

**AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

ASTAR ABATEMENT, INC.,

Appellant,

v.

07-05-AQB

**JOHN A. BENEDICT, DIRECTOR,
DIVISION OF AIR QUALITY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee.

FINAL ORDER

I. PROCEDURAL HISTORY

Appeal No. 07-05-AQB was filed by Astar Abatement, Inc. ("Appellant") with the West Virginia Air Quality Board ("Board") on September 28, 2007. The basis of this appeal is Order of Compliance No. 304-984-4030, issued to Appellant by the West Virginia Division of Air Quality ("Appellee") on August 28, 2007 regarding asbestos abatement and removal of regulated asbestos-containing material from a former brickyard in Barboursville, West Virginia.

An evidentiary hearing before a quorum of the members of the Board was held on December 18, 2007. Michael O. Callaghan, Esquire of Callaghan & Neely represented the Appellants. Roland T. Huson, III, Esquire, of the West Virginia Department of Environmental Protection ("WVDEP") Office of Legal Services represented the Appellee. The Board was comprised of Douglas E. Hudson, Chairperson; Dick Calvert; Robert Foster; R. Thomas Hansen; and J. Michael Koon. At the hearing,

Joint Exhibit 1, Appellants' Exhibits 1 through 3, and Appellee's Exhibits 1 through 17 were admitted into evidence.

In deciding this appeal, the Board reviewed and considered the certified file, the relevant law and regulations, the Notice of Appeal, all written filings and memoranda, the testimony of the witnesses, exhibits, and arguments by counsel. In accordance with *West Virginia Code* §22B-1-7(g)(1), the Board **AFFIRMS** Appellee's issuance of Order of Compliance No. 304-984-4030 to Astar Abatement, Inc. on August 27, 2007.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed in relation to the aforementioned record, as well as to applicable law. To the extent that the proposed findings of fact, conclusions of law and arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

II. STANDARD OF REVIEW

The Board hears appeals of enforcement actions in accordance with *West Virginia Code* §22B-1-7. The applicable standard of review of the Appellee's action is *de novo* review. *West Virginia Code* §22B-1-7(e). Pursuant to *de novo* review, the Board does not afford deference to the decision of the Department of Environmental Protection, but rather, the Board acts independently on

the evidence before it. *West Virginia Division of Environmental Protection v. Kingwood Coal Company*, 200 W.Va. 734, 745, 490 S.E. 2d 823, 834 (1997).

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supported such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound, regardless of the Appellant's evidence. The Appellant has an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

III. DISCUSSION

Appellant argued that it was merely a subcontractor working in a limited capacity for a contractor who controlled the demolition and renovation operation at the Barboursville Brickyard site. Appellant subcontracted to remove bricks and transite, an asbestos containing material, commingled with bricks from the remains of a former brickyard site in Barboursville, West Virginia. Appellant alleged it complied with the contract for services and within its scope of authority and that the asbestos was adequately wet during and after removal.

The Village of Barboursville contracted with Environmental Resources & Consulting, LLC ("ERC"), a licensed Remediation Specialist, for services related to voluntary remediation of the Barboursville Brickyard site. ERC retained the services of Kemron Environmental Services ("Kemron") to perform an asbestos survey of the site. Upon completion of the asbestos survey, bids

were solicited for asbestos abatement. Appellant provided the winning bid and was awarded the contract for asbestos abatement.

According to testimony at the hearing, Terry Wilfong, an employee of Kemron, contacted three subcontractors to solicit bids on performing the abatement work and conducted an on site pre-bid meeting to show the subcontractors the area needing abatement . Mr. Wilfong testified that at the on-site pre-bid meeting, he and the prospective subcontractors, including Jerry Vorholt, Appellant's representative, walked the perimeter of the area that needed remediation, which was the entire brick drying area. (Tr. 178 - 179)

