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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA, DEPARTMENT OF)
 LABOR, DIVISION OF LABOR STANDARDS)
 AND SAFETY, OCCUPATIONAL SAFETY AND)
 HEALTH SECTION,)
)
 Complainant,)
)
 v.)
)
 KETCHIKAN PULP COMPANY,)
)
 Contestant.)

Docket No. 94-1017

DECISION AND ORDER

This matter arises from an occupational safety and health citation issued by the State of Alaska, Department of Labor (Department) to Ketchikan Pulp Company (KPC) in connection with work done during a maintenance shutdown in September 1993 at KPC's pulp mill near Ketchikan, Alaska.

The Department's citation, as amended, alleges two separate violations of Alaska occupational safety and health standards. Citation 1, Item 1 alleges that KPC violated Construction Code 05.045(e) by failing to inform one of its contractors of the presence of asbestos and the need for a regulated area during work on Power Boiler No. 1 and Recovery Boiler No. 3. Citation 1, Item 2 alleges that KPC violated Construction Code 05.045(f)(1) by failing to establish a regulated area for the work on Power Boiler No. 1 and Recovery Boiler No. 3 where airborne concentrations of asbestos could reasonably be expected to exceed permissible exposure limits. Each alleged violation was classified as "willful" and included a penalty of \$24,500, for a total penalty of \$49,000.

KPC contested both alleged violations. A hearing was held before the OSHA Review Board (Board) in Ketchikan on August 22-25, 1994. The Department was represented by Assistant Attorney General Robert A. Royce. KPC was represented by Attorney Lewis K. Scott of Lane Powell Spears Lubersky. Each party presented witness testimony and documentary evidence. Following the hearing the parties submitted post-hearing briefs. Upon review and consideration of the evidence and arguments presented by the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

Background

1. Ketchikan Pulp Company operates a pulp mill at Ward Cove near Ketchikan, Alaska. The mill employs approximately 500-600 people and operates continuously 24 hours a day, 365 days a year, except for scheduled maintenance shutdowns that usually occur twice a year and last about one to two weeks. (Tr. 458-60.)

2. The pulp mill was constructed in 1953-54 and contains large quantities of asbestos-containing materials, especially in areas involving extreme heat such as the powerhouse where the mill's seven boilers are located. (Tr. 460; KPC Exh. 6.)

3. Asbestos is a known carcinogen that poses a significant health risk when fibers become airborne and are capable of being ingested into the lungs. Removal or handling of asbestos-containing materials without some type of containment (such as a negative-air enclosure) is likely to release asbestos fibers above permissible exposure limits (PELs). However, as long as asbestos is kept sealed or encapsulated so that fibers cannot become airborne, it is not hazardous. (Tr. 204-221; 461-62.)

4. The Department has cited KPC for asbestos violations at the mill several times during the past 10 years. (Tr. 304-05; Dept. Exh. 4.) Some of the citations were settled while others proceeded to a hearing and decision by the Board. On at least one previous occasion the Board has affirmed the Department's citation of a "willful" asbestos violation against KPC. (Dept. Exh. 5.)

5. In a settlement agreement approved by the Board in January 1988 concerning a previous asbestos citation, KPC was required to label all asbestos-containing materials and either encapsulate or remove all friable (i.e., capable of being easily crumbled) asbestos at the mill within four years. (Tr. 311-14; KPC Exh. 9.) Pursuant to the settlement agreement, KPC conducted a comprehensive survey of asbestos at the mill and labeled all suspected asbestos-containing materials with warning stickers. (Tr. 506-08; KPC Exh. 7-8) Unfortunately, due to heat, moisture, dirt and the surface of the materials, some of the labels fell off and had to be reglued or replaced. (Tr. 167, 511-12.)

6. To handle the extensive asbestos abatement work at the mill, KPC maintains a trained and certified asbestos crew under the supervision of an asbestos coordinator. All asbestos abatement at the mill is supposed to be handled by KPC's certified asbestos crew or, for a major abatement project, by a contractor having certified asbestos abatement workers. (Tr. 167, 827.)

7. During scheduled maintenance shutdowns, a substantial amount of maintenance and repair work is performed by outside contractors hired by KPC. To minimize lost production time during shutdowns, maintenance work is performed continuously throughout the day and night. The work environment during shutdown periods has been described as "madness". (Tr. 165, 617.)

8. Because of the widespread presence of asbestos at the mill, KPC adopted an asbestos safety policy that applies to all employees and contractors. The policy prohibits the removal or handling of any suspected asbestos-containing materials without the approval of KPC's asbestos coordinator or until the material has been positively identified as non-asbestos. Only employees who have been certified in asbestos abatement by the State of Alaska are permitted to remove or handle any asbestos-containing materials. Contractors are instructed that if the fiber content of suspected asbestos-containing materials is unknown, the material should be treated as though it were asbestos. (Tr. 464, 643; KPC Exh. 4.)

9. In recent years one of the contractors performing substantial maintenance and repair work for KPC during shutdowns has been General Electric Company and its subsidiaries (collectively referred to as "GE"). During shutdowns GE has as many as 200-250 employees at the mill and maintains its own office, lunchroom and administrative staff. (Tr. 463, 1016-18.)

10. During shutdowns it is foreseeable that contractors such as GE will come into contact with asbestos-containing materials while performing maintenance or repair work. (Tr. 1043.) However, it is not common practice for KPC's asbestos crew to inspect work areas for asbestos prior to a contractor's commencement of work. (Tr. 616.) Nor does KPC inform contractors of the existence or non-existence of asbestos before the contractor commences work in areas that may contain asbestos. Rather, KPC relies on its policy requiring contractors to notify KPC's asbestos coordinator of any suspected asbestos-containing materials. (Tr. 608.)

11. KPC's asbestos policy is included in all contracts with contractors whose work at the mill may bring them into contact with asbestos-containing materials. (KPC Exh. 4.) GE was familiar with KPC's asbestos policy and had adopted its own similar "Asbestos Procedure" which was communicated to its employees. (KPC Exh. 5.)

