

inspect for asbestos would constitute violations of § 112 of the Act, 42 U. S. C. § 7412(b), as well, since the Act provides that violations of the implementing regulations constitute violations of the Act itself. A civil penalty of \$31,200 is sought by Complainant for the violations alleged.

Complainant moved for summary decision as to liability for both counts on the grounds (1) that no material facts remain to be determined with respect to the alleged violations, and (2) that Complainant is entitled to judgment as a matter of law based upon the facts. For the reasons set forth below, it is determined that Complainant's motion will be granted with respect to Count I, and denied at this time as to Count II.

Count I of the Complaint - Failure to Notify.

40 C.F.R. § 61.145(b), *Notification Requirements*, provides as follows:

Each owner or operator of a demolition or renovation activity to which this section applies shall:

(1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U. S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(2) Update notice, as necessary, including when the amount of asbestos affected changes by at least 20 percent.

(3) Postmark or deliver the notice as follows:

(i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4)

described in paragraphs (a) (1) and (4) [except (a)(4)(iii) and (a)(4)(iv) of this section]. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

Under these provisions, the owner or operator of a "demolition activity" where there is no asbestos-containing materials, or where the combined amount of such material is less than 260 linear feet¹, must notify the U. S. Environmental Protection Agency (EPA) Administrator in writing ten days in advance of demolition of the intention to demolish. Complainant charges that such notice was not given.

Respondent takes the position that either owner or operator may provide the notification, and that it, as the owner, did not notify EPA because the salvage contractor also originally charged in this matter (Respondent Mihalakis) had agreed to "fulfill all governmental obligations and obtain all necessary permits."² Further, Respondent did not know about the requirement. It is also urged that a question of fact exists with respect to this charge because Respondent Mihalakis was contractually obligated to obtain

¹ The notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv) apply if there is no asbestos or if the combined amount of asbestos containing material is less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and less than one cubic meter (35 cubic feet) off facility components where the length of area could not be measured previously. See 40 C.F.R. § 61.145(a)(2)(i)(ii).

² Respondent's Answer to the complaint, at 2 (¶ "Count I"). The October 25, 1991, contract specifies that "contractor will be responsible for obtaining all necessary permits," at 1, ¶¶ 1 and 3.

all permits, and, since he is now deceased, Respondent "has no way of knowing whether (he) fulfilled this notification requirement."³ Furthermore, according to Respondent, Respondent Mihalakis operated under several other names, which makes it "conceivable that notification was provided under a name other than that of Phil Mihalakis d/b/a/ Mihalakis Salvage."⁴

Nothing raised here is sufficient as a matter of law to demonstrate that a material fact exists with respect to the alleged violation. In order to overcome a motion for judgment as to liability for this Count, Respondent must show more than that something is merely conceivable or the facts are unknown in order to meet Complainant's evidence. There being evidence that Mr. Mihalakis did not notify EPA, in his own name or in any of the various names used by his business⁵, and since Respondent states that it did not notify EPA because of its lack of knowledge of the regulations and its reliance upon Mr. Mihalakis, it must be held that no material fact remains to be determined. In other words, it is clear that in the current circumstances nothing would be gained by trying this issue. Accordingly, summary determination as to liability is entirely appropriate here, and will be granted to Complainant on the issue of notice.

³ Respondent's Answer to Complainant's Motion for Partial Accelerated Decision, at 2.

⁴ Id.

⁵ See Complainant's Exhibits 2 and 3 attached to its Motion.

Since Complainant's motion went only to liability for the charges, the issue of the amount of penalty, if any, to be assessed for this violation need not be reached at this time.

Count II of the Complaint - Failure to Inspect.

Complainant charges that Respondent failed to inspect the building before beginning demolition, as is required by 40 C.F.R. § 61.145(a). The regulations specify that the inspection must be "thorough." In fact, in many instances an owner or operator will not know which of the regulations control the renovation or demolition activity in the absence of an inspection which would reveal how much asbestos-containing material, approximately, is present⁶. Without a thorough inspection, the extent of regulated asbestos-containing material involved may not be known before removal activity begins. This may or may not be the situation here, but it is undisputed that the presence of such materials was not recognized in advance.

Complainant urges that, had the inspection been "thorough"⁷ as required by 40 C.F.R. § 61.145(a), the asbestos-containing material would have been found; in fact, Complainant points to the failure to discover asbestos in advance of demolition as support for the

⁶ See for instance, 40 C.F.R. § 61.145(b)(3)(i) where the particulars of the required notice depends upon whether the activity falls under "paragraph (a)(1) and (4), or under (a)(2)."

⁷ The complaint does not charge that the inspection was not "thorough," but does charge that an inspection pursuant to the regulation was not conducted.

charge that a thorough inspection as required by the regulation was not conducted by either owner or operator⁸ (and hence that no material facts remain to be determined in connection with this charge). Complainant's principal evidence consists of affidavits from both the EPA official who inspected the site after demolition had begun, and the Iowa Division of Labor Services official who twice inspected the site. The inspectors aver that Mr. Mihalakis said or "indicated" that he had not inspected the building for asbestos.⁹

Respondent counters that a question of fact relating to the charge has been raised, particularly by the affidavit of the Comptroller in Respondent's Dubuque, Iowa, office (this affidavit contradicts in part one of Complainant's affidavits); and by the affidavit of Respondent's General Manager, which places the contents of another of Complainant's affidavits in a somewhat different light. Respondent points further to a statement in Complainant's Exhibit 2, which it believes suggests that a proper inspection was conducted in advance of demolition activity.

With these sworn statements, Respondent raises sufficient indications of a question of material fact to meet Complainant's

⁸ Complainant's motion, at 10. See also Complainant's reply to Respondent's response to the motion, at 4: "Obviously Respondent did not make a thorough inspection for the presence of asbestos, as asbestos was found and documented at the demolition site during EPA and state inspections conducted after demolition and removal had commenced."

⁹ Complainant's Motion Exhibits 6 (Mr. Mosby) and 7 (Mr. Haan).

motion for liability as to this charge, particularly when bearing in mind that it is necessary to view Respondent's evidence in the light most favorable to Respondent's case when considering a motion for summary judgment.

While it is unclear what additional evidence would be available regarding Count II in the absence of Mr. Mihalakis, certainly depositions or examination of the affiants at trial might be conducted to clarify and expand upon statements already made.

Accordingly, since at this stage of the proceedings it is appropriate only to determine whether a material fact exists as opposed to weighing the present evidence, Complainant's motion as to Count II of the complaint must be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No material question of fact exists with respect to Respondent's liability for the violation alleged in Count I of the complaint. Complainant is entitled to judgment as a matter of law regarding Respondent's liability for the violation alleged therein.

2. Respondent was the owner of the facility located at 1200 Main Street, Dubuque, Iowa, which was demolished by Phil Mihalakis d/b/a/ Mihalakis Salvage, formerly a respondent in this matter and the operator of the demolition activity at the facility described in the complaint. (Stipulations of the parties, paragraph 1).

3. The required notice was not given by Respondent to the EPA Administrator as required by 40 C.F.R. § 61.145(b), or by Phil Mihalakis under the name Mihalakis Salvage or under any other name.

4. Respondent violated 40 C.F.R. § 61.145 (b) and § 112 of the

Clean Air Act, 42 U.S.C. § 7412.

5. Remaining to be determined with respect to Count I of this matter is the amount of penalty, if any, to be assessed for the violation found herein. Further remaining to be determined are the issues raised by the charge set forth in Count II of the complaint.

ORDER

Accordingly, it is ordered that Complainant's motion for partial summary decision is granted with respect to Count I of the complaint; and that the motion is denied with respect to Count II of the complaint.

And it is FURTHER ORDERED that the parties shall resume efforts to settle the issues remaining in this matter, and shall report upon their progress during the week ending May 24, 1996.

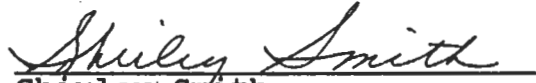


J. P. Greene
Administrative Law Judge

April 19, 1996
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER, was filed with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on April 19, 1996.


Shirley Smith
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for Judge J. F. Greene

NAME OF RESPONDENT: Fisher Investment Company
DOCKET NUMBER: VII-92-CAA-102

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