

**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH**

In re: Vincent Gaither, President
~~Environmental~~ Waste Industries, Inc.
Hartford, Connecticut 06114

Petition No. 980821-053-003
September 28, 1999

FINAL DECISION

Procedural Background

On April 13, 1999, the Department of Public Health ("the Department") issued a Statement of Charges ("the Charges") against Environmental Waste Industries, Inc. ("respondent") due to its alleged violations of the Connecticut General Statutes and the Regulations of Connecticut State Agencies ("the Regulations") as described more particularly below. H.O. Exh. 1.

On May 5, 1999, notice of the hearing was provided to respondent. In the Notice of Hearing, Elisabeth Borrino, the undersigned, was appointed by the Commissioner of the Department to be the Hearing Officer and to rule on all motions, and to determine findings of fact and conclusions of law and issue an Order. H.O. Exh. 1.

On May 26, 1999, respondent filed an Answer to the allegations contained in the Charges. H.O. Exh. 2. Respondent orally amended its Answer at the Hearing to admit all factual allegations contained in the Charges. Tr. 7/1/99, 4.

On July 29, 1999, the Hearing Officer issued a Notice of Re-opening of Hearing on Limited Issues and notice of the hearing was provided to the parties. H.O. Exh. 3.

The administrative hearing was held on July 1, 1999 and August 27, 1999, in accordance with Connecticut General Statutes Chapter 54 and Regulations §§19a-9-1 *et seq.* On July 1, 1999, respondent appeared, and was represented by Attorney

Ralph Dupont, Esq. On August 27, 1999, respondent appeared *pro se*; Attorney Linda Fazzina, Esq., represented the Department at both hearings.

This Final Decision is based entirely on the record and sets forth this Hearing Officer's findings of fact, conclusions of law, and Order. To the extent that the findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *SAS Inst., Inc. v. S & H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn 1985).

Allegations and Answer

1. In paragraphs 1 and 4 of the Charges, the Department alleges that respondent is, and has been at all times referenced in the Statement of Charges, the holder of Connecticut asbestos contractor license number 000040.

Respondent admits these allegations.

2. In paragraph 2 of the Charges, the Department alleges that in or about March 19, 1998, respondent performed an asbestos abatement project at 3 Huntington Street, Hartford, Connecticut ("the Property") in a manner that was violative of Connecticut's standards for the proper performance of asbestos abatement, which standards are found at §§19a-332a-1 to 19a-332a-16, inclusive, of the Regulations of the Connecticut State Agencies ("the Regulations"),¹ in that respondent
 - a. failed to post warning signs at all approaches to the work area;
 - b. failed to ensure that the work area was isolated from the non-work areas by air-tight barriers attached securely in place;
 - c. failed to cover floor and wall surfaces in the work area with polyethylene sheeting or the equivalent;
 - d. failed to equip the work area with a worker decontamination system to ensure that no person or equipment left the asbestos abatement work area unless first decontaminated by showering, wet washing or HEPA vacuuming to remove all asbestos debris; and/or

¹ The Regulations were amended subsequent to respondent's violations. Unless otherwise noted, all references are to those Regulations in effect on the date of violation.

- e. failed to ensure that a source of water was available on the premises to:
 - (I) adequately wet all asbestos-containing material to be removed or disturbed by removal from the Property; and
 - (ii) decontaminate any person or equipment leaving the asbestos abatement work area.

Respondent admits each of these allegations.

- 3. In paragraph 3 of the Charges, the Department alleges that the above described facts constitute grounds for disciplinary action pursuant to the General Statutes of Connecticut §§20-440, 19a-332a(b), taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(a), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(j), 19a-332a-6, 19a-332a-7(a) and/or 19a-332a-18(e) of the Regulations.

Respondent admits these allegations.

- 4. In paragraph 5 of the Charges, the Department alleges that in or about March 20, 1998, respondent performed an asbestos abatement project at the Property in a manner that was violative of Connecticut's standards for the proper performance of asbestos abatement, which standards are found at §§19a-332a-1 to 19a-332a-16, inclusive, of the Regulations, in that respondent failed to ensure that all asbestos containing waste was adequately wetted prior to placement in leak-tight containers for disposal.

Respondent admits these allegations.

- 5. In paragraph 6 of the Charges, the Department alleges that the above described facts constitute grounds for disciplinary action pursuant to the Connecticut General Statutes § 20-440, §19a-332a(b), taken in conjunction with §19a-332a-1, 19a-332a-2, 19a-332a-5(h), 19a-332a-5(j), 19a-332a-7(a), and/or 19a-332a-18(e) of the Regulations.

Respondent admits these allegations.

Findings of Fact

1. Respondent is and has been at all times referenced in the Statement of Charges, the holder of Connecticut asbestos contractor license number 000040. Tr. 7/1/99, 4.
2. Vincent Gaither is and has been at all times referenced in the Statement of Charges, the president and director of Environmental Waste Industries, Inc., and primarily responsible for its operation. Tr. 7/1/99, 4; Tr. 8/27/99, 33.
3. On March 19, 1998, respondent performed an asbestos abatement project at the Property ("the Project") in a manner that was violative of Connecticut's standards for the proper performance of asbestos abatement, in that respondent:
 - a. failed to post warning signs at all approaches to the work area;
 - b. failed to ensure that the work area was isolated from the non-work areas by air-tight barriers attached securely in place;
 - c. failed to cover floor and wall surfaces in the work area with polyethylene sheeting or the equivalent;
 - d. failed to equip the work area with a worker decontamination system to ensure that no person or equipment left the asbestos abatement work area unless first decontaminated by showering, wet washing or HEPA vacuuming to remove all asbestos debris; and/or
 - e. failed to ensure that a source of water was available on the premises to:
 - (i) adequately wet all asbestos-containing material to be removed or disturbed by removal from the Property; and
 - (ii) decontaminate any person or equipment leaving the asbestos abatement work area. Tr. 7/1/99, 4; Dept. Exh. 2.
4. On March 20, 1998, respondent performed the Project, in a manner that was violative of Connecticut's standards for the proper performance of asbestos abatement, in that respondent failed to ensure that all asbestos containing

waste was adequately wetted prior to placement in leak-tight containers for disposal. Tr. 7/1/99, 4; Dept. Exh. 2.

5. If the Department had not inspected and required compliance with the Regulations, respondent would have recouped certain costs which include but are not limited to (1) the cost of polyethylene sheeting of \$2,000.00, (2) the cost of having water on site of \$35.00, and (3) approximately \$200.00 for the cost of a worker decontamination unit. Tr. 8/27/99, 16-17.
6. Respondent employs four (4) permanent employees and between forty (40) and seventy-five (75) temporary employees who are retained on an "as needed" basis and trained by entities unrelated to respondent. Tr. 8/27/99, 17-18.
7. Asbestos Abatement contractors are required to file an Asbestos Abatement Notification Form ("Notification Form") with the Department and to state the total cost of the asbestos abatement to be performed on the Notification Form.² Tr. 8/27/99, 45.
8. The Department assesses a fee for asbestos abatement based upon the total cost of the project as stated on the Notification Form. For those projects involving up to 160 square feet of asbestos, the fee cost is a flat \$50.00. For those projects involving 160 square feet or more of asbestos containing material, it is \$50.00 plus one percent of the total abatement cost up to a maximum of \$5,000.00. Tr. 8/27/99, 45-46.
9. On February 26, 1998, the City of Hartford selected respondent as the successful bidder for eight separate asbestos abatement projects. Respondent filed Notification Forms with the Department for these projects representing the total abatement cost to be less than the amount contained in the bids. Respondent charged the City for fees based upon the total cost of the project and, respondent thereby recouped the fees not paid to the Department. Tr. 8/27/99, 53-56; Dept. Exhs. 10, 11, 12.
10. On March 4, 1998, respondent filed a Notification Form with the Department representing the total cost of the Project to be \$8,200.00. The City of Hartford thereby assessed respondent a fee of \$132.00 for the Project. Dept. Exh. 2.

² Section 19a-332a-3 of the Regulations requires that asbestos abatement contractors notify the Department before engaging in any asbestos abatement which involve more than ten (10) linear feet or more than twenty five (25) square feet of asbestos-containing material.

11. On March 31, 1998, respondent submitted a "revised Asbestos Quote" for the project to the City of Hartford proposing to complete the project for \$125,000.00. Dept. Exh. 8.
12. On April 14, 1998, respondent invoiced the City of Hartford \$125,000.00 for the Project. The City of Hartford paid respondent \$125,000.00 for the Project. Tr. 8/27/99, 24-26; Dept. Exhs. 7, 8, 11.
13. On October 18, 1998, respondent filed a "revised" Notification Form with the Department representing the total cost of the Project to be \$85,000.00 and paid the Department the assessed fee of \$850. Tr. 8/27/99, 23-24; Dept. Exhs. 2, 6.
14. There is no evidence that respondent paid the additional fees due based upon the cost of the Project actually being \$125,000.00 instead of \$93,000.00. Respondent thereby recouped \$320.00 by misrepresenting the total cost of the Project. Tr. 8/27/99, 22, 45-46.
15. Respondent filed ninety-two (92) Notification Forms with the Department between January 1, 1998 and August 2, 1999 indicating total asbestos abatement project costs of \$990,387.00 in the City of Hartford. Tr. 8/27/99, 22, 23-26, 47-51, 54-56; Dept. Exhs. 2, 6, 7, 8, 9, 10.
16. Respondent's annual sales in the City of Hartford are at least \$1.5 to \$1.6 million dollars with an approximately profit margin of fifteen (15) percent or no less than \$225,000.00.³ Tr. 8/27/99, 59-60.

³ On July 29, 1999, both respondent and the Department were ordered to produce documentary evidence regarding respondent's financial status and to appear at the hearing on August 27, 1999 whereby a determination as to that financial status would be made. The Department served a Subpoena on respondent seeking documentary evidence regarding its financial status. Notwithstanding the plain language of the Order (H.O. Exh. 3) and the Department's subpoena, respondent produced no documentary evidence at the August 27, 1999 hearing. Respondent's president and director, Vincent Gaither testified that "we are a small company" (Tr. 8/27/99, 58) but offered no supporting evidence. Additionally, throughout the hearing, respondent attempted to evade the Department's inquiries as to its financial status and was admonished by the hearing officer that refusals to answer would result in an adverse inference. The Department conscientiously provided comprehensive credible evidence in compliance with the July 29, 1999 Order. The Department should be commended for this effort which provided valuable evidence to the hearing officer.

Discussion and Conclusions of Law

Section 19a-332a-18(e) of the Regulations empowers the Department to “take any action, permitted by Section §19a-17 of the Connecticut General Statutes, against an individual or entity issued a license under these regulations for conduct including, but not limited to, violation of the provisions of the regulations and statutes governing asbestos abatement or licensure.”

The Department bears the burden of proof by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, *reh'g den.*, 451 U.S. 933 (1981); *Swiller v. Comm'r of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995.

The Department has met its burden of proof. Respondent admits all factual allegations contained in the Charges. Tr. 7/1/99, 4.

These facts constitute grounds for disciplinary action against the asbestos contractor license of Environmental Waste Industries, Inc. pursuant to the Connecticut General Statutes §20-440, and Regulations §19a-332a(b), taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(a), 19a-332a-5(c), 19a-332a-5(j), 19a-332a-6, 19a-332a-7(a), 19a-332a-18(e), and 19a-332a-5(h).

The only remaining issue is what, if any, disciplinary action should be imposed.

The Department requests that the Hearing Officer place respondent's asbestos license on probation, order monitoring of its asbestos abatement projects, and assess respondent the maximum civil penalty permitted.

1. The Department's request that respondent's license be placed on probation and be subject to monitoring.

The Department requests that respondent's asbestos abatement license be placed on probation and subject to monitoring due to (1) the numerous violations of

the Regulations, (2) the hazard posed to the public, (3) respondent's questionable judgment in delegating authority, and (4) the fact that respondent employs only four permanent employees while utilizing between forty and seventy-five temporary employees on an "as needed" basis who, respondent claims, are trained by entities unrelated to respondent. FF. 6; Tr. 8/27/99, 67-68.

The record establishes that respondent committed multiple regulatory violations and that each violation posed a significant hazard to the workers and to the general public. Although the hazards appear to have existed for one day, it is disconcerting that there is no evidence in the record that these violations would have been corrected absent intervention by the Department.

Respondent has been licensed and performing asbestos abatement for nine years. Tr. 7/1/99, 11. Vincent Gaither is the president and director of respondent corporation and is primarily responsible for its operation. FF. 2. Despite filing an Answer that falsely claimed insufficient knowledge of the facts, Mr. Gaither appeared at the July 1, 1999 hearing and admitted all factual allegations of the Charges. Mr. Gaither explained that he relied upon one of his employees to assist his attorney in preparation of the subject Answer. Mr. Gaither also explained that the subject violations were an isolated incident and that he erred when he relied upon a seemingly qualified supervisor for the Project to ensure regulatory compliance.

Mr. Gaither, initially, impressed the Hearing Officer with his immediate response to and cooperation with the Department when the violations were brought to his attention. Tr. 7/1/99, 15, 60, 62. The record, however, reveals a disturbing pattern of deceitful practices being employed by respondent to recoup various costs. FF. 9, 10, 11, 12, 13, 14.

The Department's witness, Ron Skomro testified credibly and produced unquestionably credible documentary evidence that respondent misrepresented the total cost of abatement for multiple projects which enabled respondent to recoup substantial fees that would otherwise be due and payable to the Department.

Significantly, respondent neither questioned nor disputed this evidence.

Respondent asserts that the subject violations were merely the transgressions of overzealous temporary employees and poor supervision by the erroneously entrusted project supervisor. The hearing officer finds this assertion incredulous given respondent's practice of deceitful conduct (FF. 9, 14) that can only be interpreted, absent contrary evidence, as designed to increase respondent's profits. No contrary evidence was offered. Mr. Gaither's testimony establishes that noncompliance with the Regulations enables respondent to recoup substantial costs.

It is difficult to believe that a company with a proven routine practice of recouping costs through filing knowingly false Notification Forms to avoid paying fees that would otherwise be due would not seek to similarly recoup costs in its other facets of operation.

Mr. Gaither' claims that he relied upon a seemingly qualified supervisor to ensure compliant asbestos abatement and that he otherwise has always been and will always be in full compliance with the applicable regulations are simply not credible when viewing the entirety of the record in this matter. Although there is no evidence of prior violations, this is more likely the result of lack of inspections rather than respondent's uncompromising compliance with the Regulations.

The violations contained in the Charges and admitted by respondent are serious and posed a significant hazard to the workers and to the public. Respondent performs a substantial number of Asbestos Abatement projects and it is necessary to ensure that, absent intervention by the Department, respondent shall comply with the Regulations as well as ensure full compliance by both its permanent and temporary employees.

Respondent objects to any monitoring conditions because of the inherent cost of monitoring. Respondent, however, also claims that the violations were the result of temporary employees acting "overzealously."

Respondent claims that it has performed between twenty-five and fifty asbestos abatement projects since March 1998. Since respondent maintains only four permanent employees it is evident that respondent heavily relies on temporary employees in its daily operation -- the very employees he blames for this action. Respondent has already displayed a history of questionable delegations of authority and judgment which includes not only the project supervisor but the filing of a false Answer with the Department and knowingly false Notification Forms. While the Hearing Officer understands and considers respondent's claim that monitoring is costly, it is the conduct of respondent and its method of operation that causes the need for such monitoring. The hazard posed to the public as a result of respondent's conduct and method of operation is substantial. In weighing respondent's cost of operation against the hazards posed to the general public, protecting the public must prevail.

Accordingly, the Department's request that respondent's asbestos abatement license be placed on probation and subject to monitoring is well-founded and sound.

2. *The Department's request that a civil penalty be assessed against respondent.*

Connecticut General Statutes §19a-17 provides that the Commissioner may impose a civil penalty not to exceed ten thousand dollars per incident when a person has violated §§19a-332 to 19a-332c, inclusive, pursuant to Regulation §19a-332a-18(e).

The ninety-two notification forms filed with the Department between January 1, 1998 and August 2, 1999, for the City of Hartford alone, reveal nearly one million dollars in asbestos abatement projects. It is, however, necessary to view the total asbestos abatement cost represented on the ninety-two Notification Forms as suspect. Instead, this figure is likely to be substantially understated in that respondent routinely underreports the total cost to the Department. It is more likely that respondent earned \$1.5 to \$1.6 million annually, as Mr. Gaither stated with a profit

margin of approximately fifteen percent. Therefore, respondent's profits are at least \$225,000.00 annually.

The record establishes that noncompliance with the Regulations enables respondent to recoup certain costs thereby yielding greater profit and that respondent repeatedly availed itself of this option notwithstanding the resulting regulatory violations. FF. 5, 14. Therefore, assessing a civil penalty is essential to eliminate respondent's financial incentive to violate the regulations especially when those violations place the public at risk.

Accordingly, the Hearing Officer agrees with the Department that a civil penalty should be assessed for respondent's six regulatory violations and assesses that penalty as follows:

First Count of the Charges	:	\$	9,000.00
Second Count of the Charges	:	\$	1,000.00
Total civil penalty assessed	:	\$	10,000.00

The Hearing Officer finds that this sum constitutes the amount of assessment necessary to ensure immediate and continued compliance with the Regulations.

Based on the foregoing Findings of Fact, a preponderance of the evidence establishes that respondent violated §19a-332a(b), of the C.G.S., taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(a), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(j), 19a-332a-6, 19a-332a-7(a), 19a-332a-5(h), and 19a-332a-18(e), of the Regulations, that respondent's license is subject to disciplinary action as follows:

Order

Pursuant to Connecticut General Statutes §§19a-17 and 20-440, this Hearing Officer orders the following against the license of Environmental Waste Industries, Inc. and as against its president Vincent Gaither, jointly and severally:

1. Respondent, Environmental Waste Industries, Inc., its president, Vincent Gaither, and the subject asbestos abatement license shall be placed on probation for a period of twenty-four months under the following terms and conditions:
 - a. Respondent, including its president Vincent Gaither, shall provide a copy of this Memorandum of Decision to the Local Director of Health in any town in which it is conducting asbestos abatement activity no less than thirty days before commencing that activity; if respondent is presently engaged in asbestos abatement activities or intends to engage in such activities sooner than thirty days after the effective date of this decision, such notification shall be provided within fourteen days of the effective date of this Order.
 - b. Respondent and its president, Vincent Gaither, shall provide the Department with the name of each client and the location where it is conducting asbestos abatement activity, and shall certify that it has complied with Paragraph 1a of this Order. Respondent shall provide this notice no less than thirty (30) days before commencement of asbestos abatement activity at each location; if respondent is presently engaged in asbestos abatement activities or intends to engage in such activities sooner than thirty days after the effective date of this decision, such notification shall be provided within fourteen days of the effective date of this Order.
 - c. Respondent and its president, Vincent Gaither shall obtain at their own expense the services of a licensed asbestos abatement contractor (“supervisor”), pre-approved by the Department, to conduct direct on-

site inspections of respondent's asbestos abatement projects conducted for the first six months after the effective date of this Order:

- (i) The supervisor shall have the right to monitor respondent's work on the projects by any means which he or she deems necessary to determine whether respondent is complying with the controlling statutes and regulations. Respondent shall fully cooperate with the supervisor; and
 - (ii) Respondent and its president, Vincent Gaither shall be responsible for providing written supervisor reports directly to the Department at the conclusion of each asbestos abatement project. Such supervisor's reports shall include a description of the project and of the asbestos abatement performed by respondent or his employees and a description of respondent's compliance or noncompliance of the controlling statutes and regulations.
- d. Respondent Environmental Waste, Industries, Inc., and its president Vincent Gaither are jointly and severally assessed a civil penalty of ten thousand dollars (\$10,000.00). This civil penalty shall be paid by certified check, payable to Treasurer, State of Connecticut, and due within thirty (30) days of the date of this Order.
- e. Within six (6) months of the date of this Order, Vincent Gaither, President of Environmental Waste Industries, Inc., and all of respondent's employees to whom respondent delegates the

responsibility of supervising asbestos abatement projects, currently and for the next six months, shall complete an Abatement Supervisor refresher course which has been approved by the Department, and submit satisfactory proof thereof to the Department.

- f. The civil penalty and all notices and reports shall be sent to: Ronald Skomro, at the following address:

Ronald Skomro
State of Connecticut Department of Public Health
410 Capitol Avenue, MS #15AIR
P.O. Box 340308
Hartford, CT 06134-0308

2. Respondent and its president, Vincent Gaither, shall be jointly and severally responsible for all costs associated with the satisfaction of this Order.
3. This order is effective thirty days from the date of signature.

September 28, 1999
Date


Elisabeth Borrino, Hearing Officer
Department of Public Health