

STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiff,

v

DEMOLITION CONTRACTORS, INC.,

Defendant.

ORDER

HON. CLINTON CANADY III

Case No. 18-820-CE

At a session of said Court held in the City of
Lansing, County of Ingham, State of Michigan,
this 5th day of December of 2022.

The Michigan Department of Environmental Quality (MDEQ) alleges that Demolition Contractors violated 40 CFR 61.140 *et seq.* and MCL 324.5501 *et seq.* (Asbestos NESHAP) during its demolition of a magnesia precipitator. The present case has been bifurcated on the issues of liability and damages. This opinion follows a bench trial on the issue of liability. For the reasons stated below, the Court finds that Demolition Contractors committed three of the nine alleged violations. Accordingly, a further hearing on damages is necessary.

BACKGROUND FACTS

A. Preface on Asbestos NESHAP's Requirements

A brief preface on the applicability and requirements of Asbestos NESHAP is helpful for understanding the facts and issues in the present case. Asbestos NESHAP works to protect workers who may encounter dangerous levels of asbestos, a known carcinogen, in the course of their work. With few exceptions, the act applies where there is shown to be over 160 square feet of regulated asbestos containing material, commonly abbreviated RACM.

Whether material can be classified as RACM is therefore essential to understanding whether NESPHAP applies. Relevant to the present case, a material is RACM if it contains one percent asbestos and is either: (1) friable or (2) a Category II non-friable material. A material is friable if, when dry, it can be crumbled, pulverized, or reduced to powder by hand pressure. *See* 40 CFR § 61.141. A material is classified Category II if there is a high probability that it will become crumbled, pulverized, or reduced to powder by the forces expected to act on the material during the demolition. *Id.*

B. Demolition Contractor's Demolition of the Magnesia Precipitator and MDEQ's Inspection of the Worksite and It's Complaint

Demolition Contractors was hired by Martin Marietta Magnesia Specialties Company, LLC to demolish a six-story magnesia precipitator down to its second story. The precipitator produced magnesia products through treatment of a brine solution. The precipitator structure was made of steel and enclosed with transite siding, an asbestos infused concrete product. During its use, the precipitator emitted magnesia residue that, over the decades, formed a coating on the building's structure and siding. As part of the job, Demolition Contractors also agreed to remove a significant amount of bird feces that had piled up on the structure, in some places the piles were several feet deep.

Demolition Contractor sub-contracted with Asbestos Contractors, a related group, to remove the transite siding. Work began in early October and was done in stages. On October 29th, MDEQ inspector LeBlanc visited the worksite with Michigan Occupational Health and Safety (MIOSHA) inspector Langworthy. They visited in response to an anonymous tip that work was being done in violation of NESHAP regulations. At the time of the inspection, no transite siding was being removed.

The inspectors saw hundreds of fragments strewn on the worksite ground. Inspector LeBlanc collected one fragment that she believed to be broken transite siding for the worksite ground. She attempted to scratch the piece and checked it for powder. But the piece remained intact and no powder was emitted.

The inspectors also visited the on-site garbage dumpster. It was half-filled with garbage bags, cardboard drums, and pieces of transite siding. The drums were not labeled

but the garbage bags were pre-printed with an asbestos warning label. At the time of the visit, the dumpster was not being loaded or unloaded. The dumpster was lined, but the lining had several small tears in it. Inspector Langworthy took a fragment that he suspected to be transite siding from inside the dumpster as a sample.

A lab analysis revealed that both fragments were transite siding that contained greater than 1% asbestos. On the day following the inspection, Demolition Contractors sent its first notice of demolition. In further email correspondence, Pitsch, an owner of Demolition Contractors, agreed that the company had failed to file notice in violation of 40 CFR § 61.145(b)(1).

Following the inspection, MDEQ sent notice of violation to Demolition Contractors. The parties could not work out a resolution and MDEQ filed a ten-count complaint. Of those violations five require MDEQ to prove there was 160 square feet of RACM at the worksite. The remaining allegations involve technical violations for failing to properly send notice before demolition and failing to properly dispose of asbestos containing waste.

C. Bench Trial is Held on the Issue of Liability

The parties stipulated to bifurcate the case into issues of liability and, if necessary, damages. The Court held a bench trial on the issue of liability. At trial MDEQ chose not to pursue one of the allegations. Evidence was admitted as follows.

i. MDEQ Inspector LeBlanc

Inspector LeBlanc testified first and was qualified as an expert in identifying asbestos containing materials. She testified that she believed there was 160 square feet of RACM that was being demolished at the worksite because the transite fragments on the worksite ground were friable and the siding on the precipitator was a Category II material.

