

STATE OF NEW YORK DEPARTMENT OF LABOR

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In the Matter of

WINDSOR ENVIRONMENTAL CORP.,

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.

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REPORT
&
RECOMMENDATION

File No. AH-SAP-19-008

Resolution Case No. 80027907

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 3/2/2021 via videoconference in several locations. 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 Windsor Environmental Corp. (“Respondent”) complied with the requirements of Labor Law article 30 (§§900 *et seq.*) or 12 NYCRR part 56 when Respondent undertook three asbestos abatement projects at 18 Elm Street, Pleasantville, NY 10570, Inspection Case No. 26414024 (“Pleasantville Project”); 46 Andover Road, Rockville Center, NY 11570, Inspection Case No. 16450214 (“Rockville Center Project”); and 1782 Route 106, Muttontown, NY 11791, Inspection Case No. 26476476 (“Muttontown Project”).

APPEARANCES

The Bureau was represented by Department Acting Counsel, Jill Archambault, (Evan Zablow, Attorney, of Counsel).

The Respondent appeared *pro se*.

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

FINDINGS AND CONCLUSIONS

On December 4, 2020, the Department duly served copies of the Notice of Hearing on Respondent by first class mail and by certified mail (HO Ex. 2). The record does not indicate that either the certified mailing or the first class mailing were returned as undeliverable. The Notice of Hearing scheduled a January 25 and 26, 2021 hearing and required that the Respondent serve an Answer at least 14 days in advance of the scheduled hearing. The hearing date was subsequently adjourned to March 1, 2 and 3, 2021 at the request of the Respondent (HO Ex. 3).

Respondent failed to serve an answer the charges contained in the Notice of Hearing. However, Respondent did appear at the hearing pro se by David Friedman and Joseph Stein, both of whom indicated that they were representing the Respondent (Tr. 4). During the hearing, Respondent's Representatives objected to the receipt of only one of the Department's exhibits, did not cross-examine any of the Department's witnesses, and did not offer any exhibits or testimony in support of a defense to the proof offered by the Department. The Opening Statement, Closing Argument, and Post-Hearing Submission offered by Mr. Friedman indicate that the Respondent's principal objection is that the civil penalties assessed by the Department are excessive considering the size of Respondent's business and the lack of a history of prior violations.

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

VIOLATIONS

I find that the Respondent has violated multiple requirements of the 12 NYCRR part 56, in the performance of the following for the three projects:

Pleasantville Project 18 Elm Street, Pleasantville, NY 10570, Inspection Case No. 26414024

12 NYCRR 56-3.4 (b) (2) (VII) requires an asbestos abatement contractor submit a Notification to the Department ten days before starting a large asbestos project (Tr. 29). The Notification must contain certain information about the planned asbestos project, including, but not limited to, the start and end date of the planned asbestos project and the amount of asbestos to be abated (12 NYCRR 56-3.4 [b] [2] [VII]; Tr. 17). On March 14, 2019, Windsor submitted a Notification to the Department indicating that Windsor would start the Pleasantville Project on March 25, 2019 (Dept. Exs. 2, 5). Windsor had started the Pleasantville Project on March 18, 2019 (Dept. Exs. 1, 3, 4; Tr. 30).

Rockville Center Project 46 Andover Street, Rockville Center, NY 11570, Inspection Case No. 26430214

12 NYCRR 56-3.4 (a) (4) requires a party to surrender certain records to the Commissioner or her duly authorized representative upon written request (Tr.58). Such records include, but are not limited to, the project logbook (12 NYCRR 56-3.4 [a] [1] [xii]). By letter dated May 10, 2017, Senior Industrial Hygienist Stacy Portnoy requested Windsor surrender, in part, the project logbook for the Rockville Center Project (Dept. Exs. 14, 7; Tr. 52-55). Windsor never provided any documents for the Rockville Center Project (Tr. 55, 58).

12 NYCRR 56-9.1 (d) requires an asbestos abatement contractor supervisor complete a satisfactory visual inspection for completeness of abatement and cleaning—that is, confirm that

no visible ACM, asbestos debris, or residue remains (Tr. 58-59). By letter dated April 30, 2019, Windsor cleared the project asserting that “[t]he asbestos removal work area and the surrounding area are free from any visible asbestos residue” On May 2, 2019, a contamination assessment was performed, which indicated that asbestos remained at the work area. On May 3, 2019, Senior Industrial Hygienist Portnoy observed ACM, asbestos debris, and asbestos residue (Dept. Exs. 7, 8, 13; Tr. 35-38, 50-52, 59).

12 NYCRR 56-4.3 requires the air sampling contractor be contracted by the property owner or owner’s agent and be “completely independent of all asbestos abatement contractors involved with the asbestos project . . .” (Tr. 60). Windsor hired Env Air Pro Inc. to perform air sampling at the Rockville Center Project (Dept. Exs. 7, 11).

Muttontown Project
1782 Route 106, Muttontown, NY 11791, Inspection Case No. 25476476

12 NYCRR 56-7.11 (b) requires contractors construct an isolation barrier before abating asbestos (*see* 12 NYCRR 56-7.11 [b] [1]-[4]). When constructed properly, the isolation barrier prevents asbestos that may be released during abatement from contaminating the work site or surrounding area (Tr. 81).

