No. 03-60958

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR
Petitioner-Cross-Respondent

v.

ERIK K. HO; HO HO HO EXPRESS, INC.;
HOUSTON FRUITLAND, INC.
Respondents-Cross-Petitioners
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Respondent

On Petition for Review of an Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

This case presents an important issue on which the Occupational Safety and Health Review Commission was divided: whether OSHA standards requiring training and respirators to protect employees from the hazards of asbestos may be cited separately for each employee not trained and provided a respirator. It also presents other questions important to the Secretary's administration of the Occupational Safety and Health Act. Accordingly, the Secretary respectfully requests the opportunity to present oral argument.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on cross-petitions for review of a Final Order of the Occupational Safety and Health Review Commission (the Commission) vacating in part citations issued by the Secretary of Labor to Erik K. Ho (Ho), Ho Ho Ho Express, Inc. (Ho Express) and Houston Fruitland, Inc. (Fruitland). The Commission obtained jurisdiction of the case when Ho, Ho Express and Fruitland timely contested the citations. 29 U.S.C. §659(c). The Commission issued a final order under 29 U.S.C. §§659(c) and 666(j) on September 29, 2003. This Court has jurisdiction because the Secretary filed her Petition for Review on November 14, 2003, within sixty days following issuance of the Commission's order, and the violations occurred in Houston, Texas. 29 U.S.C. §§ 660(a), 660(b).

STATEMENT OF THE ISSUES

1. Whether 29 C.F.R. §1926.1101(h)(1), which requires employers to provide respirators and ensure that they are used during asbestos work, may be cited separately for each employee not provided a respirator, and whether 29 C.F.R. §1926.1101(k)(9), which requires employers to ensure that exposed employees participate in an asbestos training program and are informed of asbestos hazards, may be cited separately for each employee not trained or informed.

2. Whether Ho Express and Fruitland were properly cited for the OSHA violations as alter egos of Ho.

3. Whether Ho willfully violated the Occupational Safety and Health Act's general duty clause by ordering an employee to tap into an unmarked pipeline to see what it contained.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

This is an enforcement action under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 (1994 & Supp. V 2000) (the Act or the OSH Act). Following an inspection of Ho's worksite in Houston, Texas, OSHA issued citations charging Ho, Ho Express and Fruitland with, inter alia, eleven willful violations of 29 C.F.R. §1926.1101(h)(1)(i) for failing to provide respirators to employees performing asbestos work, eleven willful violations of 29 C.F.R §1926.1101(k)(9)(i) and (viii) for failing to train and inform employees on asbestos hazards, and one willful violation of the Act's general duty clause, 29 U.S.C. §654(a)(1), for ordering an employee to tap into an unmarked pipeline.

Ho, Ho Express and Fruitland contested the citations, and a hearing was held before an Administrative Law Judge of the Commission. The ALJ issued a decision affirming the twenty-two cited willful violations of the

asbestos standards, and assessed penalties totaling $858,000 for these violations. The ALJ affirmed the general duty clause violation as serious, not willful, and assessed a penalty of $4400. The judge found that Ho was individually liable for OSHA penalties, and that Ho Express and Fruitland were also liable under the corporate veil-piercing doctrines of alter ego and "sham to perpetrate a fraud."

The full three-member Commission directed review of the ALJ's decision. A two-member majority concluded that the asbestos respirator and training provisions, sections 1926.1101(h)(1)(i) and 1926.1101(k)(9)(i) and (viii), could not be cited separately for each employee not protected. Accordingly, the Commission affirmed one violation of section 1926.1101(h)(1)(i) and vacated the other ten cited violations of that section, and affirmed one violation of section 1926.1101(k)(9)(i) and (viii) and vacated the other ten cited violations of that section. The Commission assessed a penalty of $70,000 for each of the two affirmed violations. The Commission affirmed the general duty clause violation as serious, not willful, and it reversed the ALJ's ruling that Ho Express and Fruitland were liable for the violations The Secretary then petitioned this Court for review, and Ho subsequently cross-petitioned for review.

B. Statutory and regulatory background

Congress enacted the OSH Act in response to millions of occupational workplace injuries and illnesses, which it found excessively costly in both money and human suffering. See Atlas Roofing Co. v. OSHRC, 430 U.S. 444-45 and n. 1 (1977). The Act addresses this problem by "assuring so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b).

To accomplish its remedial purpose, the Act requires employers to, among other things, comply with the Secretary's occupational safety and health standards. 29 U.S.C. §654(a)(2). Section 9(a) of the Act provides that if the Secretary believes that an employer has violated "a requirement of. . . any standard" she may issue a citation and proposed penalty. 29 U.S.C. §658(a). Section 17 of the Act sets forth criteria for, among other things, the assessment of penalties for willful, serious and other-than-serious violations of OSHA standards. 29 U.S.C. §666(a), (b), (c). Section 17(a) provides that an employer who willfully violates a requirement of a standard "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. §666(a). Sections 17(b) and (c) provides for penalties for "each violation" determined to be "serious" or other than serious. 29 U.S.C. §§666 (b), (c).

Employee exposure to the hazards of asbestos in construction activities is regulated by 29 C.F.R. §1926.1101. Asbestos is a particularly dangerous carcinogen that has been regulated by OSHA since 1971. In 1986, the Agency stated, "OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects than has asbestos exposure." 51 Fed. Reg. 22615 (June 20, 1986). Inhalation of asbestos fibers can cause lung cancer, mesothelioma (a virulent cancer of the chest and abdominal lining that is found only in individuals exposed to asbestos), asbestosis (a debilitating lung disease) and gastrointestinal cancer, among other effects. (Ibid).

The standard applicable in this case was initially promulgated in 1994, and was revised in 1996. See 59 Fed. Reg. 40964-41158 (August 10, 1994); 61 Fed. Reg. 43454-43460(August 23, 1996). At the time relevant here, section 1926.1101 required employers engaged in the demolition or renovation of buildings where asbestos is present to protect their employees by a combination of engineering controls, work practices and personal protective equipment. The standard established four classifications of asbestos work. Class I asbestos work, the relevant classification for this case, includes the removal of insulation and fireproofing materials

containing more than 1% asbestos. 29 C.F.R. §1926.1101(b) (1997) (definition of Class I asbestos work).

Respiratory protection for employees performing Class I asbestos work: Section 1926.1101(h) addresses respiratory protection for employees exposed to asbestos in four numbered subparagraphs. Section 1926.1101(h)(1) states, in relevant part: "(1) General. The employer shall provide respirators, and ensure that they are used . . . [d]uring all Class I asbestos jobs." (emphasis added). The remaining subparagraphs (2) through (4) of section 1926.1101(h) address the types of respirators that are suitable for asbestos and the procedures employers must follow to ensure that each employee is provided the most appropriate respirator in light of the working conditions and the employee's physical characteristics.

Section 1926.1101(h)(2), entitled "Respirator selection" requires the employer to "select and provide at no cost to the employee" either an appropriate negative pressure respirator or, if the employee requests one, an air-purifying respirator.

Section 1926.1101(h)(2) contains additional respirator selection requirements applicable to areas where Class I asbestos work is performed and exposures may exceed the permissible exposure limits (PELs) listed in section 1926.1101(a). In these areas, the employer must provide each

employee with specialized types of respirators or self contained breathing apparatus. 29 C.F.R. 1916.1101(h)(2)(v) (1997).

Section 1926.1101(h)(3), entitled "Respirator program" requires the employer to institute a respirator program in accordance with 29 C.F.R. §1910.134(b), (d), (e) and (f), OSHA's general respirator standard. The required program must include policies allowing employees to change filter elements when an increase in breathing resistance is detected, to wash their faces and respirator face pieces as necessary to prevent irritation, and to transfer to another job if a physician determines that they can not function normally wearing a respirator. Section 1910.134(b) requires, among other things, that written standard operating procedures governing the selection and use of respirators be established and that users be instructed and trained in the proper use of respirators. 29 C.F.R. §1910.134(b) (1) and (b)(3) (1997). Subparagraphs (d), (e) and (f) of section 1910.134 contain additional requirements concerning the quality of the air used for respiration, and the procedures for use, maintenance and care of respirators.

Section 1926.1101(h)(4) requires the employer to perform either quantitative or qualitative fit tests, in accordance with Appendix C, at the time of initial fitting and at least every six months thereafter for every

employee wearing a negative pressure respirator. 29 C.F.R. §1926.1101(h)(4) (ii) (1997).

Training requirements for employees performing Class I asbestos work: Section 1926.1101(k) of the rule requires the employer to "institute a training program for all employees . . . who perform Class I through IV asbestos work and ensure their participation in the program." 29 C.F.R. 1926.1101(k)(9)(i) (1997). The rule requires that each employee be trained no later than the time of initial assignment. 29 C.F.R. §1926.1101(k)(9)(ii).

The rule establishes the content of the required training and imposes requirements to ensure that employees receive and understand the information. The information that must be given to employees under this section includes:

> (A) Methods of recognizing asbestos . . .;
>
> (B) The health effects associated with asbestos exposure;
>
> (C) The relationship between smoking and asbestos in producing lung cancer;
>
> (D) The nature of operations that could result in exposure to asbestos, the importance of necessary protective controls to minimize exposure including, as applicable, engineering controls, work practices, respirators, housekeeping procedures, hygiene facilities, protective clothing, decontamination procedures, emergency procedures, and waste disposal

> procedures . . . ;
>
> (E) The purpose, proper use, fitting instructions and limitations of respirators . . . ;
>
> (F) The appropriate work practices for performing the asbestos job.

29 C.F.R. §1926.1101(k)(9)(viii) (1997). The preamble explains that these provisions "are designed to ensure that each employee receives a degree of training appropriate to the nature of the asbestos-related tasks that employee performs." 61 Fed. Reg. 43455 (August 23, 1996). Section 1926.1101(k)(9)(iii) requires that the training for Class I asbestos operations must be "equivalent in curriculum, training method and length to the EPA Model Accreditation Plan (MAP) asbestos abatement workers training." To meet this requirement, employers must give their employees at least 32 hours of instruction, including 14 hours of hands-on training. 59 Fed. Reg. 41019 (August 10, 1994), 61 Fed. Reg. 43455 (August 23, 1996).

Section 1926.1101(k)(9)(vi) - (vii) addresses training for employees performing other than Class I asbestos work. Section 1926.1101(k)(9)(viii) states that the training program "shall be conducted in a manner that the employee is able to understand." The section also states: "In addition to the content required by provisions in paragraph (k)(9)(iii) of this section, the

employer shall ensure that *each such employee is informed* of" specific information about asbestos hazards and safety precautions.

C. Statement of facts

1. The hospital renovation and removal of asbestos fireproofing

Ho is a naturalized citizen who, at the time relevant here, resided in Houston, Texas. (R 8:49, p. 1). In December 1997, Ho used funds provided by Fruitland, a fruit and vegetable wholesale company he and his family owned, to buy the abandoned Alief General Hospital and Professional Building in Houston for investment purposes. (R-1; Tr. 40, 53). An Environmental Site Assessment prepared in 1994 by the prior owner indicated that the fireproofing covering structural beams and columns throughout the hospital contained 10% asbestos. (C-17; Tr. 34-36). The broker gave Ho a copy of the report and recommended a further assessment of the severity of the asbestos problem. (Tr. 37). Ho later signed a Commercial Property Condition Statement acknowledging that the buildings contained "asbestos components." (C-19; Tr. 42-43).

In mid-January 1998, apparently without performing any further assessment, Ho hired up to eleven undocumented Mexican nationals to remove asbestos- containing fireproofing and other materials from the buildings. (Tr. 167-170, 178, 259-263, 350-351). Although two supervisors

were on site to direct the work, and Ho himself was present to inspect and monitor the progress of the job, no one warned the workers of the presence of asbestos, trained any of them on the hazards associated with asbestos, or provided any of them with appropriate safety equipment such as respirators and protective clothing. (Tr. 125-126, 131, 171-174, 176, 262-263, 274). Ho paid the workers with funds from Ho Express, a Ho family owned trucking company. The workers stood on ladders or on the floor, and used putty knives to scrape the fireproof coating off pipes, beams, columns and decking. (Tr. 58, 60, 73, 120-121,168-170, 197-200, 342-343; C- 28, pp. 4-10). The scraping process produced a dry, fluffy powder that fell onto the workers' heads and faces, and covered their clothes. (Tr. 60-61, 170, 174-175, 198-201). When the powder settled onto the floor, the men swept it into plastic trash bags. (Tr. 124).

The fireproofing powder caked on the men's faces, making it difficult for them to breathe, and turned the street clothing in which they worked white. (Tr. 174-175, 200, 284-285). Some of the workers tried using ordinary paper masks, suitable for nuisance dusts, to keep them from breathing the powder but discarded them as ineffective. (Tr. 60, 120, 174-175; C-2). There was no running water or clean room available, so the men wore their contaminated clothing home at night. (Tr. 134, 177-178).

On February 2, city building inspector Tim Steward came to the site to investigate a complaint that work was being performed without a permit. (Tr. 56-57). Stewart saw ten workers scraping fireproofing from beams and columns. (Tr. 71, 73-74). He observed as the asbestos-laden powder fell onto the hair and shoulders of the workers and drifted throughout the open building. (Tr. 60, 74, 76-77). After ascertaining that the project lacked a permit, Stewart issued a stop-work order and placed a red tag on the hospital's main entrance. (Tr. 62-63, 267, C-22). The order stated that the work could not continue until the proper permits, plans and approvals were posted. (Ibid.)

In response to the stop-work order, Ho contacted Alamo Environmental, an asbestos abatement firm, for an estimate to remove the remaining fireproofing. After walking through the building with Ho, Alamo's manager Don Weist prepared an estimate of $159,876 for removal of asbestos-containing fireproofing "in strict accordance with EPA, OSHA [and other] guidelines." (C-23).

Ho did not accept the Alamo bid; instead he decided to defy the stop-work order and resume his illegal asbestos abatement activities at night. (Tr. 122-123, 268, 271-272). One week after the city inspection, the workers began working twelve-hour shifts beginning at 6 pm, seven days a week,

scraping asbestos fireproofing from the hospital's beams and pipes in the same manner they had prior to the stop work order. (Tr. 123-129, 285-286). Ho regularly visited the site to check on the progress of the work and to ensure that the fireproofing was thoroughly scraped. (Tr. 125,-126, 173-174, 273-274).

Ho directed that the gate to the property be kept locked while the men were working at night; only Ho and two supervisors had keys. (Tr. 138, 285-286). There was nothing to drink unless the workers brought something with them, or gave money to a supervisor to buy water or soft drinks. (Tr. 183, 185, 192, 321). The one portable toilet at the site was never serviced and consequently became unusable. (Tr. 183, 299). The men relieved themselves on the property or used the bathroom of a filling station or restaurant some 300 feet away. (Tr. 183, 321-322, 331). Working in this manner, the men finished scraping the asbestos-containing fireproofing on March 10. (Tr. 293).

2. The natural gas explosion

On March 11, Ho decided to wash down the interior of the hospital building. (Tr. 293). Ho believed that the sprinkler system was still connected to a water source and could be used for washing. (Ibid.). Ho and Corston Tate, a Ho employee, walked around the building and found two

pipes that they thought might be water lines. (Ibid.). Ho directed Tate to open one of the pipes to see if it contained water, and then left the site. (Tr. 294). When Tate tried to loosen some bolts on the pipe, it cracked open and pressurized natural gas began to escape. (Tr. 299). Tate and two other workers tried to plug the pipe, but Tate's van was in the way. (Tr. 295-296). When Tate attempted to start the van to move it, the gas exploded, severely injuring the three men and blowing a hole in the exterior wall of the hospital.

3. The corporations' involvement in illegal asbestos-removal activities

Ho Express is a trucking company that transports produce for Fruitland, a fruit and vegetable wholesale company. (C-46, p. 12; C-47, pp. 9-12). Ho is the majority owner and president of both Ho Express and Fruitland, and is solely responsible for the day-to-day management of the businesses. (C-47, pp. 9, 12). Ho family members own all of the remaining shares. (C-47, pp. 9, 10; R-13).

Ho exercised complete control over the corporations' checking accounts and treated them as his own. (Tr. 624-625, 748). Debbie Chan, the corporations' bookkeeper, would notify Ho when there were insufficient funds in one of the corporate accounts, and Ho would transfer money from another corporation's account to cover the deficiency. (Tr. 626). These intercorporate transfers were handled informally, at Ho's sole direction, and

the funds transferred in this manner were not repaid. (Tr. 828). Ho also took money from the corporate accounts for his personal use whenever he wanted to and on his own say so. (Tr. 630, 631). No one approved these withdrawals, no loan papers or other formalities were observed, and no interest was paid. (Tr. 630-631).

The $700,000 Ho used to pay for the Alief hospital came from Fruitland's corporate account and from property owned by Fruitland. Ho gave the title company a Fruitland check for $10,000 as earnest money prior to the sale, and transferred an additional $619,620.09 from Fruitland's account at the closing. (C-20; C-21; R-14; Tr. 38-41). To fund the balance of the purchase price, Ho arranged with the title company to sell a building owned by Fruitland and apply a portion of the proceeds to Alief property. (Tr. 40-41).

The money used to pay the workers hired to remove the asbestos-containing fireproofing came from Ho Express's account. Manual Escobedo, one of Ho's foremen, gave Ho invoices for the workers' hours, and Debbie Chan issued Ho Express checks for their wages. (Tr. 425-431, 631-632; C-3, C-4). Ho Express rented the scaffolding necessary for the workers to reach the overhead beams, and paid for the equipment with corporate checks. Ho Express also contracted and paid for the removal of

non-hazardous waste from the site. (C-1). Ho used Melba Gomez, an employee of Ho Express, to check on the project to see if anything was needed and to translate documents into Spanish for the workers. (Tr. 404-405, 414, 416-418).

4. Enforcement actions against Ho

OSHA conducted an inspection of the worksite and issued citations against Ho, Ho Express and Fruitland alleging a total of ten serious and twenty-nine willful violations. These charges included eleven willful violations of 29 C.F.R. §1926.1101(h)(1) for failing to provide respirators to eleven employees removing asbestos, and eleven willful violations of 29 C.F.R §1926.1101(k)(9) for failing to train eleven employees on the hazards of asbestos and appropriate safety precautions. OSHA also charged Ho and the corporations with willfully violating the Act's general duty clause in ordering Tate to tap into the unmarked pipeline. The Texas Department of Health initiated similar procedings under state law, which Ho settled by paying $44,000.

In March 2000, Ho was charged with criminal violations of various federal statutes, including the Clean Air Act (CAA). Ho was convicted of violating the CAA, and received a sentence of twenty-one months imprisonment and a fine of $20,000.

Decisions below

1. The ALJ's Decision

Before the ALJ, Ho conceded that he violated the asbestos training and respirator standards. Ho argued that he was not subject to the Act's requirements because he was not engaged in a business affecting interstate commerce, and that Ho Express and Fruitland should be dismissed because they were not employers of the employees engaged in asbestos removal. Ho argued alternatively that he could not be cited separately for each employee not trained and each employee not provided a respirator. He also argued that he did not violate the general duty clause and that any violation was not willful. (ALJ Dec. at 2, 12-13, 18).

The ALJ ruled that Ho's construction activities at the site necessarily affected interstate commerce and that Ho was therefore liable for the OSHA violations. (ALJ Dec. at 3). He found that Ho Express and Fruitland were also liable for the violations under the "alter ego doctrine" and the "sham to perpetrate a fraud" doctrines, because Ho exercised control over both corporations and used them to obtain funds to purchase and renovate the property without observing corporate formalities. (Id. at 4-5).

The ALJ held that the asbestos training and respirator violations were willful, finding that Ho, a trained engineer, was likely aware of the OSHA

requirements. (Id. at 13). The judge also found that Ho showed plain indifference to employee safety in using unprotected, untrained Mexican nationals to perform work that he knew involved exposure to a dangerous carcinogen, and in deliberately violating the stop-work order by directing employees to work at night, while locked into the facility, without ventilation, potable water, or sanitary facilities. (Id. at 13-14).

The ALJ upheld the twenty-two separately cited violations of the asbestos training and respirator standards. He found that the standards implicated individual employee protection because the abatement of a violation as to one employee would not necessarily abate violations as to other employees. (Id. at 15, citing Reich v. Arcadian Corp., 110 F.3d 1192 (5th Cir. 1997)). He also noted that the Commission had stated in Secretary of Labor v. Hartford Roofing Co., 17 O.S.H. Cas. (BNA) 1361, 1366 (Rev. Comm'n 1995) that the failure to provide each individual employee in a contaminated area with a respirator could constitute a separate violation of the respirator standard. (Ibid.). The judge assessed a penalty of $39,000 for each of the twenty-two per-employee violations, totaling $858,000 for these items. (ALJ Dec. at 18).

Based upon Ho's admission at trial that tapping into an unmarked pipeline on a demolition site is a "recognized hazard," the ALJ held that Ho

violated the general duty clause (<u>Ibid.</u>). However, the judge found that the violation could not be characterized as willful, as alleged, because OSHA failed to show that Ho actually knew of the danger, or that he had a "heightened awareness" of the illegality of his conduct. (<u>Id.</u> at 19).

2. <u>The Commission's decision</u>

The full Commission reviewed the ALJ's decision and affirmed the findings that Ho was subject to the Act, and that the violations of the asbestos standards were willful. (Com. Dec. at 5-7, 36). However, a divided Commission ruled that the Secretary could not cite separate violations of section 1926.1101(k)(9) for each employee not trained on asbestos hazards and precautions, and section 1926.1101(h)(1) for each employee not provided and required to use an appropriate respirator. Commissioners Railton and Stevens concluded that the training standard imposed a duty to have a single training *program*, and that the respirator standard imposed a duty to ensure that employees as a group used appropriate respirators. (Com. Dec. at 19-27). Because the majority believed that the standards did not impose duties running to each individual employee, they did not permit per-employee citations. (<u>Ibid.</u>).

The majority did not find that reading the standards to require employers to train, and to provide respirators to, each individual employee

working with asbestos was unreasonable grammatically or in light of the purpose of the standards. However, it declined to defer to the Secretary's interpretation for two reasons. The majority stated that the Secretary's decisions, under the instance-by-instance citation policy, to group separate violations of the standards for penalty purposes in some cases but not in others reflected inconsistent interpretations of the standards' requirements. (Com. Dec. at 29). It also stated that it would not defer to the instance-by-instance policy because the policy implicated the Commission's statutory authority to set penalty amounts (id. at 29-30), and that, in any event, Ho lacked constitutionally adequate notice that it could be cited for each employee not trained and each employee not provided a respirator. (Id. at 21, 27). Accordingly, the majority vacated all but one willful violation of the asbestos training standard, 29 C.F.R. §1926.1101(k)(9), and one willful violation of the respirator standard, 29 C.F.R. §1926.1101(h)(1). (Id. at 31).

Commissioner Rodgers dissented. In her view, the plain wording of the standards permitted the Secretary to treat as a discrete violation each employee not trained in asbestos hazards and precautions, and each employee not provided and required to use an appropriate respirator. (Rodgers' dissent at 1-8). She found this interpretation entirely consistent with the Act's express requirement in section 17(a) that employers may be

assessed a penalty for "each violation," 29 U.S.C. §666(a), with prior Commission decisions addressing the unit of violation under standards using the same or similar language to that used in the standards cited here, and with this Court's decision in Arcadian. (Rodgers dissent at 4-10). She also found that the Secretary's interpretation was entitled to deference because it was plainly reasonable, and that Ho had fair notice of individualized nature of the standards requirements from the regulatory language itself, from prior Commission decisions addressing the unit of prosecution, and from the violation-by-violation penalty policy. Accordingly, Commissioner Rodgers would have affirmed, as willful, all twenty-two cited violations of the asbestos standards.

The Commission also concluded that the record did not support the ALJ's finding that Ho Express and Fruitland were liable under the "alter ego" and "sham to perpetrate a fraud" doctrines. It relied upon the fact that the corporations' primary business activities (trucking and produce wholesaling, respectively) had nothing to do with the hospital renovation project, and it said there was no evidence to show Ho's role in the management of these activities or that they existed as mere business conduits for Ho's own purposes. (Com. Dec. 11-12). It also found that while the record showed a "somewhat lax attitude toward the corporate structure", it

did not demonstrate a level of disregard for corporate formalities sufficient to establish that the corporations were alter egos of Ho. The Commission noted that the amounts withdrawn by Ho from the corporate accounts to purchase the hospital and to pay the workers to remove the asbestos were recorded on the corporate ledgers as accounts receivable and, concluded from this that the corporations' financial interest in the project amounted to a "mere loan." (Id. at 12-13). It found that the "sham to perpetrate a fraud" doctrine did not apply because there was no basis to conclude that maintenance of the separate corporate identities operated to obstruct effective enforcement of the Act. (Id. at 13-16). Accordingly, the Commission vacated the citations against Ho Express and Fruitland. (Id. at 16).

Finally, the Commission affirmed the ALJ's finding that the general duty clause violation was established, but was not willful. The Commission rejected, as contrary to law, the Secretary's argument that the circumstances surrounding the asbestos removal work established that Ho had a heightened awareness that ordering Tate to tap into the pipeline was illegal. It found that there was no direct proof of Ho's state of mind specifically in ordering Tate to tap into the unmarked pipeline, and that the evidence of Ho's disregard of or indifference to employee safety in the asbestos removal

operation could not be used to establish the willful character of the general duty clause violation. (Id. at 33-34). The Commission ruled that the violation was serious, and assessed a penalty of $7,000. (Id. at 34, 37).

SUMMARY OF THE ARGUMENT

The Commission majority fundamentally erred in concluding that the asbestos training and respirator provisions at issue may not be cited for each employee not trained or provided with a respirator. The Act expressly authorizes the Secretary to issue a citation whenever she finds the employer "has violated a requirement of . . .any standard" and provides for the assessment of a civil penalty "for each violation." 29 U.S.C. §§658(a), (b), (c). Established precedent, including that of this Circuit, makes clear that a standard that requires the employer to protect each employee as an individual, rather than to take a single action that abates for all employees alike, may be cited separately for each employee not protected.

Sections 1926.1101(k)(9) and 1926.1101(h)(1) are precisely the type of standards that this Court and the Commission agree impose individualized duties. Section 1926.1101(k)(9) required Ho to train "each employee" on the hazards of asbestos and the appropriate safety precautions. To comply, Ho had to train not one - or a few - but all eleven employees removing asbestos. Section 1926.1101(h)(1) required Ho to provide appropriate

respirators to, and ensure their use by, each employee removing asbestos. To comply, Ho had to provide eleven respirators, and ensure that eleven employees wore the devices while removing asbestos. No one action by Ho could have abated the training standard and no one action could have abated the respirator standard – Ho was required to abate for each employee.

The Commission's reasons for rejecting this plain reading of the training and respirator provisions are baseless. The standards' language could hardly be clearer in requiring Ho to ensure that each employee exposed to asbestos was trained and that each employee had and used an appropriate respirator. This should have been the end of the enquiry, since the Commission is required to defer to the Secretary's reasonable interpretations of OSHA standards. The majority's statement that the Secretary's decision to cite Ho for separate violations was inconsistent with her decision in other cases to group multiple violations of the same standard as one item for penalty purposes is plainly wrong. The majority's reasoning conflates the issue of the standards' meaning with the separate issue of the effect of the application of the violation-by-violation citation policy, and fails to recognize that the Secretary's decision under the policy is an exercise of prosecutorial discretion. The majority was also plainly wrong in relying upon due process concerns as a basis to overturn the per-employee citations,

as Ho had clear notice of his obligation to train and provide respirators to each of his employees from the language of the standards, among other sources.

The Commission erred in concluding that Ho Express and Fruitland were not liable as alter egos of Ho. These family owned corporations were nothing more than incorporated pocketbooks for Ho's personal use. The unrefuted testimony of the corporations' bookkeeper, and Ho's own admissions established that Ho unilaterally withdrew money from the corporations whenever he wanted to and on his own say so, that Ho took corporate money to pay for the property and to pay the workers hired to remove the asbestos, and that no loan papers or other formalities were observed, and no interest was ever paid. The Commission's conclusion that the record did not support an alter ego relationship between Ho and the corporations ignored important testimony and admissions by Ho, and misapplied the legal test for alter ego status in this Circuit.

Ho's violation of the OSH Act's general duty clause was willful because Ho demonstrated plain indifference in directing Corston Tate to tap into the unmarked pipeline in an attempt to procure water for washing the building. Ho's March 11 direction to Tate to tap into the pipeline was in clear violation of stop-work order Ho had received in February, which forbid

all further work in the building until Ho obtained the proper permits and approvals. Thus, Ho knew that tapping into the unmarked pipeline without approval was illegal, even if he may not have known that a source of the illegality of his conduct was the OSH Act's general duty clause. The record further shows that had Ho known of his obligation under the general duty clause, he would not have cared – he was simply indifferent to all legal requirements relating to the safety of his employees. Thus, the violation was willful.

ARGUMENT

I. THE PER-EMPLOYEE CITATIONS FOR ASBESTOS TRAINING AND RESPIRATOR VIOLATIONS SHOULD BE AFFIRMED

A. Standard of review

Whether the Secretary properly cited Ho for each employee not provided a respirator and each employee not trained on the hazards of asbestos turns on the meaning of the cited OSHA standards. The Secretary's interpretation of the standards is reviewed "to assure that it is consistent with the regulatory language and is otherwise reasonable." Mica Corp. v. OSHRC, 295 F.3d 447, 449 (5th Cir. 2002). Where the Commission and the Secretary disagree about the meaning of a standard, a court owes deference

to the Secretary's, not the Commission's, reasonable interpretation. Martin v. OSHRC, 499 U.S. 144, 154-155 (1991).

B. Each time an employer commits a prohibited act or allows a prohibited condition to exist, the employer violates the Act

Ho conceded that he failed to train any of the eleven employees who he hired to remove asbestos about the hazards of asbestos exposure, as required by section 1101(k)(9), and also failed to supply any of them with respirators in accordance with section 1101(h)(1). (ALJ Dec. at 13). His only challenge to the citations was to claim that the standards did not permit the Secretary to cite him separately for each employee not protected. A divided Commission agreed, and vacated all but one violation of section 1101(k)(9) and one violation of section 1101(h)(1). As we demonstrate below, the majority's analysis ignores the standards' plain language and the established test for determining which conditions or actions constitute separate violations under the OSH Act, as enunciated in the Commission's own prior cases and in court of appeals caselaw, including that in this circuit. The majority also ignored basic precepts of prosecutorial discretion, and applied a concept of fair notice that is at odds with established legal doctrine in numerous ways.

First, there is no doubt that, in appropriate circumstances, the statute allows the imposition of per-instance, i.e. per violation, citations and

penalties. Section 9(a) of the Act authorizes the Secretary to issue a citation when she believes that "an employer has violated *a requirement* of . . . any standard. . . ." 29 U.S.C. § 658(a)(1). A separate penalty may be assessed "*for each . . . violation*." Id. at § 666(a), (b), (c). As the D.C. Circuit observed in upholding per-instance citations and penalties for multiple violations of OSHA recordkeeping rules, "The plain language of the Act could hardly be clearer" in authorizing per-instance citations. Kaspar Wire Works, Inc. v. Secretary of Labor, 268 F.3d 1123, 1130 (D.C. Cir. 2001). "The availability of such [separate] penalties," the court added, "is consistent with the general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty." Ibid., citing Missouri, Kansas, & Texas Ry. Co. v. United States, 231 U.S. 112, 119 (1913). See also Reich v. Arcadian Corp., 110 F.3d 1192, 1198-99 (5th Cir. 1997) (violation may be cited on a per-employee basis "if the regulated condition or practice is unique to the employee (i.e., failure to train or remove a worker)").

Because an employer may be cited and assessed a civil penalty for each violation that it commits, the determination of whether an employer's actions constitute a single violation or a number of violations depends on the nature of the statutory or regulatory requirement at issue. In other words, the regulatory or statutory provision itself determines what this Court has called

the "unit of violation." Arcadian, 110 F.3d at 1198. If the standard or other mandatory provision prohibits individual acts or conditions, it is violated each time the prohibited act or condition occurs. Applying this principle in its earlier cases, the Commission has held that a regulation requiring employers to record each occupational injury or illness was violated each time an employer failed to record an injury or illness, Secretary of Labor v. Caterpillar Inc., 15 O.S.H. Cas. (BNA) 2153, 2172-73 (Rev. Comm'n 1993); Kaspar Wire Works, 268 F.3d at 1130-32; a standard requiring point-of-operation guards on machine parts that could injure employees was violated at each unguarded machine, Hoffman Constr. Co. v. Secretary of Labor, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1975); a standard requiring fall protection for floor and wall openings, stairways, and open-sided floors was violated separately at each location on a construction site that lacked appropriate protection, Secretary of Labor v. J.A. Jones Constr. Co., 15 O.S.H. Cas. (BNA), 2201, 2212 (Rev. Comm'n 1993); and a standard requiring shoring or shielding in trenches to protect against cave-ins was violated separately at each trench where shoring or shielding was not installed. Secretary of Labor v. Andrew Catapano Enters., Inc., 17 O.S.H. Cas. (BNA) 1776, 1778 (Rev. Comm'n 1996).

The Commission has also applied the principle to uphold per-employee citations where the standard requires the employer to protect each employee as an individual. In Catapano, the Commission held that the general construction training standard, which requires employers to "instruct each employee in the recognition and avoidance of unsafe conditions" may "clearly be read to permit the Secretary to cite separate violations based on the failures to train individual employees." 17 O.S.H. Cas. (BNA) at 1780. In Secretary of Labor v. Sanders Lead Co., 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995), the Commission held that the lead standard permitted the Secretary to cite the employer separately for each employee not medically removed from lead exposure, and each employee not properly fit-tested for respirator leakage, because the standard's medical removal and respirator fit-test requirements required evaluation of individual employees.

On the other hand, the number of workers exposed to a single violative condition does not increase the number of violations. Thus, a roof edge left unguarded in violation of a standard requiring a motion stopping system or warning line could be cited as only a single violation, regardless of how many employees were exposed to a fall. Secretary of Labor v. Hartford Roofing Co., 17 O.S.H. Cas. (BNA) 1361, 1366 (Rev. Comm'n 1995). In that case, the Commission pointed out that abatement required the

“single discrete action” of installing motion stopping system or line. Id. at 1366-1367.

Using similar reasoning, this Court held that the OSH Act's general duty clause, requiring an employer to "furnish to each of his employees" a workplace that is "free from recognized hazards" is directed at hazardous conditions, and does not require separate abatement actions for “each employee." Arcadian, 110 F.3d at 1196-98. The Court pointed out that Arcadian’s obligation to correct a leaking pressure vessel liner was not affected in any way because 87 different employees were exposed to the hazard. Id. at 1197. Arcadian was not required to correct the condition 87 times. By fixing the liner once, Arcadian would have abated the explosion hazard for all 87 employees. Id. at 1194. In other words, the unit of violation under the general duty clause is the "recognized hazard," not the exposed employee. Id. at 1198.

In Arcadian and Hartford Roofing, both the Court and the Commission made clear that per-employee citations could be appropriate under a standard where "the regulated condition or practice is unique to the employee." Arcadian, 110 F.3d at 1199. In Arcadian, the Court referred to a worker training standard – one of the standards involved here – as the type of standard that makes the employee the unit of violation. Ibid.

In Hartford Roofing, the Commission applied this same reasoning to respirator use requirements. The Commission concluded that the failure to provide each employee with an appropriate respirator could be a separate violation of the standard because, "the condition or practice at which the standard is directed . . . is the individual and discrete failure to provide an employee working in a contaminated environment with a proper respirator." 17 O.S.H. Cas. (BNA) at 1365-1368).

Although respirator requirements were not at issue in Hartford Roofing, the distinction between requirements that apply individually to each employee, and requirements that apply to environmental conditions affecting a number of exposed employees was a central element of the Commission's rationale in that case. 17 O.S.H. Cas. (BNA) at 1366-67. The Commission concluded that the individual-employee requirements may be cited on a per-employee basis, but that the environmental condition requirements must be cited on a per-condition basis. Ibid. This same principle applies to the training and respirator requirements in this case.

C. Ho violated 29 C.F.R. §1926.1101(k)(9) each time he assigned a worker to remove asbestos without providing the worker with training about the hazards of asbestos exposure and about the required safeguards against those hazards

Applying the analytical framework described above to the training standard at issue here makes clear that Ho committed 11 separate violations

by failing to train 11 employees. Section 1101(k)(9) required Ho to "(i) . . . institute a training program for all employees . . . and . . . insure their participation in the program." It also required him to "(viii) conduct the training program . . . in a manner the employee is able to understand. . . . [so] that *each* . . . *employee* is informed" of the health effects of asbestos and the importance of using protective controls, including respirators, protective clothing and appropriate industrial hygiene practices.

The requirement that the training program be conducted in a manner that ensures that "each employee" is informed of specific information about asbestos hazards and precautions imposed a duty upon Ho to ensure that each individual employee actually received appropriate training. 61 Fed. Reg. 43454-55 (Aug.23, 1996). This means that Ho had to take actions tailored to the specific characteristics of the employees involved.

As dissenting Commissioner Rodgers observed, the standard requires employers to train each individual employee in language that individual employee understands, and to respond to individual employee questions about the content of the training. Rodgers Dissent at 13. Because this training must be provided at or before the time of the employee's initial assignment, §1926.1101(k)(9)(ii), separate training sessions will be required for employees who begin work at different times. Moreover, the employer

must inform each and every exposed employee of each specific item of information listed in section 1926.1101(k)(9)(viii)(A)-(J).

Because the duty imposed by the standard runs to each individual employee, the actions necessary to comply will vary depending upon the language skills, cognitive abilities, and date of hire of the individual employees to be trained. Compliance as to one individual employee is not compliance as to another different employee. Accordingly, the standard makes clear that a discrete violation occurs each time an employer assigns an employee to work around asbestos without providing the employee with appropriate training.[1]

This reasoning is consistent with the observation this Court made in Arcadian that each affected employee could be the unit of violation under an OSHA standard "where the regulated condition or practice is unique to the employee (i.e., failure to train or remove a worker)." 110 F.3d at 1199. The court could have been anticipating this case. Section 1926.1101(k)(9) requires the employer to train "each employee" and the regulated condition

[1] The majority erred in claiming that the Secretary's theory of what constitutes an individual violation was uncertain because she had not made clear how many times a day a worker had to be trained. (Com. Dec. at 28). Clearly, an employee must be trained once "prior to or at the time" he first undertakes tasks exposing him to asbestos. See Catapano, 17 O.S.H. Cas. (BNA) at 1780.

is the failure to ensure that each employee receives appropriate training. The language of the standard itself thus makes the employee the unit of violation.

Citing and penalizing Ho separately for each employee not trained in accordance with section 1926.1101(k)(9) also comports with the statutory language in Section 17 of the Act that "[a]ny employer who willfully or repeatedly violates the requirements of . . . any standard . . . may be assessed a civil penalty of not more than $70,000 for *each violation.* 29 U.S.C. §666(a) (emphasis added). As discussed above, the standard's plain terms required Ho to train each of the eleven employees who performed asbestos removal work on the hazards and safety precautions related to asbestos. By failing to train any individual employee, Ho committed eleven violations of the standard, for which the Act expressly authorized eleven separate penalties.

In Catapano, the Commission itself held that individual untrained employees were the appropriate unit of violation under a training standard virtually identical in relevant wording to section 1926.1101(k)(9). 17 O.S.H. Cas. (BNA) at 1778 (construing general construction training standard, 29 C.F.R. §1926.21(b)(2)).[2] This conclusion in Catapano was not "dicta . . .

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[2] The Secretary issued separate sets of citations for violations committed at each of nine different locations where trenching operations

irrelevant to the holding in the case," as the majority characterized it. (Com. Dec. at 27, n. 18). The Commission vacated citations for multiple training violations in Catapano because they were based on different work sites rather than different employees. Catapano, 17 O.S.H. Cas. (BNA) at 1780. Thus, Catapano's discussion of the unit of violation for a requirement to train "each employee" was clearly essential to the disposition of the citations in that case. That language should be equally dispositive in the case at bar.

D. Ho violated 29 C.F.R. §1926.1101(h)(1) each time he assigned a worker to remove asbestos without ensuring that the worker had and used an appropriate, properly fitted respirator

Section 1926.1101(h)(1) states that "[t]he employer shall provide respirators and ensure that they are used . . .[d]uring all Class I asbestos jobs." The standard goes on to explain that the employer must ensure that each employee is provided an appropriate, approved, properly fitting respirator, and must ensure that each such employee actually uses the

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were performed. Each set of citations alleged violations of a variety of safety requirements applicable to trenches, including shoring and shielding requirements. Each set of citations also alleged a violation of the training requirement in section 1926.21(b)(2). The Commission held that all of the standards except section 1926.21(b)(2) were properly cited separately for each location where trenching was performed because abating each of the cited hazards at one location would not have abated them at other locations. 17 O.S.H. (Cas.) BNA at 1778. However, the Secretary could not cite separate violations of the training standard at different locations without showing that different employees were involved. Id. at 1780. The Secretary's failure to show that the training violations actually involved different employees precluded multiple citations. Ibid.

respirator. An employer's failure to ensure that any individual employee has and uses an appropriate respirator is a discrete violation of the standard; the failure to ensure that a different individual has and uses an appropriate respirator is a separate and distinct violation.

This is the plain and natural reading of the regulatory text. By requiring employers to "provide" and "ensure use" of personal respirators the standard seeks to protect individual employees rather than to eliminate or control hazards affecting employees as a group. Compliance therefore requires individualized actions: The employer must provide each employee with a respirator that is approved and properly fitted, in accordance with subparagraphs (2) and (4) of Section 1101(h), and must take reasonable steps to ensure that each employee actually uses the devices during Class I asbestos work.

The specific abatement actions required will vary depending upon the preferences and physical characteristics of the employees to be protected. An employer must, among other things: accommodate individual employee preferences for air-purifying in lieu of negative-pressure respirators (Section 1101(h)(2)(iii)); and perform individual face fit tests to ensure that the respirator issued to employee exhibits the least possible faceplate leakage (Section 1101(h)(4)(i) and (ii)). Clearly, these provisions require the

employer to address each employee's needs separately, and to provide the type of respirator best suited to that individual employee's physical characteristics and preferences.

Employers must also take employee-specific actions to ensure that respirators are actually used. This means that the employer must have a work rule requiring respirator usage, which it effectively communicates to each employee and which it enforces by adequate supervision and discipline when violations are discovered. The specific actions employers must take to effectively communicate their work rules and detect and discipline violators of the rules will vary depending upon the language skills, cognitive abilities and temperaments of the individual employees. Because an employer's duties under the standard clearly run to individual employees, the Secretary appropriately determined that Ho's failure to provide respirators to, and ensure their use by, eleven different employees constituted eleven separate violations of the standard.

This conclusion is supported by the legal authority discussed in the previous section. This Court's analysis in Arcadian, recognizing that the employee may be the unit of violation for OSHA standards where "the regulated condition or practice is unique to the employee, (i.e., failure to train or remove a worker"), 110 F.3d at 1199, applies to the asbestos

respirator standard. The failure to ensure the use of an approved, fit-tested respirator by each worker is a regulated condition unique to the employee in the same way that the failure to train the worker is. The Commission has expressly held that respirator fit-testing requirements involve protections "unique to each employee," and that violations may therefore be cited on a per-employee basis. Sanders Lead, 17 O.S.H. Cas. (BNA) at 1203. It has also explained that a standard requiring that employees in a contaminated environment use a respirator may be cited separately for each employee not provided a respirator. Hartford Roofing, 17 O.S.H. Cas. (BNA) at 1366.

E. The Commission majority's analysis of the training and respirator requirements is fundamentally flawed

1. The Commission's majority's analysis of the unit of violation under the training standard, section 1926.1101(k)(9), is fundamentally flawed in several respects. First, the majority was wrong in suggesting that the regulated condition is the absence of a training program and nothing more.   The majority said that: "the focus of the standard is on the employer's duty to train and impart information to employees generally, and the workplace condition to which the standard is directed is the absence of the appropriate training program." (Com. Dec. at 24-25).

Suggesting that the standard's sole focus is on the training program itself, without regard to whether individual employees actually receive the

required information, is wholly illogical. A training “program” is meaningless unless it is implemented. The standard expressly required Ho to “institute” a training program, “ensure [each employee’s] participation in the program,” “conduct [the program] in a way that *the employee* is able to understand” and “ensure that *each such employee* is informed of” specific information. 29 C.F.R.§ 1926.1101(k)(9)(i), (viii) (emphasis added). In short, Ho not only had to have a training program, he had to implement it by actually training each employee. Ho could not have complied by having a training program on paper, or by training some employees but not others. By failing to train the eleven employees performing Class I asbestos work, Ho committed eleven separate violations of the cited standard.

The majority cited Arcadian as support for the proposition that the phrase “each such employee” in section 1101(k)(9) is an inclusive expression meaning that the employer’s duty extends to all employees rather than some. (Com. Dec. at 25). However, the cited passage in Arcadian did not state that the term “each employee” necessarily means that the relevant duty “extends to all employees.” Arcadian held only that “in the context of [the OSH Act’s general duty] Clause as a whole, with its principal (if not exclusive) focus on hazardous conditions, ‘each of’ simply means that an employer’s duty extends to all employees regardless of their individual

susceptibilities." Arcadian, 110 F.3d at 1198 (emphasis supplied). Thus, the Arcadian Court focused on the duty to remove hazardous conditions. A single hazardous condition, such as the unsafe reactor vessel at issue in Arcadian may be abated only once, to the benefit of all employees who may have been exposed to it. The asbestos training standard, by contrast, is inherently employee-specific. To comply with it, an employer must train each individual employee; there is no single action that will abate the hazard for all purposes. In this very different context, the language "ensure that each . . . employee is informed of" in section 1101(k)(9) can only logically be read to mean that the employer's duty runs to individual employees.

2. The majority also fundamentally misinterpreted the respirator standard, section 1101(h), in concluding that it does not require individualized protections, and that "Ho's non-compliance . . . stems directly from a single act" of failing to provide respiratory protection to employees as a group. (Com. Dec. at 22). As we have demonstrated, Ho had to take separate and distinct actions for each of the eleven employees hired to remove asbestos-containing fireproofing. He had to select an appropriate respirator for each worker, accommodate each worker who requested an air-purifying respirator in lieu of a negative-pressure device, and perform an initial face fit test for each worker. Ho also had to provide

sufficiently individualized instructions and supervision to ensure that each employee actually used the devices. By complying with these requirements for even one employee, Ho would not have complied for another different employee, let alone for all eleven employees. It follows that by failing to provide appropriate respirators and ensure their use by eleven different employees, Ho committed eleven separate violations of Section 1101(h)(1).

The majority also erred in asserting, in a footnote, that the "individualized employee-specific actions" described in the subsections (2) (3) and (4) of Section 1101(h) are not implicated in this case because the Secretary did not separately cite these sections. (Com. Dec. at 21, n. 12). The provisions in subsections (2) and (4) are not separate and independent requirements; they describe the specific actions necessary to fulfill the general requirement in Section 1101(h)(1) to "provide" respirators. Obviously, the employer cannot comply by providing any respirator it chooses. It must "select and provide" an approved respirator as outlined in section 1101(h)(2) and must "ensure that the respirator issued to the employee" fits properly, as outlined in section 1101(h)(4). Thus, in the context of §1926.1101(h), "providing" respirators necessarily includes selecting and fit testing the devices. On remand from Martin v. OSHRC, 499 U.S. 144 (1991), the Tenth Circuit held that the Secretary reasonably

interpreted a different standard requiring a respirator program to require an "*as part of its program* [to] take steps to assure the proper fit of respirators including any necessary further inquiry and corrective action . . . ." Martin v. OSHRC, 941 F.2d 1051, 1054-57 (10th Cir. 1991) (emphasis by court).

Acceptance of the majority's view of the relationship between the subsections of section 1926.1101(h) would be anomalous in the extreme. Under Sanders Lead, the employer may clearly be cited separately for each employee whose respirator is not fit-tested. 17 O.S.H. Cas. (BNA) at 1203. Thus, if employer fit-tests some employees but not all, it may be cited for as many employees as it fails to fit-test. Yet, under the majority ruling, if the employer does nothing at all to provide respirators to multiple exposed employees, as Ho did here, it can be cited only once. The majority would thus limit the liability of the employer who fails to take any protective action while exposing the employer who takes some steps toward compliance to multiple citations. Such a result is contrary to a sensible reading of the standard.

F. Even if the standards' meaning is ambiguous, the Secretary's construction is reasonable and entitled to deference

Even if the standards could be viewed as ambiguous as to whether they impose duties to train each individual employee and to ensure the use of appropriate, properly fitted respirators by each individual employee, the

Secretary's interpretation is entitled to deference because it is reasonable in that it "sensibly conforms to the purpose and wording of the regulations." Martin v. OSHRC, 499 U.S. at 150-151 (internal quotation omitted).

The majority believed that it did not need to determine whether the Secretary's interpretation was reasonable because the Secretary had not "expressly argued" that the Commission should defer to her interpretation. Com. Dec. 27-28. This was error. The Secretary appeared before the Commission to defend the decision of the ALJ against the challenges raised by Ho. The Secretary did not have to ask for deference – that had already been granted by ALJ. Furthermore, Ho did not specifically raise a deference challenge. Accordingly, there was no need for the Secretary to "expressly argue" that the Commission should defer.

The Secretary argued before the Commission that the ALJ's decision was legally correct because the language of the standards implicates individual employee protections. (Secretary's Commission Brief at 29-33). Thus, the issue of the reasonableness of the Secretary's construction of the standards was squarely raised in this case, even if not presented in "deference" terms. In any event, because the Commission has no power to prefer its reasonable interpretations of OSH Act standards to the Secretary's reasonable interpretations, Martin, 499 U.S. at 158, the majority could not

reject the Secretary's interpretation without expressly finding it unreasonable.

The majority also stated that several considerations "would make it difficult, if not impossible," to defer in this case. (Com. Dec. 27-28). According to the majority: (1) the Secretary had interpreted the standards inconsistently by sometimes grouping violations involving different employees, and (2) the Secretary's per-instance penalty policy related to the setting of penalties, a function committed solely to the Commission under the OSH Act. Neither of these considerations is a basis for rejecting the Secretary's interpretation.

The majority's reasoning conflates two separate issues: (1) the interpretation of a standard and (2) the effect of the Secretary's violation-by violation policy. OSHA Instruction CPL 2.80 "Handling of Cases To Be Proposed for Violation-By-Violation Penalties" provides guidance as to when the Agency will separately cite and propose penalties for each violation of a standard instead of combining the violations into a single citation item that lists each separate violation, but proposes only one penalty. The policy applies when OSHA finds the violations willful and egregious in accordance with certain listed criteria. CPL 2.80, reprinted at O.S.H. Rptr (BNA) Reference File, p. 21949-50 (October 21, 1990). The policy allows

per-employee citation and penalty proposals only for violations of standards or statutory provisions that impose individual duties. Arcadian Corp., 110 F.3d at 1198. Thus, the first question in each case is whether the cited provision imposes such a duty, i.e., whether, in the Commission majority's words, the standard can be read to "permit[] per-employee violations." (Com. Dec. at 29). It is in making this determination that the Commission and the courts must defer to the Secretary's reasonable interpretation of the standard.

The majority's assertion that the Secretary is interpreting the standards in a "diametrically opposed" way, as not authorizing per-employee violations in cases where she chooses not to issue such citations, is completely wrong. (Com. Dec. at 29). As the D.C. Circuit recognized in Kaspar Wireworks, the Secretary's decisions under the violation-by-violation policy involve the exercise of prosecutorial discretion. 268 F.3d at 1131. It found that the policy was "an enforcement tool," and noted that "[t]he Secretary has never taken the position that she lacks authority or would decline to issue per instance citations to employers who commit multiple violations of the same regulatory requirement." Ibid. The Commission has also recognized that the Secretary's decision to issue a separate citation for each violation of a standard is an exercise of

prosecutorial discretion. Caterpillar, 15 O.S.H. Cas. (BNA) at 2173 (issuance of per-instance citations for violations of scaffold standard "within Secretary's discretion as prosecutor under the Act"

The Secretary's prosecutorial decision under the violation-by-violation policy that in some cases she will issue a single grouped citation for what are actually multiple separate violations of the asbestos standard is no more an interpretation of the standard's substantive requirements than would be her decision not to issue a citation at all, or to withdraw a citation once issued. See Cuyahoga Valley Ry. Co. v. United Transp. Union., 474 U.S. 3, 6-7 (1985). The use of grouped citations in some cases therefore poses no conflict with the Secretary's interpretation that the cited standards authorize per-employee citations.

The majority also suggested that no deference is warranted because the violation-by-violation policy addresses penalties, and the Commission has sole statutory authority to determine penalty amounts. (Com. Dec. 29-30). However, this argument fails to recognize that the Secretary's authority to issue per-employee citations in this case does not stem from the policy, but from the express language of the asbestos standards and the statute. The Commission agrees that the Secretary's issuance of per-employee citations with separate proposed penalties for failure to medically remove each

employee from lead exposure, or for failure to fit-test each employee's respirator, poses no conflict with the Commission's penalty setting authority. The same principle applies to the training and respirator standards here. The Commission retains full authority to determine the penalty assessed for each separate violation. See Caterpillar, 15 O.S.H. Cas. (BNA) at 2173 ("although the Secretary may cite separate omissions . . . as separate violations, [s]he may not exact a total penalty that is inappropriate in light of the [statutory penalty factors]).

G. Ho had constitutionally adequate notice that he could be cited separately under the training standard for each employee not trained and cited separately under the respirator standard for each employee not required to use a proper respirator

At several points in its discussion of the unit of violation under the cited standards, the majority suggested that enforcement of citations against Ho for each individual employee not trained and each individual employee not required to use an appropriate respirator would violate Ho's due process right to adequate notice of the violations. (Com. Dec. at 21, 23 (discussing §1926.1101(h)(1); at 27 (discussing §1926.1101(k)(9); at 28-29 (discussing deference considerations)). The majority's fair notice concerns are baseless in the context of this case.

To determine whether employers have adequate notice of the requirements of an OSHA standard, the first step is to examine the

regulatory language itself to determine whether a party would be able to identify the standards of conduct with which it had to conform.

AJP Constr., Inc, v. Secretary of Labor, No. 03-1073, 2004 WL 257037 at *6 (D.C. Cir. Feb. 13, 2004). See also Corbesco, Inc. v. Dole, 926 F.2d 422, 426 (5th Cir. 1991)(where regulations establish explicit requirements that employers must take in specific situations, wording of regulations provides adequate notice); Tierdael Constr. Co. v. OSHRC, 340 F.3d 1110, 1117-18 (10th Cir. 2003) (adequate notice of OSHA interpretation established by plain, ordinary meaning of standard). Even if the regulatory language itself is not specific enough, other sources, including other statements by the Agency may provide adequate notice. Deering Milliken, Inc., Unity Plant v. OSHRC, 630 F.2d 1094, 1103-1104 (5th Cir. 1980) (Secretary's enforcement position articulated in prior litigation against a different party put petitioner on notice that the Secretary might continue to pursue that position in the future). See also General Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (agency's pre-enforcement statements about regulatory requirements could provide notice). Prior Commission decisions may also provide adequate notice. Corbesco, 926 F.2d at 428. See also Texas Eastern Products Pipeline Co. v. OSHRC, 827 F.3d 46, 50 (7th Cir. 1987)

(Commission decision clarifying meaning of standard cured any due process deficiency that might have existed prior to that ruling).

Applying these principles, it is clear that Ho had constitutionally adequate notice. First and foremost, Ho was unquestionably on notice that he had to train and provide respirators to each of the eleven employees removing asbestos. The training standard, section 1926.1101(k)(9), required Ho to train "each employee" on the hazards of asbestos and the necessary safety precautions, while the respirator standard, section 1926.1101(h)(1), required him to ensure that each employee used an appropriate, fit-tested respirator. The standards' language could hardly have been clearer in informing Ho that he had to take measures to protect each individual employee; therefore, Ho could have known precisely what was required to comply simply by reading the standards. AJP Constr., 2004 WL 257037 at *5, 6. The majority's claim that nothing in the standards served to alert Ho of the individualized nature of his duties toward employees is simply "incredible." (Rodgers' Dissent at 13).

Even if the standards were not clear on this point, any infirmity was cured by the statements contained in OSHA's 1990 violation-by-violation policy, CPL 2.80, and by prior Commission decisions such as Catapano, Hartford Roofing and Sanders Lead. The policy directive states that, "29

C.F.R.§1926.21(b) (2) is a requirement for the employer to train each employee in safety and health. *For each employee not so trained there is a separate violation of the standard*." CPL 2.80, Sec. H. 3. d. (1) (a) (emphasis added). In another example, the directive makes clear that the failure to provide respirators to each employee overexposed to asbestos could be a separate violation of the general industry asbestos standard. Id. at H. 3. d. (2). The principle outlined in the directive clearly applies to the standards at issue here.

The Commission's holdings in Catapano and Sanders Lead that the employee is the unit of violation under training and fit-testing standards similar to those at issue here, and its explanatory statement in Hartford Roofing that the failure to provide respirators to each employee in a hazardous environment could be a separate violation of the general respirator standard, provided a further important source of notice to Ho. These decisions eliminated any uncertainty as to the standards' requirements, at least in the absence of any enquiry by Ho. Corbesco, 926 F.2d at 428; Texas Eastern, 827 F.2d at 50. Ho made no such enquiry.

For the foregoing reasons, Ho had adequate notice of the conduct required of him under the standards; that is, he knew or should have known that he was required to train and provide respirators to each employee. He

therefore had constitutionally adequate notice regardless of whether he also knew that he could be penalized for non-compliance on a per-employee basis. (Com. Dec. at 27). Cf. AJP Constr. 2004 WL 25707 at *6 (fair notice established if standard clearly applies to cited conduct, even if standard is vague in other respects, quoting Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness). And even if notice of the penalty for non-compliance were part of the due process evaluation here, such notice was clearly provided by the language in section 17 of the OSH Act that a penalty may be assessed for "each violation," and by the Agency statements and the Commission decisions discussed above.

Finally, Ho failed to raise a due process challenge before the Commission. This is a separate and independent ground to reject the majority's due process theory since fair notice is an affirmative defense which Ho was required to plead and prove. Secretary of Labor v. General Motors Corp., Chevrolet Motor Div., 10 O.S.H. Cas. (BNA) 1293, 1296 (Rev. Comm'n 1982). The issue was therefore excluded from the case. See Dole v. Williams Enters. Inc., 876 F.2d 186, 189 (D.C. Cir. 1989) (party's failure to plead an affirmative defense results in the waiver of that defense

and its exclusion from the case). Accordingly, there is no basis for the Commission majority's due process concern in this case.

II. HO EXPRESS AND FRUITLAND ARE LIABLE FOR THE OSHA VIOLATIONS AS HO's ALTER EGOS

A. Standard of review

The Commission's factual findings relating to the alter ego issue are conclusive if supported by substantial evidence. 29 U.S.C. §660(a). The Commission's determination of the appropriate legal standard for alter ego status, and its application of the legal standard to the facts, are questions of law. See Century Hotels v. U.S., 952 F.2d 107, 109- 111 (5th Cir. 1992). This Court may set aside the Commission's legal conclusions if they are not in accordance with law. Mica Corp., 295 F.3d at 449.

B. Ho used the corporations as mere business conduits for his illegal asbestos-removal activities

The ALJ held that Ho Express and Fruitland were liable for the OSHA violations as "alter egos" of Ho. ALJ Dec. at 4. He found that Ho controlled the corporations by: solely directing their activities, moving funds from corporation to corporation and disbursing them at his own direction and without corporate formalities, using corporation assets to perform personal chores, and using corporation assets to finance the hospital renovation. Ibid. The Commission reversed. As we demonstrate below,

the Commission's conclusion simply ignores critical, undisputed evidence of Ho's control of the corporations, including Ho's own admission that he directed the corporations' day-to-day affairs, and misapplies the governing legal criteria.

The alter ego doctrine is a well-recognized equitable principle in both federal and individual states' substantive law. It provides a basis for disregarding the limited liability inherent in the corporate form in the limited circumstances where a corporation's affairs are so entangled with those of an individual that it does not make sense to think of them as separate entities. Zahra Spiritual Trust v. U.S, 910 F.2d 240, 243-244 (5th Cir. 1990). The doctrine may be applied to hold an individual liable for the debts of the corporation, or, in "reverse piercing," to hold the corporation liable for the debts of a controlling shareholder. Ibid. Accord, Century Hotels v. U.S., 952 F.2d 107, 110-112 (5th Cir. 1992). A corporation is treated as the alter ego of its shareholder when the shareholder "treat[s] and us[es] it as a mere business conduit" for his own purposes. Century Hotels, 952 F.2d at 112. While there are a variety of factors to be considered in an alter ego enquiry, the focus is on determining who actively or substantially controlled the corporation. Estate of Lisle v. C.I.R., 341 F.3d 365, 375 (5th Cir. 2003)

(alter ego status turns on control and use); Century Hotels, 952 F.2d at 110-111.[3]

The record establishes a pervasive interconnection and unity between Ho and the corporations concerning the hospital renovation project. The critical facts are summarized below:

(1) Eric Ho owned sixty-seven percent of the shares of Ho Express and Fruitland; other Ho family members owned the remaining shares. Ho and his wife were the sole officers of Fruitland; Ho was the sole officer of Ho Express. (R-13, C-47 at p. 12). Ho alone was responsible for "general and active management of the business and day-to-day affairs" of Ho Express and Fruitland. (C-47, p. 12). Ho and his wife had sole check-writing authority for the corporations. (Tr. 625).

(2) There was a commingling of funds between Ho Express and Fruitland and between the corporations and Ho. (Tr. 624-625, 748). Bookkeeper Debbie Chan would notify Ho when there were insufficient funds in one of the corporate accounts, and Ho would transfer money from another account to cover the deficiency. (Tr. 626). When money was

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[3] The factors primarily relevant in the context of a corporation as alter ego of an individual include: "the total dealings of the corporation and the individual, the amount of financial interest the individual has in the corporation, the ownership and control that the individual maintains over the corporation, and whether the corporation has been used for personal purposes." Estate of Lisle, 341 F.3d at 375-376.

transferred from Ho Express to Fruitland, or vice versa, it was not repaid. Instead, if Ho Express needed money later, Ho would transfer money to it from Fruitland. (Tr. 628). Ho also took money from the corporations' accounts for his personal use whenever he wanted to, and on his own say so. (Tr. 630, 631). No one approved these withdrawals, no loan papers or other formalities were observed, and no interest was paid.[4] (Tr. 630-631).

(3) The funds Ho used to purchase the Alief hospital came from Fruitland – a $10,000 earnest money check, a $618,000 wire transfer and cash from the sale of a Fruitland building on the day of the Alief closing. The money used to pay the workers hired to remove the asbestos-containing fireproofing came from Ho Express. Manual Escobedo gave Ho invoices for the workers' hours, and Debbie Chan issued Ho Express checks for their wages. (Tr. 425-431, 631-632 C-3, C-4). Ho Express rented the scaffolding necessary for the workers to reach the overhead beams and paid for the equipment with corporate checks. (Tr. 241-243, C-43). Ho Express also contracted and paid for the removal of waste from the site. (C-1). Ho used Melba Gomez, an employee of Ho Express, to check on the project to see if

[4] There was some dispute about whether Ho repaid any part of the money he withdrew. Debbie Chan testified that Ho did not repay any of the money withdrawn from the corporations. Ho argued that "credits" shown on the corporate ledgers reflect amounts he repaid to the corporations. At most, only a fraction of the principal Ho took was repaid. (R-2 at 10). It is undisputed that Ho paid no interest.

anything was needed and to translate documents into Spanish for the workers. (Tr. 404-405, 414, 416-418).

All of this evidence points clearly and unequivocally to the conclusion that Ho controlled Ho Express and Fruitland and used their financial and human resources to carry out the hospital renovation without regard to the corporate form. However, the Commission found "no basis to construe" the evidence to impose liability on the corporations in light of two factors: (1) the corporations had legitimate business purposes and activities apart from the hospital project, and there was no evidence of Ho's role in these activities, and (2) the project expenses were properly recorded on the corporations' ledgers as loans. (Com. Dec. 11-13).

The Commission's analysis of the alter ego issue is fundamentally flawed. First, the fact that the corporations may have conducted some legitimate business activities does not shield them from liability based on their relationship with Ho vis-a-vis the hospital project. Insofar as the parties' dealings with the hospital were concerned, Ho Express and Fruitland had no separate identities and functioned merely as Ho's incorporated pocketbooks. Ho sold, transferred and "borrowed" corporate assets without regard to their source and without corporate resolutions, loan papers, security, collateral or interest, solely to finance his personal venture. Thus,

the evidence clearly establishes Ho's control and use of the corporations for all relevant purposes.

The corporations' business dealings outside the ambit of the hospital project are not directly implicated in the alter ego analysis. The Secretary was not required to prove that Ho Express and Fruitland lacked any legitimate business purpose or were fraudulent to establish liability. Hollowell v. Orleans Regional Hosp. LLC, 217 F.3d 379, 386 (5th Cir. 2000); United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 692-693 (5th Cir. 1985). Whether the corporations used legitimate means to obtain the funds ultimately diverted to the hospital has little bearing on Ho's control and use of the money. Estate of Lisle, 341 F.3d at 375 (source of payments to corporation largely irrelevant in determining officer-director's alter ego status since alter ego turns on control and use).

In addition, the Commission was simply wrong in stating that, "there is no evidence regarding the management of [the corporations'] business activities or to show Ho's role, if any in directing the day-to-day conduct of those corporate operations." (Com. Dec. at 12). Ho admitted in discovery that he alone had responsibility for "general and active management of the business and day-to-day affairs" of both Ho Express and Fruitland. (C-47 at p. 12). Ho himself declined to testify on Fifth Amendment grounds.

However, Debbie Chan, the corporations' bookkeeper, described in detail Ho's control and use of the corporate accounts for his own benefit. (Tr. 627-632). This testimony is supplemented by extensive documentary evidence that corporate checks were used to pay for the property itself, as well as for the wages of the workers, the rental of equipment and other expenses. Plainly, Ho controlled the corporations in every material sense.

The Commission's reliance upon the corporate ledgers as the basis to conclude that Ho's intercorporate transfers and unilateral withdrawals of corporate funds for personal use amounted to "mere loans" by the corporations is even less persuasive. (Com. Dec. 12-13). The Commission's analysis places form over substance. In fact, Ho simply took money from the corporate accounts when he wanted it; he needed no approval, signed no loan documents, posted no collateral, paid no interest, and repaid, if anything, only a tiny fraction of the amount he "borrowed." (Tr. 628-632). Ho's withdrawals were plainly not loans in the ordinary business sense, and the fact that they were recorded in the corporate ledgers as "accounts receivable" and "credits due from Ho" does not alter the reality of Ho's control and use of the corporate accounts for personal purposes.

The ledgers here are even less probative that documents submitted in Jon-T-Chemicals, where this Court rejected the argument that amounts

advanced by a parent to a subsidiary must be considered loans simply because each transaction was separately recorded on the books as a "loan." 768 F.2d at 695. The Court found that the records did not reflect the true economic relationship between the two corporations, noting that no collateral was posted for the "loans" and no interest was paid. Ibid. The Court stated, "[w]hile we do not denigrate careful recordkeeping of corporate transactions, we do not regard mere records as a philosophers' stone capable of transmuting alter egos into distinct corporations. Records are primarily a memorialization of economic reality, not constitutive of that reality." Ibid. Here, also, the fact that the corporate money Ho used for the hospital project may have been recorded as a loan does not make it one.

In summary, the Commission was required to consider the record as a whole to determine whether Ho's affairs were so intertwined with those of the corporation's that they could not realistically be considered separate entities. To do this, it had to assess credibility and resolve conflicting inferences arising from testimonial and documentary evidence. It was not authorized to ignore critical testimony credited by the ALJ, and Ho's own admissions demonstrating his control over Ho Express and Fruitland and his use of corporate resources for personal purposes. The citations against the corporations should therefore be affirmed.

III. THE GENERAL DUTY CLAUSE VIOLATION WAS WILLFUL

A. Standard of review

The Secretary challenges the legal standard applied by the Commission in determining that Ho's violation of the general duty clause was not willful. The Commission's legal conclusions may be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Mica Corp., 295 F.3d at 447.

B. Direct evidence of Ho's state of mind was not required to show that his violation of the general duty clause was willful because proof of Ho's indifference to legal requirements was clearly established

The OSH Act's general duty clause requires employers to free their workplaces of "recognized hazards that are causing or likely to cause death or serious physical harm." 29 U.S.C. §654(a)(1). The general duty clause citation arose from the explosion, on March 11, of natural gas released when Ho employee Corston Tate attempted to open an unmarked pipe. Ho was cited for willfully violating the Clause by directing Tate to tap into the unmarked pipe to see what it contained.

A willful violation is one that is committed voluntarily, with either intentional disregard of, or plain indifference to, OSHA requirements. Georgia Elec. Co. v. Marshall, 595 F.2d 309, 318 (5th Cir. 1979). At the hearing, Ho stipulated that tapping into an unmarked pipeline on a

demolition site is a recognized hazard. (ALJ Dec. at 18). The ALJ found that the violation was established, but was not willful because the Secretary had not proven that Ho possessed a heightened awareness of the illegality of his conduct or consciously disregarded a known safety hazard. (ALJ Dec. at 19).

On review of the ALJ's decision before the Commission, the Secretary argued that Ho's action in ordering Tate to tap into the unmarked pipeline was part of a consistent course of conduct by Ho in which he sought deliberately to evade legal requirements concerning the safety and health of his employees. (Secretary's Commission Brief at 39). This illegal conduct included Ho's decision to avoid the cost of a licensed asbestos contractor by hiring foreign nationals, who neither spoke English nor understood the hazards of asbestos, to remove the fireproofing, his failure to afford these workers basic safety protections, potable water or bathroom facilities; and his decision to violate the terms of the stop work order by working surreptitiously. (Id. at 37-39).

The Commission rejected this argument on the sole ground that there was no "direct evidence to show Ho's state of mind specifically with respect to his instruction to Tate to open the pipe" and that absent such evidence,

willfulness could not be presumed based on Ho's actions relating to the removal of asbestos. (Com. Dec. 33). This holding was legally erroneous.

The plain indifference element of willfulness does not require direct proof of the employer's state of mind at the time of the violation where objective conditions demonstrate that, had the employer known of the Act's requirement, it would not have complied. AJP Constr., 2004 WL 257037 at *4. Ibid. This principle applies equally to violations of the Act's general duty clause and to violations of specific standards. Central Soya De Puerto Rico v. Secretary of Labor, 658 F.2d 38, 40 (1st Cir. 1981) (plain indifference to general duty clause shown by employer's awareness of heavily corroded condition of tower floor); Ensign-Bickford Co. v. OSHRC, 717 F. 2d 1419 1422-1423 (D.C. Cir. 1983) (plain indifference to general duty clause shown by failure to train and supervise employees working with volatile explosives).

Here, Ho knew that his actions on March 11 in seeking to open a pipeline to wash down the interior of the hospital building were in violation of the stop work order, which expressly prohibited all further work in the building until the proper permits and approvals had been obtained. (C-22; Tr. 63). Clearly, Ho knew that if he were allowed to tap into the pipeline at all, under the order, he would have been required to use a licensed utility

contractor. Thus, Ho manifestly had a "heightened awareness" that ordering Tate to tap into the unmarked pipe was illegal. And while Ho might not consciously have focused on the OSH Act's general duty clause as a source of that illegality, the evidence is overwhelming that had he known, he would not have cared. Ho was simply indifferent to all legal requirements – federal, state and local – pertaining to the work and the working conditions at the hospital site, and his conduct at every turn demonstrated callous disregard for his employees' safety. Accordingly, his violation of the general duty clause was willful.

CONCLUSION

For the foregoing reasons, the order of the Occupational Safety and Health Review Commission should be reversed.

Respectfully submitted.

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