No. 10-2893

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Complainant,

v.

CONOCOPHILLIPS BAYWAY REFINERY,

Respondents.

OPENING BRIEF FOR THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

The Occupational Safety and Health Review Commission had jurisdiction over this enforcement proceeding pursuant to section 10(c) of the OSH Act, 29 U.S.C. § 659(c). The Commission issued a final order on June 15, 2010 that disposed of all of the parties' claims. Joint Appendix (JA), Vol. I, at 3. The Secretary filed a petition for review with this Court on June 25, 2010. JA, Vol. I, at 1. This Court has jurisdiction pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b).

STATEMENT OF THE ISSUE

Whether violations of OSHA's asbestos in construction standard, 29 C.F.R. § 1926.1101, which were established without regard to actual or presumed levels of exposure to asbestos fibers, are properly characterized as "serious" within the meaning of the OSH Act, 29 U.S.C. § 666(k), in the absence of case-specific evidence of exposure to a harmful amount of asbestos. *See* JA, Vol. I, at 4-8, 28-32 (Commission and ALJ decisions addressing parties' arguments whether cited violations were serious).

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

STATEMENT OF THE CASE

The Secretary cited Conoco for nine serious violations of the asbestos in construction standard, 29 C.F.R. § 1926.1100. JA Vol. II, at 246 (Secretary's Citation and Notification of Penalty, dated March 8, 2007). Conoco challenged, *inter alia*, the classification of the violations as serious before the Commission. JA, Vol. II, at 46 (Commission briefing notice). The Commission reduced the violations to other-than-serious because the Secretary failed to adduce case-specific proof that the work performed on the particular material could have generated and exposed Conoco's employees to a harmful amount of asbestos. JA, Vol. I, at 4-8. The Secretary timely petitioned this Court for review of the Commission's decision. JA, Vol. I, at 1. Venue is proper in this Court because the alleged violation occurred in New Jersey. 29 U.S.C. § 660(b).

STATEMENT OF FACTS

1. *Legal Framework*

a. *Statutory Background*

Violations of OSHA standards are characterized as "serious," "other-than-serious," "willful," or "repeated." 29 U.S.C. § 666. A violation is properly characterized as "serious" "if there is a substantial probability that death or serious physical harm could result from" the cited conditions, unless "the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). The "substantial probability" requirement relates to the degree of harm that may result from an accident or disease if it were to occur, and not to the likelihood of the accident or disease occurring in the first place. *See, e.g.*, *Secretary of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007); *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984) ("the court looks to the harm the regulation was intended to prevent, and if that harm is death or serious physical injury, a violation of the regulation is serious *per se*"). "Serious" and "other-than-serious" violations are both subject to civil penalties of up to $7,000, with a penalty being mandatory for "serious" violations. 29 U.S.C. § 666(b), (c).

b. *OSHA's Asbestos in Construction Standard*

"OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,612, 22,615 (June 20, 1986). Exposure to asbestos can result in diseases such as asbestosis, mesothelioma, lung cancer, and gastrointestinal cancer, all of which create a substantial probability of death or serious harm. *See id.* ("The diseases caused by exposure to asbestos are life-threatening or disabling."). Because of these health hazards, OSHA regulates asbestos exposure at 29 C.F.R. §§ 1926.1101 (construction standard) and 1910.1001 (general industry standard), and imposes heightened duties on employers to protect employees from exposure to asbestos.

In the rulemaking, OSHA made several critical factual determinations that shaped the standard's protective scheme. OSHA determined that the risk of asbestos-related disease is significant even at very low levels of lifetime exposure to asbestos.

51 Fed. Reg. 22648, 59 Fed. Reg. 40968. OSHA also determined that exposure levels below 0.1 f/cc could not be reliably measured and that significant risk remained at these levels. 59 Fed. Reg. 40967, 40968-69, 40974-75, 40978, 40982; 55 Fed. Reg. 29722; 51 Fed. Reg. 22648, 22690-91.

In order to comprehensively address asbestos hazards at *all* exposure levels, the construction asbestos standard includes certain protective requirements based on the measurable concentration of airborne asbestos fibers to which employees are or may be exposed, and a second class of generic and operation-specific requirements that apply regardless of the level of exposure, including exposure levels that cannot be measured reliably. Thus, the standard sets a permissible exposure limit (PEL) of 0.1 fiber per cubic centimeter of air expressed as an eight-hour time-weighted average (TWA) and imposes exposure assessment and monitoring requirements to implement the PEL. 29 C.F.R. § 1926.1101(c), (f). Under § 1926.1101(c), each employer who has a workplace or operation covered by the standard must conduct an initial exposure assessment prior to beginning the operation to ascertain expected exposures. If the exposures are expected to exceed the PEL, the employer must comply with specific engineering and work practice controls outlined in § 1926.1101(g)(2) in addition to other generic and operation-specific requirements. As a related measure, the standard requires that before any asbestos work is begun, the building and facility owner must determine the "presence, location and quantity" of materials that contain or are presumed to contain asbestos and notify their own employees as well as other employers of employees at the site. §§ 1926.1101(k)(2)(i), 1926.1101(k)(2)(ii).

The standard also contains a set of protective requirements that do not depend upon any specific level of employee exposure. Section 1926.1101(g)(1) requires certain engineering controls and work practices for all operations covered by the standard, including the use of wet methods to control employee exposures during operations involving asbestos, including cutting. Other protective measures are required based on the type of work activity involved regardless of the levels of exposure. For this purpose, the standard groups work activities into four classes, Class I, II, III and IV. Class I work consists of the removal of asbestos-containing thermal system insulation (TSI) and surfacing material and of presumed asbestos containing material (PACM). PACM is TSI and surfacing material found in buildings constructed no later than 1980. Class II work consists of the removal of all other asbestos containing materials, including the construction mastic at issue in this case. Protective requirements for Class II work include the establishment of a regulated area that is clearly demarked with warning signs (§§ 1926.1101(e)(1),1926.1101(k)(7)(i)); the use of appropriate respirators (§ 1926.1101(h)(3)(iii)(A)); in the absence of a negative exposure assessment, the use of required protective clothing (§ 1926.1101(i)(1)); and training of employees on the work practices and engineering controls related to the type of material being removed (§ 1926.1101(k)(9)(iv)(C)).

2. *The Secretary Cites Conoco for Violations of the Asbestos in Construction Standard.*

Respondent ConocoPhillips Bayway Refinery operates a refinery in Linden, New Jersey. JA, Vol. I, at 3, 11 (Commission Decision (Dec.) at 1); Administrative Law Judge Decision and Order (ALJ D & O) at 2). In September, 2006, Conoco determined that an underground pipeline, which had been installed in the early 1950's, was leaking gasoline and needed partial replacement. JA. Vol. I, at 4, 11 (Dec. at 2; ALJ D & O at 2). The gas line was 14” in diameter and was housed inside a larger 20” protective pipe (“the sleeve”) that was coated with a tar-like substance (“the mastic”). JA, Vol. I, at 4, 11 (Dec. at 2; ALJ D & O at 2).

Conoco did not at first test the mastic to determine whether it contained asbestos. JA, Vol. I, at 1213 (ALJ D & O at 3-4). It also failed to perform an initial exposure assessment before removing a portion of the existing sleeve and cutting into the mastic. JA, Vol. I at 12-13, 24 (ALJ D & O at 3-4, 15). A Conoco mechanic used a hammer and chisel for about 30 minutes to chip an approximately 5” band of mastic from around the circumference of the sleeve. JA, Vol. I, at 4, 12 (Dec. 2; ALJ D & O at 3). A second Conoco mechanic then cut through the sleeve where the mastic had been removed with a torch for about a half hour. JA, Vol. I, at 12 (ALJ D & O at 3). A third Conoco mechanic held the sleeve in a sling while it was torched. *Id.* These activities were performed without using wet methods to control exposures and without establishing a regulated area. JA, Vol. I, at 12-13, 24-25 (ALJ D & O at 3-4, 15-16). The three mechanics stood in the excavation, littered with debris, while the work proceeded and did not use or wear specialized equipment or clothing. JA, Vol. I, at 12 (ALJ D & O at 3). Their supervisors watched the work from above the excavation. *Id.* The cut sleeve and gas line were removed from the excavation and eventually taken to Conoco's scrap yard. *Id.*

