UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 NORTH SPEER BOULEVARD, ROOM 250
DENVER, COLORADO 80204-3582

SECRETARY OF LABOR, Complainant, v. TIERDAEL CONSTRUCTION COMPANY, Respondent.	OSHRC DOCKET NO. 01-0261

APPEARANCES:

For the Complainant:
Oscar L. Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
James J. Gonzales, Esq., Holland & Hart, LLP, Denver, Colorado

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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

Respondent, Tierdael Construction Company (Tierdael), at all times relevant to this action maintained a place of business at Bellview & Simms, Littleton, Colorado, where it was lowering a water line. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 30, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Tierdael's Littleton work site. As a result of that inspection, Tierdael was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Tierdael brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 6-7 and 25-26, 2001, a hearing was held in Denver. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of 1926.651(j)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(j)(2): Protection was not provided by placing and keeping excavated material or equipment at least two feet (.61 m) from the edge of the excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into the excavation, or by a combination of both if necessary:

a) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado: Tierdael Construction employees were exposed to injuries in that, a two foot clearance between the spoil pile and the edge of the excavation was not maintained.

Facts

Compliance Officer (CO) Michael England conducted the October 30, 2001 inspection of Tierdael's work site (Tr. 33, 37-38). England testified that, when he arrived on the site, he observed two Tierdael employees working in a trench (Tr. 39-40, 51). England stated that the trench, which was dug in Type C soil, was properly sloped to a 1:1-1/2 ratio (Tr. 147-148). England stated that the main spoil pile on the north side of the trench, pictured on the left in Exh. J-1 and J-4,[1] was located right on the trench's edge, rather than placed the required two feet back from the edge of the trench (Tr. 52-53, 56; 171). England testified that the spoil pile was merely a three to four foot continuation of the trench slope (Tr. 52). CO England admitted that he did not measure the distance of the spoil pile from the edge of the excavation (Tr. 148).

Shahn Morganflash, a pipe layer with Tierdael and a competent person for excavation purposes, testified that Tierdael's crew had located the water line at the Simms and Chenango work site the preceding day (Tr. 275, 332). On October 30, 2001 the backhoe operator dug down as close to the pipe as possible before Morganflash and Heredia Merced went into the trench (Tr. 272, 274-75, 312). Morganflash testified that he observed the excavation on October 30, and determined that there were no hazards presented by the trench slopes (Tr. 332). Morganflash testified that the spoil pile was located on the north side of the trench, and that there was a path between the edge of the excavation and the spoil pile, which employees used to walk back and forth (Tr. 333-36, 360; Exh. J-4; *See also*, testimony of Leary Jones, Tr. 532-33). Nonetheless, Morganflash stated, the spoil pile was moved back at CO England's request (Tr. 337; *See also*, testimony of CO England, Tr. 154). Morganflash

[1] AT THE HEARING ENGLAND ALSO TESTIFIED ABOUT THE CONDITIONS ON THE SOUTH AND WEST SIDES OF THE TRENCH, HOWEVER, THERE WAS NEVER ANY INDICATION, PRIOR TO THIS HEARING, THAT SPOILS LOCATED ANYWHERE BUT ON THE NORTH SIDE OF THE TRENCH WERE AT ISSUE (TR. 155-59, 333, 532).

testified that there was no spoil pile on the south side of the trench (Tr. 361, 365; *See also*, testimony of Leary Jones, Tr. 547).

Discussion

The cited standard provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61m) from the edge of excavations . . .

The Secretary failed to establish the cited violation. CO England maintains that there was no separation between the spoil pile and the slope of the trench. England admits, however, that he did not measure the distance of the spoil pile from the edge of the trench. Moreover, his testimony is directly contradicted by that of Mr. Morganflash and Mr. Jones, both of whom maintain that there was separation between the excavation and the spoil pile in the form of a pathway that employees used to access the west end of the trench. Complainant's photographic evidence is simply inconclusive. A videotape depicts the north slope for less than a second; a still taken from the video, J-1, shows nothing at all of the north bank, while J-4 shows a flat area on the north side, supporting Tierdael's position.

Because the Secretary failed to carry her burden of proving violation of a cited standard by a preponderance of the evidence, this item is vacated.

Alleged Violations of §1926.1101 *et seq.*

Facts

CO England testified that Tierdael was engaged in Class II asbestos work, *i.e.*, the removal of asbestos containing transite pipe [17% Chrysotile, 8% Crocodolite]. However, England stated, Tierdael had not taken any steps to comply with the OSHA regulations applicable to Class II work (Tr. 70-71, 84-85, 89, 116; Exh. J-7). Tierdael did not establish a regulated area or a decontamination area; there was no HEPA vacuum, protective clothing or respirators on the site; the asbestos job was not supervised by a competent person; asbestos debris was not promptly bagged, or properly labeled (Tr. 117-21, 456-464). According to CO England, Tierdael consistently told him that the Class II precautions were not required on the Littleton site (Tr. 114, 117, 123; *See*, testimony of Leary Jones, Tr. 527, 534-35).

Shahn Morganflash testified that Tierdael had trained him in the proper removal of asbestos pipe approximately nine months prior to the start of this job (Tr. 311-12, 319-23). Morganflash stated that as soon as he saw the water pipe in the subject trench he realized it was asbestos containing concrete transite pipe, and immediately communicated that fact to his superiors at the work site (Tr.

286-88). Morganflash and his foreman discussed the means they would use to remove the pipe and decided to take it out intact, removing it at its collar at one end of the excavation and breaking it off cleanly at the other end of the trench (Tr. 312). Morganflash would place plastic under the area of the pipe to be broken (Tr. 327-28). Mr. Merced would wet the pipe and any debris with an emulsifying agent (a combination of water and Elmer's glue)[2] as Morganflash broke it with the hammer (Tr. 312-14, 316, 350, 370).

Morganflash testified that after the pipe was uncovered he broke it by fracturing it in several places with a two pound hammer (Tr. 282). He attempted to make the break as clean as possible, creating only "minimal" debris. Morganflash believed the debris consisted mainly of dirt from the outside of the pipe (Tr. 286, 289-90, 350-51). Morganflash testified that he did not crumble or pulverize the ACM, and that there was no visible dust (Tr. 355-56, 359). According to Morganflash, any debris was bagged and taken out of the excavation (Tr. 328). The length of pipe was then lifted intact from the excavation to the south side (Tr. 318-19).

The method of removal Morganflash described was similar to the removal method advised in Tierdael's training, and its Asbestos Action Plan, though the written plan calls for the pipe to be "wrapped in 6ml. plastic and secured with industrial adhesive tape to prevent damage to the ACM [asbestos containing material] and airborne release of asbestos fibers" before breaking the pipe (Tr. 323-27; Exh. J-8). Morganflash admitted that no negative exposure assessment was performed, no regulated area was established, no protective clothing or respirators were used (Tr. 312, 329). Morganflash did not know what happened to the pipe after it was taken from the excavation, however, CO England testified that during the two hours he was on the site, the pipe was not bagged (Tr. 112).

Leary Jones, Tierdael's safety officer (Tr. 492) testified that Tierdael does not employ a competent person for purposes of asbestos removal (Tr. 459, 463). However, Jones stated that he had been, during various periods in the 10 years preceding his employment at Tierdael, a competent person for asbestos (Tr. 477-78). Jones stated that he had prior experience with transite pipe; he admitted that removal of transite water pipe met the definition of Class II asbestos work (Tr. 519). Jones testified that, in his experience, however, contact with intact transite pipe poses no asbestos danger (Tr. 477-79). From his review of industry literature, Jones knew that breakage and removal of intact transite pipe typically does not result in excess of .1 fibers per cubic foot during an eight hour period, well

[2] A weed sprayer and a pool of a milky substance beneath the end of the pipe are clearly visible in the parties joint exhibit J-1 (Tr. 338-39).

below the PEL allowed under OSHA regulations (Tr. 479-80). Jones testified that Tierdael's Asbestos Abatement Plan calls for transite pipe to be removed "intact," *i.e.*, sections of pipe must be separated or broken in such a way that asbestos fibers in the pipe remain bound to the concrete matrix. According to Jones, asbestos fibers are not likely to become airborne when removed "intact" (Tr. 517).

Jones further testified that in 1995 Tierdael removed transite pipe from a job site half a mile from the Simms and Chenango site. That job was monitored by Western Environment and Ecology (Western) to determine the probable exposure of Tierdael's employees to asbestos during removal of the pipe (Tr. 457-58, 487-88; Exh. R-1). Jones testified that Western's monitoring resulted in a negative exposure assessment. Western found that removal of the subject transite pipe did not expose employees to asbestos levels exceeding OSHA's permissible exposure level (PEL)(Tr. 458-59, 487). Jones believed that Tierdael's original Asbestos Action Plan was based on the results of that assessment (Tr. 460, 471-72; Exh. J-8). Jones testified that he has revised Tierdael's original action plan several times since becoming Tierdael's safety officer, relying on his experience with transite pipe and on telephone consultations with representatives from Western (Tr. 481-82, 484-85). Western's representative, Greg Sherman, confirmed that, over the years, Western provided Tierdael with data concerning expected asbestos exposures related to the removal of transite pipe. Sherman stated that he had spoken with someone from Tierdael specifically about the Chenango and Simms job (Tr. 913, 938, 968, 1000).

Jones testified that he knew Tierdael would be encountering transite pipe during the Littleton job, and so reviewed the Asbestos Action plan prior to beginning the job. He believed the action plan appropriately addressed the asbestos hazards Tierdael employees would be encountering (Tr. 460, 465, 467, 526).

After the October 30, 2000 inspection, Tierdael provided samples from the cited transite pipe to Western for analysis (Tr. 508). On November 22, 2000, Western furnished Tierdael with a letter confirming that, when broken, the cited transite pipe emitted asbestos fibers far below OSHA PEL (Tr. 466, 510, J-7). At the hearing Sherman opined that, based on the photographic evidence, the broken transite pipe at the Chenango and Simms site appeared to be in a non-friable condition when removed from the excavation (Tr. 915). According to Sherman, when transite pipe is broken the asbestos fiber remains encased in the concrete matrix of the pipe (Tr. 920-21). Another of Tierdael's expert witnesses, Dennis Christensen, a certified industrial hygienist in the U.S. and Canada (Tr. 1020; Exh. R-12), also testified that breaking transite pipe leaves the matrix intact within the pipe, preventing the asbestos contained within the pipe from becoming airborne (Tr. 1079-81).

The Secretary stipulates that Tierdael's employees were not exposed to asbestos above the PEL on October 30, 2000 (Tr. 499).

Applicability

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

As a threshold matter, Tierdael argues that the asbestos standard at §1926.1101 *et seq.* is not applicable to its pipe laying operations.

The cited standard provides in relevant part:

> (a) *Scope and application.* This section regulates asbestos exposure in all work. . ., including, but not limited to the following. . .
>
> (2) Removal or encapsulation of materials containing asbestos;
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> * * *
>
> (b) *Definitions.*
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> * * *
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> *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.
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> * * *
>
> *Removal* means all operations where ACM and/or PACM is taken out of or stripped from structures or substrates, and includes demolition operations.

Tierdael maintains it was not involved in Class II asbestos work because the cited transite water pipe was not removed from a structure or substrate. This judge does not agree. Tierdael was removing lengths of water pipe, which were part of a water distribution system, or structure. *See;* WEBSTER'S II New Riverside University Dictionary, defining **Structure** as **1.** Something made up of a number of parts held or put together in a specific way. The transite pipe was removed from a layer of earth beneath the surface soil, *i.e.*, a substrate. *See;* WEBSTER'S II New Riverside University Dictionary, defining substratum as **1.b**. A layer of earth beneath the surface soil; SUBSOIL.

The Supreme Court has held that the words of a statute, if not specifically defined, should be read to comport with their ordinary meaning. *FMC Corp. v. Holliday,* 498 U.S. 52 (1990). If the literal language of a statute or regulation does not create ambiguity on its face, or lead to an

unreasonable result, it is neither necessary nor proper to look to secondary sources to discern the intent of the standard. *United States v. Charles George Trucking Co.*, 823 F.2d 685 (1st Cir. 1987); *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1991-93 CCH OSHD ¶29,758 (No. 89-1192, 1992).

Tierdael was removing asbestos containing transite pipe, part of the Littleton water delivery system, a structure. The pipe was removed from the substrate, beneath the surface soil. Under the plain meaning of §1926.1101 *et seq.* this activity is Class II asbestos work.[3] The only ambiguity in this case is that which Respondent seeks to introduce with its extrinsic evidence.

Finally, the principles of statutory construction prohibit interpreting a statute or regulation in a manner which would produce an absurd result. *See; United States v. Gonzales*, 65 F.3d 814 (10th Cir. 1995). Section 1926.1101 *et seq.* is intended to regulate asbestos exposures arising in the construction industry. Excavation is a construction activity specifically covered under Part 1926, Subpart P. *Nothing* in the standard itself suggests that OSHA intended to limit the operation of §1926.1101 *et seq.* to exclude the removal of asbestos found in open earth excavations. The suggestion that the Secretary intended to withhold the protection provided by the asbestos standard from employees engaged in this single area of the construction industry is simply incredible. As noted above, the cited standards are applicable.

Individual Violations

Serious citation 1, item 2 alleges:

29 CFR 1926.1101(e)(1): All Class I, II and III asbestos work was not conducted within regulated areas.

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado; Tierdael Construction did not establish a regulated area when conducting Class II asbestos removal, two employees were removing transite water piping that contained asbestos (17% Chrysotile and 8% Crocodolite).

The cited standard provides:

> 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 they may exceed a PEL.

[3] TIERDAEL'S OWN SAFETY DIRECTOR RECOGNIZED THAT REMOVAL OF TRANSITE PIPE WAS CLASS II ASBESTOS WORK (TR. 519).

Discussion

It has been established that Tierdael's employees were engaged in Class II asbestos work. It is undisputed that Tierdael did not establish a regulated area around the area where asbestos containing transite pipe removal was taking place. Tierdael argues that the Secretary, nonetheless, failed to meet her burden of proof. Citing *Atlantic Battery Co.,* 16 BNA OSHC 231, 2138 (No. 90-1747, 1994), Tierdael's counsel maintains that to establish a violation of the cited standard, the Secretary must prove "the existent (sic) of volatile conditions and the exposure of an employee to the release of asbestos fibers."(Tierdael's Post Hearing Brief, p. 39). Counsel misrepresents the holding in *Atlantic Battery.* That case, which deals with the lead standard, specifically points out that "*some* of the provisions of the lead standard apply only to employees who are exposed to excessive amounts of lead. . .. However, the particular provision that is at issue here. . . contains no such limitations on its scope." As in *Atlantic Battery, some* of the provisions of the asbestos standard apply only where there is a likelihood that employees will be exposed to asbestos levels exceeding the PEL. The standard cited here, however, applies to all employees engaged in Class II asbestos work, regardless of their expected levels of exposure. This item has been established.

Classification & Penalty

This item is classified as serious, and a penalty of $4,000.00 is proposed. According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. The substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). CO England testified that the cited violation was "serious," as defined by the Act because exposure to asbestos "can cause life-threatening diseases" (Tr. 76). According to England, because there was no regulated area, should there be a release of fibers, Tierdael's entire crew would be exposed. England admitted, however, that there was no evidence the Tierdael employees involved in the removal operation were exposed to asbestos, even in the excavation itself (Tr. 260-61). Complainant did not speculate on what type of hypothetical "accident" might occur, or what levels of exposure might result from an unexpected release of asbestos fibers. Tierdael's expert witnesses, Greg Sherman and Dennis Christensen, both testified that the removal techniques used by Tierdael have consistently been shown to produce airborne releases of asbestos far below OSHA's permissible exposure levels [PEL] (Tr. 898-901, 1079-84). Sherman admitted that

cutting, grinding, sanding or b-blasting would render transite pipe friable, which, in the absence of other engineering controls, could expose workers cutting the pipe to asbestos levels above the OSHA PEL (Tr. 912). However, even were Tierdael's asbestos removal crew to ignore the company's Asbestos Abatement Plan, and use one of the prohibited techniques, there is insufficient evidence in the record from which this judge can gauge the probability that the resulting release of asbestos fibers would affect employees outside the excavation.

On this record I cannot find that there was a substantial probability that Tierdael's entire crew would contract a life threatening disease, even in the unlikely event of a release of asbestos fibers caused by the unanticipated misconduct of employees cutting rather than breaking the transite pipe. As a result, I cannot find that the employer's failure to set up a regulated area was a "serious" violation of the Act." Citation 1, item 2 will be affirmed as an other than serious violation.

The gravity of the violation is low. CO England testified that Tierdael was entitled to a 20% reduction in the gravity based penalty due to its size, but stated that Tierdael did have a history of OSHA violations (Tr. 64). The record establishes that Tierdael was acting in good faith, in that had what it believed to be an adequate Asbestos Abatement Plan in place. Taking into account the relevant factors, this judge finds that a penalty of $400.00 is appropriate.

Serious citation 1, item 3 alleges:

29 CFR 1926.1101(f)(1)(i): The employer who has a workplace or work operation where exposure monitoring is required under this section, did not perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed:

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado; Tierdael Construction did not conduct asbestos monitoring during the Class II asbestos removal, when employees were removing transite water piping that contained asbestos (17% Chrysotile).

The cited standard, (f)(1)(i), provides:

> Each employer who has a workplace or work operation where exposure monitoring is required under this section shall perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.
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> * * *
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> (f)(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 expected exposures during that operation or workplace.. . .
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> * * *
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> (ii) Basis of Initial Exposure Assessment: Unless a negative exposure assessment has been made pursuant to paragraph (f)(2)(iii) of this section, the initial exposure

assessment shall, if feasible, be based on monitoring conducted pursuant to paragraph (f)(2)(iii) of this section.. . .

* * *

(iii) Negative Exposure Assessment: For any one specific asbestos job which will be performed by employees who have been trained in compliance with the standard, the employer may demonstrate that employee exposures will be below the PELs by data which conform to the following criteria:

(A) Objective data demonstrating that the product or material containing asbestos minerals or the activity involving such product or material cannot release airborne fibers in concentrations exceeding the TWA and excursion limit under those work conditions having the greatest potential for releasing asbestos. . .

Discussion

Tierdael admits it did not have a competent person[4] for asbestos on staff, and that it did not conduct monitoring, or to make an initial exposure assessment. Tierdael maintains that no monitoring and no initial assessment was required, because it conducted a negative exposure assessment pursuant to subparagraph (f)(2)(iii). Tierdael maintains that it relied on objective data establishing that transite pipe cannot release airborne fibers in concentrations exceeding OSHA limits when broken. Tierdael points to its Asbestos Abatement Plan, which it maintains was based on data provided by Western Environment and Ecology establishing that, when removed as recommended by Western, asbestos emissions from transite pipe remain far below OSHA PELs (Exh. R-1, R-11).

Subparagraph (f)(2)(iii) does provide that, in lieu of monitoring, an employer may rely on a negative exposure assessment which is based on objective data establishing that "under those work conditions having the greatest potential for releasing asbestos" there is a high statistical degree of certainty that no employees will be exposed above the PEL. *See*, OSHA Directive CPL 2-2.63 (Exh. R-9, p.2).

Greg Sherman, Western's president and owner (Tr. 867), testified that the results of approximately three years of monitoring demonstrate with 99% assurance that removal of transite pipe in accordance with its recommendations will result in time weighted exposures of below .0124 fibers, a magnitude, or ten times less than the .1 fibers allowed by OSHA (Tr. 898-901; Exh. R-11). Western's

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

data, however, does not establish that the removal of transite pipe cannot result in asbestos concentrations exceeding OSHA PELs under those work conditions having the "greatest potential for releasing asbestos." According to Greg Sherman, Western's monitoring was performed on pipes broken by tension created with straps lifted by heavy equipment (Tr. 918-19, 933; Exh. R-3, R-7). Sherman admitted that Western did not measure the emission of asbestos fibers where transite pipe was subjected to cutting, grinding, sanding, blasting, or damaged in any other way so as to render it friable (Tr. 904-905, 1002-04). In its November 22, 2000 asbestos analysis of Tierdael's Simms and Chenango site, Western warned against cutting or pulverizing the transite, allowing heavy equipment to crush the material, and/or using power tools which might create dust emissions (J-7). As noted above, Sherman admitted that cutting, grinding, sanding or b-blasting would render transite pipe friable, which, in the absence of other engineering controls, could expose workers removing the pipe to asbestos levels above the OSHA PEL (Tr. 912).

The evidence shows that under certain conditions, *i.e.* when cut or crushed, transite pipe may become friable, resulting in a substantial probability that employees removing such pipe will be exposed above the PEL for asbestos. Technically, therefore, the objective data does not show that the removal of transite pipe, under the worst case scenario, cannot result in the release of asbestos above the PEL. Such data, therefore, is not sufficient to support a negative exposure assessment as defined by (f)(2)(iii)(a).

However, the Commission has held that a violation may be classified as *de minimus* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987); *Chao v. Symms Fruit Ranch, Inc.*, 242 F.3rd 894 (9th Cir. 2001)[Reduction of a violation to *de minimis* within the Commission's statutory prerogative to direct other appropriate relief]. *See also, Phoenix Roofing, Inc.*, 874 F.2d 1027 (5th Cir. 1989), in which the court held that a *de minimis* classification is required as a matter of law where: 1) no, or only minor injury will result; 2) the possibility of injury is remote; or 3) there is no significant difference between the degree of protection provided by employer and that afforded by technical compliance with standard. A *de minimis* finding does not call into question the wisdom of the standard, it merely denotes that the employer's deviation from the standard in the case at bar did not compromise any protections which would have been provided to employees under the literal terms of the standard. *Holly Springs Brick & Tile Co.,* 16 BNA OSHC 1856, 1994 CCH OSHD ¶30,468 (No. 90-3312, 1994). This judge finds that

Tierdael's negative exposure assessment, though insufficient to comply with the literal terms of the cited standard, should be classified as *de minimis*.

Both Greg Sherman and Dennis Christensen testified that there is ample objective data in the industry demonstrating that there is no danger that breaking transite pipe will release asbestos fibers in excess of the PEL. Jones testified that he relied on that data when he reviewed Tierdael's Asbestos Action plan prior to beginning the Simms and Chenango removal project, and determined that it adequately addressed the asbestos hazard to which Tierdael's employees would be exposed. Nontheless, the Secretary maintains, where an employer cannot show data meeting the "worst case scenario" test set forth under subparagraph (f)(2)(iii)(A), it may either take advantage of subparagraph (f)(2)(iii)(B), or (C) which allows an employer to make a negative exposure determination, or follow each of the default provisions of the asbestos standard. Paragraph (f)(2)(iii)(A) provides:

> (B) Where the employer has monitored prior asbestos jobs for the PEL and the excursion limit within 12 months of the current and projected job, the monitoring and analysis were performed in compliance with the asbestos standard in effect; and the data were obtained during work operations conducted under workplace conditions "closely resembling" the processes type of material, control methods, work practices, and environmental conditions used and prevailing in the employers's current operations, the operations were conducted by employees whose training and experience are no more extensive than that of employees performing the current job, and these data show that under the conditions prevailing and which will prevail in the current workplace there is a high degree of certainty that employee exposures will not exceed the TWA and excursion limit; or
>
> (C) The results of initial exposure monitoring of the current job made from breathing zone air samples that are representative of the 8-hour TWA and 30-minute short-term exposures of each employee covering operations which are most likely during the performance of the entire asbestos job to result in exposures over the PEL.

Here, where, Tierdael's Asbestos Abatement plan was based on years of industry data showing that breaking transite pipe consistently results in exposures 10 times less than the OSHA PELs, and where Tierdael's plan required that the asbestos pipe be broken rather than sawed or blasted, there can be no purpose in requiring Tierdael to conduct additional monitoring each 12 months or on each job merely to establish that transite pipe *still* does not release asbestos fibers in excess of the PEL when broken. Tierdael's assessment, though falling short of the literal requirements of (f)(2)(iii)(A), *was* sufficient to inform Tierdael as to the precautions necessary to ascertain negative employee exposure, *i.e.,* Tierdael knew that so long as the pipe was not sawed, crushed, or pulverized, and its concrete matix remained intact, employees engaged in Class II removal of transite pipe would not be exposed to concentrations of asbestos in excess of the PEL. As a result Tierdael developed an action plan that ensured no

employee exposure to asbestos, achieving the objective of the cited standard. Because Tierdael substantially complied with the Secretary's requirement that a negative exposure assessment be performed, because the evidence establishes that Tierdael's failure to comply with exact terms of (f)(2)(iii)(A) or (B) did not expose employees to any risk of harm, and because no purpose would be served in requiring abatement of this violation, item 3 is classified as *de minimis.*

Serious citation 1, item 4a alleges:

29 CFR 1926.1101 (g)(1): The employer did not use the required engineering controls and work practices in all operations covered by this section, regardless of the levels of exposure:

a) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado: Tierdael Construction did not use a wet method or wetting agents during the removal of transite water piping that contained asbestos (17% Chrysotile).

b) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado. Tierdael Construction did not use a HEPA vacuum to collect all debris and dust containing ACM and PACM, during the removal of the transite water pipe that contained asbestos (17% Chrysotile).

a) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado: Tierdael Construction did not conduct prompt clean-up and disposal of wastes and debris contaminated with asbestos, during the removal of the transite water pipe that contained asbestos (17%, Chrysotile).

The cited standard provides:

> (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. . .
> (ii) Wet methods, or wetting agents, to control employee exposures during asbestos handling, mixing, removal, cutting, application and cleanup. . .
> (iii) Prompt clean-up and disposal of wastes and debris contaminated with asbestos in leak-tight containers . . .

Discussion

As in §1926.1101(e)(1), discussed at item 2 above, paragraph (g)(1)(i) through (iii) requires the use of certain engineering controls for all asbestos removal work, regardless of expected levels of exposure. The record establishes that Tierdael did use a wetting agent to control employee exposure during handling and removal of the transite pipe. The record further shows that any waste or debris created while breaking the pipe was collected, bagged and removed from the excavation. Because

Tierdael did not have a HEPA filtered vacuum on site for collecting debris, however, the Secretary has established a violation of subparagraph (iii) of the cited standard.

