

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

TIMOTHY FOWLER

or 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.
25878119

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 October 12, 2012, in Albany, 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 Timothy Fowler (“Respondent”) complied with the requirements of Article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR part 56 when he undertook an asbestos abatement project located at 109 Benson Street, Albany, New York.

APPEARANCES

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

The Respondent appeared on his own behalf accompanied by his wife, Rochelle Blackshear-Fowler.

ISSUES

1. Did Respondent violate any of the provisions of Labor Law article 30 or of 12 NYCRR part 56 in its performance of the asbestos project?
2. Should a civil penalty be assessed, and if so, in what amount?

HEARING OFFICER DESIGNATION

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 involving construction work performed at the 109 Benson Street location by a contractor employed by the Respondent.

On October 18, 2011, pursuant to a complaint received by the Bureau that an unlicensed and/or uncertified contractor was doing renovation work in a 2-family rental home at 109 Benson Street in the City of Albany, NY, a Department Inspector visited the Project site. (DOL Ex. 1, 2; T. 11) During this visit, the Inspector observed plaster and sheet-rock debris on the sidewalk, in the grass, and in the street in front of the house, and on the sidewalk along the side of the house. (DOL Ex. 2; T. 13) The inspector also observed dust and debris on the landing and stairs leading to the basement. (DOL Ex. 2; T. 13) The Inspector further found asbestos debris on the floor and horizontal surfaces and disturbed insulation material on the pipes and boiler in the basement. (DOL Ex. 2; T. 13-14). The Inspector submitted 9 samples of the debris to Galson Laboratories, two of which tested positive for asbestos (DOL Ex. 3; T. 14-16). The Inspector spoke with the Respondent and who told him that work was being done on the property by a contractor preparatory to selling house. (T. 14) The Inspector told the Respondent that a contamination assessment was necessary and that the contamination must be cleaned by a licensed contractor. (T.14) The Inspector placed a Stop Work Order on the property that has not been taken down or modified by the Department. (T. 35)

The Department Inspector issued to Respondent a Notice of Violation and Order to Comply, which contained one (1) violation: 12 NYCRR 56-1.5: Responsibility for Cleanup of Uncontrolled Disturbance:

If there is an incidental disturbance or other disturbance (not as part of a controlled asbestos project) of ACM, PACM, asbestos material, or suspect miscellaneous ACM assumed to be ACM at a building or structure, upon discovery of the disturbance, the property owner shall be responsible for contracting with a licensed asbestos contractor for immediate isolation of the disturbance and cleanup in accordance with all provisions of this Part. (DOL 4; T. 16-17)

In or about February 2012, the Respondent contracted with Spectrum Environmental to conduct a clean-up assessment and to secure a site-specific variance for the clean-up of the subject property. (T. 18, 21, 30) Thereafter, Respondent contacted licensed contractors in March 2012 and received quotes for clean-up of the property in the amounts of \$33,200.00 (Resp. Ex. 1) and 21,500.00 (Resp. Ex. 2). The Respondent testified that he could not afford to pay for the clean-up costs. (T. 33-36) Following the inspection, the Respondent's tenant at the subject property vacated the premises and he lost the rental income. (T. 34) Additionally, the Respondent's wife lost her job as an educator. (Resp. Ex. 4; T. 41) The Respondent testified that he recognized the seriousness of the violation and he tried to remediate the situation. (T. 29) As a means of ensuring clean-up of the property, the Respondent entered into a contract to sell the property for an amount less than he owes on his mortgage so his purchaser will have the financial incentive to complete the asbestos abatement work according to the terms of the site-specific variance. (Resp. Ex. 3; T. 36-38) As of the date of the hearing, a licensed asbestos contractor had not isolated the disturbance and completed the cleanup in accordance with 12 NYCRR part 56. (T. 44)

CONCLUSIONS OF LAW

On September 6, 2012, the Department duly served copies of the Notice of Hearing on Respondent by certified mail, return receipt requested, and first class mail. The Department produced an Affidavit of Service and a US Postal Service certified mail receipt evidencing that the Notice of Hearing was received by the Respondent. (Hearing Officer Ex 1). The Notice of Hearing scheduled an October 12, 2012 hearing and required that the Respondent serve an Answer at least 14 days in advance of the scheduled hearing.

Respondent failed to answer the charges contained in the Notice of Hearing but he did appear at the hearing.

At the hearing, the Department produced sworn and credible evidence substantially supporting the Department's charge that Respondent violated the provisions of 12 NYCRR 56-1.5. The Respondent was informed of the uncontrolled disturbance by the Department Inspector on October 18, 2011 and, as of the date of hearing, he had failed to contract with a licensed asbestos contractor for immediate isolation of the disturbance and cleanup in accordance with all provisions of this 12 NYCRR part 56. For the reasons particularized herein, the findings, conclusions and determinations of the Department for the Respondent's violation of 12 NYCRR 56-1.5 should be sustained.

The Department requested the assessment of a civil penalty in the amount of \$3,000.00 for this one violation. (T. 45) 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 Respondent is not an asbestos contractor. He is a homeowner who has no history of prior violations of 12 NYCRR part 56. It appears from the record that the Respondent cooperated with the Department and was responsive to the violation. (T. 21-22) The only reason contained in the record for the Respondent's failure to clean-up the disturbance is financial. The Respondent offered credible testimony indicating that he is attempting to ensure the property is cleaned-up through the sale of the property.

Respondent has violated one section of 12 NYCRR part 56 that does involve potential exposure of the public to asbestos containing material. The Respondent did provide justifications for the violation. Although the nature of violation is serious, there are no prior violations, and the Respondent cooperated with the Bureau's investigation. Under the circumstances of this case, although the Bureau requests the assessment of a \$3,000.00 penalty for the single violation, a penalty of \$1,000.00 for the violation is appropriate and should be imposed.

RECOMMENDATIONS

Based upon the record created at the hearing, and upon the sworn testimonial and documentary evidence adduced at the hearing from the parties, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

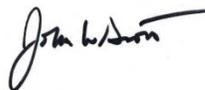
DETERMINE that Respondent committed one (1) violation of 12 NYCRR 56-11.6.B.4.I: Responsibility for Cleanup of Uncontrolled Disturbance, for failing to contract with a licensed asbestos contractor for immediate isolation of the disturbance and cleanup in accordance with all provisions of this 12 NYCRR part 56.

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed a civil penalty in the amount of \$1,000.00 for this single violation.

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 civil penalty in the amount of \$1,000.00 made payable to the Commissioner of Labor, for the one violation of 12 NYCRR part 56 that is the subject of the within proceeding.

Dated: January 31, 2013
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer