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ADMINISTRATION

LOUISVILLE METRO AIR
POLLUTION CONTROL BOARD
ADMINISTRATIVE ACTION NO. 05-LMAPD-0485

LOUISVILLE METRO AIR
POLLUTION CONTROL DISTRICT — PETITIONER

vs.

ELDER CONSTRUCTION AND ASSOCIATES, INC.
YANA ELDER COMPANY and FRED RADCLIFFE, JR. — RESPONDENTS

* * * * *

REPORT

FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDED ORDER

* * * * *

I. Introduction

This action is before the Hearing Officer on a Petition for Administrative Hearing filed by the Louisville Metro Air Pollution Control District (sometimes "the District"). The District alleged that, beginning in April of 2003, each of the Respondents participated in a demolition project in Jefferson County, Kentucky. As a result of work performed during this demolition project, the District alleges that the Respondents committed several violations of the Asbestos NESHAP, codified at 40 C.F.R. Part 61, Subpart M, adopted by reference in District Regulation 5.04. As a result of these violations, the District further asserts, the Respondents should be held jointly and severally liable and assessed an appropriate civil penalty.

An administrative hearing was conducted at the Office of the Louisville Metro Air Pollution Control District beginning May 17, 2006, and concluding on May 18, 2006, to consider the allegations referenced in the District's Petition. The hearing was conducted by Scott D. Majors, a hearing officer with the Division of Administrative Hearings, Office of the Attorney General.

Appearing on behalf of the District were Ashley May Nash, Esq., and Stacy Fritz, Esq., who were accompanied by Ms. Terri E. Phelps, the District's Enforcement Supervisor, and, on occasion, by Lauren Anderson, Esq., the District's General Counsel. Appearing on behalf of the Respondents was Schuyler J. Olt, Esq., who was accompanied by Mr. David Elder and Ms. Yana Elder. Mr. Fred Radcliffe, a party-Respondent to this action, failed to appear for this hearing despite receiving notice, and the hearing was conducted in his absence without counsel's objection.

Following careful consideration of the record taken as a whole, and as set forth in greater detail below, it is recommended that the Louisville Metro Air Pollution Control Board enter a Final Order which: (1) AFFIRMS the allegations contained in the District's Petition for Administrative Hearing, dated October 28, 2005; (2) ADJUDGES each of the Respondents to be jointly liable; and (3) ASSESSES a joint civil penalty in the amount of $57,000 against the Respondents.

II. Findings of Fact

1. Petitioner Louisville Metro Air Pollution Control District (District) is a public body corporate and a political subdivision of the Commonwealth of Kentucky. The District is charged with enforcing the laws of the Commonwealth and of Louisville/Jefferson County Metro government relating to the control of air pollution in Louisville, Jefferson County, Kentucky, pursuant to Kentucky Revised Statutes (KRS) Chapter 77 and District Regulations promulgated pursuant thereto.

2. Respondent Yana Elder Company (Yana Co.) is a Kentucky corporation and general contracting company owned by Yana Elder. Respondent David Elder and Associates, Inc. (Elder Co.) is a Kentucky corporation and general contracting company owned by Yana Elder's husband, David Elder. Respondent Fred Radcliffe (Radcliffe) is a formerly certified asbestos abatement contractor who acted as an agent for Yana Co.

3. At all times pertinent to the Petition, Southland Terrace Shopping Center, LLC (Southland Terrace) was the owner of the Southland Terrace Shopping Center (Center) located at 3901 S. Seventh Street Road. Hogan Development Company (Hogan) was the property management company hired by Southland Terrace to manage the day-to-day operations of the Center.

4. Radcliffe was contacted by Kevin Schreiber of Hogan to see if he was interested in bidding on an asbestos abatement and renovation project at the J.C. Penney's store (Penney's) at the Center. Radcliffe was then contacted by Gabriel Jeidel, owner of Southland Terrace, who negotiated a price for the abatement, and a price for the renovation. Radcliffe had previously worked with Schreiber and Jeidel on another asbestos abatement and renovation project at the former Woolworths store at the Center. Radcliffe contacted Yana Co. about the project who submitted a bid of $79,000 for general contracting services.

5. After consulting with Southland Terrace, Hogan accepted Yana Co's bid. The contract between Hogan and Yana Co. called for the removal of most of the internal building components, including the dropped ceiling, the light fixtures, and the HVAC duct work. In addition, it included abatement of asbestos-containing spray-on fireproofing on seven support beams. Radcliffe had a verbal agreement with Yana Co. to serve as the asbestos abatement consultant for removal of the beams. Radcliffe was not certified in asbestos abatement at the time.

6. Yana Co. hired Elder Co. to serve as a demolition subcontractor for the renovation project. Yana Co. subcontracted the entire project, except abatement of asbestos on the beams to Elder Co. David Elder also owns Oakland Construction (Oakland). Oakland provided Hispanic laborers for the demolition of the interior. The Hispanic laborers were not trained in detecting the presence of asbestos.

7. Derek Henderson (Henderson) is an Asbestos Technical Specialist II with the District with over 16 years of training and experience, and he serves as the lead asbestos employee in his group. As part of his job, he reviews asbestos notifications to make sure they are complete, he provides assistance to contractors to maintain compliance, and he conducts NESHAP inspections. Henderson is also an asbestos certified supervisor.

8. On May 1, 2003, Henderson and his supervisor, Bruce Gaylord (Gaylord), visited the Penney's to discuss a variance for the asbestos project with Radcliffe. The variance included waiving the requirement that plastic sheeting be used to cover the entire wall space when disturbing asbestos-containing material (ACM). After discussing the variance with Radcliffe, and in order to determine if the request was feasible, Henderson entered the store to do an assessment of his own.

9. When Henderson opened the door, the store was very drafty and particulate matter was flying in the air. A piece of debris, a gray fibrous material that appeared to be ACM, struck Henderson on his hard hat as he entered the building. Henderson believed the suspect ACM to be from a sprayed-on asbestos containing material. He observed that the suspect ACM was in powdered form and would crumble as soon as he touched it with his fingertips.

10. Henderson reported to his supervisor that there was a problem and together they entered the building to inspect the premises. Henderson noticed that the building was very dusty. There was another entrance to the store where heavy equipment had access to move in and out. Henderson noticed that Bobcats were moving about the site and workers were taking out debris. Henderson observed one or two (2) laborers inside, and four (4) or five (5) outside putting materials in the dumpsters.

11. Almost all of the duct work had been removed from the ceiling when Henderson arrived. Henderson observed piles of debris that included duct work covered with suspect ACM. Some of the piles of debris were as high as four (4) feet. The piles covered approximately two-thirds of the south side of the building.

12. The dropped ceiling was almost completely torn down and Henderson could easily observe the exposed beams with the spray-on fireproofing material suspected to be ACM. In addition to this material, there were several feet of overspray on either side of the beam. In some areas, Henderson noticed gaps in the texture of material where the fireproofing appeared to have been disturbed, such that he could see the steel surface underneath.

13. Henderson exited the building to look at the dumpsters that were located outside. There he saw the same suspect ACM on duct work found in the dumpsters. Henderson asked Radcliffe about the suspect ACM, and Radcliffe replied that he advised workers not to disturb ACM. Radcliffe also stated that he could not be present on site at all times.

14. Henderson and Gaylord took bulk samples from the entrance of the Penney's and from two (2) separate dumpsters. Each of the three (3) bulk samples taken on May 1, 2003 were prepared for laboratory analysis. Henderson and Gaylord also took photographs of the site.

15. From the report prepared by MRS, Inc.,which performed the laboratory analysis, it is found that each of the samples taken on May 1, 2003 were tested using Polarized Light Microscopy (PLM) and contained an average of 12 percent chrysotile asbestos fibers. Chrysotile is a type of asbestos commonly found in building materials.

16. On May 2, 2003, Henderson and District investigator Diana Davidson (Davidson) returned to Penney's and took seven (7) more bulk samples and prepared them for laboratory analysis. Henderson and Davidson also took additional photographs of the site.

17. The seven (7) bulk samples taken by Henderson and Davidson on May 2, 2003 were analyzed by MRS., Inc., using PLM, and two (2) were determined to contain between ten (10) and twelve (12) percent chrysotile asbestos fibers. The two (2) samples that tested positive were taken from piled duct work inside the building and duct work located in a dumpster in the parking lot outside.

18. Henderson observed that no trained asbestos abatement supervisor was present on site while workers transported debris in and out of the building. Henderson did not observe any water on the site or a water truck. He also did not see any bagged or labeled ACM on the site. Finally, Henderson did not see laborers wearing any protective equipment when handling the suspect ACM.

19. The District did not receive notice before the asbestos was disturbed, and a required District permit was never issued.

20. Kentucky OSHA representative Jesse Lewis (Lewis) was concerned about the laborers' exposure to asbestos and long-term health effects. Indeed, it was probably the most significant asbestos exposure inspection that Lewis had ever seen. David Elder provided Lewis the names and addresses of four (4) or five (5) Hispanic laborers, but Lewis was informed that there were probably ten (10) to fifteen (15) laborers originally on site. Lewis attempted to contact the Hispanic laborers but the addresses that were provided were invalid and the laborers were never informed of their exposure.

21. On May 5, 2003, the District received shipping tickets of waste sent from the site to Rumpke and Waste Management landfills. A representative of the company which leased the dumpsters informed the District that some of the dumpsters sent for disposal had not been deposited in the landfill and, in fact, were returned to the site. On May 6, 2003, Waste Management provided

information that twenty dumpsters were transported to the Outer Loop landfill for disposal. In all, seven (7) dumpsters remained on site, and five (5) were returned, for a total of twelve (12) dumpsters that were eventually secured at the Center.

22. Before the renovation occurred, neither Yana Elder, David Elder nor Fred Radcliffe conducted a thorough inspection of the Penney's for the presence of asbestos. Fred Radcliffe and David Elder observed the area containing the support beams above the dropped ceiling by standing on a platform under a two (2) by two (2) foot opening in the dropped ceiling and using a flashlight to look at the area. According to David Elder, the area was "very dirty." Yana Elder had never even been to the Penney's, and was at home at the time of the incident due to the recent birth of her child.

23. Each of the Respondents denies responsibility for identifying the presence of asbestos. Radcliffe claimed it was Southland Terrace's responsibility to advise him where the asbestos was. Yana Elder claims that she relied on Radcliffe and Southland Terrace to identify asbestos. David Elder relied on Southland Terrace and Hogan to advise him of the presence of asbestos before proceeding with the demolition. David Elder further denies liability because "he doesn't do asbestos."

24. On May 29, 2003, the District received notice from LVI Environmental Services of NC, Inc. (LVI), an asbestos abatement contractor hired by Southland, to abate the inside of the Penney's and the dumpsters outside. LVI listed the Penney's as containing 50,000 square feet and estimated the friable asbestos on eight (8) support beams to be 19,200 square feet.

25. On March 11, 2005, the District issued Notices of Violation (NOVs) to Yana Co, Elder Co, Radcliffe, Hogan and Southland Terrace for violations of District Regulation 5.04. The NOVs were addressed to each but assessed a total joint civil penalty of $141,600, to be allocated

amongst the responsible parties. The penalty was calculated based on the EPA's Asbestos Demolition and Renovation Civil Penalty Policy (Policy). The Policy is intended to "yield a minimum settlement penalty figure for the case as a whole." More particularly, the Policy provides that, "[i]n many cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish." (*See*, Asbestos Demolition and Renovation Civil Penalty Policy, Section III, admitted as Petitioner's Exhibit #28.)

26. After March 11, 2005, the District discovered that Southland Terrace possessed an asbestos survey and other documents indicating knowledge of the severity of the asbestos problem and the significant cost to abate. Consequently, the District assessed an increased penalty for willfulness and lack of cooperation. Specifically, on June 23, 2005, the District issued revised NOVs to Yana Co, Elder Co, Radcliffe, Hogan and Southland Terrace. The revised NOVs assessed a total joint civil penalty of $177,000.

27. The District did not assess an "economic benefit" penalty component under the Policy. However, the District did assess a "gravity" penalty component of $15,000 for each of the following violations:

(a) failing to notify the District before asbestos is disturbed;

(b) failing to adequately wet the ACM before disturbing it;

(c) failing to contain ACM in leak-tight wrapping;

(d) failing to keep ACM wet until disposal;

(e) failing to provide a trained supervisor on-site while ACM was disturbed;

(f) discharge of visible ACM emissions; and

(g) failing to dispose of ACM at an approved site.

Additionally, the District assessed a penalty of:

(a) $1,000 for failing to mark waste disposal vehicles;

(b) $2,000 for failing to maintain waste shipment records; and

(c) $10,000 for "size of violator" based on cumulative company assets worth between one and five million dollars.

28. In accordance with the Policy, the "gravity" penalty component is based on the square footage of ACM disturbed at the site. The Policy provides that "where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice" and "if the Region is unable to obtain specific information on the amount of asbestos involved at the site from the source, the Region should use the maximum unit range for which it has adequate evidence."

29. It is found that approximately 10,000 square feet of asbestos had been disturbed. This finding is based on Southland Terrace's notice, filed by its asbestos abatement consultant, LVI Services, which estimated the area of coverage of fireproofing and overspray to be 19,200 square feet. The District divided that in half to estimate the amount of asbestos that was disturbed when the dropped ceiling and ductwork were removed. The District documented at least 3,517 square feet of asbestos-containing waste in dumpsters outside of the building and used this figure to corroborate the estimate.

30. In accordance with the Policy, the District increased the penalty for willfulness or negligence by 30% based on:

(a) Southland Terrace's knowledge of the severity of the asbestos problem and significant cost to abate;

(b) Hogan's negligence in obtaining a survey, even though it was their normal practice; in hiring Yana Co. instead of using Cardinal, as they usually did; and in limiting the scope of the asbestos abatement in the contract;

(c) Yana Co's negligence in hiring Radcliffe, an asbestos "professional" who was not certified in asbestos abatement; and allowing him to supervise the renovation, but not requiring him to be present on site; for not conducting a survey or obtaining one before commencing the project; and

(d) Elder Co's negligence in failing to thoroughly inspect or to obtain an asbestos survey prior to commencing the project.

The adjustment in penalty for willfulness was $35,400.

31. In accordance with the Policy, the District increased the penalty for lack of cooperation by 20 % based on:

(a) Southland Terrace's reporting of false information to the District in the early stages of the investigation;

(b) Yana Co's failure to provide air samples to the District showing the amount of asbestos fibers in the air during the renovation activity on May 1, 2003;

(c) Elder Co's failure to provide air samples to the District when requested, and because someone removed some of Elder Co's tools from the renovation area, which had been secured under lock and key, and someone attempted to remove some construction equipment rented by Elder Co.; and

(d) Radcliffe's failure to provide air samples requested by the District and for reporting falsely that the samples showed there was no asbestos contamination problem.

The adjustment in penalty for lack of cooperation was $23,600.

32. The Policy provides that the government may influence the apportionment of the penalty when one party is more culpable than the others. The District found Southland Terrace to

be most culpable, because it possessed an asbestos survey indicating the severity of the asbestos problem. The District and Southland Terrace settled in the amount of $100,000, which has been paid in full. Hogan settled with the District in the amount of $20,000, which has been paid in full.

33. The District determined that the violations assessed for the remaining three operators, Yana Co., Elder Co., and Radcliffe could not be resolved informally. Accordingly, the District filed a Petition for Administrative Hearing on or about October 28, 2005, seeking a joint penalty of the remaining $57,000.

III. Conclusions of Law

34. The parties were properly served with all pleadings and scheduling notices, and all procedural due process requirements were satisfied.

35. The administrative hearing was conducted pursuant to KRS 77.310 and District Regulation 1.19.

36. In 1963, Congress passed the Clean Air Act, 42 U.S.C. §7401 *et seq*. In 1970, Congress passed amendments to the Clean Air Act, Pub. L. No. 9-95, 91 Stat 685 which authorize the United States Environmental Protection Agency (EPA) to promulgate regulations establishing emission standards for major and area sources of air pollutants.

37. EPA has promulgated National Emission Standards for Hazardous Air Pollutants (NESHAPs), including the National Emission Standard for Asbestos (Asbestos NESHAP), codified at 40 C.F.R. Part 61, Subpart M. The District is authorized to implement the Asbestos NESHAP, and District Regulation 5.04 adopts by reference 40 C.F.R. Part 61, Subpart M.

38. Pursuant to 40 C.F.R 61.141 and District Regulation 5.04, the spray-on asbestos fireproofing discovered at Penney's was regulated asbestos-containing material (RACM) because it was friable asbestos material.

39. Pursuant to 40 C.F.R. 61.141 and District Regulation 5.04, the spray-on asbestos fireproofing discovered at Penney's was friable asbestos material because it contained more than 1 percent asbestos as determined by using Polarized Light Microscopy, and, when dry, could be crumbled, pulverized, or reduced to powder by hand pressure.

40. Pursuant to 40 C.F.R. 61.141 and District Regulation 5.04, the project at Penney's was a renovation because the facility was altered, or one or more facility components was altered in any way, including the removal of RACM from a facility component.

41. Pursuant to 40 C.F.R. 61.141 and District Regulation 5.04, the Respondents are operators of a renovation activity because they operated, controlled, or supervised the renovation operation.

42. The Respondents failed to thoroughly inspect for the presence of RACM prior to the commencement of the renovation, as required by 40 C.F.R. 61.145(a) and District Regulation 5.04.

43. Pursuant to 40 C.F.R. 61.145(a)(4) and District Regulation 5.04, the renovation included the disturbance of at least 160 square feet of RACM.

44. The Respondents failed to provide the District with written notice of the intention to renovate Penney's, in violation of 40 C.F.R. 61.145(b)(1) and District Regulation 5.04.

45. The Respondents failed to adequately wet all RACM and carefully lower each section to the ground, not disturbing the RACM, when a facility component covered with RACM was taken out of the facility as a unit or in sections, in violation of 40 C.F.R. 61.145(c)(2) and District Regulation 5.04.

46. The Respondents failed to contain RACM in leak-tight wrapping after a facility component covered with RACM was taken out of the facility as a unit or in sections, in violation of 40 C.F.R. 61.145(c)(4) and District Regulation 5.04.

47. The Respondents failed to adequately wet all RACM and ensure that it remains wet until collected and contained or treated in preparation for disposal, and carefully lower each section to the ground, not disturbing the RACM, for all RACM, including material that has been removed, in violation of 40 C.F.R. 61.145(c)(6) and District Regulation 5.04.

48. The Respondents failed to have a trained supervisor present when RACM was handled or disturbed, in violation of 40 C.F.R. 61.145(c)(8) and District Regulation 5.04.

49. The Respondents allowed visible emissions to be discharged to the outside air during the collection and transporting of asbestos-containing waste material, in violation of 40 C.F.R. 61.150(a) and District Regulation 5.04.

50. The Respondents failed to deposit all asbestos-containing waste material at an approved waste disposal site, in violation of 40 C.F.R. 61.150(b) and District Regulation 5.04.

51. The Respondents failed to mark vehicles used to transport asbestos-containing waste material during the loading and unloading of waste, with signs that were visible, in violation of 40 C.F.R. 61.150(c) and District Regulation 5.04.

52. The Respondents failed to maintain waste shipment records for all asbestos-containing waste material transported off site, in violation of 40 C.F.R. 61.150(d) and District Regulation 5.04.

53. The Respondents are strictly liable for violations of the Asbestos NESHAP, codified at 40 C.F.R. Part 61, Subpart M and incorporated by reference by District Regulation 5.04.

54. Following the District's settlement with Southland Terrace and Hogan, the assessed joint civil penalty of $57,000 is consistent with the criteria set forth in the Asbestos Demolition and Renovation Civil Penalty Policy, and it is deemed to be fair and appropriate based on the evidence.

IV. Recommended Order

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is HEREBY RECOMMENDED that the Louisville Metro Air Pollution Control Board enter a Final Order which: (1) AFFIRMS the allegations contained in the District's Petition for Administrative Hearing, dated on or about October 28, 2005; (2) ADJUDGES each of the Respondents to be jointly liable; and (3) ASSESSES a joint civil penalty in the amount of $57,000 against the Respondents.

V. Notice of Exception and Appeal Rights

Notice is hereby provided to the parties that:

1. Pursuant to KRS 77.310 (3):

> * * *
> The hearing officer shall serve a copy of the report and recommended order upon all parties of record to the proceedings, and the parties shall be granted the right to file exceptions within fourteen (14) days of receipt. The Secretary-Treasurer shall schedule a time for the air pollution control board to consider the report, exceptions and recommended order and to decide the case. The decision shall be served by mail upon all parties and shall be a final order of the board.

2. Pursuant to District Regulation 1.19 Section 9.3:

> The parties may, within 14 days of receipt of the hearing officer's report and recommended order, file with the Secretary-Treasurer exceptions to the report and recommended order.

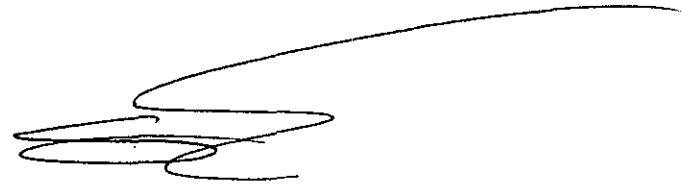
3. Pursuant to District Regulation 1.19 Section 9.4:

> After completion of the administrative hearing and any filing of exceptions, the Secretary-Treasurer shall schedule a time for the Board to consider the report, recommended order, and exceptions and to adopt a final order resolving the matter. A copy of the adopted final order shall be served by certified mail, return receipt requested, to all parties of record to the proceeding.

4. Pursuant to District Regulation 1.19 Section 10:

> Appeals of a final order following an administrative hearing shall be filed with the Jefferson Circuit Court within 30 days of the Board action. The petition shall state fully the grounds upon which a review is sought and assign all errors relied upon. The District shall be named respondent. Notice of the filing of an appeal shall be given by the appellant to all parties of record to the prior proceeding. Service shall be made upon the District by serving the Secretary-Treasurer.

SO REPORTED AND RECOMMENDED this 5th day of October, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that the original of this REPORT and RECOMMENDED ORDER was mailed this 5th day of October, 2006, by first-class mail, postage prepaid to:

JONATHAN L TROUT
SEC/TRES & RECORD CUSTODIAN
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