

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

**STEWART APARTMENTS
DAVID FANN,**

Appellant,

v.

Appeal No. 07-26-EQB

**LISA A. MCCLUNG, DIRECTOR,
OFFICE OF WATER AND WASTE MANAGEMENT,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

Appellee.

FINAL ORDER

Appeal No. 07-26-EQB was filed with the West Virginia Environmental Quality Board (“Board”) on November 29, 2007. In accordance with West Virginia Code §22B-1-7(f), an evidentiary hearing concerning the matters set forth in the Notice of Appeal filed in Appeal No. 07-26-EQB was held on April 10, 2008.

W. Richard Staton, Esquire represented David Fann (hereinafter “Appellant”). Roland T. Huson, III, Esquire, of the West Virginia Department of Environmental Protection (hereinafter “WVDEP” or “Appellee”) Office of Legal Services represented the Appellee. The Board was comprised of Dr. Edward Snyder, Chairman; Dr. Scott Simonton; Mr. Edward C. Armbrecht, III; and William Gillespie.

In deciding this appeal, the Board reviewed and considered the certified file, the relevant law and regulations, the Notice of Appeal, all written filings and memoranda, the testimony of the

witnesses, exhibits, and arguments by counsel. In accordance with *West Virginia Code* § 22B-1-7(g)(1), the Board **MODIFIES** Appellee's civil penalty issued in this matter.

II. STANDARD OF REVIEW

The Board hears appeals of enforcement actions in accordance with *West Virginia Code* § 22B-1-7. The applicable standard of review of the Appellee's action is *de novo* review. *West Virginia Code* § 22B-1-7(e). Pursuant to *de novo* review, the Board does not afford deference to the decision of the Department of Environmental Protection, but rather, the Board acts independently on the evidence before it. *West Virginia Division of Environmental Protection v. Kingwood Coal Company*, 200 W.Va. 734, 745, 490 S.E. 2d 823, 834 (1997).

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supported such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound, regardless of the Appellant's evidence. The Appellant has an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

III. DISCUSSION

This appeal requested the Board to reduce or vacate the amount of a civil penalty assessed. In the event that the Board decided to affirm the penalty, the Appellant asked the Board to direct the money be used to clean up the solid waste from the property that is the subject of the violation. The

Board is not authorized to direct the WVDEP on how it is to spend the penalties it assesses.

Thankfully the Board rarely reviews the assessment of civil penalties made by the Appellee. An appeal of this nature asks the Board to substitute its judgment for that of the inspector and hearing examiner involved in the investigation of the violation. This is not an easy task. In the present case, the Board heard detailed testimony from witnesses involved in the matter and had a full understanding of the events that occurred in July 2007.

A review of the certified record in this case is not as clear. The biggest confusion is with the negligence multiplier used to come up with the amount of the violation. It appears from the inspector's notes that the inspector applied a multiplier of 0.7 in the negligence category. He took "deviation from requirement" and "potential harm factors of 10 on each violation and came up with the maximum starting figure of three thousand five hundred dollars (\$3,500.00). He then used a multiplier of 0.7 in the negligence category. However, it is unclear if he intended the negligence rating to be 3, which resulted in a multiplier factor of 0.7, or if he intended to apply a negligence rating of 7 which would have created a multiplier of 1.6. A review of the inspector's calculations seems to indicate that he multiplied the original amount of three thousand five hundred dollars (\$3,500.00) by the multiplier of 0.7 and then added the result to three thousand five hundred dollars (\$3,500.00), creating the amount five thousand nine hundred fifty dollars (\$5,950.00). This amount is not correct. The numbers are not to be added. Instead, the total assessment would have been two thousand four hundred fifty dollars (\$2,450.00) rather than the addition of two thousand four hundred fifty dollars (\$2,450.00) and the original assessment of three thousand five hundred dollars (\$3,500.00) resulting in the higher figure of five thousand nine hundred fifty dollars (\$5,950.00) for each of the two violations written on July 11, 2007.

To further complicate matters, it appears the assessment officer understood the 0.7 to represent the negligence rating of 7 or even 8 because the assessment officer applied the corresponding multiplying factors of 1.4 and 1.6 from 33 CSR 22-§7.2 - Table F. Obviously, multiplying by 1.4 and 1.6 resulted in a much higher result than if multiplied by 0.7. At least in this area, it appears the assessment officer increased the negligence rating of 3 to a rating of 7 or 8. The assessment officer, Mr. Pino, started with a lower number because he took a “deviation from requirement” factor as 10 and a “potential harm” factor of 7 and came up with the starting figure of two thousand four hundred fifty dollars (\$2,450.00). Mr. Pino then applied the rating of 7 and 8 and multiplied by factors of 1.4 and 1.6 respectively.

The Board disagrees with the negligence rating of 7 and 8 and finds that 3 is a more appropriate rating for the two (2) violations issued on July 11, 2007. The Board finds that the violations could have been avoided if the Appellant had been more conscientious and made a greater effort to operate in a more responsible manner. A rating of 3 results in a multiplier of 0.7 rather than 1.4 or 1.6. Applying the calculations represented in 33 CSR 22-§ 7, the Board finds the resulting assessments of one thousand two hundred eighty-six dollars and twenty-five cents (\$1,286.25) for violation SERG-7-11-07-01 and one thousand two hundred eighty-six dollars and twenty-five cents \$1,286.25 for violation SERG-7-11-07-12.

III. FINDINGS OF FACT

1. David A. Fann was the owner of a two-story building in Mullens, West Virginia, that partially collapsed on June 1, 2007. Stipulation 1, Transcript page 15, 42 (hereinafter “Tr _”)
2. Mr. Fann had owned the two-story building for twenty (20) to twenty-five (25) years. Tr 43.

3. On or about June 1, 2007, a portion of the two-story building owned by Mr. Fann collapsed. Tr 15.

4. On June 10, 2007, Mullens Police Officer C. W. Spears reported that the wall next to the river, the building's southern wall, had collapsed, as had part of the roof. Stipulation 2, Tr 15.

5. Mullens Mayor Jon McKinney testified that the building was in very poor condition and needed to be torn down.

6. Sometime between June 10 and July 11, 2007, Mr. Fann undertook demolition of the building and burning of the debris. Stipulation 3, Tr 15.

7. On July 11, 2007, Environmental Enforcement Inspector Ronald H. Garrett saw thick black smoke coming from the building debris and stopped to investigate. Tr 115.

8. The fire department incident report shows the department was notified at 4:16 p.m. and arrived at the scene at 4:26 p.m. on July 11, 2007. Certified Record 11-12. (hereinafter "CR_").

9. The fire department left the scene at 10:12 p.m. on July 11, 2007. CR 11-12.

10. Mr. Fann arrived back to the site on the morning of July 12, 2007. Tr 79

11. The Mullens Fire Department was on site when Mr. Fann arrived on July 12, 2007. Tr. 80.

12. The Mullens Fire Department had been called back to the site at 4:57 a.m. on July 12, 2007 because the debris was again burning. CR 12.

13. The fire department had arrived at 5:27 a.m. The last unit left over eleven (11) hours later, at 4:30 p.m. CR 12.

14. On July 11 and 12, 2007, Inspector Garret noted debris and solid waste on the hill and in the stream behind the burning and demolished building. Tr. 123-124.

15. Mr. Garrett issued four notices of violations, two (2) on July 11, 2007 and two (2) identical violations on July 12, 2007. CR 2-13.

16. The first violation was for improper disposal of the debris and the second was for the debris disposed of in the river. CR 2.

17. The improper disposal included the creation of waste by hiring someone to knock down the building and the disposal of the waste on and off the site.

18. The original penalty recommended by the inspector was twenty-three thousand eight hundred dollars (\$23,800.00) for four (4) violations.

19. At the informal hearing on the assessment, the hearing officer reduced the fine to five thousand five hundred twelve dollars and fifty cents (\$5,512.50) and the officer vacated the violations issued on July 12, 2007.

20. The hearing examiner applied a multiplier of 1.4 and 1.6 to the violations issued on July 11, 2007 and vacated the two (2) violations issued on July 12, 2007. CR. 4-5

21. The resulting assessment amounted to a fine of five thousand five hundred twelve dollars and fifty cents (\$5,512.50) for the two (2) violations written by Mr. Garrett on July 11, 2007. CR 1.

IV. CONCLUSIONS OF LAW

22. The Board hears appeals of permit actions in accordance with *West Virginia Code* § 22B-1-7. The applicable standard of review of the Appellee's action is *de novo* review. *West Virginia Code* § 22B-1-7(e).

23. West Virginia Code of State Regulations § 33-22-7 provides that the director shall calculate a civil administrative penalty by taking into account the seriousness of the alleged violation,

negligence or good faith on the part of the violator, the type of facility, and any history of noncompliance by the violator. 33 CSR 22-§ 7.1. (1991).

24. An evaluation of the seriousness of the violation shall take into account the extent of deviation from the requirement of the statute, rule, regulation, order, or permit condition. The “seriousness of violation” ratings shall be used to determine the base penalty amount of the civil administrative penalty assessment. 33 CSR 22-§ 7.1.a. (1991).

25. The director shall take into account the negligence or good faith which the violator displayed with regard to the alleged violation by assigning a rating in accordance with Table E of the regulations. The negligence/good faith rating shall be used to determine the multiplying factor to be applied to the base penalty amount through the use of Table F of the rule. 33 CSR 22-§ 7.2. (1991).

26. The director shall take into account the type of facility by assigning an adjustment factor in accordance with Table G of the regulation. The subtotal calculated is then multiplied by the adjustment factor. 33 CSR 22-§ 7.3. (1991).

27. The director shall take into account the violator’s history of noncompliance by determining the number of previous enforcement actions (administrative, civil, or criminal) which have been taken against the facility during the twenty-four (24) months prior to the violation. Those enforcement actions which were withdrawn, dismissed, or vacated shall not be included in this determination. The number of previous enforcement actions shall be used to determine the dollar amount to be added to the penalty through the use of Table I of the rule. 33 CSR 22-§ 7.4. (1991).

28. The civil administrative penalty is calculated by multiplying the base penalty amount (established from the seriousness of violation) by the multiplying factor (established from the negligence/good faith ratings), multiplying that product by the adjustment factor and then adding to

that product a dollar amount (established from the history of noncompliance). 33 CSR 22-§ 7.5. (1991).

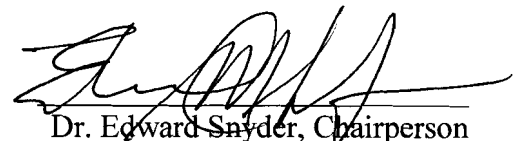
29. The civil administrative penalty assessed may not exceed the maximum assessments prescribed by the statute. The maximum assessment for solid waste violations shall not exceed five thousand dollars (\$5,000) per day per violation, up to a maximum of twenty thousand dollars (\$20,000) total penalty. 33 CSR 22-§ 7.6. (1991).

V. CONCLUSION

The Board disagrees with the negligence ratings of 7 and 8 and **MODIFIES** the assessment by finding that 3 is a more appropriate rating for the two violations issued on July 11, 2007. A rating of 3 would result in a multiplier of 0.7 rather than 1.4 or 1.6. Applying the calculations represented in 33 CSR 22-§7, the Board finds the resulting assessments of \$1,286.25 for violation SERG-7-11-07-01 and \$1,286.25 for violation SERG-7-11-07-12. The Board **AFFIRMS** the decision of the assessment officer to vacate or zero out the penalty assessed in the two (2) violations issued on July 12, 2007. The Board declines to direct the assessment toward the cleanup of the property as requested by the Appellant.

It is so **ORDERED** and entered this 13th day of November, 2008.

Environmental Quality Board



Dr. Edward Snyder, Chairperson

**ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

NOTICE OF RIGHT TO APPEAL FINAL ORDER

In accordance with §22B-1-7(j) of the *West Virginia Code*, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with §22B-1-9(a) and §22B-3-3 of the *West Virginia Code*. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate circuit court within thirty (30) days from your receipt of this final order in the manner provided by §29A-5-4 of the *West Virginia Code*.