

STATE OF NEW YORK DEPARTMENT OF LABOR

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In the Matter of

ADE COOL WATER, INC.,

**REPORT
&
RECOMMENDATION**

for a determination pursuant to Section 909 of the New York Labor Law that violations of Labor Law, Article 30 and/or Code Rule 56 took place as hereinafter described.

File # AH-16-014

Asbestos Case No(s).
26091263

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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on June 8, 2017, in Albany, New York and in New York City, New York via videoconference. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Asbestos Control Bureau (“Bureau”) of the Division of Safety and Health of the New York State Department of Labor (“Department”) into whether ADE Cool Water, Inc. (“Respondent”), undertook an asbestos abatement project at 14 Charles Street, Middleton, NY (“the Project”) and, if so, if Respondent complied with the requirements of Labor Law article 30 (§§900 *et seq.*) or 12 NYCRR part 56.¹

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz,

¹ Respondent contended throughout the proceeding that it did not engage in an asbestos abatement project or disturb asbestos containing materials as those terms are used in the law and regulations and that, therefore, it cannot be found in violation of the laws and rules that pertain to such work.

(Evan Zablow, Attorney, of Counsel).

The Respondent appeared *pro se*.

The Respondent did not file an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Did Respondent violate any of the provisions of Labor Law article 30 or of 12 NYCRR part 56 in its performance of an asbestos project?
2. Should a civil penalty be assessed, and if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau on the Project. The Project involved a structure located at 14 Charles Street, Middleton, New York (Asbestos Case No. 26091263).

On January 28, 2015, the Bureau received a complaint concerning the location of the Project. (DOL1).

Pursuant to the complaint, two Department Inspectors visited the Project site on January 30, 2015. During the visit the Inspectors observed a home that had been damaged by fire. They also saw that some of the debris at the site had been removed, but some remained. (DOL 2, T p. 19)

The Inspectors took photographs of the site. They also took samples of siding material remaining at the site. (DOL 2, T pp. 19 – 21).

The material samples taken by the Inspectors tested positive as asbestos containing material. (DOL 3, T pp. 23 -25)

The Bureau received documents from I-Con International (“I-Con”), a contractor that worked on the Project with Respondent. (T p. 29)

The documents received by the Bureau contained, among other materials, log books maintained by I-Con. (T p. 30)

I-Con's logs show that it performed asbestos clean-up on the second floor of the home that was the subject of the Project. (DOL 6)

I-Con's logs also show that Respondent conducted a visual inspection of the Project on December 20, 2014. (DOL 6)

Neither I-Con nor Respondent obtained a variance for performance of work on the Project. (T p. 34)

A Variance and Contamination Assessment created subsequent to Respondent's work on the Project established that considerable asbestos containing material remained on the site after Respondent completed its work. (DOL 5-a, 5-b; T pp. 37 – 40)

Respondent's log for the Project shows that it performed work for I-Con on the Project, established decontamination, set up pumps, used wet-method clean up techniques, and performed a visual inspection at the conclusion of its work. (DOL 7)

The Bureau issued two violations to Respondent in a Notice of Violation and Order to Comply dated September 22, 2015. (DOL 8)

The violations issued by the Bureau were for 12 NYCRR § 56-9.2.D.1.I and § 56-9.1.D.1, clearance of the work area without collecting clearance samples and passing visual inspection while asbestos containing material remained on site. (DOL 8) The details of the violations are set forth in Department Exhibit 8 which is attached to and made a part of this Report and Recommendation.

The Project was large as defined in the law and regulations. (T p. 55)

Respondent had no history of violations with the Bureau. (T p. 56)

Respondent was cooperative with the Department. (T p. 56)

The violations were serious in that they involved a considerable amount of asbestos containing material that could have been released to the surrounding neighborhood. (T p. 56)

Respondent owner, Olasanya Bayu De Ojo, testified that all he was hired to do was pick up materials on the Project. (T p. 59)

Mr. De Ojo stated that he did not disturb asbestos, only picked it up. He admitted that he used wet methods to clean up asbestos containing materials on the second floor of the home. (T pp. 63, 64)

The value of Respondent's contract for the Project was \$400.00. (T p. 60)

CONCLUSIONS OF LAW

12 NYCRR § 56-2.1.a defines abatement as: "Any portion of an asbestos project that includes procedures to control fiber release from asbestos containing material. This includes removal, encapsulation, enclosure, repair, or handling of asbestos material that may result in the release of asbestos fiber."

