

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

NORTH FORK MANAGEMENT

&

MAINTENANCE, LLC -

Respondent

A proceeding pursuant to NY Labor Law Article 30 and/or  
12 NYCRR 56.

**REPORT  
&  
RECOMMENDATION**

Asbestos Case Nos.  
25708037

To: Honorable Colleen Gardner  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on Wednesday, March 30, 2011, in Albany, New York. The purpose of the hearing was to provide the 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 North Fork Management and maintenance, LLC ("Respondent") complied with the requirements of Article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR Part 56 ("Code Rule") when Respondent undertook an asbestos abatement project at the Nassau Suffolk Lumber Yard at 102 Main Street, Smithtown, New York ("Project").

**APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito, Stephen Pepe, Senior Attorney, of Counsel.

The Respondent appeared, with its attorney, Vincent J. Trimarco, Esq.

Respondent filed an Answer to the charges incorporated in the Notice of Hearing (HO 2).

## **ISSUES**

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

## **FINDINGS OF FACT**

On or about March 12, 2009, the Bureau received a complaint alleging Respondent demolished six asbestos-containing buildings on the Project without first removing asbestos from the buildings (DOL 1).

The Bureau Inspector, on or about March 13, 2009 and pursuant to the complaint, conducted an inspection of the Project (DOL 2; T. 18).

The Inspector first visited the Town of Smithtown Building Director who informed her that the Project consisted of seven buildings (DOL 2, 11).

The Smithtown Building Director provided the investigator with an asbestos survey conducted by CL Environmental Services, Inc., Carl Lashley, Asbestos Inspector, which purported to show that there was no asbestos found in five buildings at the Project site (DOL 2, 3).

The Inspector determined that Carl Lashley was certified to conduct asbestos inspections and was the owner of CL Environmental, Inc., but that CL Environmental, Inc. was not a licensed asbestos contractor (DOL 2; T. 62-64).

The inspector visited the Project site, at which point she observed six buildings in various stages of demolition and one building on which no work had been performed; she obtained five samples of suspected asbestos containing material (“ACM”) (DOL 2; T. 27-29).

The laboratory analysis of the samples obtained by the Inspector showed that three of the five samples contained asbestos (DOL 2, 5; T. 30).

Respondent is not a licensed asbestos contractor, and its employees are not certified asbestos workers (T. 45).

Based upon her inspection, the Inspector issued to Respondent multiple Notices Of Violation and Orders To Comply, which contained the following violations and Inspector's observations:

Building 1 – Showroom Building.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures (DOL 9.1).

Building 2 – Frame and Block Building.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.2).

Building 3 – Frame Storage Building.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.3).

Building 4 – Storage Shed.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.4).

Building 5 – Storage Shed.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.5).

Building 6 – Frame and Block Storage Building.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.6).

#### Building 7 – Wood Structure Storage Building.

12 NYCRR 56-3.1.A. Licensing Requirements and Procedures. North Fork Management & Maintenance partially demolished six structures... and disturbed asbestos and presumed asbestos-containing materials. North Fork is not a NYS licensed asbestos abatement contractor.

12 NYCRR 56-3.2.A. Certification and Training Required. Employees of North Fork disturbed asbestos containing materials during partial demolition of six structures.

12 NYCRR 56-5.1.A. Asbestos Survey Required. North Fork failed to contract with a NYS licensed company to perform an asbestos survey for seven structures.

12 NYCRR 56-5.1.H. Removal Required. North Fork Management & Maintenance partially demolished six structures at the above location without prior removal of asbestos-containing materials (DOL 9.7).

### **CONCLUSIONS OF LAW**

12 NYCRR 56-3.1(a) provides that no asbestos contractor shall engage in an asbestos project unless such asbestos contractor has a valid asbestos handling license issued by the Commissioner.

12 NYCRR 56-3.2(a) provides that no asbestos contractor shall engage in or permit a person employed by the asbestos contractor to engage in or supervise work on an asbestos project unless each such person has a valid asbestos handling certificate issued by the Commissioner appropriate to the work performed by such person on an asbestos project as defined in this Part.

12 NYCRR 56-5.1(a) provides that 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.

12 NYCRR 56-5.1(h) provides that 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.

Respondent argues that, because Carl Lashley held a certificate to conduct asbestos inspections, the requirement that his company, CL Environmental, Inc., must possess an asbestos handling license is superfluous. However, the controlling Code Rule is unambiguous. 12 NYCRR 56-3.1 clearly requires an asbestos contractor to have an asbestos handling license, a document that is different from, and in addition to, the asbestos certificate that each employee of the contractor must possess. There is no question that CL Environmental, Inc., did not possess an asbestos handling license, and the violations which arose because of such lack should be sustained.

