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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLID WASTE COMPLIANCE AND ENFORCEMENT Petitioner, v. CLASSIC CLEANING (doing business as BIO-CLEAN OF NEW JERSEY) and ANDREW P. YURCHUCK, individually, Respondents.	)	ADMINISTRATIVE ACTION FINAL DECISION ORDERING REMAND OAL DKT. NO.: ECE 10303-19 AGENCY DKT. NO.: PEA 190002-2747478

This Order addresses the challenge by Classic Cleaning, a.k.a. Bio-Clean of New Jersey, and Mr. Andrew P. Yurchuck ("Respondents") to the New Jersey Department of Environmental Protection's ("Department") Notice of Civil Administrative Penalty Assessment ("NOCAPA") issued March 11, 2019, for violations of the Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) the Solid Waste Utility Control Act (N.J.S.A. 48:13A-1 et. seq.), and their supporting regulations. Specifically, the NOCAPA cited violations of N.J.A.C. 7:26-3.2(c), 16.3(a), and 7.26H-1.6(a) for failure to comply with the conditions of its approved registration and transporting regulated medical waste ("RMW") without a license and Certificate of Public Convenience and Necessity ("CPCN"). The NOCAPA assessed a penalty against Respondents in the amount of

$25,000. Petitioners denied any violation, claiming they were exempt as a "self-generator," and thus requested a hearing to appeal the NOCAPA. The contested case was transferred to the Office of Administrative Law ("OAL") on April 7, 2019. A hearing was held via ZOOM on February 3, 2022, and the record closed after post-hearing submissions were filed on May 4, 2022, and May 12, 2022.

On June 6, 2022, Administrative Law Judge Sarah G. Crowley ("ALJ Crowley"), issued an Initial Decision reversing and dismissing the violations from the NOCAPA issued by the Department to Respondents ("Initial Decision"). Specifically, the ALJ found that the Department failed to prove by a preponderance of the evidence that Respondents hauled any RMW, nor have they proven that Respondents hauled any waste from the Borgata that they did not generate themselves. The Department filed exceptions to the Initial Decision on June 20, 2022. Respondents did not submit exceptions or a response to the Department's exceptions.

After a review of the record, and for the reasons set forth below, I REJECT the Initial Decision, and REMAND the matter to OAL for further proceedings as outlined herein.

FACTUAL TESTIMONY

Rebecca Jacovini testified on behalf of the Department. Ms. Jacovini and Amy Scaffidi, who are environmental specialists and investigators for the Department's Compliance and Enforcement Division, conducted a standard compliance investigation at the Borgata Hotel and Casino in Atlantic City, New Jersey ("Borgata") on November 15, 2018. Ms. Jacovini led the investigation. The Borgata is registered with the Department as a very small quantity generator of RMW. During the investigation, which included meeting with employees and inspecting several areas of the Borgata, Ms. Jacovini observed approximately forty bags and a single container in a Hazardous Materials ("HazMat") storage area of the Borgata that were labeled as RMW. Ms.

Jacovini discussed the RMW and disposal procedures with Borgata personnel. These interactions were documented in her respective compliance reports. The violations issued in the NOCAPA did not include Ms. Jacovini's observations made on November 15, 2018, and the final disposition of that waste is unknown.

As detailed in Ms. Jacovini's November 15, 2018 inspection summary report, Borgata employees identified Respondents as the party contracted to remove RMW from the Borgata on an as needed basis. Respondent Andrew P. Yurchuck is the owner of Bio-Clean, which is registered with the Department as a Self-Generating Solid Waste Transporter. According to Ms. Jacovini, Borgata's RMW included soiled bed linens, mattresses, and rugs, contaminated with blood or other bodily fluids, which were placed in RMW bags labeled with the biohazard symbol and placed in a HazMat storage area prior to collection.

Jacovini further testified that Borgata provided to the Department various price lists and invoices from services provided by Respondents in the past. The violations from the NOCAPA issued to Respondents were based on six of these invoices for services provided[1] to Borgata by the Respondents billing for "hauling and transport" of multiple bags of waste. The Department identified two invoices, dated March 02, 2016 and August 28, 2017, which explicitly identified "clean-up" services as being billed. Those events did not result in violations as the Department considered that work as "self-generating." According to Jacovini, based on the information provided by Borgata employees[2] and the invoices that did not include "clean-up" billing, the

[1] Invoices were for the dates of 12/24/2014, 09/14/2015, 07/19/2017, 12/05/17, 02/23/2018, and 08/16/2018. All dates except for 12/24/2014 billed "disposal and hauling" of bags. The 12/24 invoice billed for "oversized material broken down".

