

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

**REPORT
&
RECOMMENDATION**

**GERALD COHEN/LAWRENCE AVIATION
INDUSTRIES, INC.**

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

Asbestos Case No.
26014269

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 28, 2016 in Albany, New York and in White Plains, 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 Gerald Cohen and Lawrence Aviation Industries, Inc. ("Respondent") complied with the requirements of Labor Law article 30 (§§900 *et seq.*) or 12 NYCRR part 56 when an unlicensed contractor performed salvage work at the Drop Hammer Room located at the Respondent's property known as Lawrence Aviation, 100 Sheep Pasture Road, Port Jefferson Station, New York.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Larissa C. Bates, Senior 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?

HEARING OFFICER

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

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau of a project involving demolition and salvage work performed at property owned by the Respondent. The project involved the removal of pipes covered in asbestos insulation at a former Lawrence Aviation Building in an area referred to as the Drop Hammer Room, 100 Sheep Pasture Road, Port Jefferson Station, New York (Asbestos Case No. 26014269) ("Project").

On December 9, 2013, Terry Kish from the United States Environmental Protection Agency (EPA) notified the Bureau that a week prior he saw an illegal disturbance in the Drop Hammer Room located in a former Lawrence Aviation building, a Superfund site (DOL Ex. 1; T. 17). The disturbance was the removal of asbestos covered pipes by Tom Datre and Tom Datre & Son Construction, Inc, ("Datre"), an unlicensed contractor (T. 21). Mr. Kish had the work stopped and was making arrangements for a clean-up (DOL Ex. 1).

Pursuant to this complaint, a Department Inspector visited the Project site on December 10, 2013 (T. 20). During this visit the Inspector observed that metal was removed in one large area where a furnace and insulation-covered pipes were located. Visual observation found that the removal room, an adjoining room through which the metal was removed from the building, and the treads of the excavator machine that was used to remove the pipes were contaminated with asbestos containing debris (DOL Ex. 2). The presence of asbestos containing material in the Drop Hammer Room and the other areas where the disturbance at issue took place was

confirmed prior to the disturbance by testing conducted by the EPA (DOL Ex. 5; Resp. Exs. 11 and 12). The Department Inspector met with the Respondent, among others, and determined that Datre, an unlicensed contractor, removed the asbestos containing material as directed by the Respondent and that the Respondent told Datre that the pipe wrap did not contain asbestos (DOL Ex. 2).

Respondent acknowledged that he did not perform a survey on the property before undertaking any salvage and demolition work (T. 65). However, the EPA had performed a survey prior to the disturbance to determine what materials were asbestos containing materials (DOL Ex. 5; T. 21). Although Respondent owned the property for many years (DOL Ex. 6; T. 38), he argued that the EPA was performing the clean-up of the property and they never informed him that the property contained asbestos (T. 24). Additionally, Respondent alleged that Tom Datre entered the property without his knowledge and permission and in violation of Restraining Orders obtained by the United States of America that prevented the transfer or otherwise disposing of any property in which Mr. Cohen may have an interest (Resp. Ex. 2; T. 12).¹ However, prior to this disturbance, Respondent had instructed Datre to perform work at the site and Respondent gave Tom Datre an access code to enter onto the property allegedly to hunt (T. 21).

Respondent owned the property for many years before the disturbance that is the subject of the within proceeding and is the person responsible for the clean-up (T. 25, 27). Respondent failed to undertake the clean-up at this Superfund site that has been the subject of clean-up by the EPA. The clean-up of this disturbance that is the subject of the within proceeding was ultimately undertaken by the EPA after the disturbance was included in the Superfund clean-up (T. 26)

The Department Inspector issued to Respondent a Notice of Violation, which contained two violations (DOL Ex. 3):

¹ The United States of America had obtained a judgment against the Respondent for the costs associated with the clean-up of this Superfund site and the Respondent was granted the ability to salvage and sell equipment located at the site and have the proceeds from these sales paid to the United States of America in partial satisfaction of the judgment (T. 63). The United States of America obtained Restraining Notices preventing dissipation of Respondent's assets (Resp. Exs. 2, 4).

56-5.1 Asbestos Survey Requirements for Building/Structure Demolition, Renovation, Remodeling and Repair

- (a) **Asbestos Survey Required.** An owner or an owner's agent, except the owner of one and two-family dwellings who contracts for, but does not direct or control the work, shall cause to be conducted, an asbestos survey completed by a licensed asbestos contractor using inspectors certified in compliance with Section 56-3.2(d), to determine whether or not the building or structure, or portion(s) thereof to be demolished, renovated, remodeled, or have repair work, contains ACM, PACM or asbestos material. This asbestos survey shall be completed and submitted as indicated in Subdivision (g) of this Section, prior to commencing work. All such asbestos surveys shall be conducted in conformance with the requirements of Subdivision (e) of this Section.

56-5.1 Asbestos Survey Requirements for Building/Structure Demolition, Renovation, Remodeling and Repair

- (h) **Removal Required.** If the building/structure asbestos survey finds that the portion of the building/structure to be demolished, renovated, remodeled, or have repair work contains ACM, PACM, suspect miscellaneous ACM assumed to be ACM, or asbestos material, which is impacted by the work, the owner or the owner's agent shall conduct, or cause to have conducted, asbestos removal performed by a licensed asbestos abatement contractor in conformance with all standards set forth in this Part. All ACM, PACM, suspect miscellaneous ACM assumed to be ACM, or asbestos material impacted by the demolition, renovation, remodeling or repair project shall be removed as per this Part, prior to access or disturbance by other uncertified trades or personnel. No demolition, renovation, remodeling or repair work shall be commenced by any owner or the owner's agent prior to the completion of the asbestos abatement in accordance with the notification requirements of this Part. For multi-phased work, the access restriction for uncertified trades or personnel applies to each intermediate portion of the entire project. Upon completion of the intermediate portion of the asbestos project, other trades or personnel may access that portion of the work site. For demolition projects that are exempt from asbestos survey requirements due to being structurally unsound, the demolition is considered an asbestos project and shall proceed as per Section 56-11.5.

CONCLUSIONS OF LAW

12 NYCRR § 56-5.1(a) requires in part, an owner shall cause an asbestos survey to be conducted to determine whether or not the building or structure, or portion(s) thereof to be demolished, renovated, remodeled, or have repair work, contains ACM, PACM or asbestos material.

Because a metal salvage contractor removed insulation-covered pipes from Respondent's property without determining if the insulation contained asbestos as required by 12 NYCRR 56-5.1(a), the violation should be sustained.

12 NYCRR § 56-5.1(h) requires that all asbestos material be removed by a licensed asbestos abatement contractor before any demolition work is commenced.

Because an unlicensed contractor removed pipes covered with asbestos insulation from the Drop Hammer Building, leaving asbestos insulation debris throughout the area and on the excavator used to remove the pipes that may have exposed the operator to contamination, the violation of 12 NYCRR § 56-5.1(h) should be sustained.

Civil Penalty

Labor Law § 909 (1) (b) provides for the assessment of a civil penalty of not more than the greater of 25% of the monetary value of the contract upon which the violation was found to have occurred, or \$5,000.00 per violation. In assessing the amount of the civil penalty, the Commissioner shall give due consideration to the size of the contractor's business, the good faith of the contractor, the gravity of the violation, and the history of previous violations.

Although Lawrence Aviation was apparently at one time a large manufacturer in the aviation industry, it appears that the company is now all but shut down. However, the record indicates that the site is a Superfund Site that is being monitored by the EPA as a result of contamination and Respondent has been found liable for the repayment of some of the remediation costs. Respondent testified that the EPA was aware of the presence of asbestos containing material at the site but he alleges that he was not given notice of this fact (T. 49, 52, 55). As the owner of the facility for many years, I find Respondent's lack of knowledge of the existence of asbestos in his facility not credible.

I also find Respondent's testimony that the salvage contractor acted on his own, without Respondent's knowledge, to not be credible. Respondent testified to an on-going relationship with the salvage contractor and indicated that the contractor had access to the property a few months before the incident (T. 58-59).

The record does not contain any evidence of prior part 56 violations. However, the fact that the facility is a Superfund Site is proof that Respondent had been involved in prior significant on-going environmental contamination issues.

Finally, the record indicates that Respondent was not cooperative with the Bureau after the salvage contractor removed the pipes. Respondent failed to participate in the clean-up of the contamination which was ultimately added to the Superfund clean-up activities (T. 67, 72). This is an indication of Respondent's unwillingness to accept responsibility as the property owner and is indicia of his lack of good faith.

Respondent has violated two requirements of the 12 NYCRR part 56. Respondent failed to provide justifications for the violations. The nature of these violations is serious based upon the potential asbestos exposure to the public and Respondent failed to cooperate with the Bureau's investigation. Under these circumstances, the Bureau's request for a total civil penalty of \$7,000.00 is appropriate.

Accordingly, the requested penalty of \$3,500.00 for each violation, for a total civil penalty of \$7000.00, is not unreasonable and should be imposed.

RECOMMENDATIONS

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 two sections of 12 NYCRR part 56 as follows:

12 NYCRR § 56-5.1(a) for failing to cause an asbestos survey to be conducted to determine whether or not the building or structure, or portion(s) thereof to be demolished, renovated, remodeled, or have repair work, contains ACM, PACM or asbestos material, and

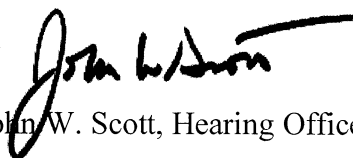
12 NYCRR § 56-5.1(h) for failing to require that all asbestos material be removed by a licensed asbestos abatement contractor before any demolition work is commenced.

DETERMINE & ORDER that pursuant to Labor Law § 909 (1) (b), Respondent be assessed the requested civil penalty of \$3,500.00 for each of the Code Rule violations, for a total civil penalty of \$7,000.00 on the Project;

ORDER that Respondent immediately remit payment to the Division of Safety & Health, Asbestos Control Bureau, State Office Campus, building 12, Room 157, Albany, NY 12240 of the total civil penalty due (\$7000.00) on the Project, made payable to the Commissioner of Labor.

Dated: March 23 , 2018
Albany, New York

Respectfully submitted,

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

John W. Scott, Hearing Officer

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

GERALD COHEN/LAWRENCE AVIATION
INDUSTRIES, INC.

DETERMINATION
&
ORDER

for a determination pursuant to Section 909
of the New York Labor Law that violations
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took place as hereinafter described

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WHEREAS a hearing was held in the above-captioned matter; and

WHEREAS the Hearing Officer submitted the annexed Report &
Recommendation dated March 14, 2018:

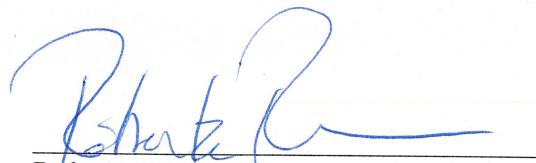
NOW, upon review of the entire record, and upon reading the Hearing Officer's
Report & Recommendation it is

ORDERED that the Hearing Officer's Findings of Fact and Conclusions of Law
be, and hereby are adopted; and it is further

ORDERED that the Hearing Officer's recommended determinations and orders
are adopted and shall constitute the final Determination & Order of the Commissioner of
Labor as if fully set forth herein.

Dated: *Apr. 3, 2018*

Albany, New York



Roberta Reardon
Commissioner of Labor
State of New York