

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

JAMESTOWN ENVIRONMENTAL, INC.

**REPORT
&
RECOMMENDATION**

Asbestos Case Nos.
25768378; 25769877

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

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on April 20, 2012 in Albany, New York and in Buffalo, New York via videoconference. 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 Jamestown Environmental, Inc. (“Respondent”) complied with the requirements of Labor Law article 30 (§§900 *et seq.*) or 12 NYCRR part 56 when Respondent undertook an asbestos abatement project at 458½ Allen Street, Jamestown, New York (“Allen Street Project”) and 2 Windsor Street, Jamestown, New York (“Windsor Street Project”).

APPEARANCES

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

The Respondent appeared *pro se*. The Respondent did not file an Answer to the charges incorporated in the Notice of Hearing.

The Department timely filed a post-hearing Civil Penalty Assessment recommendation
The Respondent failed to file a post-hearing submission

ISSUES

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?

Should a civil penalty be assessed, and if so, in what amount?

HEARING OFFICER SUBSTITUTION

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

FINDINGS OF FACT

General

The hearing concerned investigations made by the Bureau on two separate projects involving asbestos removal work performed by the Respondent. The first project (“Allen Street Project”) involved asbestos abatement at 458½ Allen Street, Jamestown, New York (Asbestos Case No. 25768378). The second project (“Windsor Street Project”) involved asbestos abatement at 2 Windsor Street, Jamestown, New York (Asbestos Case No. 25769877).

The Department’s Senior Industrial Hygienist, Edward Krasinski, testified that Respondent was a very small contractor in terms of the volume of the asbestos abatement projects undertaken (T. 67), and had no prior history of violations with the Department. (T. 69) Respondent is currently not a licensed asbestos contractor. (T. 45) Mr. Krasinski further testified that Respondent was cooperative in his response to the violations identified during the inspection up to the time that Respondent was removed from the projects by the City of Jamestown. (T. 68-69) Finally, the record reflects that Respondent paid non-refundable project notification fees of \$1,000.00 on the Allen Street Project and \$2,000.00 for the Winsor Street Project when it filed its project notifications with the Department. (Dept. Exs. 1, 9)

Allen Street Project

Respondent filed a project notification, together with the project notification fee of \$1,000.00 for this project that was received by the Department on March 8, 2010. (Dept. Ex. 1; T. 9) In the project notification Respondent described the project as involving 1 linear foot of friable asbestos containing material and 864.0 square feet of non-friable asbestos containing material. (Dept. Ex. 1) The project involved the removal of non-friable flooring and mastic. (Dept. Ex. 1; T. 26, 41) The project start date was March 15, 2010 and the project end date was March 31, 2010. (Dept. Ex. 1)

It is not in dispute that at the commencement of the project Respondent employed a remote personal decontamination system and a remote waste system, did not plasticize the abatement area, and did not employ negative air equipment, which was in full compliance with the applicable regulations for a non-friable removal project. (T. 41-42, 47, 53-55). Donald Deland, an individual identified as a supervisor for the Respondent (DOL Ex. 6), testified that this building was a demolition project and, when he could not remove the asbestos floor tile from the sub-floor, he cut the floor with a non-Hepa filtered circular saw (T.41) Mr. Krasinski and Mr. Deland both testified that once Respondent cut the flooring with a power saw, thereby rendering the non-friable asbestos containing material potentially friable, the project as constructed by Respondent violated the applicable provisions of 12 NYCRR part 56. (T. 26, 41)

The Bureau received a complaint that Respondent was using a power circular saw without water or containment to cut asbestos containing linoleum flooring (Dept. Ex. 2). Pursuant to this complaint, Mr. Krasinski inspected the Project on March 18, 2010. (DOL Ex. 3) During this inspection Mr. Krasinski determined that Respondent's means of removing the floor tile caused the project to be abatement of friable asbestos containing material and Respondent was not conducting the project in compliance with the applicable sections of 12 NYCRR part 56. (Dept. Exs. 3, 7, 8; T. 20) Based upon his inspection findings, Mr. Krasinski found Respondent in violation of the following sections of 12 NYCRR part 56:

12 NYCRR 56-11.7: Non-friable Flooring and/or Mastic Removal.

The following Phase II abatement procedures shall apply for removal of non-friable asbestos-containing flooring and/or mastic materials including cove base and associated mastic. **(Note - Full work area preparation, attached decontamination system enclosures,**

abatement and multiple cleanings per this Part are required for beadblaster use or other abrasive abatement method.)