[2] No Borgata employees provided testimony for this instance, but information relied on by the Department is included in the respective investigation report.

Department concluded that Respondents acted as an unlicensed transporter for a generator, and issued violations related to that conduct.

Mr. Yurchuck testified that he believed his business was exempt from A-901 licensure and CPCN requirements because he always conducted a "clean-up" at the job site, and never did he only pick up RMW at Borgata. Additionally, he testified that even if he conducted a pick-up only, he did not commit a violation because Borgata is not a generator of RMW. His business at Borgata included "clean-ups" of hotel rooms or crime scenes, as well as clearing out the HazMat storage area. Mr. Yurchuck stated he always cleaned out the HazMat storage area and would then load and haul away bags of RMW for disposal by another company. He testified that because he always conducted a "clean-up," that he was a "self-generator" exempt from licensure requirements. He also stated that any invoices indicating higher prices were due to more extensive "clean-up" efforts than usual, with prices reflecting the extra effort required for the respective job.

INITIAL DECISION

In the Initial Decision, dated June 6, 2022, ALJ Crowley ultimately dismissed all violations issued to Respondents by the Department. First, ALJ Crowley deemed both witnesses as credible. However, ALJ Crowley found that the Department did not prove by a preponderance of the evidence that the bags transported and removed by Respondents were not "self-generated," which was the basis of the violations in the NOCAPA. ALJ Crowley stated Mr. Yurchuck's testimony that he always conducted a "clean-up" at the site, and never just picked up bags, was credible, and that the Department provided no credible testimony or evidence to controvert that finding; thus, ALJ Crowley found as a fact that Bio-Clean provided "clean-up" and transport services for Borgata, and no evidence was provided by the Department to prove "that Bio-Clean ever hauled waste on the days in question that was not first generated by them during a clean-up at the site."

Next, ALJ Crowley outlined the statutory and regulatory framework regarding RMW. Applying this framework to the facts, ALJ Crowley found that Bio-Clean treated Borgata's waste as RMW, regardless of whether they were or were not the generator of such RMW, and that the waste was deemed RMW due to the packaging and storage methods utilized by Borgata and/or Respondents. Further, ALJ Crowley found that the Department did not prove by a preponderance of the credible evidence that Respondents were not a "self-generator", or that they transported any bags that they had not cleaned and loaded themselves on the dates of the violations.

Finally, ALJ Crowley considered statements made by "unnamed hotel staff" members regarding loaded bags being picked up by Respondents as uncorroborated, and thus insufficient for consideration under the residuum rule. ALJ Crowley stated that the only evidence to support a violation by Respondents was the relevant invoices, which did not overcome Mr. Yurchuck's assertion that he "always cleans" and never only transported RMW by a preponderance of the evidence.

Therefore, ALJ Crowley concluded that the Department failed to prove by a preponderance of the evidence that Respondents illegally transported RMW from a generator, as ALJ Crowley determined Respondents were a "self-generator;" therefore, the NOCAPA violations were reversed, and the matter dismissed.

EXCEPTIONS

The Department filed exceptions to the Initial Decision on June 20, 2022. The Department asserted that the Initial Decision misinterpreted and misapplied the applicable law, by erroneously concluding that Bio-Clean "generated" waste by performing a "clean-up" of a HazMat storage area and re-packaging pre-filled bags of RMW not actually generated by Bio-Clean. Additionally, the Department contends that the Initial Decision misapplied the residuum rule and ignored

corroborating evidence and ignored testimony from Mr. Yurchuck that he observed and removed RMW rather than generated it. The Department requests a review of the record by the Commissioner *de novo*, and for the Commissioner to conclude by a preponderance of the evidence that Respondents illegally transported RMW.

DISCUSSION

Respondents were cited in the NOCAPA for the following violations: (1) failure to comply with any conditions or limitations specified in Respondents' solid and medical waste transporter registration application (N.J.A.C. 7:26-3.2(c)); (2) failure to obtain an A-901 license prior to engaging in the business of commercial regulated medical waste transportation (N.J.A.C. 7:26-16.3(a)); and (3) failure to obtain a CPCN prior to engaging in the business of commercial regulated medical waste transportation (N.J.A.C. 7:26H-1.6(a)). The NOCAPA assessed $25,000 in civil penalties for the violations.

The collection, disposal and utilization of solid waste is a matter of grave concern to all New Jersey citizens and is an activity thoroughly affected with the public interest. N.J.S.A. 13:1E-2. The transportation of solid waste in New Jersey from a generator requires an approved registration statement from the Department. N.J.A.C. 7:26-3.2(a). A solid waste transporter must comply with any conditions or limitations which may be specified on their approved registration. N.J.A.C. 7:26-3.2(c). Solid waste is defined as "any garbage, refuse, sludge, processed or unprocessed mixed construction and demolition debris, including, but not limited to, wallboard, plastic, wood, or metal, or any other waste material…". N.J.A.C. 7:26-1.6(a). "Other waste material" includes "…any solid, liquid, semisolid or contained gaseous material which has served or can no longer serve its original intended use…" which is discarded or intended to be discarded. N.J.A.C. 7:26-1.6(b), 1.6(b)(1). RMW is a subcategory of solid waste. N.J.A.C. 7:26-3A.6.

Regardless of whether the solid waste at issue is RMW, the transportation of any solid or hazardous waste from a generator requires a proper license and a CPCN. N.J.A.C. 7:26-16.3; 7:26H-1.6(a). A transporter of solid waste or RMW is exempt from the licensing and CPCN requirements where their application to the Department is limited to the collection, transportation, treatment, storage, transfer, or disposal of solid waste generated by that person. N.J.A.C. 7:26-16.3(d)(2). Such a person is often referred to as a "self-generator."

A generator of RMW is defined under the Comprehensive Regulated Medical Waste Management Act ("CRMWMA") as a health care facility, such as a medical doctor's office, hospital, sterile syringe access program, veterinary clinic, or biological research laboratory, that generates RMW. N.J.S.A. 13:1E-48.3. The statute's definitions also list numerous examples of RMW, which include cultures from laboratory research, bodily tissues and fluids removed during a surgery or autopsy, sharps (needles) used in patient care, and so on, typically in the context of waste from a medical or biological research setting. Ibid. RMW is further defined in the CRMWMA rules as including "…any solid waste, generated in the diagnosis, treatment (for example, provision of medical services), or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals…." N.J.A.C. 7:26-3A.6. The rules also further clarify that a generator of RMW is one whose act or process produces RMW as defined in N.J.A.C. 7:26-3A.5, or whose act first causes an RMW to become subject to regulation. N.J.A.C. 7:26-3A.5. However, if waste is packaged in "biohazard" labeled bags, they are to be presumed to be potentially infectious and managed as RMW for transport and disposal. N.J.A.C. 7:26-3A.11.

In the Initial Decision, ALJ Crowley found as fact that Respondents "self-generated" the waste they collected, and that no credible testimony or evidence refuted that fact. In reaching this

conclusion, ALJ Crowley relied heavily upon Mr. Yurchuck's testimony in which he stated that he never went to the Borgata to just pick up waste, claiming that "I always clean". T122:11. Testimony from the Department, on the other hand, was misinterpreted. The Department explained that "self-generation" includes waste one generates themselves, rather than waste generated by others and collected by third parties such as Respondents. T13:10-13. The Initial Decision appeared to interpret the act of "clean-up" in the course of retrieving and aggregating solid waste as a form of "self-generation" that does not require a license. At the same time, the OAL appeared to struggle in characterizing how waste aggregation and the performance of "clean-ups" relates to "self-generation" under the rules. T122:7-T123:23; T132:10-T133:21.

The performance of "clean-up" activities that involve processing or altering existing solid waste may be considered "self-generation," whereas housekeeping attendant to waste retrieval and aggregation may not. An appropriate example of this distinction was evident in Mr. Yurchuck's testimony. Mr. Yurchuck described described processing a blood-soiled mattress at the Borgata that the Department did not consider a violation, where he broke down the mattress in a hotel room with a razor and bolt cutters and packaged those mattress materials into red biohazard bags to take back to the Respondent's facility for pickup for proper disposal. T108:3-18. Alternatively, the "clean-up" in the HazMat storage area was described by Mr. Yurchuck as cleaning up fluids from the bags they picked up and repackaged, mopping the floor, and deodorizing the area. T127:1-5, T125:7-8.

