

ILLINOIS POLLUTION CONTROL BOARD  
July 25, 1972

ANNING-JOHNSON COMPANY )  
 )  
 ) #72-60  
 v. )  
 )  
 ENVIRONMENTAL PROTECTION AGENCY )

PRICE, CUSHMAN, KECK & MAHIN, by MR. GEORGE E. BULLWINKEL, appeared on behalf of Petitioner.

MR. ROGER L. HORWITZ, appeared on behalf of Respondent.

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.)

Anning-Johnson Company, petitioner herein, a company engaged in the spraying of fire-proofing substances used in building construction, sought a variance from the asbestos spraying provisions of the newly adopted asbestos regulations (#R71-16, Chapter V, Hazardous Substances, Part III, Section 301, effective March 31, 1972), in order to complete the fire proofing of four structures already in process and in varying degrees of completion, as more fully set forth below.

The original petition for variance was received by the Board on February 15, 1972 and sought allowance to continue the spraying of Fire Bar, an asbestos-containing cementitious mixture directly sprayed on the steel members of structures.

The specific buildings involved were:

1. The DuPage Administrative Center in Wheaton, Illinois;
2. The Doctors Building in Arlington Heights, Illinois;
3. The Oak Brook Office Center in Oak Brook, Illinois; and
4. The CNA Financial Center in Chicago.

The petition recites that all of the above-named projects were contracted before adoption of the asbestos regulations, and that severe weather conditions experienced in December, 1971 and January, 1972 have resulted in a general slowdown in the construction progress on

the foregoing jobs. The original petition notes that with respect to the 45-story CNA Building, the exterior spraying has been completed to the forty-fourth floor, and interior spraying remains for the floors from the twenty-sixth to the top. Interior spraying is also required on the basement through the fourth floor.

The petition alleges the banning of asbestos-spraying on the foregoing projects would result in arbitrary hardship on the owners, architects and general contractors, as well as on petitioner. The cost of spraying other material and the training of new personnel would be prohibitive. Differential in thickness to secure rated protection allegedly would cause problems in redesign of wall sections, construction problems and increased costs resulting in delays in completion and hardship on all parties concerned with the ownership and construction of the buildings. The petition seeks a variance to enable completion of the projects, as contracted.

On June 2, 1972, an amended petition was filed, modifying in part, the original petition and setting forth that certain aspects of the work originally described, for which a variance had been sought, have already been completed. The amended petition notes that the filing of the original variance petition on February 25, 1972, being within twenty days of the effective date of the regulations, stays the operation of the regulation pending disposition of the petition, (Section 38 of the Environmental Protection Act.)

The Doctors' Building in Arlington Heights and the Oak Brook Office Center in Oak Brook have been completed so far as the spraying of fireproofing material is concerned, and, accordingly, these portions of the requested variance are dismissed as moot. The petition recites that the completion date for the DuPage Administrative Center was anticipated on the date of the filing of the petition to be July 15, 1972, which date is now passed. If, in fact, the work has been completed, then this portion likewise is mooted. If, however, it has not been so completed, we grant the variance in order to permit such completion, not desiring to stop a project in midstream where work had been initiated in good faith prior to the effective date of the restrictive regulation.

A more difficult question arises with respect to the CNA Financial Center in Chicago. Construction and fireproofing of this building are essentially in two parts. The main portion of the building involved the spraying of approximately 1,000 tons of material for fireproofing purposes, and according to the petition, was completed on May 18, 1972. The remaining portion of the building for which spray fireproofing is required, consists of a steel skeleton or "bustle" on the east side, extending from the second floor to the fifth floor. According to the petition, this work cannot be completed until construction on the main part of the building is finished. The petition and testimony at the hearing indicates that progress of construction is anticipated to be such that fireproof spraying on the

four stories of the bustle would be started in September or October of 1972 and take approximately fourteen days to complete. The original petition sought until December 1, 1972 for completion of this job for which it is anticipated that ten to twelve tons of spray material would be used. The amended petition seeks to extend the time for fireproofing spraying on this portion of the job to May 1, 1973. The petition alleges, as a basis of hardship, that substitution of alternative non-asbestos material would be "impossible for the following reasons:

1. Substitution of a different product not manufactured by Anning-Johnson would create a division of responsibility for the fire ratings established by the fireproofing operation.
2. Substitution of a new material would cause thicknesses to vary from the original asbestos-containing material specifications and may require redesign of some structural members.
3. Use of a substitute material would require the acquisition and use of new spraying equipment and retraining of spray application personnel. This would necessarily mean increased costs and delays in construction schedules.
4. The existence of a suitable non-asbestos material is in doubt at the present time, although petitioner (among others) is actively seeking such a material."

The Environmental Protection Agency filed its recommendation which we will consider only in respect to that portion dealing with the CNA Building. The recommendation describes the composition of the spray involved consisting of batch mixing asbestos, epsom salts and magnesium sulfate into a slurry with a liquid consistency which is sprayed onto the steel surface of beams, columns, decks and internal skins, taking approximately a week to ten days to harden. The precise quantity of asbestos and particulate emissions from spraying operation is unknown, although protective procedures and housekeeping indicate that emissions from the spraying operation are minimal.

The Agency recommends that the variance be granted, subject to conditions minimizing the discharge of material outside of the building and the submission of a report from independent sources, certifying that no substitute materials are available in lieu of asbestos-containing materials, that the variance be allowed only to December 1, 1972, that all other provisions of the regulations be met and that a performance bond be posted to insure compliance with the order.

Hearing was held on the petition on May 24, 1972, at which time witnesses for petitioner recited the alleged basis for hardship in prohibiting the spraying of Fire Bar, petitioner's asbestos-containing fireproofing material. This essentially consisted of the difference in thickness required and adhesion capabilities inherent in a non-asbestos material as compared with Fire Bar, the need for training of personnel and the purchase of new equipment to utilize a non-asbestos substitute, the possible increase in costs to all concerned inherent in any change in procedure and materials employed, and the possible need for major structural changes that might result in the event a different fireproofing substance was utilized.

The petitioner acknowledges the existence of alternative spray fireproofing materials that would meet the regulations, but has not employed them commercially to ascertain whether they would be suitable for this job.

On the basis of the record, we do not feel that the evidence introduced by petitioner substantiates the essential allegations of hardship set forth in its petition. All contentions made with respect to lack of availability or suitability of substitutes, increased cost of personnel and equipment and possible structural modifications, are purely speculative and not supported by evidence of any sort beyond petitioner's expressions of belief that such consequences would follow. Nor has petitioner made any substantial effort to find and use substitute materials for this particular job, notwithstanding its acknowledgment that ultimately, if it remains in the spray fireproofing business, it will be obliged to find substitutes compatible with the relevant regulations.

Accordingly, we must deny the petition, insofar as it relates to the CNA Building. Asbestos spraying of this building, located in the heart of Chicago's downtown area, will have attributes of danger to a substantial number of people notwithstanding the housekeeping and control methods being employed by petitioner. We cannot grant the variance in the absence of substantial proof of hardship resulting from compliance with the regulation. This denial is without prejudice to petitioner re-filing with the Board a new petition for variance respecting this structure and supporting its allegations of hardship with tangible evidence that will satisfy its statutory burden in proceedings of this character.

Our holding in this case does not substantially impede petitioner's program with respect to the CNA Building inasmuch as petitioner does not contemplate embarking on the fireproofing program until September, 1972, prior to which time, if it wishes, it can re-file and present its case in accordance with the foregoing observations.

This opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board:

1. Variance applications with respect to the Doctors Building in Arlington Heights, Illinois and the Oak Brook Office Center in Oak Brook, Illinois, are dismissed as moot.
2. Variance is granted petitioner to complete the spraying of asbestos-containing fireproofing on the DuPage Administrative Center Building, Wheaton, Illinois.
3. Petition for variance is denied without prejudice with respect to the CNA Financial Center Building, Chicago, Illinois.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on the 25<sup>th</sup> day of July, 1972 by a vote of 4-0.

Christan Moffett