IN RE CHIPPEWA HAZARDOUS WASTE REMEDIATION & ENERGY, INC., D/B/A CHIPPEWA HAZARDOUS WASTE, INC.

CAA Appeal No. 04-02

FINAL DECISION

Decided September 30, 2005

Syllabus

Chippewa Hazardous Waste, Inc. ("Chippewa") appeals an Initial Decision of Administrative Law Judge William B. Moran (the "ALJ") assessing a civil penalty of $45,040 for violations of section 112 of the Clean Air Act ("CAA"), 42 U.S.C. § 7412, and certain regulations appearing at subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. part 61, arising from Chippewa's removal of asbestos-containing roofing shingles from a church building. Specifically, the ALJ found that Chippewa (1) failed to adequately wet regulated asbestos-containing material ("RACM"), (2) failed to keep the RACM adequately wet until collected and contained or treated in preparation for disposal, and (3) failed to carefully lower the RACM to the ground, in violation of the NESHAP.

Chippewa raises four arguments on appeal. First, Chippewa argues that United States Environmental Protection Agency Region 3 (the "Region") did not meet its evidentiary burden of proof in demonstrating that Chippewa was responsible for stripping the shingles from the church roof. Second, Chippewa argues that the Region did not meet its evidentiary burden of proof in demonstrating that the materials analyzed by a laboratory and found to contain asbestos were the same materials collected from the job site by the EPA inspector. Third, Chippewa argues that the record does not support the ALJ's penalty determination. Fourth, Chippewa claims that the ALJ should have recused himself from the case because he and the Region's expert witness on ability-to-pay issues previously participated in a mock trial presentation together.

Held: The Board upholds the Initial Decision in its entirety.

(1) The Board affirms the ALJ's finding that Chippewa removed the shingles from the church roof. To establish its *prima facie* case in that regard, the Region met its initial burden of production by presenting admissions in Chippewa's answer and prehearing exchange, documentary evidence, and testimonial evidence. In rebuttal, Chippewa speculated that the evidence presented by the Region could have indicated that another contractor performed the asbestos removal instead, but provided no evidence in that regard. First, the admissions in Chippewa's answer are sufficient to establish that Chippewa was responsible for the asbestos removal. Moreover, the documentary and testimonial evidence presented by the Region, which Chippewa failed to rebut, further supports the Region's position. The Board therefore affirms the ALJ's finding that the Region established, by the preponder-

ance of the evidence, that Chippewa was responsible for removing the shingles from the church roof.

(2) The Board also affirms the ALJ's finding that the samples tested by the laboratory and found to be RACM were the same samples that the EPA inspector collected from the church. Chippewa argues that there were "missing links" in the chain of custody for the samples, the EPA inspector's testimony was not credible, and it was denied a fair hearing because the Region moved to substitute witnesses a month in advance of the hearing and the ALJ did not allow Chippewa to depose one of the Region's new witnesses. The Board first finds that the Region presented a chain of custody that rendered the sampling evidence reliable and thus admissible. The Board further applies a deferential standard to the review of the ALJ's assessment of witness credibility and the conduct of the trial, and declines to second-guess the ALJ's judgment with respect to those matters in this case. Therefore, the Board affirms the ALJ's finding that the samples presented at the hearing were the same samples that were collected from the church.

(3) Further, the Board affirms the ALJ's penalty assessment. Chippewa challenges whether the Region performed an adequate analysis of the company's financial condition but fails to present any evidence to indicate that the Region and the Region's consultant could have or should have conducted the financial analysis any differently. Given that the penalty assessed was within the range of penalties provided in the penalty guidelines, the Board grants discretion to the ALJ and affirms his penalty assessment.

(4) Finally, the Board refuses to disqualify the ALJ in this case. Chippewa contends that the ALJ should have recused himself because he previously had participated in an educational presentation of a mock EPA hearing with the Region's expert witness. Chippewa failed to make a timely motion for recusal of the ALJ and has presented no legal or factual basis for demonstrating that participation in the mock hearing together with the expert witness in any way caused the ALJ to be biased. The Board therefore declines Chippewa's request to disqualify the ALJ.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

Chippewa Hazardous Waste, Inc. ("Chippewa") appeals an Initial Decision issued May 26, 2004, in which Administrative Law Judge William B. Moran (the "ALJ") assessed a civil penalty of $45,040 for violations of section 112 of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. § 7412, and certain regulations appearing at subpart M (National Emission Standard for Asbestos) of the National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. part 61, arising from Chippewa's removal of asbestos-containing roofing shingles from a church building in Wheeling, West Virginia. Specifically, the ALJ found that Chippewa failed to adequately wet regulated asbestos-containing material ("RACM"), in violation of 40 C.F.R. § 61.145(c)(3); failed to keep the RACM adequately wet until collected and contained or treated in preparation for disposal,

in violation of 40 C.F.R. § 61.145(c)(6)(i); and failed to carefully lower the RACM to the ground, in violation of 40 C.F.R. § 61.145(c)(6)(ii). For the reasons explained below, we reject Chippewa's arguments on appeal and affirm the ALJ's finding of liability and his assessment of a $45,040 penalty.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 112 of the CAA identifies pollutants, including asbestos, that Congress has determined present, or may present, a threat of adverse human health or environmental effects and authorizes the Administrator of the United States Environmental Protection Agency ("EPA") to adopt emission standards and, in some cases, work practice standards for the listed pollutants. CAA § 112, 42 U.S.C. § 7412(b)(1). Pursuant to this authority, EPA promulgated the NESHAP for asbestos, found at 40 C.F.R. part 61, subpart M. *See* National Emission Standards for Hazardous Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658-01 (Apr. 5, 1984). Violators of the asbestos NESHAP are subject to civil administrative penalties under CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1).

Pursuant to the work practice standards for demolition and renovation activities set forth in 40 C.F.R. § 61.145(c), the owner or operator of a renovation activity[1] that involves the stripping or removal of at least 160 square feet of RACM[2] must, among other things, (1) adequately wet the RACM,[3] (2) ensure that

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[1] The "owner or operator of a * * * renovation activity means any person who owns, leases, operates, controls, or supervises the facility being * * * renovated or any person who owns, leases, operates, controls, or supervises the * * * renovation operation * * * ." 40 C.F.R. § 61.141.

[2] *See* 40 C.F.R. § 61.145(a)(4)(i). RACM is defined as "(a) Friable asbestos material, (b) Category I nonfriable ACM [asbestos-containing material] that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart." 40 C.F.R. § 61.141.

Category I nonfriable ACM "means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing *more than 1 percent asbestos* as determined using * * * Polarized Light Microscopy." *Id.* (emphasis added).

Category II nonfriable ACM "means any material, excluding Category I nonfriable ACM, containing *more than 1 percent asbestos* as determined using * * * Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure." *Id.* (emphasis added).

[3] *See* 40 C.F.R. § 61.145(c)(3) ("When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.").

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the RACM remains wet until collected and contained or treated in preparation for disposal,[4] and (3) carefully lower the RACM to the ground without damaging or disturbing it.[5]To establish liability for violations of these standards, EPA must show, by a preponderance of the evidence, that (1) the asbestos NESHAP requirements apply, and (2) the standards have not been met. *See In re Friedman*, 11 E.A.D. 302, 305 (EAB 2004) (citing *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994)).

B. *Factual and Procedural Background*

In April 2001, the Trustees of the Ohio Valley Christian Center of the Assemblies of God ("OVCC") hired Chippewa to remove asbestos-containing roofing shingles from one if its church buildings. The Ohio Valley Christian Center is located at 595 National Road in Wheeling, West Virginia, and consists of two buildings, a church sanctuary and an annex located behind it. Transcript, Volume I ("Tr. I")[6]at 15-16. Pastor Michael Amico, who founded the church in 1999, *id.* at 15, testified that OVCC was aware when it purchased the church that the roof contained asbestos and that it would need to be replaced, *id.* at 21.[7]

OVCC secured estimates for the removal and replacement of the roofs of both the sanctuary (the "church" or the "Facility") and the annex. *Id.* at 22-23. OVCC hired Hip & Gable Roofing ("Hip & Gable"), a contractor, to replace the roof of the annex. Pastor Amico testified that Hip & Gable told OVCC that it could not remove the sanctuary roof, however, because it was not licensed to perform asbestos removal. *Id.* at 22-25. OVCC then entered into a verbal agreement with Chippewa, a licensed asbestos contractor, to remove the shingles from the sanctuary roof at a cost of $5,000. Complainant's First Pre-Hearing Exchange Exhibit ("C Ex") 32; Tr. I at 30, 34-35. Chippewa assured Pastor Amico that they

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"*Adequately wet* means sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet." 40 C.F.R. § 61.141.

