United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90
100 Alabama Street, S. W.
Atlanta, Georgia 30303-3109

Phone: (404) 562-1640 Fax: (404) 562-1650

SECRETARY OF LABOR, Complainant, v. RELIANCE ENVIRONMENTAL MANAGEMENT, INC., Respondent.	:	OSHRC Docket No. 96-1290

Appearances:

Janice Thompson, Esquire
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Michael A. Holman, Esquire
Bricker & Eckler, LLP
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Reliance Environmental Management, Inc. (REM), is an asbestos removal contractor with an office in Holland, Ohio. In February, 1996, REM was working at the abandoned Macy's building in Toledo, Ohio when the Occupational Safety and Health Administration (OSHA) initiated an inspection of the jobsite. As a result of the inspection, REM received serious and willful citations on August 6, 1996, for alleged violations of the construction asbestos standards at 29 C.F.R. Part 1926.1101. REM timely contested the citations.

The serious citation alleges that REM failed to determine employee exposures in violation of § 1926.1101(f)(1)(ii) (item 1); failed to notify employees of their asbestos monitoring results in violation of § 1926.1101(f)(5)(ii) (item 2); and failed to provide initial asbestos worker certification

training at no cost to the employee in violation of § 1926.1101(k)(9)(i)[1] (item 3). The serious citation proposed penalties totaling $12,600.

The willful citation alleges that REM failed to use wet methods to control employee asbestos exposure in violation of § 1926.1101(g)(1) (item 1a); used prohibitive work practices including dry sweeping and shoveling asbestos containing material (ACM) or presumed asbestos containing material (PACM) in violation of § 1926.1101(g)(3) (item 1b); removed asbestos containing pipe insulation without one or more control methods in violation of § 1926.1101(g)(5) (item 1c); failed to establish decontamination areas in violation of § 1926.1101(j)(1)(i) (item 2); and failed to provide shower facilities in violation of § 1926.1101(j)(1)(i)(B) (item 3). The willful citation proposed penalties totaling $147,000. REM timely contested the citations.

The hearing was held August 25 to September 5, 1997, in Toledo, Ohio. REM stipulates to jurisdiction and coverage (Tr. 5). REM argues that OSHA's inspection was unreasonable; denies the alleged violations; and asserts an employee misconduct defense. REM's arguments regarding the inspection and employee misconduct are rejected and the violations except for monitoring and shower facilities are affirmed as non-willful.

Background

In June 1995, the former Macy's department store, located in downtown Toledo, Ohio, was a 75-year old abandoned eleven story building with a first level basement and two sub-basements. The building contained approximately 350,000 square feet of space. Each floor was approximately 455 feet long and 200 feet wide. The Alexander Company, owner of the building, decided to renovate the abandoned building into new apartments on the upper floors, shopping areas on the first two floors and parking in the basement (Exh. C-5; Tr. 42, 44-45, 1183, 1654, 1707).

Prior to initiating the renovation work, The Alexander Company hired Toltest, Inc. to survey the building to located areas which contained asbestos (Exhs. C-4, C-5; Tr. 41-42). Each bidder for the asbestos removal work, including REM, was given a copy of the Toltest survey and allowed to walk through the building (Tr. 73-74, 268-269, 1653-1654). The Toltest Building Survey of June 1995 became part of the bid agreement (Exhs. C-5, C-12; Tr. 212).

[1] The alleged violation of § 1926.1101(k)(9)(i) was amended without objection to an "other" than serious willful violation (Tr. 844-845, 940).

On September 9, 1995, REM, as low bidder, received the contract to perform the asbestos and lead paint abatement work[2] at the Macy's building (Tr. 1182, 1653-1654). For the asbestos removal contract, REM was to remove from all floors accessible floor tile material, some acoustical tile material, asbestos-containing mechanical insulation (TSI), some accessible electric conduit which had asbestos wrapping, the asbestos from inside the nonworking elevator shaft, and asbestos containing ceilings and pipe insulation on the eight floor and basement (Tr. 1655-1656). After completion of the bid contract work, representatives of The Alexander Company, Rudolph-Libbe, the general contractor, and Toltest inspected the building and conducted air samples. Final clearance was obtained by REM in October, 1995 (Tr. 92, 1957-1658).

In December 1995, Toltest, upon the request of Rudolph-Libbe Corporation, again inspected the building and found pieces of asbestos laying in different areas on the eight floor and other floors (Tr. 77, 81). The debris was caused by the demolition contractor, Homrich, Inc. At the request of The Alexander Company, REM returned to the building two or three days a week to clean up the debris. REM was also given a change order by The Alexander Company to remove asbestos from duct work on the eight floor (Exh. C-12 pp. 3-4; Tr. 1666-1667). By February 1996, there was debris throughout the building including numerous cut pipes (Exh. R-2; Tr. 121, 125, 155-156).

During this period, the building had no running water except in the basement (Tr. 1183, 1227). Also, other than permanent electricity to the lighting system, temporary power was provided by the general contractor (Tr. 76, 1228-1229). There was no permanent heat in the building. REM provided salamanders for temporary heat (Tr. 1230). During January to March 1996, the average weather temperature for Toledo ranged from 18 degrees to 30 degrees Fahrenheit (Exh. R-46).

On February 1, 1996, Toltest, at the request of The Alexander Company, reinspected the basement area and found all accessible pipe insulation to be in place and in the same condition as when Toltest originally surveyed area in June 1995 (Exh. C-8; Tr. 81-83, 157). After discussion as to whether it was part of the original contract, REM received another change order to the contract to remove the asbestos insulation in the first level basement (Exh. C-12 p. 8; Tr. 215-216, 268-269, 1668).

---

[2] The lead paint abatement is not part of the OSHA citations.

REM's asbestos removal work was under the supervision of Jim Fields, foreman and competent person (Tr. 265, 1793). On February 12, 1996, Fields inspected the first level basement "to see what work had to be done. We will have to rip wall out to get to the pipe" (Exh. C-10; Tr. 269-270). On February 14 -15, 1996, REM employees removed walls and insulation from the pipe in the basement (Tr. 274-275, 427-428, 509-510, 524-525, 641-643). According to Fields' Daily Progress Report, he "sent a few men down to start ripping out walls in basement. Kevin went into basement to start glove baging" (Exh. C-10). On February 15, Fields notes that;

> Basement crew tour down walls. ACM is on floor and on ledges. Put AFD down there to filter out air had crew clean up ACM and put it into bags. Water is frozen. Will have to build containment to get the rest of ACM off the pipes because they have ice on them. Had Larry and Joe strip fiberglass in basement. Elev. is broke." (Exh. C-10).

On February 15, 1996, OSHA received a complaint from a REM employee alleging, among other things, that REM was dry removing asbestos containing material from the basement; there was no shower facility; and REM performed no air monitoring (Exh. R-7). On February 16, OSHA Industrial Hygienist (IH) Laura Ulczynski, along with another IH and a compliance officer, initiated an inspection of REM's asbestos removal work at the Macy's building. In the basement, the inspectors found bags of debris (Exhs. C-7 photos 1-193; Tr. 758). The bulk samples, taken from six of the bags, showed 50% to 75% asbestos (Exh. C-26). OSHA's air monitoring in the basement area, however, was negative.

On March 5, 1997 IH Ulczynski returned to the Macy's building at the request of REM concerning the removal of asbestos from vertical pipes located in the pipe chase in the elevator shaft from the second floor to the eleventh floor (Exh. C-35; Tr. 797-798, 1485). On April 17, 1996, after receiving a complaint from a Rudolph-Libbe employee, IH Ulczynski returned to the Macy's building. She observed no equipment room (dirty room) attached to the containments on any of the floors (Exh. C-30; Tr. 808, 811). On April 23, 1996, after the elevator shaft containment was removed, The Alexander Company requested REM to reclean the elevator shaft and to remove the debris from the shaft (Tr. 817-818).

During its inspection of the Macy's building, OSHA received no complaints concerning any of the other contractors and for most of February, REM was the only employer on-site while OSHA conducted its inspection (Tr. 819-821).

Discussion

Reasonableness of OSHA's Inspection

OSHA's inspection of REM's asbestos removal work at the Macy's building was in response to an employee's complaint and was limited to items complained. The complaint alleged, among other things, the dry removal of asbestos, lack of shower or decontamination unit, and no air monitoring (Exh. R-7). REM consented to the inspection without requiring a inspection warrant based on probable cause.

Section 8(a) of the Occupational Safety and Health Act (Act) directs that the OSHA inspection be conducted in a reasonable manner, at reasonable times, and within reasonable limits. REM alleges that the inspection was not reasonable because it was based on an improper motive, *i.e*. to put it out of business and to harass. REM seeks to suppress OSHA's evidence gathered during the inspection and to dismiss the citations (REM Brief, p. 31-33).

To establish an affirmative defense of unreasonable inspection, there must be evidence of unreasonable conduct by OSHA. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). The evidence must show that OSHA substantially failed to comply with the provisions of § 8(a), and such noncompliance substantially prejudiced REM. *Gem Industrial, Inc.*, 17 BNA OSHC 1185 (No. 93-1122, 1995). Evidence that a compliance officer conducted an inspection to harass an employer can be relevant to a § 8(a) defense. See *Quality Stamping Products Co.*, 7 BNA OSHC 1285, 1287 n. 6 (No. 78-235, 1979).

As examples of its claim of harassment, REM notes that OSHA compliance officer Floyd Gattis stated to Charles Burge of C.S. Burge Inc. at another demolition project that "they (REM) were having trouble down at Macy's and one of his main things was to put Wayne Enterprises and Reliance out of business" (Tr. 1425-1426). Also, another compliance officer, William Trepanier, in a casual conversation with a stranger stated that "Reliance Environmental was responsible for all of the problems that were occurring down in the old Macy's building." He also called REM's president an "habitual liar" that could not be trusted and that "Reliance Environmental would do anything to

cut corners and would do anything to, quote, 'make a buck,' end quote" (Tr. 1438-1439). Another OSHA representative named "Mike" allegedly stated that IH Ulczynski "seems bent on catching Reliance doing something (Tr. 1473).

REM, also, argues that IH Ulczynski overlooked violations of the demolition contractor, did not conduct an objective impartial inspection by only interviewing employees with unfavorable things to say about REM, announced to representatives of the general contractor that REM was guilty and displayed a hostile attitude toward REM's foreman, Jim Fields (Tr. 925-926).

REM's harassment defense is rejected. OSHA's inspection was not shown unreasonable. It was conducted during normal business hours and the OSHA inspectors involved in the inspection acted in a reasonable manner. The inspection was in response to an employee complaint. See 8(f)(1) of the Act. It was limited to the employee complaint who alleged violations in REM's asbestos removal work (Exh. R-7). The alleged impartiality by the OSHA inspector is based more on who was cited than actual bias. There was no reason asserted nor shown indicating any hostility towards REM by IH Ulczynski. There was no evidence of bias or prejudice in her almost two days of testimony. REM is not relieved of its responsibility to comply with the Act. Other contractors working at the Macy's building were not the subject of an employee complaint. Also, it was not shown that IH Ulczynski failed to inspect observable violative conditions created by other contractors. During most the OSHA inspection, REM was the only contractor on-site.

With regard to comments by OSHA compliance officers, Gattis and Trepanier, OSHA denies the statements were made based on an investigation by Area Director Anderson (Exhs. C-41, R-53; Tr. 1489). He could not verify the allegations. However, Anderson' investigation was limited to interviewing the compliance officers and not the witnesses to the comments (Tr. 1500, 1502). At the hearing, the witnesses testified and appeared credible. Neither Gattis[3] nor Trepanier testified.

Such comments, if made by Gattis and Trepanier, are clearly inappropriate. The area director also considers the statements improper (Tr. 1505). However, neither Gattis nor Trepanier were involved in the inspection of REM. They were not shown to influence the OSHA inspection or

[3]Floyd Gattis transferred from the OSHA Toledo office to Atlanta in approximately March 1996 (Tr. 1490).

express the attitude of the inspectors and supervisors actually involved in the inspection. The inspectors involved in the inspection did not express a bias or show a lack of impartiality.

For REM to prevail, there must be a showing that such inappropriate comments influenced the inspection and prejudiced REM. The statements and actions by OSHA representatives that REM claims demonstrate an "improper motive," even if true, are insufficient by themselves to support a finding of vindictive prosecution. In addition to evidence of animus, REM must show that it would not have been cited absent that motive. *National Engineering & Contracting Co.*, 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997). The record from the inspection supports a *prima facia* showing of violations.

Further, even if REM had shown a "realistic likelihood" of vindictiveness, there still no basis to conclude that the Secretary's prosecution of REM in this case was unreasonable. OSHA's decision to prosecute appears to be based upon the normal factors ordinarily considered in determining what course to pursue. OSHA's inspection in this case was conducted as a result of an employee complaint involving REM's asbestos removal work. Such complaints, if reasonably based, require OSHA to initiate an inspection. Based on two previous inspection of REM which resulted in citations, OSHA clearly had a basis to determine that the employee's complaint reasonably identified possible safety and health violations (Exhs. C-16, C-17). The citations in this case, the willful designation and the proposed penalties also appear based reasonably on the evidence OSHA developed from its inspection.

REM failed to establish that IH Ulczynski's behavior resulted in any prejudice in its ability to present its defense. REM's contention that it was prejudiced by IH Ulczynski's failure to conduct a more thorough inspection, or her refusal to credit the explanations of some REM's employees is without merit. IH Ulczynski had previously inspected REM twice and was familiar with its operation (Exhs. C-16, C-17; Tr.752- 753). REM had ample opportunity to examine and record conditions at the work site and to question its own employees during and after the OSHA inspection. Moreover, REM was afforded a full opportunity to correct any of Ulczynski's misapprehensions at its closing conference (Exh. C-35). Finally, as is shown by the record, REM mounted a complete defense at the hearing.

IH Ulczynski has been employed by OSHA since 1990 (Tr. 750). During the hearing, she demonstrated an attitude of fairness and integrity. Her conduct and testimony did not bear a trace of bias, prejudice, or animosity towards REM. The record shows that IH Ulczynski conducted a fair and impartial inspection.

REM's motion to dismiss the citations are denied.

The Alleged Violations

In order to establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22 (No. 88-821, 1991).

REM does not dispute that its asbestos removal activities were covered by § 19261101 *et seq*. The work involved "construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain asbestos." *See* § 1926.1101(a). REM contracted to remove the asbestos containing material (ACM) or presumed asbestos containing material (PACM) from an abandoned 75-year old building which the owner intended to renovate into apartments and commercial business (Exhs. C-5, C-12). Toltest surveyed and sampled numerous locations in the building and concluded that "Several types and quantities of asbestos containing materials (ACM) were located within the facility as outlined in our report. They include, spray-on acoustical plaster, thermal system insulation, tank insulation, flooring materials, duct insulation and several other types of materials" (Exh. C-5). The Toltest survey identified the material, location, amount, friability, condition and whether positive for asbestos (Exh. C-5, Appendix E).

It is also undisputed that REM's asbestos removal work at the Macy's building was Class 1, asbestos removal. The OSHA standards identify four classes of asbestos work. "Those activities presenting the greatest risk are designated Class I work, with decreasing risk potential attaching to each successive class." 59 Fed. Reg. 40,964, 40,976 (August 10, 1994). "Class I asbestos work means activities involving the removal of TSI [Thermal system insulation] and surfacing ACM and PACM." *See* §1926.1101(b). ACM is any material that contains more than one percent asbestos.

PACM is thermal system insulation and surfacing material found in buildings constructed no later than 1980. See §1926.1101(b). The Toltest survey of the Macy's building identified the ACM and PACM to be removed by REM. REM contracted to perform the asbestos abatement. The removal of TSI and surfacing ACM which Toltest identified in the Macy's building is Class I asbestos work as defined at § 1912.1101(b).

Further, evidence of REM's asbestos abatement was found on February 16, 1996, by IH Ulczynski. She found bags of dry asbestos in two areas of the basement and on the eight floor. Bulk samples were taken from each location (Tr. 768, 780). The bulk samples showed 50% to 75% asbestos (Exh. C-26 pp. 2-25 to 2-35).

At the hearing, REM argues that the debris containing asbestos material in the basement resulted from the accidental disturbance when the walls were ripped out by the employees (Tr. 1298-1299). REM asserts that this work activity was Class IV which includes "activities to clean up dust, waste and debris resulting form Class I, II and III activities" §1926.1101(b) (REM Brief, p. 34-36). However, employees engaged in Class I activities are expected to clean the debris from their "removal of TSI and surfacing ACM and PACM" activities. Dr. Curt Varga, REM's expert, testified that when asbestos is intentionally removed, it should be promptly cleaned up and that the cleanup is also Class I work (Tr. 1557).

The record shows that the employees (Joseph Garcia, Jason Vargyas, Billy Marshall) working in the basement removed 200 to 300 feet of ACM aircell and the asbestos insulation form ceiling pipes, both outside of and behind the partition walls (Tr. 437-438, 509-512, 642, 685). William Watson, foreman for the electrical subcontractor who was in the basement while REM's employees were removing asbestos insulation, confirmed the employees' testimony (Tr. 639-640, 642). Jim Fields, foreman, testified that ACM insulation was also removed from elbows on February 14, 1996 (Tr. 282). According to REM's daily progress report, on February 14 "Kevin [Brice] went into basement to start glovebaging" (Exh. C-10). A glovebag is used for removing ACM from pipes. *See* definition § 1926.1101(b). Therefore, the record establishes that the employees were engaged in removal of ACM or PACM in the basement during February 13-15, 1996, and such activities constitute Class I asbestos work.

The argument that Jim Fields, foreman, was not aware of the employees' asbestos removal activities and such removal was contrary to his instructions to remove the walls, involve issues of knowledge to establish a violation and REM's asserted employee misconduct defense. These issues are discussed with regard to the alleged violations. REM's argument, however, does not change the nature of the work activities as Class I asbestos removal. OSHA for clarification has stated:

> that 'clean up' performed as a Class IV activity does not include picking up and bagging asbestos debris/dust during Class I, II, or III work. Class I, II, and III work is subject to the requirement in paragraph (g)(i)(iii) of the construction and shipyard standards for prompt clean-up and disposal of asbestos-containing waste and debris. Therefore, the collection and bagging of dust and debris that results from Class I, II and III work is considered a part of that class of work and must be done by employees trained to do such work, Class IV activities consist of clean-up work that takes place in an area after a Class I, II, or III job in that areas has been completed."

61 Fed. Reg. 43,454, 43,4456 (August 23, 1996) (Exh. C-44).

ACM was not only "disturbed" (thereby not qualifying for Class IV work), but intentionally removed from the pipes. Therefore, REM's work in the basement on February 13-15 was Class I asbestos work.

SERIOUS CITATION

Item 1; Alleged Violation of § 1926.1101(f)(1)(ii)

The citation alleges that "employee exposure samples were not made from the breathing zone." Section 1926.1101(f)(1)(ii) provides that:

> Determinations of employee exposure shall be made from breathing zone air samples that are representative of the 8-hour TWA and 30-minute short-term exposures of each employee.

The Secretary alleges that there was no air monitoring performed by REM during the Class I asbestos removal work in the basement of the Macy's building on February 13 -15, 1996 (Tr. 840; Secretary Brief, p.14).

Section 1926.1101(f)(1) requires that determinations of employee exposure be made by the employer who has a work operation where exposure monitoring is required. The employer is required to perform an initial exposure assessment of the operation "to ascertain expected exposures

during that operation" and daily monitoring "that is representative of the exposure of each employee who is assigned to work within a regulated area who is performing Class I or II work" *See* §§ 1926.1101(f)(2) and 1926.1101(f)(3).

REM asserts that it was not required to do air monitoring because Jim Fields, foreman, made a negative exposure assessment (REM Brief, p. 38). However, even with the negative exposure assessment, Fields continued to conduct air monitoring at the Macy's building (Exh. R-38; Tr. 1739). REM notes the air monitoring results for Kevin Brice dated February 14 and Eric Bishoff on February 15, 1996 (Exh. R-38).

Jim Fields, REM's foreman and competent person, testified that he made a negative exposure assessment based on air monitoring results from other projects (Tr. 1221). Under § 1926.1101(f)(2)(iii), a negative exposure assessment is permitted:

> 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[4] :
>
> (B) Where the employer has monitored prior asbestos jobs for the PEL and the excursion limit within 12 months of the current or projected job, the monitoring and analysis where 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 employer'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.

The Secretary argues that it was not until the sixth day of hearing that REM ever claimed it made a negative exposure assessment (Sec. Brief, p 16). During the inspection, IH Ulczynski was not shown a negative exposure assessment (Tr. 951, 1744). Also, IH Ulczynski after reviewing

[4]Subsections (A) and (C) which involves objective data showing no release of airborne fibers and the results of initial exposure monitoring are not applicable to this discussion.

monitoring results for the Macy's building, testified that levels of exposure in some instances were above the permissible exposure limit (PEL) and provided no basis to discontinue monitoring (Exh. C-38; Tr. 1042-1043).

REM offered a documentative history of monitoring results at prior projects: Exhibit R-65 involves asbestos ceiling cut down and some floor tile samples; Exhibit R-68, involves asbestos floor tile removal; Exhibit R-69 involves thermal system insulation and demolition; Exhibit R-70 involves duct work removal; and Exhibit R-71 involves patch and repair of asbestos-containing material (Tr. 1719, 1736-1739). The documents were put together approximately two to three weeks before Jay Burzynski, president of REM's testimony (Tr. 1720). Burzynski testified that the monitoring results were distributed to his supervisors and used in making a negative exposure assessment (Tr. 1739).

The reason for establishing a negative exposure assessment is so that the employer can ensure employee exposures for any one specific asbestos job on a current project will be consistently below the PEL. However, if the employer has any reason to suspect that there may be exposures above the PEL and/or excursion limit, additional monitoring is required regardless of whether a negative exposure assessment was previously produced for a specific job. *See* § 1926.1101(f)(4)(ii) and definition at § 1926.1101(b). The standard does not require a written assessment. It does, however, require that the employer demonstrate by data "that there is a high degree of certainty that employee exposures will not exceed the TWA and excursion limit." § 1926.1101(f)(2)(iii)(B).

REM's negative assessment is rejected for the work performed in the basement. There is no showing how Fields used the documentation and what specifically was considered relevant to the specific asbestos jobs anticipated in the basement. There is no indication that a negative assessment was made prior to OSHA's inspection. Also, the documentation supporting the assessment does not contain the information required by the standard as to environmental conditions, type of work performed, and the type of asbestos exposure. It fails to show that REM took breathing zone air samples that were representative of the 8-hour TWA or 30-minute short-term exposures of each employee. There were no 30-minute short-term exposure sampling done until February 24, 1996 (Tr. 840). The assessment does not show the type of material worked on, the environmental conditions, whether it was dry or wet removal, and the experience of the crew (Tr. 1760-1761).

Also, REM's own personal monitoring results at the Macy's building show over exposures (Exh. R-38, C-34; Tr. 1761-1762). Therefore, REM failed to demonstrate a negative evaluation assessment in compliance with the standard was made prior to its asbestos removal work in the basement on February 13-15, 1996.

In addition to claiming a negative evaluation assessment, REM asserts that it performed daily personal monitoring while asbestos removal work was done at the Macy's building. The record shows periodic air monitoring during asbestos removal work in the basement, including REM's air monitoring results on February 14 and 15 involving Kevin Brice, gloving bagging, and Eric Bishoff, clean up of ACM (Exh. R-38 p. 33-38, also in C-34). The results showed .081 fibers per cubic meter (F/cm) for Brice and .360 F/cm for Bishoff. When IH Ulczynski asked Jim Fields, foreman, during the inspection for the air monitoring results for the basement asbestos removal, she was informed that the samples were at his home (Tr. 778, 1350). The samples were not received by Toltest for analysis until February 19, 1996.

IH Ulczynksi testified that employees told her there was no monitoring done in the basement prior to her inspection (Tr. 840). Former employees, Joe Garcia, Jason Vargyas, and Billy Marshall, testified that while removing insulation from pipes in the basement on February 14 and 15, 1996, REM did not perform personal monitoring for asbestos. Garcia, asbestos worker, testified that he did not see anyone wearing a personal monitoring pump in the basement on February 14 and 15 (Tr. 429, 440). Likewise, Jason Varygas, asbestos worker, did not see anyone wearing a personal monitor (Tr. 519, 527). Billy Marshall stated there were no monitors worn on February 13 and 14 (Tr. 688). However, on cross-examination, Marshall did not recall whether or not Brice wore a personal air monitor (Tr. 725).

The records maintained by REM show the monitoring results for Brice and Bischoff while removing asbestos in the basement on February 14 and 15, 1996. Despite other employees not seeing them wearing a personal monitor, the monitoring results were not refuted. It was not shown that the other employees should have been aware or recall the work of Brice or Bishoff over a year earlier. Brice or Bischoff did not testify and apparently not interviewed by OSHA. The Secretary questions the reliability of the samples because Kevin Brice is the brother of Jim Fields, foreman and Eric Bischoff is Brice's roommate (Tr. 955, 960, 1384). However, Jim Fields informed IH Ulczynski that

the samples were obtained at the time of the inspection. The results from Toltest also show the dates sampled. The Secretary has the burden of proof. There is no showing that the sampling results for Brice and Bischoff were not representative of the other employees working in the basement. The Secretary failed to establish a violation of § 1926.1101(f)(1)(ii).

Item 2: Alleged Violation of § 1926.1101(f)(5)(ii).

The citation alleges that employees "were not informed in writing of the monitoring results which represent their exposure." Section 1926.1101(f)(5)(ii) requires that:

> The employer shall notify affected employees of the results of monitoring representing the employee's exposure in writing either individually or by posting at a centrally located place that is accessible to affected employees.

The purpose of the standard is to keep employees informed of their exposure results. The standard places the responsibility to inform employees on the employer. The employer is given the option of notifying affected employees; either individually or by posting the results at a place accessible to the employees.

The record is not in dispute. REM did not have a job trailer or a job office at the Macy's building. Because of job conditions, Jim Fields, REM's foreman, kept the monitoring results of employees in his job file (Tr. 308-309, 1216-1217). Fields acknowledges that at the time of the OSHA inspection the monitoring results were not posted nor were employees informed individually in writing. The results in his file were told to employees, if requested. He stated that if the results were high, he would verbally notify the affected employee. Fields testified that he never had an employee ask to see his air monitoring results. (Tr. 308-309, 1227).

REM does not dispute that the monitoring results were not posted or provided to employees in writing. REM seeks to reclassify the violation as "other-than-serious" (REM Brief, p. 39). REM argues that employees knew results were available to them in Fields' job file. Joe Garcia, asbestos worker, testified that he knew the results were maintained in a book kept by Jim Fields which he could request to look at. He considered the book Fields' personal property which he could not touch unless permitted by Fields (Tr. 441). Similarly, Jason Vargyas testified that he knew the monitoring results were kept with his supervisor and that he was "sure he could get the results if . . . [he] wanted

them." (Tr. 551). Varygas, however, was never told his results in writing (Tr. 527). Hugh Williford also knew where the air monitoring results were kept (Tr. 1099).

Although some employees as noted by REM knew where the results were kept, the record also shows that Rick Wisbon was never told verbally or in writing of the sampling results although he had asked to see them many times (Tr. 594-595, 617). Also, Billy Marshall never saw the results of his air monitoring and nobody told him (Tr. 698). IH Ulczynski testified that not one employee told her during the inspection that he had been notified of their monitoring results by REM (Tr. 843).

The standard places the responsibility of notification on the employer and not the employees. The standard is not triggered only because the employee's monitoring results were above the PEL or excursion limit. According to Fields' testimony, employees were not notified even verbally unless specifically requested by the employee or if the employee's result was high. The standard offers an employer two options; in writing to the employee individually or by posting at a centrally located place. Maintaining the results in a job file available upon request does not comply with the requirements of the standard and REM's responsibility to its employees.

REM argues that it could not be posted at the Macy's building because of demolition work. There is, however, no showing that the results could not have been provided to each employee individually in writing such as with their paycheck or that the result could not have been posted at REM's main office. Jay Burzynski, president of REM, testified that the monitoring results are currently posted at REM's office where employees go at least once a week (Tr. 1613-1614).

A violation of § 1926.1101(f)(5)(ii) is affirmed. The violation is serious. REM knew of the requirements and choose to ignore them. Although some employees may have known that Fields kept the results in a book, it was not shown that all employees knew. Without knowing the monitoring results, an employee may not make necessary adjustments in their work practices to limit exposure to asbestos. Also, employees may not voluntarily wear appropriate protective equipment such as respirators (Tr. 844). The information belongs to the employee for the protection of his health and not just if the results exceed the PEL.

A penalty of $4,200 is reasonable. The Commission is the final arbiter of penalties in contested cases. Under § 17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the

employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

REM had approximately 35 employees on February 1996 (Tr. 195). REM was inspected twice previously by IH Ulczynski and both inspections resulted in citations (Exh. C-16, C-17). During her first inspection, IH Ulczynski gave Burzynski a copy of the new asbestos standard (Tr. 840). REM is given credit as a small employer (Tr. 1079). REM is not entitled to credit for good faith or history. The gravity is considered moderate because the employees were not provided the results as required by the standard.

Item 3: Alleged Violation of § 1926.1101(k)(9)(i)

The citation alleges that "the costs of initial asbestos worker certification training were paid by employees through payroll deduction." Section 1926.1101(k)(9)(i) provides:

> 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.

The facts are not in dispute. The issue for determination is whether the individuals required by the Ohio Department of Health and the Environmental Protection Agency to receive initial asbestos worker certification training were employees of REM while participating in the training. The standard requires the employer to institute training programs at no cost to employees. Except for the initial asbestos certification training, REM pays for all the other training programs and its employees time spent in the training (Exhs. R-32, R-41, R-42; Tr. 393, 535-536, 728-729).

The individuals who are not already certified asbestos workers must receive the initial asbestos worker certification training. Certification is required before any asbestos worker begins work. The initial asbestos worker certification training is provided by private companies such as Environmental Abatement Systems, Inc. (EAS), located in Detroit which is a EPA licensed asbestos training company. The required initial certification training is 32 hours or 4 days with an examination. The individual is then issued a certificate of completion (Exh. C-13; Tr. 1405). Jay Burzynski, president of REM, testified that it was REM's practice that if a potential worker did not have a asbestos worker certification, the worker was referred to a training company such as EAS for certification. According to Burzynski, the worker could obtain the certification on his own or if he need financial assistance,

REM would pay the training company, such as EAS. Burzynski characterized the payment to the training company as a "loan" to the potential worker. If the worker completed the training and received certification, the worker would be hired by REM and the cost of the initial asbestos worker certification training was paid back to REM by the employees through payroll deduction of $50 over a six-week period (Tr. 1582-1583).

The workers taking the initial training course upon referral by REM are required to sign a REM form entitled "Employee Financial Responsibilities" (Exhs. C-14, C-43) which provided that:

TRAINING COSTS

> In compliance with Ohio Department of Health and The Environmental Protection Agency, all field workers working with asbestos must be a Certified Asbestos Worker. Initial certification training has a total cost of $300.00 and $70.00 for yearly renewal certification. The costs incurred for initial training shall be the responsibility of the employee. Reliance Environmental Management, Inc. will pay "up front" for the class and then be reimbursed by the employee with a payroll deduction of $50.00 per week for 6 weeks. The time spent by the individual at the initial training class will be the individual's OWN time. The costs incurred for yearly renewal certification will be the sole responsibility of Reliance Environmental Management, Inc.

The same provision appears in REM's Company Policy manual (Revised August 1, 1995) (Exh. R-27; Tr. 1712-1713). However, the policy manual added the following:

> An individual will not become an employee until they are a certified asbestos worker. If an employee becomes certified after he is employed it shall be the responsibility of the company to pay for the individuals certification.

REM argues that except for Billy Marshall who it acknowledges was an employee while taking the initial certification training, the other individuals identified by the Secretary who took the required initial certification training were not employees of REM while in training (REM Brief, p.40). The individuals, however, subsequently became REM employees.

Farrell Davis, president of EAS, testified that his company offered training in asbestos worker and refresher courses (Tr. 1403-1404). The cost of the initial training course for asbestos worker certification since 1988 was $275. A group rate for six participants was $225 with the seventh person

free (Exh. C-13 -billing to REM for November 7 through 11, 1995, initial training class; Tr. 1414-1415). Jay Burzynski conceded that REM's cost for the November 1995 training was $225 per participant referred to EAS (Tr. 1713). REM through $50 payroll deductions over six weeks charged the individuals who went to work with REM after completing the course, $300 or 33 percent interest above REM's actual cost for the training (Tr. 1713-1714). Burynzliki denied that he was aware REM paid EAS a lower price for training than the $300 REM charged the employee (Tr. 1715). The $50 deduction from the employee's wage was shown under "education" on the pay stub (Exh. C-31, C-32; Tr. 590).

IH Ulczynski also found that prior to receiving the initial certification training, workers were provided a physical examination by REM and several of the workers used a REM truck to travel to and from the training site in Detroit. A fax from the EAS referred to the workers as employees (Tr. 845-846). However, there was no requirement that after completing the training, the worker had to work for REM. Davis testified that workers who complete the training go to work for whichever contractor paid the most.

In determining whether an employment relationship exists, the Commission has adopted an economic realities test. As described in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992), the economic realities test employs the following factors: (1) who the worker considers his employer; (2) does the alleged employer have the power to control the worker; (3) who has the responsibility to control the worker; (4) does the alleged employer have the power to fire, hire, or modify the employment conditions of the worker; (5) does the worker's ability to increase their wages depend on efficiency rather than initiative, judgment, and foresight; and (6) how are the worker's wages established. The key factor in addressing the employment issue is the right to control the work. *See Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125 (No. 91-2929, 1994); *Acchione & Canuso, Inc.*, 7 BNA OSHC 2128 (No. 16180, 1980).

Having certified asbestos workers is an integral part of REM's business of asbestos abatement. Worker certification in the asbestos removal is required by both federal and state law. The training satisfies the EPA requirements and not the specific requirements of REM. As described by REM, workers without the certification have two options: "one, they can either go off and get the certification on their own, or they can come to us and we will help them financially, . . . in essence

loaning them the money" (Tr. 1582). By loaning the money for training, REM reasonably expects to receive qualified workers. REM even charges the worker more than the cost of the training. Burzynski further testified that the newly hired individuals, after going to the training and getting the certification, become an employee of the company and commence working for REM (Tr. 1582). Also, the worker has the expectation of employment upon completion of the training course. However, such expectation does not mean control.

