

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE

In re: I.E.S. Environmental, Inc.

Petition No. 2002-1115-053-018
March 5, 2004

MEMORANDUM OF DECISION

Procedural History

On April 28, 2003, the Department of Public Health (“the Department”) issued a Statement of Charges (“the Charges”) against I.E.S. Environmental, Inc. (“respondent”), pursuant to *Conn. Gen. Stat.* §§19a-10 and 19a-14, seeking the revocation or imposition of other disciplinary action against respondent’s asbestos contractor license #000078 (“the license”).
H.O. Exh. 1.

On May 14, 2003, the Department issued a Notice of Hearing in which the Commissioner of the Department appointed this Hearing Officer to rule on all motions, determine findings of fact and conclusions of law, and issue an order. H.O. Exh. 2.

On June 3, 2003, the Department filed a Motion to Deem the Allegations Admitted (“the Motion”). H.O. Exh. 4. On June 6, 2003, the undersigned issued an Order directing respondent to file an Answer on or before June 12, 2003, or the Motion would automatically be granted.
H.O. Exh. 5.

On June 16, 2003, respondent failed to appear at an administrative hearing held to adjudicate the Charges. Tr. 6/16/03, pp 2, 13. Since no Answer had been received by that date, the Motion was granted and the Department presented a case limited to the issue of remedy.
H.O. Exh. 4; Tr. 6/16/03, p. 5.¹

On June 18, 2003, respondent filed an Answer, admitting some of the allegations in the Charges and denying others. H.O. Exh. 6. The Answer was post-marked June 12, 2003, and indicated that it was sent to the Hearing Office by facsimile on that date. H.O. Exh. 6. Because the Hearing Office experienced a power failure on June 12, 2003, it was impossible to determine whether respondent had attempted to file its Answer by facsimile as indicated. Tr. 6/16/03, p. 3. Accordingly, on June 20, 2003, the undersigned rescinded the Order granting the Motion and scheduled an additional day of public hearing. H.O. Exh. 7.

On July 23, 2003 another administrative hearing was held to adjudicate the Charges. The hearing was conducted in accordance with Chapter 54 of the Connecticut General Statutes and

¹ The Order granting the Motion was erroneously dated June 15, 2003, instead of June 16, 2003.

§§19a-9-1, et seq. of the Regulations of Connecticut State Agencies (“the Regulations”). James Ney, respondent’s president, represented respondent, and Attorney Linda Fazzina represented the Department at the hearing.

This Memorandum of 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 (Md. Tenn. 1985).

Allegations

A. First Count

1. In paragraph 1 of the Charges, the Department alleges that respondent is, and has been at all times referenced in the Charges, the holder of Connecticut asbestos contractor license number 000078.
2. In paragraph 2 of the Charges, the Department alleges that in or about September 2002, respondent performed an asbestos abatement project at the former Belden Mills complex, Route 12, Thompson, Connecticut (“the site”).
3. In paragraph 3 of the Charges, the Department alleges that on or about September 6, 2002, in connection with the asbestos abatement project at the site, respondent failed to perform asbestos abatement in accordance with the alternative work practice procedure (“AWP”),² approved by the Department under §19a-332a-11 of the Regulations, for the building formerly known as “the South Building,” in that respondent:
 - a. failed to establish a regulated area, as required by the AWP; and/or
 - b. failed to sort and/or segregate waste under the oversight of a project monitor licensed by the Department, as required by the AWP;
 - c. failed to perform sorting and segregation of waste with perimeter air monitoring in place, as required by the AWP;
 - d. failed to have a source of water to adequately wet all asbestos containing material, as required by the AWP and §19a-332a-7(a) of the Regulations;
 - e. failed to adequately wet all asbestos containing waste and place it in leak-tight containers, as required by the AWP and §19a-332a-5(j) of the Regulations; and/or
 - f. failed to properly label all containers holding asbestos waste, as required by the AWP and §19a-332a-5(k) of the Regulation.

² In unusual circumstances, the Department may authorize exceptions to the abatement practices required by the Regulations. These exceptions are known as AWP’s. Request for such AWP’s must be submitted to, and approved by, the Department in advance of the abatement, and must provide an equivalent or a greater measure of asbestos emission control than the abatement practices prescribed by the Regulations. *See*, §19a-332a-11 of the Regulations.

4. In paragraph 4 of the Charges, the Department alleges that the above described facts constitute grounds for disciplinary action pursuant to *Conn. Gen. Stat.* §§19a-332a(b) and/or 20-440, taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-5(j), 19a-332a-5(k), 19a-332a-7(a), 19a-332a-11, 20-440-1 and/or 20-440-6(b) of the Regulations.
- B. Second Count**
5. In paragraph 5 of the Charges, the Department incorporated Paragraphs 1 and 2 of the Charges by reference as if set forth in full.
 6. In paragraph 6 of the Charges, the Department alleges that on or about September 6, 2002, in connection with the asbestos abatement project at the site, respondent violated §§19a-332a-1 to 19a-332a-16, inclusive, of the Regulations, in one or more of the following ways, in that respondent failed to establish and/or maintain applicable engineering controls in a building known as “the Main Building,” until compliance with the reoccupancy requirements of §19a-332a-12 of the Regulations was achieved, including, but not limited to:
 - a. failed to isolate the work area(s) from the non-work area(s) with air-tight barriers and/or to maintain said air-tight barriers, in violation of §19a-332a-5(c) of the Regulations;
 - b. failed to cover applicable floor and/or wall surfaces with polyethylene sheeting or the equivalent and/or to maintain said floor and/or wall covering, in violation of §19a-332a-5(e) of the Regulations;
 - c. failed to establish and/or maintain negative pressure ventilation units with high efficiency particulate air filtration (“HEPA”) in sufficient number to allow at least one air change every fifteen minutes, in violation of §19a-332a-5(h) of the Regulations; and/or
 - d. failed to utilize clean up procedures, until no visible residue was observed, in violation of §19a-332a-5(g) of the Regulations.
 7. In paragraph 7 of the Charges, the Department alleges that on or before September 6, 2002, in connection with the asbestos abatement project at the site, respondent failed to maintain accurate waste shipment records, recording each leg of the journey from the site to the landfill, in compliance with U.S. Environmental Protection Agency (“EPA”) regulations, as required by §19a-332a-4(b)(8) of the Regulations.
 8. In paragraph 8 of the Charges, the Department alleges that the above facts constitute grounds for disciplinary action pursuant to *Conn. Gen. Stat.* §§19a-332a(b) and/or 20-440, taken in conjunction with §§19a-332a-1, 19a-332a-2, 19a-332a-4(b)(8), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(h), 19a-332a-5(g), 19a-332a-12, 20-440-1 and/or 20-440-6(b) of the Regulations.

*Findings of Fact***A. First Count**

1. Respondent is, and has been at all times referenced in the Charges, the holder of Connecticut asbestos contractor license number 000078. H.O. Exh. 6 (the Answer).
2. At the time of hearing, and at all times referenced in the Charges, James Ney, Jr. was respondent's president, director, and sole stockholder. Tr. 7/23/03, pp. 7-8.
3. From on or about August 20, 2002, to on or about September 6, 2002, respondent performed asbestos abatement at the site. H.O. Exh. 6.
4. The site consisted of the Main Building and the remains of the South Building. Both buildings had been abandoned and vacant for several years. The South Building was formerly attached to the Main Building, but collapsed before the activities that are the subject of the Charges occurred. Dept. Exhs. 3, 5; Tr. 7/23/03, p. 19.
5. On or about May 10, 2002, the Department approved an AWP for the asbestos abatement of the remains of the South Building. Dept. Exh. 5.
6. The AWP required, *inter alia*, the following:
 - a. the establishment of a regulated area around the perimeter of the work area;
 - b. the presence of a licensed project monitor at all times asbestos abatement activity was occurring at the South Building, to supervise the abatement and perform background air sampling;
 - c. following completion of asbestos abatement activity, verification by the project monitor to the Department that no visible asbestos debris remained; and,
 - d. compliance with all other provisions of the Regulations except for the exemptions specifically set forth in the AWP approval.Dept. Exh. 5; Tr. 7/23/03, pp. 25-29.
7. On September 6, 2002, respondent's employees were walking over the remains of the South Building picking up pieces of asbestos containing materials and placing them in an unlined and unlabeled dumpster. Tr. 7/23/03, pp. 32, 33, 35, 89, 111.
8. In connection with the activities performed by respondent's employees on the South Building on September 6, 2002:
 - a. no regulated area was established around the work area;
 - b. no project monitor was present;
 - c. no air monitoring was being performed;

- d. no source of water was available to wet the asbestos containing materials; and,
- e. the asbestos containing materials were being handled dry.

Dept. Exhs. 1; Tr. 7/23/03, pp. 34, 35, 95.

B. *Second Count*

9. From on or about August 27, 2002, to on or about September 6, 2002, respondent performed asbestos abatement in the Main Building. Dept. Exh. 9; Tr. 7/23/03, pp. 41-42, 136, 165.
10. In connection with the asbestos abatement respondent performed in the Main Building on or before September 6, 2002:
 - a. work areas were not isolated from non-work areas with air-tight barriers;
 - b. floor and wall surfaces were not covered with polyethylene sheeting or its equivalent;
 - c. no HEPA ventilation units were in use; and,
 - d. the building had not been cleaned until no visible residue was observed.

Dept. Exhs. 1, 4; Tr. 7/23/03, pp. 42-44, 66, 69-71, 73-78, 81, 83-85.
11. On or before September 6, 2002, respondent shipped asbestos containing waste from the site to its main office in Rhode Island without a manifest signed by the transporter of that waste indicating the name, address, and telephone number of the transporter. Dept. Exh. 9; Tr. 7/23/03, pp. 63, 202, 217.
12. On September 10, 2002, in response to concerns raised by the Department, the Town of Thompson issued a Stop Work Order prohibiting all work at the site. On or about October 10, 2002, the Stop Work Order was rescinded in response to an agreement between the owner of the site and the Department addressing the Department's concerns. Dept. Exhs. 6-8, 10, 11; Tr. 7/23/03, pp. 214-215.
13. Conditions at the site during the period of respondent's abatement activities posed a significant risk to persons entering the site and to residents of nearby homes. Dept. Exh. 9; Tr. 6/16/03, pp. 9-11.

Discussion and Conclusions of Law

Pursuant to §20-440-6(b) of the Regulations, the Department may take any action authorized by *Conn. Gen. Stat.* §19a-17 against an asbestos contractor who violates any regulation governing asbestos abatement or licensure. Section 19a-332a-2 of the Regulations prohibits any person from engaging in asbestos abatement unless it is in compliance with §§19a-332a-3 to 19a-332a-12 of the Regulations. Those regulations require an asbestos

contractor, *inter alia*, to: (1) to comply with a Department-approved AWP; (2) provide a source of water to adequately wet all asbestos containing materials; (3) adequately wet all asbestos containing waste and place it in leak-tight containers; (4) properly label all containers holding asbestos waste; (5) isolate work areas from non-work areas, and seal all openings between work areas and non-work areas with polyethylene sheeting; (6) cover all floors and wall surfaces in work areas with polyethylene sheeting; (7) provide a sufficient number of HEPA fans to allow at least one work place air change every 15 minutes; (8) clean-up all work areas until no visible residue is observed; and, (9) maintain records demonstrating compliance with relevant regulations issued by the EPA. *See*, §§19a-332a-11, 19a-332a-7(a), 19a-332a-5(j), 19a-332a-5(k), 19a-332a-5(c), 19a-332a-5(e), 19a-332a-5(h), 19a-332a-5(g), 19a-332a-4(b)(8) of the Regulations, respectively.

In establishing such violations, the Department bears the burden of proof by a preponderance of the evidence. *Swiller v. Comm'r. of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995; *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, reh'g den., 451 U.S. 933 (1981); *Bender v. Clark*, 744 F. 2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F. 2d 240, 243 (D.C. Cir. 1980); all as cited in *Bridgeport Ambulance Service, Inc., v. Connecticut Dept. of Health Services*, No. CV 88-0349673-S (Sup. Court, J.D. Hartford/New Britain at Hartford, July 6, 1989); *Swiller v. Commissioner of Public Health*, No. CV 95-0705601 (Sup. Court, J.D. Hartford/New Britain at Hartford, October 10, 1995).

A. First Count

With regards to paragraphs 1, 2, and 5 of the Charges, respondent admits that it held asbestos contractor license number 000078 at all times referenced in the Charges, and that it performed asbestos abatement work at the site in or about September of 2002. H.O. Ex. 6. The Department, therefore, sustained its burden of proving these allegations.

With regard to paragraph 3 of the Charges, the evidence establishes that respondent's employees were walking on the South Building pile picking up asbestos containing materials and placing them in an unlined and unlabelled dumpster. FF 7. In connection with that abatement, no regulated area had been established, no project monitor was present, no air monitoring was being performed, and the asbestos was being handled in a dry condition. FF 8.

Respondent contends that its employees were not engaged in asbestos abatement on the date in question, but does not seriously dispute that its employees were picking up asbestos waste

and placing it in an unlined and unlabeled dumpster.³ Section 19a-332a-1(d) of the Regulations defines “asbestos abatement” to include the “removal . . . or other disturbance of asbestos-containing materials” Accordingly, the activity of respondent’s employees at the South Building on September 6, 2002, constituted asbestos abatement. Such activity was required to be performed in accordance with the Regulations, as modified by the AWP issued for the project. The Department, therefore, sustained its burden of proving this allegation.

B. Second Count

With regard to paragraph 6 of the Charges, respondent admits that it did not maintain airtight barriers, floor and wall coverings, and HEPA filtration in the Main Building until the reoccupancy criteria set forth §19a-332a-12 of the Regulations had been met.⁴ FF 10. Respondent claims, however, that its employees installed the proper engineering controls and HEPA filtration when they worked in the Main Building, and then removed them sometime prior to the Department’s inspection on September 6, 2002. However, the Department’s investigator testified that he saw no evidence that such controls had been installed when he inspected the Main Building on September 6th. Dept. Exh. 1; Tr. 7/23/03, pp. 43, 44. In addition, since the Main Building was scheduled for demolition, there would have been no reason for respondent to dismantle such controls once they were installed. In the absence of credible evidence to the contrary,⁵ a preponderance of the evidence established that respondent failed to both install and maintain such controls during the period in question.

The evidence also established that the Main Building had not been abated until no visible residue was observed, as required by §19a-332a-5(g) of the Regulations. FF 10. Respondent claims that it was not required to meet the re-occupancy criteria set forth in §19a-332a-12 of the Regulations because the Main Building was ultimately scheduled for demolition. Respondent’s position misconstrues the requirements of §19a-332a-12 of the Regulations. The requirements of that section apply as long as any individual, other than respondent’s employees, might enter the work area after it has been abated. It is not necessary that it be reoccupied on a permanent basis for those provisions to apply. Tr. 7/23/03, p. 59; *see also* §19a-332a-12(a) of the Regulations. The owner of the site had purchased the site, at least in part, to salvage some of the fixtures and

³ Respondent claims that the dumpster in question was lined, but that the lining had slipped down away from the sides of the dumpster after asbestos waste had been placed in it. Respondent also claims that the dumpster was labeled, but that the label had faded over time. Respondent was required to use a leak-tight and properly labeled dumpster at all times. Therefore, even if respondent’s claim were true, they would not disprove the regulatory violations alleged.

⁴ Respondent admits that the Main Building had not met the reoccupancy criteria set forth in §19a-332a-12 of the Regulations at any time relevant to the Charges. Tr. 7/23/03, p. 168.

⁵ The work logs submitted by respondent describing the asbestos abatement it performed in the Main Building are ambiguous and of dubious reliability. Dept. Exh. 9.

equipment in the Main Building. There was also evidence that the Main Building was not secure and was periodically accessed by transients and others. Tr. 6/16/03, p. 10. Accordingly, it was very likely that the Main Building would be “re-occupied” by individuals other than respondent’s employees after it had been abated. Respondent, therefore, was required to meet the requirements set forth in §19a-332a-12 of the Regulations regardless of the fact that the Main Building was ultimately scheduled to be demolished.

However, respondent made no official claim that it had completed its abatement activities in the Main Building. In fact, it was unable to do so, at least in part, because of the issuance of the Stop Work Order by the Town. FF 12. Because respondent didn’t claim that its abatement activities in the Main Building were finished, and the building had not been cleared for reoccupancy as required by §19a-332a-12 of the Regulations, respondent was not required to clean the Main Building up to the standard set forth in §19a-332a-5(g) of the Regulations until it had completed its abatement activities. Accordingly, its failure to do so cannot be a basis for the imposition of discipline in this matter. Therefore, although the Department sustained its burden of proving all of the allegations in paragraph 6 of the Charges, only the violations of subsections a. through c. of that paragraph are the basis for the imposition of discipline.

With regard to paragraph 7 of the Charges, respondent admits that it transported asbestos waste from the site to its offices in Rhode Island. Respondent further admits that the driver of the vehicle that transported that waste did not create a record of that transport. Tr. 7/23/03, pp. 63, 202. Instead, respondent claims that it co-mingled that waste with waste from other projects and then created a manifest describing the entire waste load when it was shipped from its Rhode Island office. Tr. 7/23/03, pp. 119, 125.

Section 19a-332a-5(g) of the Regulations requires an asbestos contractor to record all of the information required by applicable EPA regulations. EPA regulations require that asbestos contractors maintain waste shipment records containing “the name, address, and telephone number of the transporter(s)” for all waste transported off site. *See*, 40 CFR Part 61.150(d)(1)(vii). Respondent failed to comply with this EPA regulation because its waste shipment records do not contain the name, address, and telephone number of the transporter who transported the waste from the site to respondent’s Rhode Island office.⁶ FF 11. The Department, therefore, sustained its burden of proving this allegation.

⁶ It is also noted that respondent’s waste shipment records list the site as the only location where the waste described therein was generated. Dept. Exh. 9. Therefore, the record does not support respondent’s claim that the waste from the site was co-mingled with waste from other sites at its Rhode Island office for record keeping purposes.

Order

Based on the record in this case, the above Findings of Fact and Conclusions of Law, and pursuant to *Conn. Gen. Stat.* §§19a-17(a) and §§20-440, and §20-440-6(b) of the Regulations, the following Order is hereby issued concerning the asbestos contractor license of IES Environmental, Inc., license number 000078:

Civil Penalty:

1. Respondent shall pay a civil penalty of \$12,500 by certified or cashier's check payable to "Treasurer, State of Connecticut." The check shall reference the Petition Number on its face, and shall be payable within thirty days of the effective date of this Order.

Probation:

2. Respondent's license shall be placed on probation until respondent has completed three asbestos abatement projects in compliance with all applicable statutes and regulations as set forth below:
 - a. Respondent shall obtain at its own expense the services of a licensed asbestos abatement project monitor pre-approved by the Department ("the monitor"), to conduct on-site inspections of all asbestos abatement projects undertaken by respondent until the monitor reports to the Department that respondent has successfully completed three such projects in compliance with all applicable statutes and regulations.
 - (1) The monitor shall have the right to monitor any and all work on the projects by any means that he or she deems necessary to determine whether respondent is conducting the abatement in accordance with all applicable statutes and regulation;
 - (2) Respondent shall cooperate fully with the monitor;
 - (3) Respondent shall provide the monitor with the original records maintained on each asbestos abatement project monitored;
 - (4) The monitor shall prepare and submit directly to the Department a written report stating briefly: (a) that the asbestos abatement projects reviewed were completed with reasonable skill and safety and in compliance with applicable statutes and regulations; and, (b) the dates, locations, and duration of all site inspections and meetings with respondent's officers and employees;

- (5) If the monitor determines at any time that respondent is not in compliance with the statutes and/or regulations, he or she shall immediately notify the Department; and,
 - (6) During the period of probation, respondent is prohibited from engaging in any asbestos abatement project if the monitor is unavailable to monitor such project.
- b. Respondent's probation shall terminate when the monitor reports to the Department that respondent has successfully completed the three projects described above.
3. Respondent shall bear all costs associated with its compliance with this Order.
 4. This decision does not dispose of any criminal liability unless respondent receives or has received a written agreement from the Director of the Medicaid Fraud Control Unit or the Bureau Chief of the Division of Criminal Justice's Statewide Prosecution Bureau stating that this decision resolves any such liability.
 5. The civil penalty, and all notices and reports shall be sent to:

Ronald Skomro
State of Connecticut Department of Public Health
450 Capitol Avenue, MS #51AIR
P.O. Box 34038
Hartford, Connecticut 06134-0308
 6. This Order shall be effective thirty days from the date of signature.



Donald H. Levenson, Esq.
Hearing Officer

3-5-04
Date