It is important to differentiate between these two circumstances in the context of "self-generation" of solid waste or RMW. In the two instances where Respondents conducted a "clean-up" in Borgata rooms, they were properly considered "self-generators." Respondents were the first to intervene to process and package soiled materials from the rooms, causing them to become

RMW subject to regulation with no or little intervention from Borgata housekeeping. See N.J.A.C. 7:26-3A.5. This distinction would apply regardless of whether the subject waste was classified as ordinary solid waste or RMW. Alternatively, the solid waste brought into the HazMat area of the Borgata prior to Respondents' arrival was generated by Borgata housekeeping, not the Respondents. Respondents' aggregation of bags already filled with solid waste by Borgata staff and their attendant cleaning of the area, however, did not constitute "self-generation." To classify these actions as "self-generation" would defeat the purpose of the licensure requirements and could become an exception that swallows the rule.

Accordingly, the Department testified that no violations were issued for March 2, 2016 and August 28, 2017 because those invoices indicated Respondents performed legitimate "clean-ups" associated with "self-generation". T43:9-T44:10. In other words, Respondents generated their own waste through these "clean-ups." The March 2, 2016 event included the processing and removal of a mattress from a hotel room and the associated cleanup of said room. T42:15-T43:3. The August 28, 2017 event included a bodily fluid cleansing of an unspecified area, and disposal of potentially infectious waste related to the cleanup. T43:7-23.

The "self-generation" exemption allows businesses to dispose of the waste they generate through their work, as long as they are registered with the Department. The Department provides in their testimony the example of a roofer disposing of the waste he generated by replacing an old roof. T13:16-24. The shingles a roofer discards are a part of their "processing" to install a new roof, and that waste they generate from doing so is "self-generation," where they can dispose of it themselves if they are registered with the Department. Housekeeping at Borgata "self-generates" solid waste when they clean a room and bag that waste for disposal. The Respondents "self-generate" waste when they themselves process and remove solid waste from said room. However,

aggregating waste that is already bagged by housekeeping and removed to a holding area is not "self-generation." Respondents did not generate that waste, but simply repackaged it. Moreover, cleaning the area and mopping up spillage does not create a blanket "self-generation" exemption from licensure to transport waste previously processed. In short, the "self-generator" must be the first to process or bag the waste. The materials and supplies used to clean spillage could be considered "self-generated" waste, but not the solid waste already bagged by housekeeping.[3] The ALJ's and Respondents' interpretation that as long as some sort of "clean-up" occurs, the entire job is "self-generation," would create a gaping loophole in the rule permitting the disposal of solid waste without a license if some sort of cleaning occurred.

However, the application of RMW and the CRMWMA complicates this matter somewhat. If the waste was simply solid waste, the Respondents are clearly in violation of the rules and statutes and transported solid waste without a proper license (See, N.J.A.C. 7:26-16.3(a)) and CPCN (See, N.J.A.C. 7:26H-1.6). Typically, soiled items such as sheets and carpets, while a biological hazard, are not characterized as RMW. See, N.J.A.C. 7:26-3A.6. Thus, under normal circumstances, this solid waste would be "generated" upon removal from a guest room at a hotel. However, under N.J.A.C. 7:26-3A.11(f), any waste packaged in "biohazard" labeled bags are presumed to be potentially infectious and must be managed as RMW for transport and disposal, regardless of whether its contents are true RMW. Further, in accordance with N.J.A.C. 7:26-3A.5, the definition of "generator" of RMW includes those "whose act *first* causes an RMW to become subject to regulation [emphasis added]."

[3] Non-bagged solid waste brought down by housekeeping and placed in the HazMat Storage area could still be considered "self-generated," as long as some sort of processing occurs. If Respondents simply loaded and hauled a soiled mattress or rug, that would not be considered "self-generation." However, Respondents do break down and process the mattress and rugs in order to fit into proper disposal bags, which is likely to fall under "self-generation." If solid waste is simply transferred into new packaging for disposal, that is not "self-generation."