Respondent used an abrasive saw cutting method on the asbestos containing linoleum without first fully preparing the work area and having an attached decontamination system enclosure. (Dept. Exs. 3, 8; T. 21-23)

12 NCCR 56-7.11.a: Regulated Abatement Work Area Enclosure – Critical Barriers:

Critical barriers shall be constructed to seal off all openings and penetrations to the regulated abatement work area including, but not limited to, operable windows and skylights, doorways and corridors (which shall not be used for passage), ducts, grills, diffusers, HVAC system seams, and any other penetrations to surfaces within the regulated abatement work area. Critical barriers shall be constructed using two (2) independent layers of at least six (6) mil fire-retardant plastic sheeting with each layer sealed separately with duct tape. Caulk and fire-retardant expandable foam may be used to seal small openings or penetrations. Doorways and corridors, which shall not be used for passage during the asbestos project, shall also be sealed.

Respondent performed the abatement activity with wide open unsealed windows and doors in the work area. (Dept. Exs. 3, 8; T. 22-23)

12 NYCRR 56-7.11.b.2: Regulated Abatement Work Area Enclosure - Isolation Barriers – Sheathing:

A plywood or oriented strand board (OSB) sheathing material of at least 3/8-inch thickness shall be fastened to the regulated abatement work area side of the barrier partition.

Respondent did not have sheathing over window openings (no glass and/or sashes). (Dept. Exs. 3, 8; T. 23)

12 NYCRR 56-7.11.b.4: Regulated Abatement Work Area Enclosure - Isolation Barriers - Plasticizing Isolation Barriers:

The regulated abatement work area side of the isolation barrier partition shall be covered with two (2) layers of, at a minimum, six (6) mil fire-retardant plastic sheeting with staggered joints and sealed airtight.

There were no ceiling or wall polyethylene isolation barriers. (Dept. Exs. 3, 8; T. 24)

12 NYCRR 56-7.5.e.1: Personal and Waste Decontamination System Enclosures - Waste Decontamination System Enclosure - Large and Small Asbestos Projects - Enclosure – General:

A waste decontamination system enclosure shall be provided outside the regulated abatement work area and shall be attached to the regulated abatement work area. One (1) waste decontamination enclosure for each regulated abatement work area shall be required. This system may utilize adequate existing lighting sources separate from the decontamination system enclosure, or shall be supplied with a GFCI protected temporary lighting system. The waste decontamination system enclosure shall be sized to accommodate the number of workers and equipment for the intended purpose. Such system may consist of existing attached rooms outside of the regulated abatement work area, if the layout is appropriate, that can be plasticized and are accessible from the regulated abatement work area. When this situation does not exist, enclosure systems may be constructed of metal, wood or plastic supports covered with fire-retardant plastic sheeting. A minimum of one (1) layer of six (6) mil fire-retardant plastic sheeting shall be installed on the ceiling, and walls of the enclosure system. At least two (2) layers of six (6) mil fire-retardant reinforced plastic sheeting shall be used for flooring protection of this area. This system must be kept clean, sanitary and climate controlled at all times in conformance to all federal, state and local government requirements. This system shall remain and be used until completion of Phase II C of the asbestos project.

The waste bags were brought out of the work area and there was no waste decontamination system enclosure constructed. (Dept. Exs. 3, 8; T. 24)

12 NYCRR 56-11.1.f: In-Plant Operations – Failure to Meet – In-Plant Operations – Criteria:

If, at any time prior to, during or subsequent to the asbestos project, conditions are such that any of the criteria of Subdivision (c) of this Section are not met, all anticipated, current and further work or activity on such project shall be conducted in accordance with all requirements of Part 56.

