

4/14/99

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
)	
Franklin and Leonhardt)	Docket No. CAA-98-011
Excavation Company, Inc.)	
)	
)	
Respondent)	

ORDER DENYING COMPLAINANT'S MOTION FOR
ACCELERATED DECISION AND RESPONDENT'S MOTION TO DISMISS

Clean Air Act--By Motion dated March 22, 1999, Complainant, the United States Environmental Protection Agency, moved, pursuant to 40 C.F.R. Sec. 22.20(a), for Partial Accelerated Decision on Liability in the above-captioned case for alleged violations of 40 C.F.R. Part 61, Subpart M and Section 113(d) of the Clean Air Act, 42 U.S.C. Section 7413(d). On March 23, 1999, Respondent, Franklin & Leonhardt Excavating Co., Inc., filed a Motion To Dismiss the administrative Complaint and Amended Complaint in this proceeding, asserting it was entitled to judgment as a matter of law. **Held: The Motions are Denied.**

Before: Stephen J. McGuire
Administrative Law Judge

Date: April 14, 1999

Appearances:

For Complainant:

Michiko Kono
Assistant Regional Counsel
U.S. EPA, Region 4
61 Forsyth St., S.W.
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For Respondent:

Alfred J. Simon, Jr., Esq.
102 Wilshire Avenue
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I. Introduction

On March 22, 1999, Complainant, the United States Environmental Protection Agency (EPA), filed a Motion For Partial Accelerated Decision on liability in the above-stated proceeding. An Amended Complaint in this matter was filed on September 23, 1998. The Complaint alleges three counts of violations of the asbestos National Emission Standard For Hazardous Air Pollutants (NESHAP) regulations, 40 C.F.R. Part 61, Subpart M: (1) failure to thoroughly inspect a facility before demolition; (2) failure to remove asbestos before demolition; and (3) failure to keep asbestos adequately wet prior to disposal of the asbestos. Respondent filed an Answer to the Complaint on or around October 2, 1998.

On March 23, 1999, Respondent filed a Motion to Dismiss the administrative Complaint and Amended Complaint in this matter and on April 6, 1999, filed a Response to Complainant's Motion For Partial Accelerated Decision. Complainant filed its Response to Respondent's Motion to Dismiss on April 5, 1999.

Complainant's Motion for Partial Accelerated Decision is grounded on the principle notion that the Clean Air Act is a strict liability statute, the purpose of which is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population..." 42 U.S.C. Section 7401(b)(1). To that end, "[t]he CAA imposes strict liability upon owners and operators who violate the Act." U.S. v. Anthony Dell'Aquila Enterprises and Subsidiaries, 150 F. 3d 329 (3rd Cir. 1998). "[T]he Act and the asbestos NESHAP provide strict liability for civil violations of their provisions...Strict liability is essential to meet the purpose of the Act to protect and improve the quality of the nation's air." U.S. v. B & W Inv. Properties, 38 F.3d 362 (7th Cir. 1994), quoting United States v. Ben's Truck and Equipment, Inc., 17 Env'tl L.Rep. 20,777, 1986 WL 15402 (E.D. Cal. 1986).

Complainant asserts that there is no genuine dispute of material fact that Respondent was the "owner or operator" of the demolition of the Lowell Elementary School Building. It states that the fact that asbestos was found after the demolition is evidence that the Respondent, the demolition contractor, failed to thoroughly inspect for the presence of asbestos prior to demolition. Complainant states that the Air Pollution Control District did not have the affirmative duty to thoroughly inspect the Lowell Elementary School building for asbestos prior to demolition. Rather, EPA argues that Respondent, as the demolition

contractor, had such an affirmative duty and should be held strictly liable for failing to thoroughly inspect for asbestos prior to demolition.

Upon review of the merits of this case and the complexity of the issues raised by the parties, there remain questions of material fact that require a formal evidentiary hearing.

II. Standard For Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes the Administrative Law Judge (ALJ) to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). See, e.g., In re CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress., 398 U.S. 144, 157 (1970). In considering such a motion, 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 Hospital Assoc., 14 F. 3rd 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's

evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90 (November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. V. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. Sec. 22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1979).

III. Discussion

A. Motion For Partial Accelerated Decision

In its Response to Complainant's motion, Respondent asserts that genuine issues of material fact exist with respect to Respondent's liability for the allegations contained in the Complaint and Amended Complaint. Respondent disputes that it failed to make an "inspection" as defined by EPA and contends that EPA's definition of what constitutes an inspection is, in fact, erroneous. Respondent further disputes that it is an "operator" as defined in 42 U.S.C. Section 7412(a)(9).

The evidence shows that Respondent made a visual inspection of the building in question, which Respondent states revealed no asbestos. Moreover, Respondent asserts that the asbestos removal contractor, hired by the owner, RAA, had completed his work and certified the building as being free of Asbestos Containing Material (ACM), before Respondent made an inspection. Respondent asserts that his contract with the owner of the property did not require him to make an inspection survey of the building. Rather, RAA, the owner, had reportedly hired a firm to perform such an inspection before the ACM removal contractor performed his work. Moreover, the evidence shows that the APCD of Jefferson County also inspected the property and similarly failed to find any ACM.

Respondent argues that it did make a reasonable inspection of the premises but denies that it had a duty to make a survey inspection which would penetrate brick walls and test for ACM. Thus, there is a genuine issue of material fact regarding the nature of the inspection conducted by Respondent and whether such inspection complied with applicable law.

Given Respondent's disputed role in the demolition of the school building, EPA's conclusion that Respondent "failed to thoroughly inspect", pursuant to the NESHAP regulations, does not necessarily follow the fact that asbestos was found after demolition. As such, EPA's factual assertion is conclusory and does not establish Respondent's liability as a matter of law. Respondent has thus raised material questions of fact pertaining to the allegations contained in the Complaint. Such questions require further factual development before the issue of liability can be properly addressed.

Respondent also disputes that it was an "operator" within the meaning of the regulations and as such, was not one who "operates, controls or supervises the demolition or renovation operation or both." Respondent argues that RAA, and its demolition project manager actually operated, controlled or supervised the building and its demolition. As support for this assertion, Respondent offers the Minutes of Pre-Construction Meeting which allegedly shows the status of the parties during this project (Minutes at P. 1-3; October 4, 1994 letter).

As such, Respondent again raises important factual questions regarding its participation in the demolition project and whether it was responsible for the discovery and removal of any ACM material. It is thus disputed whether Respondent, as EPA alleges, was the "owner or operator of the demolition of the Lowell Elementary School Building". EPA bears the burden of establishing this legal conclusion and Respondent must be given an opportunity to present evidence in its defense of this allegation.

Upon review of the record, Respondent has introduced sufficient argument and evidentiary support which contests EPA's assertion of liability and raises numerous questions of material fact which require development at an evidentiary hearing. Complainant has thus failed to meet its burden that it is entitled to judgment as a matter of law on the issue of liability. For these reasons, Complainant's Motion For Partial Accelerated Decision is **Denied**.

B. Respondent's Motion To Dismiss

Respondent raises many of the same issues as addressed above as support for its Motion To Dismiss the administrative Complaint in this proceeding. Essentially, Respondent's Motion states that 1) it inspected the building for asbestos before demolition; 2) it had no contractual duty to remove or contain asbestos containing material; 3) it had no legal duty to remove or contain asbestos containing material; and 4) any law or regulation that requires the Respondent to remove or contain asbestos without compensation is a violation of the Respondent's Constitutional rights. Respondent also attached an affidavit of Robert L. Leonhardt, Sr., as support for its motion.

Addressing Respondent's last argument first, there is no evidence that its fifth amendment rights in this case have been violated. Respondent acknowledges that EPA's legal position does not actually "take" any property of F & L, but argues that EPA's interpretation of the law requiring F & L to expend sums of money to make RAA's land comply with the law, if enforced, constitutes a prohibited "taking" without just compensation.


Such argument is without merit. Only upon a legal determination that Respondent is an "owner or operator" under the NESHAP regulation at 40 C.F.R. Section 61.141, will Respondent be potentially liable for any penalty proposed by the Agency. Further, to the extent that F & L's argument challenges the constitutionality of the Clean Air Act, the undersigned declines to address such challenge as the Administrator has no authority to declare an Act of Congress unconstitutional. *See, In Re Chem-Nuclear Systems, Inc., and Chemical Waste Management, Inc. (CERCLA Petition No.94-11), 6 EAD 445, 468 (April 29, 1996).*

Respondent's remaining arguments fail to establish a basis for dismissing the Complaint in this proceeding. Although there exist questions of material fact regarding Respondent's role in the demolition of the Lowell school building, and which are sufficient to defeat Complainant's Motion for Accelerated Decision, such disputed facts do not establish grounds by which the Complaint should be dismissed. Rather, these issues are best addressed at an evidentiary hearing on the merits. For these reasons, Respondent's Motion to Dismiss is **Denied**.

IV. Order

Accordingly, for the above-stated reasons, Complainant's Motion for Partial Accelerated Decision and Respondent's Motion to Dismiss are **Denied**.

Upon a determination of a request by the parties for Alternative Dispute Resolution (ADR) status for this case, a separate Order will issue setting this case for hearing.



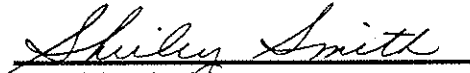
Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

NAME OF RESPONDENT: Franklin and Leonhardt Excavation Company, Inc.
DOCKET NUMBER: CAA-98-011

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND RESPONDENT'S MOTION TO DISMISS are sent to the counsel for the complainant and counsel for the respondent on APRIL 14, 1999.



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