IN RE LVI ENVIRONMENTAL SERVICES, INC.

CAA Appeal No. 00-8

FINAL DECISION

Decided June 26, 2001

Syllabus

The United States Environmental Protection Agency, Region IX filed a Complaint against LVI Environmental Services, Inc. ("LVI"), alleging that LVI violated the Asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP") by failing to provide, prior to renovation, notification of LVI's intent to conduct renovation activities and failing to keep regulated asbestos-containing material ("RACM") adequately wet until collected for disposal. The Initial Decision in this matter found LVI liable on both counts of the Complaint and assessed a $9,160 civil penalty.

LVI has filed an appeal challenging the applicability of the Asbestos NESHAP to the activities that formed the basis of the Complaint. Specifically, LVI asserts that the Presiding Officer erred in finding that asbestos-containing material ("ACM") was present at the facility. Additionally, LVI argues that, even if ACM was present, the Presiding Officer erred in finding that the ACM was RACM.

Held: The Presiding Officer did not err in finding that the results from the samples taken during the inspection of the facility showed asbestos at greater than one percent in two of the seven samples. More particularly, the undisputed test results showing asbestos in excess of one percent in one layer of each of the two samples properly supported the determination that each sample was ACM.

Further, the Presiding Officer did not err in finding that the ACM was RACM since the record included testimony that the power saw, which LVI used to remove the roofing materials, created dust and debris while removing the roofing materials, similar to that caused by a rotating blade roof cutter. By definition, use of a rotating blade roof cutter or equipment that similarly damages roofing material creates RACM. Accordingly, the Presiding Officer's determination that RACM was created and that the Asbestos NESHAP applies to LVI in this case is affirmed.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

A. *Procedural Background*

This is an appeal arising out of a two-count complaint filed by the United States Environmental Protection Agency, Region IX ("Region") on September 30, 1997 ("Complaint"). The Complaint alleges that LVI Environmental Services, Inc. ("LVI" or "Respondent") violated the Asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP") by (1) failing to provide, prior to renovation, notification of Respondent's intent to conduct renovation activities as required by 40 C.F.R. § 61.145(b); and (2) failing to keep regulated asbestos-containing material ("RACM") adequately wet until collected for disposal in violation of 40 C.F.R. § 61.145(c)(6). The Complaint proposed a civil penalty of $34,280 against the Respondent. LVI filed an answer to the Region's Complaint denying all counts of the Complaint.

The Presiding Officer assigned to this matter held an evidentiary hearing on June 30 and July 1, 1999. At hearing, both parties called witnesses and introduced exhibits into the record. The Presiding Officer issued his Initial Decision in the case on June 28, 2000. In the Initial Decision, the Presiding Officer found Respondent liable on both counts of the Complaint and assessed a $9,160 civil penalty.

LVI filed a timely notice of appeal and brief on August 1, 2000, with the Environmental Appeals Board (the "Board"), challenging the applicability of the Asbestos NESHAP to the activities at issue here ("Appeal"). The Region responded to LVI's appeal on August 21, 2000, but raised no additional issues on cross-appeal. *See* Region's Response Memorandum in Opposition to Notice of Appeal.

B. *Statutory and Regulatory Background*

The Region's Complaint in this case alleges that LVI violated section 112(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(b), and its implementing regulations. Section 112 of the CAA lists pollutants that, according to Congress, present, or may present, a threat of adverse human health or environmental effects. *See* CAA § 112(b)(2), 42 U.S.C. § 7412(b)(2). One of the pollutants listed is asbestos. 42 U.S.C. § 7412(b)(1). Section 112 of the CAA also directs the United States Environmental Protection Agency ("Agency") to adopt standards for

the listed pollutants. These standards are known as NESHAPs and may consist of both emission standards and work practice standards. The Agency has promulgated standards for asbestos at 40 C.F.R. part 61, subpart M ("Asbestos NESHAP"). In the present case, the Region alleges that LVI has violated two provisions of the standard for demolition and renovation activities — those requiring notification of the renovation activity and adequate wetting of the RACM.

In order for the Region to prevail in an Asbestos NESHAP case, the Region must make a two-fold showing. "[F]irst, the Region has to prove the Asbestos NESHAP applies in the matter and second, the Region must show that a respondent did not satisfy the particular work practice standards." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 529 (EAB 1998) (citing *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994)). Pursuant to 40 C.F.R. § 22.24(a), the Region has the burdens of presentation and persuasion to prove that each violation occurred as set forth in the Complaint. Further, pursuant to 40 C.F.R. § 22.24(b), "[e]ach matter in controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. *In re Rogers Corp.*, 9 E.A.D. 534, 543-44 (EAB 2000) (citing 40 C.F.R.§ 22.30(f)).

In the present case, LVI challenges the Presiding Officer's determination that the Asbestos NESHAP applies to the activities that formed the basis of the Complaint. In order for the Asbestos NESHAP to apply to LVI's renovation activities, the Region must prove that (1) asbestos-containing material ("ACM") was present at the facility and (2) the ACM was RACM. *See* 40 C.F.R. § 61.145(a). Except as implicit in its challenge to the applicability of the Asbestos NESHAP, LVI does not otherwise dispute either the findings of violation for the requirements cited in the Complaint or the penalty assessed.

To understand the issues presented, it is necessary to examine the regulatory definitions of ACM and RACM and the regulatory framework in which they exist. ACM is categorized by the NESHAP as "friable"[1] or "nonfriable." The asbestos-containing material in this case is alleged to be nonfriable ACM. Nonfriable ACM is further classified as either "Category I" or "Category II" nonfriable ACM. The NESHAP defines "Category I nonfriable ACM" as "asbestos-containing packings, gaskets, resilient floor covering, and *asphalt roofing products* containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 C.F.R. pt. 763, section 1, Polarized Light Microscopy [('PLM')]." 40 C.F.R. § 61.141 (definition of Category I nonfriable ACM) (emphasis added). "Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos * * *."

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[1] Friable ACM is "material containing more than 1 percent asbestos * * * that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141.

40 C.F.R. § 61.141. The material in this case is alleged to be Category I nonfriable ACM.

Once material has been found to be ACM, the next question in determining if the renovation is subject to the Asbestos NESHAP is whether the ACM is RACM. RACM includes (1) friable ACM; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that has been or will be sanded, ground, cut, or abraded; or (4) Category II nonfriable ACM that has already been or is likely to become crumbled, pulverized, or reduced to powder. 40 C.F.R. § 61.141. When RACM is present and it meets or exceeds the regulatory thresholds, the owner or operator of the renovation is subject to the Asbestos NESHAP. *See* 40 C.F.R. § 61.145(a). In the instant case, the parties focus on the third definition of RACM — Category I nonfriable ACM that has been or will be sanded, ground, cut or abraded.

The Asbestos NESHAP defines "cutting" as "to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching." 40 C.F.R. § 61.141. Under the Interpretative Rule Governing Roof Removal Operations ("Interpretative Rule"),[2] the type of machine used to remove Category I nonfriable ACM can play a significant role in determining whether the ACM is RACM, and therefore, whether the Asbestos NESHAP applies. Specifically, when a "rotating blade (RB) roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material," RACM is created. 40 C.F.R. pt. 61, subpt. M, app. A, § 1.A.1. Thus, the choice of removal method can affect whether a renovation activity is subject to the Asbestos NESHAP.

We will begin with a description of the facts in this case as found by the Presiding Officer.[3] Thereafter, we will describe the arguments LVI has raised in this appeal and will then analyze each argument to determine whether the Asbestos NESHAP applies to LVI. If the Asbestos NESHAP does apply, the Initial Decision's findings of liability for the notification and wetting violations will stand without further review since LVI has not challenged those findings in this appeal. Additionally, neither party has challenged the Presiding Officer's civil

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[2] This rule is found in appendix A of the Asbestos NESHAP and is intended to "clarify the Asbestos NESHAP as it affects roof removal operations by: (i) specifying which roof removal operations EPA construes the NESHAP to cover; and (ii) specifying roof removal work practices that EPA deems to be in compliance with the NESHAP in roofing operations where the NESHAP applies." Complainant's Exhibit 4 at 8-1 ("C Ex.") (*Applicability of the Asbestos NESHAP to Asbestos Roofing Removal Operations, Guidance Manual* (Aug. 1994)).