Subsequent to hearing, the parties agreed and stipulated to the following: (1) Appellant was hired by ERC to perform asbestos abatement and removal of regulated asbestos-containing material ("RACM") from the Barboursville Brickyard site; (2) the contract stated specifically that Appellant would "sort through brick and other building materials located at the former Barboursville Brick facility and remove all Transite (ACM) debris. All other material will be left on-site. Only the Transite (ACM) will be disposed of at an approved facility"; (3) Appellant was an operator, as defined in 40 CFR 161.141, which is incorporated into 45 CSR 15 by reference; (4) with the exception of Jerry Vorholt's attendance at an on-site meeting in the morning of July 10, 2007, Appellant's sole employee at the site and site supervisor for Appellant on July 10, 2007 and July 11, 2007 was James Bonnett; and (5) Appellant hired another company to provide an excavator and truck for the project. (Joint Ex. 1)

IV. FINDINGS OF FACT

1. The Village of Barboursville contracted with Environmental Resources & Consulting, LLC, (ERC), a licensed remediation specialist, for services related to voluntary remediation of the Barboursville Brickyard site. (CR 3)
2. ERC hired Kemron to perform an asbestos survey of the site. (CR 3)
3. On March 27, 2007, Kemron conducted an asbestos survey of the site. (CR 20; Tr. 143)
4. In April 2007, ERC and Kemron solicited and received cost proposals for asbestos abatement from several contractors. (CR 20)
5. Prior to July 10, 2007, Astar was contacted by Kemron Environmental Services, Inc. and was encouraged to provide a bid for the removal of some transite from a specific area of the Barboursville brickyard.
6. On April 11, 2007, Kemron met on-site with representatives from Astar and two other abatement contractors to discuss the work to be bid. CR 20
7. On April 11, 2007, Astar gave Kemron a winning estimate of \$16,974 in which Astar agreed that it would: "Sort through brick and other building materials located at the former Barboursville Brick facility and remove all Transite (ACM) debris. All other material will be left on-site. (Jt. Ex. 1, Stip. 2)
8. Astar provided a bid to Kemron and ultimately a contract was executed for the removal of transite material. (Appellant Ex. 3)
9. Pursuant to the contract, Astar had a scope of work to remove brick material containing transite in an area that was approximately 30 feet wide and 50-60 feet long at the Barboursville brick site.

7. Transite is a manufactured compressed product distinguished from natural rock by lines or stripes resulting from the molding process. (Tr 128, DEP 3).
8. On May 9, 2007, Kemron's report on the Asbestos Inspection by Natalie Booth was finalized. (CR 69-89).
9. Astar was hired by ERC to perform asbestos abatement and removal of regulated asbestos-containing material ("RACM") from the former brickyard. (Jt. Ex. 1, Stip 1.)
10. Astar hired another company to provide an excavator and truck for the project. (Jt. Ex. 1, Stip 5).
11. During the performance of Astar at the Barboursville brick site, Astar subcontracted with Rodney Loftis to load and transport the brick which contained transite material.
12. With regard to the asbestos abatement activity at the site, Astar was an operator, as defined in 40 CFR §61.141, which is incorporated in 45 CSR 15 by reference. (Jt. Ex. 1, Stip. 3)
13. On July 9, 2007, Natalie Booth and Terry Wilfong of Kemron and Jerry Vorholt of Astar met on-site and walked the area to be remediated. (Tr 144, 179).
13. Terry Wilfong was the project manager for Kemron. (Tr. 178).
14. Terry Wilfong pointed out a previously unnoticed tunnel to Jerry Vorholt and Natalie Booth during the July 9 site visit. (Tr 156).
15. The tunnel was shown to James Bonnett on July 10. (Tr 156).
16. The project was to begin on July 9, but Jerry Vorholt arrived at the site and told Natalie Booth and Terry Wilfong that Astar could not start until the next day because he needed to get some paperwork from the city. (Tr. 144).
17. Astar commenced its activities at the site on July 10. (Tr. 24).

18. Astar considered the project completed on July 11. (Tr. 25).
19. Except for Jerry Vorholt being at an on-site meeting in the morning, James Bonnett was the only Astar employee on site on July 10 and 11, and was the site supervisor for Astar. (Jt. Ex. 1, Stip. 4)
20. Kemron employee Natalie Booth remained at the site all day to observe Astar's asbestos abatement activities. (Tr 160).
21. Natalie Booth testified that she was surprised that Astar arrived with heavy equipment on July 10 because Astar was supposed to hand sort the material so the brick could be salvaged. (Tr. 158-159).
22. Jerry Vorholt testified that he decided not to do hand sorting of the debris because Astar had school abatements underway and "didn't have the manpower" to commit to the Brickyard job. (Tr 65).
23. Jerry Vorholt decided not to have the material hand sorted but to instead just load everything into trucks and send it all to a landfill because "it was easier." Tr. 68
24. Jerry Vorholt testified that the debris was too mixed to be reasonably and efficiently hand separated. (Tr 67).
26. James Bonnett is a frequent employee of Astar. (Tr 39).
27. Greg Pauley, who was Astar's lead witness, is Astar's Environmental and Safety Manager. (Tr 12).
30. Greg Pauley was responsible for ensuring that Astar's work is performed in compliance with environmental and safety requirements. (Tr 12).
31. Greg Pauley did not visit the project for Astar before or during the project. (Tr. 31).

33. Greg Pauley was on vacation during the project and had no involvement in it. (Tr 40, 41, 46, 49).
34. Greg Pauley testified that Astar “did not have the right to go back and do any additional work” at the site after July 11. (Tr 25).
35. Jerry Vorholt returned to the site on July 12 and picked up some transite. (Tr 69).
36. Astar’s calculations on which it based its bid called for five men to work for five days hand sorting brick from transite and hauling only the transite to a landfill. (DEP ex. 1; tr 36).

Adequately Wet

38. On June 22, 2007, DAQ received Astar’s Notification of Abatement, Demolition or Renovation which stated that “wet removal techniques” would be used. (DEP Ex. 2)
39. Broken or crumbled transite must be adequately wetted to minimize any asbestos fiber release. (Tr 101, 113)
40. Transite is friable when it is broken or crumbled. (Tr 113).
41. Greg Pauley testified that wet removal techniques were appropriate for the brickyard project. (Tr 45-46)
42. Natalie Booth was in a position to see any use of wetting equipment. (Tr 159).
43. Natalie Booth did not observe any use of wetting equipment on either July 10 or July 11. (Tr 156).
44. Natalie Booth did observe James Bonnett picking up transite. (Tr 147, DEP Ex. 13j).
45. Huntington Tri-State Airport is relatively close to the Barboursville Brickyard site. (Judicial Notice)

46. There was very little precipitation in the Huntington/Barboursville area on July 10 and 11. (DEP 17).
47. The National Climatic Data Center reported only 0.15 of an inch rain at the Tri-State Airport in Huntington on July 10 and only .07 of an inch on July 11. (DEP 17).
49. The National Climatic Data Center reported a total July 2007 rainfall of only 1.73 inches at the Tri-State Airport in Huntington, and no rain at all on July 6 through 9. DEP 17.
50. The weather was sunny and warm July 10. (Tr 148).
51. On July 10, it did not rain at the site. (Tr 148; DEP 10, 11, 17).
52. On July 11, it started to rain at the site about 2:20 p.m. (Tr 157).
53. None of the July 10 or 11 photographs of the excavator shows mud caked on the excavator tracks. (DEP 16).
55. The ground at the site was dry on July 10 and 11. (Tr 160, DEP 11, 14, 15).
56. By 1:00 p.m. on July 11, the excavator work had ended and the equipment left the site. (Tr 68, 80 and 157).
57. There was not a sufficient amount of precipitation at the site, if any, to adequately wet the broken asbestos-containing transite.
58. James Bonnett had only 3 three-gallon spray containers of water to use to suppress the dust from the tons of asbestos contaminated material removed from the site on July 10 and 22. (Tr 83).
59. Astar uses similar sprayers "on all asbestos transite job houses (sic)." (Tr 84).
60. None of the pictures of James Bonnet show any pump sprayers at all, much less a sprayer being used by him. (DEP Ex. 5, 6, 12, 13).

61. None of the pictures introduced at the hearing show any pump sprayers. (DEP 7,8,9,12,13, 14, 16).
62. None of the pictures of the excavator introduced at the hearing show a pump sprayer.
63. Spray equipment is needed on a site that has only transite form of asbestos to adequately wet the material to minimize emissions. (Tr. 100).
65. September 6, 2007 letter to Jesse Adkins from Christopher Amick, Kemron Regional Manager, acknowledged that RACM was not adequately wet during and after removal. (CR 10).
66. Natalie Booth was in a position to observe if wetting equipment had been used on July 10 and/or 11. (Tr 159).
67. No wetting equipment was used on July 10 and 11. (DEP Ex. 16; tr 159).
68. James Bonnet picked up asbestos outside the dryer area being cleared by the excavator. (Tr 147; DEP 6, 13).
70. James Bonnet did not remove all transite from the debris before the excavator removed the debris. (Tr 170).
72. Transite material remained on the ground when Astar finished. (Tr 155, 166: DEP Ex. 15).
73. Dust came from the asbestos contaminated materials disturbed by the excavator. (DEP Ex. 7, 9).

Other Findings

75. On July 10, Astar sent 4 truckloads (totaling over 75 tons) of debris from the brickyard project to a landfill. (CR 47-54).
76. On July 11, Astar sent 3 truckloads (totaling over 75 tons) to the landfill. (CR 55-60).

77. Natalie Booth was not given specific instructions on what she should document in photographs. (Tr 150).
78. Natalie Booth was the only witness presented by either party who was at the site throughout the operations on July 10 and 11.
79. DEP inspected the site on July 27, 2007. (Tr 95).
80. On August 2, 2007, Astar faxed a Project Design ("Reviweed and Approved by Jarrod Hager" and dated July 5, 2007), waste manifests and landfill tickets to Jeff Hedgecock. (CR 36).
81. On August 28, 2007, DEP issued an Order for Compliance to Astar, citing the company for failing to keep regulated asbestos containing material adequately wet after removal, as required by 40 CFR 61.145, which is incorporated by reference in 45 CSR 15.
82. On August 28, 2007, DEP issued an order of compliance to Astar with respect to its activities at the Barboursville brick site.
93. DAQ's order to Astar was based on the inspector's site visit, photographs taken on July 10 and 11 and statements from witnesses who were at the site during the project. (Tr 99).

Conclusions of Law

1. 40 C.F.R. § 61.141, as incorporated into 45 CSR 15, unambiguously states that "if visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted."
2. Adequately wet is defined in 40 C.F.R. §61.141 as meaning to "sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are

observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.”

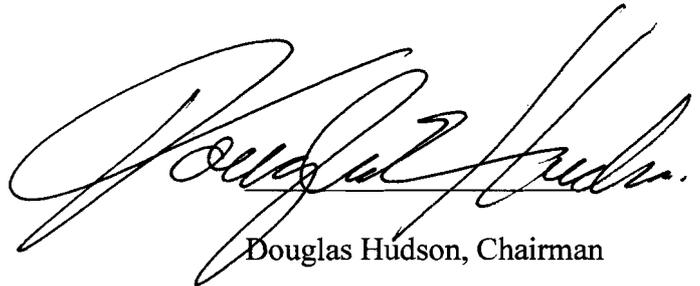
3. WVDEP Exhibit 9 proves the presence of visible emissions or dust.
4. The Board hears appeals pursuant to W.Va. Code §22B-1-7(e) and, therefore, the Board does not afford deference to the Director’s action, but rather, the Board acts independently on the evidence before it. West Virginia Div. Of Env’t Prot. V. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E. 2d 823, 834 (1997).

Conclusion

After a careful review of the evidence in the record, testimony at the hearing, and arguments of counsel the Board finds that the photographic evidence presented to the Board in photograph number nine indicates the presence of dust and therefore the material was not adequately wetted and a violation of the statute and regulations existed.

The Board hereby **AFFIRMS** the order issued by WVDEP and orders Astar to take whatever steps are necessary to prevent future violations.

It is so ordered this 17th day of July, 2008.


Douglas Hudson, Chairman