56-11.1.c: Limitations. The “in-plant operations” exception created in Section 901(12) of the Labor Law is limited in scope, as follows:

(5)For all of these purposes, in-plant operations are asbestos projects as defined in Section 56-2.1 of this Part (v)

(6)(v)(b) involves the encapsulation, enclosure, removal, disturbance, repair or handling of NOB asbestos materials. If the materials listed in this clause are involved and no asbestos material will be rendered friable during abatement, an employer may employ an outside asbestos abatement contractor (i.e., the work need not be performed by employees of such employer.)

Respondent cut asbestos containing linoleum flooring without the requirements of Part 56 as listed in the Notice of Violation. (Dept. Exs. 3, 8; T. 25-27)

12 NYCRR 56-11.1.c.6: In-Plant – Limitations:

- (1) There is a limited exemption from other Part 56 work practices where all of the following conditions are met:
 - (i) the project takes place within the premises of the nonpublic employer;
 - (ii) the project takes place in an area to which persons other than those directly involved in the work shall not have access during the course of the work;
 - (iii) the project is performed in a manner consistent with current OSHA regulations;
 - (iv) the project is performed in a manner which shall not expose the public to airborne fiber concentrations exceeding background levels or .01 fibers per cubic centimeter, whichever is greater; and
 - (v) the project:
 - (a) involves encapsulation, enclosure, removal, repair, disturbance or handling of less than 160 square feet or 260 linear feet of ACM, PACM or asbestos material and work is performed by employees of the employer; or
 - (b) involves the encapsulation, enclosure, removal, disturbance, repair or handling of NOB asbestos materials. If the materials listed in this clause are involved and no asbestos material will be rendered friable during abatement, an employer may employ an outside asbestos abatement contractor (i.e., the work need not be performed by employees of such employer.)

Respondent rendered the linoleum flooring friable by cutting it with a power saw. (Dept. Exs. 3, 8; T. 25-26)

12 NYCRR 56-11.7.b.2: Non-friable Flooring and/or Mastic Removal – Regulated Abatement Work Area Preparation – Preliminary Preparation:

Regulated abatement work area preparation shall also comply with Sections 56-7.1 through Section 7.10, except that six (6) air changes per hour are required within the work area.

Respondent did not use negative air filtration machines during the project. (Dept. Exs. 3, 8; T. 27)

12 NYCRR 56-7.2.o: Ventilation for Power Tools:

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.

Respondent used a non-HEPA equipped power saw to cut the asbestos containing linoleum. (Dept. Exs. 3, 8; T. 27-29)

12 NYCRR 56-8.4.b: Handling and Removal Procedures - Dry Removal or Dry Disturbance:

No dry removal or dry disturbance of asbestos material shall be permitted.

Respondent did not use any water during the cutting of the asbestos containing linoleum. (Dept. Exs. 3, 8; T. 29)

12 NYCRR 56-8.3.a.1.ii: Regulated Abatement Work Area Entry and Exit Procedures - Knowledge of Procedures:

All persons, before entering the regulated abatement work area or enclosure, shall read and be familiar with all posted regulations, personal protection requirements, including regulated abatement work area entry and exit procedures and emergency procedures. The entry/exit log headings shall indicate, and the signatures shall be used to acknowledge that these have been reviewed and understood by all persons prior to entry.

Respondent was using the Supervisor's Daily Log for the Entry/Exit log information and there was no Knowledge of Procedures. (Dept. Exs. 3, 8; T. 30-31)

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required:

Any asbestos abatement contractor who proposes to engage in a Large asbestos project shall notify or cause to be notified, in writing, the Asbestos Control Bureau. Such notice must be received at least ten (10) calendar days prior to commencement of Phase II A (See Section 56-2.1) of the asbestos project unless waived in writing by the Commissioner or his or her duly authorized representative. If an asbestos hazard is present which requires immediate attention, or if emergency conditions make it impossible to give notification ten (10) calendar days prior to commencement of the project, notification in accordance with Section 56-3.5 of this Part shall be given. All project notifications shall be accompanied by a nonrefundable fee. The fee shall be paid in any form, except cash, deemed acceptable by the Commissioner of Labor in the notification package. All payments shall be made payable to the Commissioner of Labor in the amounts set forth in the Labor Law. Any payments which are voided or returned to the Commissioner for any reason shall be subject to a return processing fee in an amount allowed by law and any entity submitting such checks to the Department may be subject to all other

appropriate penalties set forth in statute and code, including but not limited to enjoining of the asbestos project.

Respondent did not comply with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project. (Dept. Exs. 3, 8; T. 31, 33-34)

Mr. Deland testified that the only friable asbestos identified in the Pre-Demolition Asbestos Survey/Assessment (Dept. Ex. 4) was wrap and gaskets on a heater. (T. 41-42). When he arrived on the project site he determined that the heater had been removed which meant the whole project was a non-friable project. (T. 42) As a non-friable project, Dr. Deland testified that there was no requirement for covering the walls and windows with plastic sheeting or to construct attached personal and waste decontamination enclosures. (T. 41) Respondent completed the work on the outside of the house and then started to complete the project by removing the non-friable linoleum. (T. 42) After he cut the linoleum with a circular saw, Mr. Deland acknowledged that he was in violation of 12 NYCRR part 56 (T. 41, 47).

Mr. Krasinski inspected the project on March 18, 2010 and he instructed Mr. Deland on what to do to rectify the violations. (T. 45) However, the City of Jamestown fired Respondent and removed it from the job. (T. 45) Mr. Deland testified that he was not given the opportunity to rectify the violations and finish the project. (T. 45-46)

Mr. Deland testified that he believed he was in compliance with the notice requirement for the project. He testified that he would mail his project notification and notification fee by certified mail, return receipt requested. When he received the certified mail receipt card, he used this as proof that his papers were filed and adjusted his project accordingly. (T. 37) Mr. Deland testified that he followed this practice in all of his asbestos projects and was only cited for a violation in the two projects that are the subject of this proceeding. (T. 37)

Finally, Mr. Deland testified that the personal decontamination enclosure and waste container were located in the only available place (T. 38-39) and the waste container was properly tagged with signage, roped off, and locked. (T.39). The personal decontamination enclosure was also locked. (T. 39)

WINDSOR STREET PROJECT

Respondent mailed an asbestos project notification, together with the asbestos project notification fee of \$2,000.00 for this project that was received by the Department on March 16, 2010. (Dept. Ex. 9; T. 64) In the asbestos project notification Respondent described the project as involving 70 linear feet of friable asbestos containing material and 3240 square feet of non-friable asbestos containing material. (Dept. Ex. 9) Respondent inadvertently failed to specifically identify 1,400 square feet of vinyl asbestos tile in the project notification; but the total square footage of non-friable asbestos containing material listed on the project notification was accurate and the notification fee paid by the Respondent was correct. (Dept. Ex. 9, 10; T. 60-62, 69) The start date for the project was March 22, 2010 and the project end date was April 12, 2010. (Dept. Ex.9)

This project involved a vacant commercial building that was to be demolished. (Dept. Exs.10, 11; T.72) Mr. Krazinski testified that he inspected the project on March 23, 2010 and found that there were no notices to occupants posted on the building. (T. 60) Although Mr. Deland testified that this project involved work at a vacant building that was located next to a building that was also unoccupied (T. 72), Mr. Krasinski testified that notices to occupants were still required to protect anyone who might potentially occupy the building. (T. 72)

Mr. Deland testified that the City of Jamestown prevented him from performing the asbestos abatement activity on this project effective March 19, 2012, the date respondent was fired which was prior to the start date listed in the asbestos project notification, and that he was prevented from returning to the project site to retrieve his equipment. (T. 65-66). Mr. Deland further testified that he paid his non-refundable \$2000.00 notification fee. (T. 69)

Based upon his inspection findings, Mr. Krasinski found Respondent in violation of the following sections of 12 NYCRR part 56:

12 NYCRR 56-3.4.b.4.i: Notice and Record-keeping Requirements – Notification-Postponement, Cancellation or Change to Completion Dates of Projects:

Whenever the commencement date of a project for which notification has already been submitted is postponed, or if a project for which a notification has been submitted is cancelled, or if a project completion date is changed, the asbestos abatement contractor shall notify the

Asbestos Control Bureau of the postponement or cancellation or change of completion date by telephone or written notice. This notice shall be received at least one (1) calendar day prior to the initial start or completion date set forth on the previously submitted notification. In addition, written notification for new start dates on projects postponed for one (1) week or longer must be received at least three (3) calendar days prior to the new start date.

The Respondent did not start the project on the Notified start date of 3/22/10 and no notice of postponement was given to the department. (DOL Ex. 13; T. 64)

12 NYCRR 56-3.4.b.2.xiv: Notice and Record-keeping Requirements – Notification – Content:

The notification to the Asbestos Control Bureau shall be made on a form or forms provided by the Commissioner and shall include, but not be limited to, any other information which the Commissioner may require.

Respondent did not comply with Part 56-3.4.b.2.XIV by failing to list in the asbestos project notification the 1,400 square feet of vinyl asbestos tile identified in the survey. (DOL Ex. 13; T. 64-65)

12 NYCRR 56-3.6.a.1: Notification of Residential and Business Occupants - Ten (10) Day Notice:

The property owner and asbestos abatement contractor are responsible for ensuring that notice is provided to residential and business occupants. This notice may be provided by the property owner or by the asbestos abatement contractor or subcontractor engaged in the Phase II abatement portion of a project. The property owner, asbestos abatement contractor or subcontractor shall post or otherwise provide for a written notice to residential and business occupants of the building/structure, including visitors to the building/structure, ten (10) calendar days prior to the commencement of Phase II A work on any asbestos project within the building/structure. For projects being conducted in school buildings, the faculty, staff and students attending such school and visitors to the school shall be considered to be business occupants and shall receive notice as required in this Part.

Respondent did not post or otherwise provide notice to occupants. (DOL Ex. 13; T. 65)

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required:

Any asbestos abatement contractor who proposes to engage in a Large asbestos project shall notify or cause to be notified, in writing, the Asbestos Control Bureau. Such notice must be received at least ten (10) calendar days prior to commencement of Phase II A (See Section 56-2.1) of the asbestos project unless waived in writing by the Commissioner or his or her duly authorized representative. If an asbestos hazard is present which requires immediate attention, or if emergency conditions make it impossible to give notification ten (10) calendar days prior to commencement of the project, notification in accordance with Section 56-3.5 of this Part shall be given. All project notifications shall be accompanied by a nonrefundable fee. The fee shall be paid in any form, except cash, deemed acceptable by the Commissioner of Labor in the notification package. All payments shall be made payable to the Commissioner of Labor in the amounts set forth in the Labor Law. Any payments which are voided or returned to the Commissioner for any reason shall be subject to a return processing fee in an amount allowed by law and any entity submitting such checks to the Department may be subject to all other appropriate penalties set forth in statute and code, including but not limited to enjoining of the asbestos project.

Respondent did not comply with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project. (DOL Ex. 12; T. 63-64)

CONCLUSIONS OF LAW

ALLEN STREET PROJECT

The Department produced sufficient credible evidence and the violations of the following sections of 12 NYCRR part 56 should be sustained:

12 NYCRR 56-11.7: Non-friable Flooring and/or Mastic Removal.

Respondent used an abrasive saw cutting method on the asbestos containing linoleum without first fully preparing the work area and having an attached decontamination system enclosure. (Dept. Exs. 3, 8; T. 21-23)

12 NYCRR 56-7.11.a: Regulated Abatement Work Area Enclosure – Critical Barriers:

Respondent performed the abatement activity with wide open unsealed windows and doors in the work area. (Dept. Exs. 3, 8; T. 22-23)

12 NYCRR 56-7.11.b.2: Regulated Abatement Work Area Enclosure - Isolation Barriers – Sheathing:

Respondent did not have sheathing over window openings (no glass and/or sashes). (Dept. Exs. 3, 8; T. 23)

12 NYCRR 56-7.11.b.4: Regulated Abatement Work Area Enclosure - Isolation Barriers - Plasticizing Isolation Barriers:

There were no ceiling or wall polyethylene isolation barriers. (Dept. Exs. 3, 8; T. 24)

12 NYCRR 56-7.5.e.1: Personal and Waste Decontamination System Enclosures - Waste Decontamination System Enclosure - Large and Small Asbestos Projects - Enclosure – General:

The waste bags were brought out of the work area and there was no waste decontamination system enclosure constructed. (Dept. Exs. 3, 8; T. 24)

12 NYCRR 56-11.1.f: In-Plant Operations – Failure to Meet – In-Plant Operations – Criteria:

Respondent cut asbestos containing linoleum flooring without the requirements of Part 56 as listed in the Notice of Violation. (Dept. Exs. 3, 8; T. 25-27)

12 NYCRR 56-11.1.c.6: In-Plant – Limitations:

Respondent rendered the linoleum flooring friable by cutting it with a power saw. (Dept. Exs. 3, 8; T. 25-26)

12 NYCRR 56-11.7.b.2: Non-friable Flooring and/or Mastic Removal – Regulated Abatement Work Area Preparation – Preliminary Preparation:

Respondent did not use negative air filtration machines during the project. (Dept. Exs. 3, 8; T. 27)

12 NYCRR 56-7.2.o: Ventilation for Power Tools:

Respondent used a non-HEPA equipped power saw to cut the asbestos containing linoleum. (Dept. Exs. 3, 8; T. 27-29)

12 NYCRR 56-8.4.b: Handling and Removal Procedures - Dry Removal or Dry Disturbance:

Respondent did not use any water during the cutting of the asbestos containing linoleum. (Dept. Exs. 3, 8; T. 29)

12 NYCRR 56-8.3.a.1.ii: Regulated Abatement Work Area Entry and Exit Procedures - Knowledge of Procedures:

Respondent was using the Supervisor's Daily Log for the Entry/Exit log information and there was no Knowledge of Procedures. (Dept. Exs. 3, 8; T. 30-31)

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required:

Respondent did not comply with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project. (Dept. Ex. 7; T. 31, 33-34)

WINDSOR STREET PROJECT

The Department produced sufficient credible evidence and the violations of the following sections of Code Rule 56 should be sustained:

12 NYCRR 56-3.4.b.4.i: Notice and Record-keeping Requirements – Notification- Postponement, Cancellation or Change to Completion Dates of Projects:

The Respondent did not start the project on the Notified start date of 3/22/10 and no notice of postponement was given to the department. (Dept. Ex. 13; T. 64)

12 NYCRR 56-3.4.b.2.xiv: Notice and Record-keeping Requirements – Notification – Content:

Respondent did not comply with Part 56-3.4.b.2.XIV by failing to list in the asbestos project notification the 1,400 square feet of vinyl asbestos tile identified in the survey. (Dept. Ex. 13; T. 64-65)

12 NYCRR 56-3.6.a.1: Notification of Residential and Business Occupants - Ten (10) Day Notice:

Respondent did not post or otherwise provide notice to occupants. (Dept. Ex. 13; T. 65)

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required:

Respondent did not comply with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project. (Dept. Ex. 12; T. 63-64)

Civil Penalty

Labor Law § 909 (1) (a) provides for a maximum civil penalty of \$1,500.00 for the initial violation of Labor Law § 902, and up to \$2,500.00 for the second or subsequent violation of such section.

Respondent has violated multiple requirements of the 12 NYCRR part 56, including the Respondent's failure to timely file an asbestos project notifications. The Respondent participated in the hearing and offered testimony that he believed he was filing the project notifications by certified mail as instructed by the Bureau. As further justification for the violations the Respondent testified that he was not found in violations of 12 NYCRR part 56 in any of his other asbestos abatement projects when he filed his project notifications in the same manner. Although the nature and number of violations are serious as the violations at the Allen Street project involve the potential release of friable asbestos into the environment that could adversely affect the public, there is no evidence in the record of any prior violations. Also, the Respondent cooperated with the Bureau's investigation. Under these circumstances, the Bureau's request in the Allen Street Project (project #25768378) for a civil penalty of \$2,500.00 for the violation of Code Rule 56-11.7 *Non-Friable Flooring and/or Mastic Removal*, and a \$250.00 civil penalty for the remaining eleven (11) violations, and no civil penalty for any violation in the Winsor

Street project (project #25769877), for a total civil penalty in this matter of \$5,250.00 is not unreasonable and should be imposed.

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:

ALLEN STREET PROJECT

DETERMINE that Respondent violated twelve (12) Code Rules on the Allen Street Project:

12 NYCRR 56-11.7: Non-friable Flooring and/or Mastic Removal for using an abrasive saw cutting method on the asbestos containing linoleum without first fully preparing the work area and having an attached decontamination system enclosure.

12 NYCRR 56-7.11.a: Regulated Abatement Work Area Enclosure – Critical Barriers for performing the abatement activity with wide open unsealed windows and doors in the work area.

12 NYCRR 56-7.11.b.2: Regulated Abatement Work Area Enclosure - Isolation Barriers – Sheathing for not having sheathing over window openings (no glass and/or sashes).

12 NYCRR 56-7.11.b.4: Regulated Abatement Work Area Enclosure - Isolation Barriers - Plasticizing Isolation Barriers for not having ceiling or wall polyethylene isolation barriers.

12 NYCRR 56-7.5.e.1: Personal and Waste Decontamination System Enclosures - Waste Decontamination System Enclosure - Large and Small Asbestos Projects - Enclosure – General for bringing waste bags out of the work area and there was no waste decontamination system enclosure constructed.

12 NYCRR 56-11.1.f: In-Plant Operations – Failure to Meet – In-Plant Operations – Criteria for cutting asbestos containing linoleum flooring without following the requirements of Part 56.

12 NYCRR 56-11.1.c.6: In-Plant – Limitations for rendering the linoleum flooring friable by cutting it with a power saw.

12 NYCRR 56-11.7.b.2: Non-friable Flooring and/or Mastic Removal – Regulated Abatement Work Area Preparation – Preliminary Preparation for not using negative air filtration machines during the project.

12 NYCRR 56-7.2.o: Ventilation for Power Tools for using a non-HEPA equipped power saw to cut the asbestos containing linoleum.

12 NYCRR 56-8.4.b: Handling and Removal Procedures - Dry Removal or Dry Disturbance for not using water during the cutting of the asbestos containing linoleum.

12 NYCRR 56-8.3.a.1.ii: Regulated Abatement Work Area Entry and Exit Procedures - Knowledge of Procedures for not having a Knowledge of Procedures in the Supervisor's Daily Log for the Entry/Exit log information.

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required for not complying with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project.

ORDER that Respondent be imposed and assessed a civil penalty of \$2,500.00 for the violation of code rule 56-11.7 *Non-Friable Flooring and/or Mastic Removal* and a \$250.00 civil penalty for the remaining eleven (11) violations, for a total civil penalty in this matter of \$5,250.00 on the Allen Street Project;

WINSOR STREET PROJECT

DETERMINE that Respondent violated four Code Rules on the Winsor Street Project:

12 NYCRR 56-3.4.b.4.i: Notice and Record-keeping Requirements – Notification- Postponement, Cancellation or Change to Completion Dates of Projects for not starting the project on the Notified start date of 3/22/10 and not giving the department a notice of postponement.

12 NYCRR 56-3.4.b.2.xiv: Notice and Record-keeping Requirements – Notification – Content for not complying with Part 56-3.4.b.2.XIV by failing to list in the asbestos project notification the 1,400 square feet of vinyl asbestos tile identified in the survey.

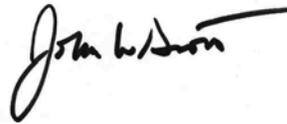
12 NYCRR 56-3.6.a.1: Notification of Residential and Business Occupants - Ten (10) Day Notice for not posting or otherwise providing notice to occupants.

12 NYCRR 56-3.4.b.1: Notice and Record-keeping Requirements – Notification - When Required for not complying with Part 56-3.4.b.1 by failing to notify the department of an asbestos project at least ten days prior to the start of the project.

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 (\$5,250.00) on these two Projects, made payable to the Commissioner of Labor.

Dated: October 19, 2012
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