IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

ALLEGHENY POWER SERVICE CORP. and CHOICE INSULATION, INC.,

Petitioners,

v. CIVIL ACTION NO. 6:01-0241

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ORDER

Pending before the Court is Allegheny Power Service and Choice Insulation's Petition for Review of a Decision by the Environmental Appeals Board. The Petitioners seek a review of an administrative penalty order dated February 15, 2001. After reviewing the entire record and the parties' briefs, the Court **FINDS** that the Environmental Appeals Board based its ruling on substantial evidence. In addition, the Court **FINDS** that the Environmental Appeals Board did not abuse its discretion. Therefore, the Court **DENIES** the Petition for Review.

I. BACKGROUND

Allegheny Power Service hired Choice Insulation to conduct asbestos removal at its Maidsville, West Virginia, facility. In April 1995, Douglas Foster inspected the asbestos removal operation at the facility. He concluded that the asbestos bagged at the site was not adequately wet as required by the Environmental Protection Agency [hereinafter "EPA"] regulations. Mr. Foster's investigation resulted in the EPA filing a complaint against the Petitioners.

The EPA assessed an original civil penalty of $74,000. At the administrative hearing, the administrative law judge [hereinafter "A.L.J."] ruled against the Petitioners, and the A.L.J. reduced the civil penalty to $32,000. On appeal to the Environmental Appeals Board [hereinafter "E.A.B."], it upheld the A.L.J.'s decision. However, the E.A.B. reduced the civil penalty to $20,000.

II. STANDARD OF REVIEW

The district "court shall not set aside or remand [an administrative penalty] order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion." 42 U.S.C. § 7413(d)(4)(1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522-23 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)); *see Harry & Bryant Co. v. FTC*, 726 F.2d 993, 999 (4th Cir. 1984).

"Substantial evidence is more than a scintilla but less than a preponderance." *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir. 1993). *See also Richardson v. Perales*, 402 U.S. 389, 401 (1971) (stating that substantial evidence requires "more than a mere scintilla") and *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (noting that substantial evidence is "something less than the weight of the evidence"). A court reviewing for substantial evidence "must examine whether the [fact finder] considered all of the reasonable inferences compelled by the evidence in reaching its decision." *Sam's Club v. NLRB*, 173 F.3d 233, 240 (4th Cir. 1999). Moreover, "[a]n ALJ's credibility determinations should be accepted by the reviewing court absent exceptional circumstances." *Id.*

A review under the abuse of discretion standard requires the court to determine whether the fact finder considered the relevant factors and whether it "committed a clear error of judgment." *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983) (internal citations and quotations omitted). *See Bethenergy Mines, Inc. v. Henderson*, 2001 U.S. App. LEXIS 2390, at *8-9 (4th Cir. Feb. 16, 2001) (per curiam) (unpublished opinion).

III. ANALYSIS

A. Count I

Count I alleged that the Petitioners failed to adequately wet the regulated asbestos containing material during the stripping operation. Specifically, 40 C.F.R. § 61.145(c)(3) states that "[w]hen RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation." The Petitioners contest the finding of liability under that section.

The Petitioners' first argument is that the A.L.J. and the E.A.B. based their rulings only on Douglas Foster's testimony while ignoring substantial evidence that supports their contentions. It is true that the E.A.B. and the A.L.J. relied on Mr. Foster's testimony. However, "[i]n cases involving alleged violations of the NESHAP for asbestos, courts have routinely relied on the observations of inspectors to determine whether asbestos was adequately wetted." *U.S. v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990). In addition to Mr. Foster's testimony, the E.A.B. and the A.L.J. relied on the letters drafted by Dave Hefner, the Superintendent of Choice Insulation, (R. at AR01165, AR01045-46), as well as other evidence discussed below.

Douglas Foster performed around a thousand inspections since he began working as an EPA inspector. (*Id.* at AR00042.) During the inspection in question, Mr. Foster lifted 23-28 bags and

observed that the bags were very light in weight. (*Id.* at AR00053-55.) He then selected four (4) bags to sample. (*Id.* at AR00055-56.) Not only did Mr. Foster visually observe the samples taken from the four (4) bags, he physically manipulated the samples to determine that the asbestos was not adequately wet. (*Id.* at AR00069.) In addition, Mr. Foster peered inside the bags and observed no moisture, and he took photographs documenting the dry state of the asbestos. (*Id.* at AR00056.) While performing his investigation, Mr. Foster documented the steps he took throughout the process. (*Id.* at AR00071-72.) After the investigation, the samples tested positive for asbestos. (*Id.* at AR00066.) Both the E.A.B. and the A.L.J. found his testimony credible and his methodology acceptable.

Next, the E.A.B. and the A.L.J. used Dave Hefner's letters to support their conclusions that the Petitioners failed to adequately wet the asbestos. Mr. Hefner wrote to Douglas Foster after the inspection. (*Id.* at AR00591-92.) Mr. Hefner began the letter acknowledging Choice's "corrective measures." (*Id.*) He also wrote that on the day of the inspection, his workers failed to inform him of the inadequate water supply present at the removal site. (*Id.*) Moreover, the letter stated that once the problem of an inadequate water supply was known, the workers tapped a new water supply, and all bags leaving the removal area thereafter were "adiquatly [sic] wet." (*Id.*) It is reasonable to conclude from the letters that Mr. Hefner's choice of words supported Mr. Foster's investigative findings. The A.L.J. came to this conclusion after considering Mr. Hefner's explanation that the letters did not form his personal opinion. (*Id.* at AR01046-47.) The E.A.B. agreed with that conclusion. (*Id.* at AR01165-67.)

Additionally, the E.A.B. and the A.L.J. relied upon the photographs taken by Douglas Foster during the inspection. (*Id.* at AR01048-49.) In examining the photographs, the A.L.J. considered the Petitioners' arguments that the bags appeared wet, that the asbestos suffered from a "wicking effect,"

and that new ends were exposed due to the breaking of the asbestos. (*Id.*) However, the A.L.J. determined that the photographs supported Mr. Foster's investigation. (*Id.*) The E.A.B. acknowledged that finding and agreed with the A.L.J. (*Id.* at AR01165.)

The A.L.J. and the E.A.B. did not ignore the evidence presented by the Petitioners. The A.L.J. assessed the testimony of and the air monitoring data collected by James Prettyman. Upon weighing and analyzing this evidence, the A.L.J. reasonably inferred that the data actually established an increase in fiber emissions on days prior to the inspection by Douglas Foster. (*Id.* at AR01047.) He weighed this evidence even though case law indicated that air emission data was not determinative of assessing whether the asbestos was adequately wet. *See SchoolCraft Constr., Inc.*, CAA Appeal No. 98-3, 1999 EPA App. LEXIS 22, at *27 (E.A.B. July 7, 1999). The E.A.B. addressed and agreed with the A.L.J. on the air monitoring data. (R. at AR01170-71.)

Furthermore, the A.L.J. addressed and weighed the daily logs provided by Choice. In doing so, the A.L.J. dismissed the Petitioners' arguments, and he found that the logs actually supported the investigation by Douglas Foster. (*Id.* at AR01047.) The support came in an entry dated the same day as Mr. Foster's inspection. (*Id.* at AR00836.) The entry stated that there was "no pressure" for the water at the removal site. (*Id.*) The inference found by the A.L.J. concerning the daily logs is reasonable.

Moreover, the Petitioners' attack on Douglas Foster's credibility as a witness was addressed by the E.A.B. and the A.L.J. in each of their decisions. The A.L.J. observed Mr. Foster at the administrative hearing and determined he was a credible witness. No exceptional circumstances exist in this case requiring a finding different from the A.L.J. Therefore, the Court accepts the A.L.J.'s determination as to Mr. Foster's credibility.

B. Count II

Count II alleged that the Petitioners failed to keep the asbestos adequately wet until disposed of. Specifically, 40 C.F.R. § 61.145(c)(6)(i) requires the removers to "[a]dequately wet the [asbestos] material and ensure that it remains wet until collected and contained or treated in preparation for disposal. . . ." The Petitioners argue that the E.A.B. made a clear error of judgment in finding liability on Count II. Specifically, the Petitioners argue that the asbestos was properly bagged when no emissions were visible in the air.

However, the E.A.B. addressed this issue and determined that a violation had occurred. It noted that the evidence in the record supported the conclusion that the asbestos was not adequately wet until collected and contained. The evidence set forth above in IIIA of the Court's analysis supports this conclusion. *See In re Ocean State Asbestos Removal, Inc.*, CAA Appeal Nos. 97-2 and 97-5, 14-15 (E.A.B. Mar. 13, 1998).

C. Penalty

In assessing a penalty of up to $25,000 per day, the E.A.B. must take into account

> the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . ., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(d)-(e) (1996). Additionally, other factors may be taken into account. *Id.* The E.A.B. addressed the factors taken into account by the A.L.J. The duration of the violation was reduced after review of the waste manifest records. (R. at AR01180-82.). There was no adjustment for Choice's economic benefit for noncompliance. (*Id.*) Economic information from Dun & Bradstreet assisted in analyzing the economic impact the penalty would have on the Petitioners. (*Id.*) The A.L.J.,

noting Choice's prior similar violations, determined that Choice would have made no good faith efforts to comply with the regulations had it not been cited. (*Id.*) Choice made no payments on the same violation at the time of assessment. (*Id.*) The size of the removal project helped determine the seriousness of the violation. (*Id.*) And finally, the compliance history of Choice was taken into account in assessing the penalty. (*Id.*) The E.A.B. addressed the relevant factors and reasonable inferences in assessing the penalty, which it reduced substantially for Count II. The penalty of $20,000 is supported by substantial evidence, and it is not a clear error of judgment on the part of the E.A.B. Therefore, the Court agrees with the assessment on the part of the E.A.B.

CONCLUSION

The Court **FINDS** that the order and assessment by the E.A.B. is supported by substantial evidence. Furthermore, the Court **FINDS** that the E.A.B. did not abuse its discretion in determining the order and assessment. Therefore, the Court **DENIES** the Petitioners' Petition for Review of a Decision by the Environmental Appeals Board.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: April 3, 2002

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE