

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of REM-CON, Inc.
Administrative Penalty Order
Dated October 30, 1995

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

A hearing in this matter was held before Allan W. Klein, Administrative Law Judge, in St. Paul, Minnesota, on January 29, 1996.

Appearing on behalf of the Minnesota Pollution Control Agency was Adonis A. Neblett, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127.

Appearing on behalf of REM-CON, Inc. were Michael Cakora and Thomas Basara, REM-CON, Incorporated, 8501 Evergreen Boulevard, Coon Rapids, Minnesota 55443.

The record closed on January 30, 1996, upon receipt of material from the Assistant Attorney General.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made 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 Charles Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-4194, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Did REM-CON, Inc. violate Minn. Rule pt. 7011.9920, which incorporates by reference the requirements of 40 C.F.R. pt. 61.145, while removing asbestos from the Sakura restaurant site in St. Paul? If there were violations, is \$10,000 an unreasonable penalty?

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

FINDINGS OF FACT

1. REM-CON, Inc. filed between 51 and 100 notices of intent to perform asbestos projects during federal fiscal year 1995. Its personnel are familiar with state and federal regulation of the handling of asbestos-containing materials.

2. On May 1, 1995, REM-CON submitted a notification form to the Agency, indicating REM-CON's intent to perform a renovation project at the Sakura Restaurant on Sixth Street in St. Paul. Ex. 9. According to the form, REM-CON would be removing 3,550 square feet of asbestos-containing materials between May 15, 1995 and May 19, 1995. The total cost of the asbestos project was estimated to be \$19,170.

3. On May 16, 1995, at approximately 2:15 p.m., agency inspectors Jeffrey T. Connell and Jess W. Richards arrived at the site for an inspection. They learned that the project involved removal of a ceiling, which consisted of a metal grid that supported wire mesh. Asbestos-containing plaster had been applied to the wire mesh. Both the plaster and mesh were being removed, while the metal grid structure was allowed to remain.

4. The work area had been properly sealed off by the construction of a plastic barrier on all four sides plus plastic on the floor, as well as a five-stage decontamination unit. There was a HEPA filter, a blower which created a negative air pressure within the containment area, and a variety of other systems mandated by federal and state rules which are not at issue in this proceeding.

5. A number of coats of latex paint had been applied to the bottom surface of the plaster ceiling over the years. These layers of paint repelled water, thus frustrating any attempt to water the ceiling from below before demolition. Therefore, the ceiling was watered from above for approximately one-half hour before any destruction began. The upper surface of the ceiling was unpainted, but the plaster itself was dense, so that even applying water to that surface did not thoroughly wet through the ceiling. See, generally, Letters from REM-CON of August 14 (Exhibit 12) and November 30 (Attachment B to Notice of and Order for Hearing).

6. The procedure used for actually removing the asbestos-containing plaster involved workers climbing into the crawl space between the ceiling and the next floor, and then hammering on the ceiling plaster. This would cause the plaster to break away from the mesh, and fall to the floor below.

7. Jeffrey Connell, the inspector inside the containment area, observed this process and took photographs. He observed visible emissions (plaster dust) coming from the ceiling where a worker was hammering. He also observed small and large chunks of plaster falling to the floor below. As these chunks hit the floor, they broke into small pieces, creating a visible cloud of dust as the material shattered. See, generally, Exhibit 10, photographs 1, 2, 3, 4 and 5.

8. The distance between the ceiling and floor was substantial, on the order of 15 feet. In addition, there was a stairwell leading from the floor level to yet another floor below, which was roughly another 15 feet below the upper one. Pieces of plaster were observed falling from the ceiling, hitting a railing around the top of the stairwell,

shattering into smaller pieces, which then fell into the stairwell and the floor of the lower level. This is documented on Exhibit 10, photographs 3, 5, 7 and 8.

9. While the workers were hammering on the ceiling in order to release the plaster, there was no water being applied to the ceiling from either the top or the bottom. However, there was a worker at the bottom who had a water hose available. When the inspector first arrived, there was no water being applied by that worker. However, when the inspector started taking photographs, that worker began spraying water on the plaster which had fallen to the floor. The inspector noticed and documented the fact that both on the floor immediately below the ceiling and on the steps going down to the lower level, there was a mix of both wet and dry plaster. The two can be distinguished by their color differences, with the wet plaster being a brownish or tannish color, while the dry plaster was white or gray. The inspector determined that at least some of the dry plaster had been on the floor before he arrived.

10. The inspector took pictures and also took three samples of the plaster material on the floor and staircase. These samples were analyzed by Braun Intertech, and found to contain ten percent chrysotile asbestos. Ex. 14.

11. On May 16, Connell prepared an asbestos renovation inspection checklist, indicating that (1) asbestos-containing material was not adequately wet during the stripping operation; (2) asbestos-containing material was not adequately wet until collected and contained; (3) asbestos-containing material was not lowered to the floor without disturbing it; and (4) there were visible emissions from the stripping operation. He determined that these constituted violations of 40 C.F.R. § 61.145(c)(3) (not adequately wet during removal operation); 40 C.F.R. § 61.145(c)(6)(i) (not adequately wet until collected and contained); and 40 C.F.R. §61.145(c)(6)(ii) (not carefully lowering the material to the ground).

12. On July 19, 1995, a staff enforcement screening committee met to discuss what action should be taken as a result of the inspection. Connell, who was the "case lead" staff person (and who also happens to be the asbestos team leader for the agency staff) prepared a case development form prior to the meeting. Ex. 4. It noted that out of the 51-100 notices of intent to remove asbestos which the company had filed during federal fiscal year 1995, there had been 11 inspections. Those 11 inspections yielded only one enforcement action, which was based on a February 2 inspection at a site referred to as "TCAAP". That violation was for dry asbestos-containing material on the floor of a containment area, which was exactly the same violation as one of the three noted in the Sakura inspection. The company had been sent a request for information letter on March 20, outlining the earlier violation and the rule which was at issue. Based on the similarity of the two, Connell (and later the committee) treated it as a "previous violation". On June 2, the company had been sent an administrative penalty order assessing a \$1,667 nonforgivable penalty for the earlier violation. While this order was not issued until after the Sakura inspection had occurred in mid-May, Connell reasoned that the oral notice given in February and the letter of March 20 put REM-CON on notice of the prohibited conduct.

13. The enforcement case screening committee for the Sakura case met on July 19 and determined to issue an administrative penalty order.

14. On August 2, Connell sent a “ten-day letter” to the company. Ex. 11. This letter alleged the three violations which Connell had initially outlined, and requested a response from the company.

15. On August 14, the company responded. Ex. 12. The general thrust of its response was that the paint and nature of the plaster made it impossible to wet it prior to removal, that the only reason there was dry plaster on the floor was because the inspector had interrupted the employee who was keeping it wet, and, finally, that there was no practical way to “carefully” lower the plaster to the ground, given its placement and the need for worker safety. The gist of this last point can be grasped from the following excerpt:

I will acknowledge that our approach was not elegant, but it was practical from a safety viewpoint. I am most interested in any recommendation you might have for removing and bagging this material without letting it fall to the floor. We had a worker on a black-iron structure with wire mesh to worry about; hammers slip, mesh gives way, and we did not want a worker directly beneath catching a hammer instead of some plaster. In every project we perform, we have to protect our workers from more than asbestos hazards.

Attached to the company’s response letter was a report of air monitoring conducted during the project by an independent testing company. That report indicates that the project was well within regulatory limits outside of the enclosure. Ex. 12.

16. On August 29, the enforcement committee met a second time. It reaffirmed its initial determination that an APO was the appropriate enforcement tool, and determined that the violations were serious and of high gravity, that the company did have a previous documented asbestos violation, but that there was no willfulness involved nor was there any economic savings to the company. Based upon these determinations, the group computed a base penalty of \$9,000 and an additional penalty of \$1,000. They determined that the total penalty of \$10,000 should be nonforgivable.

17. These decisions are consistent with the guidelines contained in the Agency’s Enforcement Response Plan, particularly Attachment 3E, relating to asbestos noncompliance and Exhibit 4B, an asbestos APO penalty calculation worksheet. Those documents classify a “failure to wet” type of violation as “high severity, nonforgivable”.

18. On November 1, 1995, the administrative penalty order itself was issued. It cited the three violations discussed earlier, ordered corrective action, and assessed a \$10,000 nonforgivable penalty.

19. On November 30, REM-CON prepared a demand for an expedited hearing, which was received by the Attorney General on December 1.

20. On December 15, the Commissioner issued the Notice of and Order for Hearing, setting the hearing in this matter for February 8, 1996. At the request of the company, the hearing date was moved forward to January 29, 1996. The hearing did take place on January 29, and concluded within half a day.

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

CONCLUSIONS

1. The Commissioner of the Minnesota Pollution Control Agency and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 116.072 (1994).

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Administrative Law Judge.

3. The Minnesota Pollution Control Agency has statutory jurisdiction to regulate the removal of asbestos-containing materials from an indoor renovation project pursuant to Minn. Stat. § 116.07, subd. 4 (1994).

4. Minn. Rule pt. 7011.9920 incorporates by reference the provisions of 40 C.F.R. § 61.145, the Federal Asbestos NESHAP.

5. REM-CON, Inc. violated 40 C.F.R. § 61.145(c)(3), and, therefore, Minn. Rule pt. 7011.9920, by failing to adequately wet asbestos-containing material during a stripping or removal operation.

6. REM-CON, Inc. violated 40 C.F.R. § 61.145(c)(6)(i), and, therefore, Minn. Rule pt. 7011.9920, by failing to adequately wet all asbestos-containing material and ensure that it remained wet until collected or contained.

7. REM-CON, Inc. violated 40 C.F.R. § 61.145(c)(6)(ii), and, therefore, Minn. Rule pt. 7011.9920, by failing to carefully lower asbestos-containing material to the floor without damaging or disturbing the material.

8. The Commissioner appropriately considered all of the factors listed in Minn. Stat. § 116.072, subd. 2 (1994), including the seriousness of the violation and Respondent's history of noncompliance. Based upon those considerations, the Commissioner's determination of the amount of the penalty, and its nature as a nonforgivable penalty, were within his discretion and are not unreasonable.

9. It is not appropriate to assess any costs of the proceeding against REM-CON, since the appeal was not frivolous.

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

RECOMMENDATION

That the Administrative Penalty Order, assessing a nonforgivable penalty against REM-CON, Inc. in the amount of \$10,000, be enforced.

Dated this 8th day of February, 1996.

/s/ _____

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded, No Transcript Prepared.

NOTICE

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

MEMORANDUM

I.

The company raises an initial objection to the Agency's application of the NESHAP because, the company argues, the NESHAP is designed to prevent escape of asbestos to the outside air but, in the company's case, the company was using the plastic containment, HEPA filters, negative air pressure, and other measures to protect the outside air so that the acts complained of only affected the inside air and thus were not in violation of the rule. This argument was rejected by the federal EPA years ago. See 40 Fed. Reg. 48,295 (1975). Indeed, the NESHAP itself refers to such "engineering controls" as local exhaust ventilation, negative pressure enclosures, and HEPA filters in the final subparagraphs of § 61.145(c), so that it cannot be seriously claimed that the controls are a substitute for the work practices required in the NESHAP. Instead, the more plausible reading is that both the engineering controls and the work practices are required to be followed, albeit by different sets of rules. That was the position advocated by the Agency, and it is the position which the Administrative Law Judge adopts as the correct one.

II.

The facts of what the inspector saw are not seriously in dispute. They support the two wetting violations. While the company does not concede either of the violations, there is no serious doubt about them. The company raises more substantial objections to the last of the violations, the one alleging a failure to "carefully lower" the plaster from the ceiling to the floor without unnecessarily disturbing it.

The first objection raised by the company is a legal one: that the requirement to "carefully lower" does not apply to what it was doing. It bases this upon its understanding of the structure of 40 C.F.R. § 61.145(c). The company believes that subparagraph (6) refers to the handling and movement of material that has already been removed or stripped, and not to the act of removing or stripping itself. The Administrative Law Judge disagrees. Subparagraph (6) begins with the language "For all RACM, including material that has been removed or stripped" It does apply to all RACM, whether in the process of being stripped, or after it has been stripped.

The second objection which the company raises to the idea of “carefully lowering” is a practical one -- that there is no practical way to remove the asbestos-containing plaster other than hitting it with a hammer from above, and that there is no practical way to prevent the plaster from falling to the floor and breaking. As noted in the Findings, the company argues that worker safety concerns prevent a worker from standing underneath the work area and somehow catching the plaster as it falls. There are other alternatives, however, which could be used. The agency staff suggested some in Exhibit 13, including scaffolding, chutes, or hand-lowering. At the hearing, there was also talk about erecting a false floor, but that was rejected by the company as unrealistic for this project. What would be more realistic would be a tall, but small, movable scaffold, from which was hung a plastic bag, which could be rolled under the area where the hammering was taking place so that plaster would fall a few feet into the bag, rather than falling 15 feet onto the floor. The Administrative Law Judge understands that the purpose of the rule is to prevent the dropping of asbestos-containing materials such that they will break up and release fibers to the air. The photographs vividly demonstrate that allowing the asbestos to fall for 15 feet, or in some cases 30 feet, created exactly the kind of situation the rule was designed to prevent. The Administrative Law Judge agrees with the company that any prevention measure will cost additional money, but the rule requires it must be done.

AWK