

SIGNIFICANT MATTERS

ADMINISTRATIVE HEARING - PENALTY ORDER DISMISSED

On May 29, 2019 the Minnesota Department of Health's ("MDH") Mortuary Science Section issued an Administrative Penalty Order ("APO") to Washburn McReavy ("Washburn"), one of Minnesota's oldest and largest provider of funeral services. The APO alleged that Washburn had violated state statutes by failing to cremate or embalm the body of a deceased individual and failed to cremate within a statutory time frame. Under an MDH statute, alleged violations which are not contested or found in a hearing to be substantiated, are publicized via MDH website.

Washburn contested the APO and requested a hearing before an Administrative Law Judge ("ALJ") to review the APO. Washburn contended the body was handled respectfully, refrigerated at all times and the family of the deceased specifically requested that the body not be embalmed. With regard to the statutory requirement that the body was held too long, Washburn McReavy noted that while arrangements were pending the family called another funeral home and set a Memorial Service without advising Washburn that it had decided to make a change in the arrangements.

A hearing was held to consider cross motions from Washburn and MDH. Washburn contended that the APO was deficient in that it failed to state factors to be considered in setting the penalty. In a Recommendation on Cross-Motions for Summary Disposition, dated March 11, 2020, the ALJ agreed with Washburn's contention that it had properly refrigerated the deceased's body. The ALJ found that Washburn had not complied with the holding time limitation in the statute but that under the circumstances the imposition of a penalty would be unjust. Finally, the ALJ recommended the MDH Commissioner vacate the APO.

After the hearing and receipt of the ALJ's recommendation MDH's Mortuary Science Section agreed to rescind the APO.

COMMON COUNSEL SUPERFUND LITIGATION

Named as Common Counsel Schnitzer Iron & Metal Superfund Site Group, (Minneapolis/St. Paul, Minnesota 1995 to 1999) consisting of twenty (20) parties identified by the Minnesota Pollution Control Agency (MPCA) as potentially responsible parties (PRPs) at the Schnitzer Iron & Metal Superfund Site in the Twin Cities. Group members included a variety of clients ranging from large multinational companies to small businesses and local units of government. As Common Counsel, Mr. Maternowski represented the interests of the Group by: (1) filing a declaratory judgment in federal district court challenging a de minimis settlement proposed the State with other PRPs; (2) mounting a successful lobbying campaign involving State-sponsored legislation changing the statute of limitations under the Minnesota Environmental Response and Liability Act (MERLA), the State Superfund law; (3) defending the Group in a cost recovery action; (4) crafting a favorable settlement for the Group in mediation; and (5) initiating a subsequent PRP identification and cost recovery campaign that netted a significant recovery for the Group.

ENVIRONMENTAL HEALTH AND SAFETY AUDIT AND COMPLIANCE MANAGEMENT PROGRAM

Coordinated environmental health and safety audits at facilities across the country, in Canada and Mexico conducted by consultants for corporation with manufacturing operations across the United States and in Canada and Mexico. Initiated compliance management program including periodic environmental compliance audits addressing compliance with federal, state and local environmental regulation. In addition, separate audits of worker health and safety and Occupational Safety and Health Act (OSHA) compliance. Reviewed and commented on draft reports and identified areas of non-compliance. Assessed potential liability and where appropriate, the need to report releases to federal and state authorities. Assisted with the preparation of recommendation of specific corrective actions and implementation of corrective measures.

LITIGATION – CONTAMINATED PROPERTY

Represented Wisconsin agricultural processing operation in civil litigation against neighboring gasoline state owned by major petroleum distributor. The case involved the release of a large quantity of petroleum from leaking underground storage tanks and an intermingled plume from a nearby agricultural chemical storage facility. Coordinated work of environmental consultants involved with site assessment and technical review of petroleum distributor's investigation and cleanup methodology. Appeared before the Wisconsin Department of Natural Resources on behalf of client. Conducted extensive discovery and motion practice in multi-party litigation in state court.

LITIGATION – DEFENSE OF CIVIL PENALTY ASSESSMENT AND RESPONSIBLE CORPORATE OFFICER CLAIMS

State of Minnesota v. Rollies Sales & Service, Roland Walsh and Dale Walsh, (Douglas County, MN District Court, 1999)

Defended Rollies Sales & Service, Inc., a petroleum services business located in Osakis, Minnesota and its 34 year old President, Dale Walsh, and his 62 year old father and shareholder, Roland Walsh, from a prosecution brought by the State of Minnesota and its Pollution Control Agency. In the complaint, which was filed in 1994, the State alleged that the business and the two individual defendants violated numerous environmental regulations. The State sought to collect civil penalties of up to \$250,000 and its attorney fees.

Through pre-trial motions and during the liability phase trial in 1999, the defendants undermined major elements of the State's case. Judge Paul Ballard found that since the few violations that the State proved were "minor" and caused no harm to the environment, a nominal penalty of \$3,400 was to be paid to the State by the corporate entity, Rollies Sales & Service, Inc. The Court

found that the State erred in naming Dale and Roland Walsh as individual defendants under the “responsible corporate officer doctrine” established In re: Dougherty, 482 N.W.2d 485 (Minn. Ct. App. 1992). The Court found the State’s case against the individual defendants was not substantially justified and awarded the Walshes \$64,000 in attorneys fees under the Minnesota Equal Access to Justice Act (MEAJA). At the time the award was the highest amount ever awarded by a Court under MEAJA.

ENVIRONMENTAL DUE DILIGENCE

Multi-State Phase I, Phase II and NEPA Assessments of Owned and Leased Property (Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Missouri, Indiana and Illinois, 2001 to present)

Responsible for directing environmental due diligence for a major telecommunications company in the eight states in the Upper Midwest. Reviewed and commented on hundreds of draft Phase I Environmental Site Assessments prepared under the American Society of Testing and Materials Standard Practice E 1527-13 and the All Appropriate inquires standard. Prepared environmental risk assessment opinion letters for each site evaluating identified “recognized environmental conditions.” Recommended Phase II work at numerous sites. Coordinated environmental site assessments with site acquisition consultants, design firms, attorneys involved with real estate transactions and in-house client contacts.

Supervised consultants involved with Phase II work conducted at numerous sites to assess potential soil and groundwater contamination. Depending upon Phase II results, directed the development of Site Contingency Plans and, where appropriate, applications to state voluntary cleanup programs for liability assurances. Directed review of National Environmental Policy Act (NEPA) impacts at sites, including assessment of impacts on potentially significant historical and natural resources.