First, she testified that, in her opinion, the fragments on the worksite ground were predominately transite and that the pieces were friable. She determined the pieces were transite based entirely on their color, testifying that transite is a darker grey than magnesia. Other than the single piece she took as a sample, she did not pick up or closely examine other pieces. Despite first testifying that a material was friable only if it emits powder or

can be crumbled by hand pressure, she later opined that the sample she took was friable because it appeared to be delaminating and had asbestos fibers protruding from it.

On cross-examination by Demolition Contractors' lawyer, she admitted that she had misidentified materials as containing asbestos in the past and that the only way to be positive was through analysis.

Inspector LeBlanc also testified that the transite siding, as it lay on the building, was a Category II material because there was high probability that, during the removal, it would be crumbled, pulverized, or reduced to powder. She relied on the broken fragments on the worksite ground as evidence that the siding was being removed in a careless manner.

Inspector LeBlanc stated that the pieces on the ground and the transite siding on the building combined to be over 160 square feet. She testified that there was over 10,000 square feet of siding on the building and that 70-80% of it was transite—with the rest having been replaced with alternative material. She received this information from employees at the site and with her later correspondence with the owner of the precipitator and it is not a fact that is disputed.

Finally, Inspector LeBlanc testified that she did not receive notice of the demolition until the day after the inspection. She also testified that the dumpster was filled with garbage bags, which had pre-printed asbestos labels on them, and cardboard drums of waste. She stated the pre-printed garbage bags warned that they contained asbestos and were used so that stickers did not have to be put on later. The dumpster did not have any warning signs on it.

ii. MIOSHA Inspector Langworthy

Inspector Langworthy also testified about the inspection. As a MIOSHA inspector he did not have expertise in applying NESHAP, such as determining whether a material is friable—a definition exclusive to NESHAP. While he did not pick up and examine any pieces on the worksite ground, he testified that he believed the fragments to be transite because of their dark grey color. Inspector Langworthy stated that the sample fragment he took from the dumpster did break, but that it did not emit powder. He further speculated that the transite fragments could be crumbled despite not attempting to do so.

Langworthy testified that he believed there was over 160 square feet of broken material on the ground. However, he admitted that during his deposition his estimate was much lower. In his deposition, Langworthy testified that there was approximately four sections of twenty-four square foot panels of broken material – or 96 square feet.

Inspector Langworthy testified consistently with Inspector LeBlanc that the dumpster was not labeled and the waste drums inside were also not labeled.

iii. Demolition Contractor's Experts Rehkopf and Haase

John Rehkopf, an expert called by Demolition Contractors, testified that there was not 160 feet of RACM present at the worksite because the pieces on the ground were not friable and the siding on the building was not a Category II material.¹ He testified that the “hand test” is the exclusive method for determining friability. Meaning that if a fragment was not subjected to hand pressure to see if it would crumble or emit powder, it could not be determined to be friable under the statute. He stated because neither inspector used the hand test, the record lacked any evidence that the pieces were friable.

Rehkopf testified that the transite siding on the precipitator was not a Category II material. Based on the depositions of Demolition Contractor employees and his review of the files, Rehkopf concluded that siding had been in good shape when it was removed and that it had been removed using hand methods. He stated that lowering transite siding by hand methods does not create a high probability that it will be crumbled, pulverized, or otherwise reduced to powder. Citing a determination letter published by the EPA, he stated that it is normal for transite siding to break during its removal but that does not render it RACM.²

Rehkopf also addressed the similarity in appearance between transite and magnesia. In his experience, magnesia fragments can imitate transite fragments and can only be differentiated through lab analysis. He stated that depending on variables, such as age and location, magnesia can be an identical shade of grey as transite. He stated that because a

¹ Rehkopf was qualified as an expert in asbestos containing materials and removal complying with NESHAP, and responding to compliance issues.

² Letter to J. Burke, *re applicability to Category II Material*, EPA Determination Index, C108, Issued January 8, 1992.

representative sample was not taken, it was not possible to determine what percentage of the fragments on the worksite ground were transite as opposed to magnesia.

Finally, on cross-examination by MDEQ, Rehkopf admitted that he had never heard of workers going into a dumpster to place labels on waste drums. Rather, the common practice is to label waste before it is put in the dumpster.

Demolition Contractors also called Douglas Haase as an expert witness.³ He agreed with Rehkopf that the proper method for determining friability was to use hand pressure to see if the fragment would crumble or be reduced to powder. He likewise testified that hand removal did not cause transite siding to become regulated. Rather, a material may be considered Category II nonfriable when it will be removed by sawing, sanding, drilling, or other similar activities. Finally, he stated that the waste bags and barrels in the dumpster did not need to be labeled because, based on his review of the record at trial, they did not contain transite or other asbestos containing material.

iv. Demolition Contractor's Workers Pitsch, Miller, and Huynh

Gary Pitsch, an owner of Demolition Contractors, testified that he helped write the work plan which laid forth the manner in which the siding was to be removed. The plan required that the transite be removed by hand methods, using torches to cut through the metal clips holding up the transite siding before lowering the sheets to the ground with ropes and pulleys. He testified that this method typically leads to minimal breakage if the transite is in good condition.

Cong Huynh and Gary Miller were project supervisors, and Huynh directly managed the removal. They testified that the transite was in good condition when it was removed. Both stated that the work was done in accordance with the work plan and no heavy machinery was used during the removal. Huynh testified that there was minimal breakage during the removal and that no sheets of transite siding broke free or were dropped. He stated that the crews continuously wet the siding, along with the other areas

³ Haase was qualified as an expert in hazardous materials and transite removal, compliance with NESHAP, and analytical testing of bulk samples and air sampling.

where work was being done, to control the dust generated by transite, bird feces, or bird nests.

Miller testified that, in his experience, magnesia could be a dark grey or brown depending on its age and location. Miller stated that because it often forms as a layer on transite, the magnesia will also mimic transite's appearance. He testified that around 30% of the siding on the precipitator had been replaced with non-transite material but that during the removal all the siding was treated as if it was transite. Miller stated that it was his job to ensure that the transite was not cut, grinded, or intentionally broken.

Huynh also testified that the dumpster had been taken to the landfill two days before the inspection and that it was taken again several days after the inspection. He stated that, if he had seen tears in the dumpster lining, they would have been repaired before the dumpster was transported. Huynh stated that there was transite siding in the dumpster and that the garbage bags were filled with Tyvek suits and other equipment used during the removal. The drums were filled with bird droppings and fragments of magnesia, but not transite.

LAW & ANALYSIS

The Court held a bench trial on the matter of liability. At trial, MDEQ alleged nine violations of Asbestos NESHAP. Of those violations, five depend on the worksite having over 160 square feet of RACM. Because this threshold requirement was not met, the Court addresses these violations as a group.

The remaining four violations allege technical failures by Demolition Contractors. MDEQ alleges that it was not provided notice 10 days before demolition began and that the notice did not include the required information. The remaining two allegations are that Demolition contractors failed to label the waste material prior to its removal from the facility premises, and that the vehicles used to transport asbestos containing material were not properly marked during the unloading or loading of the dumpster. The Court addresses MDEW's allegations in order.

As a preliminary matter, Demolition Contractors argued in its trial brief that it was not liable because it subcontracted the asbestos removal out to Asbestos Contractors. The

issue was only minimally argued at trial. The Court finds Demolition Contractor's argument unpersuasive, as the job was a single demolition for which Demolition Contract was the operator.

A. There was not 160 Square Feet of RACM Present at the Worksite

To sustain five of the violations, MDEQ bears the burden of proving that there was 160 square feet of either friable material, Category II nonfriable material, or a combination of the two. For the reasons stated below, the Court finds that the fragments on the worksite ground were not friable and that the siding on the building was not a Category II material.

i. The Transite Fragments on the Worksite Ground were not Friable and did not Total 160 Square Feet

A material is friable if, when dry, it can be crumbled, pulverized, or reduced to powder by hand pressure. 40 CFR § 61.141. The Court found the expert testimonies of Rehkopf and Haase comported with the plain reading of the statute that the "hand test" is the proper method for determining friability. Meaning that to be considered friable, a fragment must be shown to have been crumbled, pulverized, or reduced to powder under hand pressure. Simply breaking a fragment does not render it friable.

Here, MDEQ failed to prove that the transite fragments were friable. There was no evidence in the record that either inspector implemented the hand test. Inspector LeBlanc stated that she scratched her fragment and that it did not break or emit powder. Inspector Langworthy testified that his piece did break but that is not sufficient under the statute to show friability. He did not subject his piece to the hand test and no powder was emitted. Accordingly, there is no evidence that the samples taken by the inspectors were friable.

Even if the fragments were friable, combined they did not total 160 square feet. The Court finds inspector Langworthy's deposition testimony credible that there was no more than 96 square feet of broken fragments on the worksite ground. This estimate conforms the photos provided of the worksite area on the day of the inspection and Rehkopf's testimony that there did not appear to be 160 square feet of broken fragments. The Court also finds the testimonies of Rehkopf, Haase, and Miller persuasive that some magnesia fragments cannot be differentiated from transite based solely on color. Accordingly, the

inspector's assumption that nearly all the fragments were transite because of their darker grey color was improper. Because a representative sample was not taken, there are not sufficient facts in the record to determine what percentage of the fragments on the worksite's ground were transite.

Inspector LeBlanc opined that the fragment she took was friable because she could see it was delaminating and the asbestos fibers protruding from it. But this is not the test for friability put forth by the legislature. And the Court declines to rewrite the statute for friability to include signs of delamination or protruding fibers.

In summary, the Court finds that MDEQ failed to prove that the fragments on the worksite ground were friable because they were not subjected to the hand test and there was no evidence they crumbled, were pulverized, or otherwise reduced to powder. And, even if they were friable, there were not 160 square feet of transit fragments such that threshold showing is met. Accordingly, the Court next considers whether the transite siding covering the precipitator was a Category II material.

ii. *The Transite Siding Covering the Precipitator is not a Category II material*

A material is Category II nonfriable if there is a high probability that it will become crumbled, pulverized, or reduced to powder by the forces expected to act on it in the course of the demolition. 40 CFR § 61.141. MDEQ failed to show that there was a high probability that the manner in which the transite siding was being removed would cause it to become regulated under this definition.

The Court found the testimonies of Huynh, Pitsch, and Miller credible. Each testified that the siding was in good shape when it was removed and that it was removed carefully using hand methods. Pitsch testified that he created the work plan in which hand methods were prescribed for removing the siding. Miller testified that it was his job to make sure no methods were used that would cause the transite siding to become regulated. Huynh testified that torches were used to remove the clips that held the siding to the building before the siding lowered to the ground using ropes and pulleys. He testified this

is the accepted and standard practice for removing transite siding. Huynh further testified that no pieces of siding were dropped or otherwise mishandled.

Because the siding was in good shape and was removed carefully by hand methods, it does not meet the definition of a Category II nonfriable material. This holding is bolstered by the EPA's determination letter on the issue. Determination Detail C108, issued January 8th, 1992, directly addresses when damaged nonfriable asbestos containing material, such as transite siding, becomes regulated. It concludes that if the siding is in good shape and hand methods are used for removal, the siding is not a Category II material. This is true even though careful removal often does involve some amount of breakage. Because transite siding is so durable, even when it breaks it is not likely to release a significant quantity of airborne fibers. The letter contrasts hand methods with demolitions involving a wrecking ball, sawing, abrading, or other similar methods of removal which would cause transite siding become regulated.

MDEQ argues that the transite siding was not removed carefully because, if it had been, the worksite ground would not have been littered with hundreds of fragments. The Court agrees that if the fragments were predominately transite, it would tend to undercut Demolition Contractor's claims that the siding was removed carefully. However, as stated above, MDEQ failed to prove that the fragments were predominately transite. Both inspectors erroneously relied on the coloring of the fragments to determine that they were transite. As testified to by Miller, Haase, and Rehkopf the color of a fragment is not determinative. And a single sample was taken from the worksite ground is not enough to be considered a representative sample.⁴

Accordingly, the Court finds that the panels were in good shape and that they were removed carefully using hand methods. Meaning that it was not highly probable that the siding would become crumbled, pulverized, or reduced to powder during its removal and, therefore, the transite siding is not a Category II material.

⁴ Both inspectors acknowledged that the sampling was not representative.

A. Demolition Contractors Failed to File Notice of the Demolition

Next, MEDQ alleges two violations of Asbestos NESHAP's notice requirements. First, section 61.145(b) requires the operator of a demolition activity provide notice 10 working days before a demolition begins. This section applies where a demolition would break up, dislodge, or similarly disturb asbestos containing material, even when there is less than 160 square feet of RACM.

At trial, Demolition Contractors admitted to filing notice only after the inspection took place, which was after the demolition had begun. And Pitsch admitted the violation in his email correspondence with inspector LeBlanc. Accordingly, the Court finds that Demolition Contractors failed to timely file notice of demolition.

The second alleged notice violation is that Demolition Contractors failed to estimate the amount of RACM and Category I and II nonfriable asbestos containing material in accordance with § 61.145(b)(4)(vi). Here, the notice did not contain these estimates. Instead it states no asbestos was present.

Demolition Contractors argues in its trial brief that the notice provisions do not apply where there is no RACM. § 61.145(a) states that subsection (b), which lays forth the notice requirement, applies to the operator of the demolition activity prior to the commencement of the demolition. And the requirements apply each owner of a demolition activity, *including the removal of RACM. Id.* The Court finds Demolition Contractor was the operator of the demolition activity and, therefore, is governed by § 61.145(b)'s notice provision despite the absence of RACM.⁵

B. Demolition Contractors Failed to Label the Asbestos Containing Drums and MDEQ Failed to Show the Vehicles Used to Transport the Dumpster was not Labeled

Finally, MDEQ alleges two violations of Asbestos NESHAP's waste disposal provisions. First, that Demolition Contractors failed to label the containers and waste material that was set to be transported off the facility pursuant to 40 CFR § 61.150(a)(1)(v). This section

⁵ Demolition Contractor's also argued, primarily in its trial briefs, that it had subcontracted out the job of removing the siding to Asbestos Contractors, a separate but related company. However, the Court is unconvinced and finds that Demolition Contractor was the owner of the demolition activity.

applies where the waste includes asbestos containing material and does not require a threshold showing of 160 square feet of RACM.

The Court finds Demolition Contractors committed the violation because drums in the dumpster were not labeled. While the dumpster was not ready to be transported at the time of the inspection, it already contained the drums of waste. Rehkopf testified that he had never heard of a company waiting until waste was loaded into the dumpster to label it. As the Court previously found, magnesia cannot be differentiated from transite. And Huynh testified that the drums were full of magnesia, meaning that the drums likely also contained transite. Furthermore, Huynh's belief that the drums did not contain transite also means he would not have planned to label them. And, as the Court noted above, the fragments of magnesia could not be differentiated from the transite at this worksite. Meaning that the drums likely contained asbestos containing material. Furthermore, inspector Langworthy found a piece of transite in the dumpster. Accordingly, the Court finds that the dumpster contained asbestos containing material and was not labeled at the time it was set to be moved from the facility.

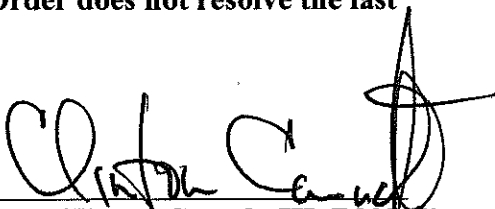
Second, MDEQ alleges that Demolition Contractors failed to label the vehicle used to transport the dumpster with visible signs pursuant to 40 CFR § 61.150(c) during its loading or unloading. While inspector LeBlanc stated that the dumpster did not have any signage on it, this section only requires it when the vehicle is being loaded or unloaded. Accordingly, MDEQ's allegation relies on pure speculation as to whether the vehicle that moved the dumpster two days after the inspection would not be marked.

CONCLUSION

MDEQ failed to prove that there was any RACM on the worksite premises. Accordingly, it has not proven the five violations which require the threshold showing of 160 square feet of RACM be shown. Because Demolition Contractors failed to provide notice of the demolition, the Court finds that it did commit both Asbestos NESHAP notice violations. Finally, the Court finds that Demolition Contractors failed to properly label the waste in the dumpster but that MDEQ failed to show that Demolition Contractors failed to properly

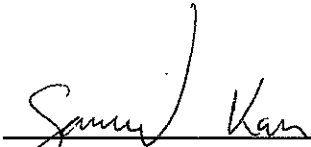
label the vehicle used to transport the dumpster off of the facility. Because the Court finds the Demolition Contractors is liable, a hearing on damages is necessary. Parties should schedule a hearing on the issue after the case is reassigned on January 1, 2023.

In accordance with MCR 2.602(A)(3), this Order does not resolve the last pending claim, and does not close the case.


Hon. Clinton Canady III (P23262)
Circuit Court Judge

PROOF OF SERVICE

I hereby certify I served a copy of the above *Order* upon the attorney(s) of record/parties, on December 15, 2022.



Samuel Kane
Law Clerk

Thirtieth Judicial Circuit of Michigan
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RECEIVED

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