BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CENTRAL INDUSTRIES, INC. Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-88 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (Draft)

Central Industries, Inc. and Baugh Construction Company appealed to this Board Puget Sound Air Pollution Control Agency's ("PSAPCA") issuance of Notice and Order of Civil Penalty (No. 6680; $1,000) for alleged January 22, 1987 violations of PSAPCA's Regulation I, Sections 10.04 and 10.05 in handling asbestos. This became our PCHB Nos. 87-88 and 87-155. Subsequently, Baugh and PSAPCA settled, and an Order of Dismissal in PCHB No. 87-155 was entered.

The formal hearing was held on April 18, 1988 and May 13, 1988. Appellant Central was represented by Attorney Douglas W. Elston of

Ulin, Dann, Elston & Lambe. Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin and McGoffin. Court reporters affiliated with Gene Barker & Associates recorded the hearing.

Argument was made, sworn testimony given and exhibits admitted. All Board members have reviewed the record. From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency is an activated air pollution control authority under the terms of the State of Washington Clean Air Act, responsible for monitoring and enforcing emission standards for hazardous air pollutants, including work practices for asbestos. PSAPCA has filed with the Board certified copies of its Regulation I (including all amendments thereto).

The Board takes official notice of the Regulation (as amended).

II

Central Industries, Inc. ("Central") is an asbestos removal company in existence since 1985. (Prior to then its name was Central Painting.) Baugh Construction hired Central to remove and dispose of all asbestos from buildings located at or near 1105 James Street in Seattle, Washington prior to the buildings' being demolished.

III

The PSAPCA Notice and Order of Civil Penalty alleges that Central, inter alia, violated WAC 173-400-075 and Regulation I on or about

January 22, 1987, at the above address, by failing to:

1. remove all asbestos from a facility prior to its wrecking or dismantling (Reg. I, Section 10.04(a));

2. collect for disposal at the end of the working day the removed asbestos. (Section 10.04(b)(2)(iii)(B));

3. contain that asbestos removed or stripped in a controlled area at all times prior to transportation for disposal (Section 10.04(b)(2)(iii)(C)); and

4. treat the asbestos with water and seal it in leak-tight containers while wet (Section 10.05(b)(1)(iv)).

A $1,000 fine was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous air Pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

> causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irrecersible, or incapacitating reversible illness. Section 112.

Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 28, 1988), citing Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10. PSAPCA's regulations govern work practices.

VI

On January 22, 1987, a trained PSAPCA inspector, assigned to a routine inspection of a demolition project at 1105 James Street, Seattle, Washington, went to the site. The demolition included several woodframe multi-unit buildings in a half-block area at James and Boren Streets intersection. The first inspector was joined on-site by a second inspector. No Central personnel were seen on-site that day. Demolition was already underway, and a "cat" was scooping up debris for disposal. Hoses were being used to control dust.

The inspectors went to an area, formerly a room north of the boiler room where they saw material that looked like asbestos. In the former boiler room itself on the floor of the foundation, they saw among the debris, pieces that appeared to be asbestos. Several pieces were the size of an inspector's fist. Photographs and a sample (3 to 4 teaspoons) were taken. The material was water-soaked. The sample was labeled and a chain of custody prepared. Tests conducted revealed that the sampled material contained 50% chrysotile asbestos.

VII

Prior to January 22, 1987, Central had been removing asbestos from the buildings, including asbestos from pipe chases that were below the building's floors, but above the cement foundation. In at least five previous PSAPCA inspections, the inspector had seen Central workers removing asbestos at this site, but had observed no violations.

Central's workers had inspected the building prior to demolition, found no remaining asbestos, and told the demolition company to proceed. Central's foreman on January 21, 1987 did an inspection during demolition and saw no asbestos. Central had an independent air pollution reading done and it produced nothing to indicate the presence of significant amounts of ambient asbestos fibers.

VIII

Based upon the inspection, PSAPCA issued Notices of Violation (Nos. 021517 and 021518), and thereafter Notice and Order of Civil Penalty (No. 6680) which is the subject of this appeal to the Board.

IX

Under all the facts and circumstances, we find that it is more probable than not that the asbestos pieces found in the former boiler room at the demolition site were the result of Central's work. Central had a responsibility to remove all asbestos prior to demolition and failed to do so.

X

Central admitted to two prior penalties for violating asbestos regulations. Both were paid, although the company maintains that one

of them was issued in error.

XI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under PSAPCA Regulation I, Section 10, implementing the Washington Clean Air Act, Chapt. 70.94 RCW.

II

We conclude that the material tested was "asbestos material" as defined by Regulation I, Section 10.02(e).

Regulation I, Section 10 provides for liability on a strict basis; negligence need not be found. This strict liability standard supports the goal of preventing harm, because asbestos is a hazardous material which may reasonably be anticipated to cause serious irreversible illness. (See Finding of Fact IV, infra).

Any diligence undertaken by appellant would be weighed against the amount of the fine, rather than negate basic liability.

III

We conclude that Central violated Regulation I, Section 10.04(a) by failing to remove all asbestos prior to the demolition. Moreover, Central employees affirmatively told the demolition company to

proceed. None of the exemptions to 10.04(a) have been alleged, nor evidence submitted, therefore we need not address them.

IV

We conclude that uncontained asbestos pieces left as a result of Central's work violated Regulation I, Sections 10.04(b)(2)(iii)(B) and (C).

V

We conclude that Central violated Regulation I, Section 10.05(b)(1)(iv). The company behaved as if its work was concluded, and demolition was underway. The asbestos found was wet, but it was in the open air awaiting disposal, and not in a leak-tight container. That situation constituted that very condition this regulatory work practice was designed to prevent, i.e. at the conclusion of the asbestos work, all asbestos is to be disposed of properly in leak-tight containers. Kent School District and Savage Enterprises v. PSAPCA, PCHB Nos. 86-190 and 195. (November 6, 1987). Since Central had completed the job (in its view), its disposal duty clearly had arisen. Id.

V

In concluding that violations have occurred, we find unpersuasive appellant's legal argument that the Notice and Order of Civil Penalty so lacked particularity that the penalty must be dismissed. Pleadings in civil penalty serve primarily a notice function. Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985). We conclude the Notice

and Order fulfilled that function.

Furthermore, the engines of pre-trial discovery (as encompassed by Superior Court Civil Rules) were available to appellant to more precisely focus the case, should the pleadings pose questions. WAC 37-108-031. Northshore School District #417 and Savage Enterprises, Inc., PCHB No. 86-179 (March 22, 1988). There is no indication that appellants availed themselves of such procedures.

VI

The purpose of civil penalties is to promote future compliance with the law, both by these parties and the public at large. Kent, supra, citing AK-WA, Inc. v. PSAPCA, PCHB No. 86-111 (February 13, 1987). The reasonableness of penalties is based upon several factors, including the scope of the violation and appellant's conduct.

We conclude that Central's efforts merit some reduction of the penalty. The reduction is to some degree lessened by Central's prior record.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

Notice and Order of Civil Penalty is AFFIRMED, with the $1,000 penalty reduced to $750.

SO ORDERED this 30th day of August, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman