Commissioner, Indiana Department of Environmental Management
v.
Tower Senior Apartments, LP, Schnippel Construction, Inc., and
Tim Treon d/b/a Dirt Brothers Demolition.
2000 OEA 24 (98-A-J-2131)

TOPICS:
asbestos containing material
paced off
linear feet
Civil Penalty policy
unwritten policy
matrix
civil penalty
good faith,

PRESIDING JUDGES:
Penrod, Lasley

PARTY REPRESENTATIVES:
Respondent: Lewis Beckwith, Esq.: Baker & Daniels
IDEM: Aaron Schmoll. Esq.

ORDER ISSUED:
August 8, 2000

INDEX CATEGORY:
Air

FURTHER CASE ACTIVITY:
Judicial review

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	) SS:	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
	)	
Complainant,	)	
	)	
v.	)	CAUSE NO. 98-A-J-2131
	)	
TOWER SENIOR APARTMENTS, LP, SCHNIPPEL CONSTRUCTION, INC., AND TIM TREON d/b/a DIRT BROTHERS DEMOLITION,	)	
	)	
Respondents.	)	

FINAL ORDER AFFIRMING RECOMMENDED ORDER

This constitutes notice that on June 26, 2000, the Administrative Law Judge issued a Recommended Order in the above-captioned matter. The parties filed appeals of the Recommended Order and the Chief Administrative Law Judge, as the ultimate authority for final decisions by the Indiana Department of Environmental Management (IDEM) and after reviewing the record of these proceedings, hereby finds the following:

1. Respondents contend that the material around the pipes was not consistently asbestos. They observe that some of it was cork or fiberglass and, therefore, some of the pipes "paced-off" by the inspectors should not have been included as meeting the threshold amount of asbestos. The Administrative Law Judge, however, correctly determined that IDEM provided credible evidence; namely, the affidavits from the inspectors and their reports, to support its contention that 600 linear feet of asbestos-containing material had been disturbed. Respondents, on the other hand, while not disputing that some of the pipes were covered with asbestos containing material, offered no evidence of what percentage of the pipes were covered with cork or fiberglass. Because IDEM presented credible evidence and Respondents offered nothing more than speculation, the Administrative Law Judge's determination is supported by the evidence.

2. Respondents, in regards to the civil penalty assessment, argue that the Administrative Law Judge did not take into account mitigating factors in adjusting the base penalty amount; rather, she considered those factors when selecting a penalty within the matrix. IDEM's Civil Penalty Policy plainly states: "Prompt correction of environmental problems can also constitute good faith. However, simply returning to compliance, in the absence of any other good-faith effort, will not justify a downward adjustment of the penalty." Civil Penalty Policy page 6. Hence, the Administrative Law Judge should not have adjusted the base penalty simply because Tower and Schnippel quickly corrected the violations.

3. IDEM appealed the Recommended Order because the Administrative Law Judge found that the case manager improperly relied on an unwritten policy of always selecting the highest penalty within the matrix. After reviewing the testimony on this issue, the Administrative Law Judge is entitled to deference for her conclusion that such an unwritten policy existed and that the case manager followed it when assessing penalties in this case. Despite the conflicting testimony, the case manager acted in conformance with the unwritten policy.

4. IDEM also argues that the Administrative Law Judge usurped the authority of the commissioner when she recalculated the penalties assessed. Just as a trial court is free to reject or calculate penalties when the commissioner seeks them without the issuance of an Agreed Order or Commissioner's Order; likewise, this office may calculate penalties based on the evidence presented during a hearing. Furthermore, the Administrative Orders and Procedures Act requires a trial court to vacate, affirm or remand an agency action. Indiana Code § 4-21.5-5-15. There is no statutory counterpart for administrative review.

5. Finally, while it was appropriate for the Administrative Law Judge to consider each group of violators as identified by IDEM, the penalties assessed against Dirt Brothers in the Commissioner's Order are not disputed by Dirt Brothers and IDEM may seek to recover the penalties in the Commissioner's Order in another forum.

6. Tower and Schnippel are hereby ordered to pay the civil penalties identified in the Recommended Order within thirty days of the date of this order. Such payment shall identify the site name and be made payable to:

Cashier
Indiana Department of Environmental Management
100 North Senate Avenue
P.O. Box 7060
Indianapolis, IN 46206-7060

The Recommended Order is hereby **AFFIRMED** and incorporated herein by reference.

You are further notified that pursuant to Indiana Code 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 8th day of August 2000.

Wayne E. Penrod
Chief Administrative Law Judge

RECOMMENDED ORDER

I. Statement of the Case:

On October 22, 1998, Tower Senior Apartments, LLC (Tower) and Schnippel Construction, Inc. (Schnippel) petitioned for administrative review of a Commissioner's Order issued against them and Dirt Brothers Demolition (Dirt Brothers) on October 5, 1998. The Indiana Department of Environmental Management (IDEM) moved for partial summary judgment as to the violations cited in the Commissioner's Order. Partial Summary Judgment was granted in favor of IDEM on January 4, 2000. A final hearing regarding the civil penalties was held on March 15, 2000. The parties submitted post-hearing briefs on April 24, 2000.

II. Findings of Fact:

The Administrative Law Judge finds, by a preponderance of the evidence, the following facts:

1. The Undisputed Facts contained in the 1999 Order Granting Partial Summary Judgment are incorporated by reference herein.

2. Ms. Lynne Donahue served as the enforcement case manager for this case and assessed a total civil penalty of $ 110,000.00 against Tower, Schnippel and Dirt Brothers.

3. Tower and Schnippel were assessed with $ 67,250.00 for the violations on November 20, 1997 (326 IAC 14-10-1, 326 IAC 14-10-3 and 326 IAC 14-10-4(1)) and December 15, 1997 (326 IAC 14-10-4(1)). Tower and Dirt Brothers were assessed with a civil penalty of $ 43,750.00 for violations on November 20, 1997 (326 IAC 18-3-3 and 326 IAC 14-10-4) and December 15, 1997 (326 IAC 18-3-3 and 326 IAC 14-10-4).

4. The case manager relied upon a number of guidance documents for assessing the civil penalties. Only one of the relied upon documents was a published, non-rule policy document; namely, the "Civil Penalty Policy."

5. As part of an unwritten IDEM policy, the case manager consistently selected the highest penalty in the civil penalty matrix when assessing penalties against Tower, Schnippel and Dirt Brothers.

6. The case manager also relied upon inspection reports containing the inspectors' observations of the premises and citations to violations.

7. The case manager considered the "project ACM" and defined it as "activities leading up to an inspection to be an entire asbestos removal project." Based on that definition, she found that 100% of the project ACM was in violation.

8. The inspection reports, however, concluded that 31% of project ACM was disturbed on November 20, 1997 and 6% on December 15, 1997.

9. The case manager also grouped certain violations together because they "basically caused," "were similar" or "contributed to" other violations. The best example of grouping was the work practice violations, which included violations like failure to wet RACM, failure to post warning signs and failure to store material securely, etc.

10. Even though the failure to inspect "largely contributed to" the failure to remove RACM before renovation/demolition activities, those violations were not grouped together.

III. Discussion:

Tower and Schnippel contend that IDEM's proposed penalty is not rationally related to the facts of this case, was calculated without adequately considering the criteria provided in IDEM's Penalty Policy or Enforcement Guidance and simply fails to address the statutory criteria required by the Clean Air Act. Specifically, the enforcement case manager failed to consider the amount of asbestos disturbed, the actions taken before and after the violations and failed to assign a nominal penalty to resultant violations. If the case manager had properly considered those factors, a penalty of $ 27,312 for Tower and Schnippel would have been appropriate.

IDEM counters the above argument with the fact that the penalties assessed were well within the statutory maximum IDEM could assess against Tower, Schnippel and Dirt Brothers. Furthermore, the penalties assessed were consistent with IDEM's Civil Penalty Policy and Enforcement Guidance, although IDEM is not bound to apply or follow either guidance document. In any event, the case manager properly considered the potential for harm and the extent of deviation in a way that was consistent with the way she calculated penalties in other cases. Thus, the civil penalty of $ 67,250 against Tower and Schnippel and the civil penalty of $ 43,750 against Tower and Dirt Brothers should be upheld.

A. IDEM Cannot Rely on Unwritten Policies

During the presentation of Petitioners' case, it became clear that IDEM has an unwritten policy of always selecting the highest penalty in the penalty matrix. Ms. Donahue testified that more than one of her supervisors has instructed her to always select the highest penalty. Hearing Transcript, Testimony of Donahue, page 57. She later attempted to retract that statement by stating that it was up to each individual case manager's discretion which penalty amount to select. Hearing Transcript, Testimony of Donahue, page 58. But, that statement is unreliable because Ms. Donahue, in fact, selected the highest penalty available for each violation cited against Tower, Schnippel and Dirt Brothers. IDEM cannot rely on this unwritten policy for two reasons: "First, parties are entitled to fair notice of the criteria by which their petitions will be judged by an agency and second, judicial review is hindered when agencies operate in the absence of established guidelines." County Department of Public Welfare of Vanderburgh County v. Deaconess Hospital, Inc., 588 N.E.2d 1322, 1327 (Ind.Ct.App. 1992). Here, IDEM has

published a guidance document that lead Petitioners to believe that the penalty assessed will lie within a range of possible penalties. If IDEM intends to always select the highest penalty available, then it should change its Civil Penalty Policy. In any event, Ms. Donahue incorrectly assessed the highest base penalty available against Tower, Schnippel and Dirt Brothers based on an unwritten policy. She also failed to provide an underlying reason for selecting the highest penalty amount. Additionally, because Ms. Donahue erroneously selected the highest penalty, the fact that she then increased the base penalty amount by 50% is also suspect. If factors had been considered to justify selecting the highest penalty, then the upwards adjustment would have a reasonable basis. Since that was not done, the penalties assessed against Petitioners must be adjusted downward because the highest penalty was not justified.

B. Enforcement Guidances Provide Rationale

IDEM correctly notes that guidance documents do not have the force and effect of law. IDEM incorrectly notes, however, that it has the option of whether to apply a guidance document or not. Once a guidance is properly published in accordance with Indiana Code § 4-22-7-7, parties coming in contact with the agency may rely upon the representations made in the guidance as a way to gauge generally how the agency will handle their permit/dispute. To allow the agency to publish guidance documents and then not follow them--without specific reasons for doing so--runs counter to due process standards, which require an "administrative decision [to] be in accord with previously stated, ascertainable standards." Community Care Centers, Inc. v. Indiana Department of Public Welfare, 523 N.E.2d 448, 450 (Ind.Ct.App. 1988). On the other hand, when an agency has not published a guidance in accordance with Ind. Code § 4-22-7-7, a party cannot argue it relied upon those standards when coming in contact with the agency. That is the case here. IDEM's enforcement guidance documents regarding asbestos were/are unpublished. Therefore, Petitioners do not have a legitimate claim that they relied upon the enforcement guidance provisions. Those guidance documents, however, do provide foundational information, which can be used to determine whether the penalty assessed had a reasonable basis ("the action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action." Indiana Department of Natural Resources v. Peabody Coal Company, 654 N.E.2d 289, 294 (Ind.Ct.App. 1995)).

(1) Grouping

The Asbestos Demolition/Renovation Work Practice Enforcement Guidance specifically discusses the concept of "grouping," which is mentioned generally in the published Civil Penalty Policy ("separate violations may be grouped for the purpose of applying this policy . . . In general, each violation or group of violations will be considered as a separate violation for the purpose of calculating a civil penalty if it results from independent acts or compliance problems and is distinguishable from any other violation cited in the same Notice of Violation").

Page four of that enforcement guidance provides:

> There are some situations when several violations have been committed that the Civil Penalty Policy allows for grouping of violations if they result from a single act. In those cases where multiple violations have occurred, the case manager should utilize a cause and effect equation. Once the cause violation has been determined, the penalty calculation should weigh most heavily on that violation. The penalty calculations for the resultant violations should be nominal because they can be considered as part of the Extent of Deviation determination.

Considering the above, grouping is done to prevent a particular violator from being punished more than once for a violation that necessarily leads to other violations. See Hearing Transcript, Testimony of Donahue, page 98. In addition, other enforcement guidances rely on the fact that grouping will be done. See Asbestos Notification Enforcement Guidance, page 3 (failure to notify--if combined with non-compliance with other rules see "Grouping"); and Asbestos Accreditation Enforcement Guidance, page 3 (in the event that the violator was not hired for the purpose of conducting an asbestos removal project (individual property owner or small non-asbestos contractor), the accreditation violations may be grouped with the work practice violations if it is the first offense (see grouping in Demo/Reno guidance). In the event of a repeat violation, the accreditation guidance shall be applied in addition to violations of 326 IAC 14-10).

Thus, grouping is an integral part of any penalty assessment. Ms. Donahue testified that she used not only the Civil Penalty Policy but also the enforcement guidances for asbestos. Hearing Transcript, Testimony of Donahue, page 41. She also stated that the failure to inspect largely contributed to the illegal removal of asbestos. Respondent's Exhibit I and Hearing Transcript, Testimony of Donahue, page 44. *See also* Hearing Transcript, Testimony of Donahue, page 141 ("It was viewed that the failure to thoroughly inspect basically caused, you know, or could have contributed to the fact that asbestos was subsequently removed"). While not willing to admit it, Ms. Donahue's statements lead to the conclusion that she viewed the failure to inspect as the "cause violation." That being so, it is hard to understand why she did not group the violations cited against Tower and Schnippel on November 20, 1997. It is even more troubling that the failure to notify was assessed a separate penalty even though the enforcement guidance specifically recommends grouping when the failure to notify occurs with other non-compliance violations. Ms. Donahue gave no explanation for the departure from the rationale in the enforcement guidance. Because the enforcement guidance sets out a reasonable scheme for assessing penalties when multiple violations stem from a single cause violation, the penalty assessed against Tower and Schnippel on November 20, 1997 must be adjusted.

(2) Project ACM

While Ms. Donahue properly considered the fact that the asbestos disturbed was dry, friable and close to a public place, she ignored the enforcement guidance's rationale for assessing potential for harm and extent of deviation. The Asbestos Demolition/Renovation Work Practice Enforcement Guidance considers work practice violations that disturb more than 260 linear feet of asbestos as a major potential for harm. It is a moderate potential for harm if less than 260 linear feet of asbestos is disturbed. These cutoffs were established based on the Indiana Air Pollution Control Board's determination that projects of that size or larger pose a greater need for inspection and pose a greater likelihood for potential exposure. Respondent's Exhibit N, page 2. Furthermore, the extent of deviation is dependent on how much of the total project ACM is in violation. If 50% or more is in violation, then it is a major extent of deviation. If between 25% to 40% is in violation, then it is a moderate extent of deviation and if 25% or less, then it is a minor extent of deviation. Presumably, the same logic applies for these cutoffs--larger projects need to be inspected and pose a greater potential for exposure. The guidance also states that if the amount disturbed cannot be determined, then other factors should be considered.

In this case, the air inspectors specifically determined the amount of asbestos disturbed and IDEM was granted a partial summary judgment on those amounts. The inspectors concluded that on November 20, 1997, 31% of the total was removed or disturbed. And, on December 15, 1997, 6% of the total was removed or disturbed. Additionally, the enforcement guidance defines project ACM as "the amount of ACM that has been stripped or removed at the time that the violation is discovered." Respondent's Exhibit N, page 3. The person in the best position to determine project ACM was the air inspector who observed the premises and cited Tower, Schnippel and Dirt Brothers. Ms. Donahue, nevertheless, chose to define for herself project ACM and concluded differently about the total amount disturbed. Hearing Transcript, Testimony of Donahue, page 140. Her definition and conclusion, however, simply do not make sense and served only to artificially inflate the amount of penalty that could be assessed. Furthermore, Ms. Donahue time and again stated she relied upon the inspectors' observations and conclusions. Hearing Transcript, Testimony of Donahue, pages 12, 34, 50, 66 and 87. Thus, there is no reason why the inspectors' conclusions about project ACM should be discarded now. For this reason, the base penalty must be adjusted.

C. Penalty Adjustment

Based on the Civil Penalty Policy and the rationale behind the Enforcement Guidance for Asbestos, the penalties against Tower, Schnippel and Dirt Brothers must be adjusted in the following manner:

(1) Tower and Schnippel's November 20, 1997 violations:

The failure to thoroughly inspect (326 IAC 14-10-1) should be grouped with the failure to notify (326 IAC 14-10-3) and the failure to remove RACM before demolition/renovation activities (326 IAC 14-10-4(1)). Alone, the failure to thoroughly inspect would warrant a major potential for harm because more than 260 linear feet were disturbed and a moderate extent of deviation because it was between 25% and 49% of the project ACM. But, including the failure to notify and the failure to remove warrants a major extent of deviation. Because IDEM's unwritten policy of always selecting the highest penalty amount is arbitrary, factors like how cooperative the parties were and how quickly the situation was corrected should be considered. For a major potential for harm and a major extent of deviation, the penalty range is $ 25,000 to $ 20,000. Since the inspectors noted that the parties were extremely cooperative and quickly corrected the situation by hiring SSI, the lowest amount should be selected. For November 20, 1997, the penalty against Tower and Schnippel should be $ 20,000.00

(2) Tower and Schnippel December 15, 1997 violation:

The failure to remove RACM before demolition/renovation activities is moderate potential for harm because less than 260 linear feet was disturbed and minor extent of deviation because it was less than 25% of the project ACM. The penalty range for that violation is $ 7,500 to $ 5,000. Once again, giving no effect to the policy of selecting the highest penalty but also recognizing that this is the second time Tower and Schnippel are cited for the same violation, the highest penalty should be selected, without an upwards adjustment. The penalty amount for Tower and Schnippel for the December 15, 1997 violation should be $ 7,500.

(3) Tower and Dirt Brothers November 20, 1997 violations:

Here, the work practice violations were properly grouped with the accreditation violations for a major potential for harm and major extent of deviation. But, the highest penalty amount was again selected. Because the parties were cooperative and quickly corrected the situation on November 20, 1997, the lowest penalty amount in the range should have been selected. The penalty for Tower and Dirt Brothers for the November 20, 1997 should be $ 20,000.

(4) Tower and Dirt Brothers December 15, 1997 violations:

For this day of violations, the work practice violations were improperly grouped with the accreditation violations. The Enforcement Guidance gives a "break" to first-time violators. This makes sense and gives the parties the benefit of the doubt. Conversely, this is the second time Tower and Dirt Brothers are cited for the exact same violations. Thus, only the work practice violations should be grouped. Based on the amount disturbed and the project ACM, the work practice violations warrant a moderate potential for harm and a minor extent of deviation. Because this is the second time for the same violations, the highest amount in the penalty matrix is warranted, which is $ 7,500. For the second accreditation violation against Tower, the potential for harm is major because it implemented a project without accreditation. The extent of

deviation is also major because Tower failed to meet a substantial portion of the regulatory requirements. Tower did work quickly to have SSI complete the asbestos removal project, but it is the same violation within a month, which warrants a penalty in the middle of the range. The penalty for Tower's second accreditation violation should be $ 22,500. For the second accreditation violation against Dirt Brothers, the potential for harm is minor because Dirt Brothers was the "worker" carrying out the project, while primary control lies with the owner or operator. The extent of deviation is major because a substantial portion of the regulations were not followed. The penalty for Dirt Brother's second accreditation violation warrants the highest penalty in the matrix, which should be $ 5,000.

IV. Conclusions of Law:

The Administrative Law Judge, based on the foregoing Findings of Fact and Discussion, concludes as a matter of law that IDEM arbitrarily selected the highest penalty in the civil penalty matrix using an unwritten policy and without a factual basis. Furthermore, IDEM also acted arbitrarily when it gave no explanation for its departure from the rationale used in the unpublished enforcement guidance documents, which provide a reasonable basis for grouping violations and considering project ACM in violation.

V. Order:

The Administrative Law Judge recommends that the penalty assessed against Tower and Schnippel should be adjusted to a total of $ 27,500.00 in accordance with the analysis in subparagraphs (1) and (2). The penalty assessed against Tower and Dirt Brothers should be adjusted to a total of $ 27,500.00 in accordance with the analysis in subparagraphs (3) and (4). And, that Tower should be assessed individually with a penalty of $ 22,500.00 and Dirt Brothers assessed individually with a penalty of $ 5,000.00. The total penalty assessed for this case should be $ 82,500.00.

VI. Appeal Rights:

You are hereby notified that pursuant to § 4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

(1) specifies which portions of the Recommended Order you object to;
(2) specifies which portions of the administrative record supports the objection(s); and
(3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

(1) the date that the order was issued under § 4-21.5-3-27;
(2) the receipt of briefs; or
(3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

IT IS SO ORDERED in Indianapolis, Indiana this 26th day of June 2000.

Linda C. Lasley
Administrative Law Judge