[4] *See* 40 C.F.R. § 61.145(c)(6)(i) ("Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150.").

[5] *See* 40 C.F.R. § 61.145(c)(6)(ii) ("Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material.").

[6] This transcript documents the first day of the June 11-12, 2003 evidentiary hearing before the ALJ.

[7] The cornerstone on the church sanctuary indicates that the building was constructed in 1953, and Pastor Amico testified that to his knowledge, at the time of OVCC's purchase of the church, the church had its original roof. Tr. I at 19-20.

could complete the work by the first Sunday in May of 2001.[8] Tr. I at 28-30. Chippewa has admitted that "[o]n April 23, 2001, OVCC and Chippewa entered a contract for Chippewa to conduct a renovation of the Facility, including the removal of asbestos material from the Facility including, but not limited to, approximately 3,500 square feet of asbestos-containing roof shingles from the Facility," and that they "removed asbestos containing material from the Facility from at least May 1, 2001 until at least May 2, 2001." Complaint ¶¶ 22-23; Chippewa Answer ¶¶ 22-23. Pastor Amico testified that he received a written agreement to this effect from Chippewa after the work was done, but that OVCC never signed the document. Tr. I at 30-31.

On April 16, 2001, the West Virginia Department of Environmental Protection ("WVDEP") Office of Air Quality received a Notification of Abatement, Demolition, or Renovation ("Initial Notice") from Russell Evans, Chippewa's "operations manager," regarding the OVCC roof removal.[9]C Ex 8; Tr. I at 102-09. The Initial Notice identified the facility owner as OVCC, the asbestos contractor as Chippewa, the "Type of Operation" to be conducted as a "Renovation," and the "Asbestos Containing Material to be Removed" as 3,500 square feet of transite[10] roofing material. C Ex 8. The Initial Notice further states that "Chippewa was contacted by Pastor Mike Amico in regards to a roof tear off located at said Facility. The reason for the tear off is to allow for a new roof to be put on by another contractor," and identifies the asbestos removal start date as April 30, 2001, and the completion date as May 11, 2001. *Id.*

Thomas Stahl, a former City of Wheeling building inspector, testified that his office received a telephone call on May 1, 2001, regarding the roof removal at OVCC. *See* Tr. I. at 76-78; C Ex 38. He visited the site at approximately 11:00 a.m. that day. When he arrived, he observed about five workers using shovels to remove roofing shingles from the west side of the church roof, dropping the shingles to the ground, and throwing them into the back of a semi dump truck, causing asbestos dust to rise up into the atmosphere. Tr. I. at 79-80. He did not observe the workers wetting any of the shingles being removed or wearing any kind of protective equipment. *Id.* at 81-82. Mr. Stahl testified that he spoke to a man he identified as the foreman at the site, who identified the contractor removing the roofing material as Chippewa. *Id.* at 78-79. Mr. Stahl stated that he left the site after approximately ten minutes. *Id.* at 83.

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[8] The 2001 calendar reveals that the first Sunday in May of 2001 was May 5.

[9] Owners and operators are required to provide notification of demolition or renovation activities involving RACM. 40 C.F.R. § 61.145(b)

[10] Transite is a material composed of asbestos and cement. Office of Quality Planning and Standards, EPA, *Asbestos NESHAP Regulated Asbestos Containing Materials Guidance* 20 (Dec. 1990) (C Ex 19); Tr. I at 123.

When Mr. Stahl returned to his office he called Douglas Foster, a trained EPA asbestos NESHAP inspector located in Wheeling, West Virginia, to inform him about the activity at OVCC and to inquire about proper asbestos removal procedures. *Id*. at 85-86, 102; C Ex 38. After contacting WVDEP to determine if an Initial Notice had been submitted for the renovation, Mr. Foster went to OVCC to conduct an inspection, arriving at approximately 2:00 p.m that day. Tr. I at 102, 111-12. Like Mr. Stahl, Mr. Foster testified that he observed workers using shovels to break shingles from the west side of the church roof and allowing the broken shingles to fall onto the ground, creating dust. Also like Mr. Stahl, Mr. Foster did not observe any workers wetting the asbestos material at any stage of the removal process. *Id.* at 116-20.

Mr. Foster testified that during the inspection on May 1, 2001, he spoke with the supervisor of the job site, who identified himself as Mr. Evans.[11] He told Mr. Evans "that he could not break up the transite and that he needed to * * * stop what he was doing and adequately wet everything down and put it in leak-tight containers or wrapping." *Id*. at 119. Mr. Foster then collected ten samples of roofing material from around the Facility. *Id.* at 120-23. He testified that he offered Mr. Evans the opportunity to take split samples, but Mr. Evans declined, stating that he knew what the material was. *Id.* at 143-44. Mr. Foster also took twenty-six photographs and approximately seven minutes of videotape during his inspection. *Id.* at 146-47, 166-67; C Ex 4, 7. Mr. Foster testified that after he finished the inspection, at approximately 3:15 p.m., he locked the samples in the trunk of his car and drove back to his office, where he locked up the samples and videotape, completed the field data report, and prepared a chain-of-custody record for the samples. Tr. I at 204-06; C Ex 1, 13.

Mr. Foster testified that he returned to OVCC at 7:32 a.m. the next day, May 2, 2001, to conduct a follow-up inspection. He again spoke to Mr. Evans, who said that he had six workers removing transite that day. Tr. I at 208-09. Mr. Foster observed workers prying dry shingles from the east side of the church roof, breaking them in the process. He observed workers placing the broken shingles in asbestos waste bags, adding water from a hose, and lowering the bags to the ground. *Id.* at 210-12. Mr. Foster testified that while he considered these methods to be an improvement from the previous day, he still was concerned that because the workers were breaking the dry shingles, asbestos was continuing to be released into the air. *Id.* at 212. During the May 2 inspection, Mr. Foster collected three samples of dust and particles from the gutter on the west side of the roof, where he had observed asbestos removal occurring the previous day, and locked the samples in his trunk. He also took 13 photographs showing the roofing material in that gutter and the back of the dump truck, as well as the renovation activ-

[11] Mr. Foster later testified that although he believed that Mr. Evans worked for Chippewa, he could not recall whether Mr. Evans specifically told him that he worked for Chippewa. Tr. I at 298-99.

ity on the east side of the church roof. *Id.* at 213-17, 232; C Ex 5, 6. After completing the inspection at approximately 8:30 a.m., Mr. Foster filled out an asbestos field data report and returned to his office. Tr. I at 232-36; C Ex 2. Mr. Foster then prepared a chain-of-custody record for the May 2 samples. Tr. I at 236; C Ex 14.

That same day, Mr. Foster sealed the samples according to EPA procedure and sent both sets of samples and their respective chain-of-custody reports via Federal Express to Richard Ponak, an EPA Region 3 (the "Region") scientist responsible for NESHAP enforcement. Tr. I at 238-45, 277-81, 291-92, 303-10; C Ex 13, 14. Mr. Ponak received these samples on May 3, 2001, and signed the enclosed chain-of-custody reports indicating such. Transcript, Volume II ("Tr. II")[12] at 31-32; C Ex 13, 14. After speaking with Mr. Foster about potential NESHAP violations at OVCC, Mr. Ponak completed the chain of custody record indicating that he was relinquishing the samples and sent them via Federal Express to Criterion Laboratories ("Criterion") for analysis. Tr. II at 35-37; C Ex 13, 14. According to the chain-of-custody record, the laboratory received these samples on May 4, 2001. C Ex 13, 14. Stephen Forostiak, the Criterion employee who analyzed the samples, testified that he recognized the signature in the "received by laboratory" box on the chain-of-custody form as belonging to Steve Siracki, another Criterion employee. Tr. II at 114-16. Mr. Forostiak conducted a polarized light microscopy analysis on the samples and found that the May 1 samples contained between 30 and 35 percent chrysotile asbestos and the May 2 samples contained 15 percent chrysotile asbestos.[13] Tr. II at 118-28; C Ex 15, 16, 39.