12 NYCRR 56-7.11 (b) (1) requires the contractor construct isolation barrier partitions in all openings larger than thirty-two square feet. This framing provides structural integrity to the other components of the isolation barrier. On October 24, 2019, Windsor merely erected short posts. The posts were too short to rise to the height that Windsor removed and was planning on removing stucco (Dept. Exs. 19A, 20; T r. 76-77, 81-83).

12 NYCRR 56-7.11 (b) (2) requires the contractor to fasten plywood or OSB sheathing material of at least 3/8-inch thickness to the regulated work area side of the barrier partition. On

October 24, 2019, Windsor failed to fasten any plywood or OSB sheathing (Dept. Exs.19A , 20; Tr. 76-77, 83).

12 NYCRR 56-7.11 (b) (3) requires the edges of the isolation barrier to be sealed at the floor, ceiling, walls, and fixtures using caulk, fire-retardant expandable foam, or duct tape to form an airtight seal. On October 24, 2019, Windsor failed to construct the required framing and sheathing to properly seal the isolation barrier (Dept. Ex. 19A , 20; Tr. 76-77, 83-84).

12 NYCRR 56-7.5 (b) (1) requires the contractor construct a personal decontamination system enclosure “attached to all locations where personnel shall enter or exit the regulated abatement work area.” On October 24, 2019, Windsor failed to attach its personal decontamination system enclosure to the regulated abatement work area. Instead, Windsor constructed a personal decontamination system enclosure inside the house (Dept. Exs.19A, 20; Tr. 84-85).

12 NYCRR 56-7.5 (e) (1) requires that the contractor construct a waste decontamination system enclosure “attached to the regulated abatement work area.” On October 24, 2019, Windsor failed to attach its waste decontamination system enclosure to the regulated abatement work area. Instead, Windsor constructed a waste decontamination system enclosure inside the house (Dept. Exs. 19A, 20; Tr. 85-86).

12 NYCRR 56-7.8 (a) (3) requires contractor establish negative air pressure inside of the regulated abatement work area. On October 24, 2019, Windsor failed to establish negative air pressure (Dept. Exs.19A, 20; Tr. 86-87).

When a contractor cannot strictly comply with the Code Rule, the contractor must obtain a site-specific variance for alternative procedures (Labor Law § 30 [1]). When a contractor will complete an asbestos project using alternative procedures defined within a site-specific variance, 12 NYCRR 56-11.2 (e) requires the contractor to obtain the approved variance decision prior to

proceeding with the project (Tr. 104-105). On October 29, 2019, Senior Industrial Hygienist Portnoy observed that much of the stucco had been removed since her last site visit (Dept. Ex. 19; Tr. 91). Windsor's representative told Ms. Portnoy that the missing stucco had delaminated onto the ground and that Windsor cleaned up that material (Dept. Ex. 19A; Tr. 97-98). A site-specific variance detailing the procedures that must be followed was required before Windsor could clean up the material because there was no containment on the floor and the material was on the bare ground (*Id.*; Tr. 104-105). Windsor did not obtain a site-specific variance before engaging in that cleanup (Dept. Ex. 19A, 24; Tr. 97-98, 104-105, 109-110).

On October 24, 2019, Senior Industrial Hygienist Portnoy educated Windsor about the requirements of 12 NYCRR 56-7.11 (b) (2) (Dept. Ex. 19A; Tr. 87-88, 106). On October 29, 2019, Windsor failed to install sheathing to form a complete enclosure including ceiling or side walls before continuing the abatement (Dept. Ex. 19A, 24; Tr. 106).

On October 24, 2019, Senior Industrial Hygienist Portnoy educated Windsor about the requirements of 12 NYCRR 56-7.11 (b) (3) (Dept. Ex. 19A; Tr. 87-88). On October 29, 2019, Windsor failed to seal the edges of an isolation barrier to create an airtight seal before continuing the abatement (Dept. Exs. 19A, 24; Tr. 106-07).

12 NYCRR 56-7.11 (e) requires, in part, all floor, wall, and ceiling surfaces in the regulated abatement work area enclosure be covered with two layers of at least six mil fire-retardant plastic sheeting (*see also* T p 107). On October 29, 2019, Windsor failed to cover the floor in any sheeting before removing stucco from the house (Dept. Exs. 19A, 24; Tr. 107). Also, Windsor failed to construct any side walls or ceiling and therefore failed to cover those surfaces with sheeting before removing stucco from the house (Dept. Exs. 19A, 24; Tr. 107).

On October 24, 2019, Senior Industrial Hygienist Portnoy educated Windsor about the requirements of 12 NYCRR 56-7.5 (b) (1) (Dept. Ex. 19A; Tr. 87-88). On October 29, 2019, Windsor failed to construct a personal decontamination system enclosure that was attached to the regulated abatement work area before continuing the abatement (Dept. Exs. 19A, 24; Tr. 108).

On October 24, 2019, Senior Industrial Hygienist Portnoy educated Windsor about the requirements of 12 NYCRR 56-7.5 (e) (1) (Dept. Ex. 19A; Tr. 87-88). On October 29, 2019, Windsor failed to construct a waste decontamination system enclosure that was attached to the regulated abatement work area before continuing the abatement (Dept. Exs. 19A, 24; Tr. 108).

On October 24, 2019, Senior Industrial Hygienist Portnoy educated Windsor about the requirements of 12 NYCRR 56-7.8 (a) (3) (Dept. Ex. 19A; Tr. 87-88). On October 29, 2019, Windsor failed to establish negative air pressure before continuing the abatement (Dept. Exs. 19A, 24; Tr. 109).

CIVIL PENALTIES

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.

Substantial evidence supports the civil penalty assessment performed by the Bureau (DOL 1-25; T pp 115-27). The Department presented evidence of the standardized policy by which the Bureau calculates civil penalties and that the standardized policy was followed in this case.

The Bureau considered Windsor a small business with no history of violations. However, Windsor's lack of good faith is evidenced by its Pleasantville Project notification, refusal to surrender records, and unwillingness or inability to refrain from committing repeated work practice violations. Furthermore, the gravity of Windsor's violations is evidenced by the health and safety risks it created for the public, including the homeowner of the Rockville Center Project, and its employees. (Dept. Ex. 25; Tr. 115-27). Additionally, the Muttontown Project, presents further examples of Windsor's lack of good faith and the gravity of its violations when Windsor failed to construct a containment enclosure for a friable asbestos removal as instructed by the investigator and continued removing asbestos material, leaving asbestos material on the bare ground and surrounding areas.

The violations at issue carry a total maximum civil penalty of \$85,000.00 (Labor Law § 909 [1] [b]; Dept. Ex 25; Tr. 119-20). After considering the size of Windsor's business, the good faith of Windsor, the gravity of the violation, and the history of previous violations by Windsor, pursuant to the standardized policy the Bureau calculated a total civil penalty of \$53,500.00 for the violations at issue (Dept. Ex. 25; Tr. 122-27).

For the foregoing reasons, the findings, conclusions, and determinations of the Department relative to violations and Civil Penalty should be sustained.

RECOMMENDATIONS

Based upon the Respondent's failure to answer and contest 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:

Pleasantville Project

DETERMINE that Respondent committed one violation of 12 NYCRR part 56 as follows:

12 NYCRR 56-3.4.B.2.VII-Notification.

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the Department's requested civil penalty of \$2,000.00 for the Code Rule violations, for a total amount of \$2,000.00.

Rockville Center Project

DETERMINE that Respondent committed three violations of 12 NYCRR part 56 as follows:

12 NYCRR 56-3.4.A.4-Surrender of Records.

12 NYCRR 56-9.1.D-Final Cleaning Procedures-Third and Final Cleaning and Visual Inspection.

12 NYCRR 56-4.3-Independent Third-Party Sampling and Analysis

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the Department's requested civil penalty of \$2,000.00 for each of the Code Rule violations, for a total amount of \$6,000.00.

Muttontown Project

DETERMINE that Respondent committed thirteen violations of 12 NYCRR part 56 as follows:

12 NYCRR 56-7.11.B.1-Regulated Abatement Work Area Enclosure-Isolation Barriers-Framing.

12 NYCRR 56-11.B.2-Regulated Abatement Work Area Enclosures-Isolation Barriers-Sheathing.

12 NYCRR 56-11.B.3-Regulated Abatement Work Area Enclosures-Isolation Barriers-Sealing and Isolation Barriers.

12 NYCRR 56-7.5.B.1-Personal Decontamination System Enclosure-Large Project.

12 NYCRR 56-7.5.E.1-Waste Decontamination System Enclosure-Large and Small Projects-Enclosures-General.

12 NYCRR 56-7.8.A.3-Engineering Controls-Negative Air Pressure Equipment-Negative Air Pressure.

12 NYCRR 56-11.2.E-Approved Emergency Project.

12 NYCRR 56-11.B.2-Regulated Abatement Work Area Enclosure-Isolation Barriers-Sheathing.

12 NYCRR 56-11.B.3-Regulated Abatement Work Area Enclosure-Isolation Barriers-Sealing and Isolation Barriers.

12 NYCRR 56-11.E-Regulated Abatement Work Area Enclosure-Floor, Wall and Ceiling Plasticizing and Sealing.

12 NYCRR 56-7.5.B.1-Personal Decontamination System Enclosure-Large Project.

12 NYCRR 56-7.5.E.1-Waste Decontamination System Enclosure-Large and Small Projects-Enclosures-General.

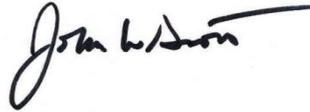
12 NYCRR 56-7.8.A.3-Engineering Controls-Negative Air Pressure Equipment-Negative Air Pressure.

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the Department's requested civil penalty of \$3,500.00 for each of the Code Rule violations, for a total amount of \$45,500.00.

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 amount due (\$53,500) on all the Projects, made payable to the Commissioner of Labor.

Dated: 1/12/2022
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Scott", written in a cursive style.

John Scott, Hearing Officer