

9. Petitioner Complied with AO Section 5: Record Retention, Documentation, Availability of Information

Petitioner is required to preserve all original documents relating to work under the AO for six years. Petitioner has stored all original documents, which are in the possession of its Attorneys. Petitioner has also made arrangements to advise the EPA at least sixty days prior to December 15, 2017, the required six-year period, or at any time thereafter, if such documents are to be destroyed, to give the EPA an opportunity to inspect such documents. Accordingly, Petitioner is in compliance with the requirements of Section 5.

10. Petitioner Complied with AO Section 6: Off-Site Shipments

Pursuant to Section 6 of the AO, Respondents were required to treat, store and/or dispose asbestos contaminated material at a facility of compliance as determined by the EPA. As identified in the Work Plan and approved by the EPA, all asbestos waste was transported for disposal and storage at Minerva. Waste manifests are included in Ex. 75. Accordingly, Petitioner has complied with the requirements of Section 6.

11. Petitioner Complied with AO Section 7: Compliance with other Laws

Pursuant to Section 7 of the AO, Respondents were required to perform all cleanup actions in accordance with all applicable local, state and federal laws and regulations. As identified in the Work Plan approved by the EPA, Petitioner complied with Section 7 requirements.

12. Petitioner Complied with AO Section 8: Emergency Response and Notification Form of Releases

Pursuant to Section 8 of the AO, Respondents were required to comply with certain requirements in the event that hazardous substances were released from the Site or posed a danger to public health, welfare or the environment. The Work Plan and Safety Plan provided for these requirements. During cleanup, no such circumstances arose.

For the foregoing reasons, Petition complied with all actions under the AO, having completed each required action by December 15, 2011. CERCLA § 106(b)(2)(A) authorizes a PRP to submit its petition for reimbursement of costs sixty days after the completion of the required action. *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 879 (9th Cir. 2009) (Once a PRP claims to have completed to the required action, he has a claim for reimbursement as the EPA's certification is not a prerequisite to bringing suit).

B. Petitioner is Not Liable for Responsive Action or Costs under CERCLA § 107(a)

Petitioner is required to establish by a preponderance of the evidence that it is not liable for response costs under CERCLA § 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the AO. CERCLA § 106(b)(2)(C), *In re Grand Pier Center, LLC Petition No. 04-01, In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 454 (EAB 1996). CERCLA § 106(b)(2)(C) provides:

Except as provided in [CERCLA § 106(B)(2)(D)], to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607 (a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

CERCLA § 107(a)(1) lists four categories of responsible parties who are liable for the costs associated with an administrative order under CERCLA § 106(a), 42 U.S.C. § 9606(a):

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance * * *.

Petitioner does meet the criteria for any subsection under CERCLA § 107(a). Petitioner is and was not the owner of the Site; Petitioner did not contract, agree or otherwise arrange for disposal or treatment of hazardous materials, including asbestos, at the Site; Petitioner does not and did not own or possess any hazardous materials identified at the Site; and Petitioner did not transport any hazardous materials to, at or from the Site.

In the Amended AO, issued on July 27, 2010, the EPA made no specific findings of fact with respect to Petitioner. Instead the Agency merely amended the June 21, 2010 AO by adding the following language:

U.S. EPA herewith determines that Safe Environment [*sic*] Corporation is a “liable party” as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is subject to this Order under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

* * *

Nationwide contracted with Asbestek, Inc. and Safe Environment [*sic*] Corporation for asbestos abatement work.

* * *

Respondents Nationwide Demolition Services, LLC, Asbestek, Inc., and Safe Environment[al] Corporation [of Indiana] are persons who at the time of disposal of any hazardous substances operated the Site, or who arranged for disposal or transport for disposal of hazardous substances at the Site.

The EPA’s determination that Petitioner is a liable party under 42 U.S.C. § 9606(a) results from the single, uncorroborated (and subsequently denied) statement of Amaya that Petitioner gave Asbestek “full permission and authority to use” Petitioner’s Ohio License for its performance at the Site. Petitioner denies that any permission or authority was given. No independent evidence exists by which the EPA determined Petitioner to be a liable party under

the AO. Subsequent to his Affidavit, Amaya testified in a deposition that he is unable to confirm whether his “request” to use Petitioner’s Ohio License was ever actually received by Petitioner’s then president, Paganelli, and that it is quite possible that Paganelli never gave any such authority. Amaya has not disputed that Petitioner was not a contractor at the Site, that Asbestek and Petitioner had no contract, that neither Petitioner nor its employees were present at anytime at the Site, that Petitioner received no benefit, financially or otherwise from work performed at the Site, that Petitioner did not inspect, assess, or authorize any work at the Site, and that Petitioner did not communicate with Piscazzi, Thomas, Aydin, Nationwide, Asbestek, Amaya, Vadas, the Ohio EPA, or ODH regarding any work to be performed or performed by Asbestek at the Site at any time prior to Asbestek’s conclusion of its abatement efforts. Petitioner has no liability under 42 U.S.C. § 9607(a). In addition, substantial evidence shows that Amaya and Vadas deceptively and fraudulently used Petitioner’s Ohio License without authorization.

1. Petitioner Did Not Authorize or Participate in Removal, Remediation or Transportation of Hazardous Materials at the Site

a. Petitioner Did Not Authorize Use of Its Ohio License to Asbestek or Tomas Amaya

Petitioner did not authorize use of its Ohio License by Amaya, Vadas or Asbestek for work at the Site. At their first meeting, Amaya and Vadas were aware that an Ohio License would be necessary to perform the abatement work at the Site. (Ex. 12, 75: 1-14.) Amaya testified that Vadas informed him that Nationwide had an Ohio License under which Asbestek would work (Ex. 12, 77:20 – 81:20.) Amaya testified that either Vadas or Collins was lying, but Amaya found out later that Nationwide did not have an Ohio License. (Ex. 12, 87:2 – 88:24.) In late August 2007, Asbestek performed non-friable asbestos abatement at the Site while Amaya and Vadas “worked on the license” (Ex. 12, 89:19-21) application for Asbestek (Ex. 12, 97:17-24.) In order to accomplish this, Amaya gave Vadas the template to fill out the application to

ODH (Ex. 12, 104:14-20) and claimed that Vadas filled it out and Amaya signed it (Ex. 12, 106:8-10.) Amaya was also aware that in order to perform asbestos abatement work in Ohio that a Supervisor License was necessary. Amaya initially testified that he had a Supervisor License which he obtained around the time that plans to work with Nationwide were being developed. (Ex. 12, 80:1-24.)

Amaya testified that because the price of metal increased and Collins wanted to remove the metal from structures on the Site without further delay, the pressure was high and “we didn’t have time to get the license because it takes six weeks.” (Ex. 12, 96:3-16.) Amaya testified that this left him with two choices: (1) either submit Asbestek’s own application for the Ohio License to ODH (even though he testified this had already been done) or (2) ask his “friend to let me use his license.” (Ex. 12, 144:3-6.) He allegedly chose the latter option, and claims to have called Paganelli by phone and requested permission to use the Ohio License. (Ex. 12, 117:10-15.) Amaya testified that he expected Paganelli to give him the Ohio License because Amaya had been a responsible and faithful laborer for Petitioner. (Ex. 12, 148: 12-20.) But he admitted that he has never experienced a situation where a company just “gives” its License for use in a job. (Ex. 12, 150:3-15.)

Amaya had a poor recollection¹¹ of when he made the request to Paganelli, but claimed to have done it after the non-friable asbestos abatement phase of the project and after he had been to the Site (Ex. 12, 151:1 – 152:11.) Amaya stated that he called Paganelli on the phone and said, “I have a small job in Ohio which I need to get done but I don’t – it going to take me too long to get the license. Can you let me use your license?” (Ex. 12, 156:4-7.) Amaya claims that

¹¹ In his Affidavit, Amaya stated that he obtained permission from Paganelli “on or about August 31, 2007.” When Petitioner provided the EPA phone records to show that this was not possible, Amaya, who was given a copy of the phone records to review before responding, told the EPA that he could not recall when the call was made.

Paganelli said “Yes, no problem” (Ex. 12, 158:7.) But he admitted that Paganelli may not have understood his request (Ex. 12, 158:7 -19.) He testified:

Q: But you think that maybe [Paganelli] didn’t understand what you were talking about [your request to use Safe Environmental’s Ohio License]?

A: I’m not sure. I’m not sure he understand [*sic*] or he didn’t understand. I’m...

Q: Okay. Well, you bring that up.

A: Because –yeah. Because maybe, maybe understand, maybe not. I don’t know.”
(Ex. 12, 162:23-163:5.)

Q. And you say you got that authority from a two-minute phone call with Anthony Paganelli, correct?

A. Yes.

Q: And you say it’s possible Anthony Paganelli didn’t understand you?

A: It’s possible, yes.

(Ex. 12, 205:19-24)

And not only is it possible that Paganelli did not understand the request, Amaya admitted that it is possible that Paganelli didn’t even hear the request:

Q: But it’s possible [Paganelli] didn’t hear what you said to him?

A: It’s possible. (Ex 12, 177:2-4)

Amaya testified that Paganelli is the only person who can answer the question of whether Paganelli “understood” or “heard” Amaya:

Q. [Asbestek’s contract at the Site is] a small job?

A. That’s like -- yes.

Q. That’s what you call a small job?

A. Yes.

Q. And so you told [Paganelli] I have a small job in Ohio?

A. Yes.

Q. And you said what, can I use your license?

A. Yes.

Q. Okay. And you said that with no prior experience of you or anyone you know making such a request, right?

A. Yes.

Q. Okay. And what did Anthony [Paganelli] say when you said that?

A. Yes.

Q. Okay. He just said yes?

A. Yes, no problem.

Q. Okay. And he understood you, didn't he?

A. That's the point.

Q. Tell us?

A. I don't know because when I told him, yes. When I ask him to use his license, he said yes.

Q. Okay.

A. But he's the only one can answer that question if he understand -- he understood or not.

Q. There's a chance he didn't understand?

A. Maybe.

Q. Okay. And why do you think there's a chance that he didn't understand what you were asking for?

A. One thing maybe because it was -- wasn't face to face. It was by phone.

Q. Okay.

A. And second thing, you know, you see my English now. Two years ago, four years ago, it was worse. (Ex. 12, 157:13 – 159:4.)

Paganelli has been available for his own deposition in the Richland County action, but none of the parties have requested to depose him. Petitioner offered to have the EPA interview Paganelli to address Amaya's claims and versions of events, yet the EPA declined to interview him. As Petitioner is unable to depose its own client, Petitioner has obtained two sworn affidavits from Paganelli to address Amaya's statements. Paganelli testified in one affidavit that while he was aware that Amaya was forming his own company to do side jobs, Amaya never made any request of Paganelli to "use" Petitioner's Ohio License. He further testified that Amaya never made any request nor did he ever authorize Amaya or Asbestek to use Petitioner's Ohio License. (Ex. 84.)

Amaya's claim is not corroborated by any other person. Vadas admitted that he has no personal knowledge about Amaya having authority to use Petitioner's Ohio License and that it is possible that Amaya never obtained authority.

Q. With respect to the Cleveland Trencher project that Asbestek had with Nationwide Demolition, do you agree with me that Tomas Amaya did not have authority from Tony Paganelli?

A. I don't know that. No, I don't because I don't. I don't know that.

Q. Is that a possibility?

A. Sure.

(Ex. 11, 172:22 – 173:5.)

Not only is Amaya's claim not corroborated by any other individual, but when confronted by the EPA, Amaya changed the circumstances surrounding his obtaining Petitioner's Ohio License that he previously described under oath. In his August 23, 2010 deposition, Amaya testified that Paganelli instructed him to obtain Petitioner's Ohio License from Petitioner's office. First, he testified that he is confident that Paganelli was not in the office because he called him in the office "for something else," but Paganelli did not answer:

Q. What did you do?

A. I went to the office and I asked the -- I told the secretary [Paganelli] let me use his Ohio contractor license. Can I have a copy, please, and he gave it to me.

Q. What's his name?

A. I don't know what his name. Some people call him Matt and some people call him Chris.

Q. Did you tell Matt or Chris -- we'll call him Matt, Okay? Did you tell Matt about your conversation with [Paganelli]?

A. Yes.

Q. And what did you tell him?

A. I just talked to [Paganelli], I asked him to use -- if he can let me use his Ohio license. He told me yes. And can I have a copy, please, and he gave it to me.

Q. Okay. Did you tell [Paganelli] about any details about the Cleveland Trencher job?

A. No.

Q. Why not?

A. Because I was secure, I was 100 percent sure the job going to be done with no problems.

Q. You're saying that you were sure there would be no problems?

A. Yes.

Q. And so that was sufficient for you not to tell him anything about the job?

A. He don't ask me.

Q. So you went to the office and you spoke with Matt and you said [Paganelli] said I can have the license for Ohio, please give it to me. What did he do?

A. Who?

Q. Matt.

A. He make a copy and gave it to me.

Q. And how did that happen? What did he do? Did he go to a filing cabinet? Did he go and talk to [Paganelli]? How did that happen?

A. Well, he -- I don't know -- I don't know where the license was. He make a copy and gave it to me.

Q. Did he do that in front of you or did he do it in a back room, what?

A. I remember he was making copy but I don't know -- he gave it to me but I don't know.

Q. Do you know where he got the license from?

A. No.

Q. Had you ever been in the office before?

A. So many times.

Q. You know that there's a board in there with the licenses all over the board, right?

A. Yes.

Q. Okay. Is that where Chris went to get the license?

A. I don't know.

Q. You didn't watch?

A. No. I didn't see it.

Q. What were you doing that you couldn't see that?

A. Maybe I was talking with the other secretary or I don't know.

Q. So you didn't even -- you didn't -- when you went to the office, you could have asked for [Paganelli] who would have been there?

A. No, he wasn't there.

Q. How do you know that?

A. Because I call him -- I call -- I was calling him for something else right at that moment. Oh, I think it was for -- calling him to tell him Chris, something like that but I was calling him and his call was for voicemail or something. (Ex. 12, 159:22 -- 167:14.)

He then testified a second time that Paganelli was not in the office because he would have been able to see Paganelli if he were there.

Q. Okay. So when you went in to talk to Chris about getting the Ohio contractor's license from [Paganelli], you also talked to him about getting [Paganelli] -- Carlos Bonilla's documents?

A. Yes.

Q. And Chris gave you all that stuff?

A. Yes.

Q. No questions asked?

A. Nope.

Q. Did he go back and talk to [Paganelli] and say that --

A. I don't know.

Q. -- Tomas Amaya is out front?

A. I don't know.

Q. Well, did he go in the back room?

A. Well, [Paganelli] wasn't there.

Q. And you know that because you tried to call him on his cell phone and he didn't answer?

A. No, he wasn't there. The office is small. You can see it (Ex. 12, 259:14 – 260:10.)

On or about November 16, 2010, Chow interviewed Tomas Amaya as a result of phone records Petitioner submitted to the EPA in support of its position that it was not a liable party to the AO. Chow related to Petitioner's attorney that Amaya now claimed that when he went to Petitioner's office to obtain Petitioner's Ohio License, Paganelli was **present** at the office. Because Amaya has either lied under oath or lied to the EPA, absent any independent evidence of Petitioner's liability, which there is none, Petitioner cannot be found to be liable under CERCLA § 107(a).

b. Petitioner Did Not Contract, Agree, Arrange for or Engage in the Transport, Disposal or Treatment of Hazardous Substances at the Site.

Beyond Amaya's refuted claim that Petitioner authorized its Ohio License to Asbestek, it is undisputed that Petitioner had no involvement at the site. As Amaya testified, Petitioner did, "nothing else, [j]ust authorize the license" (Ex. 12, 324:9-19.) Amaya admitted that Petitioner was not related to any activity at the Site.

Q: [Regarding Ex. 22], if it's true that Anthony Paganelli offered his license for free to you to use, this [Ex. 22] would have been more accurate [to submit to the Ohio Department of Health], right?

A: Yes.

Q: Because the contact person is Anthony Paganelli?

A: Not really because, see, the inspector call, okay, I'm the -- at the job sight right now, who they going -- who they going to call Tony or they going to call John Vadas? Who we want the inspector call?

Q: And who do you -- who did you want the inspector to call?

A: Either me or John Vadas.

Q: And why would it not have been a good idea for the inspector to call Anthony Paganelli?

A: Because he's not a -- he's not related with the job.

Q: At all, is he?

A: No. (Ex. 12, 200:17-201:12.)

In fact, is undisputed that Petitioner did none of the following with respect to the Site:

1. Execute a written or verbal contract with Asbestek, Amaya or Vadas for services;
2. Execute a written or verbal contract with Nationwide for services;
3. Provide laborers;¹²
4. Pay or agree to pay Amaya or Vadas for any service;
5. Pay or agree to pay any laborer for work done;
6. Provide equipment; or
7. Provide paychecks.

As Amaya testified,

Q. Did [Petitioner] show up in this case?

A. No.

Q. Okay.

A. They didn't show up.

Q. Did you ask them to show up?

A. No.

Q. Did you use their equipment?

A. No.

Q. Did you use their paychecks?

A. No.

Q. Did they pay anyone for this job?

A. No.

Q. Did they pay you?

A. No.

Q. So if the job had worked out well, they would never have to have done anything for this project, right?

A. No. (Ex. 12, 321:13 – 322:6).

In his efforts to procure insurance for abatement at the Site, Amaya added Nationwide to Asbestek's insurance certificate but did not include Petitioner. (Ex. 12, 218:9-15.) He testified that he did not obtain insurance for Petitioner because Petitioner had nothing to do with the abatement project as far as work:

Q: So who do you name as additional insured in your policy which company?

A: Nationwide [*sic*] Demolition

Q: Okay, where on that certificate did you identify Safe Environment?

A: Nowhere.

¹² Amaya tried to connect the laborers he hired at low wage (Ex. 11, 215:4-12; 216:19-24) with Petitioner simply because they worked for Petitioner in the past. (Ex. 12, 123:21-124:2). He ultimately admitted that he was able to obtain laborers who formerly worked at Safe Environmental but were out of work at the time he employed them for work at the Site, and therefore their labor at the Site was unrelated to any work by or through Petitioner (Ex. 12, 124:7-125:14). Amaya admitted that he had no authority from Petitioner to use Safe Environmental laborers (Ex. 12, 206: 14-17): "The workers did not belong to Safe [Environmental]." (Ex. 12, 170:8-13, 170:19-22).

Q: Okay. Why not?
A: Just -- I didn't do any work for Safe Environmental.
Q: So Safe Environmental had nothing to do with Cleveland Trencher, did it?
A: As far as work, no.
Q: Well, as far as what?
A: Just the license notification.

Q: So other than the license which you claim to have received from Paganelli in a two-minute call and you're not sure if he truly understood you--
A: Yes.
Q: -- what responsibility did Safe Environment have at Cleveland Trencher
A: They have never been there. They never do any work over there (Ex. 12, 216:7 - 217:18.)

As Amaya testified, Petitioner had no involvement with any arrangements related to the Site. (Ex. 12, 216:7 -217:18, 324:9-19.) Additionally, Petitioner had no contract or agreement with Amaya, Vadas, Asbestek, Nationwide, Thomas, Piscazzi, Ayden, or any entity related to the abatement efforts or the Site. Under Ohio law, a contract is defined as a promise, or a set of promises, which are actionable upon breach. Essential elements of a contract include an "offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3, 770 N.E.2d 58, 63 (2002), quoting *Perlmutter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976) (a meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." Indiana law is identical with respect to the requirements of a valid contract. *Indiana Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 365 (Ind.App. 2008.) (a contract requires an offer, acceptance, consideration, and mutual assent, with communication between the parties being essential to establish formation.) As Amaya testified, no contract or agreement existed:

Q. And you had nothing in writing from Safe Environmental with respect to the authority from them?
A. No.
Q. No e-mails?
A. Nope.