12. Over the course of several years of performing maintenance and repair work at the mill, GE had consistently complied with KPC's asbestos policy by notifying KPC asbestos personnel of any suspected asbestos materials prior to commencing work. (Tr. 482-83, 899, 1012.) Many of the inquiries regarding suspected asbestos were made by Richard Boring, a foreman for GE's subsidiary Qualified Contractors, Inc. Boring would usually contact KPC asbestos coordinator Dave Martin regarding suspected asbestos. (Tr. 486-87.)

13. The citation in this case is based on events occurring during a scheduled maintenance shutdown at the mill in September 1993. Specifically, the citation involves work performed by GE on Power Boiler No. 1 and Recovery Boiler No. 3 in the powerhouse.

Power Boiler No. 1

14. KPC contracted with GE to install sonic horn casings on the north and south sides of Power Boiler No. 1 during the September 1993 maintenance shutdown. (Tr. 1006; KPC Exh. 4.) The purpose of the sonic horns is to keep the boiler tubes from plugging up by using sound waves to prevent a build-up of fly ash within the boiler. (Tr. 754.) The contract did not require GE to perform any asbestos abatement or removal but instead included KPC's standard asbestos policy requiring contractors to notify KPC's asbestos staff of any suspected asbestos. (Tr. 718; KPC Exh. 4.)

15. On the morning of September 21, 1993, prior to beginning work on the sonic horns, GE foreman Boring went to the office of KPC powerhouse supervisor Ray Hendricks and KPC powerhouse superintendent Pete Raitanen to discuss the sonic horn work. Boring testified that he asked Hendricks and Raitanen if there was any asbestos in the area of the sonic horns and that they replied that the area had been "cleared" of asbestos several years earlier. According to Boring, Hendricks and Raitanen then accompanied him to look at the north and south sides of Power Boiler No. 1 and showed him where the sonic horns were to be installed. (Tr. 11-14, 26, 36-38; KPC Exh. 28-29.)

16. Hendricks acknowledged that Boring came to his office to discuss the sonic horn installation. Hendricks testified that when Boring asked about asbestos, he replied that he thought there was none on the south side but did not know about the north side. (Tr. 736-38, 749-50.) Hendricks acknowledged accompanying Boring to the south side of the boiler to show him where the sonic horns were to be installed but denied climbing up to inspect the north side of the boiler. (Tr. 740-43.)

17. Raitanen denied telling (or hearing Hendricks tell) Boring that there was no asbestos on the north side of Power Boiler No. 1. (Tr. 782-83.) Raitanen also denied that he accompanied Boring to inspect the north side of Power Boiler No. 1 prior to GE's sonic horn work. (Tr. 787-88.)

18. The area on the north side of Power Boiler No. 1 where the sonic horns were to be installed is hot, dark, dirty, and not easily accessible. The north side of the boiler was covered with black lagging insulation consisting of a black tar-like substance on top of chicken wire and blocks of asbestos insulation. This was typical of much of the insulation on the boilers in the powerhouse. (Tr. 512-20, 530-32; KPC Exh. 13-15.)

19. In contrast to the north side, the south side of Power Boiler No. 1 was covered with corrugated metal and a layer of brown fiberglass or mineral wool (non-asbestos) insulation underneath. There was no black lagging on the south side. (Tr. 534-36; KPC Exh. 16-17.)

20. Prior to the commencement of the sonic horn work by GE at Power Boiler No. 1, neither Boring, Hendricks or Raitanen contacted KPC asbestos personnel about the presence of asbestos in the areas where the sonic horns were to be installed. (Tr. 489-90, 614-15.) Nor is there any evidence that KPC reviewed its asbestos survey records prior to authorizing GE to perform the sonic horn work. (Tr. 600-05, 686-87.)

21. According to KPC asbestos coordinator Martin, asbestos warning labels were placed on the north side of Power Boiler No. 1 in 1988, and were rechecked and reglued during subsequent shutdowns in May 1992 and April 1993. However, because of the extreme heat while the boilers were operating, it is likely that the labels curled up and fell off. (Tr. 508-12, 688-89.)

22. During the day shift on September 21, a crew of GE employees under Boring's supervision removed part of the corrugated metal and mineral wool insulation on the south side of Power Boiler No. 1 and installed the sonic horn casings. The sonic horn work on the north side of the boiler was assigned to GE's night shift crew. GE's night foreman Melvin Melton asked Boring about the presence of asbestos; Boring told him "there was none on the south side and that most likely there wasn't any on the north side." Boring accompanied Melton to the north side to show him where the horns were to be installed. According to Boring, they did not see anything that looked like asbestos or any asbestos warning labels. (Tr. 14-17; KPC Exh. 28.)

23. On the night of September 21, GE's night crew removed asbestos insulation from the north side of Power Boiler No. 1 and installed the sonic horn casings. The work was done by GE employees who were not certified in asbestos abatement. The KPC asbestos crew was not involved, and no regulated area was established for the asbestos removal. (Tr. 17, 32-33, 163, 548-51, 717-18.)

24. Prior to the September 1993 shutdown, KPC had maintained a night asbestos crew. (Tr. 166, 846.) To cut costs, however, KPC decided not to staff a night asbestos crew during the September 1993 shutdown. (Tr. 611-12, 676-77, 846-53.) KPC's asbestos coordinator and staff had no advance notice of GE's work on the sonic horns and there was no designated asbestos supervisor at the mill on the night of September 21. (Tr. 607, 611-613, 676.)

25. On September 23, GE foreman Boring and KPC powerhouse superintendent Raitanen did a "final inspection" of GE's sonic horn work on Power Boiler No. 1. Both Boring and Raitanen signed off on the inspection although Raitanen admitted that he did not personally inspect the north side of the boiler based on Boring's assurance that the work had been completed. (Tr. 19-20, 789-93; Dept. Exh. 1.)

26. On September 25, while performing asbestos removal on another part of Power Boiler No. 1, KPC asbestos crew member Phil Benning discovered three large plastic bags containing what appeared to be asbestos insulation near the north side of the boiler where GE had installed the sonic horns. Benning was alarmed because he recognized the bags as those used by GE, he knew the material had not been removed by the KPC asbestos crew, and he suspected that GE had removed the insulation improperly. (Tr. 162-63, 176-77.)

27. Benning immediately notified Steve Eilertson, KPC's acting asbestos coordinator while Dave Martin was on leave. Eilertson visually inspected the bags and agreed that the insulation appeared to be asbestos. (Tr. 163-64, 177.) Eilertson then notified KPC hazardous materials supervisor Jim Eakes who directed that the area be cleaned up and that the bags be disposed of properly. However, Eakes decided it was not necessary to establish a regulated area for the cleanup since the apparently improper asbestos removal had occurred several days earlier and he believed there was no longer any risk of asbestos exposure. (Tr. 917-19.)

28. After speaking to Eakes, Eilertson directed Benning to clean up the bags and the area. Benning sprayed the contents of each bag with an encapsulant, double-bagged the material in asbestos disposal bags, and removed the bags from the immediate area. The bags were subsequently taken to the landfill in accordance with KPC's asbestos disposal procedures. Benning also sprayed encapsulant on the remaining insulation around the north side sonic horns and vacuumed loose materials in the immediate area. (Tr. 177-81.)

29. On the following day, September 26, members of KPC's pipefitting crew learned of the suspected improper removal of asbestos insulation during GE's sonic horn work on the north side of Power Boiler No. 1. The pipefitters were concerned about their potential exposure to asbestos because they were working very near the sonic horn area and had seen a lot of dust in the air. (Tr. 94-97, 106, 111-13.) Pipefitter Russ Davis, president of the pipefitters union local, expressed his concern to KPC shift superintendent Steve Meredith who directed that the pipefitters stay away from the affected area until the matter could be investigated. (Tr. 115, 860.) Two bulk samples from the remaining

insulation around the sonic horns on the north side of Power Boiler No. 1 were then tested by Eilertson who confirmed that they contained asbestos. (Tr. 101.)

30. A short time later on September 26, KPC hazardous materials supervisor Eakes met with a group of about 30 pipefitters to discuss the situation. (Tr. 104.) Eakes stated his belief that there was no longer any asbestos risk because GE's improper asbestos removal had occurred several days earlier and it was highly probable that any airborne asbestos fibers had been quickly dispersed; he said he would "bet his last paycheck" that air samples would show the air was clear of asbestos. (Tr. 924-25.) Despite Eakes' reassurances, the pipefitters' concerns were not allayed. After further discussion, KPC released the employees to go home or work in other areas for the rest of the day. (Tr. 896-97, 925-27.)

31. During the afternoon of September 26, KPC took three bulk air samples from areas near the north side sonic horn installation. Results obtained about two weeks later revealed that all three samples were below the applicable detection limits for asbestos. (Tr. 569-72; KPC Exh. 2.)

32. On September 27, KPC pipefitters resumed their work near the north side sonic horns at Power Boiler No. 1. Personal air monitors were placed on two employees. One of the personal air samples proved to be too dirty to obtain a valid test result; the other sample indicted airborne asbestos fibers above the applicable detection limit but below permissible exposure limits. (KPC Exh. 2.)

33. When KPC pipefitters complained to acting asbestos coordinator Eilertson on September 27 about the inadequacy of the asbestos cleanup efforts around

Power Boiler No. 1, Eilertson tried to downplay any asbestos risk and said "you guys are all expendable anyway." (Tr. 109-11, 140-41.)

34. KPC subsequently decided to remove the remainder of the asbestos insulation near the sonic horns on the north side of Power Boiler No. 1. To accomplish this, KPC's asbestos crew began to build a negative-air enclosure around the area. Before the enclosure could be completed, however, asbestos coordinator Martin returned from leave on September 29 and determined there was not enough time to finish the enclosure and remove the remaining asbestos before Power Boiler No. 1 was scheduled to resume operation. Therefore Martin directed the asbestos crew to dismantle the partially completed enclosure and instead encapsulate the remaining insulation and cover it with corrugated metal. (Tr. 183-85, 552-55, 933-35; KPC Exh. 21-23.)

Recovery Boiler No. 3

35. During the September 1993 shutdown KPC also contracted with GE to perform repair work on Recovery Boiler No. 3. (Tr. 71-72, 1006.)

36. Before beginning the work, GE superintendent Tim Baker noticed that the insulation around the work area had been sprayed with an encapsulant, suggesting the presence of asbestos. There were no asbestos labels on the material. Baker contacted asbestos coordinator Martin who had a sample of the material tested. The result indicated the sample did not contain asbestos. Baker then directed the GE night crew to proceed with the repair work which was performed during the night of September 20. (Tr. 73-77, 557-60.)

37. The next day, September 21, while the GE day shift crew continued the work on Recovery Boiler No. 3, Baker noticed another piece of insulation he suspected

might contain asbestos. He again contacted Martin who had the material tested. This time the sample turned out to contain asbestos. (Tr. 77-78, 560-61.) GE employees were directed to leave the area around Recovery Boiler No. 3 while the KPC asbestos crew built a negative-air enclosure and removed the asbestos on September 22-23. (Tr. 186, 562-63.) On September 24 GE employees returned to Recovery Boiler No. 3 to complete their work. (Tr. 79.)

38. On September 27, a large pile of debris was discovered immediately outside the powerhouse about 100'-200' from Recovery Boiler No. 3. The pile contained fire bricks, blocks of insulation, corrugated metal, black lagging, and other assorted debris. Because it had been raining, the debris pile was wet and muddy. Samples of insulation from the debris pile were tested and were found to contain asbestos. (Tr. 80-82, 88-90, 190-91.)

39. It is unknown where the materials in the debris pile came from, who placed them there or when the pile was created. One of KPC's asbestos staff assumed that the debris came from GE's work on Recovery Boiler No. 3 since GE had been working on the boiler prior to the discovery of the pile. However, GE was also working on Recovery Boiler No. 4 which was near the debris pile. (Tr. 169, 187, 191-92).

40. Upon determining that the debris pile contained asbestos, KPC directed that the pile be cleaned up by the asbestos crew. The material was double-bagged into approximately 100 asbestos containment bags and was taken to the landfill. No asbestos containment enclosure was built for the cleanup, but the area around the debris pile was demarcated with tape and asbestos warning signs were placed. (Tr. 169-71, 188-91.)

41. Personal and area air samples taken during KPC's cleanup of the debris pile showed no concentrations of airborne asbestos above either the applicable detection limits or permissible exposure limits. (KPC Exh. 3.)

CONCLUSIONS OF LAW

The Department's citation alleges that KPC violated Construction Code (CC) 05.045(e) and (f)(1). CC 05.045(e) provides:

(e) Communication among employers. On multi-employer worksites, an employer performing asbestos, tremolite, anthophyllite, or actinolite work requiring the establishment of a regulated area shall inform other employers on the site of the nature of the employer's work with asbestos, tremolite, anthophyllite, or actinolite and of the existence of and requirements pertaining to regulated areas.

CC 05.045(f)(1) provides:

(f) Regulated areas. (1) General. The employer shall establish a regulated area in work areas where airborne concentrations of asbestos, tremolite and anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the TWA [time-weighted average] or excursion limit prescribed in subsection (c).

Regarding CC 05.045(e), the Department argues that KPC failed to inform GE and its employees of the presence of asbestos and the need to establish a regulated area in connection with GE's work on Power Boiler No. 1 and Recovery Boiler No. 3. Regarding CC 05.045(f)(1), the Department argues that KPC was required to establish a regulated area for the asbestos removal work performed by GE as well as the subsequent cleanup work done by the KPC asbestos crew on Power Boiler No. 1 and the debris pile near Recovery Boiler No. 3.

In response, KPC asserts a variety of defenses including: (1) it was GE, not KPC, that performed the work requiring a regulated area and therefore the cited standards do not apply to KPC; (2) GE failed to comply with KPC's strict asbestos policy that prohibits all employees and contractors from removing or handling suspected asbestos materials without first notifying KPC's asbestos coordinator; (3) KPC did not know and could not reasonably have foreseen that GE would fail to comply with KPC's asbestos policy; (4) GE's failure to comply with KPC's asbestos policy relieves KPC from liability for the alleged violations; (5) the asbestos cleanup work performed by KPC was done properly in compliance with applicable OSHA standards; and (6) KPC committed no willful, serious or even nonserious violation of the cited standards.

OSHA Multi-Employer Principles

To determine liability for OSHA violations at workplaces with more than one employer, we have previously adopted the analytical principles developed by the U.S. Occupational Safety and Health Review Commission (OSHRC) and the federal courts. *See, e.g., Earth Movers of Fairbanks, Inc.*, Docket No. 92-921, Decision and Order at 4-6 (AKOSH Rev. Bd. 11/18/92).¹ Under the multi-employer principles, two or more employers may be liable for the same violation. In determining the liability of one employer, it is irrelevant whether another employer was cited or could have been cited for the same violation. *See* Mark A. Rothstein, *Occupational Safety and Health Law*, § 162 at 198 (3rd ed. 1990) (hereinafter "Rothstein"). OSHA violations at multi-employer

¹ The Alaska Supreme Court has stated that since the Alaska OSHA Act is based on the federal OSHA Act, consideration of federal case law is appropriate. *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1157 n.5 (Alaska 1989).

workplaces are evaluated in terms of two concepts: control and exposure. "Control" means control of the hazard, either by creating the hazard or having the ability to abate it. "Exposure" refers to whether employees have access to the zone of danger created by the hazard. Rothstein, § 165 at 200.

We conclude that KPC had ample control over the hazards alleged by the Department. The "hazard" in question is the risk of overexposure to airborne asbestos fibers from improper removal or handling of asbestos-containing materials. Although KPC did not actually perform the improper removal of asbestos, KPC clearly had authority over the worksite and the ability to abate the hazard. To determine whether an employer has the means to rectify a particular hazard that may have been created by another employer, the OSHRC looks at three factors: (1) whether the cited employer had the physical capacity to comply or to order compliance by others; (2) whether any constraints imposed by craft union agreements and practices restricted the employer's ability to abate; and (3) whether contractual or monetary restraints prevented abatement. Rothstein, § 168 at 205 (citations omitted). Under this test, KPC certainly had the physical capacity to comply with the cited standards by having its own certified asbestos crew establish a regulated area and by communicating the presence of asbestos and the need for a regulated area to other employers at the worksite. In fact, KPC was the *only* employer at the pulp mill with the knowledge, expertise and certified staff necessary to perform asbestos abatement. We find no contractual, monetary or craft union restraints on KPC's authority over the worksite or ability to comply with the cited standards.

There are additional factors demonstrating KPC's ample control over the alleged hazards. KPC has owned and operated the pulp mill since it was built 40 years ago.

After the 1988 settlement agreement, KPC conducted a comprehensive survey of asbestos throughout the entire mill. KPC was specifically aware that there was asbestos insulation on the north side of Power Boiler No. 1 as evidenced by asbestos coordinator Martin's testimony that he personally checked and reaffixed asbestos warning labels in that area in April 1993. Furthermore, KPC had complete authority to direct contractors such as GE as to when, where, and how their work should be done. These factors indicate that KPC had complete control over the worksite and the hazards in question.

We also conclude that there was employee exposure to the alleged hazards. Under principles established by the OSHRC and the federal courts, exposure does not require actual exposure to an alleged hazard but merely a showing that one or more employees had access to the "zone of danger" created by the hazard. Rothstein, § 103 at 139-42 and §§ 166-67 at 202-03. In this case, therefore, it is not necessary to determine whether any employees were actually exposed to levels of asbestos in excess of permissible exposure limits. It is only necessary to determine whether employees had access to the areas where asbestos fibers may have been released.

The record establishes that both KPC and GE employees worked on Power Boiler No. 1 and Recovery Boiler No. 3 during the September 1993 shutdown. Both KPC and GE employees had access to the zone of danger created by the alleged hazards. Therefore, both KPC and GE employees were legally exposed to the hazards. Even if no KPC employees were exposed to the hazards, KPC could still be held liable under OSHA multi-employer principles. Where an employer has control over a worksite, it need only be shown that "a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer *or those of other employers engaged in a common*

undertaking." Rothstein, § 167 at 203, quoting *Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2nd Cir. 1975) (emphasis added). See also *A/C Electric Co. v. OSHRC*, 956 F.2d 530 (6th Cir. 1991) (employer that had "control" of a hazard may be cited, even if it did not "create" the hazard and none of its employees was exposed).

Violation of Cited Standards

Having determined under OSHA multi-employer principles that KPC may be held liable for any hazards created by GE's improper removal of asbestos, we now consider whether KPC violated the specific standards cited by the Department. To establish a prima facie case of violation, the Department must prove by a preponderance of the evidence that (1) the cited standards apply to KPC; (2) KPC had actual or constructive knowledge of the hazardous condition; (3) there was a failure to comply with the cited standards; and (4) one or more employees was exposed to the alleged hazards. See Rothstein, § 102 at 138-39 (citations omitted). Since we have already concluded that there was employee exposure to the hazards alleged by the Department, we will consider only the first three of the above-described elements of a prima facie case of violation.

1. Applicability of Standards to KPC

KPC contends that the cited standards do not apply to it because it was not the "employer" which performed asbestos work requiring the establishment of a regulated area. However, we must reject such a narrow and literal reading of the cited standards. As discussed in the preceding section on multi-employer principles, where an employer has extensive control over a multi-employer worksite and possesses both the authority and ability to abate a hazard created by another employer, it may be found liable for the other employer's violation.

The applicability of the regulated area requirement in CC 05.045(f)(1) to KPC is underscored by the fact that KPC was the only employer at the worksite with a trained and certified asbestos crew capable of establishing a regulated area. GE had no qualified asbestos removal personnel at the mill. Further, it was KPC, not GE, which had the requisite knowledge, information and expertise to realize that the work assigned to GE on Power Boiler No. 1 and Recovery Boiler No. 3 would involve asbestos removal that could reasonably be expected to exceed permissible exposure limits, triggering the requirement to establish a regulated area. Applying the regulated area requirement only to GE when KPC was the only employer at the worksite capable of complying with the requirement would in effect turn the standard on its head.

The communication requirement in CC 05.045(e) applies to any employer at a multi-employer worksite who is required to establish a regulated area for asbestos work. Since we conclude that KPC was subject to the requirement to establish a regulated area, it follows that KPC was also required to communicate the requirements of a regulated area to other employers at the worksite. Accordingly, we conclude that both of the cited standards apply to KPC.

2. KPC's Knowledge of Hazard

KPC argues that it should not be held liable for the cited violations because it did not know of GE's failure to comply with the KPC asbestos policy and could not reasonably have foreseen such noncompliance since GE had consistently complied with the asbestos policy in the past.

To prove an OSHA violation, it must be shown that the cited employer knew or, with the exercise of reasonable diligence, could have known of the existence of the

condition allegedly in noncompliance with OSHA standards.² Whether or not the employer exercised "reasonable diligence" is a question of fact that will vary in each case. *Martin v. OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991).

We agree that KPC could not reasonably have foreseen that GE would remove suspected asbestos-containing materials without first contacting KPC's asbestos staff. However, that is not the end of the relevant inquiry concerning the knowledge issue. We must look at the totality of the circumstances to determine whether KPC knew or, with the exercise of reasonable diligence, could have known that a regulated area would be required for GE's work on Power Boiler No. 1 and Recovery Boiler No. 3.

Upon consideration of all the circumstances, we conclude that KPC, with the exercise of reasonable diligence, could have known that GE's work on Power Boiler No. 1 and Recovery Boiler No. 3 would involve asbestos removal and therefore would require a regulated area. As a result of its comprehensive asbestos survey, KPC knew or should have known where asbestos was located in the powerhouse. In fact, KPC's asbestos coordinator had personal knowledge of asbestos on the north side of Power Boiler No. 1 since he had reglued an asbestos warning label in that area only a few months before the September 1993 shutdown. KPC also had records pertaining to the location of asbestos in the mill but there is no indication that these records were ever reviewed prior to GE's work on Power Boiler

² AS 18.60.095(b) provides in part:

. . . a serious violation is not considered to exist if the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Although the "knowledge" element in AS 18.60.095(b) is set forth with respect to "serious" violations, we believe the requirement also applies to other types of violations including willful violations. *See generally* Rothstein, § 105 at 144-46.

No. 1. Further, since KPC developed the work order for GE's work and was in control of the scheduling of the work, it could have directed its asbestos crew conduct an advance inspection of the work area to determine whether asbestos was present and whether a regulated area was required.³ Because KPC did not check its asbestos records or inspect the worksite in advance for asbestos, we conclude that it failed to exercise reasonable diligence to discover safety hazards. *See Austin Building Co. v. OSHRC*, 647 F.2d 1063, 1067-68 (10th Cir. 1981) (employer could have known of hazardous conduct by making diligent inspection of worksite).

3. Proof of Noncompliance with Standards

The Department contends that KPC violated the two cited standards with respect to (1) GE's removal of asbestos at Power Boiler No. 1 and Recovery Boiler No. 3, and (2) KPC's subsequent cleanup efforts at both locations.

CC 05.045(f)(1) requires the establishment of a regulated area whenever airborne concentrations of asbestos "exceed or can reasonably be expected to exceed" the permissible exposure limits described in CC 05.045(c). We conclude that a preponderance of the evidence establishes, and KPC does not seriously dispute, that the sonic horn installation on the north side of Power Boiler No. 1 required a regulated area because airborne concentrations of asbestos could reasonably be expected to exceed PELs. As discussed earlier, we hold KPC liable for compliance with this requirement because of its

³ CC 05.045(d) provides:

Before authorizing or allowing any construction, demolition, renovation, or remodeling, the owner or owner's agent, or the employer, must perform or cause to be performed, a good faith inspection to determine whether materials to be worked on or removed contain asbestos.

overall control of the worksite, its constructive knowledge of the asbestos hazard, and its exclusive ability to abate the hazard.

However, we find insufficient evidence in the record to prove that a regulated area was required in connection with the materials that were found in the debris pile near Recovery Boiler No. 3. The evidence merely indicates that a large pile of debris containing some asbestos was found outside the powerhouse near Recovery Boiler No. 3 several days after GE worked on the boiler. It is unknown who created the pile, when it was created, how the asbestos in the pile was removed, and from where it was removed. Significantly, KPC's asbestos crew had already built an enclosure and had removed asbestos from Recovery Boiler No. 3 prior to the discovery of the debris pile, suggesting that perhaps the debris pile originated elsewhere. In short, there is simply not enough information to conclude that the debris pile came from Recovery Boiler No. 3 and that a regulated area was required for the removal of the asbestos material found in the pile.

We also find insufficient evidence to prove that a regulated area was required for KPC's cleanup at either the north side of Power Boiler No. 1 or the debris pile near Recovery Boiler No. 3. We find no evidence to suggest that PELs were exceeded or could have been exceeded during either cleanup. In fact, the evidence suggests the contrary. The personal and area monitoring done by KPC at the time of the cleanups failed to disclose any significant levels of asbestos. The department's own expert, Dr. Weyel, stated that asbestos sampling at the time of cleanup was "pointless" because the release of fibers had occurred several days earlier. We also note that the debris pile near Recovery Boiler No. 3 was wet, further reducing any danger of airborne asbestos fibers. Moreover, during both cleanups the asbestos-containing materials were promptly double-bagged, sealed and

removed to the landfill in accordance with asbestos disposal procedures. Under these circumstances, we conclude that the Department has not met its burden of proof to demonstrate that the cleanups at either Power Boiler No. 1 or Recovery Boiler No. 3 required a regulated area.⁴

Having found that KPC was responsible for establishing a regulated area with respect to the sonic horn installation on the north side of Power Boiler No. 1, we next consider whether there is sufficient proof that KPC failed to comply with the communication requirement in CC 05.045(e). We find no evidence that KPC ever affirmatively informed GE, prior to GE's work on the sonic horns, of the presence of asbestos on the north side of Power Boiler No. 1 and the need to establish a regulated area. KPC's asbestos coordinator was not even aware that GE would be working on the north side of Power Boiler No. 1 even though he had personal knowledge of the presence of asbestos in that area. Accordingly, we find there is sufficient proof that KPC failed to comply with the communication requirement in CC 05.045(e).

Misconduct Defense

One of KPC's primary defenses is that the cited violations were caused entirely by GE's failure to comply with KPC's strict asbestos policy and therefore KPC should not be held liable. KPC argues that if GE had followed the asbestos policy as it had

⁴ The Department charges that KPC failed to conduct air monitoring to determine whether PELs were being exceeded, and that KPC failed to present any objective data demonstrating that exposures could not reasonably be expected to exceed PELs for the purpose of dispensing with monitoring requirements. However, for purposes of enforcement of CC 05.045(f)(1), it is the Department which bears the burden of proof to show that PELs might be exceeded and that a regulated area is required. KPC does not have an affirmative burden to disprove this. KPC was not cited for failure to comply with air monitoring requirements.

done consistently in the past, KPC's asbestos crew would have established the regulated area required by CC 05.045(f)(1) and no hazard would have resulted. KPC further argues that its asbestos policy, by requiring contractors to treat all unlabeled or unknown insulation materials as asbestos, satisfies the communication requirement in CC 05.045(e) that other employers be notified of potential asbestos hazards.

OSHA law recognizes the defense of "unpreventable employee misconduct." *See Rothstein*, § 117 at 160-65. By seeking to place the entire responsibility for the cited violations on GE, KPC is essentially attempting to apply the unpreventable employee misconduct defense to its contractor rather than to one of its employees. While we know of no legal authority extending the unpreventable employee misconduct defense to contractors, we will nonetheless evaluate the defense under the facts of this case.

Unpreventable employee misconduct is an affirmative defense as to which the employer bears the burden of proof. To establish unpreventable employee misconduct, an employer must show that (1) it has established work rules designed to prevent the violations cited; (2) it has adequately communicated the rules to employees; (3) it has taken adequate steps to discover violations; and (4) it has effectively enforced its rules when violations have been discovered. *See Rothstein*, § 117 at 161. We will examine each of these elements.

1. KPC Asbestos Policy

KPC's asbestos policy for employees and contractors prohibits the removal or handling of suspected asbestos-containing materials without the approval of the KPC asbestos coordinator unless the material has specifically been identified as "asbestos free." Only employees certified in asbestos abatement are permitted to remove or handle asbestos

containing-materials. If fiber content is unknown, the material is to be treated as though it were asbestos.

Given the large quantities of asbestos at the mill and the number of employees and contractors who may come into contact with asbestos-containing materials, we find KPC's asbestos policy to be reasonable and appropriate. However, we also find the policy is inadequate to comply with the requirements of CC 05.045(e) and (f)(1). We believe that CC 05.045(e) and (f)(1) impose an *affirmative* duty on KPC -- which has control over the worksite, knowledge of the presence of asbestos, and an asbestos crew certified in asbestos abatement -- to establish regulated areas if asbestos concentrations can reasonably be expected to exceed PELs and notify other employers at the worksite of the presence of asbestos and the requirements pertaining to regulated areas. We think the cited standards require KPC to be proactive in addressing known asbestos hazards and not simply wait for notification by an outside contractor that suspected asbestos has been encountered. By shifting the burden of notification of a potential asbestos hazard to an outside contractor, KPC has impermissibly delegated its responsibility under the OSHA Act to another employer. *See Central of Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624-25 (5th Cir. 1978) (employer may not by contract shift its statutory responsibilities under the OSHA Act); *see also Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975).

We further believe that KPC's asbestos policy is inadequate to comply with the cited standards during shutdown periods at the mill. During shutdowns both KPC employees and outside contractors are expected to perform numerous repair and maintenance tasks in a limited amount of time. The work atmosphere during shutdowns has been described as "madness." Because of the additional pressure on employees and

contractors to complete maintenance work rapidly so that normal operations can resume, KPC has an even greater responsibility to take affirmative action to address known asbestos hazards. The hectic nature of maintenance shutdowns should not mean that employees receive any less safety protection than during normal operations. The fact that the sonic horn work may have been a relatively small, low-priority task also does not excuse KPC's obligation to comply with applicable safety requirements. Because of its knowledge of asbestos at the mill, staff trained in asbestos abatement, and complete control over the scheduling of maintenance work, KPC was in a much better position than GE to determine whether a regulated area was required and communicate that fact to GE and any other contractors working in the area.

2. Adequate Communication of Policy

We find that KPC's asbestos policy, despite its shortcomings, was adequately and effectively communicated to employees and outside contractors working at the mill. A written statement of the policy was included in all contracts with outside contractors. In addition, there is ample evidence that GE was well aware of the policy and had developed a similar policy of its own. The record shows that GE had consistently complied with KPC's asbestos policy in the past. Accordingly, we conclude that this element of the misconduct defense is satisfied.

3. Adequate Steps to Discover Violations

The third element of the misconduct defense is similar to the employer knowledge requirement that is part of the Department's prima facie case. The focus is on whether the employer exercised reasonable diligence in detecting safety violations. *See Pace Construction Corp.*, 14 (BNA) OSHC 2216 (OSHRC 1991) (employer could have known of

violation with the exercise of reasonable diligence). A related question is whether the employer adequately supervised and monitored work done at its direction. *See Dover Elevator Co.*, 15 (BNA) OSHC 1378, 1382 (OSHRC 1991) (employer's failure to monitor compliance with safety rules negates employee misconduct defense).

In the present case, we conclude that KPC did not adequately supervise or monitor GE's work and did not exercise reasonable diligence in detecting the asbestos hazards associated with the work. Prior to GE's work, GE foreman Boring specifically asked KPC supervisors Hendricks and Raitanen about asbestos at the worksite. Although there is disagreement about what Boring was told, it is undisputed that neither Hendricks nor Raitanen followed up by contacting KPC's asbestos staff concerning GE's inquiry. Nor is there any evidence that KPC supervised or monitored GE's sonic horn work while the work was in progress. KPC engineer Zastrow, who was in charge of outside contractors, candidly acknowledged that he was not as involved as he should have been in supervising GE's sonic horn work.

Moreover, even though KPC formulated, directed, scheduled and authorized GE's work in an area where asbestos was known to be present, the company failed to involve its own asbestos personnel in the planning and preparation for the sonic horn work. KPC elected not to maintain an on-site night asbestos crew which could have been available to monitor GE's work on the north side sonic horns and, if necessary, establish a regulated area for asbestos removal. Both KPC asbestos coordinator Martin and asbestos crew member Benning acknowledged that it would have been a good idea to notify the asbestos staff in advance of GE's work and have a night asbestos crew available whenever night work was performed. Furthermore, KPC's sign-off inspection of GE's sonic horn work was

admittedly perfunctory and failed to detect that asbestos insulation had been improperly removed. A more thorough sign-off inspection on September 23 might have discovered GE's improper asbestos removal two days earlier than it was actually discovered, leading to more prompt abatement.

For the foregoing reasons, we conclude that KPC did not take adequate steps to discover the violations cited by the Department and therefore this element of the misconduct defense has not been satisfied.

4. **Effective Enforcement of Policy**

The final element of the misconduct defense considers how the cited employer has enforced its safety rules through sanctions and disciplinary measures. *See Rothstein, § 117 at 163-64.* We find no evidence that KPC took any significant enforcement or disciplinary action against GE as a result of GE's alleged breach of KPC's asbestos policy. Although KPC's work rules state that "site safety rules are strictly enforced" and "violations can result in a breach of contract, stoppage of work in progress, and/or termination of contract for breach," none of these measures was taken by KPC following discovery of GE's unregulated asbestos removal during the September 1993 shutdown. KPC management merely discussed the matter with GE management. No payments were withheld by KPC, and GE was allowed to continue work for KPC after the incident. Under these circumstances, we must conclude that this element of the misconduct defense has not been satisfied.

Willfulness

We next consider whether the cited violations qualify as "willful." The Alaska OSHA Act, like its federal counterpart, does not define a willful violation.⁵ According to the OSHRC and a majority of the federal courts, a violation is willful if it is committed with "intentional, knowing or voluntary disregard for the requirements of the Act" or with "plain indifference to employee safety." *Asbestos Textile Co., Inc.*, 12 (BNA) OSHC 1062, 1063 (OSHRC 1984); *National Steel and Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9th Cir. 1979); *see generally* Rothstein, § 315 at 340-44. No showing of the employer's bad motive or malicious intent is required. *National Steel*, 607 F.2d at 314. The OSHRC has explained willfulness as follows:

A willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has

⁵ AS 18.60.095(a) provides:

An employer who wilfully or repeatedly violates a provision of AS 18.60.010-18.60.105 that is applicable to the employer or a standard or regulation adopted under AS 18.60.010-18.60.105 may be assessed by the commissioner a civil penalty of not more than \$70,000 for each violation. Except when a settlement is negotiated, the Commissioner shall assess a minimum penalty of \$5,000 for a violation under this subsection that was committed wilfully.

made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Williams Enterprises, Inc., 13 (BNA) OSHC 1249, 1256-57 (OSHRC 1987) (citations omitted).

Under the facts of the present case, we regard the issue of KPC's willfulness as a close question. On one hand, KPC has a history of asbestos-related citations at the mill and must be presumed to be thoroughly familiar with applicable asbestos requirements. KPC also had specific knowledge of the presence of asbestos on the north side of Power Boiler No. 1 and was the only employer at the worksite in a position to abate the hazard, yet took no action to alert GE of the hazard or to establish a regulated area. On the other hand, KPC did make some attempt to protect employee safety and health by developing an asbestos safety program including a designated asbestos coordinator, trained and certified asbestos abatement personnel, labeling of suspected asbestos-containing materials, and a written policy regarding the treatment and handling of asbestos. On balance, we conclude that KPC did not intentionally disregard OSHA requirements or demonstrate a plain indifference to employee safety.

In reaching this conclusion we recognize that a significant contributing cause of these violations was GE's failure to consult KPC's asbestos staff before removing insulation on Power Boiler No. 1. Although we conclude that GE's misconduct is not a sufficient defense to KPC's liability in this case, we think such misconduct is relevant to the issue of willfulness to show that KPC did not deliberately or consciously intend to disregard applicable OSHA requirements.

Furthermore, we find that KPC's cleanup efforts after discovering the improper removal of asbestos were prompt and adequate under the circumstances. The passage of time after the asbestos was removed, combined with the cleanup efforts of KPC's asbestos crew, make it highly unlikely that there was any overexposure to asbestos fibers during the cleanups. Also, we regard the statement by KPC's acting asbestos coordinator that employees were "expendable" to be an isolated, careless, after-the-fact remark which had little bearing on whether KPC willfully permitted the safety violations to occur.

Although we conclude that KPC's violations of the cited standards are not willful, we believe the violations are "serious" under AS 18.60.095(b). A serious violation exists if the violation creates in the place of employment a substantial probability of death or serious physical harm. *See* AS 18.60.095(b). Federal OSHA decisions have consistently held that it is not necessary to prove that an accident will occur. It is only necessary to prove that an accident is possible and that death or serious physical harm could result. *See* Rothstein, § 313 at 333 (citations omitted). In this case, an accident actually occurred when asbestos insulation was removed from Power Boiler No. 1 without a regulated area. It is beyond dispute that serious harm could result from the ingestion of asbestos fibers. We have previously determined that there was sufficient employer knowledge and employee exposure such that KPC can be held liable. Accordingly, we conclude that a serious violation under AS 18.60.095(b) has been established.

Finally, we wish to state our belief that KPC needs to take adequate remedial action to avoid a willful citation in the future. KPC should involve its asbestos staff in the planning and coordination of work during shutdowns. In particular, KPC should give advance notice to its asbestos staff of *all* projects that might involve the removal or handling

of asbestos. Further, KPC should maintain a night asbestos crew on any night shifts where employees or contractors may come into contact with asbestos. KPC should also improve its monitoring and supervision of contractors particularly where the contractor is working in an area known to contain asbestos. As the owner and operator of the mill, KPC is in the best position to inspect each work area in advance, check asbestos records, and determine compliance with applicable asbestos requirements. In the event of any future recurrence of these violations, we would have little difficulty classifying the violations as willful.

Penalty

Since we have concluded that the cited violations are "serious" rather than "willful," the maximum penalty that may be assessed for each violation is \$7,000. *See* AS 18.60.095(b). We believe the maximum penalty is appropriate, with no reductions, in view of KPC's company size, the serious gravity of the hazards, and KPC's history of previous violations. *See* AS 18.60.095(h). However, we also believe the two cited violations should be combined into a single violation. Where two or more violations are so closely related that they constitute a single hazard, the violations may be grouped into a single item. *Alaska OSHA Compliance Manual*, Chapter V, Section C.3 (1992). We find the regulated area requirement in CC 05.045(f)(1) to be so closely related to the communication requirement in CC 05.045(e) that the two violations constitute a single hazardous condition. Accordingly, we exercise our discretion to group both violations into a single item with a single penalty of \$7,000.

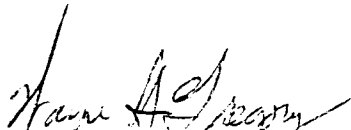
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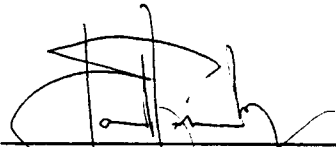
Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. Citation 1, Items 1 and 2 are grouped together into a single item.
2. Citation 1, Items 1 and 2 are affirmed as a single "serious" violation.
3. A single penalty of \$7,000 is assessed for Citation 1, Items 1 and 2.

DATED this 17th day of July, 1995.

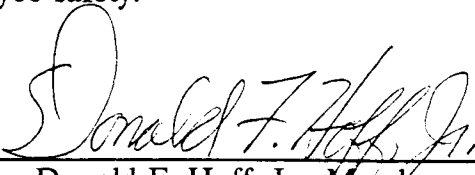
**ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD**

By: 
Wayne A. Gregory, Chairman

By: 
James J. Ginnaty, Member

Board Member Hoff, dissenting in part:

I agree with the decision of my colleagues except that I respectfully dissent on the issue of willfulness. In my judgment, KPC's violations were willful. KPC was fully aware of the presence of asbestos in the areas where GE was to work yet it took no action to establish a regulated area or alert GE concerning the presence of asbestos. In light of its lengthy prior history of asbestos citations at the mill, KPC had an obligation to do much more than it did. To me, KPC's inaction constitutes a conscious disregard of OSHA requirements and plain indifference to employee safety.

By: 
Donald F. Hoff, Jr., Member