

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

LIVINGSRING ENVIRONMENTAL SERVICES, INC.,

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

**REPORT
&
RECOMMENDATION**

Asbestos Case Nos.
25866578, 25866582

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on September 13, 2013 in Albany, New York and in New York City, New York via teleconference. 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 Livingspring Environmental Services, Inc. (“Respondent”) complied with the requirements of Labor Law article 30 (§§900 *et seq.*) or 12 NYCRR part 56 when Respondent undertook two asbestos abatement projects, the first at 46 St. Pauls Road North, Hempstead, New York (“Project 1”) and the second at 2620 Neptune Avenue, Seaford, New York (“Project 2”).

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz (Steven Pepe, Senior Attorney, of Counsel). The Respondent appeared *pro se* in the person of Grant Kaogu approximately one hour after the proceeding began.

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?
3. Should Respondent's asbestos handling license be revoked?

FINDINGS OF FACT

The hearing concerned two separate investigations made by the Bureau on two separate projects involving asbestos removal work performed by the Respondent.

PROJECT 1

On August 8, 2011, the Bureau received a complaint that a home was being demolished at 46 St. Pauls Road North, Hempstead, New York, and there may be asbestos present (Ex. 1). A Department Inspector visited the Project 1 site on August 8, 2011 (T. p. 12; Ex 2). During this visit the Inspector observed that the demolition of the home at the site was ongoing and that the foundation and basement of the home were still intact (T. p. 13). The Inspector was informed at the site that an asbestos survey had been conducted and given to the local building department (T. p. 13). The Inspector obtained a copy of the survey which stated that no asbestos had been found on the site (T. 13; Ex. 4). The Inspector returned to the site and took four samples of suspect materials, which included roofing materials, black tar, and general building materials (T. p. 14). The Inspector submitted the samples for laboratory analysis, which found that two of the four samples submitted contained asbestos (T. p. 19; Ex. 3). Based upon her examination of the project site, the asbestos survey, and the laboratory analysis, on August 11, 2011, the Inspector issued a Notice of Violation and Order to Comply ("Notice 1") to Respondent, for a violation of 12 NYCRR 56-5.1.f.1, Building/Structure Asbestos Survey Information (Ex. 5). In Notice 1, the Inspector observed that Respondent performed an inadequate pre-demolition survey in that it failed to test suspect materials as required (T. p. 23; Ex. 5). Subsequent to the inspection, the Inspector spoke with Respondent and informed him that his survey of Project 1 was inadequate. Respondent replied that the project owner did not wish to pay for a thorough survey so he did only what the client wanted (T. p. 24).

PROJECT 2

On August 8, 2011, the Bureau received a complaint concerning the possible signing of a false affidavit concerning the absence of asbestos in abandoned home (Ex. 6). A Department Inspector visited the Project 2 site on August 9, 2011 (T. p. 12; Ex 2). During this visit the Inspector entered the basement of the home. In the basement, he found in plain sight material on the boiler, which he photographed and sampled (T. p. 34). The Inspector took samples of the material on the boiler and submitted it for laboratory analysis (T. p. 35). The laboratory analysis found that the material contained asbestos (T. p. 36; Ex. 8). The Inspector issued a stop work order to the Town of Hempstead Building Department on August 26, 2011, but because the building official who responds to such orders was on vacation, it was not implemented, and the structure was demolished on September 22, 2011 (T. p. 38).

The Inspector also requested from the Town of Hempstead Building Department a copy of the Demolition Permit issued for the structure (T. p. 39). The Permit had with it an Affidavit of Absence of Asbestos signed by Respondent (Ex. 9). The Affidavit stated that Respondent had conducted an asbestos investigation of the structure and declared that it was free of any asbestos containing material. The Affidavit had attached to it the Asbestos Certificate issued to Respondent (Ex. 9).

