

Commissioner, Indiana Department of Environmental Management

v.

Arthur Hicks

IDEM Case No. 2008-18353-A
Muncie, Delaware County, Indiana
2010 OEA 134, (10-A-E-4381)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 134 cite this as
IDEM v. Arthur Hicks, 2010 OEA 134.

TOPICS:

hearing
hearsay
asbestos
notification
demolition
penalty policy
potential for harm
extent of deviation
regulated asbestos containing material (RACM)
326 IAC 14-10-1(b)
326 IAC 14-10-3(1)
326 IAC 14-10-4(1)

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Justin Barrett, Esq.
Respondent: Arthur Hicks, pro se

ORDER ISSUED:

September 1, 2010

INDEX CATERGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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Muncie, Delaware County, Indiana

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

IN THE MATTER OF:)

COMMISSIONER, INDIANA DEPARTMENT)
OF ENVIRONMENTAL MANAGEMENT,)
Complainant,)

v.) CAUSE NO. 10-A-E-4381

ARTHUR HICKS,)
IDEM Case No. 2008-18353-A,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing and the Court, being duly advised and having read the pleadings, record, exhibits and having heard the testimony finds that judgment should be entered and enters the following findings of fact, conclusions of law and final order:

Summary of Decision

The Indiana Department of Environmental Management (IDEM) issued a Notice and Order of the Commissioner of the Department of Environmental Management (the CO) to the Respondent on June 1, 2010. The Respondent appealed the issuance of the CO on June 16, 2010. The IDEM alleges that the Respondent violated 326 IAC 14-10-3(1) and 326 IAC 14-10-4(1) and seeks a penalty of \$10,500. The violations arise from the Respondent’s alleged failure to notify IDEM of a demolition project in Muncie Indiana and to remove asbestos containing material before beginning demolition. The Respondent denies violating these rules. The Court heard testimony and admitted the offered evidence at a hearing held on August 13, 2010. The Court finds the Respondent in violation of 326 IAC 14-10-3(1) and orders the Respondent to pay a penalty of \$5,000 (five thousand dollars).

FINDINGS OF FACT

1. Arthur Hicks (the Respondent) owns property located at 705 East 18th Street, Muncie, Delaware County, Indiana (the Property). There were three (3) buildings on the Property.

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2. The Respondent notified the IDEM on August 4, 2008 that he was going to demolish a building on the Property. The Respondent provided uncontroverted testimony¹ that he had been ordered to demolish the buildings by the City of Muncie as the result of a fire. The Respondent did not provide any information regarding this order to the IDEM in the notification.
3. The IDEM inspected the Property on August 12, 2008 and found no violations.
4. On December 17, 2008, the IDEM inspected the Property again. The inspector determined that a different building, other than the building observed on August 12, had been demolished. On this date, the inspector found and sampled suspect material. This material was friable. The material consisted of mag block and air cell insulation.
5. The samples were analyzed and revealed the presence of asbestos. The material was regulated asbestos containing material (RACM).
6. The inspector observed approximately 5 linear feet of material similar to the sampled material in the debris pile.
7. The Respondent testified that he hired an accredited asbestos inspector to inspect the Property prior to demolition² and that he was told that there was no asbestos present. The inspection report was not produced.
8. The Respondent hired a licensed contractor to remove and dispose of the RACM. The Respondent testified that this contractor told him that there was no RACM on the Property. The work was completed on or before July 16, 2009.
9. The Respondent took a sample of the material and sent it to a laboratory for analysis. This sample did not contain asbestos.

Applicable Law

The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3. This is an enforcement action brought under I.C. § 13-30-3. The IDEM, in accordance with I.C. § 13-30-3-9, has the burden of proving that the Respondent committed the alleged violations.

¹ The Respondent did not produce a copy of an order; however, the IDEM did not object to the testimony regarding the existence of the order.

² The IDEM introduced Complainant’s Exhibit #10 into evidence, which verified that an inspection was done.

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This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

IDEM alleges that the Respondent violated 326 IAC 14-10-3(1) and 326 IAC 14-10-4(1). 326 IAC 14-10-3(1) states that an owner or operator of a demolition activity must notify the IDEM of his intent to demolish the building. 326 IAC 14-10-4(1) provides that the owner must remove all regulated asbestos containing material (RACM) prior to starting demolition.

Pursuant to 326 IAC 14-10-1(b) the requirements of 326 IAC 14-10-3 and 326 IAC 14-10-4 apply to a building being demolished under an order of a local government agency as follows:

- (b) In a facility being demolished under an order of a state or local government agency, because the facility is both structurally unsound and in danger of imminent collapse, all of the following shall apply:
 - (1) Only the notification requirements in section 3 of this rule and the emission control requirements in section 4(4) through 4(8) and 4(11) through 4(12) of this rule shall apply.
 - (2) The owner or operator must assume that the debris in the wreckage is contaminated with RACM and dispose of all demolition debris as RACM unless a licensed Indiana inspector has thoroughly inspected the affected facility and certifies that no RACM is present.
 - (3) All RACM and any asbestos-contaminated debris or assumed RACM shall be properly disposed of at a waste disposal site operated in accordance with the requirements of 40 CFR 61.150 and 329 IAC 10-8.

The IDEM used the Civil Penalty Policy³ to determine the appropriate penalty in this matter. According to this policy, a civil penalty is calculated by “(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance.”⁴ The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.⁵ The policy states that the potential for harm may be determined by considering “the likelihood and degree of exposure of persons or the environment to pollution” or “the degree of adverse effect of

³ IDEM's Civil Penalty Policy is a nonrule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5.

⁴ Page 2 of Civil Penalty Policy.

⁵ Page 2 of Civil Penalty Policy.

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noncompliance on statutory or regulatory purposes or procedures for implementing the program”.⁶ There are several factors that may be considered in determining the likelihood of exposure. These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs and the size of the violator.⁷ Extent of deviation is determined by looking at whether the violation “significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented.”⁸

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. 326 IAC 14-10 requires the owner of a building being demolished to notify the IDEM of the demolition activity, regardless of whether RACM is present. The Respondent provided notification prior to demolition of one of the buildings on the Property. The specific information⁹ provided on the notification makes it clear that the notification was for one building.
4. No notifications were provided for any of the other buildings. The Respondent provided evidence that he was ordered to demolish the buildings. Under 326 IAC 14-10-1(b), he was required to provide notice of demolition activity to IDEM. The Respondent failed to provide notice of the demolition of the remaining buildings. Therefore, the Respondent violated the provisions of 326 IAC 14-10-3(1).
5. IDEM presented substantial evidence that RACM was present on the Property. The Respondent asserts that there is no RACM on the Property based on his sample and on the statements of his inspector and the asbestos contractor that he hired to remove the RACM. However, the fact that the Respondent’s sample contained no asbestos does not negate the fact that the IDEM inspector found RACM. There was no evidence that the IDEM’s samples were flawed.

⁶ Page 4 of Civil Penalty Policy

⁷ Page 4 of Civil Penalty Policy.

⁸ Page 5 of Civil Penalty Policy.

⁹ The building size and the number of floors provided on the notification (Complainant’s Exhibit #10) are indicative of a single building.

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6. Further, neither the inspector nor the contractor hired by the Respondent testified at the hearing so any statements made by the inspector or the contractor were hearsay and unsupported by direct evidence such as written documentation.¹⁰ So, while the Respondent's good faith belief that there was no asbestos on the Property may have been reasonable, it does not contradict the fact that regulated asbestos containing material was found on the Property.
7. The uncontroverted evidence was that the Respondent undertook the demolition because of the city of Muncie's order. Under 326 IAC 14-10-1(b), the Respondent must comply with the notification requirements and the emissions control requirements found in 326 IAC 14-10-4(4) through 4(8) and 4(11) through 4(12). The IDEM alleges that the Respondent violated 326 IAC 14-10-4(1). As the Respondent was not required to comply with this subsection, he did not violate 326 IAC 14-10-4(1).
8. For the violation of 326 IAC 14-10-3(1), the ELJ determines that the potential for harm is moderate as "the likelihood and degree of exposure of persons or the environment to pollution" was moderate. Regulated asbestos containing material was present at the Property. This is a known carcinogen. Further, there was no fence or security at the Property to minimize public exposure.
9. The extent of deviation is minor as the Respondent did notify the IDEM of the demolition of one of the buildings on the Property and he complied with the requirement to have the Property inspected for asbestos.
10. The IDEM did not produce evidence that economic benefits accrued or of aggravating or mitigating circumstances.
11. For the violation of 326 IAC 14-10-3(1), the Respondent is assessed a penalty of \$5,000 (five thousand dollars).

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Respondent, is in violation of 326 IAC 14-10-3(1) and is assessed a penalty of five thousand dollars (\$5,000). This penalty shall be paid to the Environmental Management Special Fund in accordance with the directions contained by the Notice and Order of the Commissioner of the Indiana Department of Environmental Management.

¹⁰ The presiding ELJ left the record open for two weeks after the hearing to allow the Respondent to produce a copy of the inspection report, but it was not produced.

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You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 I.C. § 4-21.5. Pursuant to I.C. § 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 this 1st day of September, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge