

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

JOHN DENNISON and JIM EASTMAN
Respondents

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

**REPORT
&
RECOMMENDATION**

Asbestos Case No.
25811495

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 September 16, 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 John Dennison and Jim Eastman ("Respondents") complied with the requirements of Article 30 of the Labor Law (§§900 *et seq.*) or 12 NYCRR part 56 when Respondents undertook an asbestos abatement project at the former "U and I Restaurant" located at Old Route 4, Whitehall, New York ("Project").

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, Stephen Pepe, Senior Attorney, of Counsel.

Respondent John Dennison appeared *pro se* and on behalf of Respondent Jim Eastman.

Respondents filed Answers to the charges incorporated in the Notice of Hearing.

ISSUES

1. Was Jim Eastman the prime contractor on the Project?
2. Was John Dennison the subcontractor on the Project?
3. Did Respondents violate any of the provisions of Labor Law article 30 or of 12 NYCRR part 56 in the performance of an asbestos project?
4. Should a civil penalty be assessed, and if so, in what amount?

FINDINGS OF FACT

On September 30, 2010, the Bureau received a complaint concerning the Project (DOL 1; T. 13).

The complaint alleged that the Project involved the demolition of a structure for which an asbestos survey had not been conducted (DOL 1).

On October 1, 2010, a Bureau inspector conducted an inspection of the Project (DOL 2; T. 14).

There was no one present at the Project when the inspector arrived (T. 23).

When he arrived at the Project, the inspector found a partially demolished building and a backhoe on site (T. 15). There was a plywood sign with the name John Dennison and a telephone number painted on it (T. 15). The inspector called the number on the plywood sign and left a message for Mr. Dennison (DOL 2).

The inspector took photographs of materials at the Project site (DOL 12; T. 15, 18-20). While on the Project site the inspector observed plaster, sheet rock, window glaze, and joint compound, all of which the inspector identified as materials suspected or presumed to contain asbestos (T. 16). The inspector took samples of material at the Project site; four of the 14 samples taken by the inspector at the Project contained asbestos (DOL 3; T. 28, 29).

The inspector next went to the Whitehall Town Hall and obtained the name of the owner of the property that was the subject of the Project (DOL 2, T. 23).

Mr. Dennison returned the call from the inspector and the inspector informed Mr. Dennison that unless an asbestos survey of the Project had been conducted he could not continue work on the Project (T. 23). During the call Mr. Dennison stated that he was not a licensed asbestos contractor or a certified asbestos worker (T. 24).

On October 6, 2010, the inspector issued to Mr. Dennison a Notice of Violation and Order to Comply with the following violations:

- 12 NYCRR 56-3.1 (a), a contractor on an asbestos project must have an asbestos handling license, and
- 12 NYCRR 56-3.2 (a), no one may work on an asbestos project without an asbestos handling certificate (DOL 4).

The DOL inspector revisited the Project on October 12, 2010 and saw that the building on the site had been completely demolished and most of the waste removed (DOL 6; T. 32, 34).

At the time of his second visit to the Project, the inspector called Mr. Dennison and left a message telling him that he was not permitted to remove waste from the Project and that the Project site, including the dumpster on the site, had to be cleaned by a licensed asbestos contractor (DOL 6; T. 32, 33). The inspector also posted project suspension placards (DOL 6).

While at the Project on October 12, 2010, the DOL inspector took pictures of the site as well as samples of materials (DOL 6; T. 34). Of the 16 samples taken, five contained asbestos (DOL 7).

Also while on site, a waste hauler came to remove the dumpster that was filled with debris (T. 36). The inspector spoke with the waste hauler representative and told him that the dumpster could not be removed until the asbestos containing material had been decontaminated (T. 36). The waste hauler owner told the inspector that Mr. Dennison had called repeatedly, asking him to remove the dumpster (T. 36).

