantial, so OSHA called the Asbestos Control Board to get more solid information. This was considered a referral. (Exhibit ALJ-9 at 26, 29). CO Stutz was assigned to the case. (Ex. ALJ-9 at 26). Mr. Stratton testified that, although they received information from the New York DOL, they didn't need that information to file the citation. (Exhibit ALJ-9 at 29-30).

CO Stutz began his inspection on June 12. (Exhibit ALJ-9 at 34). As a matter of routine, he would check in with the office. When he checked in, they discussed the knowledge of the conditions by Cambria's supervisors, the knowledge that there was asbestos, the scope of work

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<sup>11</sup> The Secretary objected to a portion of the transcript on the grounds that the questions involved the Secretary's litigation strategy and should be protected by the Client Work Product Privilege. Those portions, page 32, lines 5-16 have been segregated from the deposition and admitted into the record as Exhibit ALJ-10. (Tr. 1213-1214). For the record, I find that this portion of the deposition has no bearing on my decision in this matter, and I have not relied upon it.

and the conditions of the situation in the basement. No notes were taken of his discussion with the CO, and he could not recall any specifics of their conversation. (Exhibit ALJ-9 at 35-36). Mr. Stratton was briefed by the CO when he returned to the office. However, Mr. Stratton took no notes and could not recall specifics of the briefing. (Exhibit ALJ-9 at 36).

Sometime prior to June 17, 2009, he decided to send Mr. Le out with Mr. Stutz to provide a second set of hands to facilitate the inspection and the taking of bulk sampling. (Exhibit ALJ-9 at 38). CO Stutz indicated that he needed to take additional bulk sampling because of the vastness and variation of the debris piles. There was a lot of material and he wanted to make sure that they took appropriate samples so they could more accurately define the situation. (Exhibit ALJ-9 at 39). Mr. Stratton approved the request. (Exhibit ALJ-9 at 40).

Because he had to report to others, he wanted to see the situation first hand. He was concerned about the length and breadth of the debris and wanted to see its composition. (Exhibit ALJ-9 at 44-45, 55)

When he got to the site on June 30, he met with Mr. Stutz. (Exhibit ALJ-9 at 57). They put on protective clothing and entered the site. His recollection is that they were accompanied by Mr. Sperrazza. (Exhibit ALJ-9 at 57-58). Mr. Stratton did not wear any personal air monitoring equipment, but believes such equipment was worn by Mr. Stutz. (Exhibit ALJ-9 at 60).

They spent time pacing off the size of the room, looking at piles and at the overhead pipes. The pipes were rusted and he saw no insulation on them. He recalls that Mr. Stutz took samples of what appeared to be some pipe insulation that was on the floor adjacent to a pile. (Exhibit ALJ-9 at 61-62). Photos were taken of the location of the samples. (Exhibit ALJ-9 at 65). He described how Mr. Stutz took the samples. Mr. Stutz would spray a piece he was interested in with amended water in a spray bottle; open a glass vial; manually take a chunk of the material and put it in the vial; screw the top back on the vial; mark the sample number with a Sharpie pen; then put the sample in a plastic baggy. (Exhibit ALJ-9 at 67).

They moved to Room 2 which had a higher ceiling than Room 1<sup>12</sup>. He estimated that the ceiling in Room 2 was 10 feet high. Pipes in Room 1 were suspended from the ceiling with pipe joists. (Exhibit ALJ-9 at 68). In Room 3, he noticed a lot of questionable debris at the end of the foot ramp leading from Room 2 to Room 4. Mr. Stutz took samples of the material. (Exhibit

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<sup>12</sup> Mr. Stratton referred to the buildings by number rather than letters. It is not certain which numbers correspond to which letters.

ALJ-9 at 71). To the northeast of the ramp, there was a second field of questionable material. There were at least two pipes, perhaps three, that were insulated. Up above the second location, he observed that there was insulation missing from at least one of the pipes. To the east, slightly northeast, there was a third area of material that appeared somewhat powdery and looked like it could be asbestos. He looked up and saw the same two pipes running above the debris field that were missing insulation. The pipes were suspended and not falling. He did not see any pipes either drooping or falling in that area. (Exhibit ALJ-9 at 72-73).

According to Mr. Stratton, where the insulation on the pipes is intact, employees can work without concern because one wouldn't expect any airborne asbestos. (Exhibit ALJ-9 at 75-76). He did not notice any signs of prior asbestos abatement during his walk through. (Exhibit ALJ-9 at 78-79). He did not go into Room 4, and spent a total of about 1.5-2 hours in the basement. (Exhibit ALJ-9 at 79).

### Discussion<sup>13</sup>

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<sup>13</sup> Two motions remain before this Court. First, at the hearing, the Secretary introduced into the record a recorded interview with employee [redacted]. (Ex. C-29a)(Tr. 572, 601, 1053-1054) The Secretary was instructed to submit a time-marked index of the disc to facilitate review. In response, the Secretary submitted a transcript with time-marks set forth in the margins. Cambria objects to the transcript on the grounds that this Court rejected other transcripts of recordings because the accuracy of the transcripts could not be verified. Cambria contends that the same rationale should apply here and that they should be given an opportunity to review the accuracy of the purported transcript. Since then, the reporter has submitted several "corrections" to the transcript. Nonetheless, Cambria maintains its objections. In my review of this case, I have decided not to rely on the transcript, except insofar as it provides a time mark for the purported testimony. Rather, I have listened to the recorded interview and any reliance on [redacted] interview, slight as it is, is based on my listening to that interview, not on the written transcript.

Second, employee [redacted] refused to comply with an administrative subpoena issued at the behest of Cambria, directing him to appear for a deposition. To mitigate any prejudice associated with Cambria's inability to depose [redacted], on February 17, 2011 I issued an order precluding the Secretary from using any testimony, statements and/or documents received from [redacted]. I also Ordered that Cambria may object to any testimony, statements and/or documents the Secretary seeks to introduce into the record "if, and only if, it has credible grounds to believe they may have been received *directly* from [redacted]." (emphasis in original). Cambria now objects to several specific references in the Secretary's Brief where she references [redacted]. In response, the Secretary points out that my Order allowed Cambria to object only to information received directly from [redacted]. She contends that all the objected references were attributable to sources other than [redacted]. For example, she points out that the objected reference at page 16, which includes [redacted] as one of the Cambria employees working in the basement, was obtained from Exhibit C-28, and was based on information provided by Cambria. Similarly, she argues, all other references are based on information received from Cambria management or from other witnesses, and not [redacted]. I find no merit to Cambria's objections. As the Secretary properly points out, all references to [redacted] are based on the knowledge or testimony of others. For example, the references to [redacted] on pp. 17 and 66 of the Secretary's brief are based on the interview with [redacted] (Ex C-29A); the reference on p. 65 is based on the list of employees set forth in Ex. C-28; the reference on p. 79 of the Secretary's brief is simply a restatement of the citation; and the reference on p. 82 is based on testimony of others, such as the deposition of Mr. Barone. My Order restricting reference to [redacted] was not intended to cast him into judicial limbo, but only to prevent any evidence that might have been received *directly* from him.

## **I. Secretary's Burden of Proof**

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

## **II. Stipulations:**

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.
2. The Respondent Cambria Contracting Inc. ("Respondent") is a corporation with an office and place of business at 5105 Lockport Road, Lockport, New York.
3. Many of the materials and supplies used and/or manufactured by Respondent originated and/or were shipped from outside the State of New York and the respondent was and is engaged in a business affecting commerce within the meaning of section 3(3) and 3(5) of the Act.
4. Respondent is an employer within the meaning of section 3(5) of the Act.
5. The parties stipulate that a variance for the basement was granted by the NY State Department of Labor on June 29, 2009.  
(Ex. ALJ-1).

## **III. Presence of Asbestos**

The seminal issue in this case is whether the Secretary established, by a preponderance of the evidence, that there was asbestos contaminated debris in the basement before the site was shut down by the New York DOL on June 3, 2009. The evidence establishes that all the asbestos samples were taken by OSHA after New York DOL shut down the site. Of the 14 samples that tested positive for asbestos, 12 were from various locations within Building A and two were from locations in Building D. (Exhibits R-23, R-23A). None of the debris samples taken from Buildings B or C contained asbestos. (Exhibits R-23, R-23A).

*Positions of the Parties*

*a. Respondent*

Respondent asserts that these samples were not representative of conditions that existed at the worksite prior to the work stoppage. It is Cambria's position that the asbestos contamination of the debris occurred within a week of the stoppage when Cambria began working on the first floor and the Bobcat fell broke through the floor. (Resp. Brief at 38). According to Respondent, this disturbed the insulation on the pipes, resulting in pieces of asbestos insulation falling into the garbage and debris. Cambria argues that there is no credible evidence that the insulation on the pipes were not intact and that the garbage or that the debris being cleaned by its employees contained any asbestos before the basement worksite was shut down by the State. Respondent points out that the Asbestos Survey made by an independent company before the onset of work, did not indicate any ACM or PACM in the basement and concluded that the insulation on the overhead pipes was in "fair" condition. (Resp. Brief at 11, Exhibit C-1). It argues that Mr. Sperrazza was justified in relying upon the Survey, because it's very purpose under New York law is to identify, locate and quantify the presence of asbestos on a worksite. (Resp. Brief at 64). Nonetheless, Mr. Sperrazza conducted his own walkthrough of the basement, verified the condition of the insulation on the pipes, and took the additional step to inspect the ground below any section of pipe where he observed missing insulation. (Resp. Brief at 65-67, Tr. 930-931). Mr. Sperrazza found nothing that required further inquiry and confirmed the findings of the Asbestos Survey. (Tr. 930-931). Indeed, Mr. Sperrazza testified that his own inspection revealed no TSI and surfacing material in the trash while work was performed. (Resp. Brief at 68, Tr. 873-875, 916, 924, 931, 934-935, 946-947).

Respondent also argues that New York Inspector Krasinski never testified that he actually located TSI and surfacing material in the trash on June 3, 2009. At most, he testified that there were sections of missing insulation from the overhead pipes and that he saw debris that matched the color and texture of the insulation. Cambria points out that Mr. Krasinski never testified that the missing pieces of insulation were actually located in the piles of trash and debris. It argues that it is pure speculation to conclude that the trash piles contained PACM, especially when the Asbestos Survey did not reveal the presence of asbestos, no witness identified ACM or PACM in the trash piles, and Mr. Krasinski did not have any of the debris tested. (Resp. Brief at 68, n. 5).

*b. Secretary*

The Secretary contends that she established by a preponderance of the evidence, that the

trash in the basement contained ACM and PACM debris prior to the shutdown on June 3, 2009. The Secretary notes that the Asbestos Survey noted that the asbestos-containing pipe insulation was friable. TSI's friability makes it prone to damage and deterioration and contamination of the surrounding areas. (SOL Brief at 29). Indeed, Mr. Sperrazza testified that, during his walkthrough of the basement prior to the commencement of work, he observed pieces of insulation missing from the overhead pipes. The Secretary points out that in the Preamble to the Asbestos Standard, she stated that "Debris which is present in rooms, enclosures or areas where PACM or high risk ACM is present and not intact, is presumed to be asbestos-containing." 59 Fed. Reg. at 41,017; *see also* 29 C.F.R. §1926.1101 App. F ("Work practices and engineering controls for Class I Asbestos Operations.")("mobile objects" being removed from work area at start of Class I project "will be presumed to be contaminated.").

The Secretary also argues that the evidence demonstrates that the condition of the pipes did not materially change between June 3, when work was stopped and June 12, when the first OSHA inspection took place. According to the Secretary, a comparison of photographs taken by Mr. Krasinski on June 3 to those taken during the OSHA inspection on June 12 show no material change in the condition of the overhead pipes. (SOL Brief at 35-36). Also the Secretary notes that Mr. Krasinski testified that, on June 3, he saw and photographed a debris field in Building A, underneath a section of damaged pipe insulation, that had scrape marks like something was dragged through the debris, and that the scrape marks appeared relatively new. (SOL Brief at 36, Tr. 125-126, Exhibit C-16(a)). Similarly, Mr. Stutz testified that he observed suspect debris below the same damaged pipe insulation and noticed that there were scrape marks, and that the material had been scattered, pressed out...pushed down and changed form." (Tr. 416, Ex. S-54). This suspect material on the floor turned out to be ACM. (Tr. 420-421, Ex. S-56, Sample D62798). Furthermore, Mr. Stutz took a sample of confirmed ACM debris from Building D that resembled the type of TSI that was found in an adjoining area in Building C. (Tr. 410, 585-588). The Secretary contends that this suggests that the ACM debris was moved through the basement after it had fallen. (SOL Brief at 37). The Secretary points out that work in the basement was stopped on June 3, 2009. Therefore, the foregoing conditions of the ACMs, appearing to be disturbed and/or moved by recent work, support the logical conclusion that these ACMs were already present on the floor during Cambria's work on and before June 3. (SOL Brief at 37).

The Secretary disputes Cambria's contention that the asbestos debris found on the

basement floor resulted from the failure of the first floor, including the concrete slab, which occurred when the Bobcat broke through the floor during the week after work in the basement was stopped. First, the Secretary contends that Cambria never established any nexus between (1) any impact from the first floor work after June 3, 2009 and (2) the damaged and missing pipe insulation and resulting fallen ACM in the basement. (SOL Brief at 39). She points out that Mr. Krasinski did not see holes in the basement ceiling during his visits, even though he made it a point to look for ceiling holes near damaged pipe insulation. (Tr. 156-157, Exs. C-14, 15, 17, 18). Similarly, Mr. Stutz testified that each time he looked at damaged pipe insulation in the Building A basement, he also looked at the ceiling above and did not see any holes. (Tr. 1264, Exs. C-54, 57, 82, 90, 107). The Secretary notes that John Schenne, who testified that he saw holes in the first floor, could not recall the locations of the holes or whether he first observed these holes before or after June 3, 2009. (Tr. 1230, 1232). Also, Mr. Ferrucci's did not memorialize the alleged incidents of ceiling damage. (Tr. 1178). Moreover, his testimony as to the timing of the first floor work was contradicted by his own daily log which states that the work on the first floor began on June 23, 2009. (Tr. 1185-1186, Ex. S-121(b)). (SOL Brief at 40).

#### *Discussion*

Central to Respondent's assertion that the debris in the basement was asbestos free on or before June 3, 2009 is the Asbestos Survey (Ex. C-1) which did not identify any asbestos in the trash. However, I do not find that Survey to be dispositive.

A close review of the Survey demonstrates that the debris on the basement floor was never tested for asbestos. The Survey which purports to identify asbestos containing material indicates that it tested only building material/items such as plaster, drywall, linoleum, tiles, roofing, flashing, piping, etc. Nowhere in the Survey does it indicate or even suggest that the debris on the basement floor was tested for asbestos. To the contrary, the reporting notes on the last page of each of the Summary Pages for the PLM Bulk Asbestos Reports contain the following "Warning": "TEM bulk analysis is representative of the fine grained matrix material and may not be representative of *non-uniformly distributed debris*, soils or other heterogeneous materials for which a combination of PLM/TEM evaluation is recommended."<sup>14</sup> (emphasis added).

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<sup>14</sup> PLM (Polarized Light Microscopy and TEM (Transmission Electron Microscopy) refer to testing methods for asbestos.



In its list of ACM that it found, the Survey states that there was 1500 linear feet of piping throughout the basement area and that had friable asbestos in “F” or fair condition.” However, this refers only to the actual piping and does not refer to any ACM or PACM debris that may have fallen from the friable and worn asbestos insulation.

Mr. Sperrazza testified that, when he performed his walkthrough of the basement, he noticed areas of bare pipe where the insulation had fallen off. (Tr. 874-875). He inspected the exposed areas of garbage and to the bare floor where it was not covered with garbage to see if there was asbestos debris. (Tr. 875). He testified that, to his knowledge, no TSI and surfacing material was located in the trash at the time the work was performed. (Tr. 873-875, 916, 924, 934-935, 946-947). However, he saw no need to move the garbage to see to the floor below because “There was an asbestos survey done and there was nothing in regards to asbestos debris.” (Tr. 875). However, it is clear that the Survey did not detect any asbestos debris because it never tested for asbestos debris.

Even assuming *arguendo* that the Survey tested for and failed to find ACM or PACM in the basement debris, the evidence demonstrates that the Survey was not necessarily reflective of the conditions when Cambria began working in the basement.

In a note to the list of ACM, in the center of the second page of the Survey (Ex. C-1, p.2), there is a warning that “Piping insulation is located in the separate basement structures through out [sic] the basement the access to some areas was incomplete and amounts should be verified prior to abatement.” This warning is repeated again, at the end of the first page: “This report is based on the condition and contents present at the above referenced location at the time of inspection.” The Survey further states that it “only represent[s] conditions as of August 15, 2008.” (Exhibit C-1, p.2). It also warns, at the end of the first page, that “This report is based on the condition and contents present at the above referenced location at the time of inspection.” This clearly implies that conditions at the worksite could have changed between August 15, 2008 and when work actually began in May 2009.

Mr. Sperrazza testified that he walked through the complex, including the basement to confirm what was in the Survey. (Tr. 924). He specifically noted the time between the Survey and the beginning of work as a reason for his walkthrough. (Tr. 924). However, the warning in the Survey failed to identify what areas of the basement were inaccessible and not considered in the Survey. This had to compromise Mr. Sperrazza’s ability to verify any information contained

in the Survey regarding conditions at specific locations in the basement. Moreover, Mr. Sperrazza testified that the basement was dark and that he conducted his walkthrough with only a flashlight. (Tr. 871-872). This, too, compromised the effectiveness of Mr. Sperrazza's walkthrough. Further, Sperrazza did not move the garbage and debris to look for any ACM or PACM because, in his view, the Survey did not reveal any such material. However, as noted, *supra*, the Survey did not identify any ACM or PACM in the debris because it did not test for it.

It is not disputed that TSI is friable and can be easily broken and go airborne. Daniel Crane of the Salt Lake Technical Center testified that vibration from within the building or from traffic can shake loose asbestos and distribute it through the workplace. (Tr. 1072, 1095). Vibration is one of the factors that can disturb TSI. The Survey states that it reflects conditions as of August 15, 2008. Although CO Stutz testified that he did not feel any vibrations in the basement (Tr. 355), his inspection took place after the New York DOL stopped all activities in the basement. When the work was in progress, Cambria was using a Bobcat and a Dingo to move large quantities of debris through the basement. These machines undoubtedly caused vibrations which could have dislodged the friable asbestos insulation on the pipes. Thus, even if there was no ACM or PACM in the debris at the time of the Survey, the friable insulation on the pipes could have been dislodged during the nine months between the Survey and the commencement of work and during the work itself.

That the Asbestos Survey is entitled to little weight insofar as it purports to establish that there was no ACM or PACM in the debris, does not establish that ACM or PACM existed in the debris prior to the commencement of work. Such evidence must be found elsewhere. The evidence establishes that the overhead pipes contained TSI, which is ACM material. (Tr. 42, 144-146, 858, 868, 870, 29 C.F.R. §1101(b)). Moreover, the evidence demonstrates that on or before June 3, 2009 pieces of the insulation were missing from the pipes. (Tr. 72, 874). Therefore, the pipe insulation was not intact<sup>15</sup>. In the Preamble, the Secretary set forth the requirements for

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<sup>15</sup> I do not find credible Mr. Sperrazza's testimony that, on his walkthrough, he found the insulation on the pipes to be tight and intact. (Tr. 874). First, this assessment is contradicted by his further statement that there was missing sections of insulation on the pipes. (Tr. 874). Also, at the time of his walkthrough, the basement lights were not working, the basement was dark and Mr. Sperrazza conducted his walkthrough with a flashlight. (Tr. 871). The evidence establishes that the pipes were suspended from ceilings ranging from 8-10 feet high (Tr. 68, 936-937). These conditions make his assessment of the condition of the pipe insulation questionable. Indeed, Mr. Krasinski testified that, during his June 3 inspection, he observed pipe insulation in a severe state of degeneration with hanging pieces. (Tr. 90, Ex. C-15). There were broken edges and protruding pieces. (Tr. 98-99). Below the section depicted in Ex. C-15, he saw material on the ground that matched the color and texture of the missing sections of insulation. (Tr. 88)

handling debris under these conditions:

*Debris which is present in rooms, enclosures or areas where PACM or high risk ACM is present and not intact, is assumed to be asbestos-containing. Other building materials which may contain asbestos such as roofing material, ceiling tiles and miscellaneous products listed in EPA's "Green Book" have not been found to be both as widely prevalent and easily disturbed and damaged as are TSI and surfacing material or as widely prevalent, accessible and frequently disturbed as resilient flooring.*

59 Fed. Reg. at 41,017 (emphasis added).

On this basis, absent any evidence to rebut this presumption, Cambria should have “assumed” that the debris contained ACM or certainly PACM. Cambria protests that this reverses the burden of proof that normally would require the Secretary to prove by a preponderance of the evidence, the presence of ACM or PACM in the garbage and places the burden upon Respondent to prove the absence of asbestos. Respondent asserts that “presumed asbestos containing material” is defined at 29 C.F.R. §1926.1101(b) as “thermal system insulation and surfacing material found in buildings constructed no later than 1980.” (Resp. Brief at 67-68). Cambria acknowledges that PACM must be treated as ACM, but contends that there is no competent evidence that TSI and surfacing material was located within the basement garbage at the time it was being removed. (Tr. 68-69).

I do not agree. The burden to adduce the facts that give rise to the presumption remains on the Secretary. Thus, the Secretary must establish that there was ACM in the area, which was in a state of deterioration and not intact. Here, the Secretary has met that burden. The evidence establishes that the insulation on the pipes contained asbestos. Indeed, Mr. Sperrazza testified, without hesitation, that the pipes contained TSI (Tr. 868), which unless shown otherwise, is PACM. The evidence also establishes that there was insulation missing from the pipes and non-uniformly dispersed debris scattered around the basement. Also, Mr. Krasinski testified that, based on his experience, he identified aerosol asbestos insulation on the pipes. (Tr. 146). Sprayed on asbestos insulation is a “high risk” asbestos material and is to be treated as PACM. 59 Fed. Reg. 40978. As made clear in the Preamble to the Asbestos Standard, under these conditions, the debris is presumed to contain asbestos<sup>16</sup>.

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<sup>16</sup> That the air sampling taken during the inspection failed to detect any airborne asbestos does not require a different result. When the OSHA inspections took place, the worksite had been shut down for at least six days during which time there was no activity taking place in the basement. The evidence establishes that asbestos fibers settle to the ground over time, depending on the type and size of the asbestos fibers, and the nature of the air currents in the area.

Even without this presumption, I find that the preponderance of the evidence establishes that the debris contained ACM. Mr. Krasinski testified that he saw no change in the conditions in the basement from his first visit on June 3 to the June 12 inspection by CO Stutz. (Tr. 156). Moreover, two of the samples that tested positive for asbestos were found in Building D where the ceiling did not collapse and where no work or activity took place after the New York DOL shut down the site on June 3, 2009. Also, the New York DOL determined that the cleaning crew was exposed to a risk of asbestos exposure that required it to shut down the site on June 3, 2009, until Cambria could obtain a variance. On his June 3 inspection, Mr. Krasinski observed a considerable amount of friable TSI in the basement. He found the material to be in a severe state of deterioration, with missing sections and hanging pieces. He also noticed material on the basement floor below the insulation that he suspected contained asbestos due to the Asbestos Survey and because it matched the color and appearance of the insulation. (Tr. 72, 79, 88, 92, 125, 128 Exs. C-14, 15, 16). This material was in both Building A (Tr. 88, 92, Exs. C-15, 16) and Building D. (Tr. 72, 79, Ex. C-14) It is important to note that the material in Building A was observed by Mr. Kasinski before he shut down activities in the basement, and before the Bobcat allegedly broke through from the floor above, and that similar material tested positive for asbestos. (Samples 5,6, Tr. 418, 428).

Cambria minimizes the importance of the shut down. It points out that Mr. Krasinski never had any of the materials in the basement tested for asbestos and therefore had no basis for characterizing the material he characterized as disturbed as asbestos, or the debris as PACM. (Tr. 92, Resp. Brief at 76). However, Mr. Krasinski has been with the New York Asbestos Control Bureau since 1991. (Tr. 28-31). As a senior industrial hygienist, it is his job to inspect asbestos projects and handle complaints that come in regarding the handling of asbestos. (Tr. 29). Moreover, I found his testimony to be informed and credible. Although not proffered as an expert witness, I find that his opinions, while not dispositive, are entitled to substantial weight.

Finally, Cambria applied for a variance from New York to enable it to continue its operations in the basement. (Ex. C-9). In the section entitled "Reason for Request for Variance," Cambria stated in pertinent part that "The project consists of the cleanup of friable asbestos containing materials in the basement that has degraded for the past 10 years, during the past

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(Tr. 1074)

years approximately 750 sf [square feet] of *contaminated debris* and the remaining 1500 lf [linear feet] of piping.” (emphasis added). (Ex. C-9, p.2).

The variance was granted on June 29, 2009. In the Order granting the variance it is stated that “The *basement floors*, walls, ceilings, fixtures, and movable and fixed objects *contaminated with asbestos debris* shall be cleaned as part of this abatement project.” (Ex. C-119, p. 4 of 8). (emphasis added).

Both the variance application and the Order granting the variance confirm that there was asbestos contaminated debris in the basement as on June 3, 2009. However, Cambria argues that no weight should be given to the variance. Cambria reiterates its contention that, not having actually tested any of the material, Mr. Krasinski had no legal basis for shutting down the worksite and that his shut-down order was arbitrary. (Resp. Brief at 76). However, in order to “appease” Mr. Krasinski and “to get the job done” it applied for the required variance. (Resp. Brief at 76). Respondent points to the testimony of William Eichorn, Cambria’s Estimator Project Manager (Resp. Brief at 77, Tr. 1140). Mr. Eichorn testified that, once the State shut down the job, there was no alternative but to seek a variance. He was not sure if the shut-down order could be challenged or to whom a challenge would be filed. (Tr. 1143). Thus, Respondent contends that the decision to file the variance application was merely a business decision, and not an admission that there was ACM or PACM in the debris. (Resp. Brief at 78).

I find Cambria’s argument unpersuasive. Mr. Eichorn also testified that he had no asbestos certification and that the variance was prepared by another employee because he was not the project designer and, therefore, could not apply for the variance. (Tr. 1142, 1146). Mr. Eichorn admitted that he had no knowledge regarding the conclusions of the New York DOL who mandated the variance; and Mr. Chopra, who prepared the variance application, did not testify. (Tr. 1141-1142, 1145).

Cambria contends that Mr. Krasinski’s decision to order the shut-down had no legal basis. However, there is not a scintilla of evidence to suggest that Mr. Krasinski was acting beyond his authority in shutting down the worksite without first testing the material or that it he or the State acted improperly in relying on his nearly two decades of experience inspecting asbestos projects to recognize asbestos hazards. The “presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *National Archives and Records*

*Admin. V. Favish*, 541 U.S. 157, 174 (2004)(Citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)).

That Cambria made a “business decision” to file for a variance has no bearing on the validity of Mr. Krasinski’s shut-down order or on the correctness of his assessment of conditions in the basement. A governmental order does not require the agreement of the aggrieved party to be found to have a factual basis<sup>17</sup>.

Despite its numerous objections, Respondent’s only real argument is that conditions changed when Bobcat fell through the roof and that, without actual testing of debris on or before June 3, there is no evidence that the contamination did not arise from asbestos being knocked from the pipes when the ceiling collapsed. Nonetheless, there were two samples that revealed contamination in Building D. Respondent only contends that the ceiling was damaged in Building A. However, no work or other activity was being performed in the basement between June 3 and June 29 and Cambria offers no explanation how the contaminated debris might have migrated from building A to building D during that period. Moreover, even if the collapse of the floor disturbed the pipe insulation and added to the contaminated debris, it doesn’t rebut the presumption that, prior to the collapse, the debris already on the floor in Building A was not contaminated with asbestos<sup>18</sup>. Therefore, I find nothing in the record that would rebut the presumption that the debris was contaminated by asbestos prior to June 3, 2009<sup>19</sup>.

Accordingly, I find that the Secretary established by a preponderance of the evidence that the debris in the basement on and before June 3, 2009 contained ACM and PACM and required compliance with the asbestos standard.

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<sup>17</sup> I would also note that the variance obtained by Sienna Environmental on June 19, 2008, for the abatement of asbestos of the tunnel areas under Washington St. which predated this project, demonstrates that the pipes had asbestos insulation and that the debris under those pipes were contaminated by asbestos. The Order granting the variance, the stated that “The Petitioner’s proposal for removal of 100 lin. ft. friable ACM pipe, *and minor amounts of debris below the piping*, from the pipe tunnels at the subject premises...is accepted.” (Ex. R-140, p. 2 of 5)(emphasis added). While I do not find this evidence to be conclusive of conditions in the basement, it is suggestive of the “assumption” that the wider area was contaminated.

<sup>18</sup> Given my disposition of this issue, I do not find it necessary to resolve the dispute regarding whether the Bobcat broke through the floor of Building A before June 12, 2009.

<sup>19</sup> Cambria could have gone a long way to rebut the presumption by having tested the debris for asbestos contamination, which it was urged to do by the Asbestos Survey. Had Cambria taken this step with negative results, and the Secretary later found some contaminated debris, Respondent would have had cause to argue that it took all reasonable steps to discover the violation and, therefore, lacked even constructive knowledge of the condition. At a minimum, such measures would likely have dissuaded the Secretary from citing these violations as willful.

#### **IV. Were the Basement Employees Engaged in Class I Asbestos Work?**

In each of the alleged violations, the Secretary asserts that the work in the basement qualified as Class I asbestos work. By the terms of the cited standards, if the work was not Class I, item 5, which applies to Class I work, must be vacated. Item 1 applies to Class I, II and III asbestos work; item 4 applies to Class 1 work and, under certain circumstances, Class IV work. Items 2 and 3, 6a and 6b apply to all asbestos work even if unclassified and, finally items 7-11 apply to Class I, II, III, and IV asbestos work and, under certain circumstances, all work even when not classified.

The definitions of the various Classes of asbestos work are set forth at 29 C.F.R. §1926.1101(b) as follows:

*Class I asbestos work* means activities involving the removal of TSI and surfacing ACM and PACM.

*Class II asbestos work* means activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics.

*Class III asbestos work* means repair and maintenance operations, where “ACM”, including TSI and surfacing ACM and PACM, is likely to be disturbed.

*Class IV asbestos work* means maintenance and custodial activities during which employees contact but do not disturb ACM or PACM and activities to clean up dust, waste and debris resulting from Class I, II, and III activities.

The parties agree that the work did not involve either Class II-IV asbestos work, and I concur. From May 23, 2009 to June 3, 2009, the work performed by Cambria’s employees in the AM&A warehouse entailed the removal of debris from the basement that was contaminated with ACM and PACM, and specifically TSI, that had fallen from the damaged and deteriorated ceiling pipe. That the employees were removing TSI disqualifies the basement work from the definition of Class II asbestos work.

Respondent argues that the work was not Class III or IV because the evidence failed to establish that the debris even contained any ACM or PACM. The Secretary argues that by sweeping and pushing the material, the basement employees actually disturbed, not merely contacted, asbestos containing debris, thereby disqualifying the work from Class IV status.

I find that Cambria’s employees were not conducting either Class III or IV abatement work. There is no evidence that they were engaged in any “repair” or “maintenance” operations

which would have qualified the work as Class III<sup>20</sup> or “custodial” or “maintenance” activities that could qualify the work as Class IV. In the Preamble to the Asbestos Standard the Secretary stated that “Custodial Work” includes “sweeping, dusting and other housekeeping duties that occasionally expose building maintenance and custodial personnel to asbestos. Custodial work falls under Class IV asbestos work as defined in the revised standard.” 59 Fed. Reg. at 41,041. Similarly, the Secretary has indicated that maintenance, as stated for Class III and Class IV activities means “routine maintenance.” *Id.* Clearly, the work involved at the AM&A warehouse was neither custodial nor routine maintenance.

The Secretary argues that the work performed by Cambria fits the activities listed as Class I asbestos work. First, the Secretary contends that Cambria’s removal of contaminated basement debris “clearly” entailed “removal of materials containing asbestos.” 29 C.F.R. §1101(a)(2). Moreover, because the work involved the removal of TSI ACM (from the TSI that had fallen off the pipes), Cambria’s work specifically was covered as Class I asbestos work which is defined as “work involving the removal of TSI and surfacing ACM and PACM.” 29 C.F.R. §1926.1101(b). (SOL Brief at 42)

Respondent argues that the activities in the basement did not constitute Class I asbestos work. It is Cambria’s assertion that to qualify as Class I asbestos work, the Secretary must first prove that ACM or PACM was within the basement garbage. Cambria asserts that the Secretary failed to establish that the garbage contained any ACM or PACM and, therefore, the Secretary failed to establish that such material was “removed.” (Resp. Brief at 71-73). However, as discussed, *supra*, the Secretary established that the basement debris was contaminated with ACM/PACM.

I find that the work conducted in the basement by Cambria constituted Class I asbestos work. According to OSHA, “Class I asbestos work means activities involving the removal of asbestos containing material (ACM) and presumed asbestos containing material (PACM) which is “high risk.” 59 Fed. Reg. at 40969. “Removal” is defined in 29 C.F.R. §1926.1101(b) as “all operations where ACM and/or PACM is *taken out* or stripped from structures or substrates, and includes demolition operations.” (emphasis added). In the Preamble to the Asbestos Standard the

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<sup>20</sup> Although the Secretary agrees that Cambria was not involved in repair or maintenance work, it notes the remainder of the definition “does at least have some bearing and relevance” because Cambria’s operations involved activities where TSI or surfacing material was likely to be *disturbed*. (SOL Brief at 49). Nonetheless, the Secretary recognizes that the work was not Class III because it involved neither repair nor maintenance. (SOL Brief at 51).



Secretary elaborated :

"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, 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.

59 Fed.Reg. at 40978.

The work here involved the removal of various trash and debris some of which, as this Court found *supra*, contained ACM and PACM debris from the insulation of the overhead pipes. Accordingly, I find that the work was properly cited as Class I asbestos work<sup>21</sup>.

## V. The Items.

### a. **Item 1 willful violation of 29 C.F.R. § 1926.1101(e)(1)( Cambria failed to establish a regulated area while performing Class I asbestos work.)**

The cited standard states:

§1926.1101 **Asbestos**

\* \* \*

*(e) Regulated areas.* (1) All Class I, II, and III asbestos work shall be conducted within regulated areas. All other operations covered by this standard shall be conducted within a regulated area where airborne concentrations of asbestos exceed, or there is a reasonable possibility that they may exceed a PEL. Regulated areas shall comply with the requirements of paragraphs (2), (3), (4), and (5) of this section.

Having determined that employees were exposed to asbestos contaminated debris and that they were engaged in Class I asbestos activity, the evidence overwhelmingly established that the violation was established. There is no dispute that Cambria failed to establish a regulated area in the basement of the AM&A warehouse where employees were removing garbage and debris. CO Stutz testified that Cambria did not set up a regulated area in the basement. (Tr. 603).

Mr. Sperrazza testified that he did not set up a regulated area in the basement because,

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<sup>21</sup> I note that, in the Preamble to the Asbestos Standard the Secretary instructed that: "If it is not clear which category the work belongs, the employer should assume the higher, more restrictive, category applies, and should comply with the listed work practices and controls for that category." 59 Fed. Reg. at 40990.

in his view, they were not performing asbestos abatement. (Tr. 881) The failure to set up a regulated area was confirmed by New York DOL Inspector Krasinki who testified that, when he entered the AM&A basement on June 3, 2009 the doors were all open, not restricted or sealed with plastic, and that he saw no other signs of a regulated area. (Tr. 134-135).

Mr. Stutz determined that seven Cambria employees were exposed to the hazard. The employees included [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted]. (Tr. 606, Ex. C-28).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**b. Item 2 willful violation of 29 C.F.R. § 1926.1101(f)(2)(i) (failure to conduct an initial asbestos exposure assessment immediately before or at the initiation of its asbestos work.)**

The cited standard states:

§1926.1101 **Asbestos**

\* \* \*

*(f) Exposure assessments and monitoring*

\* \* \*

*(2) Initial Exposure Assessment.* (i) Each employer who has a workplace or work operation covered by this standard shall ensure that a “competent person” conducts an exposure assessment immediately before or at the initiation of the operation to ascertain the expected exposures during that operation or workplace. The assessment must be completed in time to comply with requirements which are triggered by exposure data or the lack of a “negative exposure assessment,” and to provide information necessary to assure that all control systems planned are appropriate for that operation and will work properly.

It is not disputed that no asbestos exposure assessment was made on or before June 3, 2009. Mr. Sperrazza admitted that no exposure assessment was made during the basement work. (Tr. 903-904). This was confirmed by the CO, who testified that, during the OSHA inspection, Mr. Sperrazza told him that there had been no exposure assessment. (Tr. 612). Mr. Stutz testified that the employees listed in Ex. C-28 were exposed to the violation. (Tr. 613).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**c. Item 3, willful violation of 29 C.F.R. § 1926.1101(g)(1)(i) (failure to use HEPA vacuums for the collection of all debris and dust containing asbestos-containing materials or presumed asbestos-containing materials.)**

The cited standard provides:

§1926.1101 **Asbestos**

\* \* \*

*(g) Methods of compliance.* (1) Engineering controls and work practices for all operations covered by this section. The employer shall use the following engineering controls and work practices in all operations covered by this section, regardless of the levels of exposure:

(i) Vacuum cleaners equipped with HEPA filters to collect all debris and dust containing ACM and PACM, except as provided in paragraph (g)(8)(ii) of this section in the case of roofing material.

Again, the evidence is not disputed that the employees working in the basement were not provided with vacuum cleaners provided with HEPA filters. Mr. Sperrazza testified that the employees cleaning the garbage and debris in the basement were not provided with vacuums. (Tr. 881). This was supported by CO Stutz who testified that Mr. Sperrazza told him that the work was performed using brooms, shovels, a Bobcat and a Dingo, but not vacuums with HEPA filters. (Tr. 615). Also, employee [redacted] testified that he never saw a vacuum in the basement. (Tr. 183).

CO Stutz testified that the same seven employees listed in Ex. C-28 were exposed to the violative condition. (Tr. 615).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**d. Item 4 willful violation of 29 C.F.R. § 1926.1101(h)(1)(i) (failure to require its basement employees to use respirators.)**

§1926.1101 **Asbestos**

\* \* \*

*(h) Respiratory protection-(1) General.* For employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph. Respirators must be used during:

(i) Class I asbestos work.

The standard requires that employees performing Class I asbestos work wear

appropriate respirators. The evidence is undisputed that the employees working in the basement were not provided with respirators of any sort. Mr. Krasinski testified that, during his first inspection of the site on June 3, 2009 the four Cambria employees he observed in the AM&A basement were not wearing respirators. (Tr. 74-76, 89). CO Stutz testified that, during the inspection, Mr. Sperrazza told him that the basement employees were not using respirators. (Tr. 617). This was confirmed by employee [redacted], who testified that all he was given was a paper dust mask, but was not required to wear it. (Tr. 182-183, 185, 187).

Even if employees were required to wear them, dust masks do not satisfy the standard. The asbestos standard states at 29 C.F.R. §1926.1101(h)(3)(i) Table I specifies that, at a minimum, employees are required to wear “Half-mask air purifying respirator other than a disposable respirator, equipped with high efficiency filters.”

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**e. Item 5 willful violation of 29 C.F.R. § 1926.1101(i)(1) (failure to provide adequate clothing to its basement employees.)**

§1926.1101 **Asbestos**

\* \* \*

(i) *Protective clothing*-(1) General. The employer shall provide or require the use of protective clothing, such as coveralls or similar whole-body clothing, head coverings, gloves, and foot coverings for any employee exposed to airborne concentrations of asbestos that exceed the TWA and/or excursion limit prescribed in paragraph (c) of this section, or for which a required negative exposure assessment is not produced, or for any employee performing Class I operations which involve the removal of over 25 linear or 10 square feet of TSI or surfacing ACM and PACM.

As noted in Item 1, the evidence establishes that Cambria did not conduct a negative exposure assessment. Therefore, it was required to provide its employees with protective clothing “such as coveralls or similar whole-body clothing, head coverings, gloves, and foot coverings.” Mr. Sperrazza testified that the Cambria employees working in the basement were not provided with protective clothing. (Tr. 881). This was confirmed by CO Stutz who testified that, during the inspection, Mr. Sperrazza told him that employees did not wear coveralls or Tyvek protective clothing. (Tr. 619). Moreover, employees [redacted] and [redacted] both testified that they wore their personal clothing while working in the basement. (Tr. 182, 269).

[redacted] testified that he wore jeans, T-shirt, work boots, hard hat, safety glasses and gloves. (Tr. 182).

CO Stutz testified that the same seven Cambria basement employees, identified in the previous items, were exposed to the violative condition. (Tr. 618-619).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**f. Item 6(a), willful violation of the 29 C.F.R. §1926.1101(k)(3)(ii)(B)( Cambria failed to inform its basement employees of the location and quantity of asbestos-containing material present in the AM&A basement debris and of the precautions to be taken to avoid exposure.)**

§1926.1101 **Asbestos**

\* \* \*

(k) *Communication of hazards.*

\* \* \*

(3) (ii) Before work under this standard is performed employers of employees who will perform such work shall inform the following persons of the location and quantity of ACM and/or PACM present in the area and the precautions to be taken to insure that airborne asbestos is confined to the area.

\* \* \*

(B) Employees who will perform such work and employers of employees who work and/or will be working in adjacent areas.

Mr. Sperrazza testified that he only told his employees not to make contact with the overhead pipes because it contained asbestos. (Tr. 880-881). [redacted] testified that Mr. Sperrazza told the employees to watch out for the asbestos in the ceiling. (Tr. 268). [redacted] confirmed that his supervisor told him that there was asbestos in the basement. (Tr. 180-181). CO Stutz also testified that, during his inspection, Mr. Sperrazza told him that the employees were warned not to contact the pipes because they contained asbestos. (Tr. 620). According to Mr. Stutz, this was not enough information to inform employees of the precise location of the asbestos containing insulation and other measures that need to be taken to prevent the generation of asbestos fiber. (Tr. 621).

Mr. Sperrazza's warnings did nothing to inform the employees of the presence of asbestos contaminated debris. As a result, employees swept, pushed, and ran over asbestos debris without using any measures to minimize its dispersal. Therefore, I find that the information provided the employees by Mr. Sperrazza was inadequate to provide employees the requisite

information regarding the location and quantities of asbestos, or of the precautions to be taken to confine the asbestos to the area.

The evidence also demonstrates that all seven of the employees listed in Ex. C-28 were exposed to the violative condition. (Tr. 621).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**g. Item 6(b) willful violation of 29 C.F.R. § 1926.1101(k)(8)(i) (Cambria failed to ensure that labels were affixed to all products containing asbestos.)**

§1926.1101 **Asbestos**

\* \* \*

(k) *Communication of hazards.*

\* \* \*

(8) *Labels.* (i) Labels shall be affixed to all products containing asbestos and to all containers containing such products, including waste containers. Where feasible, installed asbestos products shall contain a visible label.

Although there were signs at employee entrances warning of asbestos in the building in general, there were no signs or labels specifically warning of asbestos in the basement. (Tr. 1155-1158). Mr. Krasinski testified that, during his inspection of June 3, 2009, he did not see any warning signs at the AM&A warehouse. (Tr. 132). This was confirmed by employee [redacted] who testified that he saw no asbestos labels in the basement. (Tr. 269-270). Indeed, CO Stutz testified that, during the inspection, Mr. Sperrazza told him that no asbestos warning labels were placed in the basement. (Tr. 622).

According to the CO, the seven employees listed in Ex. C-28 were exposed to the violative condition. (Tr. 623).

Based on this evidence, I find that the evidence establishes that Cambria failed to comply with the cited standard and that employees were exposed to the violative condition.

**h. Items 7-11, willful violation of 29 C.F.R. §1926.1101(k)(9)(i) (failure to ensure that five individually named employees who performed asbestos work in the AM&A basement had appropriate asbestos related training.)**

§1926.1101 **Asbestos**

\* \* \*

(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 ensure their participation in the program.

In her brief, the Secretary points out that 29 C.F.R. §1926.1101(k)(9)(ii) specifies that an information and training program for Class I asbestos work shall be equivalent in curriculum, training method and length to the EPA Model Accreditation Plan (MAP) set forth at 40 C.F.R. PaRT 763 (F), App. C. Under the MAP a training course is required to adequately address: (1) the physical characteristics of asbestos, including how to identify asbestos; (2) the potential health effects related to asbestos exposure; (3) employee personal protective equipment; (4) the proper work practices for asbestos abatement activities; (5) medical monitoring; (6) air monitoring; and (7) relevant federal, state and local regulatory requirements. (SOL Brief at 79).

Under her egregious willful policy, which will be discussed *infra*, the Secretary chose to issue cited separately the five employees who allegedly were not trained in an asbestos information and training program as required by the cited standard. The five individually named employees are:

Item 7- [redacted] (Also identified as Employee A)(Tr. 625)

Item 8-[redacted] (Also identified as Employee B) (Tr. 627)

Item 9-[redacted] (Also identified as Employee C)(Tr. 629)

Item 10-[redacted] (Also identified as Employee D)(Tr. 630-631)

Item 11-[redacted] (Also identified as Employee E)(Tr. 633)

Mr. Stutz testified that employees need to be trained on the hazards of asbestos and how to protect themselves to prevent exposure. (Tr. 626). In each instance, Mr. Sperrazza told CO Stutz that the named employees had not been given asbestos training. (Tr. 625, 628, 629, 632, 633). Mr. Krasinski testified that none of the four basement workers he encountered were certified asbestos workers. (Tr. 76). This was confirmed by Mr. Sperrazza who testified that none of the Cambria employees working in the basement were certified asbestos workers. (Tr. 882). To qualify as a certified asbestos worker requires the employee to receive asbestos training. (Tr. 859).

[redacted] told the CO that he received some training years earlier by a previous employer. However, he had not received any training from Cambria. (Tr. 625) The recording of [redacted] interview with the CO indicates only that he received training in respirator use by a former employer due to a lead hazard. (Ex. C-29(a) at time mark 35 min 25 sec.) Thus, the training was not related to asbestos.

[redacted] testified at the hearing that he did not receive any asbestos training. (Tr. 268). This was confirmed by the CO who testified that Mr. Sperrazza told him that [redacted] did not receive any asbestos training. (Tr. 628).

[redacted] told CO Stutz that he did not receive any asbestos training. (Tr. 630).

[redacted] was one of the employees identified by Mr. Sperrazza as not having received any asbestos training. (Tr. 631-632).

[redacted] was specifically identified by Mr. Sperrazza as one of the employees who had not received any asbestos training. (Tr. 633).

Besides arguing that the basement employees were not engaged in any asbestos work, Cambria does not dispute that it did not provide any of the identified employees with asbestos training.

The evidence also demonstrates that the identified employees worked in the basement and, as found *supra*, were engaged in Class I asbestos work. Accordingly, the employees were exposed to the violative condition.

The Secretary has opted to cite the failure to train each employee on an individual basis. Where a standard explicitly extends its protection to “each employee” the law is clear that the employer’s duty runs to each employee on an individual basis and that the Secretary has the discretion to cite the “each employee” exposed to the violative condition on a “per employee” basis. Thus, where a training standard requires the employer to train “each employee” the Commission has held that the Secretary may issue a separate violation for “each employee” that did not receive the requisite training. *Gen. Motors Corp.* (“GM”), 22 BNA OSHC 1019, 1046-48 (No. 91-2834E, 2007) (consolidated); *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, (No. 90-0050, 1996) (consolidated).

In contrast, in *Eric K. Ho*, 20 BNA OSHC 1361, 1373-75 (No. 98-1645, 2003) (consolidated), *aff’d sub nom. Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005), the Commission found in a split decision that the general industry asbestos training standard at 29 C.F.R. §



1926.1101(k)(9), prescribing a “training program for all employees,” required only “one program for all employees” and, therefore, affirmed only one violation for the employer’s failure to train all eleven of its employees. In its split decision affirming the result in *Ho*, the Fifth Circuit employed a different legal analysis from that applied by the Commission. The court found that, unlike standards that explicitly require the employer to take an action for “each employee,” the asbestos training standard affords protection to “all employees” and was ambiguous. The court stated that “unlike the Commission, which found the standard to be stated solely in inclusive terms, we agree with the Secretary that the language of the asbestos training standard allows the Secretary, in her discretion, to reasonably [issue citations] on a per-employee basis.” 401 F.3d at 372. However, the court determined that the Secretary’s application of the standard to *Ho* on a “per employee” basis was unreasonable. The court pointed out that the case did not “present any employee-specific unique circumstances that could merit citation based on each failure to train an individual employee.” 401 F.3d at 373. Moreover, the court noted that each of the items were identical to each other, except for the names of the employees. 401 F.3d at 373. The court concluded that :

Nothing in this record indicates that one training program regarding this Class I asbestos removal at the hospital site would not have abated the violation of both subparts (i) and (viii), nor that unique individual training sessions, or even more than one session, would have been necessary to abate the violation. The ALJ indicated that one training session, if all 11 workers had attended, would have been sufficient to meet the training standard here. The citations and evidence support that this was one Class I asbestos removal job on a single site at one address, performed by all the same 11 untrained workers, from the beginning to the end. Thus, although we acknowledge that there may be cases where per-employee citations of § 1926.1101(k)(9) based on unique circumstances of the employees might be considered reasonable, here we do not defer to the Secretary's unreasonable interpretation of the asbestos training regulation as applied to *Ho*.

*Id.*

In dissent, Judge Garza pointed out that, where a standard is ambiguous, the court must determine whether the Secretary’s interpretation of that standard is reasonable. Citing to the Supreme Court Case *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 150 (1991), Judge Garza stated that, if the court finds that the Secretary’s interpretation is reasonable, the court *must* defer to the Secretary. *Id.* at 378. Having not found unreasonable the Secretary’s interpretation of the asbestos training standard as imposing a “per employee” duty, it was Judge Garza’s opinion that the court should have affirmed the “per employee” violations. *Id.* at 379-380.

In *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1573 (No. 94-1979), the Commission reconsidered its decision in *Ho* and held that such standards may be cited on a “per employee” basis. The Commission stated that its earlier decision in *Ho* elevated form over substance by emphasizing the coincidental placement of particular wording, and ignored the basic principle of statutory construction that regulations should be read as a consistent whole. 22 BNA OSHC at 1580. The Commission stated that a “unit of violation must reflect the substantive duty that a standard imposes, and therefore ‘any failure to train would be a separate abrogation of the employer’s duty to each untrained employee.’” *Id.* at 1581 (Citing *General Motors Corp.*, 22 BNA OSHC at 1047). The Commission concluded that, “when read in its entirety and in context, the asbestos training standard *imposes* a duty that runs to each employee.” *Id.* (emphasis added).

Respondent argues that, under the Fifth Circuit decision in *Ho*, the Commission must conclude that the Secretary abused her discretion by citing the training violation on a “per employee” basis. Cambria points out that, as in *Ho*, the Secretary failed to present any employee-specific unique circumstances that could merit citation on a “per employee” basis. (Resp. Brief at 83).

*Ho* was decided in the Fifth Circuit. Therefore, it is not controlling precedent for this case which is appealable to the Second Circuit. Furthermore, Commission judges are obligated to follow precedent as set by the Review Commission, unless there is some intervening Circuit or Supreme Court case that reverses that precedent. *Municipal Services*, 19 BNA OSHC 2120, 2122 (No. 01-1230, 2002)(ALJ). The Commission has made it clear that it agrees with the Secretary’s interpretation that the asbestos training standard imposes a duty that runs to each employee. Such an interpretation does not require that the Secretary present any specific circumstances warranting citation on a “per employee” basis. According, following Commission precedent in *E. Smalis Painting*, I find that the Secretary acted within her discretion in issuing citations for training violations on a “per employee” basis.

Finally, at the hearing, Mr. Stutz testified that the violations of the training standard were cited on a per employee basis under the Secretary’s “egregious” policy. Under that policy, the Secretary will exercise her discretion to cite as a separate violation in willful situations where there is intense or plain indifference where a situation has occurred. (Tr. 635). In her brief, however, the Secretary does not rely on her “egregious” policy as justification for citing the

violations on a “per employee” basis. Rather, she asserts only that the decision to cite on a “per employee” basis was within her discretion.

I find nothing in the law that requires that a violation be found to be “egregious” before the Secretary may exercise her discretion to cite on a “per employee” basis. The basis of her discretion to cite on a “per employee” basis lay in the language of the standard, not in the state of mind of the employer. The Secretary’s institution of an “egregious” policy is an internal policy decision and cannot be interpreted as limiting her discretion to cite on a “per employee” basis in other than Willful situations.

## **VI. Knowledge**

The evidence establishes that each of the cited standards applied to Cambria’s work in the basement of the AM&A warehouse, that Cambria failed to comply with the cited standards, and that its employees were exposed to the violative conditions. The final element the Secretary must prove to establish a violation is that the employer had knowledge of the violative conditions. The Secretary satisfies her burden of showing knowledge by establishing that the cited employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *United States Steel Corp.* 12 BNA OSHC 1692, 1699 (No. 79-1998, 1986).

Mr. Sperrazza was aware that Class I work had to be performed in a regulated area. (Tr. 604). It is Cambria’s position that Mr. Sperrazza did not find it necessary to comply with the cited asbestos standard because the Asbestos Survey, which is supposed to identify asbestos at the site, made no mention of asbestos in the debris. According to Cambria, the Survey results were confirmed by Mr. Sperrazza’s own walkthrough of the worksite. Moreover, Cambria was not expecting to remove any asbestos at that stage of the work. (Tr. 904).

However, had Mr. Sperrazza exercised reasonable diligence, he would have known of the probability that the debris contained asbestos and that an asbestos assessment was required. Had Mr. Sperrazza read the Survey closely, he would have known that it explicitly stated that “non-uniformly dispersed debris” should be tested for asbestos content. (Ex. C-1). Mr. Sperrazza was also aware that the pipes contained friable TSI and that pieces of insulation on the pipes were missing. (Tr. 867-868, 874, 931, 969). Nonetheless, he made no inquiries regarding the missing insulation, conducted a walkthrough of an unlighted basement equipped only with a flashlight and only made a superficial inspection of the surface of the debris. (Tr. 875, 969). Mr.

Sperrazza is a qualified asbestos supervisor and was the “competent person” for asbestos at the site. Had he exercised “reasonable diligence” he would have had the basement debris tested for asbestos content and would have known that he was required to comply with the cited standards. He would have known that he was required to set up a regulated area (Item 1); conduct an initial asbestos exposure assessment (Item 2); require the use of HEPA vacuums (Item 3) and respirators (Item 4); provide appropriate protective clothing to the employees (Item 5); inform the basement employees of the location and quantity of asbestos containing material in the AM&A warehouse basement (Item 6a); ensure that labels were affixed to all products containing asbestos (Item 6b); and ensure that each employee who was working in the basement received appropriate asbestos related training (Items 7-11) . The actual or constructive knowledge of the employer’s foreman or supervisor is generally be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff’d*, 19 F.3d 643 (3rd Cir. 1994). As Cambria’s supervisor on the site, and as its “competent person,” Mr. Sperrazza’s knowledge is imputed to Cambria.

Accordingly, the evidence establishes that Cambria, with the exercise of reasonable diligence, knew or could have known of the violations.

## **VII. Willfulness**

### *Position of the Parties*

#### *a. Secretary*

The Secretary asserts that all 11 items are willful. The Secretary first asserts that Cambria intentionally disregarded its obligations under the Act. She notes that Cambria, which specializes in asbestos work, had a heightened awareness of the requirements of the asbestos standard. Also, both of Cambria’s supervisors, Mr. Ferrucci and Mr. Sperrazza, were certified by New York State as asbestos supervisors, with intensive training in asbestos hazards and controls, and had significant on the job experience with asbestos. Mr. Sperrazza understood both the nature of TSI and the work practices required for abatement work involving TSI. He knew that, as a general matter, pipe insulation is presumed to contain asbestos. He also knew that the TSI in the AM&A warehouse basement was friable and that the removal of TSI debris was to be treated no differently than the removal of TSI. Mr. Sperrazza was aware of the health hazards associated with the inhalation of asbestos fibers. (SOL Brief at 88-92). Moreover, Cambria was aware of the

presence of asbestos in the basement and that, in any event, Cambria knew that the building was over 50 years old and, therefore, presumed to contain asbestos.

The Secretary also notes that deteriorating condition of the pipe insulation was readily apparent. Indeed, Mr. Sperrazza observed the deteriorated condition of the pipe insulation and noted that some of the debris below the deterioration “looked the same color as the insulation” but that it “had taken another form.” (SOL Brief at 93, Tr. 591-593). Nonetheless, he did not even attempt to get the debris tested for asbestos. Therefore, the Secretary asserts that Cambria had knowledge that the basement debris were contaminated with TSI ACM from the damaged and deteriorating pipe insulation, yet chose not to follow the requirements of the asbestos standard. (SOL Brief at 92). The Secretary also asserts that Cambria was under time pressure to get the work finished quickly. According to CO Stutz, Mr. Sperrazza told him that he did not test the debris for asbestos because he “had to get the work done A.S.A.P. and that was just the way it was.” (SOL Brief at 96, Tr. 593). Also, the contract with the developer stated that “Time is of the essence” and that Cambria was subject to liquidated damages of \$100 per day for “[a]ny delay caused directly or indirectly by subcontractor” and “any other damages” incurred by Cambria. (SOL Brief at 96, Ex. C-37 at ¶¶ 4, 13). The Secretary speculates that such time pressure may have given Cambria a disincentive to treat the basement debris as contaminated with asbestos.

The Secretary also asserts that Cambria displayed plain indifference to employee safety. The Secretary notes that in *A.E. Staley Mfg. Co.*, 295 F.3d. 1341, 1350-53 (D.C.Cir, 2002), the court agreed with the Commission that plain indifference does not require “direct evidence that the employer knew of the specific noncomplying condition;” rather, “plain indifference substitutes for knowledge of the specific condition as a means of inferring the employer’s willful intent.” *Id.* at 1351. The Secretary points out that the D.C. Circuit found this principle apt for willful “violations by omission” such as the situation here where “the citation is for failing to act rather than for affirmatively acting.” *Id.* at 1353. Therefore, the Secretary concludes that even assuming *arguendo* that Cambria did not know of the asbestos containing materials in the basement, that Cambria ignored the obvious asbestos hazards without conducting any tests or taking any precautions, demonstrates at least plain indifference to employee safety and the requirements of the Act. (SOL Brief at 97-98).

The Secretary further argues that Cambria’s failure to act cannot be attributed to a good faith belief that conditions in the basement were safe because, given the facts of this case, such a

decision was not objectively reasonable. (SOL Brief at 98). For example, the Secretary contends that Mr. Sperrazza's walkthrough of the basement before the onset of work lacked due diligence. She points out that Mr. Sperrazza saw a missing piece of asbestos insulation from the pipe and even wondered what happened to the missing piece. (T. 969). Furthermore, he superficially inspected the basement with only a flashlight under dark conditions and never moved the garbage to observe the debris below. Also, he never sampled the debris to make sure it was not the missing TSI and failed to test the air. (SOL Brief at 101-102).

Similarly, the Secretary argues that Mr. Sperrazza's reliance on the Asbestos Survey was not reasonable. The Secretary argues that, on its face, the Survey was limited in its scope and timing and was never intended to constitute a substitute for Mr. Sperrazza's own contemporaneous observations. By its own words, the Survey warned that the identified asbestos materials were "field approximations only and should be verified prior to abatement." (Ex. C-1, at p. 2). The Survey warned that there were areas of the basement that were not examined. Also, none of the samples taken for the Survey were either from the pipes or from the floor debris. Under these circumstances, Mr. Sperrazza's reliance on the Survey was not reasonable. (SOL Brief at p.103).

*b. Cambria*

Cambria vigorously disputes the "willful" allegations. It points out that the Asbestos Survey was conducted by a licensed surveyor. Mr. Krasinski testified that the Survey was a credible, valid and accurate work product and was a common document of the type that he himself regularly relies upon. (Resp. Brief at 84, Tr. 288-300) Nonetheless, rather than blindly relying on the Survey, Mr. Sperrazza conducted his own inspection of the basement to verify that the conditions in the basement matched the conclusions of the Asbestos Survey. (Resp. Brief at 84). He found nothing in his inspection that raised suspicions in the area where he noted missing insulation on overhead pipes. He was further assured by the indications of a prior asbestos abatement in the basement, which meant that air clearances had to be obtained to close out the prior abatement. (Resp. Brief at 85).

Cambria contends that it was only after Mr. Sperrazza was satisfied that the basement garbage did not contain asbestos that he made the determination that the laborers could safely perform the garbage removal without impacting the overhead pipes. He informed the employees of the location of the overhead asbestos pipe insulation and instructed the laborers to stay away

from them. Also, there were signs posted at each employee entrance warning them of the presence of asbestos. (Resp. Brief at 85, Tr. 1155-1158, Ex. R-151).

Furthermore, as a highly trained asbestos supervisor, he was well aware of the health hazards of asbestos. Yet, Mr. Sperrazza worked alongside the other employees in the basement. To assert that he was indifferent to employee safety implies that he deliberately exposed himself to the hazards of asbestos.

Cambria also points out that it subcontracted the asbestos abatement, and that its subcontractor had the proper decontamination unit on site and had made arrangements to have an air monitor perform the required air clearances. Moreover, the contract was on a time and materials basis and the cost of any additional asbestos abatement would have been passed on to the building owner. Thus, Cambria asserts that it makes no sense that it would willfully decide to cheat on a minor aspect of the project like cleaning garbage out of the basement. (Resp. Brief at 86). It asserts that it obtained the variance from the State because Mr. Krasinski “arbitrarily” directed it to get a site specific incidental disturbance variance. (Resp. Brief at 92).

Cambria concludes that it had a good faith opinion that the cited conditions did not violate any standards.

#### *Discussion*

A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff’d* 73 F.3d 1466 (8<sup>th</sup> Cir. 1996). The Secretary must differentiate a Willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.*, 17 BNA OSHC at 1136. The Secretary must show that, at the time of the violative act, the employer was actually aware that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). The Commission has found heightened awareness “where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that the violative conditions exist.” *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993); *See also, E.L. Davis Contrac.*, 16 BNA OSHC 2046, 2051-52 (No. 92-35,

1994)(employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector's warning).

The lynchpin of the Secretary's argument is that Mr. Sperrazza was a highly trained asbestos supervisor, yet chose to rely on the Asbestos Survey even though he knew that the overhead pipes contained friable asbestos, were in a deteriorated condition, and had pieces missing. According to the Secretary, this reliance was not reasonable and his failure under these circumstances to test the debris for asbestos demonstrated a willful disregard of the asbestos standard and exhibited a conscious disregard of employee safety.

However, it is not enough for the Secretary to show that an employer was aware or should have been aware of conduct or conditions constituting the alleged violation. Such evidence is already necessary to establish any violation. A Willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, (No. 89-433, 1993). While the Secretary's arguments clearly demonstrate that Cambria, through Sperrazza, should have known that the debris was contaminated, I find that the evidence falls short of the bar necessary to establish willfulness. Mr. Sperrazza's reliance on the Asbestos Survey was unjustified, but not necessarily unreasonable. The evidence demonstrates that an Asbestos Survey is the first line of information that a company receives when working in an asbestos or potentially asbestos contaminated environment. In most instances, such surveys represent a reliable assessment of the presence, location and amounts of asbestos on a site. (Tr. 304-307) Nonetheless, while the Asbestos Survey may have provided a reasonable assessment of asbestos on pipes, in walls, on structures, etc., it did not attempt to assess loose asbestos such as that represented in the loose debris in the basement. This was made clear by the note on the sample results that explicitly stated that the bulk analysis "may not be representative of non-uniformly dispersed debris." (Ex. C-1). Mr. Sperrazza should have been, but was not, aware of this limitation. He wrongly assumed, apparently without carefully reading the caveats in the Survey, that the Survey was comprehensive and that it included the condition of the debris in the basement. So viewed, I cannot find that his reliance on the Asbestos Survey was so unreasonable as to rise to a level of "conscious disregard" or "plain indifference."

I agree with the Secretary's assessment that Mr. Sperrazza's walkthrough of the basement was inadequate. He did not inspect the entire basement, failed to inquire about the whereabouts



of the missing pieces of pipe insulation, did not move the surface garbage to check the debris underneath, and conducted the inspection under unfavorable lighting conditions. Again, however, the inadequacy of the walkthrough must be viewed in context of his overreliance on the Asbestos Survey. Mr. Sperrazza erroneously believed that the failure of the Survey to identify asbestos in the debris indicated that the debris was not contaminated with asbestos. Therefore, his objective for conducting the walkthrough was simply to ensure that conditions had not changed since the Survey was completed.

Mr. Sperrazza was also misled by the earlier asbestos abatement into assuming that air clearances that had to be obtained somehow indicated that there was no airborne asbestos. However, the prior abatement took place only in the area by the tunnels. There is no indication that anyone conducting that abatement had reason to disturb the debris in the four basement buildings and, therefore, cause asbestos fibers to become airborne. So, any air clearances obtained would have represented only the lack of airborne asbestos from disturbances caused by the earlier abatement.

Furthermore, the Secretary's assumption that Cambria ignored the hazard posed by the debris to avoid additional costs and /or lost time is, at best, speculative. As the Secretary asserts, the contract states that "Any delay caused directly or indirectly by Subcontractor will, at a minimum, subject Subcontractor to liquidated damages of One Hundred (\$100.00) Dollars per day." (Ex. C-37 at ¶4). Moreover, the contract specifies that "Time is of the essence" (Ex. C-37 ¶13). However, the contract sets forth no specific dates or timelines for completion of the work. Rather, it states at ¶4 that "Turnover date to Owner is Unspecified." Also, the liquidated damages clause is effective only for delays" caused directly or indirectly by Subcontractor." Certainly, any delay caused by the legally required testing of the debris for asbestos would not be considered a delay caused by the subcontractor. The contract provides that the work will comply with "local and state building codes" (Ex. C-37 ¶2). The contract also provides that:

No additional compensation shall be allowed for conditions increasing costs, which were not known by Subcontractor when submitting proposal if the condition was obvious and could have been discovered by him had he visited the project and thoroughly informed himself of all existing conditions which could affect his work.

(Ex. C-37 ¶2).

Although it is not the province of this court to interpret the contract between the parties, it

is arguable that the failure of Mr. Sperrazza to test the debris ran Cambria afoul of the provisions of ¶2, in that the condition could have been discovered early on. So viewed, had Mr. Sperrazza tested the debris, found it contaminated and began to implement the requirements of the asbestos standards, compensation could have been allowed for the increased costs<sup>22</sup>.

I also give little weight to Mr. Stutz testimony that Mr. Sperrazza told him that “they had to get the work done A.S.A.P., and that was just the way it was.” (Tr. 593). Mr. Stutz recollection of Mr. Sperrazza’s comment lacks context and follow-up. In his testimony, Mr. Sperrazza stated that the presence of asbestos did not change what they were getting paid for the job. (Tr. 942). He also testified that Cambria had no pecuniary interest in his decision not to test for asbestos, that nobody forced him to make the decision or suggested that he “look the other way.” (Tr. 943). Indeed, he further testified that he too worked in the basement and aware of the health effects of asbestos and didn’t want to cause that to put himself, his family or his employees “in harm’s way.” (Tr. 941).

Finally, Mr. Stutz testified that, while he made a recommendation and took part in the discussion, the decision to cite the violations as Willful was made “above” him. (Tr. 851). However, there was no testimony from those “above” Mr. Stutz as to what went into their decision to cite these violations as Willful.

I find that the evidence fails to establish that Cambria’s failure to comply with the cited standards was the result of intentional, knowing or voluntary disregard for the requirements of the Act or by indifference to the safety of its employees. Accordingly, I find that the Secretary failed to establish that the violations were Willful.

### **VIII. Seriousness**

Under Section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if, in the event of an accident, the result would be death or serious physical harm. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consolidated). Where the standard is designed to protect the health of employees, a violation that could result in serious damage to the health of employees is properly classified as serious. *Phelps Dodge Corp.*, 11 BNA OSHC 1441,

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<sup>22</sup> It is relevant to note that Cambria began work at the warehouse during the first week in May 2009 (Tr. 868) and the contract signed on May 8, 2009 (Ex. C-37, p.11). Mr. Sperrazza testified that he conducted his walkthrough before the work began. (Tr. 871). Thus, there was time, before the signing of the contract for Cambria to have tested the debris and discovered the presence of asbestos contamination.

1448-49 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237 (9th Cir. 1984). The Secretary is not required to show that an incident or a life-threatening disease will occur or is substantially probable to occur in order to establish a serious violation. *Beverly Enterprises*, 11 BNA OSHC at 1188; *Phelps Dodge Corp.*, 11 BNA OSHC at 1448-49. Instead, the Commission has inquired whether a disease could result from the violative condition, and whether there is a substantial probability of death or serious physical harm if the disease does occur. *Beverly Enterprises*, 11 BNA OSHC at 1188; *Phelps Dodge Corp.*, 11 BNA OSHC at 1448-49.

The links between lung disease and asbestos have long been well-known. In 1986, the Secretary stated that:

OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure are life-threatening or disabling. Among these diseases are lung cancer, cancer of the mesothelial lining of the pleura and peritoneum, asbestosis, and gastrointestinal cancer. Of all of the diseases caused by asbestos, lung cancer constitutes the greatest health risk for American asbestos workers. Lung cancer has been responsible for more than half of the excess mortality from asbestos exposure in some occupational cohorts.

51 Fed. Reg. 22,612, 22615 (1986).

CO Stutz, testified that each of the cited violations could result in the inhalation of asbestos fibers which could cause lung cancer, asbestosis and death. (Tr. 607, 613, 616, 618, 620, 622, 626). Also, the Secretary's asbestos expert witness, Daniel Crane, lead physical scientist at the Salt Lake Technical Center, testified that even the tiniest particles of asbestos can cause harm. (Tr. 1074). He testified that exposure to asbestos can lead to bronchogenic cancer, asbestosis, and mesothelioma. (Tr. 1076). Mr. Crane, explained that asbestosis is characterized by a stiffing of the lungs and the formation of white pleural plaques. The lungs become inelastic, and fibers within the lung become scarred. This results in a reduction in the reduction of the oxygen available to the body. He further explained that mesolthelioma is a kind of cancer in the lining of the lung. (Tr. 1076-77). These are all progressive diseases that affect the ability to breathe and eventually cause death. (Tr. 1077). Furthermore, the onset of the diseases can occur from 30-50 years after the first exposure. (Tr. 1077). Mr. Crane also testified that a person exposed at the current PEL would have an excess death rate of six per thousand. (Tr. 1077). Smoking exacerbates the effects of asbestos exposure. (Tr. 1078). He noted that [redacted] was a

smoker. (Tr. 186, 1079). Also, [redacted] testified that he smokes a little less than a pack a day. (Tr. 186).

That the Secretary did not establish that the employees were actually exposed to airborne asbestos concentrations in excess of the PEL does not reduce the seriousness of the violations. The debris sampled by the CO revealed asbestos contents 5-25% in Building A and 5-40% in Building D (Exs. C-22 & 23, R-23A) and was located near overhead pipes that contained TSI. The potential for harm in both Class I and Class II asbestos work is sufficiently severe that the presumption is that any exposure to asbestos exceeds the PEL. *Secretary of Labor v. ConocoPhillips Bayway Refinery*, 654 F.3d 472, 478 (3d Cir. 2011). The asbestos standards require only that there *could* be harmful exposure to asbestos that could lead to serious physical harm. *Secretary of Labor v. ConocoPhillips Bayway Refinery*, 654 F.3d at 478.

I find nothing in the record that rebuts this presumption<sup>23</sup> and I find that the evidence and legal precedent demonstrate that the violations were properly cited as serious.

## IX. Penalty

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). In *J. A. Jones Construction Company*, 15 BNA OSHC at 2214, the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. . . . The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.

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<sup>23</sup> As noted, *supra* n.14, that the results of the air monitoring conducted by the CO on himself carries little weight regarding conditions at the site on and before June 3, 2009. When the monitoring occurred on June 12, the site had been shut down for nine days during which time there was no activity in the basement. This could have allowed any airborne asbestos fibers to settle to the ground. Moreover, it is not clear whether the working conditions on and before June 3 were dusty. For example, Mr. Krasinski testified that conditions were dusty. (Tr. 77). Similarly, in his interview with CO Stutz, [redacted] interview stated that conditions were dusty and that he would have dust on his clothes (Ex. C-29A at time marks 8:16-8:30, 28:56-29:06). On the other hand, Mr. Sperrazza testified that the work did not generate dusty conditions. (Tr. 950). Employee [redacted] also testified that conditions were not dusty. (Tr. 214, 218). However, the veracity of this testimony was placed in doubt when he admitted that in his interview with Mr. Stutz he stated that they were "sucking dust" and that their work generated a lot of dust. (Tr. 244). In any event, the absence of visible dust does not mandate a conclusion that there was no airborne asbestos. As SOL expert Daniel Crane testified, airborne asbestos fibers can be too small to be seen. Therefore, visible dust is not a prerequisite to obtaining a positive result for airborne asbestos. (Tr. 1095).

(citations omitted).

CO Stutz testified that the gravity of a violation determines the base from which a final proposed penalty is calculated. (Tr. 606-607). The gravity of a violation is determined by the severity and probability of the potential injury. (Tr. 607).

The Secretary applied the same penalty calculations for each item. (Tr. 607, 608, 613, 616, 618, 619, 621, 626, 628, 630, 632, 634). According to Mr. Stutz, these violations were classified as higher/lesser, meaning that the severity was “higher” and the potential for injury was “lesser.” (Tr. 607). Mr. Stutz noted that inhalation of asbestos fibers can lead to cancer and asbesotos, resulting in death or serious physical harm. (Tr. 607). For each of the eleven items, the Secretary determined that an appropriate gravity based penalty was \$55,000.

Finding Cambria to be a small employer, the Secretary gave Cambria a 20% penalty reduction. (Tr. 608). No reduction was given for safety history because Cambria had been issued a prior citation for serious violation within the last three years. (Tr. 608). Also, no reduction was given for good faith because of the seriousness of the violation. (Tr. 608). Under section 17(a) of the Act, 29 U.S.C. §666(a), the maximum penalty for a willful violation is \$70,000 Under section 17(b) of the Act, 29 U.S.C. §666(b), the maximum penalty for a serious violation is \$7,000. Therefore, the penalty for a willful violation is ten times that of a nonwillful violation. Having found each of the violations to be serious, but not willful, a commensurate penalty reduction is appropriate. I also note that the Secretary combined the penalties for items 6(a) and 6(b), which I find appropriate.

I agree with the Secretary that, as a small employer, Cambria is entitled to a 20% penalty for size and that a reduction based on the prior violation for serious violation, credit for safety history is not appropriate. Had I found these violations to be Willful, I would have also agreed with the Secretary that Cambria should not be given credit for good faith. However, Mr. Stutz also testified that no credit was given for good-faith based on the seriousness of the violation. While the Secretary’s policy may be not to grant good-faith credit for violations high on the scale of seriousness, the Commission is the ultimate arbiter of an appropriate penalty and, therefore, is not bound by the Secretary’s policy considerations. *Hern Iron Works*, 16 BNA OSHC 1619,1621-23 (No. 88-1962, 1994). While the evidence falls short of demonstrating willfulness, the record does show that Cambria failed to take the measures expected of an experienced asbestos removal company to protect its employees in the basement. However, when determining good-faith, the

Commission has also considered such factors as whether the employer cooperated with the inspection. *E.g. 4 State Trucks*, 22 BNA OSHC 1929 (No. 08-1125, 2009). The evidence establishes that Cambria was fully cooperative with the OSHA inspection. It also fully cooperated with the New York DOL shut down order and obtained the necessary variance that eventually allowed it to resume its work while in compliance with the asbestos standards. On this basis, I find that Cambria is entitled to credit for good faith.

Considering all the statutory factors, I find that a penalty of \$4000 for the six items (Items 1-6B) to be appropriate<sup>24</sup>.

Regarding Items 7-11, although the Secretary has the discretion to cite the training violations on a per employee basis, the Commission is the final arbiter of an appropriate penalty. *C.T. Taylor Company, Inc. and Espirit Constructors, Inc.*, 20 BNA OSHC 1083, 1088-1089 (No. 94-3241 & 94-3327, 2003). Thus, where the Secretary has cited on a “per employee” basis, and the individual items are affirmed, the Commission can impose separate penalties for each violation or assesses a combined penalty for all of the items. *E. Smalis Painting Co., Inc.*, 22 BNA OSHC at 1578, n. 26. Here, as the Commission indicated in *E. Smalis Painting Co., Inc.*, *Id.* and *Manganas Painting Co.*, 21 BNA OSHC 1964, 1999 (No. 94-0588, 2007), it is not necessary to determine whether a separate penalty should be assessed for each item or whether a combined penalty is appropriate. Although Cambria violated its duty individually to each employee, I find that a single training session conducted before work began in the basement could have satisfied its training obligations to each of the employees. Its failure to do so was not the result of five individual decisions by Cambria, but of a single misunderstanding of the hazard the employees to which employees working in the basement were about to be exposed. Nonetheless, as noted, Cambria should have known of conditions in the basement, and its failure to provide adequate training to its employees left the employees helpless to protect themselves against the hazards inherent in exposure to asbestos.

Considering the seriousness of the hazard, the number of employees exposed, Cambria’s general good-faith in cooperating with both OSHA and the NY DOL, I find that a combined penalty of \$5000 (or \$1000 per item), is appropriate for Items 7-11.

Accordingly, a total penalty of \$29,000 is assessed for Items 1-11.

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<sup>24</sup> As noted, *supra*, a combined penalty assessed for Items 6(a) and 6(b).

## **X. Findings of Fact and Conclusions of Law**

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

### **ORDER**

Accordingly, it is **Ordered** that:

**Citation 1, Item 1** for violation of 29 C.F.R. § 1926.1101(e)(1) is Affirmed as a serious violation and a penalty of \$4000 is Assessed;

**Citation 1, Item 2** for violation of 29 C.F.R. § 1926.1101(f)(2)(i) is Affirmed as a serious violation and a penalty of \$4000 is Assessed;

**Citation 1, Item 3** for violation of 29 C.F.R. § 1926.1101(g)(1)(i) is Affirmed as a serious violation and a penalty of \$4000 is Assessed;

**Citation 1, Item 4** for violation of 29 C.F.R. § 1926.1101(h)(1)(i) is Affirmed as a serious violation and a penalty of \$4000 is Assessed;

**Citation 1, Item 5** for violation of 29 C.F.R. § 1926.1101(i)(1) is Affirmed as a serious violation and a penalty of \$4000 is Assessed;

**Citation 1, Item 6a** for violation of 29 C.F.R. § 1926.1101(k)(3)(ii)(B) and **Citation 1, Item 6b** for violation of 29 C.F.R. § 1926.1101(k)(8)(i) are Affirmed as serious violations and a combined penalty of \$4000 is Assessed;

**Citation 1, Items 7, 8, 9, 10; and 11** for violations of 29 C.F.R. § 1926.1101(k)(9)(i) are Affirmed as serious violations and a combined penalty of \$5000 is Assessed for these five items.

**SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
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The Honorable G. Marvin Bober  
U.S. OSHRC Judge

Dated: January 11, 2012

Washington, D.C.