Serious citation 1, Item 4b alleges:

29 CFR 1926.1101(g)(7)(i): Class II asbestos work was not supervised by a competent person:

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado; Tierdael Construction did not have an asbestos competent person to supervise the Class II asbestos work being conducted at the site.

Discussion

Tierdael admitted that the Class II asbestos work at Simms and Chenango was not supervised by a competent person. Because paragraph (g) applies to Class II asbestos work regardless of expected exposures, a violation of the cited standard is established.

Serious citation 1, item 4c alleges:

29 CFR 1926.1101(g)(8): In addition to the general Class R requirements, the employer did not use the work practices and controls designated for the type of work being performed:

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado; Tierdael Construction did not require the use of specific controls for the removal of the transite water pipe which contains 17 % chrysotile. The required controls and work practices include:

(i) The material shall be thoroughly wetted with amended water prior to and during removal.
(ii) The material shall be removed in an intact state unless the employer demonstrates that intact removal is not possible.
(iii) Asbestos-containing material removed, shall be immediately bagged or wrapped, or kept wetted until transferred to a closed receptacle, no later than the end of the work shift.

Discussion

The evidence establishes that Tierdael thoroughly wetted asbestos containing transite pipe prior to and during removal, and that the pipe was removed in an intact[5] state. There is no evidence establishing whether the pipe was kept wetted until bagged, or that it was not bagged prior to the end of the work shift. The Secretary failed to prove the violation cited at item 4c, and it will be vacated.

[5] 1926.1101(B) STATES: INTACT MEANS THAT THE ACM HAS NOT CRUMBLED, BEEN PULVERIZED OR OTHERWISE DETERIORATED TO THAT THE ASBESTOS IS NO LONGER LIKELY TO BE BOUND WITH ITS MATRIX.

Penalty

A combined penalty of $4,000.00 was proposed for the instances cited at item 4. Section 1926.1101(g)(7)(i), cited at 4b, requires that Class II asbestos work be supervised by a competent person. As this litigation demonstrates, the requirements of the asbestos standard are extensive, and the interaction of the provisions is quite complex. Supervisory personnel who have not been specifically trained in asbestos abatement may not be aware of the interrelation of the standard's provisions, and so are ill equipped to enforce them. The presence of a competent supervisor for asbestos removal is especially important here, where such competent person may be expected to understand the limitations of the negative exposure assessment for transite pipe, and the need to adhere to the removal methods described in Tierdael's Asbestos Abatement plan so as to remain within the parameters of that assessment. This judge finds that the gravity of the violation affirmed at item 4b significantly exceeds that of the other items cited in this matter. A combined penalty of $1,000.00 is deemed appropriate and will be assessed for those portions of item 4 which are affirmed.

Serious citation 1, item 5 alleges:

29 CFR 1926.1101(h)(1): Respirators were not selected and used as required for the asbestos work:

a) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado; Tierdael Construction did not require respiratory protection for the two employees who were removing Class II asbestos. The employees did not use a wet method when performing their work.

b) At the intersection of Simms St. and W. Chenango Dr., Jefferson County. Colorado; Tierdael Construction did not require respiratory protection for the two employees who were removing Class II asbestos. The company did not establish a negative-exposure assessment for the two employees.

Discussion

As noted above, the record shows that the Class II asbestos work at Simms and Chenango was conducted using wet methods. However, paragraph (h) provides that employers who do not perform a negative exposure assessment conforming to the requirements of paragraph (f), must provide respirators for employees conducting asbestos work. As noted in item 3 above, Tierdael's negative exposure assessment did not technically comply with the requirements of paragraph (f). The Secretary has, therefore, established a violation of the cited standard. Tierdael's assessment showed that its employees would not be exposed to asbestos levels exceeding the PEL, however, and it is clear that respirators would not provide any meaningful protection for employees breaking transite pipe. For the reasons discussed at item 3, this item is deemed *de minimis.*

Serious citation 1, item 6a alleges:

29 CFR 1926.1011(i)(1): The employer did not provide and require the use of protective clothing, such as coveralls or similar whole-body clothing, head coverings, gloves and foot coverings for the employees exposed to asbestos and when a negative exposure assessment was not produced:

a) At the intersection of Sims St. and W. Chenango Dr.. Jefferson County, Colorado; Tierdael Construction did not provide the employees with appropriate whole-body protective coverings while removing Class II asbestos.

Serious citation 1, Item 6b alleges:

29 CFR 1926.1101(j)(2)(i): The employer did not establish an equipment room or area that is adjacent to the regulated area for decontamination of employees and their equipment:

a) At the intersection of Simms St. and W. Chenango Dr., Jefferson County, Colorado: Tierdael Construction did not establish a decontamination area for the employees who were removing Class II asbestos. and when a negative exposure assessment was not produced.

Discussion

Because Tierdael did not perform an conforming negative exposure assessment, its violation of the cited standards is established. For the reasons set forth in item 5 above, those violations are classified as *de minimis*..

Serious citation 1, item 7 alleges:

29 CFR 1926.1101 (k)(8)(i): Labels were not affixed to all products containing asbestos and to all containers containing such products, including waste containers:

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado: Tierdael Construction did not affix labels onto the transite water pipe and onto the bagged transite piping that was removed from the trench.

Discussion

Labeling is required for all ACM, regardless of the levels of exposure expected. The evidence establishes that labels were not affixed to bagged asbestos containing debris. This violation is established. Because the evidence does not establish whether transite pipe which is removed in an intact state is likely to result in hazardous releases of asbestos, this judge cannot find that the violation was "serious." The violation will be affirmed as an Other-than-serious violation of the Act, and a penalty of $400.00 will be assessed.

Serious citation 1, item 8 alleges:

29 CFR 1926.1101(k)(9)(iv)(C): For Class II operations not involving the categories of materials specified in paragraph (k)(9)(iv)(A) of this section, training was not provided which would include at a

minimum all the elements included in paragraph (k)(9)(viii) of this section and in addition, the specific work practices and engineering controls set forth in paragraph (g) of this section:

a) At the intersection of Simms St. and W. Chenango Dr. Jefferson County, Colorado; Tierdael Construction did not train the employees who were exposed to unknown concentrations of asbestos while removing transite water piping. The employees were not trained in the following: a) methods to recognize asbestos; b) the health effects associated with asbestos exposure; c) the relationship between smoking and asbestos; d) the nature of operations that could result in exposure to asbestos; e) the purpose, proper use, fitting instructions and limitations of respirators; f) the appropriate work practices for performing the asbestos job; g) medical surveillance program requirements; h) contents of the standard; i) the names, addresses and phone numbers of public health organizations which provide information, materials and/or conduct programs concerning smoking cessation; and j) the requirements for posting signs and affixing labels.

Discussion

CO England admitted that he was provided an August 21, 2000 roster indicating that Tierdael provided asbestos training for its employees (Tr. 230-31). England stated that he did not follow up on that document because he had already determined, based on the existence of violations at the Simms and Chenango site that "training was not likely" (Tr. 231). England made no effort to determine whether the training Tierdael provided its employees was deficient (Tr. 231-32).

The Commission recognizes that the mere existence of violations on a work site cannot, in itself, establish a failure to train. *N & N Contractors, Inc.* 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000). In this case, Mr. Morganflash, one of the employees working on the asbestos job, testified that he had received asbestos training approximately nine months prior to the subject OSHA inspection. The Secretary introduced no evidence that the training program did not contain the required elements, or was deficient in any other way. This item is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.651(j)(2) is VACATED.
2. Citation 1, item 2, alleging violation of §1926.1101(e)(1) is AFFIRMED as an Other-than-serious violation of the Act, and a penalty of $400.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of §1926.1101(f)(1)(i) is AFFIRMED as a *de minimis* violation.
4. Citation 1, item 4a, subsection b), alleging violation of §1926.1101(g)(1) is AFFIRMED as an Other-than-serious violation of the Act.
5. Citation 1, items 4a, subsections a) and c), alleging additional violations of §1926.1101(g)(1) are VACATED.

6. Citation 1, item 4b, alleging violation of §1926.1101(g)(7)(i) is AFFIRMED as an Other-than-serious violation of the Act.

7. A single penalty of $1,000.00 is ASSESSED for the two violations of §1926.1101(g) at items 4a.b) and 4b.

8. Citation 1, item 4c, alleging violations of §1926.1101(g)(8) is VACATED.

9. Citation 1, item 5, alleging violation of §1926.1101(h)(1) is AFFIRMED as a *de minimis* violation.

10. Citation 1, item 6a and 6b, alleging violations of §1926.1101(i)(1) and (j)(2)(i) are AFFIRMED as *de minimis* violations.

11. Citation 1, item 7, alleging violation of §1926.1101(k)(8)(i) is AFFIRMED as an Other-than-serious violation of the Act, and a penalty of $400.00 is assessed.

12. Citation 1, item 8, alleging violations of §1926.1101(k)(9)(iv)(C) is VACATED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: February 14, 2002