9/21/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF

PANTHER VALLEY SCHOOL DISTRICT and **BILL ANSKIS CO., INC.**

Respondents

Dkt. No. CAA-III-027-T

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR PARTIAL "ACCELERATED" DECISION

Complainant moved for partial "accelerated" decision herein, on the grounds that (1) no genuine issue of material fact exists as to liability for eight violations of the Clean Air Act and the Toxic Substances Control Act charged in the complaint, and (2) Complainant is entitled to judgment as a matter of law with respect to such violations.[1] The complaint alleges four violations of the National Emission Standard for Asbestos ("the

[1] **Complainant's Motion for Partial Accelerated Decision,** received December 2, 1994, at 2.

asbestos NESHAP") by Respondents Panther Valley School District ("Panther") and Bill Anskis Company, Inc. ("Anskis"),[2] two violations of the Asbestos Hazard Emergency Response Act ("AHERA") by Respondent Panther,[3] and two violations of AHERA by Respondent Anskis.[4] Complainant's Memorandum in Support of the motion urges that every factual element of the violations charged has been established either by admission, by a preponderance of record evidence thus far, and/or by Respondents' failure to produce evidence that places any material fact at issue in response to the motion.[5]

Specifically, the complaint alleges that Respondent Anskis, as a contractor in charge of removing vinyl asbestos tiles from the Panther Valley Elementary School, and Respondent Panther, as operator of the school, failed to submit written notice of a "demolition or renovation activity" in which approximately 3000 square feet of regulated asbestos-containing material was removed from the school, failed to have on site a trained representative, failed to keep the removed material adequately wet until collected for disposal, and failed to dispose of asbestos-containing waste material as soon as practical. In addition, Respondent Panther was charged with failures to (1) notify the public of the availability of a management plan, and (2) maintain

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[2] Counts I - IV.

[3] Counts V - VI.

[4] Counts VII - VIII.

[5] **Memorandum in Support of Complainant's Motion for Partial Accelerated Decision**, received November 23, 1994, at 4-21.

a copy of the plan in the main office. Respondent Anskis was charged additionally with failure to have obtained accreditation in connection with the removal of the asbestos containing material.

Respondent Panther responded briefly to the motion by pointing out that no admissions had been made by Panther "as to the existence of asbestos, the friability of same, the removal process for material taken out of the school building . . . [and] thus Complainant's request [for summary judgment] violates [Panther's] due process rights since genuine issues of material fact do exist."[6] Noting that Complainant's Memorandum "contains conclusions of law" of the inspector "which have not been subjected to cross-examination on behalf of Panther. . . ," Panther observes that "[t]here is nowhere contained therein the tests and examinations done at the site or results of same but merely the conclusions" of the inspector.[7] It is further contended that:

> Resolution of liability on the record without according Panther . . . its due process rights is akin to being accused and found guilty as a result of an accusation without being provided the opportunity to be confronted with "evidence" to be presented or an opportunity to challenge same.[8]

Respondent Anskis responded at length to Complainant's

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[6] **Answer of Panther Valley School District to Complainant's Motion for Partial Accelerated Decision**, received December 13, 1994, at 1.

[7] Id.

[8] Id.

motion, arguing that basic factual issues are in contention, including the threshold question of whether 160 square feet of regulated asbestos-containing material had been removed during the renovation at the Panther School.

At the outset of the discussion of this matter, it is appropriate to review established principles which govern summary judgment. The opinion in Hahn v. Sargent, 523 F. 2d 461 (1st Cir. 1975) at 464 sets forth the standard for granting summary judgment:

> The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both "genuine" and "material". A material issue is one which affects the outcome of the litigation. To be considered "genuine" for Rule 56 purposes, a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). The evidence manifesting the dispute must be "substantial," Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co., Inc., 149 F. 2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. Beal v. Lindsay, 468 F. 2d 287, 291 (2d Cir. 1972).

Rule 56(e) delineates the defense required of a party which opposes summary judgment:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

To defeat a motion for summary judgment, then, the opposing party must produce evidence of a genuine dispute of material fact. A material fact is one that "affects the outcome of the litigation." Id. For such an issue to be considered genuine, there must be "'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" Id. (quoting First National Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)).

As stated in Rule 56(e), an adverse party may not rest upon the mere allegations or denials contained in the pleadings. The response must set forth specific facts which show that there is a genuine issue for trial. Thus "rule 56 requires that the opposing party be diligent in countering a motion for summary judgment, and mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." Liberty Leasing Co. v. Hillsum Sales Corp., 380 F. 2d 1013, 1015 (5th Cir. 1967) (citations omitted).

"On a motion for summary judgment, the burden is on the moving party to show the absence of a genuine issue of any material fact, and the pleadings and other documentary evidence must be construed in favor of the party opposing the motion." Otteson v. United States, 622 F. 2d 516, 519 (10th Cir. 1980). If the movant presents documents which demonstrate the absence of a genuine issue, the opposing party must produce probative

evidence sufficient to withstand the motion. See Fed. R. Civ. P. 56(e); see also Brown v. Ford Motor Co. 494 F. 2d 418, 420 (10th Cir. 1974). However, if the moving party's papers do not show the absence of a genuine issue of fact, summary judgment is not proper even if no opposing evidentiary matter is presented. See, e.g., Luckett v. Bethlehem Steel Corp., 618 F. 2d 1373, 1382-83 (10th Cir. 1980).

The purpose of the 1963 amendment of Rule 56(e) was to overturn a line of cases, primarily in the Third Circuit, which had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying upon a contrary allegation in the pleadings. Adickes v. Kress & Co., 398 U.S. 144, 160 n. 20 (1970). See Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56. Reliance upon mere allegations to the contrary in opposing summary judgment, if this were sufficient to overcome the motion, would simply force the moving party to prove its case, leaving it where it was prior to the motion. By requiring the responding party to show that it, too, has a substantial position, the Rules are intended to discourage waste of both private and public resources in resolving disputes. In short, each party must show the presence of significant evidence to support its position, such that a trier of fact, whether judge or jury, must resolve the now-shown-to-be-genuine dispute. The amended rule is an attempt to require all parties to show, at an early point, that they have a

substantial case.

Of course, the amendment was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. The Advisory Committee noted that the changes were not "designed to affect the ordinary standards applicable to the summary judgment motion. . . . Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

"It is clearly perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. . . . Yet the moving party has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required." 6 James W. Moore et al., Moore's Federal Practice, § 56.22[2] (2d ed. 1995).

Accordingly, the record here, which includes pretrial exchange by the parties, will be examined with the foregoing principles in mind.

To establish the applicability of the asbestos NESHAP work practice and disposal regulations, Complainant must show that at least 160 square feet (the "jurisdictional amount") of regulated asbestos-containing material was "stripped, removed, dislodged, cut, drilled, or similarly disturbed" in the course of demolition

or renovation.[9] At the outset, Respondent Anskis asserts that an issue exists as to whether 160 square feet of such material were in fact removed from the Panther Valley School[10] as alleged in the complaint.[11] An issue of fact as to this threshold requirement would require that Complainant's motion be denied as to the NESHAP counts (I - IV). The AHERA counts (V - VIII) are not affected by this issue, and will be considered separately.

The NESHAP Counts and the Jurisdictional Amount

In maintaining that the jurisdictional amount of regulated asbestos-containing material was disturbed by Respondent, Complainant relies principally upon the sworn statements of the EPA Inspector. The inspector states in his affidavit that:

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[9] 40 C.F.R. §61.145(a)(4)(i) of the Standard for Demolition and Renovation provides as follows:

> In a facility being renovated . . . all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of [regulated asbestos-containing material] to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is
>
> (i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components. . . .

The term "facility component" is defined at 40 C.F.R. § 61.141 as "any part of a facility including equipment," and would include the vinyl floor tile at issue here.

[10] **Memorandum in Support of Respondents, Bill Anskis Company, Inc., Answer to the Environmental Protection Agency's Motion for Accelerated Decision**, received December 14, 1994, at 4-8.

[11] **Complaint and Notice of Opportunity for Hearing**, September 10, 1993, at 10, ¶¶ 34, 39.

> [B]ased on observations of the abatement site and the RACM [regulated asbestos-containing material] debris pile stored outside the school building, the combined amount of RACM in the facility which was stripped, removed, dislodged, cut, drilled, or similarly disturbed was at least 3,000 square feet on facility components.[12]

Respondent maintains, however, that the majority of the tile in the debris pile was not "taupe" (and thus not regulated asbestos-containing material),[13] and that the EPA inspector did not take this into account in observing the debris pile:

> The EPA and Department of Environmental Resources have attempted to commingle the non-asbestos contained tile material and the asbestos tiled material into one group and characterize them incorrectly as RACM. The regulatory bodies have used an observation of a debris pile behind the elementary school and a co-mingling of the non-asbestos material with the asbestos material as their source of proof that at least 160 square feet of RACM was removed.[14]

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[12] Affidavit of Mr. Richard Ponak, Attachment A to **Complainant's Motion for Partial Accelerated Decision**, received December 2, 1994, at ¶ 9.

[13] It is undisputed that only the "taupe" colored tile was regulated asbestos-containing material. See **Memorandum in Support of Respondents, Bill Anskis Company, Inc., Answer to the Environmental Protection Agency's Motion for Accelerated Decision**, received December 14, 1994, at 7; **Complainant's Reply to Respondent Bill Anskis's Response to EPA's Motion for Partial Accelerated Decision**, received February 21, 1995, at 11.

The color "taupe" is described in Webster's New Collegiate Dictionary (1979) at 1185, as "a brownish-gray". The EPA inspector describes the asbestos-containing tiles as "gray-black." See ¶ 12 of his affidavit. In the photograph to which the inspector makes reference, the tiles appear to be brownish. CX 10, #11.

[14] **Memorandum in Support of Respondents, Bill Anskis Company, Inc., Answer to the Environmental Protection Agency's Motion for Accelerated Decision**, received December 14, 1994, at 7.

In an amended affidavit, however, the EPA inspector states that he lifted the covering of the debris pile, and "[w]ith the exception of a few blue and white tile pieces, the pile was comprised almost exclusively of broken-up taupe tiles."[15]

Nevertheless, Respondent has presented the affidavit of the superintendent of the construction work at Panther School.[16] In his affidavit, the superintendent states that he was present every day during the construction work and that "[t]here was not 160 square feet of taupe colored classroom tile removed from the Panther Valley Elementary School. There was nowhere near 160 square feet of classroom tile removed from the Panther Valley Elementary School."[17] These sworn statements contradict Complainant's evidence and raise a genuine, material issue of

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[15] Amended Affidavit of Mr. Richard Ponak, Attachment A to **Complainant's Reply to Respondent Bill Anskis's Response to EPA's Motion for Partial Accelerated Decision**, received February 21, 1995, at ¶ 12. In addition, Inspector Ponak makes reference to certain photographs from Complainant's pretrial exchange which he believes verify his observations. Id. at ¶ 13 (citing photographs #1 and 2 of Complainant's Exhibit 10). However, it is by no means clear in examining these photographs, that they "clearly evidence" that the debris pile contained "significantly more than 160 square feet of taupe RACM." Id. Only a small portion of the debris pile is exposed in the referenced photographs, and the color of the tiles is difficult to ascertain.

[16] Affidavit of Mr. Michael Treese, Exhibit 4 to **Respondents, Bill Anskis Company, Inc., Answer to the Environmental Protection Agency's Motion for Accelerated Decision**, received December 14, 1994.

[17] Id. at ¶ 4.

fact as to whether the jurisdictional amount of regulated asbestos containing-material was removed from the school. Since the jurisdictional amount is a threshold requirement for proof of the allegations recited at Counts I-IV, summary judgment as to these counts must be denied.

The AHERA Counts

Counts V and VI

AHERA provides, inter alia, that each Local Education Agency ("LEA") must prepare an asbestos management plan, make available a copy of the plan for inspection in its offices, and notify parent, teacher, and employee organizations of the availability of the plan. In pertinent part, AHERA states as follows:

> A copy of the management plan developed under the regulations shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such plan.

15 U.S.C. § 2643(i)(5).

Count V alleges that Respondent Panther failed to notify parent, teacher, and employee organizations of the availability of a management plan. Count VI alleges that Respondent Panther failed to make available a copy of a plan for inspection in its administrative offices.

Respondent Panther has conceded liability for Count VI (that

it did not make a management plan available for inspection).[18] It follows that Respondent Panther is liable for Count V, because parent, teacher, and employee organizations could not have been notified of the "availability" of a plan if such plan had not in fact been made available. As Complainant argues, therefore, Respondent Panther's denial[19] of liability as to Count V is without effect.[20]

Accordingly, no genuine issue of material fact has been raised as to either Count V or Count VI. Complainant's Motion for Partial Accelerated Decision will be granted as to these counts.

Counts VII and VIII

The AHERA provides, inter alia, that a person may not remove regulated asbestos-containing material from a school building "unless such person is accredited by a State . . . or pursuant to an Administrator-approved course. . . ." 15 U.S.C. § 2646(a). Counts VII and VIII allege that Respondent Anskis was not accredited to perform asbestos-abatement work when it removed regulated asbestos-containing materials from the Panther Valley

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[18] **Answer of Panther Valley School District to Complainant's Motion for Partial Accelerated Decision**, received December 13, 1994, at ¶¶ 66-68.

[19] Id. at ¶¶ 63-64.

[20] See **Memorandum in Support of Complainant's Motion for Partial Accelerated Decision**, received November 23, 1994, at 19.

School.[21]

In its Answer, Respondent Anskis denied liability for Counts VII and VIII.[22] However, mere denials in pleadings, without more, will not raise an issue of fact. Fed. R. Civ. P. 56(e). Rather, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Id.[23] Accordingly, Respondent Anskis has failed to raise a genuine issue of material fact as to liability for either Counts VII or VIII. Complainant's motion will be granted as to these counts.

Under the Act, Respondent Anskis "is liable for a civil penalty . . . for each day during which the violation continue[d]. . . ." 15 U.S.C. § 2647(g). Here, Respondent Anskis is liable for removing asbestos-containing tile on the dates alleged in the complaint.

ORDER

1. Complainant's Motion for Partial Accelerated Decision is hereby denied as to Counts I - IV of the complaint.

2. Complainant's motion is granted as to Counts V - VIII of the complaint.

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[21] **Complaint** at ¶¶ 70-74.

[22] **Answer of Bill Anskis Company, Inc. to the Complaint,** received October 22, 1993, at ¶¶ 70-74.

[23] See discusion, supra, at 5-6.

3. It is FURTHER ORDERED that, no later than October 20, 1995, the parties shall confer regarding the remaining counts of the complaint and shall use their best efforts to reach an agreed disposition of such counts.

4. And it is FURTHER ORDERED that the parties shall report upon the status of their effort to reach an agreed disposition no later than October 25, 1995.

J. F. Greene
Administrative Law Judge

Washington, D.C.
September 21, 1995

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on September ~~20~~ 21 1995.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: Panther Valley School District and Bill Anskis Co., Inc.
DOCKET NUMBER; CAA-III-027-T

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