The inspector contacted Jim Eastman on October 12, 2010, after leaving a message for Mr. Dennison (T. 36). Mr. Eastman informed the inspector that he was the general contractor for the Project and that he had subcontracted the Project to Mr. Dennison, his stepson (T. 36). Mr. Eastman also stated that he had performed some of the demolition on the Project himself (DOL 6). The inspector told Mr. Eastman that the Project site was contaminated and could be worked on only by a licensed asbestos contractor (DOL 6; T. 38, 102).

The owner of the property on which the Project was conducted informed the DOL inspector that the property is zoned residential by the Town of Whitehall (DOL 6). Town of Whitehall documents confirmed that the property was zoned residential (DOL 8).

On October 14, 2010, Mr. Eastman called the Department inspector and, during the course of the call, informed him that he had removed a skid steer from the Project site in violation of the project suspension as set forth on the placards the inspector posted at the Project site (DOL 11). The inspector reminded Mr. Eastman that he had posted placards at the Project suspending all work there (T. 102).

On October 14, 2010, the inspector issued to Mr. Dennison a Notice of Violation and Order to Comply with the following violations:

- 12 NYCRR 56 - 3.1 (a), a contractor on an asbestos project must have an asbestos handling license, and
- 12 NYCRR 56-3.2 (a), no one may work on an asbestos project without an asbestos handling certificate, and
- 12 NYCRR 56 – 5.1 (a), failure of an owner’s agent to obtain an asbestos survey (DOL 9).

Also on October 14, 2010, the inspector issued to Mr. Eastman two Notices of Violation and Orders to Comply; the first contained the following violations:

- 12 NYCRR 56 - 3.1 (a), a contractor on an asbestos project must have an asbestos handling license, and
- 12 NYCRR 56-3.2 (b), failure of a worker to have a copy of an asbestos handling certificate on his person, and

- 12 NYCRR 56 – 5.1 (a), failure of an owner’s agent to obtain an asbestos survey (DOL 10).

The second Notice of Violation contained the following violation: Labor Law § 908, failure to comply with project suspension placards, specifically, removal of equipment after the posting of the placards (DOL 12).

On October 29, 2010, the inspector sent a letter to Jim Eastman requesting business records to support the contention of Mr. Eastman and Mr. Dennison that Mr. Dennison worked for or with Mr. Eastman and was not a subcontractor to Mr. Eastman (DOL 14; T. 108, 109). The inspector sent the letter via the United States Postal Service, certified mail, with a domestic return receipt; the return receipt was not signed and the letter was unclaimed by Mr. Eastman (DOL 14). The inspector received no records in response to the records request (T. 109).

On November 11, 2010, the inspector issued to Mr. Eastman a Notice of Violation and Order to Comply with the following violation: 12 NYCRR 56 – 3 (4) (A) (3), failure to produce records within 10 working days of the receipt of a written records request (DOL 16).

Mr. Dennison stated that he was not a subcontractor of Mr. Eastman (T. 123). He stated that he and Mr. Eastman were in a business relationship and that eventually Mr. Dennison would take over the company after paying Mr. Dennison for it (T. 131). Mr. Dennison signed most documents for the business and acted as a superintendent on jobs (T. 131). Mr. Dennison stated that he and Mr. Eastman were partners; he also stated that he and Mr. Eastman split the business’ profits but “on papers” Mr. Eastman was the owner of the business (T. 136). Mr. Dennison stated that he was an employee of Mr. Eastman’s business and was paid in cash (T. 138). The contract for the Project was hand written and signed by Mr. Dennison (T. 141).

The inspector had no knowledge of the size of Mr. Eastman’s business, the number of projects in which it is involved, or whether prior violations concerning asbestos projects had been issued to the business (T. 113).

CONCLUSIONS OF LAW

The Project involved the disturbance of asbestos containing material and was subject to the asbestos law and supporting regulations (Labor Law art 30; 12 NYCRR part 56).

The Department treated Mr. Eastman and Mr. Dennison as prime contractor and subcontractor on the Project. Because the Department viewed the two men as two separate businesses, it issued a total of ten violations to Mr. Eastman and Mr. Dennison. Three of the violations issued to Mr. Eastman – failure to conduct an asbestos survey, failure to have an asbestos handling license, and failure to have an asbestos handling certificate - are duplicates of violations issued to Mr. Dennison. However, if the underlying assumption that two separate business entities existed is incorrect, the issuance of multiple versions of the same violations to these two individuals is also incorrect.

The record does not contain a contract, a subcontract, a payroll – in short it does not contain any documents that bear upon the nature of the business or businesses that performed the Project. The record does contain contradictory testimony from Mr. Dennison regarding the nature of his and Mr. Eastman’s business relationship. However, Mr. Dennison did testify that his relationship with Mr. Eastman was not that of a subcontractor and prime contractor, and I find that testimony credible. Mr. Dennison also characterized his working relationship with Mr. Eastman variously as that of an employee and a partner. In light of the dearth of documentary support, in particular payrolls, for a finding of an employer – employee relationship, it is most reasonable to find that the relationship between the two men was a business partnership, and I recommend that the Respondents be treated as such. Because Respondents were a single business, it was incorrect for the Department to issue to Mr. Eastman copies of the same violations issued to Mr. Dennison, and I recommend that the Notice of Violation issued to Mr. Eastman dated October 14, 2010 and containing violations of 12 NYCRR 56 – 3.1 (a), 3.2 (a) and 5.1 (a) be dismissed.

The Department also issued to Mr. Eastman a Notice of Violation finding a single violation for the failure to supply records within 10 days of the receipt of a written request for records. The document in evidence shows only that a letter was mailed to Mr. Eastman and returned unclaimed. The Department produced no other documentary evidence to show that Mr. Eastman ever received the request for records, nor did the Department inspector testify to that effect. Accordingly, I recommend that the Notice of Violation issued to Mr. Eastman dated November 23, 2010 and containing a single violation of 12 NYCRR 56 – 3.4 (a) (1) be dismissed.

12 NYCRR 56-3.1 (a) states: “No asbestos contractor shall engage in an asbestos project unless such asbestos contractor has a valid asbestos-handling license issued by the Commissioner.” Neither Mr. Dennison nor Mr. Eastman possessed an asbestos handling license. The Department issued two Notices of Violation to Mr. Dennison for violations of this section: One immediately after the inspector’s initial visit and one after a subsequent visit during which the inspector found further work on the Project to have been performed. Insofar as no representative of the business that conducted the Project possessed an asbestos handling license, the violations should be sustained.

12 NYCRR 56-3.2 (a) states: “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...” Neither Mr. Eastman nor Mr. Dennison possessed an asbestos handling certificate. Again, the Department issued two Notices of Violation for violations of this section: One immediately after the inspector’s initial visit and one after a subsequent visit during which the inspector found further work on the Project to have been performed. No one from Respondents’ business who worked on the Project possessed an asbestos handling certificate, so these violations should be sustained.

12 NYCRR 56-5.1 (a) requires an owner or owner’s agent to have a licensed asbestos contractor conduct an asbestos survey prior to performing any work on a project. No such survey was conducted prior to the Project. The Department issued a Notice of Violation to Mr. Dennison for single violation of this section. No survey was conducted prior to work beginning on the Project, so this violation should be sustained.

Labor Law § 908 authorizes the Commissioner to enjoin work on an asbestos project if the Commissioner find that the project is not being conducted in accordance with the regulations promulgated pursuant to the asbestos law found at 12 NYCRR part 56. Mr. Eastman failed to comply with the suspension issued by the Department inspector. The Department issued a Notice of Violation to Mr. Eastman for a single violation of the law, which violation should be sustained.

Civil Penalty

Labor Law § 902 requires contractors that engage in asbestos contracts to have asbestos handling licenses and workers on such projects to have asbestos handling certificates. Labor Law § 909 (1) (a) provides for a civil penalty of up to \$2,500.00 for the initial violation of Labor Law § 902, and up to \$4,000.00 for the second or subsequent violation of such section. Such penalty assessments may be made by the Commissioner and are not subject to the hearing process (*North Shore Mgt. & Maintenance LLC v. New York State Dept. of Labor*, 2010 NY Slip Op 33233U [N.Y. Sup. Ct. Nov. 15, 2010]). In this case, the Department attorney requested the Hearing Officer to recommend the civil penalty for the license and certificate violations found. The record shows that neither Mr. Eastman nor Mr. Dennison had much, if any, familiarity with the law and regulations concerning asbestos projects when first contacted by the Department inspector. Their business was small, and they had no prior violations from the Department. Therefore, I find the penalty of \$1000 for each violation requested by the Department excessive, and instead recommend a penalty of \$200 each.

Once notified of the violations, however, Mr. Eastman and Mr. Dennison were obligated to comply with the law, which they did not do. Again taking into account the size and prior history of the business, I recommend a reduction of the Department's requested penalty from \$2000 each to \$1000 each for the second pair of license and certificate violations.

Labor Law § 909 provides for civil penalties for all violations of the law and regulations other than violations of Labor Law § 902. For a first violation, the maximum amount of a penalty is \$5000. Factors to be considered when assessing a penalty are the

size of the contractor, its good faith, the gravity of the violation, and the history of previous violations by the contractor (Labor Law S 909 [1] [b]). This contractor was small and had no history of violations. It did not cooperate well with the Department and consequently cannot be said to have shown much in the way of “good faith.” While any violation of the asbestos law must be viewed with concern, the gravity of the Respondents’ failure to comply with the work suspension order far outweighs their failure to obtain a survey before beginning the Project.

At the hearing, the Department attorney recognized the likelihood that Mr. Dennison could reasonably have been unsure of the zoning status of the Project, and thus of his obligation to obtain a survey, and recommended a penalty of \$1,500 for the failure to conduct an asbestos survey prior to demolition. Once again, given the factors set forth at the hearing, I find such penalty excessive, and recommend a penalty of \$250.

However, the remaining violation, issued because the Respondents ignored the work suspension order and completed the Project, cannot be considered minor. I find that ignoring a work suspension on an asbestos project – which creates the possibility of widespread asbestos contamination - must be considered a violation of significant gravity, and I recommend the Department’s proposed penalty in the amount of \$4000.

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:

DETERMINE that Respondents Jim Eastman and John Dennison constitute a single business entity and Respondent for purposes of this proceeding;

ORDER that the October 14, 2010 Notice of Violation issued to Mr. Eastman is dismissed;

DETERMINE that there is no evidence that Mr. Eastman received a request for records issued by the Department;

ORDER that the November 23, 2010 Notice of Violation issued to Mr. Eastman is dismissed;

DETERMINE that Respondent violated 12 NYCRR 56-3.1 (a) and 12 NYCRR 56-3.2 (a) as follows:

- 12 NYCRR 56-3.1 (a) for engaging in the asbestos Project without a valid asbestos handling license;
- 12 NYCRR 56-3.2 (a) for permitting uncertified employees to engage in work on the asbestos Project;

ORDER that Respondent be assessed a civil penalty of \$200.00 each for the first violations of 12 NYCRR 56-3.1 (a) and 12 NYCRR 56-3.2 (a), and \$1000 each for the second violations of 12 NYCRR 56-3.1 (a) and 12 NYCRR 56-3.2 (a), for a penalty of \$2400.00;

DETERMINE that Respondent violated 12 NYCRR 56-5.1 (a), which requires an owner or owner's agent to have a licensed asbestos contractor conduct an asbestos survey prior to performing any work on a project;

ORDER that Respondent be assessed a civil penalty of \$250.00 for the violation of 12 NYCRR 56-5.1 (a);

DETERMINE that Respondent violated Labor Law § 908, which authorizes the Commissioner of Labor to enjoin work on an asbestos project;

ORDER that Respondent be assessed a civil penalty of \$4000.00 for the violation of Labor Law §908; and

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 (\$6,650.00) made payable to the Commissioner of Labor.

Dated: November 22, 2011
Albany, New York

Respectfully submitted,



Jerome A. Tracy, Hearing Officer