During the inspections, Mr. Foster had asked Mr. Evans for his certificate of training showing that he was an accredited asbestos contractor under section 206 of the Toxic Substances Control Act, 15 U.S.C. § 2646. Chippewa faxed a copy of Mr. Evans's certificate to Mr. Foster on May 2. Tr. I at 251-54; C Ex 18. Mr. Foster also, after the inspections, called the Martin Arden Landfill, the landfill to which the Initial Notice indicated the waste would be shipped, and asked for copies of the waste shipment records for the asbestos waste. The landfill sent him two weigh tickets and two waste manifests. Tr. I at 256-69; C Ex 9-11. Although the weigh tickets do not state the precise origin of the waste, they indicate that the landfill received from Chippewa two loads of friable asbestos, consisting of 3.37 tons and 3.11 tons, on May 3, 2001, delivered by vehicles driven by Russell Evans and Mike Postelwait, respectively. C Ex 9, 10. The corresponding waste manifests provide more information on these shipments. They indicate that 5,600 square feet of waste consisting of asbestos roofing shingles, 75% friable and 25%

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[12] This transcript documents the second day of the June 11-12, 2003 evidentiary hearing before the ALJ.

[13] To qualify as RACM, regulated by NESHAP, asbestos content must exceed one percent. *See* 40 C.F.R. § 61.141; note 2, *supra.*

nonfriable, were received by the Martin Arden Landfill on May 3, 2001; the generator of the waste was OVCC;[14] and the operator and transporter was Chippewa. C Ex 11.

After reviewing the information received from Mr. Foster, including documents, photographs, and videotape, Mr. Ponak made an initial determination that NESHAP work practice violations had occurred at the Facility and recommended that the Region proceed with an enforcement action. Tr. II at 48-53. The Region sent information request letters, authorized by section 114 of the CAA, 42 U.S.C. § 7414, to OVCC and Chippewa on March 21, 2002, and received responses to both letters. Tr. II at 53, 57-62; C Ex 31-34. Chippewa's response, dated April 9, 2002, states that Russell Evans, Michael Postelwait, and James McAbee, all Chippewa employees, removed asbestos-containing material from OVCC in or around May 2001. C Ex 33, 34. OVCC's response likewise indicates that it hired Chippewa to remove the asbestos-containing roof material. C Ex. 31, 32.

On April 24, 2002, the Region filed an Administrative Complaint and Notice of Opportunity for Hearing against both OVCC and Chippewa alleging violations of the asbestos NESHAP work practice requirements and section 112 of the CAA, 42 U.S.C. § 7412, and seeking a joint civil penalty of $36,300. Count I alleged that the Respondents failed to comply with 40 C.F.R. § 61.145(c)(3) by not adequately wetting regulated RACM during the stripping operation on May 1, 2001; Count II alleged that the Respondents failed to comply with 40 C.F.R. § 61.145(c)(6)(i) by not keeping the RACM wet until collected for disposal on both May 1 and 2, 2001; and Count III alleged that the Respondents failed to comply with 40 C.F.R. § 61.145(c)(6)(ii) by dropping or throwing dry RACM to the ground on May 1, 2001. Mr. Ponak testified that he calculated the joint $36,300 proposed penalty using EPA's *CAA Stationary Source Civil Penalty Policy* (Oct. 25, 1991) (the "CAA Penalty Policy") and its Appendix III, the *Asbestos Demolition and Renovation Civil Penalty Policy* (revised May 5, 1992) (the "Asbestos Penalty Policy"). C Ex 21, 22. The penalty amount included $11,000 for one day of violations in Count I, $12,100 for two days of violations in Count II, $11,000 for one day of violations in Count III, and an additional $2,200 based on the size of the violator. Complaint at 11-12.

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[14] Specifically, the manifests contain the following dates. The manifest signed by Mr. Evans indicates May 1, 2001, as the generator's "Shipment Date"; May 2, 2001, as the date of receipt by the driver and delivery by the driver; and May 3, 2001, as the date of receipt by the disposal facility. The manifest signed by Mr. Postelwait indicates May 1, 2001, as the generator's "Shipment Date"; May 3, 2001, as the date of receipt by the driver and delivery by the driver; and May 3, 2001, as the date of receipt by the disposal facility. C Ex 11. Additionally Pastor Amico's name is signed as the "generator's authorized agent" on both the manifests, along with a set of unidentified initials. Pastor Amico testified that he did not sign the manifests. Tr. I at 43-44.

In its Answer, dated May 24, 2002, Chippewa admitted to contracting with OVCC to remove approximately 3,500 square feet of asbestos-containing roofing shingles from the Facility and admitted to having removed asbestos-containing material from the Facility on May 1 and 2, 2001. *Id.* ¶¶ 22, 23; Answer at 2. It denied violations of the asbestos NESHAP, however. Answer at 2-4. On November 22, 2002, the Region entered into a settlement agreement with OVCC that included only a $500 civil penalty, based on OVCC's inability to pay. Tr. II at 102. After OVCC settled, the Region sought the $35,800 balance from Chippewa, relying on the CAA Penalty Policy, which states "[i]f the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants." CAA Penalty Policy at 24; *see also* Tr. II at 103-04; C Ex 22.

The penalty proposed in the Complaint did not account for Chippewa's ability to pay. Tr. II at 95-96, 100-101. Accordingly, the Complaint stated that EPA would consider the company's ability to pay in adjusting the proposed penalty, but explained that the burden of raising and demonstrating an inability to pay would rest with Chippewa. Complaint at 13. In its Answer, Chippewa asserted that it would be unable to pay the proposed penalty and submitted income tax returns for tax years 1999 to 2001 in support of its position. Answer at 4; Tr. II at 96-97; C Ex 24-26. The ALJ's November 15, 2002 prehearing order advised Chippewa that if it intended to take the position that it was unable to pay the proposed penalty, it should provide supporting documentation such as financial statements or tax returns.[15] Prehearing Order at 2. Chippewa raised the inability to pay argument again in its prehearing exchange, but it did not submit further evidence to support its claim. Respondent's First Prehearing Exchange; Tr. II at 240-41.

To evaluate Chippewa's ability to pay the proposed penalty, the Region sent Chippewa's 1999-2001 tax returns to Industrial Economics, Inc. ("Industrial Economics"), an economic and environmental consulting firm, for review and analysis. Tr. II at 96-97, 101-02, 159. Joan Meyer, a principal with Industrial Economics, testified that the firm evaluated Chippewa's ability to pay the proposed penalty using the financial information provided by EPA.[16] Tr. II at 159-60, 166-70; C Ex 36. Industrial Economics concluded that Chippewa could afford to pay the full proposed penalty without suffering undue financial hardship. Tr. II at 166-67, 185-86; C Ex 23.

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[15] We note that the ALJ's prehearing order did not acknowledge that Chippewa previously had submitted tax returns for 1999-2001 along with its Answer.

[16] Ms. Meyer explained that the ability-to-pay analysis had been conducted by a senior associate at Industrial Economics who was out of the country at the time of the hearing, but that she had reviewed the analysis and fully concurred with the findings. Tr. II at 167-68.

The ALJ held an evidentiary hearing on June 11 and 12, 2003, in Wheeling, West Virginia.[17] The Region presented six witnesses: Pastor Amico, Mr. Stahl, Mr. Foster, Mr. Ponak, Mr. Forostiak, and Ms. Meyer. Although Chippewa's counsel previously had indicated that he would present up to seven witnesses at the hearing to support his client's case, he presented none. *Compare* Respondent's First Prehearing Exchange at 1-2 *with* Tr. II at 248. Both the Region and Chippewa submitted post-hearing briefs and reply briefs. The main issues the parties disputed were whether Chippewa was in fact the operator that stripped the roofing shingles from the church roof on May 1 and 2 and whether the Region adequately demonstrated that the shingles consisted of RACM.

The ALJ issued an Initial Decision on May 26, 2004, finding that the record demonstrated that Chippewa was the operator that stripped the shingles from the roof and that the shingles did consist of RACM. Accordingly, the ALJ found that Chippewa violated the work practice standards in 40 C.F.R. § 61.145(c), as alleged in Counts I-III of the Complaint. The ALJ assessed a $45,040 civil penalty, increasing the Region's proposed penalty by $9,240: by $3,300, based on Chippewa's net worth, and by $5,940, finding that Chippewa acted with knowledge in violating the asbestos NESHAP. Initial Decision at 26-27.

Chippewa appealed from the Initial Decision on June 24, 2004, asserting that the ALJ did not base his findings on the evidence in the record. Specifically, Chippewa disputes that its employees stripped the shingles from the roof and that the samples collected by Mr. Foster were the same samples that were tested by Criterion. Chippewa also challenges whether Ms. Meyer performed an adequate ability-to-pay analysis of the company and contends that the ALJ should have removed himself from the case because he had participated in a mock presentation of an EPA hearing with Ms. Meyer in the past. Appellant's Brief in Support of Appeal ("Appellant's Brief") at 2-3, 5. The Region filed its reply brief on July 15, 2004. Reply of Complainant to the Notice of Appeal and Appellate Brief from Respondent Chippewa Hazardous Waste Remediation & Energy, Inc. d/b/a Chippewa Hazardous Waste Inc. ("Region's Reply Brief").

III. *DISCUSSION*

Chippewa raises four arguments on appeal. Chippewa's first two arguments involve whether the ALJ properly found that the Region met its evidentiary burden of proof in demonstrating that the NESHAP regulations were violated by

[17] At the conclusion of the first day of the hearing, counsel for Chippewa informed the ALJ that he might not be present during the morning of the second day and requested that the hearing "please go forward without me." Tr. I at 314-16. Chippewa's counsel was not present during the testimony of Mr. Ponak or Mr. Forostiak on June 12, 2003. Tr. II at 7-8, 155.

Chippewa. First, Chippewa argues that the Region did not adequately demonstrate that Chippewa stripped the shingles from the west side of the church roof on May 1, 2001.[18] Second, Chippewa argues that the Region did not adequately demonstrate that the samples taken by Inspector Foster on May 1 and 2 were the same samples later analyzed by Criterion and found to contain asbestos. Third, Chippewa argues that the record does not support the ALJ's "ability-to-pay" penalty determination. Finally, Chippewa claims that the ALJ should have recused himself from the case because he and the Region's ability-to-pay witness, Ms. Meyer, previously participated in a mock trial presentation together. Significantly, Chippewa did not appeal the ALJ's findings that (1) the material tested by Criterion was RACM; (2) the material that was stripped from the church roof on May 1, 2001, was not adequately wet; (3) the material stripped on May 1 and 2, 2001, had not been kept adequately wet until collected for disposal; or (4) the material had not been carefully lowered to the ground. Accordingly, we will not address these issues.

The Board reviews the ALJ's legal and factual conclusions on a de novo basis. 40 C.F.R. § 22.30(f); *see also, e.g., In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004); *In re Yee*, 10 E.A.D. 1, 13 (EAB 2001), *petition dismissed*, 23 Fed. Appx. 636 (8th Cir. 2002). In doing so, however, the Board may apply a deferential standard of review to issues such as factual findings when the credibility of witnesses is at issue "'because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility.'" *Friedman*, 11 E.A.D. at 314 n.15 (quoting *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998)). The Board also applies a deferential standard of review to penalty determinations when the presiding officer assigns a penalty within the range of penalties provided in the penalty guidelines, absent a showing that the presiding officer committed an abuse of discretion or a clear error in assessing the penalty. *In re Pac. Ref. Co.*, 5 EAD. 607, 613 (1994).

The Board considers this appeal based on the preponderance of the evidence in the record. *Friedman*, 11 E.A.D. at 314-15. In other words, when reviewing the ALJ's conclusions and issuing our decision on appeal with respect to the factual issues raised, we look to determine whether each "'factual conclusion is more likely than not.'" *Ocean State*, 7 E.A.D. at 530 (quoting *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994)); *see also In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n.20 (EAB 1994) (explaining that the preponderance of the evidence means that a fact is more probably truethan untrue).

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[18] Chippewa does not dispute that it removed the shingles from the east side of the church roof on May 2.

A. *The Record Demonstrates That Chippewa Removed the Shingles from the West Side of the Church Roof on May 1*

Chippewa argues that "the record does not contain any testimony or other evidence that Chippewa's employees stripped any shingles from the west side of the church roof on May 1, 2001." Appellant's Brief at 6. Chippewa's theory is that the Region's witnesses observed not Chippewa employees, but Hip & Gable employees removing the asbestos shingles from the west side of the church roof on May 1. Appellant's Brief at 7. The record in this case, however, fully supports the ALJ's finding that Chippewa stripped and removed asbestos-containing roofing shingles from the church roof on May 1, 2001, and thus was the operator of a renovation activity subject to NESHAP.

1. *Chippewa's Answer and Prehearing Exchange*

It is difficult to understand Chippewa's current position, given Chippewa's admissions in its Answer. In its Answer, Chippewa stated that "[a]t all times relevant to the Complaint, Respondent Chippewa was the 'operator of a demolition or renovation activity' as that term is defined in 40 C.F.R. § 61.141." Answer ¶ 20; *see also* Complaint ¶ 20. Chippewa also admitted that it contracted with OVCC to remove "approximately 3,500 square feet of asbestos-containing roof shingles from the Facility," and that it in fact "removed asbestos-containing roof shingles from the Facility from at least May 1, 2001, until at least May 2, 2001." Complaint ¶¶ 22-23; Answer ¶¶ 22-23.[19] Chippewa is bound by these admissions.[20] *See In re J. V. Peters & Co.*, 3 E. A. D. 280, 292 (EAB 1990) (explaining that it is appropriate for the ALJ to rely on a party's admission in its answer to establish liability), *aff'd*, 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part and rev'd in part*, 221 F.3d 1336 (3d Cir. 2000); *see also Bright v. QSP, Inc.*, 20 F.3d 1300, 1305 (4th Cir. 1994) ("'[E]ven if the post-pleading evidence conflicts with the evidence in the pleadings, admissions in the pleadings are binding on the parties.'" (quoting *Mo. Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990))); *Lucas v. Burnley*, 879 F.2d 1240, 1242-43 (4th Cir. 1989) (finding that defendant was bound by an admission in its answer even though it directly contradicted its trial testimony); *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683,

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[19] Chippewa's Answer was signed by its counsel, Mr. Donald Balsley, Jr. A "Verification" to the Answer in which Mr. Evans, identified as Chippewa's President, certified that "the averments contained in the foregoing [Answer] are true and correct to the best of my knowledge, information and belief" was attached.

[20] The admissions in Chippewa's Answer are consistent with statements made in its First Prehearing Exchange. There, Chippewa stated that "the roofing material was removed by Chippewa pursuant to verbal agreement," and identified Russell Evans, Michael Pastelwait [sic] and James McAbee as Chippewa employees. Respondent's First Prehearing Exchange at 2. Chippewa further admitted that "OVCC paid Chippewa the total amount of $5,000.00 to remove the roofing material." *Id.* at 3.

686 (8th Cir. 1968) ("[J]udicial admissions are binding for the purpose of the case in which the admissions are made including appeals.").

The Appellant's Brief fails to explain why these admissions alone are not a sufficient basis on which to find the company liable for the asbestos removal from the west side of the church roof on May 1. Chippewa, apparently, is suggesting that it was at the site on May 1 to remove the asbestos shingles from the church grounds and transport them for disposal, but it did not remove the shingles from the roof that day.[21] *See* Appellant's Brief at 17 ("[The ALJ] used assumptions and speculation to place Chippewa's workers on the roof."). In our view, the Complaint adequately distinguished the "Facility" from the grounds "around the Facility,"[22] and thus Chippewa's admission that it removed shingles from the Facility on May 1 was an admission that it removed these shingles from the church roof, not the church grounds. Nonetheless, for completeness we also will consider the other evidence presented in this case, which further confirms that Chippewa was responsible for the removal of asbestos from the west side of the church roof on May 1.

2. *Documentary Evidence*

Documentary evidence prepared by Chippewa further supports the conclusion that Chippewa conducted the asbestos removal for OVCC on May 1. First, the Initial Notice that Chippewa prepared and submitted to WVDEP is consistent with the admissions made in its Answer and First Prehearing Exchange. It is appropriate for us to consider statements made in documents such as Initial Notices, which are required to be submitted by law, to establish liability. *See In re City of Salisbury*, 10 E.A.D. 263, 284 (EAB 2002) (finding that required reports such as discharge monitoring reports required under the Clean Water Act may be used as admissions in court to establish a defendant's liability (citing *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 n.8 (4th Cir. 1988))). The Initial Notice identifies Chippewa as the "Asbestos Contractor" for the OVCC renovation project and Russell Evans, who certified the document, as Chippewa's "Contact." C Ex 8 at 1-2. The Notice indicates that "Asbestos Removal" would begin on

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[21] Chippewa does not advance an argument, nor have we seen any evidence, that it removed shingles from a different side of the church roof (a side other than the west side) on May 1. The evidence indicates that asbestos shingle removal took place only on the west side of the church roof on May 1. C Ex 1.

[22] *See* Complaint ¶ 17 ("Chippewa was engaged in the removal of asbestos containing material from the roof of the Ohio Valley Christian Center Church, located at 575 National Road, Wheeling, West Virginia ("the Facility") * * * ."); *id.* at 28 ("On May 1, 2002, the EPA inspector observed workers from Chippewa carelessly tossing, throwing and dropping dry asbestos-containing roof shingles off the roof and onto the ground around the Facility."); *id.* ¶ 29 ("At the time of the May 2, 2001 inspection, the inspector observed in and around the Facility in gutters and in a large dump truck at the Facility debris * * * .").

"4/30/01" and be completed on "5/11/01," with project work hours of 7:00 a.m. to 5:00 p.m. on weekdays. C Ex 8 at 1. It describes the asbestos-containing material to be removed as 3,500 square feet of "Transite Roofing Material." C Ex 8 at 2; Tr. I at 106-07. It further notes that "Chippewa was contacted by Pastor Mike Amico in regards to a roof tear off located at said Facility. The reason for the tear off is to allow for a new roof to be put on by another contractor." C Ex 8 at 2; Tr. I at 107.

Chippewa's response to the Region's CAA section 114 information request letter also states that Chippewa was the contractor that removed the asbestos from the church roof on May 1. *See* C Ex 34, 35. Paragraph 1 of the information request asked that Chippewa:

> Identify who removed asbestos containing material (ACM) from the Facility * * * in or around May 2001 and provide the full legal name and address of the entity which removed the ACM. Identify the legal entity which paid for the removal of the ACM from [the Facility]. Provide any and all documents related to that removal including any and all contractual documents related to the removal and to the hiring for the removal.

C Ex 33 at 2-3. Chippewa answered the above questions in its response letters by stating:

> Russell Evans, Michael Postelwait, and James McAbee removed asbestos containing material from the Facility * * * . Chippewa Hazardous Waste, Inc. P.O. Box 249, Triadelphia, WV 26059. The Ohio Valley Christian Center Of the Assemblies of God paid $4,000.00 dollars.

C Ex 34 at 1. Although the information request was not specific as to whether Chippewa removed the ACM on May 1, Chippewa did not, despite its current argument and despite having the opportunity to do so, indicate in its response having any knowledge that Hip & Gable conducted any ACM removal in or around May 2001.[23] C Ex 34. Moreover, Chippewa included with its section 114 response two "asbestos waste manifests from the project at the Ohio Valley Christian Center." C Ex 34. These manifests indicate a May 1, 2001 "Shipment Date" in the "Generator Information" section and a May 3, 2001 "Date of Receipt" in the "Destination (Disposal Facility)" section. C Ex 34. They identify the generator of

[23] Similarly, OVCC's section 114 response did not indicate that Hip & Gable conducted any ACM removal. OVCC's response states that "CHIPPEWA HAZARDOUS WASTE INC. removed the asbestos containing material from our church roof * * * ." C Ex 32.

the waste as OVCC and the operator and transporter as Chippewa. They list "asbestos" as the common name of the waste and "roofing shingles" as the description. The manifests further indicate a disposal volume of 5,600 square feet and the condition of the asbestos as 75% friable and 25% nonfriable. These manifests are identical to the ones that Mr. Foster received from the Martin Arden Landfill, which corresponded to weigh tickets dated May 3, 2001. C Ex 9-11.

The Initial Notice, Chippewa's section 114 response, the waste manifests, and the weigh tickets collectively demonstrate, as the ALJ found, that Chippewa performed the asbestos removal from the west side of the church roof on May 1. *See* Init. Dec. at 12.[24] Contrary to what Chippewa alleges, none of the documentary evidence suggests that any other contractor was involved.

3. *Testimonial Evidence*

Moreover, the testimonies of Pastor Amico, Mr. Stahl, and Mr. Foster are consistent with the documentary evidence. Pastor Amico recalled talking to Mr. Evans on May 1 about the work and that Mr. Evans advised him that "they were leaving and were going to come back and complete the job the next day." Tr. 1 at 68-69. Pastor Amico testified that he was able to recognize Mr. Evans and additionally could identify a few of his employees because he had met them prior to the day of work. Tr. 1 at 56-57. Similarly, Mr. Stahl testified to having spoken to the site foreman about the removal of the asbestos roofing. He stated that the foreman identified himself as being with the same company as the workers on the roof, and that Chippewa was the name of the company. Tr. 1 at 79. Mr. Foster testified that he spoke to Mr. Evans about the manner in which his workers were removing the asbestos shingles on May 1, and advised him that he needed to stop what he was doing and wet everything down and put it in leaktight containers or wrapping. He recalled that Mr. Evans responded, "[w]ell, I do it like this * * * all the time." Tr. 1 at 119. Although he testified that he could not recollect whether Mr. Evans specifically told him that he worked for Chippewa, he did ask Mr. Evans for his certificate of training, which he later received via facsimile and which identified Mr. Evans as being with Chippewa. Tr. 1 at 251-53, 299; C Ex 18.

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[24] It is appropriate to make such inferences from evidence presented in the record. *See In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 653 (EAB 2001) (allowing a reasonable inference that the materials not been adequately wetted because the materials had been sealed in leak-tight bags and were found not to be adequately wet), *aff'd*, No. 6:01-cv-241 (S.D. W. Va. Apr. 5, 2002); *In re Hoosier Spline Broach Corp.,* 7 E.A.D. 665, 685 (EAB 1998) (explaining that the presiding officer may draw reasonable inferences as long as they are based on the evidence contained in the record (citing 2 *McCormick on Evidence* § 342 (John W. Strong ed., 4th ed. 1992))), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999); 40 C.F.R. § 22.4(c)(7) (permitting the presiding officer to decide questions of fact).

4. *Chippewa's Arguments*

Despite overwhelming evidence to the contrary, Chippewa disputes that the record indicates that its employees removed the asbestos shingles from OVCC's church roof on May 1, and instead asserts that the Region's witnesses observed Hip & Gable workers on the roof. Chippewa does not offer any evidence to support its position, however.[25] To support its position Chippewa instead merely challenges the credibility of the Region's witnesses, focusing on portions of the transcript where they appear to have trouble recollecting certain events, and in doing so misconstrues the witnesses' testimony and provides nothing but speculation. As a result, we, like the ALJ, are unpersuaded by Chippewa's arguments and we find no reason to second-guess the ALJ's findings, which were based on his observations and evaluation of the credibility of the witnesses. *See Friedman*, 11 E.A.D. 302, 314 n.15 (EAB 2004); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

For example, first Chippewa argues that Pastor Amico's testimony that he spoke with Mr. Evans and observed Chippewa workers on the church roof on May 1 is not credible, because he had trouble recollecting if he *specifically asked* the workers if they worked for Chippewa. Appellant's Brief at 6. Chippewa neglects to mention, however, that Pastor Amico testified to having a conversation with Mr. Evans, Chippewa's site manager, and that Pastor Amico was able to identify not only Mr. Evans but also some of the workers by sight as being Chippewa employees because he had met a few of them prior to the day of work. Tr. I at 56-57.It is reasonable for Pastor Amico to have inferred that Chippewa employees were removing the shingles from the roof when he had a contract with Chippewa to perform that very work; he spoke with the site manager, who he knew was Mr. Evans from Chippewa and who identified the workers as being under his supervision; and he was able to identify some of the workers by sight.[26] Given these facts, Chippewa offers no explanation as to why Pastor Amico would have asked for the identities of each worker. Moreover, Chippewa mischaracterizes Pastor Amico's testimony by making the blanket statement that "[Mr.] Amico admitted that his observations and recall were not accurate as to the events on May 1, 2001." Appellant's Brief at 6. In support of this statement Chippewa cites to a portion of the transcript where Pastor Amico recalled seeing three, four, or five workers on the roof, but as to a specific number said that "I cannot say accurately." Tr. I at 59. Pastor Amico's statement certainly does not suggest that his entire testimony was inaccurate, as Chippewa asserts, nor does it give us any reason to doubt his credibility. Rather, he simply made clear that he was not sure

[25] Curiously, Chippewa criticizes the Region for not providing enough witnesses at the hearing to establish its case. Appellant's Brief at 17.

[26] Likewise, it is appropriate for the ALJ to accept these inferences given the facts established. *See supra* note 24.

about the specific number of employees on the roof. The ALJ, who observed the testimony firsthand, appropriately found this testimony credible.

Chippewa similarly attempts to mischaracterize Mr. Foster's testimony, asserting that he testified to identifying only Hip & Gable workers on the church roof on May 1. Appellant's Brief at 8. In fact, what Mr. Foster stated was that he identified the men putting up felt paper as working for Hip & Gable. This is fully consistent with the record in this case which indicates that OVCC hired Chippewa to remove the old roof and Hip & Gable to install the new one. Chippewa further argues that because Mr. Foster testified that he observed Chippewa employees wetting the removed shingles and placing them into bags on May 2, but did not observe workers following these practices on May 1, these workers on May 1 must not have been Chippewa employees. Appellant's Brief at 9-11. The fact that Mr. Foster observed Chippewa employees wetting the shingles on May 2 does not in any way demonstrate that Chippewa was not the same contractor that neglected to wet the shingles on May 1, especially given that Mr. Foster testified that he instructed Mr. Evans to change his procedures on May 1.[27]

Chippewa further argues that the ALJ should have barred any of Mr. Foster's testimony that occurred after the lunch break because Mr. Foster had lunch with the Region's counsel. Appellant's Brief at 14. The ALJ, when the hearing began, instructed counsel not to discuss *anything pertaining to the case* with the witnesses. *See* Tr. I at 10. Then, when the hearing broke for lunch during Mr. Foster's testimony, he changed his instructions slightly and told Mr. Foster "not to speak with anyone." Tr. I at 144. Immediately after the lunch break, Chippewa's counsel expressed concern that Mr. Foster and the Region's counsel had improperly had lunch together, and requested a representation on the record that no discussion of the case took place over lunch. The Region's counsel represented as such. The ALJ instructed the Region's counsel not to have lunch with witnesses in the future, and Mr. Foster resumed his testimony. Tr. I at 145-46.

Chippewa's counsel did not, during the hearing, formally object to Mr. Foster and the Region's counsel having lunch together; asked no questions of Mr Foster during cross-examination related to what he discussed with the Region's counsel over lunch; and did not raise the issue in Chippewa's post-hearing briefs. A party's right to appeal is limited to the "issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter

[27] Chippewa also argues that Mr. Foster's testimony cannot be used to demonstrate that the Chippewa workers were on the west side of the church roof on May 1 because in his testimony he said that he observed Chippewa workers remove asbestos from the west side of the "church building" without specifying that they were on the "roof." Appellant's Brief at 14. Absent any evidence that workers were removing asbestos from anywhere but the roof, it is reasonable to infer that Mr. Foster's statement meant that he observed the workers removing asbestos from the roof, and not elsewhere. *See supra* note 24.

jurisdiction." 40 C.F.R. § 22.30(c). First, because Chippewa's counsel did not formally raise the issue during the proceeding, it is inappropriate for him to raise it on appeal. Moreover, there is no rule requiring the sequestration of non-party witnesses. *See* 40 C.F.R. part 22, subpart D; *see also Geders v. United States*, 425 U.S. 80, 87-88 (1976). Rather, the ALJ has broad powers to conduct the proceeding within the discretion provided by the Consolidated Rules of Practice, 40 C.F.R. part 22 (the "CROP"). *See, e.g., In re Titan Wheel Corp.*, 10 E.A.D. 526, 536 (EAB 2002) (explaining that the CROP vests the ALJ with broad authority to conduct proceedings and make the necessary decisions at all stages of a proceeding). Here, although it appears that the ALJ would have preferred that Mr. Foster and the Region's counsel have had lunch separately, because the ALJ was satisfied with the representation by the Region's counsel that he did not discuss the case with Mr. Foster during lunch, so are we.

Last, Chippewa attempts to misconstrue Mr. Stahl's testimony by focusing on areas to which he did not testify and speculating as to what he *could* have witnessed, without providing any evidence to support its theory. Mr. Stahl testified that he visited OVCC on May 1 and spoke with the foreman, who identified the company removing the asbestos as Chippewa. Tr. I at 79. Chippewa argues that because Mr. Stahl did not testify as to whether he obtained the foreman's name, the workers on the roof could have been from Hip & Gable. Appellant's Brief at 12. Mr. Stahl's testimony is consistent with the record and, without contrary evidence, we have no reason to speculate that Hip & Gable, rather than Chippewa, was responsible for the asbestos removal on May 1, merely because we do not know if Mr. Stahl asked the foreman for his name.

For all the foregoing reasons, we find that the Region demonstrated, by a preponderance of the evidence, that Chippewa performed the asbestos removal on May 1. The Region satisfied its initial burden of production to establish its *prima facie* case in that regard. The burden then shifted to Chippewa to rebut. *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538-39 (EAB 1994) (explaining that after the complainant establishes its *prima facie* case, the burden of going forward shifts to the respondent to rebut the complainant's case through the introduction of evidence). Chippewa provided nothing but speculation about what "might have happened" on May 1 to counter the Region's direct evidence about what did happen. Mere speculation, without supporting evidence, is insufficient for Chippewa to succeed in rebutting the Region's case. *See In re Solutia, Inc.* 10 E.A.D. 193, 214 (EAB 2001) (refusing to accept the Region's speculative evidence on rebuttal); *see also In re Bricks, Inc.*, 11 E.A.D. 224, 239-40 (EAB 2003) (declining to speculate on the existence of a channel when no evidence was presented to establish its existence). We therefore find that the Region has demonstrated, by the preponderance of the evidence, that Chippewa was responsible for the asbestos removal from the west side of the church roof on May 1, 2001.

B. *The Record Demonstrates That the Materials Tested by Criterion and Found to be RACM Were the Same Materials Collected on May 1 and 2*

Chippewa next argues that the Region has not adequately demonstrated that the asbestos-containing transite roofing shingles removed from the church roof on May 1 and 2, 2001, were RACM because the Region did not establish a chain of custody for the samples collected by Mr. Foster from the church on May 1 and 2. Again, we defer to the ALJ's judgment regarding the reliability of the evidence presented to him, noting that he was not bound by the Federal Rules of Evidence. *See In re Pyramid Chem. Co.*, 11 E.A.D. 657, 675 (EAB 2004) (explaining that the Federal Rules of Evidence do not apply to administrative hearings (citing *In re William E. Comley, Inc.*, 11 E.A.D. 247, 266 (EAB 2004), and *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 368-70 (EAB 1994))); *In re Friedman*, 11 E.A.D. at 302, 314 n.15 (EAB 2004) (explaining that the Board may apply a deferential standard to issues such as factual findings relating to the credibility of witnesses (citing *In re OceanState Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998))).

1. *Alleged "Missing Links" in the Chain of Custody*

According to Chippewa, there are a number of "missing links" in the chain of custody for the samples collected by Mr. Foster and analyzed by Criterion. It is well established that "precision in developing the 'chain of custody' is not an iron-clad requirement, and the fact of a 'missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect.'" *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). The "chain of custody" rule is merely an extension of the principle that evidence must be authenticated prior to being admitted into evidence, or, in other words, that the evidence is what it purports to be. "[T]he ultimate question is whether the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original item had been exchanged with another or otherwise tampered with." *Id.* When considering such testimony, we will grant a presumption of regularity in the handling of evidence by government officials. *SeeUnited States v. Jackson*, 649 F.2d 967, 973-74 (3d Cir. 1981). Given this standard, enough "missing links" in a chain of custody might render certain evidence unreliable and thus inadmissible. *See* 40 C.F.R. § 22.22(a)(1) (explaining that the presiding officer shall not admit unreliable evidence). In the present case, however, Chippewa has failed to establish even one missing link in the chain of custody for the asbestos samples taken on May 1 and 2, or provide any other reason why we should not believe that the samples collected by Mr. Foster at OVCC were the same samples that were tested to be RACM by Criterion.

Chippewa alleges that the initial "missing link" is that Mr. Foster could not connect the materials that he was shown at the hearing with the samples he collected on May 1 and 2. Appellant's Brief at 25. Chippewa quotes, out of context, a portion of the transcript where the ALJ struck part of Mr. Foster's testimony because the Region's counsel had not introduced the samples properly. Appellant's Brief at 24; Tr. I at 125-26. The Region's counsel immediately corrected the procedural problem, however, and Mr. Foster then was able to testify that he did in fact recognize the samples that he was shown at the hearing as being the same samples that he collected on May 1 and 2. Tr. I at 126-28.

Chippewa then attempts to discredit Mr. Foster by asserting that his testimony that he filled out the chain-of-custody record after returning to his office on May 1 is inconsistent with the May 2, 2001 date on the document. Chippewa claims that "there is a missing link as to where the May 1, 2001 samples were during the period from 3:15 P.M. on May 1, 2001, to 10:30 A.M., on May 2, 2001." In fact, there is no inconsistency. Mr. Foster testified that he filled out the chain-of-custody record on May 1, Tr. I at 206, but that he did not send the samples to Mr. Ponak until the next day.[28] Tr. I at 236-38. The May 2, 2001 date on the chain-of-custody record is the "Relinquished by" date; it is not meant to indicate the date when Mr. Foster filled out the rest of the information on the form, describing the samples and sampling locations. C Ex 13. Thus, Mr. Foster's testimony that he relinquished the samples on May 2 is absolutely consistent with the information on the chain-of-custody record. Again, Chippewa has failed to discredit Mr. Foster or establish a "missing link."

Chippewa asserts that there is a third and a fourth missing link because when Mr. Foster relinquished the package of samples to Federal Express to deliver to Mr. Ponak, and when Mr. Ponak relinquished the package of samples to Federal Express to deliver to Criterion, they did not record the name of the Federal Express representatives on the chain-of-custody record. Appellant's Brief at 26-27. Chippewa, however, has provided no basis to support the contention that inspectors are required to obtain the signatures of Federal Express employees to establish a proper chain of custody, and indeed the standard chain-of-custody form used by Mr. Foster and EPA's Office of Enforcement does not require such a signature. C Ex 13, 14. Furthermore, when Mr. Ponak received the samples, he spoke to Mr. Foster on the telephone to verify the integrity of the samples and match the information on the sample bags with the information on the chain-of-custody records. Tr. II at 35-37. Chippewa has provided no reason to believe that the samples received by Mr. Ponak were not the same ones that Mr. Foster sent him, or that the samples received by Criterion were not the same ones that Mr. Ponak sent.

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[28] Mr. Foster sent Mr. Ponak the May 1 and 2 samples together in the same shipment.

Chippewa further asserts that the Region did not establish a chain-of-custody record for the samples after they arrived at Criterion because Mr. Siracki's signature is the last signature that appears on the record. Appellant's Brief at 28. However, Criterion's Certificates of Analysis, and each of the Bulk Sample Sheets used by the laboratory, confirm that the samples tested match the samples identified on the chain-of-custody records. *See* C Ex 15, 16, 39.[29]

A chain-of-custody record is used to demonstrate that evidence is what it is purported to be. The preponderance of the evidence shows that Mr. Foster, Mr. Ponak, and the Criterion employees all handled the OVCC asbestos samples according to established procedures developed to prevent samples from being tampered with, and we therefore have no reason to second-guess the ALJ's finding that the sampling evidence is what it is purported to be. Chippewa's claims otherwise all are unsubstantiated, and we affirm the ALJ's finding that the samples found to be RACM by Criterion were the same samples collected from OVCC by Mr. Foster.

2. *Mr. Foster's Credibility*

In arguing that the Region did not establish a chain of custody for the samples, Chippewa also attacks Mr. Foster's credibility as a witness. Appellant's Brief at 18-19. We are not persuaded by these attacks, however, and, as noted above, defer instead to the ALJ's factual findings where the credibility of witnesses is at issue.

For example, Chippewa questions the validity of the Air Compliance Inspection Report (the "Inspection Report") Mr. Foster prepared. C Ex 3. First Chippewa notes that he did not complete it until October 29, 2001. Although there was a six-month delay in completing the Inspection Report, Mr. Foster did complete the Asbestos Field Data reports, C Ex 1 & 2, immediately, and explained at the hearing that a backlog of cases caused the delay in the preparation of the Inspection Report. Tr. I at 281-82. The ALJ found that explanation satisfactory, as do we. Then Chippewa criticizes the validity of the Inspection Report because it does not specifically identify "Chippewa" as the contractor in the "General Information" section. Although the Inspection Report does not indicate "Chippewa" specifically, it does list Mr. Evans as the "Contractor." C Ex 3. We are not persuaded by Chippewa's argument, which misconstrues the information contained in the report. The fact that Mr. Foster identified only Mr. Evans's name, and not his em-

[29] Chippewa also asserts that there is no chain-of-custody record for the samples being transported from Criterion to Mr. Ponak. The record reflects that Criterion sent the samples back to Mr. Ponak after determining that they contained RACM, Tr. II at 38-39, and Chippewa has advanced no evidence to question this testimony.

ployer, is a mere technicality and in no way undermines the validity of the report as applied to Chippewa.

Chippewa also argues that the entire set of samples collected by Mr. Foster should be discarded because the times marked on the videotape and the photographs he took were inconsistent. Mr. Foster explained this minor inconsistency by testifying that he set the time on the video camera based on his office clock, and set the time on the camera based on his watch, which he later determined to be five minutes fast. Tr. I at 310-12. We, again, defer to the ALJ's judgment with respect to evidentiary findings dependent on witness credibility and support his finding that this inconsistency is immaterial. Init. Dec. at 4 n.9.

3. *Photographs Taken by Mr. Foster*

Chippewa also challenges the validity of Mr. Foster's photographs. First, Chippewa asserts that they are invalid because they do not show the locations where the samples were collected. *See* C Ex 4, 5. In fact, however, these photographs are each numbered and these numbers correspond to descriptions in the chain-of-custody records he prepared, which describe the sampling locations in detail. *See* C Ex 4, 5, 13, 14. Thus Chippewa's argument is meritless.

Chippewa next asserts that the photographs should not be admitted because the Region did not establish a chain-of-custody record for them. Chippewa failed to explain why a chain-of-custody record for photographs would be necessary, however. Although, as previously explained, the Board is not bound by the Federal Rules of Evidence, these rules advise that "the witness identifying the item in a photograph need only establish that the photograph is anaccurate portrayal of the item in question." *Guam v. Ojeda*, 758 F.2d 403, 408 (9th Cir. 1985)(citing Fed. R. Evid. 901(b)(1)); *see alsoUnited States v. Neal*, 527 F.2d 63, 65 (8th Cir. 1975) (explicitly finding that testimony regarding chain of custody is not necessary for the admission of photographs); *cf.* 40 C.F.R. § 22.22(a)(1) (setting forth the "reliability" standard for admission of evidence). Moreover, the ALJ has broad discretion in determining what evidence is admissible. *SeeIn re Titan Wheel Corp.*, 10 E.A.D. 526, 537 (EAB 2002) (citing *In re J. V. Peters and Co.*, 7 E.A.D. 77, 99 (EAB 1997)). We therefore defer to the ALJ's finding that Mr. Foster's testimony established that the photographs were true and accurate representations of the Facility and the samples he took, Init. Dec. at 21, and thus they were properly admitted.

4. *Fair Hearing*

Chippewa further contends that it was denied a fair hearing because the ALJ granted a motion by the Region, filed a month before the hearing, to use Mr. Forostiak rather than Mr. Sieracki or Mr. James A. Weltz as a witness from Criterion. Chippewa also claims that it was unfair for the ALJ to deny its motion to

depose Mr. Forostiak, and instead direct Chippewa to examine the witness, and the evidence he would present,[30] at the hearing. Appellant's Brief at 29-30. First, as previously explained, the ALJ has broad discretion in determining how to conduct a hearing. *See supra* Part III.A.4. Additionally, in administrative hearings parties do not have a constitutional right to take depositions, or indeed discovery at all, absent a showing of prejudice, denying the party due process. *See McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977). In fact, the CROP is specific in this regard, stating that the presiding officer may order depositions only under certain conditions. *See* 40 C.F.R. § 22.19(e). One of these conditions is that there must be a finding that there is "a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by at witness at the hearing." 40 C.F.R. § 22.19(e)(3)(ii).

Chippewa has provided no basis for its assertion that granting a motion to substitute witnesses a full month before the hearing is in any way unfair or prejudicial. Moreover, Chippewa's counsel chose not to attend the hearing during the testimonies of Mr. Ponak or Mr. Forostiak and therefore did not take the opportunity to cross-examine them regarding the sampling analysis. Tr. II at 155. Likewise, although Chippewa had every opportunity to do so, it presented no testimony or other evidence at the hearing to attack, challenge, or rebut any of the analytical testing activities or results.[31] Therefore we find Chippewa's claims that it was denied a fair hearing meritless.

As previously discussed, we agree with the ALJ's finding that the Region demonstrated, by a preponderance of the evidence, that Chippewa conducted the asbestos removal from the church roof on May 1. Further, applying a deferential standard of review with respect to findings related to witness credibility and the ALJ's conduct of the hearing, we find Chippewa's allegations of "missing links," unreliable witnesses, and unfairness all to be unsubstantiated and unfounded. We therefore affirm the ALJ's finding of liability and conclude that Chippewa is liable under section 112 of the CAA and NESHAP regulations for violations associated with the removal of asbestos shingles from OVCC's church roof on May 1 and 2, 2001.

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[30] This evidence included Criterion's Bulk Analysis Data Sheets. Appellant's Brief at 29.

[31] Although it certainly was not required to cross-examine witnesses or present rebuttal evidence, we find it unusual that Chippewa claims that denying a deposition was unfair when it did not even take advantage of some of the opportunities it did have to examine the Region's witnesses or counter the Region's other evidence.

C. *The Record Supports the ALJ's Penalty Assessment*

Having affirmed the ALJ's findings with respect to liability, we now turn to the few points Chippewa raises with respect to the appropriate civil penalty. First, we note that the penalty the ALJ assessed was within the range of penalties provided in the penalty guidelines, thus making this a case where we ordinarily would grant the ALJ discretion in penalty assessment. Chippewa disputes the ALJ's increase of the proposed civil penalty by $3,300 based on the size of the violator.[32] In support of its position, Chippewa argues that the ALJ based his conclusion on the tax returns of "Chippewa Hazardous Waste Remediation & Energy, Inc.," rather than "Chippewa Hazardous Waste, Inc.," which it asserts is a separate entity.

Chippewa argues that Ms. Meyer, the Region's expert witness, and in turn the ALJ, based their assessment of the "size of the violator" on financial information that did not apply to Chippewa.[33] The CAA Penalty Policy provides a chart for assessing the size of the violator based on the net worth of the company. C Ex 22 at 14. Mr. Ponak testified that he did not have much financial information about the company when he calculated the proposed penalty, and therefore assigned the lowest amount on the chart, which is reserved for companies with a net worth of under $100,000. Tr. II at 95-96. When determining the appropriate penalty, the ALJ considered financial information in the tax returns that Chippewa provided along with its Answer. Based on these tax returns, the ALJ found that Chippewa's net worth was in the $100,000 to $1,000,000 range, and therefore increased the penalty accordingly.

Chippewa now argues that it was inappropriate to use these tax returns to determine the penalty because they apply to Chippewa Hazardous Waste Remediation & Energy, Inc., which Chippewa now argues is a different entity.[34] Appellant's Brief at 5, 31-32. This position is difficult for us to understand, however, given that these tax returns were the returns that Chippewa submitted along with its answer to support its inability-to-pay argument. Answer at 4; Tr. II at 96-97; C Ex 24-26. Furthermore, when the ALJ advised Chippewa that it had the opportunity to provide additional financial information to assist with the penalty

[32] Chippewa also, in one sentence, disputes the ALJ's finding that Chippewa acted with knowledge in violating the asbestos NESHAP work standards. Chippewa provides no explanation for why the ALJ's finding is incorrect, however. Appellant's Brief at 34.

[33] The CAA Penalty Policy and the Asbestos Penalty Policy both call for adjusting the gravity component of the penalty based on the size of the violator. *See* C Ex 22 at 14; C Ex 21 at 6.

[34] Chippewa states that "Meyer did not request information about the financial condition and status of Chippewa Hazardous Waste, Inc., a West Virginia corporation. Rather, she reviewed only the corporate tax returns for Chippewa Hazardous Waste Remediation & Energy, Inc., an Ohio corporation." Appellant's Brief at 5.

calculation, it provided none. Prehearing Order at 2; Respondent's First Prehearing Exchange; Tr. II at 240-41. Chippewa accuses the Region of "prevent[ing] its financial consultant from obtaining [additional] information about Chippewa," because Ms. Meyer testified that when she asked for additional information about the company, the Region told her that it was not possible to obtain further information. Appellant's Brief at 31; Tr. II at 235. Chippewa presents no evidence, however, that the company made any effort to submit to the Region any information that it would deem relevant to the penalty assessment, nor did it cross-examine Mr. Ponak with regard to his efforts to obtain additional financial information about the company, or any other aspect of the penalty assessment analysis.[35] Moreover, Chippewa neglects to consider that the Region did do an independent inquiry into the company's financial status to confirm that it was still a viable business and discovered that Chippewa was continuing to perform work under contracts. Tr. II at 235-35. Because the penalty assessed falls within the range provided in the CAA Penalty Policy and the Asbestos Penalty Policy, and because Chippewa has provided no direct evidence in support of its arguments, we affirm the ALJ's penalty assessment.

D. *Alleged Conflict of Interest*

Finally, Chippewa argues that the ALJ should have recused himself from the case because he previously participated in a mock hearing with Ms. Meyer, the Region's expert witness with respect to the penalty calculation. Chippewa claims that these circumstances created "bias" and thus should preclude the ALJ from serving as the ALJ in this case. Once again, however, Chippewa provides no factual or legal support for its assertion.

The CROP provides that Administrative Law Judges "may not perform functions * * * regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act." 40 C.F.R. § 22.4(d)(1). The CROP advises that if a party believes that an ALJ should be disqualified because of a conflict, that party should first make a motion to the ALJ asking him to disqualify himself from the proceeding. If such a motion is denied, the party may appeal that decision to the Board. *Id.* To disqualify a judge, a party must identify facts that are legally sufficient to demonstrate the judge's personal bias or prejudice against a party. *See Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 718-19 (7th Cir. 2004) ("[T]he existence of non-litigation-reasons for [the judge and the witness] to converse allays any appearance of impropriety."). "It is well established that the recusal inquiry [for a judge] must be 'made from the perspective of a *reasonable* observer who is

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[35] Although there is no requirement that parties conduct cross-examination, when Chippewa does not cross-examine with respect to an issue in dispute, it should not be surprised when it fails to meet its burden of proof on rebuttal.

informed of all the surrounding facts and circumstances.'" *Cheyney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S.Ct. 1391, 1400 (2004) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (citations omitted)).

First, under the CROP, Chippewa should have submitted a motion to the ALJ asking him to disqualify himself before raising the issue to the Board. Chippewa made no such motion, however, despite having every opportunity to do so. Moreover, Chippewa has not adequately demonstrated any bias or prejudice. Accordingly we find Chippewa's argument that the ALJ should have recused himself to be unfounded, and decline, especially at this late date in the history of this proceeding, to disqualify the ALJ in this case.

IV. *CONCLUSION*

For the reasons set forth above and pursuant to CAA sections 112 and 113, 42 U.S.C. §§ 7412, 7413, Chippewa is hereby assessed a civil administrative penalty of $45,040 for its violations of subpart M of NESHAP, 40 C.F.R. part 61. Chippewa shall pay the full amount of the penalty within 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:

EPA-Region III
Regional Hearing Clerk
Mellon Bank
P.O. Box 360515
Pittsburgh, PA 15251-6515

So ordered.