

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty
Order Issued to Asbestos Control
Consulting Team, Inc. (ACCT).

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

Administrative Law Judge Kathleen D. Sheehy conducted a hearing in this matter on October 8, 2002, at the Office of Administrative Hearings, 100 Washington Avenue South, Minneapolis, Minnesota. There were no post-hearing submissions.

Jennifer Beens Harper, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared for the Department of Health (the Department).

Richard Neumann, 7290 Morris Thomas Road, Cloquet, Minnesota 55720, appeared pro se for Asbestos Control Consulting Team, Inc. (ACCT).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the Commissioner may not make the final decision until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Jan Malcolm, Commissioner of Health, 85 East Seventh Place, Suite 400, St. Paul, MN 55101, to find out how to file exceptions or present argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Should the Administrative Penalty Order, assessing forgivable and nonforgivable penalties in the amount of \$6,500 against ACCT, be affirmed?

The Administrative Law Judge concludes that the Administrative Penalty Order should be affirmed.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Facts

1. ACCT is a licensed asbestos abatement contractor in Cloquet, Minnesota. Richard Neumann is its owner and president.
2. Danial Miller is an inspector with the Department. His job responsibilities include conducting inspections of asbestos-related projects. On June 12, 2001, Miller was at the Chisholm Junior High School at 301 Fourth Street SW in Chisholm, Minnesota, to inspect a project involving asbestos removal from a mechanical room for which the Department had issued a permit. While in the building, Miller noticed that another asbestos-related project, for which no permit had been issued, was apparently in progress in an office area. The area was posted with asbestos warning signs, there was plastic sheeting covering the windows and doorways, workers were using water to control emissions, and there was a HEPA fan unit exhausting to the outside and an air sampling pump in operation.
3. ACCT was the contractor for the project in the office area, which involved removal of approximately 750 sq. ft. of asbestos-containing floor tile with floor scrapers (also known as spud bars within the industry). Workers had removed approximately half of the tile, which was crumbled.¹ The pieces ranged in size from dust to larger fragments about the size of a hand. Miller collected samples of the tile debris and took photographs of the area.² He also picked up a handful of debris and was able to crumble it with hand pressure. Subsequent analysis by Braun Intertec showed that the tile was approximately 3% chrysotile asbestos and that the black adhesive used to glue the tile to a subfloor was 2% chrysotile asbestos.³
4. Miller stopped work on the project on the basis that the tile had become friable⁴ during removal, rendering the project one that was subject to all of the Department's asbestos rules, including the use of a full containment of

¹ Ex. 1.

² Ex. 2.

³ Ex. 5.

⁴ "Friable" asbestos material is any material containing more than one percent asbestos that, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure. See Minn. R. 4620.3100, subp. 21. There is no dispute that the project was large enough (in excess of 160 sq. ft.) to be considered regulated "asbestos-related work" under Minn. Stat. § 326.71, subd. 4.

plastic sheeting. ACCT ultimately completed the work by cutting apart and removing the wood subfloor to which the tile had been glued.

5. ACCT's owner, Richard Neumann, believed that the project was not a regulated project subject to all Department rules because the workers were using manual methods to remove the tile, as opposed to mechanical equipment such as electric buffers or hydraulic chippers. The precautions he took on the site complied with OSHA regulations, but did not comply with a number of Department rules.

Procedural History of Administrative Penalty Order

6. By letter dated October 12, 2001, the Department notified ACCT that it had found six statutory and rule violations and sought ACCT's response to the findings within ten days. The violations were as follows: (1) failure to notify the Department of asbestos-related work, in violation of Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1; (2) failure to pay the project permit fee, in violation of Minn. Stat. § 326.75, subd. 3, and Minn. R. 4620.3430, subp. 2; (3) failure to seal all penetrations with polyethylene sheeting to achieve an air-tight seal, in violation of Minn. R. 4620.3567 (E); (4) failure to place wall sheeting over all the wall surfaces of the work area, in violation of Minn. R. 4620.3568, subp. 3; (4) failure to have a decontamination unit attached to the work area, in violation of Minn. R. 4620.3569, subp. 1 (D), and *id.* 4620.3569, subp. 5; (5) failure to establish a negative pressure of at least 0.02 inches of water within the work area, in violation of Minn. R. 4620.3570, subp. 4 (B); and (6) failure to measure the negative pressure in the work area with a recording manometer, in violation of Minn. R. 4620.3570, subp. 4 (C).⁵

7. ACCT responded on October 30, 2001, contending that the rules cited were not applicable to the project because the workers had used manual methods of removal and the tile had not become friable.⁶

8. On May 17, 2002, the Department issued an Administrative Penalty Order seeking corrective action and assessing a forgivable penalty in the amount of \$500 for failure to pay the project permit fee and a nonforgivable penalty in the amount of \$6,000 for the remaining violations.

9. ACCT appealed the Administrative Penalty Order by letter dated June 19, 2002 and requested that a hearing be scheduled within 90 days.⁷ It has not taken the corrective actions or paid the penalties.

⁵ Ex. 3.

⁶ Ex. 4.

⁷ Ex. 11. *See also* Minn. Stat. § 144.991, subd. 5, which provides that the person subject to an administrative penalty order may request an expedited hearing, to be held within 30 days of the request for hearing, unless the parties agree to a later date.

10. The Department issued a Notice and Order for Hearing on September 5, 2002, setting the hearing to take place on September 26, 2002. The hearing date was continued by agreement of the parties to October 8, 2002.

Calculation of the Penalty

11. The Department's Division of Environmental Health has a Plan for Use of Administrative Penalty and Cease and Desist Authority, as required by Minn. Stat. § 144.99, subd. 7.⁸ The plan incorporates the statutory directive that the commissioner is to consider the following factors in determining the amount of the penalty: (1) the willfulness of the violation, (2) the gravity of the violation; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained through the violation; and (6) other factors as justice may require.⁹ The plan also incorporates the statutory provision that the commissioner may deem repeated or serious violations to be nonforgivable,¹⁰ and it defines serious violations as those showing disregard of requirements or standards, or violations that present an actual or potential danger to the public health or natural resources.¹¹

12. All the violations alleged in the Administrative Penalty Order issued to ACCT, except for the failure to pay the project permit fee, are defined as serious violations in Appendix A to the Plan, and as such the Department deems them nonforgivable.¹² The Plan does not define the failure to pay a project permit fee as a serious violation.

13. The Department found, consistently with the Plan, that all the violations alleged against ACCT were serious and nonforgivable except for the failure to pay the project permit fee.

14. The Plan further provides that in calculating the base penalty, the Department should consider both the extent of the potential for harm and the extent of deviation from compliance with the rule or statute violated. The Department uses a matrix that sets a penalty range for minor, moderate, and severe potential for harm on one axis and minor, moderate, or severe deviation from compliance on the other. Using this matrix, the Department calculated a \$500 forgivable penalty for the failure to pay the project permit fee and a \$6,000 forgivable penalty for the remaining five violations.

15. The Plan then requires the Department to determine whether any adjustments should be made to the base penalty for repeat violations, for willfulness of the violation, history of past violations, number of violations,

⁸ Ex. 10.

⁹ Minn. Stat. § 144.991, subd. 1; see *also* Ex. 10 at 10-11.

¹⁰ Minn. Stat. § 144.991, subd. 4(b); see *also* Ex. 10 at 13.

¹¹ Ex. 10 at 14.

¹² Ex. 10 at 14-15 & A10-11.

economic benefit gained, and other factors as justice may require.¹³ In this case, the Department made no adjustments to the base penalty for any of these factors.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Department have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. § 144.991, subd. 5.
2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements have been fulfilled.
3. As the party proposing that action be taken, the Department has the burden of proving the facts at issue by a preponderance of the evidence.¹⁴
4. Minn. Stat. § 144.99, subd. 7, requires the Department to use its Plan for Use of Administrative Penalty and Cease and Desist Authority in determining whether to issue an administrative penalty order.
5. Minn. Stat. § 144.991, subd. 4(B), allows the Department to assess a nonforgivable penalty in the case of repeated or serious violations.
6. The Department's determination that the failure to pay the project permit fee is a violation that is neither serious nor repeated is consistent with the Plan, and the Department followed the provisions of the Plan in assessing a forgivable penalty in the amount of \$500 for this violation.
7. The Department's determination that the remaining violations are serious is consistent with the Plan, and the Department followed the provisions of the Plan in assessing a nonforgivable penalty in the amount of \$6,000 for these violations.
8. The Department properly considered the factors contained in Minn. Stat. § 144.991, subd. 1, in calculating the amount of the penalty. The penalty is reasonable in light of the statutory factors.
9. The statute precludes the Administrative Law Judge from recommending a change in the amount of the proposed penalty unless the Administrative Law Judge determines that the amount of the penalty is unreasonable based on the statutory factors.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

¹³ Ex. 10 at App. C-6.

¹⁴ Minn. R. 1400.7300, subp. 5.

RECOMMENDATION

That the Administrative Penalty Order imposing a forgivable fine of \$500 and a nonforgivable fine of \$6,000 against ACCT be AFFIRMED in all respects.

Dated: October 15, 2002

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Health is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded.

MEMORANDUM

The only factual issue raised in the hearing is whether the floor tile was rendered friable during the removal process so as to make the project subject to the Department's full containment rules. Friable asbestos material, as noted above, is defined as material that may be crumbled, pulverized, or reduced to powder by hand pressure, including previously nonfriable material that becomes damaged to the extent that it may be crumbled, pulverized, or reduced to powder by hand pressure.

During the hearing the Department appeared to focus mainly on the fact that the tile at the work site undeniably was crumbled and powdery, and not so much on whether hand pressure (as opposed to the tools) could produce this result. The Department's witness testified, only after the Department had rested its case and in response to a question by the Administrative Law Judge, that he was able to and did in fact crumble the tile fragments with hand pressure. ACCT's owner attempted to demonstrate during the hearing that he was not able to crumble the small bag of tile debris collected by the Department using hand pressure. Although neither witness was entirely convincing on this issue, the Administrative Law Judge has accepted the testimony of the Department's witness because he had a better opportunity to make this determination using larger pieces of tile at the work site.

In addition, ACCT maintains that the Department has not interpreted the rule defining friable material consistently, pointing to a publication issued by the Department in July 1996. The publication, entitled "Removal of Asbestos Flooring," has an attachment called a "Flooring Work Practice Matrix."¹⁵ The matrix states, in the column describing high-risk activities, that all MDH rules must be followed when "greater than 160 square feet of flooring will be sanded, abraded, ground, or mechanically chipped in order to remove the flooring." The column pertaining to moderate-risk activities, for which compliance with Department rules is optional, addresses the removal of less than 160 square feet of flooring that is "made friable due to forces used in removal of that flooring."

Although it is not crystal clear from the matrix, the rule itself is clear that it is the amount of friable material involved (more or less than 160 square feet), not the method of removal, that determines whether the project is a regulated project. The first page of the document does clearly state that flooring can be made friable during removal, and that "removal of friable flooring, in quantities greater than 160 square feet, must be performed according to all Minnesota Department of Health asbestos rules, including the use of a full containment constructed of plastic sheeting." When read carefully as a whole, the document is not inconsistent with the Department's rule defining friable material.

The work practice matrix, however, is confusing and does interject the suggestion, found nowhere in the rules, that the method of removal may affect the amount of regulation. In July 2002, after the date of the Administrative Penalty Order in this case, the Department issued a letter to regulated parties stating that:

Building owners and contractors, both licensed and unlicensed, believe that using spud bars, ice chippers, etc., is always a nonregulated removal method because hand tools are being used. Using hand tools to remove floor tile does not mean the floor tile will remain in a nonregulated state.

The letter advises contractors that if floor tile becomes damaged or will become damaged during removal, then it will be subject to Department regulation.¹⁶

In considering "other factors that justice may require" under Minn. Stat. § 144.991, subd. 1, the Department could consider whether its work practice matrix played any part in contributing to ACCT's confusion, which is apparently shared by many other building owners and contractors, about which projects are fully regulated and which are not. The Department could make a determination that the penalty should be reduced for this reason. The Administrative Law Judge cannot say, however, that the penalty as it stands is unreasonable in light of the statutory factors.

K.D.S.

¹⁵ Ex. 12.

¹⁶ Ex. 13.