BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ALPINE BUILDERS, INC., and TACOMA SCHOOL DISTRICT NO. 10, Appellants, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB NOs. 86-183 & 86-192 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter involves timely appeals by Alpine Builders, Inc., (PCHB No. 86-192; "Alpine") and Tacoma School District No. 10 (PCHB No. 86-183; "District"), of Puget Sound Air Pollution Control Agency's ("PSAPCA") Notice and Order of Civil Penalty (No. 6511), which assesses a $1,000 penalty for alleged violations of Section 10.04(a) and (b) of Regulation I, and WAC 173-400-075 in the handling of asbestos on August 12, 1986 at the Arlington Elementary School in Tacoma, Washington. The appeals were consolidated.

On January 9, 1987, appellant District filed a Motion for Summary Judgment and Memorandum and Affidavit in Support. PSAPCA filed its Memorandum in Opposition on January 20, 1987.

A formal hearing was held on January 27, 1987, before the Pollution Control Hearings Board. Present for the Board were Members Judith A. Bendor (Presiding), Lawrence J. Faulk (Chairman), and Wick Dufford. Appellant Alpine was represented by Mr. Gary Davis. Attorney Susan Schreurs represented appellant District. Attorney Keith McGoffin represented respondent PSAPCA. Court reporter Cheri L. Davidson with Gene Barker & Associates recorded the hearing.

Argument on the Summary Judgment Motion was heard. The Board deferred ruling on the Motion. Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. Post-hearing briefs were submitted and reviewed.

From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency is an activated air pollution control authority under the terms of the State of Washington Clean Air Act. PSAPCA has filed with the Board certified copies of its Regulations I and II, of which the Board takes official notice.

II

Alpine Builders, Inc., is a company located in Tacoma, Washington which does business in the State of Washington. It does not have

certified asbestos workers on staff. Tacoma School District No. 10 operates Arlington Elementary School, located at 3002 South 72nd Street in Tacoma (Pierce County), the site at issue in this appeal. The District hired Alpine as the general contractor to remove asbestos and renovate the School. Alpine in turn hired Steve's Maintenance Service as a sub-contractor to remove asbestos. Steve's Maintenance, which employs certified asbestos workers, is not a party to this appeal.

III

PSAPCA's Notice and Order of Civil Penalty No. 6511 states that appellants violated Regulation I on or about August 12, 1986, as follows:

A. Section 10.04(a), by failing to remove all asbestos materials from the facility before causing or allowing any wrecking or dismantling;

B. Section 10.04(a)(2), by failing to adequately wet asbestos-containing material whenever exposed during wrecking or dismantling;

C. Section 10.04(a)(3), by disturbing asbestos-containing materials;

D. Section 10.04(b)(1), by failing to have a certified asbestos worker conduct the removal and encapsulation;

E. Sections 10.04(b)(2)(i)(A), by failing to adequately wet asbestos material exposed during cutting or disjointing when materials are being removed in units or in sections; and

F. Section 10.04(b)(2)(ii), by failing to adequately wet the asbestos-containing materials when being stripped from the facility components.

A $1,000 penalty was assessed.

IV

On August 12, 1986, a PSAPCA inspector arranged with District Safety Project Coordinator Ralph Thorpe, while both were attending an asbestos removal seminar, to have an inspection of Arlington Elementary School later that afternoon. After leaving the seminar, Mr. Thorpe -- who is a certified asbestos worker -- returned to the school. A Department of Labor & Industries ("L&I") inspector was already there and showed him a sample of "suspicious" material. Mr. Thorpe locked the doors to the building and told personnel to leave.

Sometime later the PSAPCA inspector arrived and met with Mr. Thorpe, who told him that Alpine Builders had disturbed asbestos while doing a renovation job.

V

The PSAPCA inspector, accompanied by Mr. Thorpe and the L&I employee, did an inspection. During the renovation project two skylights and their frames were removed, the openings scraped, light fixtures worked with, and the surfaces sealed. It was during this work that considerable amounts of the "suspicious" material was disturbed and knocked to the floor. Both Alpine and their sub-contractor Steve's Maintenance worked on the skylights. Debris was scattered up and down the hallway, on the floor on top of a

plastic sheet, enough to fill several lunch sacks. The debris was dry and friable. The PSAPCA inspector testified that he took pictures and four samples.

VI

The inspector testified he had filled out a Data and Chain of Custody Sheet (Exh. R-8) using standard agency procedures. The samples were tested at the Washington State Department of Ecology's laboratory. Test results were received by respondent, as reflected in the Department's Analysis Reports (Exh. R-7, three separate test results). Each test result is one page, states a conclusion as to the average type of asbestos present in percentage, provides the test analyst's name and the date of the analysis, identifies the location of the sample and provides the samples' identification number (which is the same one used in the Chain of Custody sheet). Under the titles: "sample description," "stereoscope observations" and "polarizing scope observations" appears the statement: "Data Available Upon Request."

Respondent offered Exhibits R-7 and R-8 into evidence, to which appellant District objected on hearsay grounds. Argument was heard. The Board deferred a final ruling on admitting the exhibits and allowed the parties to file post-hearing briefs on the issue of admissibility. Briefs were filed and reviewed.

VII

Any Conclusion of Law hereinafter determined to be a Finding of Fact is hereby adopted as such.

From these Facts, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these issues. Ch. 43.21B RCW. Respondent has the burden of proof in this case.

II

Appellant's Motion for Summary Judgment challenges PSAPCA asbestos Regulation I, Section 10.4 as overreaching statutory authority, being facially invalid. We disagree, and reaffirm our conclusion in University of Washington, et al. v. PSAPCA, PCHB No. 86-212, (Order Denying Summary Judgment Motion, April 10, 1987), from which we now extensively quote:

> [. . .] The Congress of the United States has enacted a special program for control of "Hazardous Air Pollutants" which are defined as:
>
> > . . . an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator [of the U.S. Environmental Protection Agency] causes, or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious, irreversible or incapacitating reversible, illness. [Wording in brackets added]. Section 112(a)(1), Federal Clean Air Act.
>
> Pursuant to this statutory authority, the Administrator has identified, by regulation, the pollutants severe enough in

their environmental effect to warrant inclusion under the above definition. As of July 1, 1986, there are only eight pollutants so designated: 1) asbestos, 2) benzene, 3) beryllium, 4) coke oven emissions, 5) inorganic arsenic, 6) mercury, 7) radionuclides and 8) vinyl chloride. 40 CFR Section 61.02.

The Administrator of the U.S. Environmental Protection Agency has adopted, also at 40 CFR Part 61, rules to prevent any emission of asbestos. These are referred to as "NESHAP" rules, an acronym for "National Emissions Standards for Hazardous Air Pollutants" which, in turn, are the body of federal rules applicable to asbestos and the other seven pollutants hazardous enough to warrant the special attention of Congress. In the case before us, the federal "NESHAP" rules for asbestos[1] have been cited in tandem with PSAPCA's asbestos rules challenged in this motion. Both sets of rules may be fairly characterized as "work practice" rules having the avowed purpose of preventing any asbestos emission. See 40 CFR Sec. 61.147. Such rules are explicity provided for within the federal Clean Air Act:

> For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous pollutant or pullutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his[her] judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. (Emphasis added). Section 112(e)(1).

With that background in view, we turn next to the Washington State Clean Air Act, chapter 70.94 RCW. It is declared within that act, at the outset that the public policy of the state is to

> ". . . secure and maintain such levels of air quality as will protect human health and safety and comply with the requirements of the federal clean air act . . . " RCW 70.94.011

University of Washington, supra.

---

1 PSAPCA Notices cite the provisions of WAC 173-400-075, a regulation of the State Department of Ecology which adopts by reference the federal NESHAP rules for asbestos.

III

In the case herein, PCHB Nos. 86-183 and 86-192, the thrust of appellant's challenge to PSAPCA's asbestos regulations is that they are inconsistent with the State Clean Air Act which appellant argues only proscribes outdoor pollution, while PSAPCA regulations functionally also include indoor emissions. Returning to the conclusions reached in University of Washington, supra, at 4, we reaffirm that reasoning:

> [. . .] there is no inconsistency with or overreaching of the state act by PSAPCA's regulations which have prevention of any asbestos emission as their aim. That aim is shared by the federal NESHAP rules for asbestos. Those rules, in turn, implement the federal Clean Air Act which the state Clean Air Act was devised to meet and carry out. Interpretation of the state act must therefore proceed with that understanding.

IV

Appellant cites PSAPCA v. Kaiser Aluminum, 25 Wn.App 273, 607 P.2d 870 (1980) for the proposition that the Agency can only lawfully control outside air. Reliance on that case is misplaced, as it involved leaks of alumina, not asbestos. Alumina is not a Hazardous Waste Pollutant under NESHAP and the state and local regulations, whereas asbestos is. By legislation, stricter controls of asbestos, a highly dangerous material, have been enacted.

The reasons for such strict controls are readily apparent. Asbestos has a "harmful potential" to increase mortality or result in grave illness. University of Washington, supra, at 6, citing Kaiser

Aluminum v. Pollution Control Board, 33 Wn.App. 352, 654 P.2d 723 (1982). Whenever asbestos is or may be emitted into the atmosphere, the "harmful potential" test of the second Kaiser case is met. The challenged PSAPCA asbestos regulations validly seek to prevent that harmful potential. University of Washington, supra.

V

Furthermore, the challenged PSAPCA regulations are presumed valid. The party challenging the regulations has the burden. Appellants have not met their burden to prove their invalidity. The regulations are reasonably consistent with the statute being implemented and are valid. See, Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 314, 545 P.2d 5 (1976).

VI

Based upon the record before us, the Board concludes that the Data/Chain of Custody Sheets (Exh. R-8) were properly admitted. The document is an exception to the hearsay rule (Evidence Rule 803(6); RCW 5.45) in that it is a business record. We find that a qualified witness testified to its identity and the mode of its preparation, and that the document was prepared near the time of the act. We conclude that the source of the information, method and time of preparation justify its admissions, consistent with RCW 5.45.020.

VII

We conclude, however, that the Department of Ecology Asbestos Analysis Report (Exh. R-7, three pages) should not be admitted. The

documents are clearly hearsay, i.e., statements made outside the hearing by Department of Ecology personnel who were not present to testify and which were being offered to prove that the suspicious material was in fact more than 1% asbestos. (Civil Rule 801).

We also conclude that the documents do not come within any exceptions to the hearsay rule. In particular, they are not business records within the meaning of RCW 5.45 et. seq. There was no qualified witness present to testify on the records mode of preparation. The PSAPCA inspector who did testify expressed no views on the Department of Ecology's test procedures i.e., what type of test was conducted, how the test was conducted, the test's reliability in the scientific community, and so forth. Thus, we cannot conclude on the record currently before us that the information is trustworthy.

It is true that test results which are part of the physician's file and are authenticated by the doctor can be admitted without testimony from the lab technician or supervisor, e.g., State v. Sellers, (1985) 37 Wn. App. 799, 695 P.2d 1014. However, such tests are viewed by the law as reliable because they are used in the course of treating a patient.

The record before this Board is simply bare of facts demonstrating such reliability. We therefore decline to admit the test results as business records.

VIII

Respondent PSAPCA contends that the exhibit should be admitted as a

public records exception to the hearsay rule. RCW 5.44.040. We decline to do so.

To fall within this exception, the exhibit must contain facts, and not conclusions involving an exercise judgment or discretion or the expression of opinion. Kaye v. State Department of Licensing (1983), 34 Wn. App. 132, 659 P.2d 548. From the record before us, we cannot conclude that the test result's conclusion -- that the material is more than 1% asbestos -- is a factual conclusion, devoid of judgment, discretion, or opinion. We know nothing of the tests involved, or how conclusions therein were reached.

IX

While the Board predominately follows Superior Court evidentiary rules, as an administrative agency it is not required to do so. Nisqually Delta Association v. DuPont (1985), 103 Wn.2d 720, 733-734, 696 P.2d 1222. See, Gary Merlino Construction Company v. City of Seattle (1987) 108 Wn.2d 597, 605-606.

In this instance, we decline to admit the evidence under the Board's procedural rules, WAC 371-08-186. That section allows admission of relevant evidence which is in the opinion of the presiding officer conducting the hearing:

> "the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness."

See, Nisqually, supra, at 733-734.

We conclude that on the record before us the exhibit is not the "best evidence" under WAC 371-08-186. We so conclude because we have absolutely no basis upon which to evaluate its trustworthiness.

And lastly, we note, that a host of procedural mechanisms are available to litigants, in advance of hearing, such as stipulations to facts or to the admission of documents, to alleviate what parties may view as an unnecessary burden of producing a live witness at hearing. Moreover, in the future, the agency is free to establish on the record the trustworthiness of a particular test procedure. Official notice may thereafter be taken of its trustworthiness. See, WAC 371-08-188.

Therefore, in the exercise of our discretion, we decline to admit Exhibit R-7.

XII

Evidence did establish that the material contained some asbestos. However, absent the test results, we cannot conclude on this record that the material contained more than 1% by weight. The PSAPCA Regulation I Section 10 work rules apply only when the material contains more than 1% asbestos by weight. Section 10.02(e). Respondent PSAPCA has failed therefore to sustain its burden of proof.

ORDER

The Notice and Order of Civil Penalty is REVERSED.

SO ORDERED this 10th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

11/10/87

LAWRENCE J. FAULK, Member