[3] LVI does not dispute the facts in the Initial Decision or offer any alternative facts but, rather, "take[s] exception to the conclusions, regarding issues of law and discretion." Appeal at 1.

penalty assessment in this matter.[4] Therefore, should the NESHAP apply in this case, we will uphold the penalty assessment without further analysis.

C. *Factual Background*

A brief discussion of the factual background follows.[5] LVI, an Oklahoma corporation, is an asbestos and lead abatement contractor that has a place of business in Phoenix, Arizona. Initial Decision at 2 ("Init. Dec."). LVI contracted with the Davis Monthan Air Force Base ("DMAFB") to conduct a renovation project which included the removal of roofing material on Building 1540. *Id.* The Initial Decision describes Building 1540 as a 50,000 square foot building which at one time was used as a hangar ("the facility").[6] *Id.*

On March 24, 1997, LVI provided a "courtesy" notification to Pima Co. Department of Environmental Quality which stated that 50,120 square feet of Category I nonfriable ACM was to be removed by hand or by non-mechanical tools, commencing on March 25, 1997. *See id.;* Complainant's Exhibit 7 ("C Ex.") (Original Notification).

On March 25, 1997, LVI began removing roofing materials at Building 1540, located on the DMAFB. *See* Init. Dec. at 2; Joint Stipulation Ex. 1, ¶ 1. According to the testimony of Scott Goodballet, LVI's Operations Manager and Vice President at the time of this renovation, Respondent began the renovation using hand tools to remove the roofing material. Hearing Transcript at 111 ("Tr."). However, in order to complete the renovation at a faster pace, LVI later used a roof removal machine which had rotating blades. Tr. at 112, 128; Init. Dec. at 7.

On March 31, 1997, Frank Bonillas, an inspector with Pima's Department of Environmental Quality, performed an inspection of the facility. Init. Dec. at 3. During his inspection, Mr. Bonillas observed a "Vanguard Power Saw, 9 horsepower, with a rotating blade" on the facility. *Id.* The inspector's report and his subsequent testimony indicated that LVI had used the power saw to remove roofing materials by cutting portions of the roof into squares. C Ex. 1. LVI removed roofing material with the power saw on the entire west side of the roof and about one third of the east side of the roof. Init. Dec. at 3. While inspecting the roof,

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[4] LVI states that it "finds no fault with the calculation of penalty based upon the Judges [sic] conclusion." Appeal at 4.

[5] Additional detail regarding the facts of this case can be found in the Initial Decision. *See* Initial Decision at 2-9, Dkt. No. CAA-09-97-10 (ALJ, June 28, 2000).

[6] For purposes of the Asbestos NESHAP, Building 1540 constitutes a facility as defined by 40 C.F.R. § 61.141. *See* Joint Stipulation Ex. 1, ¶ 6 ("Building 1540 is a(n) institutional, commercial, public or industrial structure, installation or building.")

Mr. Bonillas noted markings on the roofing materials and exposed edges. He further observed and photographed debris on the roof that he described as fine, ground up roofing debris, which was a few millimeters in size. Tr. at 26, 34, 36.

Mr. Pyeatt, an employee at the DMAFB, stated that he had on occasion observed dust being generated from LVI's power saw. Tr. at 74, 80, 89.

At hearing, witnesses described the power saw as having a blade guard used for, among other things, preventing debris from flying back into the operator's face. Tr. at 117-18, 261-62. The machine also had a connection for misting the blade and roofing materials with water. Tr. at 117-18. The blade used on Building 1540 was approximately 8 to 9 inches long and sharpened to approximately 1/16 of an inch thickness. Init. Dec. at 8; Tr. at 121-22, 228.

While inspecting the roof, the inspector took seven samples of the roofing material. C Ex. 1. The laboratory results indicated that sample nos. 5 & 7 tested positive for asbestos and consisted of roofing debris. *Id.* The composite of each of these samples contained less than or equal to one percent asbestos. *Id.* However, when the separate layers of each composite sample were tested, sample nos. 5 & 7 each contained a layer in excess of one percent asbestos (6.25% and 4.25% asbestos, respectively). *Id.*

II. *DISCUSSION*

A. *Issues Raised*

LVI's appeal focuses on whether the Asbestos NESHAP applies in this particular instance. LVI argues that the Presiding Officer erred when he found that the roofing material was ACM and he further erred when he found that the alleged ACM (roofing material) was RACM.

LVI first asserts that the Presiding Officer erred in his interpretation of the sample asbestos results when he determined that samples 5 & 7 taken during the inspection were ACM. The Presiding Officer determined that the two samples were ACM because certain layers within those samples contained greater than one percent asbestos, even though the entirety of the composite sample was less than one percent asbestos. LVI argues that a proper analysis using the PLM method requires that the composite of all layers of a sample, rather than any single layer, be used to determine the percentage of asbestos. Appeal at 3.

Secondly, LVI challenges the Presiding Officer's conclusion that the alleged ACM constituted RACM under the regulations. LVI asserts that the power saw used at the renovation was not a RB roof cutter, or machine that similarly damages materials. Further, LVI asserts that the roofing debris found at the facil-

ity would not qualify as "small fragments." According to LVI, in order for the Presiding Officer to correctly find that the power saw used by LVI damaged the roof in a similar manner to a RB roof cutter, the power saw would have had to cut or grind the roofing material into small fragments that "more closely resemble[d] powder or dust than pea gravel." *Id.* LVI argues that powder was not present in the debris. LVI points to the laboratory's ability to analyze the samples for asbestos by layers as "irrefutable evidence that the structural matrix or integrity of the roofing material remained intact, even in the debris generated by LVI's equipment." *Id*. at 4.

B. *Did the Presiding Officer Err in Determining the Roofing Material was ACM ?*

LVI challenges the conclusions drawn from the laboratory results in this case. The laboratory results from two of the seven samples taken at the inspection found asbestos at greater than one percent in one discrete layer of each multi-layered sample. But when the laboratory composited all layers of each sample, the samples contained less than one percent asbestos.

As discussed in Part I.B., the regulations that implement the Asbestos NESHAP define ACM as material that contains "more than one percent asbestos as determined using the method specified in appendix E, subpart E, 40 C.F.R. pt. 763, section 1, Polarized Light Microscopy [('PLM')]." *See* 40 C.F.R. § 61.141 (definition of Category I nonfriable ACM).

According to LVI, a composite sample must be greater than one percent asbestos in order to be considered ACM. The issue then is whether it was proper for the Presiding Officer to determine that these two samples were ACM when it is undisputed that only one layer of each sample, rather than the entire sample, contained more than one percent asbestos.

The regulations describing the proper way in which to analyze a sample include the following instructions:

> [W]hen discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.

40 C.F.R. pt. 763, subpt. E, app. E, § 1.7.2.1.[7] While this language appears to provide some support for LVI's position, on two occasions the Agency has issued notices of clarification regarding the identification of asbestos in multi-layered samples which provide support for the Region's position. *See* 59 Fed. Reg. 542 (Jan. 5, 1994); 60 Fed. Reg. 65,243 (Dec. 19, 1995). According to the notice published in December of 1995, the language quoted above had "led to considerable confusion as to how to analyze multi-layered samples for NESHAP purposes." 60 Fed. Reg. at 65,243. In an effort to resolve that confusion, the Agency published this additional notice of clarification which reiterated the Agency's position regarding analyzing multi-layered samples for asbestos. *See id.*

In the December 19, 1995 Notice, the Agency explained that any source sending a multi-layered sample to a laboratory may request that certain samples first be composited for analysis in an effort to reduce time and the costs associated with sampling. *Id.* The Notice goes on to explain that when the composite analysis shows that the average of the sample's layers is greater than one percent, the sample is deemed to be ACM and an individual analysis of the sample's layers is not necessary. *Id.* However, when the composite sample analysis results in less than one percent asbestos, but greater than "none detected," an "analysis by layers is required to ensure that no layer in the system contains greater than one percent asbestos." *Id.* It explains further:

> If any layer contains greater than one percent asbestos, that layer must be treated as asbestos-containing. This will have the effect of requiring all layers in a multi-layered system to be treated as asbestos-containing if the layers can not be separated without disturbing the asbestos-containing layer. Once any one layer is shown to have greater than one percent asbestos, further analysis of the other layers is not necessary if all the layers will be treated as asbestos-containing.

Id.

Thus, it would seem that LVI's argument has been contemplated and rejected in prior Agency notices. Indeed, a layer containing greater than one percent asbestos can require a determination that the entire sample is ACM. A determination that the entire sample should be treated as ACM rests on whether the layers can be separated from the asbestos-containing layer without disturbing that asbestos-containing layer.

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[7] We note that LVI states that "[t]he method of analysis does not affect the interpretation of NESHAP, merely describes how to conduct the analysis." Appeal at 2.

In the instant case, we have a record before us that includes sampling results showing two layers in two separate samples contained greater than one percent asbestos — 4.25 % and 6.25%. The samples have been described as roof debris; and the inspection report described the roof as "mostly black asphaltic roofing felts with a white painted surface." C Ex. 1, at 3. Under the regulatory definition of Category I nonfriable ACM, asphaltic felts containing more than one percent asbestos are ACM. 40 C.F.R. § 61.141. In order to determine whether asphalt roofing material is ACM, the regulations, through the notices discussed above, require a layer by layer analysis of a sample to be performed. In this case, the laboratory did perform such an analysis. *See* C Ex. 1. Pursuant to the December 19, 1995 Notice, the asphalt roofing products contained in the two samples collected during the inspection are ACM if the layers cannot be separated from the asbestos-containing layer. *See* 60 Fed. Reg. at 65,243.

The layers, which contained greater than one percent asbestos, were identified by the laboratory as paint. *See* C Ex. 1; Init. Dec. at 4. The adherent nature of paint would make it quite difficult to separate it from the other layers of the sampled material without disturbing the paint (the asbestos-containing material). Not surprisingly, the record reveals that the layers of the samples were not separated prior to removal; rather, LVI removed the materials together initially by hand tools and then later with a power saw. Tr. at 111-12. LVI has made no claim that the paint layer was, or could have been, separately removed from the other layers. Thus, based on the record, we reject LVI's argument that the Presiding Officer erred in finding LVI's renovation project involved ACM. We find his conclusions to be consistent with the Agency's long-held position on interpreting PLM analysis for ACM.

C. *Did the Presiding Officer Err in Determining the ACM was RACM?*

The second issue raised by LVI is whether the Presiding Officer erred in finding that RACM was present at the renovation. Specifically, LVI asserts that the power saw used to remove the roof was not a rotating blade roof cutter or a RB roof cutter, nor did it damage the roof in a similar manner as a RB roof cutter. Appeal at 3-4. LVI further argues that the debris created by the power saw did not resemble powder, and therefore is not RACM under the Asbestos NESHAP. *Id.* at 3.

As discussed above, this case involves Category I nonfriable ACM. Category I nonfriable ACM is RACM in two instances: 1) when it has become friable,[8] and 2) when it will be or has been subjected to sanding, grinding, cutting or

[8] In this matter, the Region has not alleged that the Category I nonfriable ACM became friable; rather, it focuses on the second instance when Category I nonfriable ACM is RACM. *See* Complaint ¶¶ 7, 11.

abrading. *See* 40 C.F.R. § 61.141. The regulations also include definitions for cutting and grinding. "Cutting means to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching." *Id.* "Grinding means to reduce to powder or small fragments and includes mechanical chipping or drilling." *Id.*

As previously noted, the regulations provide that "where a rotating blade (RB) roof cutter or equipment that similarly damages the roofing material is used to remove Category I nonfriable asbestos-containing roofing material, the removal * * * will create * * * RACM." 40 C.F.R. pt. 61, subpt. M, app. A, § 1.A.1. As the regulations explain, the underlying reason that the Asbestos NESHAP applies when RB roof cutters and other equipment that similarly sands, grinds, cuts or abrades roofing material are used is "because of the damage to the roofing material, and the potential for fiber release." *Id.* at 1.C.1. In the instant case, the question of whether RACM was present turns on whether LVI used a RB roof cutter or machine that similarly damaged the ACM to remove the roofing material, rather than a slicer, which, under the regulations, would not create RACM.

The regulations provide a definition of a RB roof cutter.[9] Similarly, the Agency has issued guidance on the descriptions of RB roof cutters and slicers. *See* C Ex. 4.

Notably, the guidance document refers to slicers as creating no visible emissions, dust, or debris, while a RB roof cutter will produce visible emissions, dust or debris. *See id.* §§ 5.1.4, 6.1.2.

In the Initial Decision, the Presiding Officer reviews the Asbestos NESHAP regulations and the Agency guidance regarding the use of RB roof cutters and slicers and finds the application of the regulatory definitions to LVI's power saw unclear. In light of this, he concludes that "this issue thus turns on the evidence of the debris observed on the roof." Init. Dec. at 18. After reviewing the descriptions of the debris found in the record, the Presiding Officer concludes that a significant amount of the debris was reduced to small fragments, and thus, falls within the definition of Category I nonfriable ACM which has been ground. *Id.* at 19. And pursuant to the definition of RACM, Category I nonfriable ACM that has been subject to grinding is RACM. *See* 40 C.F.R. § 61.141. Further, based on the condition of the debris described in the record, the Presiding Officer concludes that by using the power saw LVI had, indeed, used "an RB roof cutter 'or other equip-

[9] The regulations define a RB roof cutter to mean "an engine-powered roof cutting machine with one or more rotating cutting blades the edges of which are blunt. (Equipment with blades, having sharp or tapered edges, and/or which does not use a rotating blade, is used for 'slicing' rather than 'cutting' the roofing material; such equipment is not included in the term 'RB roof cutter.')" 40 C.F.R. pt. 61, subpt. M, app. A, § 1.A.1.

ment that sand[s], grind[s], cut[s] or abrade[s] the roof material' to remove Category I [nonfriable] ACM * * *." Init. Dec. at 18.

The Board upholds the Presiding Officer's conclusions and rejects LVI's argument that in order for RACM to have been present, the record must show the Category I nonfriable ACM more closely resembled powder or dust than pea gravel. Category I nonfriable ACM which has been subject to sanding, grinding, cutting, or abrading is RACM. Under the regulations, grinding "means to reduce to powder or *small fragments* and includes mechanical chipping or drilling." 40 C.F.R. § 61.141 (emphasis added). Clearly, "small fragments" is an alternative to "powder," and LVI cites no support in its appeal for its argument that small fragments must resemble powder. Thus, reducing Category I nonfriable ACM to small fragments, without the presence of powdered ACM, is sufficient to create RACM.

We find the Presiding Officer's determination of RACM based on the type of debris described in the record to be supportable. The factual record is clear. The Presiding Officer found the inspector's testimony to be accurate and credible,[10] and relied on the inspector's testimony that described the debris to be fine, ground-up debris, which was a few millimeters in size, to conclude that the ACM had been subjected to grinding. Init. Dec. at 18; *see* Tr. at 26, 34, 36.

The Presiding Officer cites further evidence in the record to support his conclusion that a RB roof cutter or similar machine was used to remove the Category I nonfriable ACM at the facility. Specifically, the Presiding Officer cites the photographs included in the inspection report as supporting the inspector's description of the roofing debris. Init. Dec. at 18; C Ex. 1. Additionally, he cites the testimony of Mr. Pyeatt, an Air Force base employee, in the record, which established that, similar to a RB roof cutter, LVI's power saw created dust and debris while removing the roofing materials. Init. Dec. at 18; *see* Tr. at 26, 34, 36, 74, 80, 89.

Given these facts, we believe the record clearly supports a finding that LVI created RACM from the Category I nonfriable ACM present at the facility by subjecting it to grinding. Here, the roofing material debris created by LVI's removal with a power saw was described as "small particles" of "fine, ground up material." *See* Tr. at 26, 33-34, 36-37. Thus, the condition of the ACM suggests that it has been subject to grinding, and is therefore RACM. For the reasons discussed above, the Board upholds the Presiding Officer's finding that LVI's use of

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[10] The Board generally defers to a presiding officer's factual findings where the credibility of the witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (citing *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994)).

a power saw that ground the Category I nonfriable ACM created RACM, and therefore, subjected the renovation to the Asbestos NESHAP.

III. *CONCLUSION*

After considering the issues raised by LVI, we uphold the Initial Decision in its entirety. Accordingly, LVI shall pay the full amount of the $9,160 civil penalty within thirty (30) days of receipt of this final order. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

U.S. EPA Region IX
Danielle Carr
Regional Hearing Clerk
P.O. Box 360863
Pittsburgh, PA 15251-6863

So ordered.