Under this framework, the process of the Respondents placing Borgata solid waste into the red biohazard bags would effectively change its legal designation from solid waste to RMW. As the Respondents would be responsible for the resulting change referenced in that legal definition, the waste is technically "self-generated" and there would be no violation occurring for transporting the RMW under the Department's regulations. However, if the solid waste has been already placed into a red biohazard bag by Borgata staff, it would then be considered RMW as a result and would therefore not be "self-generated" by the Respondents were they to then repackage it into their own biohazard bags. Thus, the RMW framework created a factual question in this contested case as to whether Respondents were responsible for putting the solid waste in the HazMat storage area into biohazard bags.

It is noted by the ALJ that the Department does not have firsthand knowledge of how the solid waste in the HazMat storage area was presented to the Respondents when they arrived for a job at Borgata. T71:15-19, T76:3-6. Mr. Yurchuck testified that the HazMat storage area would include clear bags, garbage bags, trash cans, rolled up carpet, and loose sheets for them to process. T112:4-8. However, Mr. Yurchuck admitted observing red biohazard bags during one or more of these jobs, and that he consolidated those existing red biohazard bags of waste at Borgata, and simply repackaged and consolidated them into his own containers before transport. T122:19-25, T123:16-22, T126:1-8, T126:20-T127:20. He admitted he believed repackaging the Borgata's red bags into his containers was a part of a "clean-up." T122:19-25, T123:12-22. As these rules are based upon strict liability, Mr. Yurchuck's belief is not relevant. See, State v. Lewis, 215 N.J. 564, 573 (App. Div. 1987). On the record, and in testimony the ALJ deemed credible, Mr. Yarchuck admitted to repackaging solid waste that was already in biohazard bags, thus already considered RMW. Under the application statutes and regulations, neither Mr. Yurchuck nor his company

could be considered a "self-generator" of those aggregated wastes. To that end, Respondents' testimony alone evidences a violation of applicable rules.

In view of the foregoing, I hereby reject the ALJ's finding that there was no credible testimony or evidence that Bio-Clean ever hauled waste on the days in question that was not first generated by them during a clean-up at the site. Mr. Yurchuck's admission corroborates other more circumstantial evidence of Respondents' violations in the record. Such evidence includes Borgata's policy for housekeeping staff to conduct biohazard cleanup in guest rooms and to place cleanup waste into biohazard bags before removing them to the HazMat storage area. T35:3-13; Respondents' invoices, which helped form the basis for the NOCAPA, refer to nothing more than the disposal and hauling of bags and boxes from Borgata; Respondents' invoices charged Borgata the rate identified on Respondents' own price list for RMW hauling and disposal; statements from Borgata staff, as testified to by Ms. Jacovini, that Respondents would transport RMW generated by housekeeping staff. T35:15-23. While these statements may constitute hearsay, they corroborate and give added probative value to Mr. Yurchuck's admission that his company transported RMW previously generated by Borgata staff. Therefore, I find that this evidence satisfies the residuum rule and reject the ALJ's finding to the contrary. See Weston v. State, 60 N.J. 36, 50-52 (1972).

This evidence taken together shows that Respondents repackaged solid waste that was already placed in red biohazard bags and hauled it away without an A-901 license or CPCN on at least one occasion. As such, Respondents committed a violation and could not be considered a "self-generator" in such instances. I therefore REJECT the ALJ's conclusion that the Department did not prove by a preponderance of the credible evidence that Respondents hauled any RMW bag,

or that Respondents hauled any waste from the Borgata that they did not generate themselves. As such, I AFFIRM the Respondents' violations in the NOCAPA.

My determination does not fully resolve this contested case. ALJ Crowley did not address whether the penalty assessed by the Department in the NOCAPA was proper, as such analysis was unnecessary at the time, given the ALJ's determination that the Department did not prove that Respondents committed the violations contained in the NOCAPA. Assessment of whether the penalty amounts in the NOCAPA are supported by the Department's rules will require review by the ALJ. Thus, this contested case must be remanded back to OAL for consideration of the penalty amount assessed by the NOCAPA.

CONCLUSION

For the foregoing reasons, I REJECT the ALJ's findings as contained in the June 6, 2022, Initial Decision and REMAND for consideration of the penalties assessed in the NOCAPA.

IT IS SO ORDERED.

Dated: September 6, 2022

Shawn M. LaTourette,
Commissioner

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