

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Timpson Excavating, Inc.
Notice of Violation OC&I/SW 2009-038
AAD No. 10-002/WME
April 2012

DECISION AND ORDER

This matter came on for Administrative Hearing on October 3, 2011. The Department of Environmental Management, Office of Compliance and Inspection (“OC&I”) was represented by Joseph LoBianco, Esq. Respondent Timpson Excavating, Inc. (“Timpson”) was represented, by its spokesperson and vice president, John Timpson. After the conclusion of the hearing the parties were given the opportunity to file a Post Hearing Memorandum. OC&I filed its Post Hearing Memorandum on December 9, 2011. Respondent did not file a Post Hearing Memorandum. The Administrative Hearing was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (RI GEN. LAWS § 42-17.7-1 et seq.); Chapter 17.6 of Title 42 entitled “Administrative Penalties for Environmental Violations”; the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-1 et seq.); The Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (“AAD Rules”) and the Rules and Regulations for Assessment of Administrative Penalties (“Penalty Regulations”).

TRAVEL OF THE CASE

On January 11, 2010 OC&I issued a Notice of Violation (“NOV”) alleging that Timpson was guilty of the following violations:

- (1) R.I. Gen. Laws Section 23-18.9-5 prohibiting disposal of solid waste at other than a licensed solid waste management facility.
- (2) R.I. Gen. Laws Section 23-18.9-8 prohibiting the operation of a solid waste management facility without a license issued by the Director.
- (3) DEM Solid Waste Regulation 1.4.01 prohibiting the operation of a solid waste management facility without a license from DEM.

A. The NOV ordered the Respondent to remove and dispose of all solid waste within sixty (60) days. The NOV also imposed an administrative penalty of twelve thousand five hundred (\$12,500.00) dollars. Respondent filed its request for an Administrative Hearing on January 27, 2010. A Prehearing Conference was held and a Prehearing Record was issued on August 15, 2011. The Prehearing Record reflects that the parties did not stipulate to any facts and the exhibits were marked for identification purposes only.

HEARING SUMMARY

OC&I presented two (2) witnesses; Daniel Lawton and Tracey Tyrrell. Daniel Lawton is an environmental scientist who has been employed by DEM full time since 1992. Mr. Lawton testified as a fact witness and is the representative of OC&I who conducted an inspection of the subject premises at 94 Rose Hill Road in South Kingstown Rhode Island on August 6, 2009. Mr. Lawton testified regarding his resume which was admitted into evidence without objection as OC&I's # 7 Full. Mr. Lawton next testified that he consulted an on-line data base called Vision Appraisal to determine the identity of the owner of the subject premises. Counsel for OC&I, after preliminary questioning, requested to have a print out from Vision Appraisal admitted as OC&I's

2 Full. The Respondent objected and OC&I # 2 was not admitted as a full exhibit but remained marked for identification purposes only. Mr. Lawton identified OC&I Exhibit # 3 as a printout from the Secretary of State's Office relative to a corporate name change from Ed. Timpson & Sons, Inc. to Timpson Excavating Inc. on May 5, 1998. The Respondent initially objected regarding a point of identity of corporate officers but the document was admitted as a full exhibit without objection.

Mr. Lawton testified in detail regarding his observations at the subject premises during his initial inspection on August 6, 2009. The specific details, as well as pictures taken on that day, were contained in his Solid Waste Field Inspection Report which was admitted into evidence as OC&I # 4 Full. Mr. Lawton estimated the total solid waste volume at the site as approximately 1729 cubic yards.

Mr. Lawton next testified as to his observations during a re-inspection on September 23, 2010. His testimony is reflected in his Solid Waste Field Inspection Report which was admitted into evidence as OC&I # 5 Full. The amount of solid waste was reduced in part by the removal of scrap metal and tanks which had previously been stored on the property. What remained included compost mixed with soil, solid waste and loose manure. Mr. Lawton estimated the total solid waste at the site as approximately 265 cubic yards. Mr. Timpson conducted a brief cross examination OF Mr. Lawton. It should be noted that the inspection reflected in OC&I #5 was conducted nine (9) months after the issuance of the NOV and therefore is not part of the reason for its issuance.

OC&I's next witness was Tracey Tyrrell who identified herself as a supervising environmental scientist who has been employed by DEM since 1989. Ms. Tyrrell's resume was admitted into evidence, without objection, as OC&I # 6 Full. Ms. Tyrrell identified OC&I # 1 as a Notice of Violation ("NOV") that was sent to Timpson Excavating Inc. on January 11, 2010. She testified that she participated in the drafting of the NOV and explained how the Administrative Penalty was calculated. Mr. Timpson conducted a brief cross examination of Ms. Tyrrell which focused on the fact that a significant amount of solid waste has been removed from the property after the issuance of the NOV. During a brief re-direct examination Ms. Tyrrell stated that removal of solid waste after the issuance of an NOV does not affect the calculation. Ms. Tyrrell, in answer to a question posed by the Hearing Officer, testified that the administrative penalty was calculated in accordance with the Administrative Penalty Regulations. OC&I had OC&I # 1 was entered as a Full exhibit without objection. OC&I rested after the completion of Ms. Tyrrell's testimony. Timpson Excavating Inc. elected not to present any evidence on its own behalf. A list of Full Exhibits is annexed hereto and made a part hereof as an Appendix.

ANALYSIS

OC&I objected at the beginning of the Administrative hearing to the fact that the Respondent was being represented by one of its corporate officers who is not a licensed attorney. OC&I in its Post Hearing Memorandum, argues that, in spite of the presence of a corporate officer at the Administrative Hearing, the respondent should be defaulted for failure to appear.

Rule 4 of the Rules and Regulations of the Administrative Adjudication Division provide as follows:

"Organizations who are parties to an administrative hearing and who are not represented by legal counsel shall designate a spokesperson to participate on their behalf in the hearing. Officers of the organization shall serve as alternate spokespersons. Should the spokesperson be unavailable on a scheduled hearing date, they shall notify the hearing officer of the specific reason for their unavailability".

Counsel for OC&I cites *Mild, Inc. v. R.I. Department of Environmental Management 02-6281* in support of his argument. The AAD has ruled subsequent to *Mild* in support of the proposition that a corporation may be represented by a "spokesperson". See *Re: Earthsource, Inc. AAD No. 04-*

001/WRA and Re: 1850 Realty Corp. AAD No. 04-0002/WRE. I therefore deny OC&I's request to enter a default against the Respondent.

The burden of proof is on OC&I to establish each essential element of its case by a preponderance of the evidence.

The evidence presented by OC&I has established that solid waste in excess of three (3) cubic yards were deposited and present on property located at 94 Rose Hill Road in South Kingstown Rhode Island on or before August 6, 2009. The evidence also establishes that the solid waste present at the subject premises was being processed in a manner to constitute operating a solid waste management facility without a license issued by the Director to Timpson Excavating, Inc. The testimony of OC&I witness, Tracey Tyrrell, establishes the fact that the Administrative Penalty was calculated in accordance with the Rules and Regulations for Assessment of Administrative Penalties.

OC&I has the burden of proving by a preponderance of the evidence that the Respondent, Timpson Excavating, Inc., engaged in the activity which constituted the violation and/or owned the property where the illegal activity was conducted. I have carefully reviewed the transcript of testimony as well as the investigative reports, OC&I Exhibits # 4 and # 5 full, and find no evidence that Timpson Excavating, Inc. was identified as the responsible party.

Mr. Lawton's testimony and his investigative report, (OC&I Exhibit # 4) indicate that on August 6, 2009, he went to the subject premises to inspect the subject premises. "Mr. Timpson" was not at the site but when reached on the phone he gave permission to go ahead and inspect the premises. Mr. Lawton described in detail his observations during that inspection. His testimony regarding that day does not indicate that he met with "Mr. Timpson" on the site but his report reflects that he returned to the office and spoke with "Mr. Timpson". The report states "he told me he is storing the scrap metal because the price is down. He said he is going to burn the pile of tree waste in the winter. He said he takes in manure and lets it sit until it grows weeds and then mixes it with loam and sells it". (OC&I # 4)

There is no evidence in the testimony of Mr. Lawton that "Mr. Timpson" was an employee of or acting on behalf of Timpson Excavating, Inc. There is no evidence in Mr. Lawton's testimony or report, OC&I Exhibit # 4, that there were signs or indication that Timpson Excavating, Inc. was conducting the activities on the subject property. The only reference in Mr. Lawton's testimony to Timpson Excavating, Inc. was that it did not have a license to operate a Solid Waste Facility. The Notice of Violation ("NOV"), OC&I Exhibit # 1, was issued on January 11, 2010 against Timpson Excavating, Inc.. Mr. Lawton's testimony was that he next inspected the subject premises on September 23, 2010. His investigative report, OC&I Exhibit # 5, reflects that he next met with John and Ed Timpson who took him out to inspect the premises. Mr. Lawton's testimony and report reflect his observations and the conversations he had with Ed and John Timpson regarding the operation on the subject premises. They described where they got the materials, how they processed them and how they disposed of it.

Mr. Lawton's testimony and report do not reflect that Ed and John Timpson were acting on behalf of a corporation or any other entity for that matter. There is nothing in the statements attributed to the Timpsons that they were acting on anyone's behalf but their own. In spite of their alleged admissions neither Ed nor John Timpson were named as Respondents in the NOV. (OC&I Exhibit # 1) Once again the only reference in Mr. Lawton's testimony, to Timpson Excavating, Inc. at this point, is that it doesn't have a license to operate a Solid Waste Facility.

OC&I alleges in the NOV at paragraph (2) of the "Fact" section that "Respondent is the owner of the Property". The only evidence in this matter on the issue of ownership of the subject premises came by way of the testimony of OC&I witness, Daniel Lawton. Mr. Lawton testified about OC&I # 2 which was marked for identification only. He testified that the exhibit was a copy of a "Vision Appraisal" form relating to the ownership of 94 Rose Hill Road in South Kingstown. He said that Vision Appraisal is an on-line database that is used to determine ownership of property. Mr. Lawton testified "It shows the owner of the property to be Ed Timpson & Sons,

Incorporated". Mr. Lawton was next asked "And Mr. Lawton, is this the type of document you typically rely upon in your usual course of business at the OC&I to determine who owns a particular piece of Property?" He answered "Yes".

Counsel for OC&I next requested that OC&I # 2 for identification be entered as a full exhibit. The spokesperson for the Respondent objected on the basis that Ed Timpson & Sons does not own the property. (T. pg. 13)

The following is the exchange between the parties relative to the ownership of the property as reflected on page 13 of the transcript.

MR. LOBIANCO: Mr. Hearing Officer, could we ask Mr. Timpson if he'll stipulate to who does indeed, own the property?

HEARING OFFICER KERINS: We can ask.

MR. TIMPSON: Sure, you can ask.

MR. LOBIANCO: I'm just asking who owns the property.

MR. TIMPSON: I believe you should have done your homework.

HEARING OFFICER KERINS: Okay, You're not going to stipulate. We'll note rather than getting into an argument.

MR. TIMPSON: I'm not getting into an argument.

HEARING OFFICER KERINS: This is for identification purposes. OC&I Number 2 is marked for identification purposes. (Whereupon OC&I Exhibit 2 is marked for identification)

OC&I argues in its Post Hearing Memorandum that although the Respondent claimed that it did not own the property, but Respondent failed to present any evidence on the issue. OC&I further argues that based on OC&I Exhibits # 2 and # 3 that "it is obvious" that Timpson Excavating, Inc. is the owner of the subject premises. The burden is on OC&I to prove by a preponderance of the evidence, properly entered at the Administrative Hearing, that the facts it alleged in the NOV are true and not what it considers as "obvious". An exhibit which is marked for identification but which is never admitted as a full exhibit is not evidence. OC&I Exhibit # 2 for identification is not evidence and cannot be taken into consideration with other competent evidence to prove an allegation to be true. The Respondent is not obliged to present evidence to rebut an allegation which OC&I has not proven in its direct case.

In most cases that come to hearing the parties stipulate to certain facts such as ownership of the subject premises. There were no stipulations of fact in this case. OC&I can certainly use a resource such as Vision Appraisal to determine, on a preliminary basis, who is the likely owner of a property under investigation. However, this type of proof is inadequate and inadmissible in an Administrative Hearing. A print out from an on-line source is hearsay. When it is attempted to be used to support testimony, such as in this case, it is hearsay on top of hearsay. A print out from an on-line source is not an exception to the Hearsay Evidence Rule, such as in the case of an official public document. A print out from an on-line source does not have the reliability of a public document. The basis for the print out cannot be cross examined. Although hearsay is allowed at times in an Administrative Hearing I will not allow it as proof of such an essential element of the case. Once it is determined that a case is proceeding to a hearing, OC&I must take the necessary steps to properly prove each and every element of its case. OC&I has not proven ownership of the subject premises by a preponderance of the evidence in this matter.

Conclusion

OC&I has failed to prove by a preponderance of the evidence the involvement of Timpson Excavating, Inc. in the violations cited in the NOV. There is no evidence, either by testimony or as part of an investigative report, that John and Ed Timpson were employees of Timpson Excavating, Inc. or were agents of the corporation when they engaged in the prohibited activities. There is no evidence in the record to establish who was the owner of the subject premises at the

time of the prohibited activity. For the reasons stated above this appeal should be granted and the NOV should be dismissed.

Findings of Fact

1. The subject premises is located at 92 Rose Hill Road in South Kingstown, Rhode Island.
2. On August 6, 2009 Daniel Lawton from the Rhode Island Department of Environmental Management, Department of Compliance and Inspection (“OC&I”) conducted an inspection of the subject premises.
3. During his August 6, 2009 inspection, Mr. Lawton observed solid waste on the subject premises in the amount of approximately 1729 cubic yards.
4. During his August 6, 2009 inspection Mr. Lawton observed piles of manure and soil mixed in the nature of a composting process.
5. On January 11, 2010 OC&I issued a Notice of Violation (“NOV”) to Timpson Excavating, Inc. for violation of Solid Waste Laws and Regulations.
6. On September 23, 2010 Mr. Lawton, on behalf of OC&I, re-inspected the subject premises.
7. At the September 23, 2010 inspection John Timpson and Ed Timpson acknowledged that they had caused the materials to be deposited on the subject premises.
8. No evidence has been submitted to establish that John Timpson or Ed Timpson was acting as an employee or agent of Timpson Excavating, Inc. relative to their solid waste activities on the subject premises.
9. There is no evidence or testimony establishing that Timpson Excavating, inc. was engaged in the depositing and processing of solid waste on the subject premises.
10. On 5/5/98 Ed Timpson and Sons, Inc. changed its corporate name to Timpson Excavating, Inc.
11. There is no competent or reliable evidence to establish who owns the subject premises.
12. OC&I has proven by a preponderance of the evidence that John and Ed Timpson deposited more than three (3) cubic yards of solid waste on the subject premises in violation of Solid Waste Laws and Regulations.
13. OC&I has proven by a preponderance of the evidence that John and Ed Timpson operated a solid waste facility on the subject premises in violation of Solid Was Laws and Regulations.
14. The Administrative Penalties were calculated in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
15. OC&I has not proven by a preponderance of the evidence that Timpson Excavating, Inc. deposited solid waste on the subject premises.
16. OC&I has not proven by a preponderance of the evidence that Timpson Excavating, Inc. engaged in operating a solid waste facility.
17. OC&I has proven by a preponderance of the evidence that Timpson Excavating did not have a permit to operate a solid waste facility.
18. OC&I has not proven by a preponderance of the evidence that Timpson Excavating, Inc. owned the subject premises at the time of the violations.
19. John Timpson acted as a spokesperson for Respondent Timpson Excavating, Inc.

Conclusions of Law

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this a action and personal jurisdiction over the Respondent.
2. OC&I has proven by a preponderance of the evidence that an amount greater than three (3) cubic yards had been deposited on the subject premises.

3. OC&I has proven by a preponderance of the evidence that a solid waste management facility was being operated on the subject premises.
4. OC&I has proven by a preponderance of the evidence that Timpson Excavating, Inc. did not have a license to operate a solid waste management facility.
5. OC&I has proven by a preponderance of the evidence that the administrative penalty was calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties.
6. OC&I has not proven by a preponderance of the evidence that John Timpson and Ed Timpson were employees of Respondent Timpson Excavating, Inc., or were acting as its agents.
7. OC&I has not proven by a preponderance of the evidence that Respondent, Timpson Excavating, Inc. was the owner of the subject premises.
8. OC&I has not sustained its burden of proof that the Respondent, Timpson Excavating, Inc. has committed or is responsible for the violations alleged in the NOV.
9. The AAD Rules allow a corporate officer to act as a spokesperson for a corporation which is not represented by an attorney.

Wherefore, based upon the Findings of Fact and Conclusions of Law it is hereby

ORDERED

1. Respondent's Timpson Excavating, Inc.'s Appeal is **SUSTAINED**.
2. The Notice of Violation and resulting penalties against Timpson Excavating, Inc. are vacated and dismissed.

Entered as an Administrative Order this ____ day of April, 2012.

David Kerins

Chief Hearing Officer

Appendix

Exhibits

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| OC&I Exhibit # 1 Full. | Notice of Violation issued to Timpson Excavating, Inc. dated January 11, 2010; |
| OC&I Exhibit # 2 ID only. | Print out from Vision Appraisal; |
| OC&I Exhibit # 3 Full. | Print out from Rhode Island Secretary of State's Office; |
| OC&I Exhibit # 4 Full. | Solid Waste Field Inspection Report dated 8/7/09; |
| OC&I Exhibit # 5 Full. | Solid Waste Field Inspection Report dated 9/28/10; |
| OC&I Exhibit # 6 Full. | Resume of Tracey D'Amadio Tyrrell; |
| OC&I Exhibit # 7 Full. | Resume of Daniel Lawton |