Rick Wisbon testified that Burzynski hired him the same day of his job interview. He testified that Burzynski said to him, "I will hire you, and then I will send you to school" (Tr. 627). He completed W-2 health insurance form and other forms prior to training (Tr. 591). Wisbon used REM's van to drive back and forth from REM offices in Toledo to Michigan for the training. REM made all the arrangements for the training (Tr. 589, 627).

Billy Marshall, asbestos worker, started at REM on June 14, 1995. During his first month, he did remediation work, but no asbestos removal work (Tr. 671). He received regular paychecks (Tr. 744). Marshall was given a physical examination for asbestos work on June 17, 1995. He received the initial asbestos certification training in July 18 - 21, 1995 (Exh. C-15 p.2; Tr. 674). After the training, $50.00 was deducted from for six weeks under the heading "education" (Exh. C-32; Tr. 676). REM concedes that Marshall was an employee when he received initial training (REM Brief, p. 40).

REM also paid for Scott Weirich's initial certification training (Tr. 1111). REM deducted $50 from each payroll check (Tr. 1127). Weirich described his hiring as:

> Weirich: Came here. In my interview, they told me that I was hired. They sent me to a class in Detroit. It was five days; four or five days. Then, I went to work after that.
>
> Holman: Okay, so they hired you and then sent you to the class or did they say, Look, before we hire you, you've got to go to the class?
>
> Weirich: Well, I was under the impression I was hired already because why send someone to class that you ain't -- if you're not going to hire them? Why send them to class? (Tr. 1127-1128).

The Secretary argues that the individuals who attended the initial certification training provided by EAS at REM's expense were under the control of REM. The training was in furtherance

of REM's business. It was REM's cost of doing business. The fact that the worker goes to work for another employer after completing asbestos training happens all the time according to Kurt Varga, REM's expert (Tr. 1548-1549).

With exception of Marshall, which REM acknowledges was an employee at the time of his initial training, the other individuals identified by the Secretary were not shown to be employees of REM while attending the initial certification training. The training and certification was required by the state and federal government. The training course was devoted to meeting the EPA requirements for asbestos removal regardless of the employer. The training was not instituted by REM and not conducted at REM's place of business. REM was not shown to have any control over the course content. During training, the worker did not perform any work for REM or supplement any of REM's employees. The standard contemplates that the training programs are initiated by the employer, not programs required by the state or federal government as initial training to become an asbestos worker. REM did not control or have the power to control the course content and the activities of the training company. REM did not pay wages during the training. Although REM paid for the training, if needed, and the worker had an expectation of employment upon receiving asbestos worker certification, an employment relationship was not created until the worker started work for REM. Several workers failed to complete the training or refused to work for REM upon completion of the initial training. Of the thirteen individuals sent to EAS for initial training on November 7, 1995, two dropped out after the first day and one after the second day. REM was charged $25 for each day attended and $75 because the individuals failed to return the manual (Exh. C-13; Tr. 1414-1415). Upon completion of the course, there was no assurance other than the $300 "loan" that the worker would work for REM as opposed to another asbestos abatement employer. The record does not show what part of the group which completed the training declined employment. The training skills acquired during the training can be utilized by any asbestos employer.

Although a worker knew there was a job available upon successful completion of the training, he also did not view the training as part of their job which would entitle them to wages. As stated by Scott Weirich, "Well, anytime I work, I expect to get paid for it; but, you know, you can't work without a license, for one" (Tr. 1129-1130). To perform the asbestos work, the state and EPA requires workers to obtain an asbestos worker certificate. Such training is not provided by REM but

is done by private companies such as EAS in Detroit. REM hopes that the workers for which it paid for the training will work for REM upon certification. However, it has no guarantees. The workers who received the initial asbestos certification training were not employees of REM except for Billy Marshall. Although initial certification training benefits REM by providing it with certified asbestos workers, the workers attend the training for their own benefit; to qualify for employment they could not otherwise obtain. REM receives no immediate benefit while the workers are in training and the workers are not productive for REM until after completing the training. See *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir., 1982) (an employer's required flight attendant school did not convert the trainees into employees under the Fair Labor Standards Act).

REM admits that Marshall was employed when he attended the initial worker training. REM argues a good faith mistake and such mistake should be considered *de minimus* violation (REM Brief, p. 40-41). The court rejects such classification. By sending Marshall after he was already on its payroll and deducting from his wages more than the cost of the training directs an "other" than serious classification. The Secretary moved to amend the violation to an "other" than serious willful violation (Tr. 844-845, 940). REM disregarded the standard. There is no dispute that Marshall was an employee and the standards requires that training is provided without cost to "employees." REM directed Marshall to participate in the training. However, the willful classification is rejected. There is no evidence of intent or reckless disregard.

Accordingly, an "other" than serious violation of § 1926.1101(k)(9)(i) is affirmed.

WILLFUL CITATION

Item 1a: Alleged Violation of § 1926.1101(g)(1)

The citation alleges that in the basement of the Macy building "wet methods, or wetting agents were not used to control employee exposures, during removal of asbestos containing pipe insulation." Section 1926.1101(g)(1) requires the employer to use engineering controls and work practices in covered operations regardless of the levels of exposure. One of the required controls is the use of:

> wet methods or wetting agents to control employee exposures during asbestos handling, mixing, removal, cutting, application, and cleanup, except where employers demonstrate that the use of wet methods is infeasible due to for example, the creation of electrical hazards,

> equipment malfunction, and, in roofing, except as provided in paragraph (g)(8)(ii) of this section." *See* § 1926.1101(g)(1)(ii).

The use of the wet methods controls asbestos fiber dispersion. "The theory is that if you mist the air and mist the material, the binders surrounding the asbestos fibers will close down on the fibers and, therefore, slow or hinder the release of those fibers into the air" (Tr. 151).

On February 16, 1996, IH Ulczynski observed bags of debris in two areas in the first basement and on the eighth floor (Exh. C-7; Tr. 758, 761-762, 779). She felt the bags and found there was no dampness (Tr. 1805-1806). She cut open the bags and observed insulation material (Tr. 1770). Bulk samples of material taken from several of the bags, ladder rungs and a ledge were found containing 50% to 75% asbestos (Exh. C-26 pp. 2-25 - 2-33; Tr. 769, 1769). The material was friable, thermal system insulation and none of it appeared damp or wet (Tr. 1769-1770).

REM initially argues that the work performed was not asbestos removal. It involved Class IV asbestos clean up work.(REM Brief, p. 34). On the evening of February 13, 1996, Jim Fields, foreman, instructed his men remove the wall/soffit. According to Fields, he did not instruct the employees to remove asbestos insulation. When he returned to the basement the second time, Fields found asbestos mixed with drywall pieces (Tr. 1297-1298). The crew told him that the asbestos "was coming down with the wall" (Tr. 1299). Fields then had the crew to promptly shovel up the debris and put it into sealed bags (Tr. 1301-1302). Fields claims that he had not instructed the employees to remove asbestos off the pipes and did not observe anyone doing so (Tr. 1303). This was confirmed by asbestos workers, Hugh Williford and Scott Weirich who worked on February 15 (Tr. 1091-1092, 1118). Dr. Curt Varga, REM's expert, classified the work as a spill (Tr. 1551).

REM's argument is rejected. As discussed, the clean up work was part of REM Class I asbestos removal activities. Also, wet methods or wetting agents are specifically required "during asbestos handling, mixing, removal, cutting, application, and cleanup." *See* § 1926.1101(g)(1)(ii). Therefore, the use of wet methods or wetting agents to control employee asbestos exposure unless shown infeasible were required during the removal or cleanup of asbestos debris in the basement.

REM does not dispute that the clean up of the asbestos in the basement was a dry removal. Employees who worked in the basement testified that the asbestos was removed without water. Joe Garcia, asbestos worker, testified that no water was used to remove asbestos on either February 14

or 15 (Tr. 427, 438-439). Jason Varygas also testified that there was no water being used to remove asbestos on February 14 and 15, 1996 (Tr. 515, 525). Nor did employees use pump sprayers while removing asbestos (Tr. 516). Varygas stated that Jim Fields knew dry removal was going on in the basement and did not tell them to stop (Tr. 517). Billy Marshall testified that there was dry removal of asbestos and no water or hand sprayers available when he removed asbestos in the basement (Tr. 680, 687). Rick Wisbon, also testified that dry removal occurred every day on the site and that Jim Fields was present most of the time (Tr. 597).

REM argues that it was not feasible to use wet methods or wetting agents in removing the asbestos in the basement. Jim Fields testified that the water was frozen and the two gallon pump-up sprayers were also frozen. "So there wasn't a whole lot of water in there" (Tr. 1300). REM's infeasibility argument is based on the water being frozen.

Section 1926.1101(g)(1)(ii) requires wet methods "except where the employer can demonstrate that the use of wet methods is infeasible due to for example, the creation of electrical hazards, equipment malfunction, and, in roofing." As an exception, it is to be read narrowly and the burden is on the employer to show entitlement.

REM's infeasibility defense is rejected. REM failed to demonstrate that wet methods or wetting agents were not feasible for use in the basement of the Macy's building in February 13 - 15, 1996. REM argues that its action was consistent with EPA regulations, which provide an exception from the use of water when it is below freezing. According to the national weather bureau, the temperature in Toledo during the month of February, 1996 averaged from 19 to 34 degrees Fahrenheit (Exh. R-46). REM asserts that the infeasibility exception to the use of wet methods under § 1926.1101(g)(1)(ii) should be interpreted consistent with the EPA exception applicable to the use of water when the temperature is below freezing.

IH Ulczynski testified that OSHA considered the infeasibility exception to the use of wet methods to apply to equipment malfunction, electrical hazards or in the roofing industry (Tr. 992-993; also see Fed. Reg. at 40,989). OSHA has not given a variance for freezing conditions (Tr. 1024). IH Ulczynski suggested heating the water, adding biodegradable antifreeze to the water, window washer fluid, or adding salt to the water to keep it form freezing. Also, she suggested that REM could not have delayed its removal work (Tr. 850).

The EPA regulates ambient air (Tr. 1178). EPA regulations do not enforce worker protections (Tr. 1188). While OSHA does not make an exception for freezing temperatures, the EPA does at 40 CFR § 61.145(c)(7) (Exh. R-55) which provides that:

> When the temperature at the point of wetting is below 0 C (32 F):
> (i) The owner or operator need not comply with paragraph (c)(2)(i) and the wetting provisions of paragraph (c)(3) of this section.
> (ii) The owner or operator shall remove facility components containing coated with or covered with PACM as units or in sections to the maximum extent possible.
> (iii) During periods when wetting operations are suspended due to freezing temperatures, the owner or *operator must record the temperature in the area containing the facility components at the beginning, middle, and end of each workday and keep daily temperature records available for inspection* by the Administrator during normal business hours at the demolition or renovation site. The owner or operator shall retain the temperature records for at least 2 years (emphasis added).

There is no record that REM recorded the temperatures inside the basement or at any other location in the Macy's building. After the fact, REM obtained temperatures recorded at the Toledo airport (Exh. R-46; Tr. 1231). Jim Fields claims that he recorded temperatures three times a day and turned them into the office (Tr. 275). His records, however, were not produced by REM. Also, none of the employees recalled seeing Fields with a thermometer recording the temperature (Tr. 436, 522, 598). Fields did discuss with Burzynski that the water was frozen at the Macy's building (Tr. 293, 298). His daily progress report for Feb 14 notes that "water froze back up to showers and pump up sprayers are froze." His daily progress report for February 15 also notes "Water is frozen." (Exh. C-10). Fields also admitted that the pump up sprayer was not adequate to clean up the asbestos in the basement on February 15 (Tr. 294). He stated that it was never discussed prior to February 19 that if there was no water, the job would be shut down (Exh. C-10; Tr. 299). Fields did not try to add something to the water so that it would not freeze (Tr. 299). Further, the record indicates that the bags containing asbestos debris were carried to the eighth floor containment to add water for EPA approval (Tr. 299, 785-786).

REM has not met its burden of showing of infeasibility. The alternative methods, such as suggested by IH Ulczynski were not shown to be unacceptable. *Armstrong Steel Erectors, Inc.*, 1995

CCH OSHD ¶30,909 (No. 92-262, 1995); affd D.C. Cir 1996 CCH OSHD ¶ 31,024. REM failed to show why the recommendations suggested by OSHA were not feasible for use in the basement. OSHA standards do not provide exception for freezing temperature. It requires wet methods or wetting agents. Also, the record is unclear whether some water was available for use.

A violation of § 1926.1101(g)(1) is affirmed.

Item 1b: Alleged Violation of § 1926.1101(g)(3)

The citation alleges that employees in the basement "dry swept and shoveled dust and debris containing ACM or PACM from the floor." Section 1926.1101(g)(3) prohibits work practices and engineering controls "which disturbs ACM or PACM, regardless of measured levels of asbestos exposure or the results of initial exposure assessments." Within the prohibited work practices, subsection (iii) prohibits "dry sweeping, shoveling or other dry clean-up of dust and debris containing ACM and PACM."

As discussed, REM argument that the employees in the basement on February 15 were not engaged in asbestos removal is rejected (REM Brief, p. 34). Although several workers testified to removing asbestos insulation (Garcia, Vargyas, Wisbon, Marshall) and others only to doing preparation work (Hugh Williford, Scott Weirich), there is no dispute that workers also performed clean-up work to remove the debris. Jim Fields admitted that in cleaning up the asbestos on February 15, the employees used a shovel, a broom and picked up the material with their hands. Fields was aware that the debris contained asbestos. Jason Varygas and Billy Marshall confirmed that a shovel, broom and no water was used to clean up the asbestos (Tr. 525-526, 688). As evident by the bulk samples taken from bags of debris from the basement, the debris contained asbestos.

The standard specifically prohibits "dry sweeping, shoveling or other dry clean up of dust or debris containing ACM or PACM." There is no dispute that the debris contained ACM or PACM. OSHA's bulk samples contained 50 - 75 percent asbestos. The prohibition applies to any "work related to asbestos or for work which disturbs ACM or PACM." When Fields assigned the workers to clean up the debris, he knew or should have known it contained ACM or PACM. The use of dry methods such as brooms and shovels are strictly prohibited.

A violation of § 1926.1101(g)(3) is affirmed.

Item 1c: Alleged Violation of § 1926.1101(g)(5)

The citation alleges that employees in the basement were required to remove asbestos containing pipe insulation without the use of one or more of the control methods. Section 1926.1101(g)(5) requires that for Class 1 asbestos work, control methods include a negative pressure enclosure, glove bag system, negative pressure glove bag system, negative pressure glove box system, water spray process system, or a small walk-in enclosure.

REM argues that the action taken by Fields was reasonable and proper. He had not instructed employees to remove asbestos from the pipes and did not observe anyone doing so (Tr. 1303). REM does not argue that Fields used any of the methods outlined in § 1926.1101(g)(5) (REM Brief, p. 35).

Jim Fields did not consider using a containment or plastic sheeting when he asked the employees to remove the walls in the basement on February 14-15. He, also, did not consider using such methods when he discovered the asbestos in the debris. He made no attempt to encapsulate the asbestos. He did not use HEPA vacuums to clean up the debris (Tr. 294-295). There were no engineering controls used in removing the asbestos debris (Tr. 297). Fields testified that his brother, Kevin Brice, was removing mag asbestos fittings off pipes using glove bags in the basement on February 14 (Exh. C-10; Tr. 1294). Fields, therefore, was aware that asbestos was being removed in the basement.

Also, employees who testified to removing asbestos insulation in the basement did not use glove bags or a containment. Billy Marshall testified that there was no glovebags or a containment (Exh. R-31; Tr. 680-681, 715, 724). Jason Varygas also testified to not using glovebags or a containment (Tr. 515, 525, 562). Joe Garcia testified that Fields returned to the basement every hour and did not tell them to stop work and use glovebags (Tr. 426-427). William Watson, the Pyramid Electric employee, who observed REM employees removing asbestos from pipes in the ceiling, also saw no glovebags or containment (Tr. 641-642). Watson's crew wore masks because of the dust (Tr. 644-645). When IH Ulczynski inspected the basement on February 16, she saw no containment or glovebags in the basement on Feb 16. When asked, Fields responded "I just didn't get to it" (Tr. 778, 852-853).

The record shows that employees working in the basement were not using any of the required methods for containing asbestos while performing Class I asbestos work. Based on Fields presence on-site, the note in his daily log that Brice was using a glovebag in the basement, and the testimony of employees, Fields knew or should have known of the asbestos removal work in the basement. Fields' knowledge is imputed to REM. An employer has a duty to inspect its work area for hazards, and an employer who lacks actual knowledge can nevertheless be charged with constructive knowledge of conditions that could be detected through an inspection of the worksite. An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980); *Pace Constr. Corp*. 14 BNA OSHC 2216, 2221(No. 86-758, 1991). An employer is also chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr., Inc*. 16 BNA OSHC 1995 (No 92-1022, 1994).

A violation of § 1926.1101(g)(5) is affirmed.

Item 2: Alleged Violation of § 1926.1101(j)(1)(i)

The citation alleges that no decontamination area was established in the basement and adjacent to regulated areas located on floors two through eleven where employees removed asbestos containing pipe insulation from the pipe chase. Section 1926.1101(j)(1)(i) provides that:

> The employer shall establish a decontamination area that is adjacent and connected to the regulated area for the decontamination of such employees. The decontamination area shall consist of an equipment room, shower area and clean room in series. The employer shall ensure that employees enter and exit the regulated areas through the decontamination area.

A decontamination area "is used for the decontamination of workers, materials, and equipment that are contaminated with asbestos" (§ 1926.1101(b)*;* Tr. 1240). Employees must enter and exit the asbestos regulated area through the decontamination area which consists of an equipment room, a shower area, and a clean room. REM was cited for two instances of failing to have a proper decontamination area.

BASEMENT

There is no dispute that no decontamination area was established in the basement where employees removed asbestos containing pipe insulation. As discussed, REM argues that Fields' action was reasonable under the circumstance in that he did not instruct employees to remove asbestos material and when he discovered the asbestos, Fields took immediate action to remove the debris (REM Brief, p. 36).

The employees were removing asbestos insulation and cleaning up asbestos containing debris. Samuel Ansara, the Toltest analyst, testified that there was no decontamination area in the basement. There was no place to change and Ansara left his protective tyvek suit on the basement stairs (Tr. 178-179). Joe Garcia and Jason Varygas confirmed that there was no decontamination area in the basement (Tr. 435, 520, 528). Billy Marshall testified that there was no shower except on the 8th floor (Tr. 688-689, 780). IH Ulczynski also did not see a decontamination area in the basement during her inspection on Feb 16, 19, and 26. There was one the first floor on March 5 (Tr. 799, 854). James Fields testified that the decontamination area on the first floor was for employees to use on Feb 14 and 15 (Tr. 1256).

The record establishes that there was no decontamination area in the basement for employees to use after handling asbestos containing debris.

PIPE CHASE AREA

There is no dispute that a decontamination room was on the first floor. The stairway areas between floors where employees were removing asbestos from the pipe chase were sealed and regulated providing access to the decontamination areas on the first floor. REM argues that Fields based on IH Ulczynski's instruction, constructed a remote decontaminant unit on the first floor. Fields denied knowing that IH Ulzcynski who agreed to a remote decontamination area also wanted REM to construct an equipment room on each of the other floors (REM Brief p. 36). REM does not dispute that an equipment room was not established adjacent and connected to the regulated (contamination) areas located on floors two through eleven.

On March 5, 1996, IH Ulzcynski returned to the Macy's building at the request of REM. REM was concerned about the asbestos removal from vertical pipes located in the pipe chase in the elevator shaft area running from the second floor to the eleventh floor. Because of complaints about

the dust in the building, EPA had instructed REM that it would have to put the pipe chase under containment even though REM intended to glovebag the vertical pipes (Exh. C-35; Tr. 797-798, 1174-1175). According to IH Ulzcynski, she agreed to allow REM to use a remote decontamination area on the first floor provided REM had an equipment room on each floor attached to the pipe chase/elevator shaft containment (Exh C-35; Tr. 798). An equipment room attached to the containment would allow employees to leave the containment area, vacuum off or take off their dirty suit, and put on a clean one before proceeding to the remote decontamination area on first floor (Tr. 798). An equipment room or change room is defined as a "contaminated room located within the decontamination area that is supplied with impermeable bags or containers for the disposal of contaminated protective clothing and equipment." *See* § 1910.1101(b).

Fields, however, disputes IH Ulzcynski's account. Fields testified that Ulycnski instructed only a remote decontamination area on the first floor and did not mention equipment rooms for each floor (Tr. 1257-1258). REM argues that employees exited the pipe chase elevator shaft area by means of the stairs which were also in containment all the way to the first floor (Tr. 1260). REM asserts that Fields sought and obtained approval for the construction of a remote decontamination area (Tr. 1257-1258). He did not recall any discussion about an equipment room on each floor (Tr. 1288). REM argues that it would be illogical for Fields to have disregarded OSHA's instruction in the middle of an OSHA inspection (REM Brief, p. 37).

OSHA argues that because some of the upper stairs were missing, employees could not get to the remote decontamination area without existing on several of the floors (Exh. C-40; Tr. 1789-1790). Also, Greg Boehler, Rudolph-Libbe employee, testified that the stairs next to the elevator were used by Rudolph Libbe and were not in containment (Tr. 490). Billy Marshall who worked in the pipe chase/elevator shaft stated that some stairs were enclosed and some floors had missing stairs. There was no decontamination area and some employees used HEPA vacuum to clean off (Tr. 694-695). IH Ulczynski recalled that she told Fields to include an equipment room on each floor attached to the containment (Tr. 798). Douglas Sykes, a former REM supervisor, also understood that there was to be an equipment room on each floor (Tr. 1484-1485).

The record establishes that a remote decontamination area was permitted by IH Ulzcynski except that an equipment room was required on each floor. IH Ulzcynski's instruction was confirmed

by Douglas Sykes, a former REM supervisor. The stairway was not complete throughout all floors and to require employees wearing Tyvek suites and respirators to move up and down stairs is illogical.

A violation of § 1926.1101(j)(1)(i) is affirmed.

Item 3: Alleged Violation of § 1926.1101(j)(1)(i)(B)

The citation alleges that on February 26, 1996, "the shower facility for the 8th floor containment did not comply with 29 C.F.R § 1910.141(d)(3)(i) in that hot and cold water was not provided." Section 1926.1101(j)(1)(i)(B) provides in part that:

> Shower facilities shall be provided which comply with 29 CFR 1910.141(d)(3), unless the employer can demonstrate that they are not feasible. The showers shall be adjacent both to the equipment room and the clean room, unless the employer can demonstrate that this location is not feasible.

The standard requires a shower facility unless the employer can demonstrate that it is not feasible. There is no dispute that on February 19 and 26, 1996, the shower facility for the 8th floor containment was not operable. Fields daily progress reports indicate that on Feb 19, the hoses to the shower were frozen (Exh. C-10; Tr. 297). The report also indicates that the PVC in shower was broken. Hugh (Larry) Williford testified that the head on the shower was broken and a garden hose with hot and cold water was used (Tr. 1092-1093). Williford claimed he accidentally had broken the shower and repaired it immediately.

On February 26, IH Ulczynski discovered that the shower was not hooked up with any water (Exh. C-7 page 1-205; Tr. 795). She told Douglas Sykes, a REM supervisor, that the shower was broken (Tr. 796). Fields testified that the same part that broke on the February 19 also broke on the 26th. His daily progress report states that the "hot water tank keeps blowing a circuit" (Exh. C-10; Tr. 1286-1297). Rick Wisbon confirmed that the shower was not working and the hot water tank was not working. He stated that there was just a hose with a sprayer. He just squirted his legs because "the water was too darn cold" (Tr. 595-596).

The record establishes that a properly functioning shower was not feasible and a garden hose had to be used of February 19 and 26, 1996. Jeffrey Ridley, an asbestos coordinator for the City of Toledo, Division of Environmental Services, inspected REM's work on January 15. He testified that

he used the shower to wash his face (Exh. R-44; Tr. 1153). According to field reports, on February 16, Williford had broken the PVC for the shower and Fields testified that he had broken it on February 26 (Exh. C-10; Tr. 1344). A hose had to be used.

When IH Ulczynski observed the unhooked shower on the 8th floor on Feb 26, the employees were working inside the containment (Tr. 962). Employees were not ready to use the shower at that time and IH Ulczynski did not re-inspect the shower (Tr. 966). As a result, a garden hose was used to the shower the employees (Tr. 1248-1249). The hose was not hooked up when the employees were in the containment. It was hooked up when employees went to clean up (Tr. 1250). Although Wisbon testified that the shower was not working, he agreed he "squirted off with the hose" (Tr. 595-596). Because the shower was broken, a garden hose was a feasible means for the employees to shower that day.

A violation of § 1926.1101(j)(1)(i)(B) is not established.

Unpreventable Employee Misconduct Defense

REM alleges an employee misconduct defense to willful citation No. 2, item 1a, § 1926.1101(g)(1) (failure to use wet methods); item 1b, § 1926.1101(g)(3) (dry sweeping); item 1c, § 1926.1101(g)(5) (no control methods); and item 2, § 1926.1101(j)(1)(i) (no decontamination area) (REM Brief, p. 41). To prevail on an employee misconduct defense, REM must show that (1) it had established work rules designed to prevent the violation; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991). As an affirmative defense, REM has the burden of proof.

REM asserts that its safety program includes work rules, that its safety rules were communicated to its employees, and that it took steps to discover any violations. REM trained its employees, including supervisors, in asbestos removal practices. The employee training records reflect the training received (Exh R-4 Rohr; R-13 Vargyas; R-22 Wisbon; R-32 Marshall; R-41 Williford; R-42 Weirich; R-45 Fields; R-56 Burzynski). REM also took disciplinary action when employees violated safe work practices. REM disciplined several employees who worked during the nights when the alleged dry removal occurred. Varygas was disciplined at least twice (Exhs. R-17, R-18; Tr. 543-545). Marshall was also disciplined (Exh R-49; Tr. 1306). Garcia was disciplined

(Exh R-49; Tr. 1306). REM's attempt to discover violations included Fields' inspections of his crew's work (Tr. 1298).

Despite the assertions, REM's evidence fails to show specific work rules prohibiting the activity addressed by the cited standards including the use of dry methods, the lack of controls methods and failure to use proper decontamination areas. Also, there were four employees removing asbestos under the supervision of REM's foreman and competent person, Jim Fields. Although there is a dispute as to Fields' instructions regarding the work in the basement, the record does not contradict the improper methods used by employees to cleanup the asbestos debris. Such methods were under the supervision of Fields.

REM produced a statement signed by employees stating that to their knowledge there was no dry removal of asbestos at the Macy's building (Exh. R-25). The statement did not specifically address the cleanup in the basement. Also, Billy Marshall testified that he signed the statement because he wanted to keep his job. He stated that Jay Burzynski, president, only wanted to know if he signed the statement and not the truth of the assertion (Tr. 737-738). Billy Marshall was only 20 years old when he began working for REM in June 1995 (Exhs. R-33, p.9). Jason Varygas, Marshall's best friend and of the same age, is the younger brother of a REM manager (Tr. 545, 717). Varygas testified that he did not sign the dry removal statement because he had already signed a statement for OSHA and was not going to turn his words around (Tr. 576-577). He felt threatened but he told his brother that he was going to tell the truth (Tr. 564, 577). Rick Wisbon, a foreman for Jim Fields, worked the Macy's project at the end of February. He quit for a better job and because he did not feel REM was safe for his health (Tr. 388, 588, 592-593, 633). He testified that the signature on the REM dry removal statement was not his (Exh. R-25; Tr. 625-626, 635).

Jim Fields directed the employees to perform the dry removal work and periodically inspected their progress. He took no action to prevent the dry removal (Tr. 1330-1331). Fields did not ensure the use of wet methods and control methods to remove the asbestos. Also, no decontamination area was constructed in the basement on February 13 - 16, 1996 while removing and cleaning up the asbestos debris. As supervisor, knowledge of the condition is imputed to REM. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr., Inc*. 16 BNA OSHC 1995, 1998, 2000 (No 92-1022, 1994). Also, when the

misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the violative condition, including adequate instruction and supervision. *Archer Western Contractors, Ltd,* 15 BNA OSHC 1013, 1017 (No. 87-1067). The Review Commission in the *Archer Western* case stated that "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision....A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax" *Mel Jarvis Constr., Co.*, 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981), citing *Jensen Construction Co.*,7 BNA OSHC 1477 (No. 76-1538, 1979). It is the employer's burden to show that the supervisory employee's misconduct was unpreventable. *V.I.P. Structure, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994).

REM's employee misconduct defense is rejected.

Willful Classification for Citation No. 2

The violations alleged in citation No. 2 were classified as "willful." 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." *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994). A willful violation is differentiated from other classifications of violations by a heightened awareness of the illegality of the conduct or conditions and by a state of mind showing conscious disregard or plain indifference.

A violation, however, is not willful if the employer has a good faith belief that it was not in violation. The test of good faith for these purposes is objective--whether the employer's belief concerning a factual matter, or the interpretation of a rule, was reasonable under the circumstances. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068-2069 (No. 82-630, 84-731, 84-816; 1991).

It is undisputed that at two prior projects, REM received citations and was advised of the requirements of the asbestos standards. REM received a serious citation on July 13, 1995 and serious and willful citations on April 16, 1996 (Exhs. C-16, C-17). The citations alleged violations of the asbestos construction standards. The citations were settled and the violations affirmed with change

in some classifications and a reduction in penalties. Jim Fields, foreman, was also REM supervisor on the other projects (Tr. 266-267). In the informal settlement agreement resolving the 1995 citation, REM was informed of the asbestos requirements of the standards and invited to work with OSHA (Exh. C-16 p. 14).

REM was cited willful for failing to use appropriate work practices such wet methods, appropriate control methods and use of dry shoveling in removing asbestos in the basement (items 1a, 1b and 1c). Also, REM was cited willful for not having a decontamination unit (item 2). Fields was REM's supervisor and competent person on-site (Exh. R-45). REM, while removing asbestos in the basement of the Macy's building, failed to document the need for using other than the required engineering controls and work practices. REM had not sought a variance from OSHA.

The Secretary, however, failed to establish the violations were willful. Jeffrey Ridley with the Toledo Division of Environmental Services under contract with the Ohio EPA regularly inspected REM's work at the Macy's building. His inspections included the adequacy of REM's wetting methods to ensure no release of fibers into the ambient air (Tr. 1138, 1141). On January 15, Ridley found wetting method adequate (Exh. R-44; Tr. 1151). Also, during his inspections, Ridley found no evidence of dry removal by REM (Tr. 1168). Ridley's inspections identified no violations of the asbestos standards.

Further, the record indicates that the employees may have misunderstood Fields's instruction about the work to be done in the basement on February 13, 1996. Regardless, the record does establish that employees did remove asbestos insulation and Fields did become aware of the asbestos removal. Once, the asbestos was down, Fields initiated a prompt clean up the debris. REM noted that constructing a containment would have taken two days. Also, the purpose of a containment is to protect the rest of the building and not the employee working inside (Tr. 1546-1547). The employees were protected by protective clothing and North ½ mask respirators. OSHA's air monitoring results on February 16, were negative for asbestos in the basement (Exh. C-26; Tr. 771-772). The asbestos removal work in the basement may have resulted from a misunderstanding and although the clean up work was not handled properly by REM, it was not willful. There is no record that REM failed to utilize proper work practices at other locations in the Macy's building.

Item 2, failing to maintain equipment rooms on floors two through eleven while REM was removing asbestos from the pipe chase in the elevator shaft, is also not considered willful. REM was cited previously for a shower violation and IH Ulczynski spoke personally with Fields regarding what was required for the pipe chase/elevator shaft. Douglas Sykes, a former REM supervisor, agreed with Ulczynski's account (Tr. 1474-1475).

However, the record indicates that Fields may have misunderstood the Ulczynski's instruction. There is no evidence that proper decontamination areas were not used at other times and locations in the Macy's building. Also, REM was not cited previously for failing to utilize decontamination areas on other projects. According to the standard, a decontamination area consists of an equipment room, shower area, and a clean room "in series." Ulczynski directed that the equipment room be separated from the rest of the decontamination area on the first floor. Fields had requested Ulzcynski's assistance during her inspection for the remote decontamination unit. It is unlikely that Fields would have ignored a clear instruction to have an equipment room on each floor. Although REM should have been aware of the inadequate stairway between floors and the difficulty to employees in traveling the stairway with full protective equipment, the record fails to show an intentional knowing or voluntary disregard for the requirements.

Penalty Consideration for Citation No. 2

For violations of §§ 1926.1101(g)(1), 1926.1101(g)(3) and 1926.1101(g)(5) (items 1a, 1b, 1c), a grouped penalty of $6,000 is assessed. REM knew of the condition through its supervisor on-site and the exposure to asbestos can cause serious health problems including death. The gravity is high gravity because of employee exposure to asbestos. Although the air monitoring was negative, the bulk samples showed the debris being removed from the basement contained 50% to 75% asbestos. REM is given credit as a small employer but no credit for history or good faith. REM had received two previous serious citations.

Items 2, violation of § 1926.1101(j)(1)(i), a penalty of $5,000 is assessed. REM's supervisor on-site knew of the condition and employee exposure to asbestos can cause serious health problems. There was decontamination unit in the basement and no equipment room on each floor. Because of the exposure to asbestos, the gravity is high. REM is a small employer and had received two previous serious citations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

SERIOUS CITATION NO. 1

1. Item 1, violation of § 1926.1101(f)(1)(ii), is vacated.
2. Item 2, violation of § 1926.1101(f)(5)(ii), is affirmed and a penalty of $4,200 is assessed.
3. Item 3, violation of §1926.1101(k)(9)(i), is affirmed as "other than serious" and no penalty is assessed.

WILLFUL CITATION NO. 2

1. Item 1a, violation of § 1926.1101(g)(1), Item 1b, violation of 1926.1101(g)(3), and Item 1c, violation of 1926.1101(g)(5), are affirmed as non-willful and a grouped penalty of $6,000 is assessed.
2. Item 2, violation of § 1926.1101(j)(1)(i), is affirmed as non-willful a penalty of $5,000 is assessed.
3. Item 3, in violation of § 1926.1101(j)(1)(i)(B), is vacated.

KEN S. WELSCH
Judge

Date: