

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

HouseInspect, Parris Bradley, :  
Peter Bradley and Blaine Illingworth, :  
Petitioners :  
 :  
v. :  
 :  
Department of Environmental :  
Protection, : No. 1625 C.D. 2009  
Respondent : Submitted: December 24, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: April 22, 2010

HouseInspect, Parris Bradley, Peter Bradley, and Blaine Illingworth (collectively, HouseInspect) petition for review from the order of the Environmental Hearing Board (Board) that dismissed their appeals from a denial of HouseInspect's recertification application for radon testing by the Department of Environmental Protection (DEP).<sup>1</sup>

HouseInspect was in the business of radon testing. Parris Bradley was the contact for HouseInspect and worked as a house inspector. HouseInspect listed

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<sup>1</sup> HouseInspect originally appealed the letter dated October 29, 2007, from Michael A. Pyles (Pyles), chief of the radon division of DEP, that informed HouseInspect that its individual (Parris Bradley) and firm radon testing certifications expired on October 18, 2007, and it could not longer conduct radon testing. HouseInspect filed an appeal. The Board determined that HouseInspect waived any appeal from this denial letter, and that appeal is not before this Court.

Parris Bradley on the renewal radon certification application as the “certified individual applicant.” Blaine Illingworth worked as a certified home inspector for HouseInspect on a contract basis.<sup>2</sup>

In October 2005 DEP’s Bureau of Radiation Protection directed inspector Kenneth Hoffman (Hoffman) to conduct a review of HouseInspect. This inspection was a follow up to a 1998 inspection which noted violations related to the documentation of “spike sampling”<sup>3</sup> and the “failure to document calculations of the relative percent difference between duplicate sample results for radon testing.” Environmental Hearing Board, Adjudication, July 20, 2009, (Adjudication), Finding of Fact No. 8 at 4; Reproduced Record (R.R.) at 591a. Hoffman attempted to contact Parris Bradley to make an appointment, but Parris Bradley failed to return his call. Hoffman was directed to contact Cindy Lawn (Lawn) and made arrangements to visit the office.

On November 16, 2005, Hoffman and two other inspectors arrived at the offices of HouseInspect. Parris Bradley was unavailable, but they met with Lawn. Hoffman requested required documentation. When Hoffman asked for HouseInspect’s “quality assurance plan” (QAP), Lawn produced a plan that was out of date. Hoffman asked Lawn to produce “reports to clients,” but the reports Lawn produced contained missing information: the name and identification number of the testing company, the name and tester identification number of the

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<sup>2</sup> The record does not indicate Peter Bradley’s position with HouseInspect.

<sup>3</sup> Spike sampling is part of the quality assurance process to insure the quality of test results.

person placing and/or receiving the test device, the location of the test device, information pertaining to health effects the Pennsylvania notice to clients, and the recommendations for test results greater than four “picocuries.”<sup>4</sup> Lawn was unable to produce exposure tracking records. She also was unable to produce records for spike sampling or records for the calculation of the relative percent differences for duplicate samples.

The failure to produce “spike sample analysis” and “relative percent difference calculations” were violations that were also noted in an inspection performed in 1998. After the inspection, HouseInspect submitted some blank sampling data. Data from the first half of 2005 was not produced. DEP concluded that sampling data was not being done in early 2005. When Hoffman received a corrective action plan from HouseInspect at the end of 2005, he checked to see that the plan was actually in use.

In September 2006, Hoffman went to HouseInspect on an unannounced inspection. Neither Parris Bradley nor Lawn was available. Hoffman left a message and contacted HouseInspect the next day to schedule another inspection. The follow up inspection was scheduled for September 14, 2006. Parris Bradley was again unavailable. Hoffman informed Lawn that HouseInspect might receive a notice of violation. Hoffman referred the matter to

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<sup>4</sup> A curie is “a standard measurement for radioactivity, specifically the rate of decay for a gram of radium – 37 billion decays per second. A unit of radioactivity equal to  $3.7 \times 10^{10}$  disintegrations per second.” Indoor Radon and Radon Decay Product Measurement Device Protocols, July 1992, at G-3; R.R. at 261a. A picocurie is one-trillionth of a curie.

Bureau of Regional Compliance specialist Bridget Craig (Craig) for possible enforcement action.

DEP sent HouseInspect a “20-day letter” which requested that HouseInspect address the issues which Hoffman raised in the September inspection as well as the issue of the outstanding blank sampling. HouseInspect responded, but Craig considered the response insufficient. On February 6, 2007, DEP sent a notice of violation to HouseInspect. The notice set forth the following violations: 1) failure to produce a worker health and safety program; 2) incomplete reports to client; 3) failure to record “spiked sampling analysis;” and 4) failure to record duplicate analysis.

HouseInspect responded to the notice of violation by letter dated February 17, 2007. HouseInspect explained the actions taken after the September inspection:

1. An Excel program that was designed to track the precision and accuracy of the duplicate radon readings was expanded to track the exposure levels of the testing personnel. The technician who placed and/or retrieved the devices at each test site is entered into the database. Tracking the individual’s yearly exposure is available by using the total of his picocurie exposure than determining the average picocurie level and plugging this sum into the ‘working level month’ formula. An exposure letter is provided to each field tech on a yearly basis.
2. A routine quarterly spikes run procedure was put into operation the results of two subsequent runs have been sent to the office of Mr. Hoffman and Mr. Rutzmoser. We are attaching a summary of both of these in case they were not previously noted.

3. We have revised both of our radon report cover letters to reflect the continued compliance issues and have attached copies of these revisions for your review. The firm's ID, the technician's name and ID and the average of the duplicate readings have been addressed on the cover as well as on the individual data sheets from the lab.

4. We beg to differ with you about an additional violation noted in your letter of February 6<sup>th</sup> as #2-c on pages 2 and 3. In you [sic] letter it indicates that we had not been conducting our tests using duplicate devices. This is incorrect and may have been a misreading of your inspector's report. We have always conducted our tests using duplicate devices. In the initial inspection of 11/05 we were cited for failure to uniformly calculate the RPD or the precision of our duplicate readings, but that failure was addressed and noted in the follow up inspection in September 06. Please double check your inspection follow up report for notes on our Excel program. To be helpful, Mr. Rutzmoser emailed us a sample data collection program in December, but this was for us to use to possibly 'fine tune' our program and not because we had no collection and calculation program in place.

Letter from Parris Bradley, February 17, 2007, at 1; R.R. at 291a.

HouseInspect submitted spike sampling data for 2006 and 2007, but the reports revealed that HouseInspect did not spike 3% of the canisters deployed as required. No blank records were submitted for the first half of 2005. No worker exposure records were submitted prior to 2006. HouseInspect did not provide records of spike sample analysis for 2003-2005. After a meeting in July 2007, with DEP to discuss the ongoing failure to maintain adequate records, HouseInspect submitted further documentation by letter dated August 31, 2007. DEP determined that HouseInspect was not in compliance with recordkeeping requirements prior to 2006.

Craig notified DEP's Chief of the Radon Division Certification Section, Kelly Oberdick (Oberdick), that HouseInspect had compliance problems. HouseInspect's certifications expired in October 2007. Parris Bradley contacted DEP to determine the status of HouseInspect's renewal application. DEP informed him that it would not renew the certifications until the outstanding notice of violation was resolved. By letter dated October 29, 2007, Michael A. Pyles (Pyles), chief of the radon division of DEP, informed HouseInspect that its individual (Parris Bradley) and firm radon testing certifications expired on October 18, 2007, and it could no longer conduct radon testing. HouseInspect appealed.

By letter dated March 27, 2008, Pyles informed HouseInspect that DEP denied HouseInspect's application for certificate renewal. DEP also denied individual certifications for Parris Bradley, Peter Bradley, and Blaine Illingworth. Pyles explained DEP's decision:

1. On November 16, 2005, representatives of the Department conducted an inspection of Parris Bradley's radon testing program. During the course of their inspection they found the following violations:
  - a. HII (HouseInspect) failed to update its quality assurance plan with current radon testing information in violation of 25 Pa.Code §240.304;
  - b. HII (HouseInspect) did not have a radon worker health and safety program as required by 25 Pa.Code §240.305;
  - c. HII (HouseInspect) had not submitted known spike samples for its activated charcoal absorption devices as required by EPA protocol; 'Indoor Radon and Radon Decay Product Measurement Protocols', EPA 402-R-92-004, Section 2.4.11.2;

d. HII (HouseInspect) was not analyzing the relative percent difference between duplicate tests and investigating significant deviations for its activated charcoal absorption devices as required by EPA protocol; Indoor Radon and Radon Decay Product Measurement Protocols', EPA 402-R-92-004, Section 2.4.11.4.3.

e. HII (HouseInspect) has failed to submit, analyze or monitor field blank samples for its activated charcoal absorption devices as required by EPA protocol Indoor Radon and Radon Decay Product Measurement Protocols', EPA 402-R-92-004, Section 2.4.11.2.

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f. In violation of 25 Pa.Code §240.103(6), HII (HouseInspect) did not provide the following information on client test result reports:

- i. HII's (HouseInspect) DEP Radon Certification ID number.
- ii. The name and DEP Radon Certification ID number of the person placing and retrieving test devices.
- iii. The average test result of the two passive short-term test devices placed for real estate transactions.
- iv. Current EPA guidance information for passive short-term test devices.

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The Department received HII's [HouseInspect] applications for renewal of radon testing individual and firm certification on September 19, 2007. These applications did not contain any information regarding the compliance history described above. The applications did not include any information regarding the notice of violations received by HII [HouseInspect] and the other actions taken by the Department for the violations noted by the Department in its inspection of November 2005, despite the fact that these violations remained outstanding as of the date that the applications were submitted. Pursuant to 25 Pa.Code §240.103(4), an application for radon testing certification submitted to the Department shall contain compliance information, including descriptions of notices of violation, administrative orders, civil penalty assessments and actions for violations of the act, this chapter or a term or condition of a certification. HII [HouseInspect] failed to

comply with the requirements of §240.103(4), and the application [sic] are denied on that basis.

In addition, pursuant to 25 Pa.Code 240.201(b) the department may deny certification to a person who has shown a lack of ability or intention to comply with the Radon Certification Act (63 P.S. §§ 2001 – 2014) (RDA), the Radon Protection Act (35 P.S. §§7110.101-7110.703) (RPA), or the regulations in 25 Pa.Code Chapter 240, as indicated by past or continuous conduct. Based on the Department's review of HII [HouseInspect] compliance history, as outlined above, the Department has determined that HII [HouseInspect] has shown a lack of ability or intention to comply with the RDA, the RPA and the regulations in 25 Pa.Code Chapter 240. Consequently, the Department is denying your renewal applications for this reason.

Letter from Michael Pyles, March 27, 2008, at 1-3; R.R. at 380a-382a.

HouseInspect appealed the denial to the Board. The Board held a hearing on April 1, 2009. Parris Bradley testified that House Inspect had a QAP which had contained a worker health and safety plan since April 5, 2004. Notes of Testimony, April 1, 2009, (N.T.) at 14-15; R.R. at 47a. In his opinion HouseInspect was in compliance with Pennsylvania regulations. N.T. at 27-28; R.R. at 50a.

Blaine Illingworth (Illingworth) testified that he was subcontracted to HouseInspect to conduct home inspections. N.T. at 55; R.R. at 57a. "As far as I've been able to tell" HouseInspect complied with the Pennsylvania requirements for radon testing. N.T. at 56; R.R. at 57a.



HouseInspect called Oberdick on cross-examination. Oberdick explained the recertification process. To her knowledge no company or individual had received a certification renewal when there was an outstanding notice of violation. N.T. at 75; R.R. at 62a. Oberdick explained that HouseInspect's application was denied because there was an outstanding notice of violation. N.T. at 76; R.R. at 62a.

HouseInspect called Pyles on cross-examination. Pyles testified that HouseInspect's renewal application was denied because of its past history and notices of violation. N.T. at 82; R.R. at 64a. In the denial letter Pyles referenced a federal Environmental Protection Agency (EPA) publication, Indoor Radon and Radon Decayed Product Measurement Protocols. HouseInspect violated the protocol. Pyles denied that the protocol was eliminated in 1998. N.T. at 94-95; R.R. at 67a. Pyles admitted that the EPA's National Radon Proficiency Program ended in 1998. N.T. at 96; R.R. at 67a. Pyles further admitted that the EPA's website stated that the agency no longer updated the Indoor Radon and Radon Decayed Product Measurement Protocols. N.T. at 97; R.R. at 68a.<sup>5</sup>

Hoffman testified on behalf of DEP concerning his inspection of HouseInspect and the resulting notice of violation.

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<sup>5</sup> HouseInspect called Joseph Pryber, a supervisor of the Radioisotope safety and special projects section in the Bureau of Radiation Protection of DEP. Pryber signed the notice of violation. HouseInspect also called Craig on cross-examination to explain a proposed settlement offer.

On July 20, 2009, the Board dismissed HouseInspect's appeals. The Board determined that HouseInspect waived its appeal of the October 29, 2007, letter which informed it that its certifications had expired. With respect to the appeal of the denial of the application for recertification, the Board reasoned:

As we explain more fully below, we agree that the totality of HouseInspect's behavior between 1998 and 2008 clearly demonstrates that HouseInspect lacks the ability or intent to comply with the Department's regulations. Nor did HouseInspect demonstrate that it was in compliance with those regulations at the time if [sic] applied for recertification, which is a pre-requisite for re-certification. . . .

We find that HouseInspect failed to prove that the Department's denial of its radon recertification application was improper. HouseInspect did not demonstrate to the Department between 1998 and 2008, or to the Board at the hearing, that its operation was in compliance with regulations. Nor did HouseInspect demonstrate that it had any real commitment or plan to come into conformance with the regulations in the future. The Department has provided HouseInspect with numerous opportunities to demonstrate its commitment to proper recordkeeping and radon tracking requirements embodied in the regulations and HouseInspect has repeatedly failed to do so. HouseInspect has yet to produce a complete set of appropriate health and safety records, exposure reports or various testing reports for the time period requested by the Department. These records are not only required by the Department's regulations, but are required by the implementation of HouseInspect's own Quality Assurance Plan (QAP) which the regulations provide must be maintained and implemented. . . .

Although some records have been produced piecemeal over a period of years, this does not demonstrate HouseInspect's commitment to comply with the regulations. First, HouseInspect's QAP states that all

records will be maintained at its offices in Media. Yet Cindy Lawn could not produce a complete set of records requested at either the November 2005 inspection or the September 2006 inspection, even though HouseInspect was on notice that the Department would be examining their files. Although HouseInspect maintains that the lab that analyzes the radon canisters and generates the results of the radon testing has the ability to track certain types of data for HouseInspect, clearly no ‘responsible’ person at HouseInspect is familiar with this data, nor is there any indication that the data is reviewed if it is not even maintained on the premises. For example, the relative percent difference analysis for the duplicate canisters which was submitted to the department was apparently generated by a company known as Radiation Data in New Jersey. . . . None of this data was produced at Department inspections and there is no testimony that Parris Bradley, the quality assurance officer, ever reviewed this data on any kind of a regular basis. Indeed, Mr. Hoffman testified that although it appeared that HouseInspect was testing duplicates, there was no indication that the results were being tracked in any consistent way. . . .

. . . .

HouseInspect contends that many of the test data tracking requirements are derived from an EPA protocol which is no longer enforced by the EPA, therefore it was inappropriate for the Department to find that it had violated the Department regulation which purports to incorporate this protocol. The Department argues that the EPA protocol is properly incorporated into the Department’s regulations. . . .

HouseInspect contends that ‘Indoor Radon and Radon Decay Product Measurement Device Protocols’ includes a disclaimer by EPA that EPA ‘no longer updates this information’ and ‘The material and descriptions compiled for these pages are not to be considered Agency guidance, policy, or any part of any rulemaking effort but are provided for informational and discussion purposes only. . . . HouseInspect argues that this publication therefore can not [sic] be considered an ‘EPA approved protocol,’ therefore HouseInspect can not [sic] be in

violation of Section 308 of the Department's regulations by failing to maintain the records relating to spike samples, duplicate samples and blank samples as described in the protocol.

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However, the question before the Board in this matter is not whether or not the Department could base a civil penalty assessment or take other enforcement action against HouseInspect predicated on a violation of EPA's protocols. The issue before the Board is whether HouseInspect has demonstrated a commitment to compliance with the Radiation Certification Act and regulations. Even if the EPA protocol is not properly incorporated as a requirement of the Department's regulations, HouseInspect explicitly adopted it as the testing protocol in its Quality Assurance Plan submitted to the Department. An important element of the Department's radon testing program is embodied by Section 240.304 which requires that a radon tester maintain a quality assurance program 'to assure that measurements are accurate and errors are controlled. The program shall insure that testing devices are routinely and properly calibrated.' . . . HouseInspect's Quality Assurance Plan, submitted to the Department by letter dated August 31, 2007, . . . provides that

[a]ll sampling will be done in accordance with EPA 402-R-92-004, "Indoor Radon and Radon Decay Product Measurement Device Protocols, and with EPA-R-92-003, Protocols for Radon and Radon Decay Product Measurements in Homes. . . .

Mr. Hoffman testified that duplicate testing and the calculation of 'relative percent difference' were elements of a quality assurance plan. Since HouseInspect's Quality Assurance Plan provided for the use EPA protocols to track its sampling data, and it failed to produce the data for the time period requested by the Department, then HouseInspect failed to demonstrate that it was implementing the plan or 'assuring that radon measurements were accurate and errors are controlled' on any kind of a consistent basis. . . .By failing to continuously maintain records in accordance with its own

QAP, or otherwise demonstrating any institutionalized interest in implementing this plan, we fail to see any reason why HouseInspect's certification should be renewed. Clearly the QAP is a critical element in effectuating the legislature's purpose to protect the public from 'unqualified or unscrupulous consultants and firms' and HouseInspect has consistently failed to comply with this basic requirement of the regulations. (Footnotes omitted).

Adjudication at 10-16; R.R. at 597a-603a.

HouseInspect contends that the Board erred when it determined that HouseInspect's conduct and behavior between 1998 and 2008 demonstrated that HouseInspect lacked the ability or intent to comply with DEP/s regulations when the most/all of the regulations were never adopted by DEP and/or were never intended for use as regulations, and/or were abandoned. HouseInspect also contends that the Board erred when it dismissed its objections on the basis that it did not comply with DEP regulations where the deficiencies consisted of non-compliant documents which were not produced and/or the evidence of the non-compliance was improperly admitted. HouseInspect also contends that the Board erred when it dismissed HouseInspect's objections based on the assertion that HouseInspect was not compliant between 1998 and 2008, where HouseInspect produced competent evidence of compliance, no evidence of non-compliance was produced, and there were no record retention regulations and/or rules.<sup>6</sup>

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<sup>6</sup> This Court's review of an order of the Board is limited to determining whether the Board's findings are supported by substantial evidence and whether constitutional violations or errors of law were committed. Eureka Stone Quarry v. Department of Environmental Protection, 957 A.2d 337 (Pa. Cmwlth. 2008).

Initially, HouseInspect contends that the Board erred when it affirmed DEP's determination that it violated EPA approved protocols which EPA had abandoned in 1998, and which EPA did not intend to be used as regulations.

Under Section Thirteen of the Radon Certification Act (Act)<sup>7</sup>, DEP has the authority to adopt rules and regulations to administer and enforce the Act. Under Section 4 of the Act, 63 P.S. §2004, the General Assembly designated DEP to establish a testing program for those who test for the presence of radon gas in buildings and on building lots.

One of the regulations DEP established, 25 Pa.Code §240.308, Testing and mitigation protocols, provides in pertinent part:

A person conducting radon testing or mitigation for radon contamination shall conduct the testing and mitigation in accordance with EPA- or DEP-approved protocols and shall comply with applicable statutes, regulations, ordinances and building codes. The following protocols, 'Protocols for Radon and Radon Decay Product Measurements in Homes,' 'Indoor Radon and Radon Decay Product Measurement Device Protocols' and 'Pennsylvania Radon Mitigation Standards' are available upon request. . . .

In the Notice of Violation, HouseInspect was cited for certain violations of the EPA Publication, Indoor Radon and Radon Decay Product Measurement Device Protocols. At the hearing before the Board, HouseInspect introduced evidence from the EPA website that addressed this protocol:

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<sup>7</sup> Act of July 9, 1987, P.L. 238, 63 P.S. §2013.

EPA closed its National Radon Proficiency Program (RPP) in 1998. The information in this document which refer to companies, individuals or test devices that ‘meet EPA’s requirements’, or ‘EPA Certified. . .’, or refers to EPA’s old RPP designations ‘RMP or RCP’ is no longer applicable. Please check our proficiency page for more information on how to find a qualified radon service professional.

#### Disclaimer

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Indoor Radon and Radon Decay Product Measurement Device Protocols, [www.epa.gov/radon/pubs/devprot1.html](http://www.epa.gov/radon/pubs/devprot1.html) at 2; R.R. at 275a.

HouseInspect asserts that this protocol was no longer considered an EPA-approved protocol in accordance with 25 Pa.Code §240.308 given the EPA’s disclaimer. Consequently, HouseInspect argues that it did not violate the protocol because it no longer constituted a valid protocol.

The Board did not explicitly rule on whether DEP’s reliance on the protocol was improper. However, HouseInspect did not cite any case law for its theory that DEP could not adopt an EPA protocol and maintain the protocol as a standard for regulation even if the EPA no longer had the protocol in place. Further, there is no indication that the EPA dropped the protocol for reasons that it was incorrect or faulty. Additionally, Pyles testified that the protocol was still in

use in Pennsylvania. N.T. at 186; R.R. at 90a. DEP's interpretation of its own regulation was reasonable and not unlawful. This Court does not agree with HouseInspect that it was error to rely on the protocol to establish a violation and, ultimately, the denial of the renewal application.

Assuming *arguendo* that DEP erred when it relied on the protocol contained in the regulation, the failure to comply with the protocol still was a basis for a notice of violation because HouseInspect's QAP provided that all sampling would be performed in accordance with the EPA protocol. HouseInspect failed to produce the sampling data for the time period requested by the Department. As the Board determined, HouseInspect failed to demonstrate that it implemented the plan or 'assuring that radon measurements were accurate and errors are controlled' on any kind of a consistent basis.

DEP's regulation, 25 Pa.Code §240.304 provides:

A person conducting radon testing or radon laboratory analysis activities shall have a quality assurance program to assure that measurements are accurate and errors are controlled. The program shall insure that testing devices are routinely and properly calibrated. The program shall provide the information related to the following activities: (1) Organization and responsibilities. (2) Sampling procedures. (3) Detector custody. (4) Analytical procedures. (5) Data reduction, validation and reporting. (6) Corrective Action.

HouseInspect's failure to comply with the EPA protocol rendered it in non-compliance with its own QAP.<sup>8</sup>

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<sup>8</sup> HouseInspect does not challenge this determination.



HouseInspect next contends that the Board erred when it dismissed HouseInspect's appeal where it produced competent evidence of full compliance, and DEP failed to produce evidence of non-compliance. Specifically, HouseInspect argues that there was no legitimate basis for the violations for failure to update its QAP and for failure to have a worker health and safety plan because Hoffman testified that the documents submitted by HouseInspect complied with DEP's regulations.

A review of the record reflects the following responses by Hoffman to questioning by HouseInspect's counsel:

Q: Very briefly. You've reviewed the quality assurance plan contained in Appellant's [HouseInspect] exhibits?

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A: Yes, I reviewed that plan. Would have been the first week in September of '07 after our compliance meeting.

Q: Okay. And that plan complies with all applicable statutes and regulations, doesn't it?

A: Yes. On paper, it was adequate.

Q: Where else would it be?

A: On paper, it was adequate. In the inspection field we have a saying, say what you do and do what you say. On paper it was adequate.

Q: Okay. Are you saying that this hasn't been implemented?

A: I could not – at that point in time, I could not determine that.

Q: Okay. I don't understand what you mean when you say on paper it's adequate. What do you mean by that?

A: Up until that time in September of 2007, this is the first I've seen this document.

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A: September 2007. I did not conduct an inspection against this document. So, although on paper everything appeared adequate, I do not know if the implementation of this quality assurance plan was being carried out. The inspection I conducted in 2005, the quality assurance plan that was provided to me at that time by Cindy Lawn, that was grossly outdated and it was not being followed.

N.T. at 172-173; R.R. at 86a-87a.

Hoffman's testimony does not support, but actually refutes, HouseInspect's assertion that there was full compliance and no evidence of non-compliance in reference to the 2005 inspection.

Finally, HouseInspect contends that the Board improperly admitted evidence of non-compliance in violation of the Pennsylvania Rules of Evidence and the "best evidence rule."<sup>9</sup> HouseInspect asserts that Hoffman's testimony that client reports reviewed by Hoffman in 2005 and 2006 was inadmissible.

This Court does not agree. First, the Board does not necessarily have to follow the Pennsylvania Rules of Evidence. The Board's regulation, 25 Pa.Code §1021.123(a), provides "The Board is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible. The Board generally applies the Pennsylvania Rules of Evidence." Second, even if the

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<sup>9</sup> Rule 1002 of the Pennsylvania Rules of Evidence provides in pertinent part: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court or by statute."

Pennsylvania Rules of Evidence control, Pa.R.E. 1004 limits Pa.R.E 1002 and does not require an original writing when that writing is lost or within the control of the non-proponent. Hoffman testified that after he read the client reports he returned the documents to HouseInspect. N.T. at 136; R.R. at 77a. This Court finds no error on the part of the Board.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

