

10/3/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Ocean State Asbestos Removal) Docket No. CAA-I-93-1054
Inc. / Ocean State Building)
Wrecking and Asbestos Removal)
Co., Inc.,)
)
Cranston, Rhode Island)
)
Respondents)

RULING DENYING MOTION FOR PARTIAL ACCELERATED DECISION
and
ORDER SETTING PROCEEDING FOR HEARING

Proceedings

By Order of the Chief Administrative Law Judge, dated September 22, 1995, the undersigned has been redesignated to preside in this proceeding pursuant to the EPA Rules of Practice, 40 C.F.R. §22.04(d)(3), 22.21(a). This proceeding arises under Section 113(d)(1) of the Clean Air Act ("CAA"), 42 U.S.C. §7413(d)(1).

The Environmental Protection Agency, Region I, Boston (the "Complainant") commenced this proceeding by filing a Complaint and Notice of Opportunity for Hearing, dated March 31, 1993, on Ocean State Asbestos Removal, Inc., Cranston, Rhode Island (the "Respondent").¹ The Complaint charges the Respondent with violating Section 112 of the CAA, 42 U.S.C. §7412(b), by failing to adequately wet regulated asbestos-containing material ("RACM") it was removing during a renovation project at a school in Providence, Rhode Island on August 27, 1992. This constitutes an alleged violation of a provision of the implementing regulations,

¹ The Complaint was later conformed to add the alleged official corporate name of the Respondent, Ocean State Building Wrecking and Asbestos Removal Co., Inc. The former Presiding Officer, Chief Administrative Law Judge Jon G. Lotis, in a series of transcribed telephonic rulings on October 19, 1994, granted Complainant's motions to conform the Complaint and to compel Respondent to supplement its Prehearing Exchange. Judge Lotis had earlier granted Complainant's motion to amend the Complaint to increase the amount of the penalty sought, from \$17,000 to \$25,000, based on the discovery by Complainant of an alleged prior violation by Respondent.

the National Emission Standards for Hazardous Pollutants ("NESHAPs") for asbestos, 40 C.F.R. §61.141(c)(6)(1). In its Answer, Respondent, through its attorneys Mosca & Volpe, North Kingstown, Rhode Island, denied the material allegations of the Complaint. Respondent seeks a civil penalty in the amount of \$25,000, which is the maximum allowed for one day of violation pursuant to 42 U.S.C. §7413(d)(1).

Ruling on Motion for Partial Accelerated Decision on Liability

On December 15, 1994, Complainant filed a Motion for Partial Accelerated Decision as to liability on Count I of the Complaint. Respondent filed its Objection and Supporting Argument on December 28, 1994 opposing Complainant's Motion for Partial Accelerated Decision. This ruling addresses that motion.

Complainant has supported its motion by submitting affidavits by William A. Osbahr, the EPA environmental engineer who conducted the inspection of Respondent's renovation project, and Howard S. Davis, the EPA microbiologist who analyzed the samples taken from the Project. The Respondent did not submit any additional evidentiary materials, but contends that it has the right to cross-examine Complainant's witnesses and offer its own witnesses who could testify contrary to Complainant's. Both parties also refer to their Prehearing Exchanges submitted previously in this proceeding.

The EPA Rules of Practice, §22.20(a), allow the Presiding Officer to render an accelerated decision without a hearing "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." This procedure is analogous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure.² The burden of showing there exists no genuine issue of material fact is upon the Complainant in this proceeding as the moving party. Adickes v. Kress, 398 U.S. 144, 157-160 (1970). In considering a motion for summary judgment or accelerated decision, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hosp. Assoc., 14 F.3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for accelerated decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits,

² Numerous decisions of Administrative Law Judges and the Environmental Appeals Board have recognized the equivalence of the motion for accelerated decision under Rule 22.20(a) with the motion for summary judgment under F.R.C.P. 56. See, e.g., In re CWM Chemical Serv., TSCA Appeal 93-1, 1995 TSCA Lexis 10, 25 (EAB, Order on Interlocutory Appeal, May 15, 1995).

and other evidentiary materials submitted in support or opposition to the motion. 40 C.F.R. §22.20(a), F.R.C.P. 56(c), Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

The Complainant's inspector, Mr. Osbahr, set forth the details of his August 27, 1992 inspection in a Compliance Inspection Report dated March 1, 1993 submitted with Complainant's Prehearing Exchange. In that report, he describes visiting the project and finding two bags that appeared filled with dry asbestos-containing material -- one in a dumpster and one in the containment area. He took samples from those two bags. The Prehearing Exchange also includes Mr. Davis' analysis report of those samples, which finds they contained, respectively, 30% and 35% chrysotile asbestos. Complainant now asserts that because none of Respondent's witnesses identified in its Prehearing Exchange was present during Mr. Osbahr's observations or Mr. Davis' analysis, Respondent cannot dispute Mr. Osbahr's conclusion that the bags contained RACM that was not adequately wet.

In its Answer, Respondent denied the allegation in the Amended Complaint (§ 13) that "the EPA inspector observed dry, friable RACM that had been stripped or removed and was not adequately wet to ensure that it remain wet until collected and contained or treated in preparation for disposal." In its Prehearing Exchange, Respondent offered three witnesses who will testify about the asbestos removal techniques followed at the project in Providence. Two of them, Michael Macaruso and Steven Tassinieri, were present at various times during Mr. Osbahr's inspection. Respondent also points out that Complainant offers no explanation why Mr. Osbahr's inspection report was not produced until over six months after his inspection, and asserts that its witnesses will offer probative evidence. Respondent further contends it has the right to cross-examine Complainant's witnesses as to their observations, chain of custody, and sampling and analysis methods.

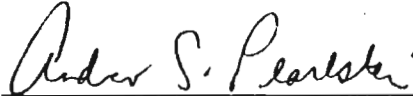
In these circumstances it is not appropriate to grant Complainant's motion for a partial accelerated decision on liability. To do so would deprive Respondent of its right to confront and cross-examine adverse witnesses. The evidentiary materials and Prehearing Exchanges do not fully establish a prima facie case supporting liability. Viewing the record thus far most favorably to the Respondent as the non-moving party, genuine issues of material fact remain as to the circumstances of Mr. Osbahr's observations, the chain of custody of the samples, and the sampling techniques. By their nature, these factual matters can be elucidated through cross-examination of the witnesses who have exclusive knowledge of their own observations and analyses. In addition, it appears from Mr. Osbahr's inspection report that at least two of Respondent's witnesses, Michael Macaruso and Steven Tassinieri, were present at various times during Osbahr's inspection and could be in a position to offer contradictory

testimony. Accordingly, Complainant's Motion for Partial Accelerated Decision on Liability is denied.

Order Setting Proceeding for Hearing

The hearing in this proceeding will convene at 10:00 a.m. on Tuesday, January 23, 1996, in Providence, Rhode Island, continuing if necessary on January 24, 1996. The parties will be advised later of the exact location of the hearing.

The Regional Hearing Clerk is requested to arrange for appropriate hearing accommodations for January 23-24, 1996, and for the services of a stenographic reporter to transcribe the proceedings. The undersigned's office shall be notified upon the completion of these arrangements. When a hearing facility is acquired, a further order will issue advising the parties of the location and addressing other pertinent matters associated with the proceeding.



Andrew S. Pearlstein
Administrative Law Judge

Dated: October 5, 1995
Washington, D.C.

IN THE MATTER OF OCEAN STATE ASBESTOS REMOVAL, INC. / OCEAN STATE
BUILDING WRECKING AND ASBESTOS REMOVAL, INC., Respondent

CERTIFICATE OF SERVICE

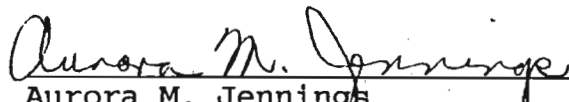
I certify that the foregoing Ruling Denying Motion for Partial Accelerated Decision and Order Setting Proceeding for Hearing dated October , 1995, was sent in the following manner to the addresses listed below:

Original by Pouch Mail to: Mary Anne Gavin
Regional Hearing Clerk
U.S. EPA, Region I
J.F. Kennedy Federal Building
Boston, MA 02203-2211

Copies by Certified Mail to:

Counsel for Complainant: Hugh W. Martinez, Esq.
Office of Regional Counsel
U.S. EPA, Region I
J.F. Kennedy Federal Building
Boston, MA 02203-2211

Counsel for Respondent: Fred J. Volpe, Esq.
Mosca and Volpe
130 Tower Hill Road
P.O. Box 444
North Kingstown, RI 02852


Aurora M. Jennings
Legal Assistant
U.S. EPA
Office of Administrative Law Judges
401 M Street SW
Washington, DC 20460

Dated: October 5, 1995
Washington, DC