Samples taken from the sleeve mastic were found to contain 2-25% asbestos. JA, Vol. I, at 4 (Dec. at 2); *see also* JA, Vol. I, at 23-24 (ALJ D & O at 14-15 (mastic contained 20% asbestos)).

The Secretary cited Conoco for failing to determine the presence, location and quantity of asbestos-containing material (ACM) and notify employees of this information prior to beginning work (§§ 1926.1101(k)(2)(i) and (ii)) and to conduct an initial exposure assessment before cutting into the mastic (§ 1926.1101(f)(2)(i)). JA, Vol. II, at 246-254 (Secretary's Citation and Notification of Penalty, dated March 8, 2007). Conoco was also cited for failing to use wet methods to cut the mastic-coated sleeve (§ 1926.1101(g)(1)(ii)) and to follow requirements applicable to Class II work, including establishing a regulated area, (§ 1926.1101(e)(1),

§ 1926.1101(k)(7)(i)); using required respirators (§ 1926.1101(h)(3)(iii)(A)); using required protective clothing (§ 1926.1101(i)(1); and training employees (§ 1926.1101(k)(9)(iv)(C). *Id.* The Secretary classified the violations as serious and proposed a penalty of $2,500 for each. *Id.*; *see also* JA, Vol. I, at 23-27, 32 (ALJ D & O at 14-18, 23).

3. *Decisions Below*

a. *The ALJ Affirms Nine Serious Violations.*

The ALJ affirmed the violations. JA, Vol. I, at 10-37. She rejected Conoco's main argument, based on alleged uncertainties in the sampling procedures and results that the asbestos standard did not apply. Rather, she found that Conoco's own testing and reports established the presence of 20% asbestos in the sleeve mastic. JA, Vol. I, at 16-21, 23-24 (ALJ D & O at 7-12, 14-15). The ALJ further upheld the classification of the violations as serious. The ALJ observed that the test for a serious violation relates to the degree of harm that may result from an accident or disease and that there is a significant risk of diseases causing death or serious harm from asbestos exposure even at levels below the PEL. JA, Vol. I, at 28-32

(ALJ D & O at 19-23). The ALJ reduced the proposed penalty by 25%, to $1,875 for each violation, largely on the ground that Conoco's mock testing established a low likelihood of injury. JA, Vol. I, at 32-36 (ALJ D & O at 23-27).

b. *The Commission Reclassifies the Violations as Other-Than-Serious.*

The Commission reduced the characterization of the violations to other-than-serious and the penalty from $16,875 to $3,150. JA, Vol. I, at 3-9. It explained that in the asbestos context, the Secretary need not prove actual employee exposure but "must demonstrate that the potential for harmful exposure existed." JA, Vol. I, at 5 (Dec. 3). It then held that the Secretary failed to show how the work performed on the particular material in this case "could have generated, and exposed Conoco employees to, a harmful amount of asbestos." *Id.* It faulted the Secretary's reliance on the asbestos standard itself and its regulatory history to establish the potential for harm. JA, Vol. I, at 6 (Dec. 4). It observed that the rulemaking record, while indicating that the risk of harm extends to exposures below the PEL, did not establish how far below the PEL that risk extends. *Id.* Moreover, the Commission pointed out that the asbestos standard presumes exposures above the PEL only for Class I work, not the Class II work at issue here. *Id.* Thus, according to the Commission, "the standard and regulatory history leave open the possibility that the Class II work performed [here] may not have had the potential to generate and expose Conoco employees to a harmful amount of asbestos." *Id.* Finally, the Commission distinguished the Third Circuit's *Trinity* opinion on the ground that it involved Class I work. JA, Vol. I, at 7 (Dec. 5).

The Commission further reduced the penalty to $350 per violation on the grounds that the Secretary failed to adduce case-specific evidence that the workers could have been exposed harmful amounts of asbestos and that only eight workers (not 12 as found by the ALJ) were exposed to the hazard. JA, Vol. I, at 9 (Dec. 7).

SUMMARY OF ARGUMENT

The Court should reinstate the ALJ's determination that Conoco's violations of the asbestos standard were "serious." The Commission decision to require case-specific proof in order to establish a serious violation of the asbestos standard conflicts with

Secretary of Labor v. Trinity Indus., Inc., 504 F.3d 397 (3d Cir. 2007), which held that violations of the requirements to determine and communicate the presence, location and quantity of ACM or PACM (§§ 1926.1101 (k)(2)(i)), (ii)) are properly classified as serious without regard to proof of any actual asbestos exposure. In addition, the requirement for case-by-case proof conflicts with factual findings in the rulemaking record that exposure to asbestos at levels that cannot be reliably measured pose a significant risk of asbestos-related disease, including asbestosis, mesothelioma, lung cancer, and gastrointestinal cancer. Finally, the Commission decision imposes an impossible evidentiary burden for the Secretary and is contrary to the well-understood meaning of the "substantial probability" requirement of 29 U.S.C. § 666(k).

ARGUMENT

1. *The Standard of Review is Plenary.*

This Court's review of Commission decisions is governed by the Administrative Procedure Act's scope of review provision, 5 U.S.C. § 706. *See Secretary of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 400 (3d Cir. 2007); *Bianchi Trison, Inc. v. Chao*, 409 F.3d 196, 204 (3rd Cir. 2005). Under that provision, the Court must set aside an agency's legal conclusions if they are “not in accordance with law,” 5 U.S.C. § 706(a)(2); and the Court applies a plenary standard in determining whether an agency conclusion is “in accordance with law.” *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997). The issue here – whether the Commission applied the correct legal test in determining whether ConocoPhillips’ violations were “serious” within the meaning of 29 U.S.C. § 666(k) – is a purely legal one, so this Court’s review is plenary. *See Trinity*, 504 F.3d at 401 (engaging in plenary review of ALJ reclassification of asbestos violations as non-serious); *Broome v. U. S. Dep’t of Labor*, 870 F.2d 95, 99 (3rd Cir. 1989) (whether agency adjudicator applied correct legal standard is “an issue of law receiving plenary review”); *see also Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131 (6th Cir. 1978) (reviewing *de novo* whether Commission applied correct legal test to determine whether OSHA violation was “serious”).

2. *The Trinity Decision Is Controlling for the Identification, Assessment, and Communication Violations.*

Because the violations occurred at the ConocoPhillips refinery in New Jersey, Third Circuit precedent governs. *Jones & Laughlin Steel Co. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980).

In *Secretary of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007), this Court held that held that a building or facility owner's violations of the requirements to determine the presence, location and quantity of ACM or PACM (§ 1926.1101 (k)(2)(i)) and notify its employees and other employers of this information (§ 1926.1101(k)(2)(ii)) are properly classified as serious without regard to proof of any actual asbestos exposure. The Court reasoned that the failure to test for asbestos and notify employees of the results "made it possible that workers could unwittingly stumble into large amounts of asbestos without adequate protection." *Trinity*, 504 F.3d at 401. It was this possibility, the Court emphasized, and not the subsequent exposure to employees that formed the basis of the violations. *Id.* "Given the 'detrimental health effects' that can result from exposure, 51 Fed. Reg. 22,612, 22,615 (June 20, 1986), the failure to test for asbestos in those situations in which it is presumed to be present (and, given the failure to test, the concomitant failure to communicate the results of any tests) is unquestionably a 'serious' violation." *Id.* The identical testing and notification violations at issue in *Trinity* are involved in Items 6(a) and (b) of the Conoco citation, and these violations are squarely controlled by the *Trinity* holding.

Trinity's holding also logically applies to Conoco's violation of § 1926.1101(f)(2)(i) for failing to perform an initial exposure assessment before cutting into the mastic-coated sleeve. The purpose of the initial assessment is "to predict whether exposure levels during the planned asbestos work can be expected to exceed the PELs, and thus whether additional monitoring and other precautions are required." 59 Fed. Reg. 40983. Conoco's failure to perform the assessment before cutting into mastic material containing 20% asbestos meant that Conoco's employees could have been exposed to quantities of airborne asbestos exceeding the PEL without necessary protection. *Trinity*, 504 F.3d at 401. The violation was therefore "unquestionably serious" without regard to whether employees suffered any actual exposure. *Id.*

The Commission attempted to distinguish *Trinity* on the ground that the workers there were engaged in Class I asbestos work, whereas Conoco performed Class II work. The Commission noted that the standard's initial exposure assessment requirement provides that for Class I work, the employer must presume that exposures exceed the PEL until it demonstrates otherwise. 29 C.F.R. § 1926.1101(f)(2)(ii), Dec. 5. Because this presumption applied to Trinity's Class I work but not to Conoco's Class II work, the Commission concluded that *Trinity* was not controlling. JA, Vol. I, at 7 (Dec. 5).

The Commission's analysis is plainly wrong because *Trinity* did not turn on a presumption of actual exposure. Sections 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii), the standards at issue in *Trinity* and in this case, require that before work subject to the standard is begun, the facility owner must determine the presence, location, and quantity of <u>any</u> asbestos-containing material or presumed asbestos-containing material at the work site and notify its employees and other employers at the site. Their purpose is to ensure that asbestos-containing materials are located in advance, so that appropriate asbestos abatement measures can be implemented before workers inadvertently disturb the materials, thereby releasing airborne asbestos fibers. The *Trinity* court emphasized that it is the possibility that the failure to determine the location and quantity of asbestos-containing materials before beginning work could lead to the release of a significant amount of airborne asbestos, not the actual release of asbestos, that renders the violation serious. *Trinity*, 504 F3d. at 401.[1] This possibility exists for all types of asbestos-containing materials regardless of the classification of the work activity. Therefore, under *Trinity*, any

[1] *See also Dec-Tam Corp.*, 15 BNA OSHC 2072, 2083 n.14 (No. 88-523, 1993) (upholding violation as "serious," despite the fact that the employees wore respirators that protected them from overexposure, and stating proper inquiry was whether "Dec-Tam's failure to conduct full-shift monitoring could lead to death or serious physical harm," and not, as Dec-Tam had argued, "whether the employees' exposure to excessive amounts of asbestos could lead to death or serious physical harm").

violation of sections 1926.1101(k)(2)(i) and 1926.1101(k)(2)(ii) (or section 1926(f)(1)) is necessarily serious.[2]

3. *Violations of Class II Work Requirements Are "Serious" Even if There is No Case-Specific Proof Regarding Exposure.*

The remaining citation items involve requirements for work practices and engineering controls applicable to Class II asbestos work without regard to whether exposures exceeded the PEL. The Commission found that the Secretary failed to prove that these violations could have exposed employees to harmful quantities of asbestos because there was no evidence of the actual exposure level and the standard does not create a presumption that Class II work activities generate exposures above the PEL. The Commission's analysis conflicts with the standard's findings on the risk posed by

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[2] *Trinity* involved PACM (presumed asbestos-containing material), which may actually contain less than 1% asbestos or no asbestos at all. *See* 29 C.F.R. § 1926.1101(k)(5). The mastic on the Conoco pipe was ACM, which is material that contains at least 1% asbestos. 29 C.F.R. § 1926.1101(b) (definition of asbestos-containing material). The material in *Trinity* actually contained 5% asbestos, whereas the Conoco mastic contained 20% asbestos. *Compare* 504 F.3d at 399 with JA, Vol. I, at 4, 23-24 (Dec. 2 (2-25% asbestos in mastic); ALJ D & O at 14-15 (mastic contained 20% asbestos)).

asbestos at levels below the PEL and creates an impossible evidentiary burden for the Secretary.

In the rulemaking, OSHA expressly found that the risk of asbestos-related disease is significant even at very low levels of lifetime exposure to asbestos. 51 Fed. Reg. 22648, 59 Fed. Reg. 40968. OSHA concluded that quantitative studies supported the hypothesis that there is no threshold for asbestosis, *i.e.* an exposure level that poses no increased risk of the disease, and that the risk increases linearly with cumulative exposure to asbestos dust. 51 Fed. Reg. 22645. Asbestosis is a progressive, irreversible lung disease that can cause disabling health effects and death.[3]

The PEL represents the lowest exposure level that can be reliably measured. 59 Fed. Reg. 40967, 40968-69, 40974-75, 40982; 55 Fed. Reg. 29722; 51 Fed. Reg. 22690-91. Thus, the significant health risk associated with lower asbestos exposures,

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[3] OSHA also found a linear dose response to predict the risk of developing lung cancer from asbestos exposure, 51 Fed. Reg. 22633, although excess mortality rates were not strictly linear, but only a "close approximation," because of "competing risks," among other reasons. 51 Fed. Reg. 22644. A linear dose response to exposure to toxic substances is typically the case, as is the presence of residual significant risk below the PEL. *E.g.*, *Public Citizen v. Dep't of Labor*, 557 F.3d 165, 170 (3d Cir. 2009).

i.e., those below the PEL, cannot be correlated with specific exposure measurements. 59 Fed. Reg. 40978 ("reducing exposure to 0.1 f/cc would … reduce but not eliminate significant risk," and "continued exposure to asbestos at the TWA permitted level would still present residual risks to employees which are significant"); 59 Fed. Reg. 40982 (establishing regulated areas for Class I, II, and III work regardless of exposure levels, explaining that "[s]ince OSHA has determined that a still significant risk remains below the PELs, intended protection [by establishing regulated areas] should not be limited to protecting down to these levels."); 51 Fed. Reg. 22648. OSHA found, however, that the degree of risk associated with asbestos at lower levels is directly associated with the type of work operation being conducted, and it divided these operations into four categories. Category I operations present the greatest risk with decreasing risk potential associated with each successive class. 59 Fed. Reg. 40976. However *all* asbestos operations covered by the standard carry a significant risk of harmful exposure if the requirements applicable to the specific operation are not followed. As the preamble explains, "[t]he operations for which mandatory work practices are required *would otherwise result in employee exposure that is significant.*" 59 Fed. Reg. 40969; 59 Fed. Reg. 40978 (explaining OSHA's two-prong approach to risk reduction by utilizing the 0.1 f/cc PEL along with mandatory operation-specific work practices and describing the PEL as a "backstop" for operations requiring particular controls). OSHA further stated:

> there would be remaining significant risk at this new 0.1 f/cc exposure limit *if there were not other provisions to these standards.* However, the exposure limit is accompanied by mandated work practice controls and requirement for hazard communication, training and other provisions. *Together these will very substantially reduce the remaining significant risk, although the exact amount of that reduction cannot be quantified*...[I]mposing work practice and ancillary provisions for operations *regardless of measured fiber levels will result in risk reduction well below that expected from just enforcing the 0.1 f/cc PEL.*

59 Fed. Reg. 40981; *see also* 55 Fed. Reg. 29723 (explaining in proposed rule the imposition of work practices, rather than PELs, for limiting exposure).

The Commission's analysis directly conflicts with the standard. By requiring the Secretary to prove how "the work performed on the particular material involved in this case . . . could have generated a harmful amount of asbestos," JA, Vol. I, at 5 (Dec.

3), the Commission apparently assumed that exposure to some amount of asbestos may not be harmful.[4] This assumption is contrary to the standard's linear, no-threshold model of risk and with the standard's express finding that the failure to comply with protective requirements for each class of operations, including removal of the construction mastic involved here, results in "significant" asbestos exposure. 59 Fed. Reg. 40969.

The Commission stated that it would not presume that Class II operations always have the potential to expose employees to harmful amounts of asbestos because Class II work involves a wide range of asbestos-containing materials. JA, Vol. I, at 6 (Dec. 4, n. 2). By contrast, the Commission noted that Class I work involves only surfacing materials and thermal system insulation, for which the standard requires "rigorous control methods." JA, Vol. I, at 6 (Dec. 4, n. 1). However, Class II work is limited to materials that contain more than 1% asbestos, and the mastic in this case actually contained 20% asbestos. Class II work is also limited to

[4] The Commission noted that although asbestos is hazardous at levels below the PEL, the rulemaking did not establish how far below the PEL the health risks extend.

“removal” of asbestos-containing materials and does not include disturbance or incidental contact with existing materials or installation of new asbestos-containing materials. Although Class I work is relatively more dangerous than the other classes, the differences between the classes are not major. 59 Fed. Reg. 40990 (noting that “the differences in controls required among classes is not great [and] the risk overlap between adjoining classes is neither frequent nor large.”). Even Class IV, the *least* dangerous of the listed categories of work, is presumed to produce significant asbestos dust exposures and therefore necessitates work practices to reduce significant risk to workers. 59 Fed. Reg. 40976. The Commission gave no reasoned basis for rejecting the standard’s presumption that the Class II work at issue produced significant asbestos exposures.[5]

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[5] The Commission also noted that “unlike Class I work, which is presumed under the standard to result in employee exposure above the PELs, Class II work is not presumed to generate any particular level of asbestos.” JA, Vol. I, at 6 (Dec. 4). The standard presumes that Class II work generates “significant” employee exposure to asbestos. Concentrations of asbestos below the 0.1 f/cc PEL are harmful, but cannot be reliably measured. At these lower levels, the risk is correlated with the classification of the work operation rather than the measurement of a particular concentration of cont’d.

4. *The Commission Holding Would Require the Use of Unreliable Evidence and Conflicts with the Well-Established Understanding of the "Substantial Probability" Requirement of 29 U.S.C. § 666(k).*

Besides being inconsistent with the standard, the Commission's holding imposes an impossible evidentiary burden on the Secretary. The additional case-specific evidence the Commission requires is presumably evidence of the actual amount of asbestos to which employees were exposed. However, the standard establishes that exposure measurements below the PEL are unreliable, and therefore effectively forecloses the Secretary from developing evidence of seriousness in any case, such as this one, which does not involve proof of exposures above the PEL. Nor can the Secretary be expected to produce evidence of actual harm, given the long latency period of asbestos-related diseases. 51 Fed. Reg. 22616.

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cont'd.

asbestos. Thus, the standard's four-tiered classification scheme substitutes for measurement-based PELs for exposures below 0.1 f/cc. The failure to implement the requirements applicable to Class II work is presumptively serious to the same extent that a violation of the PEL would be. 59 Fed Reg. 40968-69.

The Commission standard also conflicts with the well-established case law interpreting the "substantial probability" requirement for a serious violation, 29 U.S.C. § 666(k). The term refers not to the probability that an accident will occur but to the probability that an accident having occurred, death or serious injury could result. *See*, *e.g.*, *Trinity*, 504 F.3d at 401. In the context of asbestos work practice violations, the proper analog to "an accident having occurred" is employee exposure to asbestos. Thus by requiring case-specific proof of exposure, JA, Vol. I, at 5 (Dec. 3), the Commission conflates the probability of the event occurring with the harm following its occurrence.[6]

To the extent the Commission test can be read as assuming an exposure occurred but mandating additional proof that the exposure was harmful, it is contrary to the asbestos rulemaking record, which establishes no safe threshold for asbestos exposure, as discussed above. Moreover, the *Trinity* court specifically rejected a similar ALJ-imposed requirement. *Trinity*, 504 F.3d at 401

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[6] Conoco's argument that no exposure occurred, based on it post-violation mock testing, likewise conflates these two distinct inquiries.

(rejecting ALJ's ruling that Secretary establish "significant exposure to asbestos"). Finally, to assume some exposure, but not a significant exposure, is fundamentally artificial, hypothetical, and contrary to the level or type of proof typically needed to establish a serious violation. *E.g.*, *Walmart Stores, Inc. v. Sec. of Labor*, 406 F.3d 731, 736 (D.C. Cir. 2005) ("the ALJ was free to consider any plausible circumstance that might 'eventuate in serious physical harm'"); *Illinois Power Co. v. OSHRC*, 632 F.2d 25, 29 (7th Cir. 1980) (common sense informs that employee who completes electrical circuit may be electrocuted); *Shaw Const. Inc. v. OSHRC*, 534 F.2d 1183, 1185 (5th Cir. 1976) (vibrations from nearby traffic and equipment could cause debris to fall into trench and injure workers).

In sum, the Commission was wrong to focus on the actual amount of asbestos exposure. Conoco created a circumstance in which its employees could have been exposed to a significant amount of asbestos without adequate protection Even if no employee actually contracts an asbestos-related disease (which, given their long latency, likely would not be known for years or even decades), that fortuity would not be the result of anything that Conoco did. The OSH Act is not a "no-harm, no-foul" statute: a violation is serious if death or serious injury *could* occur. *Trinity*, 504 F.3d at 401. Conoco's failure to comply with its obligations under the asbestos standard was "serious" within the meaning of 29 U.S.C. § 666(k), and the Commission's determination to classify the violations as other-than-serious should therefore be reversed.[7]

[7] Actual exposure levels and probability of contracting an asbestos-related disease are factors which the Commission may take into account in assessing the appropriate penalty. *See* 29 U.S.C. § 666(j); *Wal-Mart Stores*, 406 F.3d at 736 (agreeing with Secretary that actual store conditions relate to gravity of violation and appropriate fine); *Conie Constr., Inc. v. Reich*, 73 F.3d 382, 385 (D.C. Cir. 1995) (gravity factor in penalty assessment maybe based on both the severity of possible injury and probability of accident); *see also Baltz Bros. Packing*, 1 BNA OSHC 1118, 1119 (No. 91, 1973). The ALJ reduced the proposed penalties by 25% based on low exposure levels and low likelihood of injury. JA, Vol. I, at 35 (Dec. 26).

CONCLUSION

The Court should reverse the Commission's classification of the violations as other-than-serious and remand for reconsideration of the appropriate penalty.[8]

Respectfully submitted.

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[8] The Commission drastically reduced the proposed penalty from $2,500 per violation to $350 per violation, an 86% decrease. (The ALJ had assessed a penalty of $1,875 per violation. JA, Vol. I, at 36). The Commission did so in part because the Secretary did not provide case-specific proof of harmful exposure. JA, Vol. I, at 9 (Dec. 7). Because this reason is invalid, remand is needed for reassessment.

COMBINED CERTIFICATION OF COUNSEL

Undersigned counsel for the Secretary of Labor hereby certifies that:

1. The foregoing opening brief of Petitioner complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,023 words, excluding the parts of the brief exempted by Fed. R. app. P. 32(a)(7)(B)(iii). In addition, the brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Bookman Old Style 14-point font.

2. The foregoing opening brief for petitioner complies with electronic filing requirements of LAR 31.1 because the text of the electronic copy is identical to the text of the paper copies and a virus detection program (McAfee Enterprise Virus Scan, Version 8.0, updated October 4, 2010) has been run on the file containing the electronic brief and no virus was detected.

3. On October 4, 2010, a copy of the foregoing opening brief of petitioner was served electronically through the CM/ECF system of

the United States Court of Appeals for the Third Circuit on Dennis J. Morikawa and Justin O. Reliford, counsel for Respondent ConocoPhillips Bayway Refinery. Ten paper copies of the brief were also served on this date by overnight mail on the Clerk of the Court for the Third Circuit.

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