

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

TUTEN CLEANING SERVICE, 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.

**DEFAULT
REPORT
&
RECOMMENDATION**

Asbestos Case Nos.
25713647

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 May 10, 2011, in Albany, New York. 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 Tuten Cleaning Services, Inc. (“Respondent”) complied with the requirements of Article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR 56 (“Code Rule”) when Respondent undertook an asbestos abatement project at the former North Country Shopping Plaza, Route 9, Plattsburgh, New York (hereinafter referred to as “the Project”).

APPEARANCES

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

There were no appearances made by or on behalf of Respondent.

HEARING OFFICER DESIGNATION

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

FINDINGS AND CONCLUSIONS

On April 6, 2011, the Department duly served copies of the Notice of Hearing on Respondent by first class mail and by certified mail. (Hearing Officer Ex 1). Although the Respondent did not sign a Return Receipt card for the certified mail, the Department produced United States Postal Service Track and Confirm documents verifying that the notices were left at the Respondent's addresses on April 8, 2011. (Hearing Officer Ex. 2) Additionally, the attorney for the Department verified that the first class mailings were not returned to the Department as undeliverable. (T. 5) The Notice of Hearing scheduled a May 10, 2011 hearing and required that the Respondent serve an Answer at least 14 days in advance of the scheduled hearing.

Respondent failed to answer the charges contained in the Notice of Hearing or appear at the hearing. As a consequence, Respondent is in default in this proceeding.

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

For the foregoing reasons, the findings, conclusions and determinations of the Department should be sustained.

RECOMMENDATIONS

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

DETERMINE that Respondent committed a total of fourteen (14) violations of the Labor Law Article 30 and Industrial Code Rule 56 (12 NYCRR Part 56) in connection with the Project as follows¹:

¹ The Department produced fifteen (15) Notices of Violation but two (2) are for the same violation of 12 NYCRR 56-3.4.B.1 (Notification) for failure to pay the full Notification Fee. (DOL Ex. 8; T. 41)

12 NYCRR 56-11.8.B.4.1 (Abandoned Pipe/Duct/Conduit Wrap and Cut Removal-Regulated Abatement Work Area Preparation): The Respondent wrapped pipes in only a single layer of plastic sheeting prior to cutting, as opposed to the required two independent layers of at least six mil fire-retardant plastic sheeting. (Dept. Exs. 2, 5; T. 19-21)

12 NYCRR 56-7.5.D (Remote Personal Decontamination System Enclosure): The Respondent was using a remote personal decontamination system, as opposed to an attached personal decontamination system for the work area where gross removal of friable asbestos containing material had been performed. (Dept. Exs. 2 5; T. 21-22)

12 NYCRR 56-7.5.D.3 (Remote Personal Decontamination System – Airlocks) :The Respondent had only a single airlock attached to the work area as opposed to the required airlocks attached to both the work area and the remote personal decontamination system. (Dept. Exs. 2, 5; T. 22-24)

12 NYCRR 56-7.5.E.3 (Waste Decontamination System Enclosure – Large and Small Projects – Curtained Doorway): The Respondent had duct taped the flaps of the curtained doorway to the waste decontamination system thereby creating a hallway from the contaminated work area and the exterior of the building. Code Rule 56 requires curtained doorways consisting of overlapping sheets of at least six mil fire-retardant plastic sheeting, hanging freely with weights attached to the bottom to insure that the sheets hang straight and maintain a seal over the doorway when not in use. (Dept. Exs. 2, 5; T. 24-25)

12 NYCRR 56-7.8.A.3 (Engineering Controls – Negative Air Pressure Equipment – Negative Air Pressure): The Respondent was abating asbestos containing material with no negative air pressure equipment installed for the work area creating a work environment where the asbestos fibers could migrate freely from the work area into the exterior areas. (Dept. Exs. 2, 5; T. 25-26)

12 NYCRR 56-7.8.A.4 (Engineering Controls – Negative Air Pressure Equipment – Manometer): The Respondent did not use a manometer for this work area where gross removal of friable asbestos containing material had occurred. (Dept. Exs. 2, 5; T. 26)

12 NYCRR 56-7.10.C (Regulated Abatement Work Area Pre-Cleaning – Pre-cleaning): The circumstances of this abatement project prevented the Respondent from complying with the

requisite pre-cleaning requirements. Since the Respondent could not comply with this section of Code Rule 56, the Project should have been placed on hold until a Site Specific Variance relieving the Respondent of the Code Rule requirements could have been obtained. (Dept. Exs. 2, 5; T. 27- 30)

12 NYCRR 56-7.11A (Regulated Abatement Work Area Enclosure – Critical Barriers): The Respondent did not install critical barriers sealing all openings in the work area thereby preventing asbestos fibers from migrating into the openings and possibly being later released into the environment. (Dept. Exs. 2, 5; T. 30-32)

12 NYCRR 56-7.11e (Regulated Abatement Work Area Enclosure – Floor, Wall and Ceiling Plasticizing and Sealing): The Respondent did not cover the walls and ceiling of the work area with the required two layers of at least six mil fire-retardant plastic sheeting. (Dept. Exs. 2, 5; T 32-34)

12 NYCRR 56-8.3.A.2 (Regulated Abatement Work Area Entry and Exit Procedures – Entry to Work Area): The Respondent was using a remote personal decontamination system and the work area was only equipped with a single airlock, which did not have a supply of clean Tyvek suits. Consequently, the proper exiting procedure that required the employee to remove the outer most of two Tyvek suits and put on a clean one before exiting the airlock was impossible to follow. (Dept. Exs. 2, 5; T. 34)

12 NYCRR 56-8-4.D (Handling and removal Procedures – Asbestos Abatement): The Respondent was using dry removal methods for the abatement of the asbestos containing material as opposed to wetting down the material with amended water. (DOL Exs. 2, 5; T. 35-36)

12 NYCRR 56-8.9.C.2 (Equipment and Waste Container Decontamination and Removal Procedure – Washroom Procedures – Additional Containerizing): The Respondent was not following proper waste out procedures. The Code Rule requires that the contractor bag the asbestos material in the work area where it is created. The worker then moves the bags to the waste out area where, after the exterior of the bags are cleaned, they are passed to another worker who puts this bagged waste material in a second clean bag, which is then sealed and labeled with a generator label. The double-bagged material is then moved to a lined waste trailer. The Respondent only single-bagged some waste material; some asbestos containing material was

removed from the work area without being bagged and wasted out; and the bagged asbestos containing material was not labeled. (DOL Exs. 2, 5; T. 36-37)

12 NYCRR 11.1.B.1.II (In-Plant – Where Allowed): The Respondent was using In-Plant methods in an area where this procedure was not an option because friable material had been removed and not cleared, and mastic was removed using abrasive methods. (DOL Exs. 2, 5; T. 38-39)

12 NYCRR 56-3.4.B.1 (Notification): The Respondent received two (2) Notices for this violation that resulted from its payment of a \$1,000.00 fee for this Project when the proper notification fee was \$2,000.00. The fee, which was due prior to the start date for the project on April 27, 2009, remained unpaid as of May 9, 2011 the fee had not been paid. (DOL Exs. 6, 7, 8; T. 39-41).

DETERMINE & ORDER that, as required by Labor Law § 904 (2), Respondent be liable for and shall pay the unpaid notification fee of \$1,000.00.

Civil Penalty

The Department requested the assessment of a civil penalty in the amount of \$5,000.00 for each of the thirteen work practice violations, and further requested that no civil penalty be assessed for the violations resulting from the Respondent's failure to pay the full notification fee. (T. 46) The basis for this request is the negligent work practices exhibited by the Respondent and its employees that could have resulted in the release of dangerous asbestos fibers into the environment. (T. 46) The potential for release of asbestos fibers into the environment is a serious consideration. However, the Department specifically indicated that there was no history of prior violations by the Respondent as this was the Respondent's first project. (T. 42-43) In addition, the Department's investigator testified that he believed the Respondent acted in good faith and wanted to perform the asbestos abatement correctly. (T. 45) The investigator testified that the Respondent was led astray by his business partner who was trusted to have proper experience and expertise in this field of asbestos abatement. (T. 43-45) Finally, the investigator testified that he believed the Respondent was replaced on the Project and ultimately went out of business. (T. 42-43)

Based upon due consideration of the factors set forth herein and in Labor Law § 909 (1) (b), it is recommended that the Commissioner

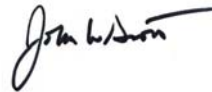
DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed a civil penalty of \$1,000.00 for each of these thirteen work practice violations of Industrial Code Rule 56 for a total Civil Penalty of \$13,000.00.

Finally

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 Project Notification fees in the amount of \$1,000.00 and civil penalties in the amount of \$13,000.00, for the total amount due \$14,000.00 on all the Projects, made payable to the Commissioner of Labor.

Dated: July 15 , 2011
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott".

John W. Scott, Hearing Officer