12 NYCRR § 56-2.1.ax defines a disturbance as "Any activities that disrupt the matrix of ACM or PACM, or generate debris, visible emissions or airborne asbestos fibers from ACM or PACM. This includes moving of friable asbestos containing material from one place to another."

12 NYCRR § 56-9.2.D.1.I and § 56-9.1.D.1 establish standards for Air Sampling and Final Cleaning Procedures on asbestos remediation projects.

Respondent argues that whatever he did on the Project, it cannot be defined as asbestos removal, air monitoring or cleaning such that it was subject to the asbestos law and regulations. I find this argument unconvincing. Clearly Respondent, through the evidence of its own logs and those of the abatement contractor I-Con, was on the Project site and involved in clean up and air sampling. Respondent was aware of proper abatement techniques and actually used some, such as wet method clean up, decontamination, and pumps. Whether called "picking up," abatement, sampling or monitoring, it was work subject to the asbestos law, and the violations issued by the Bureau are valid.

CIVIL PENALTY

Labor Law § 909 (1) (b) provides: "If, after an investigation and a formal hearing, the commissioner finds that an asbestos contractor has violated any provision of this article, other than section nine hundred two or any rule or regulation promulgated hereunder, the commissioner shall, by an order which shall describe in detail the nature of the violation or

violations, assess the asbestos contractor a civil penalty of not more than the greater of twenty-five percent of the monetary value of the contract upon which the violation was found to have occurred or five thousand dollars per violation. Any asbestos contractor who, having previously been assessed a civil penalty under this section, or whose substantially owned-affiliated entity having previously been assessed a civil penalty under this section, violates any provision of this article or any rule or regulation promulgated hereunder, shall be subject to a civil penalty of not more than the greater of fifty percent of the monetary value of the contract upon which the violation was found to have occurred or twenty-five thousand dollars per violation. Each day a violation continues may be considered a separate violation under this section. In assessing the amount of penalty, the commissioner shall give due consideration to the size of the asbestos contractor's business, the good faith of the contractor, the gravity of the violation and the history of previous violations by the asbestos contractor and/or any substantially owned-affiliated entity of such asbestos contractor. Any substantially owned-affiliated entity of such asbestos contractor shall be held jointly and severally liable for the payment of such civil penalty. The commissioner may issue an order directing payment of such civil penalty by the asbestos contractor and any substantially owned-affiliated entity.”

The Bureau has requested civil penalties in the amounts of \$3000.00 for the violation of 12 NYCRR § 56-9.2.D.1.I and \$2750.00 for the violation of 12 NYCRR § 56-9.1.D.1. Given the factors set forth in the law for the assessment of civil penalties, the value of the contract, and the Respondent’s testimony concerning work on the Project, I find these amounts excessive. Instead, I find that the evidence warrants the imposition of civil penalties of \$1000.00 for each violation, for a total civil penalty of \$2000.00.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, I

RECOMMEND that the Commissioner of Labor adopt the Findings of Fact and Conclusions of Law as the Commissioner’s determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Respondent violated 12 NYCRR § 56-9.2.D.1.I and § 56-9.1.D.1 on the Project; and

ORDER that a civil penalty of \$2000.00 be imposed and assessed on the Project; and
ORDER that Respondent immediately remit payment to the Division Of Safety & Health,
Asbestos Control Bureau, SOB Campus, Building 12, Room 157, Albany, NY 12240 of the total
amount due (\$2000.00) made payable to the Commissioner of Labor.

Dated: September 21, 2017
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerome Tracy", with a long horizontal flourish extending to the right.

Jerome Tracy, Hearing Officer