

STATE OF NEW YORK DEPARTMENT OF LABOR

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In the Matter of

**REPORT**  
**&**  
**RECOMMENDATION**

**DANNY DUNN**

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

Asbestos Case Nos.  
25928628

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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 February 22, 2017 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 Danny Dunn ("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 125 North Liberty, Albion, NY.

**APPEARANCES**

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Larissa Bates, Senior Attorney, of Counsel).

The Respondent appeared *pro se*.

The Respondent filed an Answer to the charges incorporated in the Notice of Hearing.

## **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?
3. Should Respondent's asbestos handling license be revoked?

## **FINDINGS OF FACT**

The hearing concerned an investigation made by the Bureau on one project involving asbestos removal work performed by the Respondent. ("The Project") The Project involved asbestos abatement at 125 North Liberty, Albion, NY, New York (Asbestos Case No. 25928628).

On or about July 31, 2012, the Bureau received a telephone complaint concerning demolition of a structure at 125 North Liberty Street, Albion, NY. (DOL 1; Tr. p 16)

Pursuant to the complaint, a Department inspector visited the Project site on August 1, 2012. (DOL 2)

A pre-demolition survey of the building in question, performed in 2010, identified the structure as a commercial building which contained asbestos containing material. (DOL 3)

During his visit the inspector observed a vacant, dilapidated, commercial structure at the address in the complaint. The structure was in a severe state of decay, with structural cracks in its stone wall and the roof partially collapsed. A dumpster on the site contained roof material which the inspector collected for sampling. (DOL 2; Tr. pp 20, 21)

The inspector determined that the structure could not be inhabited in the state it was in at the time of inspection. (DOL 2; Tr. p 21, 22)

An independent laboratory determined that the sampled material obtained by the inspector was asbestos containing material. (DOL 4)

On August 6, 2012, the inspector issued a Notice of Violation and Order to Comply ("Notice 1") to Respondent, as the owner of the structure. Notice 1 contained four violations of 12 NYCRR part 56 and two violations of Labor Law §902. (DOL 5)

Respondent stopped work on the Project when he received Notice 1. (Tr. p 61)

Thereafter, Respondent conducted additional demolition work on the structure. (Tr. pp 61 – 64)

Respondent had only two residences for the ten years prior to the time of the hearing; neither residence was at 125 North Liberty, Albion, NY. (Tr. pp 59, 60)

The Department inspector conducted a second inspection of the Project on April 19, 2013. At that time, he observed that additional demolition had occurred subsequent to his first visit. (DOL 2; Tr. pp 32, 33)

On April 22, 2013, the Department inspector issued a second Notice of Violation and Order to Comply (“Notice 2”) to Respondent, which contained two violations of 12 NYRR part 56 and two violations of Labor Law §902. (DOL 6)

Also on April 22, 2013, the Department inspector issued to Respondent a letter confirming the violations set forth in Notice 1 and Notice 2. The inspector stated that the Department had assessed a civil penalty of \$6500.00 “for violation of 12 NYCRR Part 56-3.1(a) and 56-3.2(a)...” (DOL 7)

The Department inspector confirmed with the building inspector of Albion, NY, that the structure, although a commercial building, had been classified as residential during the period of the Project because of its decaying condition. The Albion building inspector stated that such classification was done to provide the owner with tax relief. (DOL 2)

Respondent stated that he is not a contractor and that he was the sole owner and occupant of the building in question. (Tr. p 54)

### **CONCLUSIONS OF LAW**

Labor Law Article 30 contains the Asbestos Law.

Labor Law §901.7 defines of an asbestos project as follows: ““Asbestos project” means work undertaken which involves the removal, encapsulation, enclosure, repair or disturbance of friable or non-friable asbestos, or any handling of asbestos material that may result in the release

of asbestos fiber *except for work in an owner-occupied single family dwelling performed by the owner of such dwelling ...*” (emphasis added)

12 NYCRR part 56, promulgated pursuant to Labor Law Article 30, applies to asbestos projects and follows the definition set forth above.

Respondent has made no argument challenging the individual violations set forth in Notice 1 and Notice 2. His position throughout has been that, as the owner of the structure where the Project took place, he is exempt from coverage under the asbestos law.

However, even conceding that Respondent is the sole owner of the structure, credible evidence supports the finding that the structure was not in any meaningful sense of the word “occupied” by Respondent. Nor was any evidence adduced showing that it was a single family dwelling. The sole fact that Albion classified the property as “residential” solely to provide tax relief to the owner cannot be construed to mean the structure was an owner-occupied single family dwelling as contemplated by the statute and regulations.

That being the case, I find that the Department properly issued each of the violations set forth in Notice 1 and Notice 2, which documents are attached to and made a part of this Report and Recommendation.

### **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. Any contractor who has previously been assessed a civil penalty, shall be subject to a civil penalty of not more than the greater of 50% of the monetary value of the contract upon which the violation was found to have occurred, or \$25,000.00 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.

In this case, there is no indication that Respondent, an individual, owned a business of any size. His testimony was that he was not a contractor and that he performed the work on the Project himself.

Respondent initially complied with the Department's directions to stop work on the Project. However, on his own, and contrary to the Department's written direction, he then began work again. While Respondent's behavior can in no way be condoned, there is also a credible basis for his belief that he was not subject to the law, for at least a portion of the Project.

The Department did not provide evidence concerning the seriousness of the violations. There was no evidence as to whether Respondent had any prior history with the Bureau.

Respondent has violated multiple sections of 12 NYCRR part 56, and the Department has asked for a total civil penalty of \$6500.00. The manner in which the Department arrived at that number is unclear. The inspector's own letter to Respondent states that "after a careful review" the \$6500.00 penalty is for only two violations – 12 NYCRR 56-3.1(a) and 56-3.2(a).

Department counsel in her closing statement asked for a \$6500.00 penalty, "equally broken up among all six violations..." Given that Notice 1 and Notice 2 contain a total of ten violations, the six referred to are not defined. Furthermore the value of each violation, if assessed as Department counsel stated, would be \$1083.33, a number that does not appear to have been arrived at on a violation-by-violation basis.

Under these circumstances, and considering the factors set forth above, although the Bureau requests a penalty of \$6500.00 for two violations, or \$3750.00 per violation, I find that penalty excessive, and instead assess a penalty of \$1000.00 for each of the two violations referenced by the Bureau, for a total civil penalty of \$2,000.00 on the Project.

### **RECOMMENDATIONS**

Based upon the weight of the evidence set forth in the record as a whole, I

RECOMMEND that the Commissioner of Labor adopt the Findings of Fact and Conclusions of Law set forth in this Report and Recommendation as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Respondent violated Labor Law §902 as set forth in Notice 1 and Notice 2, which Notices have been attached and made a part of this Report and Recommendation; and

DETERMINE that Respondent violated six sections of 12 NYCRR Part 56 as set forth in Notice 1 and Notice 2, which Notices have been attached and made a part of this Report and Recommendation; and

ORDER that a civil penalty of \$1000.00 be imposed and assessed for the violations of 12 NYCRR 56-3.1(a) and 56-3.2(a) on the Project; 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 (\$2000.00) on the Project, made payable to the Commissioner of Labor.

Dated: September 18, 2017  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Tracy", with a long horizontal line extending to the right.

Jerome Tracy, Hearing Officer