COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

March 6, 2008

In the Matter of:
Ronald P. Anger and
Ranger, Inc.

Docket No. DEP-05-721
File No. PAN-CE-05-C002

Fitchburg

RECOMMENDED FINAL DECISION

The Department of Environmental Protection issued a single $47,150.00 penalty to Ranger, Inc. and its president, Ronald P. Anger, the petitioners, charging them with violating 310 CMR 7.15, the asbestos regulations, while demolishing a building. Petitioners filed a single appeal. This decision comes after an adjudicatory hearing.

I conclude that the definition of "owner/operator" in the Air Quality Regulations (310 CMR 7.00) does not negate the privilege against personal liability enjoyed by corporate officers for actions taken on behalf of their corporations. Additionally, I find that Ronald P. Anger is entitled to the privilege. Accordingly, I vacate the penalty issued to him as an individual.

I find that Ranger, Inc. was required to notify DEP before beginning demolition and did not do so. Accordingly, I sustain the portion of the penalty based on failure to notify. See 310 CMR 7.15(1)b. I, however, reduce the penalty amount from $19,575.00 to $16,312.50.

DEP failed to prove that Ranger Inc.'s demolition activities released asbestos into the ambient air. Accordingly, I vacate the $19,575.00 portion of the penalty based on causing a condition of air pollution. See 310 CMR 7.15(1)a.

I find that Ranger, Inc. did not remove asbestos-containing materials from the building. Accordingly, I vacate the $5,000.00 portion of the penalty based on violations of the procedures for removing asbestos from a facility. See 310 CMR 7.15(1)c.

I find that Ranger, Inc. did not dispose of asbestos-containing material from the building. Accordingly, I vacate the $3,000.00 portion of the penalty based on violations of the requirements for the disposal of asbestos-containing waste. See 310 CMR 7.15(1)e.

BACKGROUND AND PROCEDURAL HISTORY

Wayne J. Amico owned property on South Street in Fitchburg that contained an unoccupied single-family house. Amico, who planned to redevelop

the site, hired D. R. Poulin Construction Company as his general contractor. D. R. Poulin asked Ranger, Inc. to demolish the unoccupied building and haul away the debris.

On the morning of July 28, 2004, Daniel Jolie, an employee of Ranger, Inc., began demolishing the building with an excavator. Donald Heeley, an employee of the Department of Environmental Protection's asbestos program, arrived during a lull in the action. Heeley observed that the excavator had reduced part of the building to a pile of debris and ripped open the adjacent section leaving it partially demolished, while the portion of the building furthest from the debris pile remained intact.

In the debris pile and partially demolished portion of the building, Heeley saw and photographed broken insulating material that he suspected contained asbestos. After donning protective gear, he entered the intact portion of the building where he took photographs and gathered samples of undamaged insulating material that subsequent laboratory testing showed contained asbestos.

After the inspection, Heeley ordered Jolie not to resume demolition. Neither Jolie nor any other employee of Ranger, Inc. did any more work at the site.

Later on the morning of the 28th, Amico arrived. Heeley informed him that demolition could continue only after a licensed company removed all asbestos-containing materials from the building. Subsequently, Amico hired Aero Tech, a

licensed asbestos removal company. Aero Tech took away all asbestos-containing material.

Based on (1) Heeley's observations on July 28, 2004, (2) the results of the laboratory test of his samples, and (3) and the absence of any prior notice of the demolition, DEP issued a single penalty to Ranger, Inc. and its president, Ronald P. Anger, on May 9, 2005. DEP charged both with multiple violations of 310 CMR 7.15, the asbestos regulations. Ranger, Inc. and Ronald P. Anger, the petitioners, filed a timely appeal. After "pre-screening," DEP transferred the appeal to this office on August 10, 2005.

I conducted a prehearing conference on October 14, 2005[1]. On the same day, I issued a report and order that identified five issues,[2] approved the four witnesses identified by DEP as well as the three identified by petitioners, and established a schedule, including an adjudicatory hearing on February 15 and 16, 2006.

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[1] At the conference, I denied a motion to dismiss petitioners' appeal filed by DEP on August 11, 2005 (the day after DEP transferred this matter to DALA). DEP based its motion on petitioners' purported failure to file a copy of the penalty assessment notice with a DEP hearing officer. I denied the motion because the record showed that petitioners had filed the document, although they had not served a copy on DEP counsel.

[2]
1. Although DEP did not meet the general requirement of issuing a notice of noncompliance before issuing this penalty assessment notice, is its action justified by the willfulness exception? See 310 CMR 5.14.
2. In determining the amount of the proposed penalty, did DEP consider each of the twelve required factors? See 310 CMR 5.25.
3. Is Ronald P. Anger in his individual capacity an owner/operator or person who caused, suffered, allowed or permitted actions which caused or contributed to a condition of air pollution? See 310 CMR 7.15(l)(a).
4. Did Anger (if he is an owner/operator or otherwise liable) or Ranger, Inc. violate any of the following regulatory provisions: 310 CMR 7.15(1)(a), 7.15(1)(b), 7.15(1)(c)1, 7.15(1)(c)2.c.ii, 7.15(1)(c)3.d, 7.15(1)(d), 7.15(1)(c)2a, 7.15(1)(c)3a, 7.15(1)(c)2.c.i, 7.15(1)(c)4 or 7.15(1)(e)1.a.?
5. Is the penalty amount excessive?

As the hearing date approached, the parties filed a joint motion to stay, asserting that they were likely to settle without the need for a hearing. I granted the motion on January 13, 2006. Subsequently, I granted several extensions of the stay based on continued reports of imminent settlement. On May 26, 2006, however, the parties reported that their settlement efforts had failed. On June 15, 2006, after a telephone conference, I established a new hearing schedule that included dates for filing written testimony and a hearing on October 26, 2006.

At the October 26, 2006 hearing, the parties presented five witnesses, all of whom had already provided their direct testimony in writing.

Although I had approved all four witnesses proposed by DEP, it presented only two: (1) Donald Heeley, the DEP employee who conducted the inspection and investigation that preceded the penalty notice and (2) Gregory Levins, the DEP employee who calculated the penalty amount. DEP did not call the other two witnesses: (1) Wayne J. Amico, the owner of the building and (2) Gregory Harding of Aero Tech, the company that did the subsequent asbestos removal.

Petitioners presented three witnesses: (1) Ronald Anger, president of Ranger, Inc., (2) Daniel Jolie, the Ranger employee who began the demolition, and (3) Sean Pepper, president of D. R. Poulin Company, the general contractor at the site.

DISCUSSION

PERSONAL LIABILITY OF RONALD P. ANGER

I begin with these eight uncontested facts concerning the events of July 2004 and make additional findings while addressing the parties' arguments on Anger's liability.

1. Ranger, Inc. was a bona fide Massachusetts corporation that followed corporate formalities.

2. Ranger, Inc. had assets, liabilities and several employees.

3. Ronald P. Anger was the sole director and officer of Ranger, Inc. and served as its president.

4. Wayne J. Amico owned the demolition site.

5. Amico hired D. R. Poulin Construction Company as the general contractor for his site.

6. Anger and Sean Pepper, president of D. R. Poulin, had a conversation about work on the site.

7. After the conversation, Anger directed Daniel Jolie, an employee of Ranger, Inc., to knock down the building.

8. On the morning of July 28, 2004, Jolie began demolishing the building with an excavator.

Petitioners argue that these facts establish that Ronald P. Anger is not personally liable for the violations enumerated in the penalty. Petitioners assert that he is entitled to the privilege against personal liability enjoyed by corporate

officers when acting on behalf of their corporations. See Gram v. Liberty Mutual Insurance Company, 384 Mass. 659, 429 N.E. 2d 21 (1981).

DEP responds with a legal argument. It asserts that regardless of the privilege, Anger is liable because he meets the definition of "operator" in the asbestos regulations. DEP also makes a factual argument. It contends that the privilege does not apply to Anger because the record shows "Anger and Ranger Inc. are one and the same."

LEGAL ARGUMENT

DEP argues that Anger would not be entitled to the privilege even if all of his actions were consistent with his role in Ranger, Inc. DEP contends that Anger is personally liable because he meets the definition of operator in 310 CMR 7.00 of the air quality regulations, which includes "any person … [who]... has control of a demolition operation, including but not limited to contractors and subcontractors." DEP does not attempt to show that this or any regulatory definition can extinguish an otherwise applicable legal privilege. In fact, DEP presents neither analysis nor case law to support its assertion. Additionally, DEP does not explain how two persons (one a corporation and the other an individual) can simultaneously control the same demolition operation. In the absence of any support for DEP's contention, I reject it. Consequently, I conclude that the definition of operator in the air regulations does not negate the privilege against personal liability.

FACTUAL ARGUMENT

DEP contends that Ranger, Inc.'s corporate status and Anger's position as its president do not insulate him from personal liability because he acted on his own behalf and not in his role as president of Ranger, Inc. DEP offers three arguments to support its position.

First, DEP contends that there was no contract for the demolition of the building. Its only support for this is the absence of a written agreement. Petitioners rely on the uncontradicted testimony of Anger and Sean Pepper, president of D. R. Poulin, that during their conversation (see uncontested fact #6), they made an oral contract for the demolition of the building. Because a service contract need not be written to be valid, I reject DEP's argument and credit the testimony of Anger and Pepper. Accordingly, I find that there was a valid contract for the demolition of the building.

Second, DEP contends that any contract Pepper entered into on behalf of D. R. Poulin was actually with Anger individually rather than with Ranger, Inc. DEP argues that its contention is supported by Pepper's statement during cross-examination that he did not need contracts to work with Anger. DEP interprets this to mean that the contract was between D. R. Poulin and Anger. I, however, reject this strained interpretation for two reasons. First, I find that Poulin was merely saying that he did not need a <u>written</u> contract when dealing with Anger because he had worked with him in the past and trusted him. Second, during cross-examination, Pepper maintained that the contract was between the corporations. Consequently, I credit the unrefuted testimony of Pepper and

Anger and find that while acting on behalf of their corporations, they entered into a contract that required Ranger, Inc. to demolish the building and obligated D. R. Poulin to pay Ranger, Inc. for the work. Consequently, I find that Ranger, Inc. and D. R. Poulin entered into a valid oral contract for the demolition of the building.

Third, DEP contends that regardless of any contractual arrangements, Anger is liable because he personally controlled the demolition. DEP offers only two weak arguments to support this contention. It points out that when the demolition began neither the property owner nor a representative of the general contractor was present. DEP implies that this fact somehow bolsters its assertion that Anger was personally in control of the demolition. DEP, however, fails to address the fact that Anger too was not at the site when the demolition began. Consequently, DEP's argument lacks merit and I reject it.

Finally, DEP relies on Jolie's testimony that after he stopped the demolition, he had a telephone conversation with Anger in which Anger told him not to recommence demolition. DEP contends this testimony shows that Anger, not Ranger, Inc., controlled Jolie's actions. DEP, however, ignores the fact that Ranger, Inc. could not speak on the telephone with Jolie and would have to communicate either through Anger, its sole officer, or an agent. Consequently, I reject DEP's arguments and find that Ranger, Inc. was in control of the demolition.

After considering the factual contentions, I make three findings. First,

Ranger, Inc. and D. R. Poulin were parties to a valid oral contract. Second, the contract placed Ranger, Inc. in control of the actual demolition on July 28, 2004. Third, Anger's actions were consistent with his role in Ranger, Inc. Accordingly, I vacate the penalty against Ronald P. Anger because he is entitled to the privilege against personal liability enjoyed by corporate officers.

PENALTY AGAINST RANGER, INC.

REQUIREMENT TO NOTIFY DEP BEFORE DEMOLITION

DEP assessed Ranger, Inc. $19,575.00 for failing to notify it before beginning a demolition that involved asbestos-containing material. See 310 CMR 7.15(1)b. I have already found that Ranger, Inc. was in control of the actual demolition (second finding above). Additionally, it is uncontested that neither Ranger, Inc. nor any other entity provided DEP advanced notice of the demolition. Thus, to prevail, DEP need only establish that (1) the building held asbestos-containing material and (2) Ranger Inc.'s actions fall within the "willful" exception to the requirement that a penalty must be preceded by a notice of noncompliance.

At the hearing, DEP showed that the building held asbestos-containing material in the usual manner. Heeley testified that he took samples of undisturbed insulation material from two undamaged portions of the building and he provided laboratory test results showing that the samples contained asbestos. Accordingly, I find that the building held asbestos-containing material.

In its closing brief, DEP argued that the definition of the statutory term "willful and not the result of error" is well-established through a long line of

administrative decisions. It cited decisions that define willful as the intent to do the act that results in the violation and hold that neither knowledge of the violation nor intent to violate a regulatory provision are necessary for an act to meet the definition of willful. See Matter of Central Water District. Inc., Docket No. 87-114, Ruling on Cross Motions for Summary Decision,10 MELR 1119,1121 (March 25,1992). Here, the act that resulted in the violation was the partial demolition of the building. Ranger, Inc.'s reliance on verbal assurances from the property owner and the general contractor that the building was free of asbestos does not render the act either unintentional or the result of error. Accordingly, I conclude that although DEP did not meet the general requirement of issuing a notice of noncompliance before issuing the penalty, its action is justified by the willfulness exception. See 310 CMR 5.14.

Consequently, I sustain the portion of the penalty based on Ranger, Inc.'s failure to notify DEP before beginning the demolition. I, however, reduce the penalty for this violation from $19,575.00 to $16,312.50.

Gregory P. Levins of DEP testified that he calculated the penalty amount before DEP issued the penalty and while doing so, followed DEP guidance that encompasses the twelve factors listed in the penalty regulations at 310 CMR 5.25. He explained that DEP uses a base penalty amount for this violation of $8,700.00. Levins increased the base penalty by 50% based on the gravity of the offense, thus bringing the penalty amount to $13,050.00. He added an additional 25% for lack of good faith and a further 25% for financial conditions.

This brought the total penalty to $19,575.00. I find that with one exception, the penalty amount complies with the penalty regulations.

At the hearing, Ranger, Inc.'s president, Ronald P. Anger, testified that since DEP issued the penalty, the company has let go two of its four employees and sold equipment because of a lack of business. Based on this testimony, I conclude that the penalty amount should not be increased by 25% based on financial conditions. Accordingly, I increase the $13,050.00 penalty amount by 25% rather than 50%. This reduces the final penalty amount from $19,575.00 to $16,312.50.

CAUSING A CONDITION OF AIR POLUTION

DEP assessed Ranger, Inc. $19,575.00 for causing a condition of air pollution. See 310 CMR 7.15(1)a. To prevail, DEP had to establish that Ranger, Inc.'s demolition activities released asbestos-containing material into the ambient air. DEP offered no direct evidence, such as air sampling results. Instead, Heeley testified that on the morning of the demolition, he observed and photographed damaged insulation in the partially-demolished portion of the building and in the debris pile. He added without contradiction that (1) the material was damaged during the demolition and (2) the damage would have released asbestos to the ambient air, if as he believed, the insulation contained asbestos. Thus, to prevail, DEP needed only to show that the damaged insulation material in fact contained asbestos.

While attempting to establish this, DEP did not offer the usual evidence: (the inspector did not testify that he took samples of the damaged insulation and

sent them by certified mail to a licensed laboratory. DEP did not introduce a report from a laboratory that it received the samples and determined that they contained asbestos. DEP had no laboratory report analyzing samples provided by its inspector because while Heeley sampled undamaged insulation, he did not sample the damaged insulation.

Heeley testified that he stayed out of the partially-demolished portion of the building and the debris pile and, thus, did not take samples of the damaged insulation there. He explained that the excavator had so destabilized the partially-demolished portions of the building that it was in danger of collapsing either on itself or into the debris pile. Heeley explained why he did not take samples of damaged insulation on the day of the demolition. He, however, did not explain his failure to collect samples at a later date when the danger had abated as Harding did (see the below discussion of Harding's samples).

Without samples from Heeley, DEP was forced to rely on (1) statements in a report filed with it by Gregory Harding of Aero Tech, the company that did the subsequent asbestos removal, as well as a laboratory analysis of insulation material Harding had gathered and (2) opinion testimony from Heeley.

At the hearing, DEP did not call Harding even though it had identified him as a witness and I had approved him. Instead, DEP relied on statements contained in a document that Harding filed with it in August 2004. The document pertains to work his company would be doing while removing all asbestos-containing material from the site.

DEP urges me to accept as true statements in the document by Harding about where he took samples of material that later analysis showed contained asbestos. DEP mistakenly relies on the exception to the hearsay rule for business records. There is no question of admissibility of the document in this administrative proceeding. Rather, the question here is how much weight to ascribe to the statements contained in the document. I cannot accept the statements as true because without an opportunity to cross-examine Harding, Ranger, Inc. would be denied a meaningful hearing. Thus, I do not accept Harding's statements as true. Accordingly, the statements in the document and the related laboratory analysis do not meet DEP's burden of proof on its contention that the damaged insulation that Heeley saw and photographed contained asbestos.

Heeley asserted that even in the absence of laboratory test results, he was confident that the damaged insulation contained asbestos. He based his opinion on his work experience, training, and observations at the site.

Heeley testified that based on his training and experience, he recognized the damaged material he photographed as "corrugated air-cell asbestos insulation", which as its name implies contains asbestos. He added that some of the undamaged insulation he sampled in stable portions of the building also appeared to be "corrugated air-cell asbestos insulation" and the laboratory report showed that the sampled material in fact contained asbestos. Based on his observations and the test results, Heeley formed the opinion that the damaged insulation also contained asbestos.

While Heeley's conclusions are logical, they are less persuasive than the usual method of establishing that material contains asbestos. Heeley's testimony that he knows asbestos when he sees it is not enough to meet DEP's evidentiary burden. It is not the kind of evidence that reasonable people rely on in making important decisions like penalizing a very small business $19,575.00.

Accordingly, I determine that DEP failed to prove that Ranger, Inc. released asbestos-containing material to the ambient air. Thus DEP failed to show that Ranger, Inc. caused a condition of air pollution. Consequently, I vacate this portion of the penalty.

REMOVING ASBESTOS FROM A FACILITY

DEP assessed Ranger, Inc. $1,000.00 for each of five violations of the procedures for removing asbestos from a facility (310 CMR 7.15(1)c). The building owner and his general contractor, however, were responsible for removing asbestos prior to demolition. Ranger, Inc.'s role as the demolition subcontractor was limited to knocking down the building, which it began, but did not finish, and hauling away the debris, which it did not do. DEP presented no evidence that Ranger, Inc. removed asbestos-containing material from the building. Accordingly, I vacate the $5,000.00 portion of the penalty based on violations of the procedures for removing asbestos-containing material.

DISPOSING OF ASBESTOS-CONTAINING MATERIALS

DEP assessed Ranger, Inc. $1,000.00 for each of three violations of the requirements for disposal of asbestos-containing waste (310 CMR 7.15(1)e). The owner of a site hired a general contractor to clear it and the general contractor

subcontracted two tasks to Ranger, Inc.: (1) demolishing the building and (2) hauling away the debris. Shortly after a Ranger employee began knocking down the building, an official of DEP ordered him to stop. The employee complied and Ranger, Inc. did no further work at the site. DEP presented no evidence that Ranger, Inc. disposed of any asbestos-containing material from the site. Accordingly, I vacate the $3,000.00 portion of the penalty based on violations of the requirements for disposal of asbestos-containing waste.

HOLDING AND ORDER

The definition of "owner/operator" in the Air Quality Regulations (310 CMR 7.00) does not negate the privilege against personal liability enjoyed by corporate officers for actions taken on behalf of their corporations. Ronald P. Anger is entitled to the privilege. Accordingly, I vacate the penalty issued to him as an individual.

Ranger, Inc. was required to notify DEP before beginning demolition and did not do so. Accordingly, I sustain the portion of the penalty based on failure to notify. See 310 CMR 7.15(1)b. I, however, reduce the penalty amount from $19,575.00 to $16,312.50.

DEP failed to prove that Ranger Inc.'s demolition activities released asbestos to the ambient air. Accordingly, I vacate the $19,575.00 portion of the penalty based on causing a condition of air pollution. See 310 CMR 7.15(1)a.

Ranger, Inc. did not remove asbestos-containing materials from the building. Accordingly, I vacate the $5,000.00 portion of the penalty based on

violations of the procedures for removing asbestos from a facility. See 310 CMR 7.15(1)c.

Ranger, Inc. did not dispose of asbestos-containing material from the building. Accordingly, I vacate the $3,000.00 portion of the penalty based on violations of the requirements for disposal of asbestos-containing waste. See 310 CMR 7.15(1)e.

Francis X. Nee
Administrative Magistrate

NOTICE

This is a recommended final decision. This office has transmitted it to the Commissioner of the Department of Environmental Protection for her final decision. It is not subject to reconsideration at the Division of Administrative Law Appeals, and may not be appealed to the Superior Court pursuant to G.L. c. 30A. The Commissioner's final decision is subject to these rights and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any portion of it and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.