

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2002

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 00-110
) (Enforcement - Air)
JOE DECICCO DEMOLITION, INC., an)
Illinois corporation,)
)
Respondent.)

INTERIM ORDER OF THE BOARD (by N.J. Melas):

This matter is before the Board on the complainant's November 19, 2001 motion for summary judgment (Mot.) against respondent, Joe Decicco Demolition, Inc (Decicco). Complainant filed a two-count complaint on December 29, 1999. Complainant alleged that Decicco submitted untimely and incomplete notifications to the Illinois Environmental Protection Agency (Agency) for demolition projects in Chicago, Cook County. Complainant alleged that, as a result, Decicco violated the Environmental Protection Act (Act) and the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos. Decicco has not filed an answer to the complaint or the motion for summary judgment as of the date of this order. For the reasons stated below, the Board grants complainant's motion for summary judgment against Decicco.

ADMISSION OF MATERIAL ALLEGATIONS

Complainant alleges in its motion that Decicco admitted the material allegations asserted in the complaint because Decicco did not file timely notifications with the Agency and because there were omissions in the notifications. Mot. at 8, 11. Decicco did not file an answer to the complaint by February 27, 2000, or a motion to stay the 60-day period in which Decicco was required to file an answer.

Sections 103.204(d) and (e) of the Board's regulations (35 Ill. Adm. Code 103.204(d) and (e)) state in relevant part that:

- (d) Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief

- (e) If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(d), (e).

Decicco failed to file an answer or motion pursuant to 35 Ill. Adm. Code 103.204(d) or (e) as of the date of this order. The Board deems the material allegations concerning Decicco in the complaint to be admitted pursuant to 35 Ill. Adm. Code 103.204(d).

Specifically, the Board finds the following material allegations are admitted:

1. Decicco is an Illinois corporation and from at least February 1997 until the filing of the complaint was a contractor engaged in the demolition of structures. Mot. at 2.
2. On February 26, 1997, the Agency received a notification from Decicco postmarked February 24, 1997. In the notification, Decicco notified the Agency that a structure located at 4305 West 24th Place in Chicago was to be demolished starting March 1, 1997. Mot. at 7-8, Exh. A.
3. On March 17, 1997, the Agency received a notification from Decicco postmarked March 13, 1997. In the notification, Decicco notified the Agency that structures located at 5650 South Ashland Avenue in Chicago were to be demolished starting March 17, 1997. Mot. at 8, Exh. B.
4. On March 20, 1997, the Agency received a notification from Decicco postmarked March 17, 1997. In the notification, Decicco notified the Agency that a structure located at 2910 West Madison Street in Chicago was to be demolished starting March 17, 1997. Mot. at 8, Exh. C.
5. On February 14, 1997, the Agency received a notification from Decicco. In the notification, Decicco notified the Agency that a structure was to be demolished at 911-919 West 69th Street in Chicago. The notification failed to indicate the type of notification, the type of operation, if there was asbestos present, the dates of asbestos removal, the dates of demolition, and the procedure, including analytical methods, used to detect the presence of asbestos. Mot. at 9-10, Exh. D.
6. On February 14, 1997, the Agency received a notification from Decicco. In the notification, Decicco notified the Agency that a structure was to be demolished at 3353-3355 West Chicago Avenue in Chicago. The notification failed to indicate the type of notification, the type of

operation, if there was asbestos present, the dates of asbestos removal, the date of the demolition, and the procedure used to detect the presence of asbestos. Mot. at 10, Exh. E.

7. The notification for 4305 West 24th Place failed to indicate the procedure used to detect the presence of asbestos. Mot. at 10, Exh. A.
8. The notification for 5650 South Ashland Avenue failed to indicate the procedure used to detect the presence of asbestos. Mot. at 10, Exh. B.
9. On March 20, 1997, the Agency received a notification from Decicco for the demolition of a structure at 2908 West Madison Street. The notification failed to indicate the procedure used to detect the presence of asbestos. Mot. at 10-11, Exh. F.

The Board finds that the above facts concerning Decicco are admitted. Accordingly, the Board discusses if the People are entitled judgment as a matter of law based on the admitted facts.

MOTION FOR SUMMARY JUDGMENT

Decicco has not yet filed a response to the motion for summary judgment, and, according to a hearing officer order of February 5, 2002, Decicco has no intention of doing so.

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should only be granted when the movant’s right to the relief “is clear and free from doubt.” *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis, which would arguably entitle [it] to a judgment.” *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Discussion

Relevant Statutes and Regulations

Section 9.1(d)(1) of the Act states, that “No person shall: Violate any provisions of Sections 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto”. 415 ILCS 5/9(d)(1) (2000).

The United States Environmental Protection Agency (USEPA) has adopted the asbestos NESHAP regulations pursuant to Section 112 of the Clean Air Act (42 U.S.C. § 7412 (2001)).

The relevant asbestos NESHAP regulations are at 40 C.F.R. § 61.141 and 40 C.F.R. § 64.145(a) and (b) (2000). Those regulations provide, in pertinent part:

40 C.F.R. § 61.141 Definitions

* * *

Category I nonfriable asbestos-containing material (ACM) means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR. part 763, section 1, Polarized Light Microscopy.

Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

* * *

Demolition means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

* * *

Facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

* * *

Owner or operator of a demolition or renovation activity means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

* * *

Working day means Monday through Friday and includes holidays that fall on any of the days Monday through Friday.

* * *

40 C.F.R. § 61.145 Standard for demolition and renovation

(a) Applicability. To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

* * *

(2) In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is

(i) Less than 80 linear meters (260 linear feet) on pipes less than 15 square meters (160 square feet) on other facility components, and

(ii) Less than one cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously or there is no asbestos.

* * *

(b) Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall:

- (1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

- (3) Postmark or deliver the notice as follows:

- (i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

* * *

- (4) Include the following in the notice:

- (i) An indication of whether the notice is the original or a revised notification.

- (iii) Type of operation: demolition or renovation.

- (v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

- (vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.

- (viii) Scheduled starting and completion dates of asbestos removal work (or any other activity, such as site preparation that would break up, dislodge, or similarly disturb asbestos material) in a demolition or renovation; planned renovation operations involving individual nonscheduled operations shall only include the beginning and ending dates of the report period as described in paragraph (a)(4)(iii) of this section.

* * *

- (ix) Scheduled starting and completion dates of demolition or renovation.

* * *

Count I: Untimely Notifications

Complainant alleged that Decicco violated Section 9.1(d) of the Act and Section 61.145(b) of the asbestos NESHAP. Specifically, the complaint stated that Decicco violated the Act and the asbestos NESHAP by submitting untimely NESHAP notifications to the Agency. Mot. at 2.

Decicco is an owner/operator of a demolition activity as those terms are defined in the asbestos NESHAP. The structures at issue in Count I (4305 West 24th Place, 5650 South Ashland Avenue, 2910 West Madison Street) are facilities as defined by the asbestos NESHAP. The requirements of the asbestos NESHAP at 61.145(b) apply to facility demolitions even where there is no asbestos, which is what Decicco indicated on the NESHAP notifications. *See* 40 C.F.R. § 61.145(a)(2) (2000). Section 61.145(b)(3) requires such notice “[a]t least 10 working days before demolition begins”. Decicco did not submit the notice to the Agency at least 10 working days before the demolitions were to commence for the three facilities cited in count I.

The Board finds, in light of these facts, that Decicco violated Section 61.145(b) of the asbestos NESHAP. As USEPA adopted the asbestos NESHAP regulations pursuant to Section 112 of the Clean Air Act, the Board finds that Decicco also violated Section 9.1(d)(1) of the Act.

Count II: Incomplete Notifications

Complainant alleged that Decicco violated Section 9.1(d)(1) of the Act and Section 61.145(b)(4) of the asbestos NESHAP by neglecting to include required information in NESHAP notifications sent to the Agency. Mot. at 11.

The structures at issue in count II (4305 West 24th Place, 5650 South Ashland Avenue, 911-919 West 69th Street, 3353-3355 West Chicago Avenue, 2908 West Madison Street) are facilities as defined by the asbestos NESHAP.

Section 61.145(b)(4)(i) of the asbestos NESHAP states that the notification must indicate if it is original or revised. The notifications for 911-919 West 69th Street and 3353-3355 West Chicago Avenue did not indicate if the notifications submitted were original, revised, or cancelled. The Board finds that Decicco has violated Section 61.145(b)(4)(i) of the asbestos NESHAP and Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(iii) of the asbestos NESHAP states that the notification must indicate the type of operation – demolition or renovation. The notifications for 911-919 West 69th Street and 3353-3355 West Chicago Avenue did not indicate if the notifications were for demolitions or renovations. The Board finds that Decicco has violated Section 61.145(b)(4)(iii) of the asbestos NESHAP and Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(v) of the asbestos NESHAP states that the notification must indicate the procedure, including analytical methods, employed to detect the presence of RACM and Category I an II nonfriable ACM. The notifications for 4305 West 24th Place, 5650 South Ashland Avenue, 911-919 West 69th Street, 3353-3355 West Chicago Avenue, and 2908 West Madison Street did not indicate these methods. The Board finds that Decicco has violated Section 61.145(b)(4)(v) of the asbestos NESHAP and Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(ix) of the asbestos NESHAP states that the notification must indicate the starting and ending dates of demolition or renovation. The notifications for 911-919 West 69th Street and 3353-3355 West Chicago Avenue did not indicate the starting and ending dates for either demolition or renovation. The Board finds that Decicco has violated Section 61.145(b)(4)(ix) of the asbestos NESHAP and Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(viii) of the asbestos NESHAP states that the notification must indicate the starting and ending dates of asbestos removal work “or any other activity, such as site preparation that would break up, dislodge or similarly disturb asbestos material”. As alleged, the notifications for 911-919 West 69th Street and 3353-3355 West Chicago Avenue did not indicate the starting and ending dates for either asbestos removal or the other associated activities. However, these notifications indicated that there was no asbestos to be removed. In situations where the amount of RACM small to nonexistent, Section 61.145(b)(4)(viii) of the notification requirements does not apply. The Board finds that Decicco did not violate Section 61.145(b)(4)(viii).

Decicco neglected to indicate if there was asbestos present on the notifications for 911-919 West 69th Street and 3353-3355 West Chicago Avenue. The Board can find nothing in the asbestos NESHAP notification requirements requiring the owner or operator to indicate if asbestos is present. Section 61.145(b)(4)(vi) mandates that owner/operator estimate the amount of RACM to be removed from the facility in addition to Category I and II nonfriable ACM not to be removed. However, Decicco answered this question on the Agency’s notification form. Since the Board can find no requirement in the asbestos NESHAP requiring an owner or operator to indicate if asbestos is present on the notification form, the Board finds that Decicco is not in violation of Section 61.145(b)(4)(vi) of the asbestos NESHAP.

CONCLUSION

The Board deems admitted the material allegations set forth in the complaint in this matter. The Board finds that complainant is entitled to summary judgment in its favor as a matter of law on all of the alleged violations except those involving (1) failure to indicate the

starting and ending dates of asbestos removal work in addition to related activities, and (2) failure to indicate if asbestos was present.

The Board finds that Decicco violated Section 9.1(d)(1) of the Act and Sections 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) of the asbestos NESHAP regulations. The Board also finds that Decicco may be liable for all costs, pursuant to 42(f) of the Act, including attorney, expert witness, and consultant fees, expended by the State in pursuit of this action against Decicco.

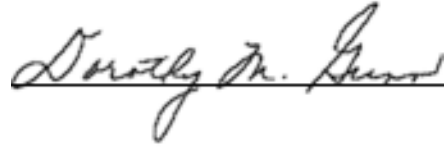
The Board directs the parties to hearing as expeditiously as practicable on the specific issue of the appropriate penalty amount, costs, and attorneys' fees in this matter. The parties are only to present testimony and evidence that are relevant to the factors as set forth in Sections 33(c), 42(f), and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)).

In summary,

1. The Board grants complainant's motion for summary judgment, and finds Decicco in violation of Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2000)), and Sections 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) of the asbestos NESHAP (40 C.F.R. §§ 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) (2000)).
2. The Board orders Decicco to cease and desist from further violations of Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2000)), and Sections 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) of the asbestos NESHAP (40 C.F.R. §§ 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) (2000)).
3. The Board directs the parties to hearing on the specific issue of the appropriate penalty amount, costs, and attorneys' fees in this matter. The parties are only to present testimony and evidence that are relevant to the factors and costs that are set forth in Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)). The Board directs the parties to provide specific figures for proposed penalties and proposed justification for such figures.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim order on April 18, 2002, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board