The Inspector spoke with Respondent on October 4, 2011 (T. p. 46). Respondent stated that he had not seen the materials the Inspector had collected and tested, even though he was at the location before the Inspector was (T. p. 47). The Inspector noted that Respondent had tested mostly external materials and had not tested any of the thermal system insulation or anything from the basement (T. p. 48). Based upon his examination of the project site, the laboratory analysis, and the Affidavit filed with the Demolition Permit, on August 11, 2011, the Inspector issued a Notice of Violation and Order to Comply ("Notice 2") to Respondent, for violations of 12 NYCRR 56-3.2.d.4 Inspector Certificate; 12 NYCRR 56-5.1.e.1 and 2 Building/Structure Asbestos Survey Requirements; 12 NYCRR 56-5.1.f.1.i.b Building/Structure Asbestos Survey Information/Thermal Insulation (Ex. 11). In Notice 2, the Inspector observed that Respondent performed an inadequate pre-demolition survey in that it failed to test suspect materials as required (T. p. 23; Ex. 5).

The Inspector for Project 1 stated that she was unaware of the Respondent having any prior history with the Department; that he appeared to be a small operation; that he appeared to have deliberately not tested materials as required by law; and that the possible result of such a failure was the release of asbestos into the air and injury to the public or workers at the site (T. pp. 24, 25).

The Inspector for Project 2 stated that he was unaware of the Respondent having any prior history with the Department other than his involvement in Project 1; that he did not know the size of Respondent's business; that he appeared to have deliberately submitted a false affidavit to the Town of Hempstead; and that such action was a serious violation of the law.

Respondent stated that he should have taken samples from inside Project 1 but failed to do so (T. p. 72, 77).

Respondent stated that he did not see any asbestos containing material on the boiler at Project 2 (T. p. 61).

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.

Testimony provided at the hearing supports a finding that Respondent is a small – perhaps single person – operation; that it has no history of previous violations; that it exhibited a reasonable level of good faith; and that the violations found were serious. Specifically, Respondent violated several requirements of 12 NYCRR part 56 by failing to properly conduct asbestos surveys on two projects, which resulted in buildings with asbestos containing materials being demolished before the asbestos was abated. The Respondent failed to provide justifications for the violations. Under these circumstances, although the Bureau requests the maximum penalty of \$5000 for each violation, a penalty of \$2,000.00 for each of the four violations is appropriate, for a total civil penalty of \$8000.00 on Projects 1 and 2.

Revocation of License

Labor Law § 909 (2) states that if a contractor has “demonstrated a lack of responsibility in the conduct of any job involving asbestos or asbestos material of such seriousness as to warrant the revocation of the contractor’s license... the Commissioner may, by an order which describes in detail the nature of the violation or violations, revoke the contractor’s asbestos handling license... and... such asbestos contractor... shall [not] be eligible to apply for a new asbestos handling license for a period of up to two years.”

Because of the serious consequences that could result from Respondent’s failure to properly conduct two asbestos surveys, the Respondent’s asbestos handling license should be revoked for a two-year period.

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:

PROJECT 1

DETERMINE that Respondent violated one section of 12 NYCRR part 56 on Project 1:

12 NYCRR 56-5.1.f.1, Building/Structure Asbestos Survey Information; and

ORDER that a civil penalty of \$2000.00 be imposed and assessed on Project 1;

PROJECT 2

DETERMINE that Respondent violated four sections of 12 NYCRR part 56 on Project 2:

12 NYCRR 56-3.2.d.4 Inspector Certificate;

12 NYCRR 56-5.1.e.1 and 2 Building/Structure Asbestos Survey Requirements;

12 NYCRR 56-5.1.f.1.i.b Building/Structure Asbestos Survey Information/Thermal Insulation; and

ORDER that a civil penalty of \$2000.00 per violation, for a total of \$6000.00, be imposed and assessed on Project 2; and

I further recommend that the Commissioner:

ORDER that any existing asbestos handling license issued to Respondent be revoked, or alternatively, that Respondent be barred from applying for a new asbestos handling license, for a period of two years from the date of the Notice of Filing of the Commissioner of Labor's Determination & Order; 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 (\$8000.00) on all the Projects, made payable to the Commissioner of Labor.

Dated: October 11, 2013
Albany, New York

Respectfully submitted,

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

Jerome Tracy, Hearing Officer