



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ECE 10303-19

AGENCY DKT. NO. PEA 190002-27478

**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.**

William Rozell, Deputy Attorney General, for petitioner (Matthew J. Platkin Acting
Attorney General of New Jersey, attorney)

Christopher M. Manganello, Esq., for respondents (Law Office of Christopher M.
Manganello, attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

Record Closed: May 12, 2022

Decided: June 6, 2022

STATEMENT OF THE CASE

On March 11, 2019, respondent, Bio-Clean of New Jersey (Bio-Clean) was issued a Notice of Civil Administrative Penalty Assessment (NOCAP) by the petitioner, New Jersey Department of Environmental Protection Department, Solid Waste Compliance and Enforcement (NJDEP, Department), for violations of the New Jersey Comprehensive Regulated Medical Waste Management Act (the RMW Act) and its supporting regulations. The Department issued Bio-Clean a Notice of Civil Administrative Penalty Assessment (NOCAPA) claiming violations of N.J.A.C. 7:26-3.2(c), 16.3(a); and 7:26H-1.6(a). Bio-Clean denies any violation of the law claiming that Bio-Clean cleaned the areas in question and bagged the waste in question which constitutes a “clean-up” and thus, the exemption for self-generated waste applied. They also argue that the soiled linens did not meet the definition of RMW, and that the Borgata does not generate RMW because it does not have a medical waste generator ID.

PROCEDURAL HISTORY

Bio-Clean appealed and requested an administrative hearing on April 7, 2019, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. 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.

TESTIMONY AND FINDINGS OF FACT

For petitioner:

Rebecca Jocovini (NJDEP) testified on behalf of the petitioner. She is employed by NJDEP as an environmental specialist and an investigator. She was in charge of the investigation which led to the issuance of the NOCAPs against the respondents in this case. On November 15, 2018, she performed a standard compliance inspection of the Borgata Hotel and Casino (Borgata) in Atlantic City. The Borgata is registered with the Department as a very

small quantity generator of RMW. Bio-Clean is a company owned by Andrew P. Yurchuck and registered with the Department as a Solid Waste Transporter/Self-Generator. Bio-Clean does not have an A-901 license nor a Certificate of Public Convenience and Necessity (CPCN), both of which are necessary for the transportation of another generator's RMW. She testified that even if the waste in question did not contain hazardous waste if they are labeled as RMW, an A-901 license is required.

On November 15, 2018, she and Amy Scaffidi who is also with the Compliance and Enforcement Division conducted a compliance inspection at the Borgata Hotel and Casino. They met with several employees at the Borgata and inspected several areas, including the maintenance area, electrical shop, kitchen, carpentry shop, loading docks, storage areas and the hazmat storage area. On that date, Ms. Jocovini observed approximately forty bags and one container which were labeled as "RMW" in the storage area at the Borgata. She discussed the bags and the removal process with the hotel employees. However, these individuals were not present to testify. No one witnessed who filled the bags, how they ended up there or who picked up the bags. There was no testimony or evidence that Bio-Clean picked up the bags that were labeled RMW. No violations were issued for this date or the bags that were observed on that day.

The relevant portion of the inspection report is as follows:

Heavily soiled bed linens which were contaminated with blood or other bodily fluids are currently being placed in RMW bags which are labeled with the biohazard symbol. The bags are then sorted in the HazMat storage area. Approximately 40 bags and 1 container were observed in the Hazmat storage area and the time of the inspection.

There was no testimony regarding who loaded these bags, and who picked them up. Ms. Jocovini had no first-hand knowledge of what was in these bags, if these bags were picked up by Bio-Clean or who loaded the bags in question. She provided no testimony or evidence that the transport by Bio-Clean did not also involve a clean-up, which would have exempted them from any violation.

Ms. Jocovini identified the bills and the price lists from Bio-Clean for the work done for the Borgata. The bills in question did not indicate a pickup on November 15, 2018, the day of the inspection. She identified the bills which led to the NOVs in question. These bills indicate that they are for "hauling and transport." Ms. Jocovini testified that because they did not specify that they also included a "clean up" they found a violation. Ms. Jocovini did not question Bio-Clean or anyone from the Borgata about what services were provided by them. She provided no testimony regarding the charges and if a charge of \$395 per bag was a reasonable charge to just pick it up or if a charge of \$395 per bag would include additional services such as a clean-up. Ms. Jocovini confirmed that if Bio-Clean had done any clean-up prior to loading and hauling the bags in question, they would be exempt for the regulations in question and not in violation of the regulations.

Ms. Janonelli testified that she was advised by someone in housekeeping that Bio-Clean collected the bags on an as needed basis. However, she provided no testimony regarding who loaded the bags or if clean-up services were provided by them as well. She confirmed that Bio-Clean has a A-901 license which would allow them to transport self-generated waste. If Bio-Clean cleaned up the rooms or areas in question and bagged the waste themselves, this would be considered "self-generated," and they were exempt. Her assumption that they did not do any clean-up, was predicated entirely on the bills which listed only "disposal and hauling" of potentially hazardous waste.

The following is a list of the bill entries:

12/24/14	oversized material broken down	\$1,420
9/14/15	Disposals and hauling of 16 bags at 218	\$ 3,488
7/19/17	Disposal and hauling of 15 bags at 395	\$ 5,925
12/5/17	Disposal and hauling of 13 bags at 395	\$ 5,135
2/23/18	Disposal and hauling of 18 bags at 395	\$ 7,119
8/16/18	Disposal and hauling of 39 bags at 395	\$15,405

Ms. Jocovini testified that if the charge was for clean-up, it should have been described in the bill as "clean-up." She identified a bill from March 2, 2016, which was

identified as a special waste pick up of an oversized material broken down with a \$1,420 charge. Then there is a charge for medical waste hauling and disposal on that same date. A similar bill was identified for August 28, 2017, which specifically listed clean-up of an infected area. Within those bills is a charge for hauling and disposal of potentially infested waste. No violations were issued for those dates because the bills specifically listed the clean-up and thus, the self-generation exemption would apply.

The remaining invoices (September 2015; July and December 2017; February and August 2018) all listed the same basic invoice charge for “[d]isposal and hauling of [#] bags/boxes of potentially hazardous waste from housekeeping.” With the only difference being the quantity of bags/boxes of waste that was transported and disposed of by Bio-Clean. The Department concluded that because the invoices did not specifically itemize or list any clean-up labor services beyond “hauling and disposal,” Bio-Clean did not self-generate any RMW and was acting only as a transporter for a generator in violation of the applicable State laws and regulations. To summarize, NJDEP presented no evidence, nor did they question Bio-Clean or anyone else about whether they had in fact done the clean-up and loaded the bags in question. There were no witnesses who testified that they did not do the clean-up, nor was there any inquiry or testimony as to bills and reasonable and customary charges for a clean-up as opposed to just hauling and disposal.

For respondents:

Andrew Yurchuck

Mr. Yurchuck is the principal of Bio-Clean. He testified that he provides clean-up services to the Borgota. He denies the allegation of transporting biohazardous medical waste without the proper license. He maintains that any transport that he did for the Borgota always involved a clean-up. He believed that he was exempt from the regulations at issue because if you did the clean-up that was considered self-generation and was exempt. In addition, he argues that even if they had done just a pick-up (which they never did), the Borgota does not generate RMW and thus, they should not be subject to the RMW regulations. The NJDEP investigator indicated that if the bags were labeled as containing Biohazardous material they needed

to be treated as such. Mr. Yurchuck testified that he did not believe that the Borgota generated any such waste, but if they loaded them in those bags, they treated them as such. He emphasized that they always did a clean-up there and used the bags provided by the Bogota.

Mr. Yurchuck testified that they were called to the Borgata to clean-up hotels rooms or crime scenes. They would also be called to clean-up the storage area. They would clean- up, load the bags, and haul them away. Th invoices were for the collection and hauling of the bags. They have the appropriate license to haul if it is self-generated. He believed that if they did the clean-up and hauled the bags which they loaded, they were exempt. He testified that they never went to the Borgata to just pick up bags that had already been loaded. Some of the bills were more due to the type of clean up that was required, some being more extensive than others.

The resolution of the claims made by the petitioner requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the witnesses were all credible except the only witness for the State had no first-hand knowledge of any of the violations at issue. No one had any evidence that the bags observed on the day of the investigation were picked up by Bio-Clean. Moreover, there was no evidence that the any of the bags which led to the NOCAPs were not generated by Bio-Clean prior to their transport. The testimony from Mr. Yurchuck, whom I found credible is that its company provided clean-up and hauling for the Borgota and never just picked up bags. There was no credible testimony or evidence to controvert this. Accordingly, I FIND as FACT that Bio-Clean provided clean-up and transport services for Borgota and 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.

LEGAL ANALYSIS AND CONCLUSIONS

The Comprehensive Regulated Medical Waste Management Act (the Act), N.J.S.A. 13:1E-48.1 to 48.25, and its regulations govern the “proper and safe tracking, identification, packaging, storage, control, monitoring, handling, collection, and disposal of regulated medical waste.” *Id.* at 13:1E-48.2(d). See generally, N.J.A.C. 7:26-3A.1 to 3A.49. The definition of RMW generally covers blood or body fluids which originated from a medical procedure (including autopsies) and from related research. N.J.S.A. 13:1E-48.3; N.J.A.C. 7:26-3A.5, 3A.6. However, the regulations also provide that if non-RMW is combined with RMW or otherwise stored and packaged as RMW then the non-RMW is, for the purposes of these regulations, regulated medical waste. *Ibid.*

There are numerous requirements for generators and transporters of RMW, most relevant to this particular matter are those that require the registration and licensing of such generators and transporters and those regarding the management (i.e., packaging and storage) or RMW. See generally, N.J.S.A. 13:1E-127(g)(2); N.J.A.C. 7:26-16.3 (licensing and filing of disclosure statements requirement to manage solid waste or hazardous waste in the State); N.J.A.C. 7:26H-1.6(a) (requires a CPCN in order to perform any activities related to the transportation or disposal of solid waste); N.J.S.A. 13:1E-48.8(a); N.J.A.C. 7:26-3.2, 3A.27 (registration, licensing, and disclosure requirements for solid waste and RMW

transporters); Id. at 3A.16 (general requirements for acting as a generator or transporter or RMW); Id. at 3A.10 to 12, 14 to 16 (provisions related to the separation, packaging, storing, and labeling of RMW respectively).

A small quantity generator of solid waste or RMW, or a generator that transports their own waste (i.e., a self-generator) is exempt from the registration, licensing, and disclosure requirements. See, N.J.S.A. 13:1E-48.8(b); N.J.A.C. 7:26-3.2(b) (solid waste transporter provisions do not apply to self-generators of RMW). A small quantity generator is one that creates less than fifty pounds (or three cubic feet) of RMW each month and transports its own waste for disposal or to another facility. N.J.A.C. 7:26-3A.17(a). These generators are exempt from the regulation requirements of N.J.A.C. 7:26-3A.16(d) and 3A.27(c). Ibid. If the waste in question was generated and then transported by the respondents, then it is exempt, as noted in two of the invoices that were entered into evidence. Although the bills for the other four invoices in question stated "hauling and disposal" of such waste and did not itemize any clean-up, there was no evidence or testimony from NJDEP that Bio-Clean did not do the cleanup and load the bags in question. The testimony from the principal at Bio-Clean is that they never did just hauling for the Borgata, they were always called to do clean-up and hauling.

In this present matter, if either the Borgata or Bio-Clean staff combined the waste with RMW or packaged the waste as RMW then the material must be treated as RMW for storage, transportation, and disposal purposes. Since Bio-Clean charged the Borgata for the disposal and hauling of "potentially infectious/hazardous waste from housekeeping" it appears that, at the least, Bio-Clean treated the waste as RMW when charging the Borgata for its "disposal and hauling," regardless of whether the Borgata or Bio-Clean was the official generator of the waste. Therefore, regardless of whether they originally met the regulatory definition of RMW, became RMW because of the packaging and storage methods by the Borgata and/or Bio-Clean. This is supported by the testimony from the NJDEP investigator.

According to Bio-Clean, the Borgata does not have a standard operating procedure for packaging its contaminated linens and materials as waste. Bio-Clean claims that although the Borgata's housekeeping staff stores these materials in a caged locker room area, it is the act of Bio-Clean packaging the waste into DOT approved containers and cleaning the cage and

containers which causes the waste to become RMW. This also renders them the generator of the waste which they proceed to transport. The Department's investigator alleges that the Borgata held the waste materials in forty red RMW bags and a container labeled as Biohazard inside its HazMat Storage Area. The DEP investigator observed the bags in the Borgata storage area on November 15, 2018. However, she did not observe Bio-Clean pick-up or transport these bags. There is no bill from Bio-Clean for hauling and transport on that day.

The NJDEP provided copies of six invoices from Bio Clean to the Borgata which state they are for "transport and hauling." None of the bills introduced into evidence were from the date of the inspection nor do they relate to the bags observed on November 15, 2018. There was no testimony as to whether \$395 was a reasonable rate to just pick up a bag or if such a rate would include a clean-up as well. The principal from Bio-Clean, Andrew Yurchuck testified that they never just picked up bags from the Borgata, there was "always a clean-up" involved in jobs at the Borgata. I found this testimony credible, and it was not contradicted by any other evidence or testimony. The DEP concedes that if there was clean-up or labor involved prior to the transport, it would be exempt and was not a violation. The DEP did not prove by a preponderance of the credible evidence that Bio-Clean did not generate the waste in question or that they transported any bags that they had not cleaned and loaded themselves.

The petitioner argues that an uncorroborated statement from an unnamed hotel staff member that the loaded bags were sometimes picked up by Bio-Clean comes in under the residuum rule. The unnamed source never advised who loaded the bags, and if Bio-Clean did the cleanup, nor do they provide any dates. Moreover, if they were coming to pick up the bags which were observed by the investigator, query as to why there was no inquiry as to when such a pick-up would occur and why was there was no subsequent observation of the offense. The residuum rule is to be used at the judge's discretion and the judge may give the hearsay statement whatever weight they deem appropriate if there is corroborating evidence. There is no such corroborating evidence here. Moreover, contrary to the respondent's argument that Mr. Yurchuck testified that he transported filled bags, he testified on several occasions that they never just picked up and "I always clean," and never just hauled from the Borgata. There has been no evidence to support the violations in this matter,

except perhaps in artfully drafted bills, which is not enough to prove a violation by a preponderance of the evidence.

I therefore **CONCLUDE** that the NJDEP did not prove by a preponderance of the credible evidence that BioClean hauled any RMW bag, nor have they proven that Bio-Clean hauled any waste from the Borgata that they did not generate themselves. Accordingly, the NOV is **REVERSED**, and the matter is DISMISSED.

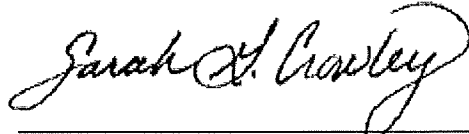
I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 2022

DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency:

June 6, 2022

Date Mailed to Parties:

June 6, 2022

SGC:sm

WITNESSES AND EXHIBITS

WITNESSES:

For petitioner:

Rebecca Jacovini

For respondents:

Andrew Yurchuck

EXHIBITS

Joint Exhibits:

J-1 Joint Stipulation of Facts

For petitioner:

P-1	Waste Transport Application
P-2	NOCAPA Issued on March 11, 2009
P-3	NJDEP Inspection Summary form 11/15/19 Inspection
P-4	NJDEP Follow-up Inspection Report dated July 7, 2021
P-5	Borgota Clean Up Policies and Procedures
P-6	Invoice from Classic Cleaning/Bio-Clean dated 12/24/14
P-7	Invoice from Classic Cleaning/Bio-Clean dated 9/14/15
P-8	Invoice from Classic Cleaning/Bio-Clean dated 7/19/17
P-9	Invoice from Classic Cleaning/Bio-Clean dated 12/5/17
P-10	Invoice from Classic Cleaning/Bio-Clean dated 2/23/18
P-11	Invoice from Classic Cleaning/Bio-Clean dated 8/16/18
P-12	2018 Bio-Clean Price List

P-13	Invoice from Classic Cleaning/Bio-Clean dated 3/2/16
P-14	invoice from Classic Cleaning/Bio-Clean dated 8/28/17
P-15	Invoice from Classic Cleaning/Bio-Clean dated 4/7/19
P-16	Respondent's Answers to Interrogatories

For respondents:

None