There is also no dispute that Respondent engaged in the demolition of structures at the Project site. The Code Rule requires any contractor engaging in such demolition to possess an asbestos handling license; to have employees who possess asbestos certificates; and to conduct a valid asbestos survey. The Code Rule also requires an owner to use a licensed contractor for any demolition work. Respondent did none of

these things. It relied upon a document that it contends should be treated as though it were a valid asbestos survey, even though the contractor was not licensed to conduct surveys. It then proceeded to demolish structures which, when debris of the same was tested, was found to contain asbestos. It did not use an asbestos contractor for the demolition, nor did it use workers certified to work with asbestos.

Respondent finally contends that the Department's position that the Project consisted of seven structures is incorrect, and that a reasonable view of the manner in which several of the building were connected must lead to a smaller number of structures and, consequently, a smaller number of violations. However, there is sufficient evidence in the record, including the inspector's own observations and the documents supplied by the Town of Smithtown, to support the inspector's findings.

I note that several of the violations that are the subject of this proceeding were also the subject of litigation brought on in New York State Supreme Court. Furthermore, in a decision rendered in State Supreme Court, County of Suffolk, the Court concluded that "Labor Law §909[1][b] specifically excludes violations of the licensing, certification and training provisions from the statutorily mandated pre-assessment penalty hearing... As to the third and fourth categories of violations, the petitioner's failure to provide an adequate asbestos survey in conformance with 12 NYCRR Part 56-5.1[a] and the petitioner's failure to engage in the proper removal of the asbestos as mandated by 12 NYCRR Part 56-5.1[h], the respondent agrees that the petitioner is entitled to a formal hearing before a penalty may be imposed upon the petitioner for such violations." (*North Fork Mgt. & Maintenance LLC v NYS Dept. of Labor*, 2010 NY Slip Op 33684U; 2010 N.Y. Misc. LEXIS 6596, 4).

Based upon this decision, I find that there is no reason to make a recommendation to the Commissioner concerning those violations which arose from violations of the Code Rule sections concerning licensing, certification and training (12 NYCRR 56-3.1(a) and 3.2(a)), as the Commissioner has the authority to issue Orders and penalties concerning such violations without a hearing and Respondent has already had judicial review of such penalties.

What remain, then, are thirteen violations of Code Rule 56-5.1(a) and (h).

## **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. Any contractor who has previously been assessed a civil penalty, shall be subject to a civil penalty of not more than the greater of 50% of the monetary value of the contract upon which the violation was found to have occurred, or \$25,000.00 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.

The Department has requested the imposition of a penalty in the amount of \$5000 for each of the thirteen violations for which a penalty may be assessed. The record is unfortunately silent with regard to any significant discussion by the Department of the relevant criteria to be considered when assessing a penalty. There is little to be gleaned with regard to the size of Respondent's business, its history of violations, or its good faith during the course of the investigation. Respondent did not have a survey properly performed and did not use an asbestos contractor for the work on the Project. The record shows that there was asbestos containing material found at the site of the demolition, and that is a serious matter that must be given significant weight when assessing a penalty. The record also shows that the Respondent did make an effort – however flawed – to survey the Project prior to demolition being performed.

In light of all of the facts, I recommend that a penalty of \$2000 per violation be imposed for a total of \$26,000<sup>1</sup>.

## **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:

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<sup>1</sup> This amount is in addition to the \$30,000 penalty assessed by the Commissioner with regard to the licensing and certification violations that are not properly before the Commissioner in this hearing.



DETERMINE that the violations and penalties concerning license and certification violations are final when issued and not subject to review at an administrative hearing; and

DETERMINE that Respondent violated Labor Law and regulations as follows:  
12 NYCRR 56-5.1 (a), failure to conduct an asbestos survey; and  
12 NYCRR 56-5.1 (h), failure to conduct asbestos removal by a licensed contractor.

ORDER that Respondent be imposed and assessed a civil penalty of \$2000.00 for each violation of the Code Rule, for a total civil penalty of \$26,000.00 on the Project;

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 (\$26,000) on the Project, made payable to the Commissioner of Labor.

Dated: November 7, 2011  
Albany, New York

Respectfully submitted,

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

Jerome A. Tracy, Hearing Officer