

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

THE JOHN GALT CORPORATION

Contractor – Respondent

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

**REPORT
&
RECOMMENDATION**

Asbestos Case Nos.
18668

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on November 18, 2009, in New York, 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 The John Galt Corp., incorrectly named herein as “The John Galt Corporation” (“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 located at 130 Liberty Street, New York, New York.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Jeffrey G. Shapiro, Associate Attorney, of Counsel).

The Respondent, by and through its Corporate Counsel, Thomas J. Byrne, Esq., filed an Answer and an Amended Answer (Hearing Officer Exs. 3, 3A) to the charges incorporated in the Notice of Hearing (Hearing Officer Ex. 1) and appeared at the hearing.

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?

HEARING OFFICER

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

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau of a project involving asbestos abatement work performed by the Respondent at 130 Liberty Street, New York, New York (Asbestos Case No. 18668).

The Department received a Project Notification for the 130 Liberty Street Project (Dept. Ex. 1) indicating that the Respondent was the asbestos abatement contractor (T. 11, 12). The Project Notification also indicated that the Project was proceeding in accordance with a Variance (Dept. Ex. 2) issued by the Department.

On September 20, 2006, Senior Safety and Health Inspector Eric Lutzker visited the Project site and inspected the abatement work being performed on the 32nd, 33rd, and 34th floors (Dept. Ex. 3; T. 14). During this visit, Mr. Lutzker observed the Respondent's employees performing preparatory work that included installation of plastic barriers and plasticizing of electrical conduit on the 33rd floor. Mr. Lutzker found metal objects piled on all three of the floors he inspected, and the asbestos handlers were spraying water with high powered garden hoses. Water from the 33rd floor was observed to be dripping through the ceiling decks onto the floors below. In the areas where the workers were spraying water, Mr. Lutzker found that the energized components were not completely plasticized (Dept. Ex. 3; T. 15, 16). Mr. Lutzker testified that, pursuant to the Variance, it was permissible to have energized components in the abatement work area to supply electricity throughout the abatement floors as long as appropriate steps were taken to prevent these energized components from coming into contact with water (T. 46). Mr. Lutzker further testified that it was a violation of Code Rule 56-8.1.c for the Respondent to have sprayed water in the asbestos abatement work area before the protection/plasticization of

the energized components had been completed (Notice of Violation and Order to Comply dated September 28, 2006 attached to Hearing Officer Ex. 1).

Mr. Lutzker returned to the Project on July 3, 2007 and inspected the abatement work being performed on the 16th and 17th floors. Mr. Lutzker testified that he observed one of the Respondent's asbestos abatement workers within the asbestos abatement work area on the 17th floor cutting a pipe with an electrical circular saw that was not equipped with HEPA filtration (Dept. Ex. 4; T. 19, 49). Mr. Lutzker testified that cutting the metal pipe in an asbestos contaminated and World Trade Center ("WTC") contaminated work area with a power tool that was not equipped with HEPA filtration was a violation of Code Rule 56-7.2.o and the Variance. Mr. Lutzker testified that this was a violation because the activity occurred in the asbestos abatement work area and the pipe may have had asbestos or other WTC dust on it (Dept. Ex. 4; T. 20, 50; Notice of Violation and Order to Comply dated July 3, 2007 attached to Hearing Officer Ex. 1).

On July 3, 2007 Mr. Lutzker also observed an open door to an electrical cabinet on the 16th floor, which was supposed to have been sealed for the purpose of protecting the transformer and circuit boxes that were inside from water that was being sprayed throughout the asbestos abatement work area (Dept. Ex. 4; T. 20, 62, 65; Notice of Violation and Order to Comply dated July 3, 2007 attached to Hearing Officer Ex. 1). Mr. Lutzker testified that the open door to the electrical cabinet was a violation of Code Rule 56-7.7 because the full protection of the electrical components from the water that was being sprayed throughout the overall work area was compromised by the open and unsealed door (T. 64; Notice of Violation and Order to Comply dated July 3, 2007 attached to Hearing Officer Ex. 1).

Mr. Lutzker issued two Notices of Violation and Orders to Comply, which contained a total of three Code Rule violations (Hearing Officer Ex 1):

- 12 NYCRR 56-7.2.o ----- Ventilation of Power Tools
- 12 NYCRR 56-7.7 (a)(1) ----- Electric Power Shutdown Exemption
- 12 NYCRR 56-8.1 (c) ----- Electric Power

CONCLUSIONS OF LAW

Code Rule 56-7.2.o, in part, requires that “Power tools used to drill, cut, or otherwise disturb asbestos material in regulated abatement work areas, shall be manufacturer equipped with HEPA-filtered local exhaust ventilation.” Mr. Lutzker testified that he observed a worker using a power saw that was not equipped with a HEPA filter to cut a metal pipe in the asbestos abatement work area. Although this was a bare pipe that was not asbestos or fiberglass insulated (T. 57), the pipe was in an area with asbestos and other toxic WTC dust, and should have been handled in a manner that would have prevented any dust from becoming airborne (T.60). The Respondent’s attorney implied through cross-examination that the Respondent’s employees wiped down the pipe before it was cut with the power circular saw and, therefore, a HEPA filter was not required. The record contains no evidence to support this conclusion. Because cutting the pipe with the power circular saw could have disturbed asbestos material in a regulated work area and the saw was not equipped with a HEPA filter, the violation of Code Rule 56-7.2.o should be sustained.

Code Rule 56-7.7.a.1, in part, requires that “All unprotected cables (except low-voltage [less than 24 volts] communication and control system cables), panel boxes of cables and joints in live conduit that run through regulated abatement work area shall be covered with three (3) independent layers of six (6) mil fire retardant polyethylene. Each layer shall be individually duct taped and sealed. All three (3) layers of polyethylene sheeting shall be left in place until satisfactory clearance air sampling results have been obtained.” Mr. Lutzker testified that the energized electrical closet on the 16th floor was properly plasticized, but the door to the closet was left open and unsealed (T. 61, 62).

Code Rule 56-8.1.c requires that the abatement contractor “[s]hut down and lock out electric power to all work areas. The contractor shall provide temporary power and lighting and ensure safe installation of temporary power sources and equipment used where high humidity and/or water shall be sprayed in accordance with all applicable codes.” Mr. Lutzker testified that the Respondent’s employees were spraying water on the 32nd, 33rd, and 34th floors of the

regulated abatement work area before the energized electrical circuit panels were fully plasticized (T. 15, 16, 17).

The Respondent's attorney argued that there were no violations relating to the use of water in the vicinity of unprotected energized electrical components. The Respondent argued in the context of cross-examination that, while the Variance (Dept. Ex. 2) required the use of wet methods for asbestos abatement, the applicable OSHA regulation, 29 CFR 1926.1101(g)(1)(ii), [Resp. Ex. C] allowed the employer to determine whether the use of wet methods of asbestos abatement was feasible. The Respondent's attorney argued that the Respondent must have made a determination of feasibility, since the Respondent allowed its employees to spray water in the vicinity of unplasticized energized electrical circuit panels.

I find the Respondent's argument unpersuasive. Assuming for the sake of argument that the OSHA regulations, which are intended to protect employees as opposed to the Code Rule's purpose and intent of reducing the risks to the public associated with exposure to asbestos (See, Code Rule 56-1.2.b) are controlling, the Respondent failed to produce any testimony or evidence supporting the argument that any determination was made by the Respondent as to the feasibility of using wet methods of asbestos abatement under the circumstances present at the time of the September 20, 2006 inspection. Additionally, the Respondent produced no evidence to support a finding that the abatement activities that were observed by Mr. Lutzker during his inspections, specifically including the use of water in the vicinity of unprotected live electrical components, were not a violation of the Code Rule sections and the Variance as cited in the Notices of Violation.

The record supports a finding that the door to the energized electrical closet on the 16th floor was not sealed as required to prevent water from entering the closet where the actual live transformer was located. Therefore, this live electrical system passing through the regulated abatement work area was not covered and sealed as required by the applicable Code Rule. Additionally, it is undisputed that the Respondent's employees were spraying water on the 32nd, 33rd, and 34th floors of the regulated abatement work area before the energized electrical circuit panels were fully plasticized. Based upon the credible testimony produced by the Department, the violations of Code Rule Sections 56-7.7.a.1 and 56-8.1.c should be sustained.

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.

The Department did not produce any evidence of the size of the Respondent's business, the Respondent's good faith, the gravity of the violation or the Respondent's history of previous violations. However, these violations involved the use of water in the presence of unprotected energized electrical components, and performing a cutting activity that is known to make asbestos or other WTC toxic dust air borne. While the case involves a relatively small number of violations, I deem all three violations to be of a serious nature. The abatement activities that resulted in the violations potentially exposed the public to air borne carcinogens, and subjected the Respondent's employees to the risk of electrocution. Under these circumstances, a civil penalty in the amount of \$5,000.00 per violation is appropriate and supported by the credible evidence in the case, for a total civil penalty of \$15,000.00 on the Project.

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:

DFETERMINE, that the Respondent violated three (3) Code Rules in regards to the Project as follows:

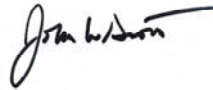
- 12 NYCRR 56-7.2.o ----- Ventilation of Power Tools
- 12 NYCRR 56-7.7 (a)(1) ----- Electric Power Shutdown Exemption
- 12 NYCRR 56-8.1 (c) ----- Electric Power

ORDER, that a civil penalty of \$15,000.00 be imposed and assessed;

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 (\$15,000.00) on the Project, made payable to the Commissioner of Labor.

Dated: May 25, 2010
Albany, New York

Respectfully submitted,

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

John W. Scott, Hearing Officer