

STATE OF NEW YORK DEPARTMENT OF LABOR

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In the Matter of

ANDUJAR ASBESTOS AND LEAD ABATEMENT
SERVICES LLC AND ALFREDO ANDUJAR

DEFAULT
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 No. DSH-0012783
Resolution Case No. 800064522

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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 dated October 11, 2023, a videoconference hearing was held on February 13, 2024, in Albany, New York with participating parties and/or witnesses appearing remotely at various other locations. The purpose of the hearing was to provide all parties 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 ANDUJAR ASBESTOS AND LEAD SERVICES LLC AND ALFREDO ANDUJAR (“ANDUJAR”) complied with the requirements of article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR part 56 when ANDUJAR undertook one (1) asbestos abatement project located at 33 West Avenue, Hamburg, NY (“Project”); and whether Andujar is liable for \$45,250.00 in civil penalties relating to the Project.

APPEARANCES

The Bureau was represented by Department Counsel, Jill Archambault (Debra Collura, Senior Attorney, of Counsel).

Andujar was originally represented by Zdarsky, Sawicki & Agostinelli LLP (Daniel J. Bobbett, Esq., of counsel). Mr. Bobbett appeared on the record without his client to withdraw as counsel for Andujar. It was explained that his withdrawal would result in a finding that Andujar is in default. He understood the consequences of his withdrawal, acknowledged that no answer had been served, and exited the proceeding.

HEARING OFFICER

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

FINDINGS AND CONCLUSIONS

On October 16, 2023, the Department duly served copies of the Notice of Hearing (HO Ex. 1) on Andujar by first class mail and by certified mail. Evidence supports the finding that Andujar received the certified mailings as the certified mail green card receipts were placed in evidence as HO Ex. 2. The Notice of Hearing scheduled a December 5 and 6, 2023 hearing and required that Respondents serve an Answer at least 14 days in advance of the scheduled hearing. Attorney Bobbett requested an adjournment of the originally scheduled hearing dates and, after a discussion during a WebEx conference, the parties consented to adjourn the hearing until February 13 and 14, 2024. Other than the hearing dates, all other provisions of the October 16, 2023 Notice of Hearing remained in full force and effect and binding on the parties.

Andujar failed to answer the charges contained in the Notice of Hearing or appear at the hearing. Therefore, Andujar is in default in this proceeding.

At the hearing, the Department produced sworn testimony and credible evidence substantially supporting the Department's charges that Andujar violated the provisions of the Labor Law or the Code Rule that are hereinafter particularized.

The Department further offered sworn testimony and credible evidence showing how the Department used a Penalty Assessment Calculation Sheet methodology to consistently assess civil penalties against Andujar in the total amount of \$45,250.00 for the violations of these provisions of the Labor Law or the Code Rule. (DOL Ex. 5; T. 98-116).

RECOMMENDATIONS

Based upon the default of Andujar in timely answering and contesting the charges contained in the Department's Notice of Hearing, and upon the sworn credible testimonial and documentary evidence adduced at hearing in support of those charges, and based on the record as a whole, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

Project

33 West Avenue, Hamburg, NY 14075, Project No. 26474556

12 NYCRR 56-11.6.B.1 requires that the immediate work area shall be considered to be the area from which the asbestos containing materials are actively being removed. The asbestos project regulated abatement work area shall extend twenty-five (25) feet from the perimeter of the immediate work area and shall have signage in accordance with Section 56-7.4. An airlock shall

be required at the entrance to the regulated abatement work area to serve as a changing area, if the workers shall have to pass through enclosed publicly occupied space, such as from a roof through an interior stairway, to access the decontamination units.

On inspection on 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to isolate the immediate exterior work area with asbestos warning tape and signage and or orange construction fencing with signage. Only the front of the property was cordoned off appropriately. (DOL Ex.4; T. 43-45). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-11.6.B.1 because it failed to cordon off the entire work area and have signage in accordance with Section 56-7.4. and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-11.6.B.1. (DOL EX. 5; T. 91).

12 NYCRR 56-11.6.B.1.I requires that where the asbestos project regulated abatement work area extends outward twenty-five (25) feet and extends downward one (1) floor to encompass a passage or vehicular door which must be used for either a primary entrance or by an emergency vehicle, thereby precluding sealing such door, a tunnel structure (with sides and roof) built of plywood sheeting, covered with at least two (2) layers of at least six (6) mil plastic, shall extend outward 25 feet horizontally from the line of vertical projection of the roof edge downward to grade level.

On inspection on 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to isolate the waste dumpster with appropriate fencing, wrapping tape and signage to prevent

unauthorized access. (DOL Ex.4; T. 44-45). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-11.6.B.1.I because it failed to isolate the waste dumpster with appropriate fencing, warning tape and signage to prevent unauthorized access; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-11.6.B.1.I (DOL EX. 5; T. 91-92).

12 NYCRR 56-11.6.C.1 requires that residential non-friable ACM shall be wet scraped and HEPA vacuumed. Materials removed shall be containerized or immediately wrapped in two (2) layers of 6 mil fire retardant plastic sheeting and secured airtight to transport to the waste decontamination facility.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to properly containerize all loose asbestos transite siding throughout the perimeter of the property. Debris was found throughout the property near neighbor's property and driveways (DOL Ex. 4; T. 45-46). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-11.6.C.1 because it failed to properly containerize all loose asbestos transite siding; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$3,750.00 for one violation of 56-11.6.C.1. (DOL EX. 5; 92-93).

12 NYCRR 56-11.6.E.1 requires that asbestos projects which are exempt from clearance air sampling requirements at one or two family owner occupied residential buildings/structures, are also allowed an exemption from the project monitor visual inspection requirements. For asbestos projects utilizing this exemption, once final cleaning is complete, a visual inspection shall be completed by the asbestos abatement contractor's supervisor to confirm that the scope of asbestos work for the asbestos project is complete, and no visible debris/residue, pools of liquid, or condensation remain. The results of this inspection shall be documented by the asbestos abatement contractor's supervisor in the asbestos abatement contractor daily project log, and once the asbestos project is complete the asbestos abatement contractor's supervisor shall also obtain the owner's written acceptance of the final results of the asbestos project within the daily project log.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar conducted a supervisor visual inspection of the exterior and informed the general contractor that all exterior transite removal had been completed. Several areas of transite debris were found throughout the entire perimeter of the site as well as remaining on the building in several locations (DOL Ex. 4; T. 46). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-11.6.E.1 because it reported that all exterior transite removal had been completed when there were several areas where transite debris was found.; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$4,000.00 for one violation of 56-11.6.E.1. (DOL EX. 5; T. 93-94).

12 NYCRR 56-3.4.B.1 requires that any asbestos abatement contractor who proposes to engage in a Large asbestos project shall notify or cause to be notified, in writing, the Asbestos Control Bureau. Such notice must be received at least ten (10) calendar days prior to the commencement of Phase II A (See Section 56- 2.1) of the asbestos project unless waived in writing by the Commissioner or his or her duly authorized representative. If an asbestos hazard is present which requires immediate attention, or if emergency conditions make it impossible to give notification ten (10) calendar days prior to the commencement of the project, notification in accordance with Section 56- 3.5 of this Part shall be given. All project notifications shall be accompanied by a nonrefundable fee. The fee shall be paid in any form, except cash, deemed acceptable by the commissioner of Labor in the notification package all payments shall be made payable to the Commissioner of Labor in the amounts set forth in the Labor Law.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder noted that Andujar failed to submit a notification for the interior removal of 2460 square feet of joint compound, 40 square feet of linoleum and 2028 square feet of exterior removal of transite and roof patching. (DOL Ex. 4; T. 46-47, 50-51). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-3.4.B.1 because it failed to submit a notification; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-3.4.B.1. (DOL EX. 5; T. 72-77).

12 NYCRR 56-3.6.E.1 requires, in part, that each posted notice shall include the building/structure address and room location(s) or area designation of the asbestos project.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to provide room locations and areas of interior abatement on the Notice to Occupants posted on the door of the house. (DOL Ex. 4; T. 51-52). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-3.6.E.1 because it failed to give proper notice; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,000.00 for one violation of 56-3.6.E.1. (DOL EX. 5; T. 78-79).

12 NYCRR 56-3.6.E.2 requires that each posted notice shall include the amounts and types of ACM, PACM or asbestos material, in square feet and or linear feet, that is to be handled, removed, enclosed, encapsulated, repaired or disturbed. Piping, fittings and associated insulation (excluding breaching and large [2 foot or greater] diameter piping/fittings/associated insulation) are to be measured in linear feet.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to list the quantities of asbestos to be abated for the interior and exterior portions of the buildings (DOL Ex. 4; T. 52). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-3.6.E.2 because it failed to list the quantities of asbestos to be abated for the interior and exterior portions of the buildings; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,000.00 for one violation of 56-3.6.E.2. (DOL EX. 5; T.

80).

12 NYCRR 56-7.11.B.2 requires that a plywood or oriented strand board (OSB) sheathing material of at least 3/8-inch thickness shall be fastened to the regulated abatement work area side of the barrier partition.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to construct an isolation barrier with at least 3/8" thickness plywood or oriented strand board (OSB). The area of the stairwell leading to the second floor had only two layers of polyethylene and no hard wall whatsoever (DOL Ex. 4; T. 52-53). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.11.B.2 because it failed to construct a hard wall isolation barrier to the regulated abatement work area side of the barrier partition; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-7.11.B.2. (DOL EX. 5; T. 87-88).

12 NYCRR 56-7.5.B.1 requires that a personal decontamination system enclosure shall be provided outside the regulated abatement work area and attached to all locations where personnel shall enter or exit the regulated abatement work area. One personal decontamination enclosure system for each regulated abatement work area shall be required. The system may utilize adequate existing lighting sources separate from the decontamination system enclosure, or shall be supplied with a GFCI protected temporary lighting system. The personal decontamination system enclosure shall be sized to accommodate the number of workers and equipment required

for the intended purpose. Such system may consist of existing attached rooms outside of the regulated abatement work area, if the layout is appropriate, they can be plasticized and are accessible from the regulated abatement work area. When this situation does not exist, personal decontamination closure systems may be constructed of metal, wood or plastic supports covered with fire-retardant plastic sheeting. A minimum of one (1) layer of six (6) mil fire-retardant plastic sheeting shall be installed on the ceiling and the walls of the enclosure system. At least two (2) layers of six (6) mil fire-retardant reinforced plastic sheeting shall be used for the flooring protection of this area. The system must be kept clean sanitary and climate controlled at all times in conformance with all federal, state and local government requirements. This system shall remain on-site, operational and be used until completion of Phase II C of the asbestos project.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to attach a personal decontamination enclosure system (PDES) to the large interior work area for removal of friable joint compound. The contractor was using a remote personal decontamination enclosure system (PDES) with two airlocks attached inside the building (DOL Ex. 4; T. 53-54). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.5.B.1 because it failed to attach a personal decontamination and closure system to the large interior work area for removal of friable joint compound; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,750.00 for one violation of 56-7.5.B.1. (DOL EX. 5; T. 80-82).

12 NYCRR 56-7.5.D.3 requires that at a minimum, two (2) extra airlocks as defined in

Section 56- 2.1 shall be constructed as per Section 56- 7.5(b)(11). One shall be constructed at the entrance to the equipment room or equipment/washroom. The other extra airlock shall be constructed at the entrance to the containment or regulated abatement work area(s). These airlocks shall have lockable doorways at the entrance to the air lock from the from the uncontaminated areas. These airlocks shall be cordoned off at a distance of twenty-five (25) feet and appropriately signed in accordance with Section 56-7.4(c). Airlocks shall not be used as a waste decontamination area and shall be kept clean and free of asbestos containing material.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to construct air locks that had overlapping flaps as defined in 56-2.1(DOL Ex. 4; T. 54). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.5.D.3 because it failed to construct air locks that had overlapping flaps as defined in 56-2.1; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-7.5.D.3. (DOL EX. 5; T. 82-83).

12 NYCRR 56-7.8.A.1 requires that the negative air pressure equipment shall operate continuously, twenty-four (24) hours a day, from startup of negative air pressure equipment, through the cleanup operations and satisfactory clearance air sampling results being obtained, or the asbestos project is complete.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to have negative air machines in continuous operation as required for a large friable interior

abatement. An inspection of the work area clearly showed an incomplete abatement of the joint compound (DOL Ex. 4; T. 54-55). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.8.A.1 because it failed to have negative air machines in continuous operation during the period when the asbestos project was not complete; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$3,000.00 for one violation of 56-7.8.A.1. (DOL EX. 5; T. 83-84).

12 NYCRR 56-7.8.A.10.V requires that ducts of at least equivalent shape and dimension as those of the negative pressure ventilation exhaust shall be used to exhaust to the outside of the building or structure.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to have exhaust tubes of at least equivalent size of the negative air machines used for the interior asbestos abatement. The size of the exhaust tubes was the size of the average adult male fist. (DOL Ex. 4; T. 55-56). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.8.A.10.V because it failed to have the exhaust tubes of at least equivalent size of the negative air machines used for the interior asbestos abatement; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,500.00 for one violation of 56-7.8.A.10.V. (DOL EX. 5; T. 85-86).

12 NYCRR 56-7.8.A.10.VIII requires that a four (4) foot high construction fence with appropriate signage in compliance with section 7.4 (c) shall be constructed at a minimum of ten (10) feet from the end of the exhaust duct tube, or bank of duct tubes, to surround and control this area from public access. For ground level exhaust duct terminations at the immediate exterior of the building/structure, the fence shall be installed at the tube discharge location.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to have the negative air exhaust tube exit cordoned off with a four (4) foot high construction fence with appropriate signage to surround and control the area to prevent public access. No fencing of any kind was in the area of the exhaust tube exit from the house (DOL Ex. 4; T. 56-57). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-7.8.A.10.VIII because it failed to have the negative air exhaust tube exit cordoned off with a four (4) foot high construction fence with appropriate signage to surround and control the area to prevent public access; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,000.00 for one violation of 56-7.8.A.10.VIII. (DOL EX. 5; T. 86-87).

12 NYCRR 56-8.4.B requires that no dry removal or dry disturbance of asbestos material shall be permitted.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar conducted dry removal and disturbance of friable asbestos joint compound in the 1st floor stairwell (DOL Ex. 4; T. 57-59). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-8.4.B because it conducted dry removal and disturbance of friable asbestos joint compound in the 1st floor stairwell; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$4,000.00 for one violation of 56-7.8.4.B. (DOL EX. 5; T. 88-90).

12 NYCRR 56-8.5.B requires that during Phase II B, all waste generated shall be bagged, wrapped or containerized immediately upon removal. Clean up of accumulations of loose debris/waste material shall be performed whenever enough loose debris/waste material has been removed to fill a single leak-tight container appropriate for the type of ACM being removed. Cleanup of all remaining waste generated shall be performed at least once prior to the close of each work shift. All waste material shall be kept adequately wet at all times.

On inspection 9/4/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to containerize the loose asbestos material found on the ground of the work area. In addition to the debris not containerized, it was found to be dry and dusty (DOL Ex. 4; T. 59-60). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-8.5.B because it failed to containerize the loose asbestos material found on the ground of the work area; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$2,750.00 for one violation of 56-8.5.B. (DOL EX. 5; T. 90).

12 NYCRR 56-8.1.B requires project air sampling shall be conducted daily for the full work shift for large projects. If more than one daily work shift is required to accomplish the work, air sampling shall be performed on each work shift. Air sampling is not required on days when there are no Phase II B activities.

On inspection 9/16/2019, Senior Industrial Hygienist Mark Yoder observed that Andujar failed to have project air sampling conducted for the large interior asbestos abatement project (DOL Ex. 4; T. 60-63). Therefore, it is:

DETERMINED that Andujar violated 12 NYCRR 56-8.1.B because it failed to have project air sampling conducted for the large interior asbestos abatement project; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Andujar be assessed the requested civil penalty of \$4,000.00 for one violation of 56-8.1.B. (DOL EX. 5; 95-96).

FINALLY

ORDER that Respondents immediately remit payment to the Division of Safety & Health, Asbestos Control Bureau, W. Averell Harriman State Office Campus, Building 12, Room 157, Albany, NY 12240 in the total amount due of \$45,250.00, assessed on all Projects at issue herein, made payable to the Commissioner of Labor.

Dated: October 9, 2024

Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer