

IN THE MATTER OF

TWEEDIE CONSTRUCTION SERVICES, INC.;

For a determination of the penalties to be assessed for violations of Section 909 of the Labor Law and 12 NYCRR part 56.

REPORT
&
RECOMMENDATION

Asbestos Case No.

25961051

To: Honorable Mario J. Musolino
Acting Commissioner of Labor
State of New York

Pursuant to the Department of Labor's Streamlined Asbestos Hearing Procedure ("Streamlined Procedure"), Tweedie Construction Services, Inc. ("Respondent"), submitted a request to the Department's Office of Administrative Adjudication on March 30, 2015. The purpose of the Streamlined Procedure is to provide the parties with notice and an opportunity to be heard on the issues raised in the course of an inspection conducted by the Department's Asbestos Control Bureau ("the Bureau") and to establish a basis for the Hearing Officer to prepare this Report and Recommendation for the Commissioner of Labor without the necessity of proceeding to a full administrative hearing, thereby avoiding the attendant costs and time expenditures of such a hearing. This matter concerns the amount of penalties to be assessed as a result of violations found during an investigation conducted by the Bureau into an asbestos abatement project conducted by Respondent at 14178 Main Street, Prattsville, NY 122468.

Respondent, in its request to have this matter resolved pursuant to the Streamlined Procedure, has stated through Donald Tweedie, its President/Owner that, at its sole discretion, it has chosen to use the Streamlined Procedure and that, by doing so, it knowingly and voluntarily waives its right to a hearing pursuant to Labor Law § 909, and agrees to be bound by the decision rendered by the Commissioner of Labor ("Commissioner") at the conclusion of the process.

THE STREAMLINED PROCEDURE

The Department has established the Streamlined Procedure so that in certain cases in which the Bureau has issued Notices of Violation, Respondents may avoid the time and expense of an administrative hearing and resolve the issue of penalties by providing relevant information concerning such penalties directly to the Department Hearing Officer hearing the matter. Under the Streamlined Procedure, a contractor is notified by the Department's Counsel's Office or the Bureau that the Bureau has found it in violation of Labor Law article 30 ("the Asbestos Law") or regulations issued thereunder. In its notification, Counsel's Office or the Bureau identifies the violations in question and the penalties the Department would seek at an administrative hearing, and offers to settle the matter for less than that amount. The contractor is given the option of accepting the offer, requesting a full administrative hearing, or opting for the Streamlined Procedure. The contractor is notified that if it chooses the Streamlined Procedure, it waives all right to an administrative hearing and agrees to be bound by the decision of the Commissioner of Labor, which is rendered after a Hearing Officer reviews all of the materials submitted by the contractor and the Department and issues a Report and Recommendation.

The contractor is also notified of the statutory factors relevant to the assessment of a penalty as set forth in Labor Law § 909.1.b:

In assessing the amount of penalty, the commissioner shall give due consideration to the **size of the asbestos contractor's business, the good faith of the contractor, the gravity of the violation and the history of previous violations** by the asbestos contractor and/or any substantially owned-affiliated entity of such asbestos contractor. (emphasis added)

In short, the Streamlined Procedure is an opportunity for a contractor to contest the proposed settlement amount offered with the knowledge that the amount assessed by the

Commissioner might be less than that offer, but will in no event be greater than the amount it has been told the Department would have sought at an administrative hearing.

APPEARANCES

The Bureau's submission was made by Department Counsel, Pico Ben-Amotz (Matthew Robinson-Loffler, Senior Attorney, of Counsel).

The Respondent's submission was made by the Owner and President of Respondent, Donald Tweedie.

ISSUE

1. Should a civil penalty be assessed, and if so, based upon the statutory criteria set forth in the law and the submission of Respondent, in what amount?

NOTICES OF VIOLATION

By virtue of Respondent's use of the Streamlined Procedure, the following facts, including the violations as set forth by the Department, are uncontested:

On March 26, 2013, a Bureau inspector conducted an inspection of an asbestos project being conducted by Respondent at 14178 Main Street, Prattsville, NY 12468. During the course of the inspection, the inspector found the following violations of the applicable law and/or regulations:

1. 12 NYCRR § 56 – 8.3.a.2.v – Exit From the Work Area. All persons shall exit the regulated abatement work area through the personal decontamination system enclosure, or through an airlock when used with an approved remote decontamination unit. Showering. Still wearing respirators, persons shall proceed to the shower area, clean the outside of the respirator and the exposed face area under running water prior to removal of the respirator, and fully and vigorously shower and shampoo to remove residual asbestos contamination. Respirators shall be washed thoroughly with soap and water. Some types of respirators shall require slight modifications to these procedures. An airline respirator with a HEPA-filtered disconnect protection shall be disconnected in the equipment room and worn into the shower. A

powered air-purifying respirator facepiece shall be disconnected from the filter/power pack assembly prior to entering the shower.;

2. 12 NYCRR § 56 – 7.5.b.9 – Personal Decontamination System Enclosure - Large Project. Shower Room. The shower room shall contain one (1) shower per every six (6) full shift abatement workers, calculated on the basis of the largest work shift. Multiple showers shall be simultaneously accessible (installed in parallel) to certified personnel. Each showerhead shall be supplied with hot and cold water adjustable at the tap. The shower enclosure shall be constructed to ensure against leakage of any kind. Uncontaminated soap, shampoo and towels shall be available at all times. Shower water shall be drained, collected and filtered through a system with at least 5.0-micron particle size collection capability. Submersible pumps shall be installed, maintained and utilized in accordance with pertinent OSHA regulations and manufacturer's recommendations. A multi-stage filtering system containing a series of several filters with progressively smaller pore sizes shall be used to avoid rapid clogging of the filtering system by larger particles. Filtered wastewater shall be discharged in accordance with applicable codes. Contaminated filters shall be disposed of as asbestos-contaminated waste. ;
3. 12 NYCRR § 56 – 7.5.b.2 – Personal Decontamination System Enclosure - Large Project. Rooms and Configuration. The personal decontamination system enclosure shall consist of a clean room, a shower room and an equipment room connected in series but separated from each other by airlocks. There shall be a curtained doorway separation between the equipment room and the regulated abatement work area, and there shall be a lockable door to the outside. (See Figure 1 within this Section) Minimum dimensions for each airlock, shower room and equipment room shall be three (3) feet wide by six (6) feet in height, to allow for adequate access to and from the regulated abatement work area.
4. 12 NYCRR § 56 – 7.5.b.8 - Personal Decontamination System Enclosure - Large Project. Clean Room. The clean room shall be sized to accommodate a full workshift of asbestos abatement contractor personnel, as well as the air sampling

technician and the project monitor. The clean room shall be a minimum of six (6) feet in height. A minimum of thirty-two (32) square feet of floor space shall be provided for every six (6) full shift abatement workers, calculated on the basis of the largest work shift. If the largest work shift consists of three (3) or less full shift abatement workers, the minimum clean room size requirement is reduced to twenty-four (24) square feet of floor space. Benches, lockers and hooks shall be provided for street clothes. Shelves for storing respirators shall be provided. Clean clothing, replacement filters for respirators, towels and other necessary items shall be provided. The clean room shall not be used for storage of tools, equipment or materials. It shall not be used for office space. A lockable door shall be provided to permit access to the clean room from outside the regulated abatement work area or enclosure and shall be used to secure the regulated abatement work area and decontamination enclosure during non-work hours

5. 12 NYCRR § 56 – 8.3.a.2.iv - Exit From the Work Area. All persons shall exit the regulated abatement work area through the personal decontamination system enclosure, or through an airlock when used with an approved remote decontamination unit. Removal of Personal Protective Equipment. Persons shall proceed to the equipment room where coveralls, head covering, foot covering and gloves shall be removed. Disposable clothing shall be deposited into labeled containers for disposal. Reusable contaminated clothing, footwear, head covering and gloves shall be stored in the equipment room when not being used in the regulated abatement work area. Respirators shall not be removed during this process.
6. 12 NYCRR § 56 – 11.5.b.1 - Asbestos to Remain During Demolition. A building/structure may be demolished with asbestos material in place, as per the requirements of this Section, when the following condition is met:
Building/Structure is Condemned. A building or structure may be ruled structurally unsafe by a licensed Professional Engineer, Registered Architect, Building Inspector, Fire Inspector or other official of competent jurisdiction. The official shall attest to the condition of the building/structure in writing. A copy of

the condemnation letter shall be attached to the project notification mailed to the Department of Labor and a copy shall be posted at the work site.

7. 12 NYCRR § 56 – 3.2.a - Certification and Training Required. 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. Training for all types asbestos handling certificates shall meet all requirements established by the New York State Department of Health.

CIVIL PENALTY

Labor Law § 909 (1) (a) provides for the assessment of a civil penalty of up to \$2500.00 per violation of section 902 (Licensing and Certification); § 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.

DEPARTMENT'S POSITION

The Department has stated that if Respondent were to request an administrative hearing, it would seek \$10,875.00 in penalties. As six of the violations could receive a penalty of up to \$5000 and one could receive up to \$2500, this sum represents approximately one-third of the maximum possible penalties of \$32,500. The reductions that resulted in the amount of \$10,875.00 were initially made by the Bureau, consistent with the statutory factors described previously:

1. 12 NYCRR § 56 – 8.3.a.2.v – Exit From the Work Area: \$2500;
2. 12 NYCRR § 56 – 7.5.b.9 – Personal Decontamination System Enclosure - Large Project. Shower Room: \$2500;

3. 12 NYCRR § 56 – 7.5.b.2 – Personal Decontamination System Enclosure - Large Project. Rooms and Configuration: \$500;
4. 12 NYCRR § 56 – 7.5.b.8 - Personal Decontamination System Enclosure - Large Project. Clean Room: \$1750;
5. 12 NYCRR § 56 – 8.3.a.2.iv - Exit From the Work Area: \$2250;¹
6. 12 NYCRR § 56 – 11.5.b.1 - Asbestos to Remain During Demolition: \$500;
7. 12 NYCRR § 56 – 3.2.a - Certification and Training Required: \$875.

In its letter-offer, the Department offered a further 40% reduction in penalties, resulting in a total amount of \$6,525.00.

RESPONDENT’S POSITION

Respondent submitted documentation, including a letter and photographs, in which it requested a reduction of the penalties to \$500.00 . Respondent addressed the issues as follows:

1. 12 NYCRR § 56 – 8.3.a.2.v – Exit From the Work Area: “Guilty”;
2. 12 NYCRR § 56 – 7.5.b.9 – Personal Decontamination System Enclosure - Large Project. Shower Room: “A car drove over the hose causing one of the fittings to break, that went to the shower. I thought it was important, in that circumstance, to keep the debris wet. I am now better prepared with different fittings, hoses, and spares”;
3. 12 NYCRR § 56 – 7.5.b.2 – Personal Decontamination System Enclosure - Large Project. Rooms and Configuration: “There was an airlock (curtain) at the end of the equipment room but it was a tripping hazard when it got wet. This is a portable decon trailer it is outside – not like a structure that would be built inside on abatement project. I have since put the curtain back up.”;
4. 12 NYCRR § 56 – 7.5.b.8 - Personal Decontamination System Enclosure - Large Project. Clean Room: “Guilty. The roles of poly were neatly piled that was my bench”;
5. 12 NYCRR § 56 – 8.3.a.2.iv - Exit From the Work Area: “Guilty”;

¹ Although the Bureau lists a violation of 12 NYCRR 8.3.a.2.iv (Exit from Work Area) in its Notice of Violation and Order to Comply dated February 28, 2013, it lists in its penalty calculation sheet a violation of 12 NYCRR 8.3.a.1.iv (Entry to Work Area), but labels it “removal of PPE.” For purposes of this Report and Recommendation I have deemed such inconsistency to be a matter of clerical error, and accept the penalty calculations as having been prepared for 12 NYCRR 8.3.a.2.iv.

6. 12 NYCRR § 56 – 11.5.b.1 - Asbestos to Remain During Demolition: “I did not realize that it also had to be posted on site. I now have it stapled to the door of the decon trailer”;
7. 12 NYCRR § 56 – 3.2.a - Certification and Training Required: “there was an employee standing on the sidewalk using the water hose. He was outside the regulated area (hat zone). It was my understanding you only had to be certified inside the hat zone.”

DISCUSSION

As set forth above, under the statutory scheme, the commissioner shall give due consideration to four factors when assessing penalties:

- Size of Respondent’s business. By all indications, Respondent’s business is small. This was recognized by the Bureau in its initial reductions and by the Department in its further reductions in the letter-offer.
- Respondent’s Good faith. There was no indication that Respondent acted in bad faith. Statements made by the Respondent in its submission indicate a lack of familiarity with some of the basic asbestos abatement project rules, but no intent to deliberately avoid those rules; reductions again reflect this.
- Gravity (seriousness) of the violation (s). There were also reductions made for this factor, smaller in size because of the serious nature of asbestos remediation in general and the specific sections violated.
- Respondent’s history of previous violations. There were no reductions made by the Bureau; this may be because this Respondent has had previous involvement in Bureau investigations. However, other than the fact that the Bureau form states “This contractor has past history with ACB” there is no evidence concerning the nature of the past history Respondent had with the Bureau.

Respondent has violated seven sections of 12 NYCRR part 56. Respondent is a small contractor, with less than thorough knowledge of the law and regulations. The sections violated involve several in which contamination of the public could occur and thus are serious in nature. There is no evidence that Respondent has a history of violations prior to this matter, only that

Respondent has a “past history.” This term is unfortunately vague, as it could mean almost anything from a prior argument with an inspector about a minor issue to multiple abatement projects all of which contained numerous and significant violations of the law and regulations. In light of the undefined nature of the term “past history,” I find it reasonable to further reduce the penalties originally assessed by the Bureau by an additional twenty per cent, which results in penalties of \$5375.00 as shown below:

1. 12 NYCRR § 56 – 8.3.a.2.v – Exit From the Work Area: \$1500;
2. 12 NYCRR § 56 – 7.5.b.9 – Personal Decontamination System Enclosure - Large Project. Shower Room: \$1500;
3. 12 NYCRR § 56 – 7.5.b.2 – Personal Decontamination System Enclosure - Large Project. Rooms and Configuration: \$0;
4. 12 NYCRR § 56 – 7.5.b.8 - Personal Decontamination System Enclosure - Large Project. Clean Room: \$750;
5. 12 NYCRR § 56 – 8.3.a.2.iv - Exit From the Work Area: \$1250;
6. 12 NYCRR § 56 – 11.5.b.1 - Asbestos to Remain During Demolition: \$0;
7. 12 NYCRR § 56 – 3.2.a - Certification and Training Required: \$375.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt these recommendations as the Commissioner’s determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE AND ORDER that the penalties for the violations found by the Department shall be as follows:

1. 12 NYCRR § 56 – 8.3.a.2.v – Exit From the Work Area: \$1500;
2. 12 NYCRR § 56 – 7.5.b.9 – Personal Decontamination System Enclosure - Large Project. Shower Room: \$1500;
3. 12 NYCRR § 56 – 7.5.b.2 – Personal Decontamination System Enclosure - Large Project. Rooms and Configuration: \$0;

4. 12 NYCRR § 56 – 7.5.b.8 - Personal Decontamination System Enclosure - Large Project. Clean Room: \$750;
5. 12 NYCRR § 56 – 8.3.a.2.iv - Exit From the Work Area: \$1250;
6. 12 NYCRR § 56 – 11.5.b.1 - Asbestos to Remain During Demolition: \$0;
7. 12 NYCRR § 56 – 3.2.a - Certification and Training Required: \$375;

For a total penalty amount of \$5,375.00.

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 (\$5375.00), made payable to the Commissioner of Labor.

Dated: May 14, 2015
Albany, New York

Respectfully submitted,

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

Jerome Tracy, Hearing Officer