

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty
Order Issued to Asbestos Abatement
Association

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Barbara Case for a hearing on September 22, 2015. The record closed on October 20, 2015.

David F. Strohkirch, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department). Dan Sacco, Lindquist & Vennum LLP, appeared on behalf of Asbestos Abatement Association (Respondent).

STATEMENT OF THE ISSUES

1. Was the Department's issuance of the March 21, 2014 and July 18, 2014, Administrative Penalty Orders to Respondent proper?
2. Was the Department's August 6, 2014 revocation of Respondent's license to conduct asbestos-related work proper?
3. Was the Department's March 3, 2015 refusal to renew Respondent's license to conduct asbestos-related work proper?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Administrative Penalty Order of March 21, 2014, be upheld. The Administrative Law Judge respectfully recommends that the July 18, 2014 Administrative Penalty Order be upheld with the exception that the fine be reduced from \$10,000 to \$5,000. The Administrative Law Judge respectfully recommends that the Department rescind the license revocation and the refusal to renew and instead issue Respondent a Conditional License.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background

1. “Asbestos” means the asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite, and actinolite.¹ Asbestos is a known carcinogen.²

2. “Asbestos-related work” means the enclosure, removal, or encapsulation of asbestos-containing material in a quantity that meets or exceeds 260 linear feet of friable asbestos-containing material on pipes, 160 square feet of friable asbestos-containing material on other facility components, or, if linear feet or square feet cannot be measured, a total of 35 cubic feet of friable asbestos-containing material on or off all facility components in one facility. In the case of single or multifamily residences, “asbestos-related work” also means the enclosure, removal, or encapsulation of greater than ten but less than 260 linear feet of friable asbestos-containing material on pipes, greater than six but less than 160 square feet of friable asbestos-containing material on other facility components, or, if linear feet or square feet cannot be measured, greater than one cubic foot but less than 35 cubic feet of friable asbestos-containing material on or off all facility components in one facility.³

3. Asbestos-related work includes asbestos abatement area preparation; enclosure, removal, or encapsulation operations; and air quality monitoring specified in rule to assure that the abatement and adjacent areas are not contaminated with asbestos fibers during the project and after completion.⁴

4. Minnesota law requires individual companies licensed by the Commissioner of Health (Commissioner) to conduct asbestos-related work and asbestos-management activities in accordance with minimum prescribed work practices under Minn. Stat. §§ 326.70-.81 (2014) and Minn. R. 4620.3000-.3724 (2015).

5. Asbestos contracting companies must be licensed by the Department.⁵

6. Individuals who perform asbestos related work must hold a certificate issued by the Department. The Department only issues the certificates if the individual shows evidence of training or experience in the general construction trades, has taken a course of training in asbestos control and removal, has passed an examination in those subjects, and has demonstrated the ability to perform asbestos-related work safely.⁶

¹ Minn. Stat. § 326.71, subd. 2 (2014).

² Testimony (Test.) of Mary Navara.

³ Minn. Stat. § 326.71, subd. 4 (2014).

⁴ *Id.*

⁵ Minn. R. 4620.3200.

⁶ Minn. Stat. § 326.73, subd. 1.

7. Licensed asbestos contractors must notify the Commissioner whenever an asbestos-related project is to be performed.⁷ If the licensed asbestos contractor complies with all requirements, the Commissioner then issues a project permit to the licensed asbestos contractor.⁸

Inspections and Sanctions

8. An employee or agent authorized by the Commissioner may conduct surveys or investigations in order to ensure compliance with a contractor's license or a certain project's permit.⁹

9. The Department tries to inspect approximately 10 percent of the work sites for contractors who have applied for over 25 work permits in the previous year.¹⁰

10. Department staff characterize the selection of the work sites to be inspected as "random."¹¹ However, as described by the staff who testified, the selection process is not random, but rather sites are selected at the discretion of the inspectors.¹² The process is set forth in the Department's "Inspection Protocol for Asbestos" manual (Inspection Manual).¹³ "The Enforcement Coordinator will send around monthly reports documenting the inspection rates of the various contractors. These reports will identify contractors that need inspection, and contractors that have been over-inspected."¹⁴ The Inspection Manual goes on to explain that individual inspectors search the Department's data base and determine which sites will be inspected from the notices¹⁵ found in the data base.¹⁶

11. If Department staff discover violations of asbestos abatement laws during inspection, the Department has a range of enforcement options available under the Health Enforcement Consolidation Act of 1993.¹⁷ The Department may "suspend, place

⁷ Minn. Stat. § 326.74; Minn. R. 4620.3410.

⁸ Minn. R. 4620.3425; Ex. 16 at 14 (example of permit).

⁹ Minn. Stat. § 144.99, subds. 1, 2 (2014).

¹⁰ Test. of Mark Bender; Test. of Bruce Lange.

¹¹ Test. of Daniel Locher. As described at hearing, the investigator pulls a list of potential work sites to be inspected and chooses which sites to visit. The selection is not random, i.e., the selection is not left to chance and without potential influence from the investigator. Rather, the selection criteria is undefined and selection could be influenced by a myriad of factors, none of which were made explicit through testimony.

¹² Test. of D. Locher.

¹³ Ex. 105. The exhibit is dated December 2014. However, Mr. Locher testified that the Inspection Manual had been written in 2012 and that the protocols had been in use in unwritten form for much longer, before his tenure at the Department. However, at least with regard to the cap on contractors that had been over-inspected, Inspector Lange testified that the protocol was new and "prior to the establishment of the ten percent protocol" an inspector could pick a contractor repeatedly for any reason including if the inspector had problems with that contractor.

¹⁴ Ex. 105 at MDH 9 (Inspection Manual p. 8).

¹⁵ Notices are created in the data base when asbestos contractors notify the Department that they will be performing asbestos related work at a particular site.

¹⁶ Ex. 105 at MDH 9 (Inspection Manual p. 8).

¹⁷ Minn. Stat. §§ 144.989-.993 (2014).

conditions on, or revoke a permit, license, registration, or certificate.”¹⁸ The Department may also issue correction orders, administrative penalty orders, and cease and desist orders.¹⁹

12. The Department exclusively issued administrative penalty orders when it found violations at Respondent’s work sites.²⁰

13. Administrative penalty orders are issued pursuant to a plan for their use prepared by the Commissioner as ordered by the legislature.²¹ “The administrative penalty order identifies violation(s) discovered, requires that the violation(s) be corrected, and imposes a penalty that may or may not be forgiven by the Commissioner depending on the seriousness or repetitiveness of the violation(s) and the violator’s response to the order.”²² Generally, violations deemed serious are not forgivable.²³ In the case of asbestos, violations are almost always deemed severe.²⁴

14. Before issuing an administrative penalty order, the Department provides written notice of the alleged violation(s) and an opportunity for response. The notice is sent to the regulated party in a “ten-day letter.”²⁵

The letter clearly identifies the violation(s) and explains the findings upon which the alleged violations are based. The letter contains a request that the regulated party provide, within ten calendar days, any information that might affect the commissioner’s determination of alleged violation(s). In addition, Department staff may contact the regulated party to explain the violation(s).²⁶

15. Subsequently, the Department convenes an Administrative Penalty Forum to determine what, if any, penalty will be issued for a violation. The lead investigator presents his or her findings to a group of Department employees who review the evidence and citations for correctness. The Forum decides whether an Administrative Penalty Order should be issued, the level of seriousness of the violation(s) and the appropriate fine, if any.²⁷ The Forum’s decision is documented on a “Summary” form.²⁸

¹⁸ Minn. Stat. § 144.99, subd. 10 (2014).

¹⁹ Minn. Stat. § 144.99, subds. 4-6 (2014).

²⁰ See record generally. The Department did hold one face-to-face meeting with Respondent. Face-to-face meetings are not listed in the statute or the Inspection Manual as an enforcement tool.

²¹ Minn. Stat. §§ 144.99, subd. 7, .991 (2014); Ex. 106 (Plan for the Use of Administrative Penalty Order, Cease and Desist Authority, and Other Enforcement Tools, September 28, 2010 (Plan)).

²² Ex. 106 at 431 (Plan p. 6).

²³ *Id.* at 432 (Plan p. 7).

²⁴ Test. of M. Bender.

²⁵ Ex. 106 at 432 (Plan p. 7). The Department is now referring to this letter as an “allegations of violations letter” however the Plan, a public document, continues to use the term ten-day letter. This report will use the term ten-day letter.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Test. of D. Locher.

Respondent's Background

16. Respondent has worked in the asbestos abatement industry for 30 years. He started as a worker. After five years he obtained his site supervisor license and was in that position for four years. He later obtained an asbestos inspector license. He currently holds an inspector license, a supervisor license, and a contractor license.²⁹

17. Respondent has been licensed by the Department as an asbestos abatement contractor since March 18, 2009.³⁰ Over the last year, on a web site that allows the public to rate and comment on contractors, Respondent has been praised for his professionalism and honesty by several customers and received no negative comments.³¹

18. Respondent sent the Department 933 notifications of asbestos-related work from 2009 to the present.³²

19. The Department has conducted 71 compliance inspections of Respondent since 2009.³³

20. On May 14, 2013, the Department held a meeting with Respondent where Dale Dorschner, then supervisor of the Department's Asbestos/Lead Compliance Unit, told Respondent that the Department would revoke his license if he had another serious violation in a 12-month period.³⁴ No written evidence of this meeting was introduced at the hearing.³⁵ The Department considered this meeting when it decided to revoke Respondent's license.³⁶

21. The Department sent Respondent 12 letters containing allegations of violations and provided Respondent with notice that the Department was considering issuing an Administrative Penalty Order.³⁷ Two of the twelve are being appealed in this case: Administrative Penalty Order for case numbers 140272 and 140441.³⁸

22. Since January 16, 2015, the Department has sent Respondent 15 letters indicating that his work sites have been inspected with no violations found.³⁹

²⁹ Test. of Richard Pruitt.

³⁰ Ex. 115. Respondent's license was renewed every year between 2009 and 2015.

³¹ Ex. 208.

³² Ex. 100 at 3.

³³ *Id.*

³⁴ Ex. 104 at 3; Aff. of Dale Dorschner at 5; Test. of D. Dorschner.

³⁵ See record generally.

³⁶ Test. of D. Locher; Test. of M. Navara.

³⁷ *Id.*

³⁸ Test. of D. Locher.

³⁹ Ex. 117. One letter was issued by Mr. Bender and the others by Mr. Boysen.

The Work-Sites and Inspections

One Penalty Order between 2009 and 2012

23. On June 10, 2009, Bruce Lange, an inspector for the Department, inspected a project run by Respondent at 55 Manitoba Avenue in St. Paul, Minnesota. Following the inspection⁴⁰ the Department alleged violations of the following statutes and rules:

- a. Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1, for failure to submit a notification for asbestos-related work to the Commissioner.
- b. Minn. Stat. § 326.75, subd. 3 and Minn. R. 4620.3430, subp. 4, for failure to pay the permit fee for conducting asbestos-related work.

24. The Department issued a ten-day letter containing the above allegations on December 10, 2009.⁴¹

25. The record does not contain a response from Respondent to the ten-day letter.

26. The Department did not take samples of any asbestos containing material at the site. The Department has no physical evidence that the amount of asbestos removed at the site required a permit. The inspector agreed that Respondent should have been treated as if he were in compliance in the absence of documented proof that any asbestos was removed from the house.⁴²

27. An Administrative Penalty Forum met on March 4, 2010 and determined that the notification violation was serious because it is defined as serious in the Plan; the permit fee violation was not serious because it is not defined as serious in the Plan; the potential for harm for both violations was minor because neither put the public's health at risk; and neither violation was a repeat violation because there was no history of a similar violation. The Penalty Forum levied a \$500 nonforgivable fine for the notification violation and a \$100 forgivable fine for the permit violation.

28. The Department issued an Administrative Penalty Order for the above violations on March 24, 2010.⁴³

⁴⁰ The inspector testified that, although the ten-day letter stated that the violations were observed at the time of the inspection, he did not observe any violations on June 10, 2009. The Combination Administrative Penalty Order states that the violations were found "[b]ased on this inspection, follow-up inspections and submitted documentation."

⁴¹ Ex. 6 at 10-11.

⁴² Test. of B. Lange.

⁴³ Ex. 6 at 12-16.

29. Respondent paid a \$500 penalty and the \$100 penalty was forgiven because Respondent completed the corrective action portion of the Administrative Penalty Order.⁴⁴

30. Respondent had no violations and no Administrative Penalty Orders between June 10, 2009 and July 19, 2012.

Two Penalty Orders in 2012

Case Number: 130019, July 2012

31. On July 19, 2012, Todd Schaefer and Mark Bender, inspectors for the Department, inspected a project run by Respondent at 6603 42nd Avenue North in Minneapolis, Minnesota. Todd Schaefer was the lead inspector.⁴⁵ As a result of the inspection, the Department alleged violations of Minn. R. 4620.3250, subp. 1(A) for failing to employ only asbestos workers with current certificates to conduct asbestos-related work.⁴⁶

32. Minn. R. 4620.3250, subp. 1(B) requires “[a]n asbestos contractor [to] ensure that a current asbestos worker certificate . . . for each individual engaged in asbestos-related work is readily available at the work site for review by the commissioner” A certified asbestos worker who allows their certification to lapse may apply for renewal of their certification by completing a refresher course and submitting an application to the Department.⁴⁷ An asbestos worker who applies for renewal of an expired work certificate may continue to perform asbestos-related work for up to 30 days while waiting for the certificate if the application has been submitted and a copy of the diploma issued after completion of the course is on-site and available for review.⁴⁸

33. The Department issued Respondent a ten-day letter on August 22, 2012.⁴⁹ The Department cited Respondent for violating Minn. R. 4620.3250, subp. 1(A) by failing to employ only asbestos workers with current certificates to conduct asbestos-related work.⁵⁰

34. Respondent replied in a letter dated August 8, 2012, stating that one of his employee’s certificates had expired on June 11, 2012.⁵¹ The worker had attended the

⁴⁴ *Id.* at 17.

⁴⁵ When two inspectors are on a case one inspector is considered the lead. The lead inspector takes the lead on the inspection, asks the questions, both do a visual inspection, the lead fills out the checklist if used, checks for worker’s “hard cards” (the certificate given to a worker and supervisor to show that they are certified to do the work), and fills out the paperwork at the end of the inspection. Test. M. Bender.

⁴⁶ Ex. 7 at 1.

⁴⁷ Minn. R. 4620.3300, subp. 3a.

⁴⁸ *Id.*, subp. 5A.

⁴⁹ Ex. 7 at 1.

⁵⁰ *Id.*

⁵¹ *Id.*

required training course on June 30, 2012, but due to miscommunication neither the worker nor the company had received the certification as of July 19, 2012.⁵²

35. In addition to the explanation regarding the course certification, Respondent stated that the site supervisor failed to make sure that the employee had his certification and the worker went to work when he knew he did not have his certification.⁵³ Respondent subsequently terminated the site supervisor after the Department found violations at another of his supervised sites.⁵⁴

36. The Department convened an Administrative Penalty Forum on August 16, 2012 and again on September 13, 2012. The Forum found that the violation was serious because it is defined as serious in the Department's Plan;⁵⁵ the potential for harm was minor because the employee was previously trained and certified;⁵⁶ the deviation from compliance was severe;⁵⁷ the violation was not a repeat violation;⁵⁸ and the penalty amount was nonforgivable because the violation was serious.⁵⁹

37. The Department issued an Administrative Penalty Order for the above violations on September 19, 2012,⁶⁰ and Respondent paid a \$500 penalty.⁶¹

38. Respondent took further remedial action by notifying his supervisors and worker about the violation and having them sign a statement regarding their understanding.⁶²

Case Number: 130094, September 2012

39. On September 5, 2012, Mark Bender, a Department inspector, inspected a project run by Respondent at 1143 Minnehaha Avenue West in St. Paul, Minnesota. As a result of the inspection the Department alleged violations of Minn. R. 4620.3582, subp. 3B, C, D, G for failing to follow proper work practices for the removal of asbestos-containing materials. Specifically, Respondent failed to ensure the asbestos-containing material was wet before wrapping, failed to wrap the component in two layers of six-mil polyethylene sheeting, failed to seal the polyethylene sheeting, and failed to label the components with asbestos warning labels.⁶³

⁵² *Id.* at 2.

⁵³ *Id.* at 20.

⁵⁴ Ex. 8 at 21-22.

⁵⁵ Ex. 7 at 12.

⁵⁶ *Id.* at 13.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 16.

⁶¹ *Id.* at 22.

⁶² *Id.* at 20-21.

⁶³ Ex. 8 at 13-14, 21. Wetting the material helps prevent any fibers from becoming airborne, there was no water at the site but there are methods for wetting material when no water is available.

40. The Department summarized its findings in a ten-day letter issued to Respondent on October 2, 2012.⁶⁴

41. On October 12, 2012, Respondent sent a reply letter to the Department.⁶⁵

42. Respondent stated that the supervisor at the work site intentionally committed violations to sabotage Respondent because the supervisor had recently opened a rival company.⁶⁶ Respondent terminated the supervisor from Respondent's company on September 27, 2012, because of this and other violations and because of absenteeism.⁶⁷

43. The Administrative Penalty Forum met on October, 25, 2012 and determined that all four violations were serious because they are defined as serious in the Department's Plan; the potential for harm was serious; and the deviation from compliance was severe because the violation could have exposed people to asbestos. The Forum determined the appropriate penalty to be \$5,000.⁶⁸

44. The Department issued an Administrative Penalty Order on November 6, 2012, fining Respondent \$5,000.⁶⁹ The Department also ordered Respondent to submit a plan for implementing procedures to assure the violations would not be repeated; give written notice of the violations to company officers and site supervisors; and require each officer and supervisor to sign a statement that the person has read and understands the written notice and will comply with the regulatory requirements in the future.⁷⁰ The order described Respondent's right to have the order reviewed by requesting a hearing.⁷¹

45. Respondent paid the \$5,000 penalty and again indicated that the worker who committed the violations had done so to undermine Respondent's company.⁷²

46. On December 11, 2012, the Department sent a letter notifying Respondent that he had met all the requirements of the corrective action portion of the Administrative Penalty Order. The letter also stated that "[t]hese violations will be considered in the event of future violations."⁷³

⁶⁴ *Id.* at 13-14.

⁶⁵ *Id.* at 21-22.

⁶⁶ *Id.*

⁶⁷ *Id.* at 22, 28-29.

⁶⁸ *Id.* at 15-20.

⁶⁹ *Id.* at 23-26.

⁷⁰ *Id.* at 25.

⁷¹ *Id.* at 26.

⁷² *Id.* at 30.

⁷³ *Id.*

Three Penalty Orders in 2013

Case Number: 130326, February 26, 2013

47. On February 26, 2013, Department inspectors Colin Boysen and Mark Bender inspected Respondent's project at 1721 Brook Avenue Southeast, Minneapolis, Minnesota.⁷⁴ There were no workers at the site when the inspectors arrived.⁷⁵ Air clearance samples were running, although one of three air pumps had overheated and stopped running.⁷⁶

48. As a result of the inspection, the Department alleged violations of Minn. R. 4620.3582, subp. 3C, D, which state that a facility component (in this case an air duct) that is being removed must be wrapped in two layers of six-mil polyethylene sheeting and the sheeting sealed with tape or a comparable material to provide an airtight seal.⁷⁷

49. The Department summarized its findings in a ten-day letter issued on March 13, 2013. In addition to the violations cited above, the ten-day letter cited Respondent for failing to label the facility component with an asbestos warning label.⁷⁸

50. Respondent responded to the Department on March 26, 2013, stating that his employees were provided with the materials they needed to correctly perform the job, that there were warning labels on the item but on the downside where the inspector did not look, and the "entire facility component that had asbestos on it was wrapped in polyethylene sheeting. The non-Asbestos containing portion of this duct, which was wood, was not completely wrapped." Respondent complained that the inspector caused the poly covering to fail by excessively manhandling the "product." Respondent also alleged that the inspector, Mr. Bender, was overly aggressive during the inspection.⁷⁹

51. Mr. Bender took a sample of the material.⁸⁰

52. There is no evidence that the Department had the material tested, and Mr. Bender testified that nothing in the exhibits establishes a violation.⁸¹

⁷⁴ Ex. 9.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.*

⁷⁷ *Id.* at 24-29.

⁷⁸ *Id.* at 11-12, 24. The ten day letter cited three violations but the third violation was not part of the summary or the Order apparently because the Department took into consideration Respondent's responsive letter which stated that the required labels were attached but that the inspector did not look on the underside of the component where the labels were affixed. Relatedly, upon arrival at the job site, the Inspectors found no workers at the site but air samples were being run. The Inspectors shut off the samples, called the company, and asked why there was no supervisor on the site. A little after the call was made the supervisor arrived in a truck that carried the asbestos-containing material that had been removed from the job site. The no-supervisor-on-site violation was not cited by the Department.

⁷⁹ *Id.* at 27.

⁸⁰ Test. of M. Bender; Ex. 9 at 12.

⁸¹ *Id.*

53. Photographs taken by the inspector show that the component was not completely sealed.⁸²

54. The Department convened an Administrative Penalty Calculation Forum on April 18, 2013.⁸³ The Department dismissed the labeling violation.⁸⁴ The Administrative Penalty Forum determined both violations—failure to wrap the asbestos-containing material in two layers of polyethylene sheeting and failing to seal the component with tape—were serious; the \$5,000 penalty for each violation was nonforgivable; and the deviation from compliance and the potential for harm was severe for both violations.⁸⁵

55. The Forum calculated the total base penalty to be \$10,000.⁸⁶

56. The Department issued an Administrative Penalty Order on April 22, 2013,⁸⁷ ordering Respondent to pay a \$5,000 fine and notify the Department how Respondent would ensure future violations would not occur. Respondent was also required to notify various officers and workers in his company about the violation and have them sign statements indicating they understand the requirements and would comply with them in the future.⁸⁸

57. Respondent paid the \$5,000 penalty and performed the other requirements in the order.⁸⁹ In a June 3, 2013 letter to the Department, Respondent reiterated his response to the ten-day letter and expressed his belief that the employee's actions should not reflect upon the company.⁹⁰ In a June 13, 2013 letter, Respondent told the Department that the employees involved were no longer employed with his company and he had implemented a check-off list to assure correct completion of projects.⁹¹

Case Number 130339, March 7, 2013

58. On March 7, 2013, Department inspectors Colin Boysen and Mark Bender inspected Respondent's project at 2530 Jackson Street Northeast in Minneapolis, Minnesota.⁹² As a result of the inspection the Department alleged violations of Minn. R. 4620.3571, subp. 1C, for failure to seal bags containing asbestos-containing materials. The Department also found violations of Minn. R. 4620.3571, subp. 2B, because an entire component that had been removed was not sealed in six-mil clear

⁸² Ex. 9 at 23.

⁸³ *Id.* at 28-32.

⁸⁴ *Id.* at 28 (labeling violation not mentioned).

⁸⁵ *Id.* at 29-32.

⁸⁶ *Id.* at 30.

⁸⁷ *Id.* at 33-36.

⁸⁸ *Id.* at 35.

⁸⁹ *Id.* at 43.

⁹⁰ *Id.* at 38.

⁹¹ *Id.* at 39-42.

⁹² *Id.* at 19.

polyethylene sheeting.⁹³ The Department also alleged violations of Minn. R. 4620.3575, subs. 1D, 9B(2), for failing to clean abatement equipment upon completion (waste bags coming out of containment area were contaminated) and for failing to gooseneck a polyethylene bag used for asbestos-containing waste material.⁹⁴

59. On March 19, 2013, the Department sent Respondent a ten-day letter describing the violations and requesting a written response within ten days.⁹⁵

60. Respondent wrote to the Department on April 3, 2013, requesting more information about the citations so that he could better respond. Respondent specifically requested pictures of, and samples taken from, the furnace components and the waste bags.⁹⁶

61. The Department did not provide any additional information to Respondent in response to his request.⁹⁷

62. There is no evidence that the Department took any samples of the alleged asbestos-containing material.

63. Respondent again wrote to the Department on April 17, 2013.⁹⁸ He noted that the open and improperly sealed bags in the truck were not necessarily from the site and may not have contained asbestos and the Department's initial letter had cited boiler remnants but there had been no boiler removal at the site. The Department's letter stated that Respondent "failed to all abatement equipment coming out of the truck. Waste bags witnessed going from the containment that were contaminated and being hauled to the truck."⁹⁹ The letter also alleged that Mark Bender had, contrary to Department protocol, spoken to a worker on the project rather than to the site supervisor, Jacob Martin Sr., and that Mark Bender told the worker that he should look for work elsewhere as the company would not be around long.¹⁰⁰ The letter alleged that the Department's inspectors exhibited an aggressive manner and harsh attitude at Respondent's job sites. Respondent further alleged that the Department had a vendetta against his company.¹⁰¹

64. Respondent did not receive any responses, verbal or written, to his complaint letter.¹⁰²

⁹³ Ex. 10 at 12. The Department's ten-day letter called the component a "boiler." However, a furnace not a boiler was removed at that job site. *Id.* at 16.

⁹⁴ *Id.* at 13.

⁹⁵ *Id.* at 12-13.

⁹⁶ *Id.* at 14.

⁹⁷ *Id.* at 15-18; Test. of R. Pruitt.

⁹⁸ Ex. 10 at 15-18.

⁹⁹ *Id.* Respondent notes that the first sentence about the bags is not a sentence and does not make sense. However, it is fairly obvious when read in context that the word "clean" is missing and that the second sentence makes the violation clear notwithstanding the dropped word in the first sentence.

¹⁰⁰ *Id.* at 17.

¹⁰¹ *Id.*

¹⁰² Test. of R. Pruitt; see hearing record generally.

65. The Administrative Penalty Forum met on April 18, 2013, and determined that the four violations were serious, and therefore nonforgivable, because they are defined as serious in the Plan.¹⁰³ The Forum found that none of the violations were willful or repeat violations but that the deviation from compliance and potential for harm for each violation was severe.¹⁰⁴ The Forum calculated the base penalty and the total penalty to be a \$5,000 nonforgivable fine.¹⁰⁵

66. The Department sent Respondent an Administrative Penalty Order on April 25, 2013 upholding the Department's findings. The Department ordered Respondent to notify officers and site supervisors of the violations, to develop a plan of procedures to ensure the violations would not recur, and to pay a \$5,000 nonforgivable administrative penalty.¹⁰⁶

67. On May 20, 2013 and June 13, 2013, Respondent wrote to the Department questioning its findings,¹⁰⁷ and again asking for photos and/or samples taken at the work site so that he could make an informed decision about whether to request a hearing.¹⁰⁸

68. On June 13, 2013, Respondent wrote to the Department and described the actions he was taking to ensure that the cited violations did not recur. He specifically stated that he was incorporating a checklist for each project to ensure that things were done correctly, terminating the culpable employees, and purchasing longer bags to prevent problems with goose-necking.¹⁰⁹

69. Respondent also questioned why his company was held responsible for the employees' failure to follow the regulations when they were licensed by the Department. Respondent further stated that the penalty seemed disproportionate to the monetary value of the small project and speculated that it was designed to put him out of business rather than for any other purpose.¹¹⁰

70. Respondent paid the \$5,000 penalty.¹¹¹ The Department determined that Respondent met all the requirements of the corrective action portion of the APO and noted that the violations "will be considered in the event of future violations."¹¹²

¹⁰³ Ex. 10 at 19-20; Ex. 106 at A-4; MDH 445. The Plan's Appendix specifically lists a violation of this rule as serious.

¹⁰⁴ Ex. 10 at 19-22.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.* at 29-30, 33-36.

¹⁰⁸ *Id.* at 29-30. The Department testified that it is its policy to not offer any evidence unless a party appeals.

¹⁰⁹ *Id.* at 33. This letter is in response to citations made at two different addresses/job sites.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 37.

¹¹² *Id.*

Case Number 130350, March 12, 2013

71. On March 12, 2013, Department inspectors Mark Bender and Colin Boysen inspected Respondent's project at 3251 Upton Avenue North in Minneapolis, Minnesota. As a result of the inspection, the Department alleged violations of Minn. R. 4620.3569, subp. 1, for failing to properly use a decontamination unit. The decontamination unit's shower was inoperable due to lack of water.¹¹³ The Department also noted that employees were found to have left the containment area while wearing street clothes and without showering off in the decontamination unit.¹¹⁴ In summary, workers were coming and going from the containment area, which was potentially contaminated with asbestos, without changing their clothes or washing themselves.¹¹⁵

72. The Department sent Respondent a ten-day letter on March 15, 2013.¹¹⁶ The letter notified Respondent that the Department was citing him for violating Minn. R. 4620.3569, subp. 1: failing to use a decontamination unit.¹¹⁷

73. Respondent replied to the Department's ten-day letter on March 27, 2013. He explained that the workers wore t-shirts and shorts under disposable Tyvek suits which were properly disposed of with other material; the relevant worker was not working in the containment area but rather disconnecting the gas; and the containment unit was so small that the water came from the unit itself and was turned off so that it would not leak.¹¹⁸

74. Respondent also stated in his responsive letter that Mark Bender had lost his temper and yelled vulgarities at the workers in the containment area.¹¹⁹ Respondent stated that the site supervisor believed the inspector had found everything to be in order at the site prior to this incident.¹²⁰

75. The Department's Administrative Penalty Forum met on April 18, 2013. The Forum found that the workers on site failed to use the decontamination unit to decontaminate upon exiting the containment area; the violation was serious; there was no history of similar previous violations; and a \$5,000 nonforgivable penalty was appropriate.

¹¹³ Ex. 11 at 11-12.

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.* at 12, 16.

¹¹⁶ *Id.* at 16-17.

¹¹⁷ *Id.*

¹¹⁸ The explanations were that workers had disposable Tyvek suits; worker was in the containment area to shut off gas not to work with asbestos; and that the water supply was within the decontamination unit and was turned off because of water leaking.

¹¹⁹ Ex. 11 at 19; Test. of M. Bender. Although recollections of the exact words differ, Mr. Bender admits he used inappropriate language with the workers at the site. He otherwise testified that he believes that he acted appropriately on this site. Test. of M. Bender.

¹²⁰ Ex. 11 at 19.

76. The Department issued an Administrative Penalty Order on May 16, 2013.¹²¹ The order required Respondent to submit procedures to ensure the violation would not recur; issue a notice of the violation to company officers and site supervisors; and have each sign a statement indicating they read the notice and would comply in the future. In addition, the Department ordered Respondent to pay a \$5,000 fine.¹²²

77. The Department and Respondent stipulated that Respondent would pay \$2,500 of the penalty and \$2,500 would be stayed for a period of five years as long as Respondent issued a written notice of the violations to his then-current employees and required each employee to sign a statement indicating that they read and understood the notice and would comply with the regulatory requirements in the future.¹²³

78. On or about December 17, 2013, Respondent wrote to the Department and stated that he understood the Department's findings. He also stated that the three employees involved in the incident of March 12, 2013, were no longer employed with the company.¹²⁴

79. On December 18, 2013, the Department informed Respondent that he had complied with the order's requirements.¹²⁵

Five Penalty Orders in 2014

Case Number 140272, January 13, 2014 (Appealed)

80. On January 13, 2014, Inspectors Colin Boyson and Mark Bender inspected Respondent's asbestos abatement work at a residence located at 4621 Arden Ave., Edina, Minnesota.¹²⁶ As a result of the inspection, the Department alleged violations of the following Minnesota Rules:

- a. Minn. R. 4620.3581, subp. 1, for the removal of more than 10 square feet of asbestos containing material within the mini-containment;¹²⁷
- b. Minn. R. 4620.3581, subp. 5B, for failure to thoroughly clean surfaces within the mini-containment until no visible asbestos containing material was present;¹²⁸

¹²¹ *Id.* at 24-27.

¹²² *Id.* at 26.

¹²³ *Id.* at 30-31.

¹²⁴ *Id.* at 34.

¹²⁵ *Id.* at 36.

¹²⁶ Ex. 12 at 48.

¹²⁷ *Id.* at 54. The Department is not pursuing this violation. Notice and Order for Hearing, at 5.

¹²⁸ Ex. 12 at 55.

- c. Minn. R. 4620.3581, subp. 6G(1), for failure to seal the door and completely collapse the containment using a HEPA-filter equipped vacuum;¹²⁹
- d. Minn. R. 4620.3592, subp. 5A, for failure to conduct air monitoring during the glovebag activity.¹³⁰

81. The Department issued a ten-day letter to Respondent on February 27, 2014, detailing the above violations.¹³¹

82. By letter to the Department dated March 10, 2014, Respondent attributed the violations to the on-site supervisor.¹³²

83. On March 13, 2014, the Department held a Penalty Forum which found that the two violations at issue were nonforgivable, serious, not willful or repeated, and the potential for harm and deviation from compliance for both was severe.¹³³

84. The Department issued an Administrative Penalty Order on March 18, 2014.¹³⁴ The Department levied a \$10,000 fine.

85. On April 24, 2014, Respondent appealed the Administrative Penalty Order.¹³⁵ Respondent argued that the supervisor of the job site, who accepted full responsibility for the violations and was terminated from the company, should have been held accountable rather than Respondent.¹³⁶

Complaint Number 140291, January 6, 2014

86. On February 11, 2014, Bruce Lange inspected Respondent's project at 2159 Wilson Avenue in St. Paul, Minnesota. No one was present at the site when the inspector arrived and, in fact, the house at that address was gone and there was only an empty lot remaining.¹³⁷ As a result of the inspection, the Department alleged the following violations:

- a. Minn. Stat. § 326.74, for failing to properly report asbestos work
- b. Minn. Stat. § 326.75, subd. 3, for failing to pay a project permit fee;

¹²⁹ *Id.* The Department is not pursuing this violation. Notice and Order for Hearing, at 5.

¹³⁰ Ex. 12 at 55.

¹³¹ *Id.* at 44.

¹³² *Id.* at 46-47.

¹³³ *Id.* at 48-51.

¹³⁴ *Id.* at 52-56.

¹³⁵ *Id.* at 57.

¹³⁶ *Id.*

¹³⁷ Test. of B. Lange.

- c. Minn. R. 4620.3410, subp. 1, for failing to notify the commissioner of the project.¹³⁸

87. The inspector called Respondent to inform him that the person Respondent had hired to demolish the house was not licensed. In a subsequent call, Respondent told the inspector that he believed the house was not regulated by the Department because there was no furnace or duct work.¹³⁹

88. Respondent was hired to perform a hazardous materials and asbestos survey and to line the dumpsters with polyethylene sheeting.¹⁴⁰ Respondent was not hired to do the demolition and removal.¹⁴¹ Another company demolished the house.¹⁴²

89. The Department concluded that there was asbestos at the site based on Respondent's asbestos survey. Respondent's survey shows that Respondent took no asbestos samples at the site.¹⁴³

90. The Department issued a ten-day letter on March 10, 2014.¹⁴⁴

91. The Department convened an Administrative Penalty Forum on February 13, 2014. The Forum found that the failure-to-report-asbestos-work violation was serious, nonforgivable, the potential for harm was minor, the deviation from compliance was severe, and the violation was not a repeat violation. The Forum found the appropriate penalty to be \$500.¹⁴⁵ The Forum found that the failure-to-pay-a permit-fee violation was not serious, was forgivable, the potential for harm was minor, the deviation from compliance was severe, and the violation was not a repeat violation.¹⁴⁶ The Forum found the appropriate penalty to be \$500, for a total of \$1,000 for the two violations.¹⁴⁷

92. The Department issued an Administrative Penalty Order on June 25, 2014.¹⁴⁸ The Department assessed a \$1,000 penalty, with \$500 being forgivable if Respondent completed all required corrective actions.¹⁴⁹

93. Respondent paid \$500 and completed the corrective actions.¹⁵⁰

¹³⁸ Ex. 13 at 17. This exhibit states that "no inspection was performed" but Bruce Lange testified that this notation was an error and that he performed the inspection at 2159 Wilson Ave. *Id.* at 16; Test. of B. Lange.

¹³⁹ Ex. 13 at 14.

¹⁴⁰ *Id.* at 14-15.

¹⁴¹ Ex. 13 at 14.

¹⁴² Test. of B. Lange.

¹⁴³ *Id.*; Ex. 13 at 4-10.

¹⁴⁴ Ex. 13 at 1-2.

¹⁴⁵ *Id.* at 16-17.

¹⁴⁶ *Id.* at 16-18.

¹⁴⁷ *Id.* at 19.

¹⁴⁸ *Id.* at 20-24.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ *Id.* at 29.

Complaint Number 140426, May 27, 2014

94. On May 27, 2014, Department inspectors Colin Boyson and Mark Bender inspected Respondent's asbestos abatement project at 5131 Dupont Avenue North in Minneapolis, Minnesota. As a result of the inspection, the Department alleged violations of Minn. R. 4620.3569, subp. 1C, D(3), for failing to have doorways in the decontamination unit between the rooms and entrances to the unit with two sheets of polyethylene; and failing to have a shower room supplied with hot and cold water.¹⁵¹ More specifically, when the inspectors arrived at the work site asbestos removal was underway but the hose that should have been connected to the decontamination unit was lying disconnected on the kitchen floor and the flaps in the decontamination chambers were being sucked into the work area such that one could see into the containment area.¹⁵²

95. On June 12, 2014 the Department issued a ten-day letter containing the allegations.¹⁵³

96. Respondent requested proof regarding the allegations by letter dated June 27, 2014.¹⁵⁴ Respondent alleged the inspectors' treatment of his employees upset the site supervisor, who therefore ultimately quit working for Respondent.¹⁵⁵

97. Respondent received no response to his letter.¹⁵⁶

98. The Department convened an Administrative Penalty Forum on July 10, 2014. The Forum determined that both violations were serious, and therefore nonforgivable, because they were defined as serious in the Plan; neither was a repeat violation; the deviation from compliance was minor for the doorway violation and severe for the decontamination unit violation; and the potential for harm for both was minor. The Forum based its determination that the potential for harm was minor on the fact that the hose was there, the crew had just started working, the hose was hooked up after the inspector arrived, and, because the flaps were there, the crew was running enough negative pressure in the containment area so there was little chance of any fibers escaping the containment area.¹⁵⁷ The fine for each was \$500, for a total of \$1,000.

99. The Department issued an Administrative Penalty Order on July 17, 2014.¹⁵⁸

¹⁵¹ Ex. 14 at 9-10.

¹⁵² *Id.* at 7-8; Test. of C. Boysen.

¹⁵³ Ex. 14 at 7-8; Test. of C. Boysen.

¹⁵⁴ Ex. 14 at 16.

¹⁵⁵ *Id.*

¹⁵⁶ Test. of R. Pruitt.

¹⁵⁷ Test. of C. Boysen.

¹⁵⁸ Ex. 14 at 17-21.

100. On August 15, 2014, Respondent acknowledged the violations by letter, which was signed by Respondent and six of his employees.¹⁵⁹

101. On August 26, 2015, the Department issued Respondent a letter stating that he had complied with the Order's requirements.¹⁶⁰

Complaint Number 140441, June 3, 2014, Stahl House Project (Under Appeal)

102. On June 3, 2014, Department inspectors Colin Boysen and Mark Bender inspected Respondent's project at 586 Rice Street in St. Paul, Minnesota. As a result of the inspection, the Department alleged violations of Minn. R. 4620.3575, subp. 1B, for failure to thoroughly clean the work area until no asbestos dust, residue, dirt, or debris was visible. As a result of the inspection, the Department also alleged violations of Minn. R. 4620.3594, subp. 2, for failure to thoroughly clean the containment area before clearance air sampling.¹⁶¹ At the time of the inspection, asbestos-containing material was found on the chimney, a pipe thread on the boiler, a pipe elbow on the boiler, and on a pipe elbow (nonboiler) in the boiler room after clearance air sampling had been performed.¹⁶²

103. The house that was the subject of this work was scheduled for demolition.¹⁶³ The work was bid and performed following an asbestos inspection report created by another company.¹⁶⁴ Respondent bid to remove pipe insulation and boiler insulation.¹⁶⁵

104. The Department sent Respondent a ten-day letter on June 13, 2014.¹⁶⁶

105. Respondent replied to the ten-day letter on July 1, 2014.¹⁶⁷ Respondent explained that his crew followed the asbestos survey report and that the containment passed the final air clearance sampling.¹⁶⁸

106. Mr. Bender testified that he did not disagree with anything in Respondent's response to the Department's ten-day letter.¹⁶⁹ He also testified that he continued to believe that the Administrative Penalty Order was warranted because asbestos containing material had been left behind and Respondent was, according to the rules,

¹⁵⁹ *Id.* at 22. According to Mr. Boysen, only one of the employees who signed the letter had been at the job site in question, Mr. Perez.

¹⁶⁰ *Id.* at 24.

¹⁶¹ Ex. 15 at 4.

¹⁶² *Id.*

¹⁶³ *Id.* at 31; Test. of Jacob Martin Sr.

¹⁶⁴ Ex. 15 at 8; Test. of J. Martin Sr.

¹⁶⁵ Test. of J. Martin Sr.; Test. of R. Pruitt.

¹⁶⁶ Ex. 15 at 4.

¹⁶⁷ *Id.* at 30-31 (page 29 was remarked as page 30 during the hearing).

¹⁶⁸ *Id.*

¹⁶⁹ Test. of M. Bender regarding Ex. 15 at 30-31.

responsible for cleaning the work area regardless of what was in the asbestos survey report.¹⁷⁰

107. Jacob Martin Sr. was the supervisor on this project. He relied on the asbestos survey report to determine the job's scope.¹⁷¹ According to the survey and the scope-of-work plan, they were supposed to remove boiler and pipe insulation.¹⁷² After a job was completed, Mr. Martin would do a series of visual inspections to ensure he could not see any asbestos, clean the containment area, spray an encapsulant, wait for it to dry, run air samples, and once those are clear, tear down the containment area.¹⁷³

108. Mr. Martin rechecked the building after the inspectors' inspection and found additional asbestos above the building rafters that had not been identified on the survey and were not part of the job.¹⁷⁴ He removed that material.¹⁷⁵ He subsequently amended the site permit to reflect these findings.¹⁷⁶

109. The scope of work described on the permit is unknown. The permit was not offered as evidence and the Department did not produce it when Respondent's attorney requested, for the purpose of this appeal, production of all documents in the Department's possession related to this work site.¹⁷⁷

110. The Department convened a Penalty Forum on July 10, 2014.

111. The Penalty Forum determined that both violations were serious, and therefore nonforgivable, because they were defined as serious in the Plan; neither was a repeat violation; deviation from compliance for both was severe; and the base penalty for each was \$5,000, making the total fine \$10,000.

112. The Department issued an Administrative Penalty Order on July 18, 2014.¹⁷⁸

113. Respondent replied by letter dated July 1, 2014, in which he explained that the containment area was thoroughly cleaned and encapsulated prior to final air clearance; the site supervisor relied on the asbestos survey report and used measurements therein for his scope of work; and the chimney was not removed by his company.¹⁷⁹

¹⁷⁰ *Id.*

¹⁷¹ Test. of J. Martin Sr.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*; Ex. 31.

¹⁷⁵ Test. of J. Martin Sr.; Ex. 31.

¹⁷⁶ Test. of J. Martin Sr.; Ex. 31. No permit was produced.

¹⁷⁷ Ex. 103.

¹⁷⁸ Ex. 15 at 24-28.

¹⁷⁹ *Id.* at 15, 29.

114. On August 22, 2014, Respondent appealed the fine.¹⁸⁰

115. On August 6, 2014, the Department revoked Respondent's license.¹⁸¹

Complaint Number 150140, October 2, 2014

116. On October 2, 2014, the Department's inspectors Colin Boysen and Daniel Locher inspected Respondent's project at 3833 17th Ave. South in Minneapolis, Minnesota. As a result of the inspection the Department alleged violations of the following rules:

- a. Minn. R. 4620.3250, subp. 2A, for failure to ensure that a certified asbestos supervisor was present at the work site when asbestos-related work was performed;
- b. Minn. R. 4620.3569, subp. 1D(3), for failure to provide a shower room supplied with hot and cold water in the decontamination unit;
- c. Minn. R. 4620.3594, subp. 2F(2), for failure to properly place a stationary fan when conducting clearance air sampling in the containment area.¹⁸²

117. On October 8, 2014, Mr. Boysen requested additional information regarding this job from Respondent.¹⁸³

118. On October 23, 2014, Respondent submitted the requested material. In the letter accompanying the documents, Respondent explained that he had provided a permit and the materials needed to perform the job. Respondent argued that the workers were certified as competent site supervisors by the Department and therefore the workers should lose their licenses rather than Respondent.¹⁸⁴

119. On October 31, 2014, the Department sent Respondent a ten-day letter containing the alleged violations.¹⁸⁵

120. On November 12, 2014, Respondent responded to the ten-day letter. He again argued that if workers certified by the Department commit violations the Department bears responsibility for the violations. Respondent also explained that he had gone over the decontamination unit issue with his employees and had them sign statements regarding their understanding.¹⁸⁶

121. The Department convened an Administrative Penalty Forum on November 25, 2015. The Forum determined that the violations were serious because they was

¹⁸⁰ *Id.* at 29 (the page was numbered 30 and corrected to 29 during the hearing).

¹⁸¹ Ex. 195.

¹⁸² Ex. 16 at 25-26.

¹⁸³ *Id.* at 11.

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Id.* at 25.

¹⁸⁶ *Id.* at 27.

defined as serious in the Plan and therefore carried nonforgivable penalties; none of the violations were deemed to be a repeat violation; deviation from compliance was severe; the potential for harm for not having a supervisor on site was minor; the dry-contamination-unit violation posed a severe potential for harm; and the air-sampling violation posed a minor potential for harm.¹⁸⁷

122. The Department issued an Administrative Penalty Order to Respondent on December 3, 2014, which included a \$6,000 fine and a plan to correct the violations.¹⁸⁸

123. The Department sent Respondent a letter on January 23, 2015, stating that he had complied with the APO's requirements.¹⁸⁹

Other Relevant Facts

124. On May 14, 2013,¹⁹⁰ Dale Dorschner, then manager of the Department's Indoor Environments and Radiation Section, met with Respondent at the Department.¹⁹¹ He called the meeting with Respondent to address concerns about the unprecedented number of violations for which Respondent's company had been cited. Mr. Dorschner chose to proceed in this manner because prior managers of the division with whom he consulted advised him that they had done this to let "them know the severity of where they're at." Mr. Dorschner told Respondent that if he received another violation within 12 months, the Department would exercise its authority to revoke his license. Dan Lashner was also at the meeting. Respondent blamed his workers, but Mr. Dorschner told him that as the licensed contractor, he was responsible.¹⁹²

125. Respondent's complaint letters were not addressed at the meeting.¹⁹³

126. On August 6, 2014, the Department issued a Notice of Intent to Revoke to Respondent.¹⁹⁴

127. On March 9, 2015, the Department issued a Notice of its Refusal to Renew Respondent's license.¹⁹⁵

Based on these Findings of Fact, the Administrative Law Judge makes the following:

¹⁸⁷ *Id.* at 29-30.

¹⁸⁸ *Id.* at 33-37.

¹⁸⁹ *Id.* at 38.

¹⁹⁰ Ex. 104 at 3. In these answers to interrogatories, the Department states that the meeting was held on May 14, 2013. However, in its notes from the Enforcement Forum where the Department decided to revoke Respondent's license, the meeting is referred to as having occurred on May 14, 2014. Ex. 196. As the Enforcement Forum met on July 31, 2014, it is reasonable to assume that the warning meeting was held in 2013.

¹⁹¹ Test. of D. Dorschner.

¹⁹² *Id.*

¹⁹³ Test. of R. Pruitt.

¹⁹⁴ Ex. 2 at 9.

¹⁹⁵ Ex. 4.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Office of Administrative Hearings and the Department of Health pursuant to Minnesota Statutes §§ 144.59, .99, subd. 10 (2014).

2. Minnesota law requires individual companies licensed by the Commissioner to conduct asbestos-related work and asbestos-management activities in accordance with minimum prescribed work practices under Minn. Stat. §§ 326.70-.81, the Asbestos Abatement Act, and Minn. R. 4620.3000-.3724.

3. The Department has the authority to issue Administrative Penalty Orders requiring violations to be corrected and administratively assessing monetary penalties for violations of the Asbestos Abatement Act.¹⁹⁶ The procedures in Minn. Stat. § 144.991 must be followed when issuing administrative penalty orders. Except in the case of repeated or serious violations, the penalty assessed in the order must be forgiven if the person who is subject to the order demonstrates in writing to the commissioner before the 31st day after receiving the order that the person has corrected the violation or has developed a corrective plan acceptable to the commissioner. The maximum amount of an administrative penalty order is \$10,000 for each violator for all violations by that violator identified in an inspection or review of compliance.¹⁹⁷

4. The Department has the burden to prove by a preponderance of the evidence that it properly issued the fines in this case.¹⁹⁸

5. On March 18, 2014, the Department issued an Administrative Penalty Order to Respondent in Case Number 140272 with a fine of \$10,000 for violations of asbestos abatement work rules.¹⁹⁹

6. Respondent timely appealed the Administrative Penalty Order.²⁰⁰

7. For Case Number 140272, the Department proved by a preponderance of the evidence that Respondent violated Minn. R. 4620.3581, subp. 5B, when he failed to ensure that the work site surfaces within the containment unit were cleaned until no visible asbestos containing material was present.

8. For Case Number 140272, the Department proved by a preponderance of the evidence that Respondent violated Minn. R. 4620.3592, subp. 5A, when he failed to ensure that the appropriate indoor air monitoring was conducted from the time of the initial asbestos disturbance until the containment unit was removed.

¹⁹⁶ Minn. Stat. § 144.99, subd. 4.

¹⁹⁷ *Id.*

¹⁹⁸ Minn. R. 1400.7300, subp. 5 (2015).

¹⁹⁹ Ex. 12 at 54-55.

²⁰⁰ *Id.* at 57.

9. On July 18, 2014, the Department issued an Administrative Penalty Order to Respondent in Case Number 140441 with a fine of \$10,000 for violations of asbestos abatement work rules.²⁰¹

10. Respondent timely appealed the Administrative Penalty Order.

11. For Case Number 140441, the Department failed to prove by a preponderance of the evidence that Respondent violated Minn. R. 4620.3575, subp. 1B, when he failed to assure that all interior surfaces were cleaned so no dust, dirt, or debris was visible.

12. For Case Number 140441, the Department proved by a preponderance of the evidence that Respondent violated Minn. R. 4620.3594, subp. 2, when he allowed asbestos containing material to remain after the cleaning process, thereby failing to ensure that no asbestos fibers would become airborne during the air sampling process.

13. The Department may suspend, place conditions on, or revoke an asbestos contractor's license for serious or repeated violations of the requirements in the statutes, rules, or other actions that apply to the license.²⁰²

14. As required by Minn. Stat. § 144.99, subd. 10, the Department properly notified Respondent of its intent to revoke Respondent's license.²⁰³

15. Respondent timely appealed the Notice of Revocation.²⁰⁴

16. The Department may deny or refuse to renew an asbestos contractor's license if the applicant has a persistent pattern of violations related to the license.²⁰⁵

17. Under Minn. Stat. § 144.99, subd. 8 (2014), the Department properly notified Respondent that it intended to deny his application for an asbestos contractor license because of a persistent pattern of serious violations of Minnesota law.²⁰⁶

18. Respondent timely appealed the denial of his license.²⁰⁷

19. The Department proved by a preponderance of the evidence that Respondent had a persistent pattern of serious violations of Minnesota law.

Based on these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

²⁰¹ Ex. 15 at 26-28.

²⁰² Minn. Stat. § 144.99, subd. 9(1) (2014).

²⁰³ Ex. 2.

²⁰⁴ The appeal letter was not an exhibit but is presumed to have been timely because the Department moved forward with the appeal process.

²⁰⁵ Minn. Stat. § 144.991, subd. 8(b) (2014).

²⁰⁶ Ex. 4.

²⁰⁷ The appeal letter was not an exhibit but is presumed to have been timely because the Department moved forward with the appeal process.

RECOMMENDATION

Based upon these Findings of Fact and Conclusions of Law, the Administrative Law Judge respectfully recommends that the Administrative Penalty Order of March 21, 2014, be upheld. The Administrative Law Judge respectfully recommends that the July 18, 2014 Administrative Penalty Order be upheld with the exception that the fine be reduced from \$10,000 to \$5,000. The Administrative Law Judge respectfully recommends that the Department rescind the license revocation and the refusal to renew and instead issue Respondent a Conditional License.

Dated: November 20, 2015

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendations. Under Minn. Stat. § 14.61 (2014), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Edward Ehlinger, Commissioner, Minnesota Department of Health, 85 East Seventh Place, P.O. Box 64975, St. Paul, MN 55164, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

Statutory Background

Asbestos is a known carcinogen.²⁰⁸ Even a single fiber of asbestos, if inhaled and lodged in a human lung, can cause cancer. Asbestos-abatement contracting is regulated by the Minnesota legislature and the Minnesota Department of Health under the Asbestos Abatement Act.²⁰⁹ Except for the domiciled owner of a single family residence, anyone in the state who, directly or indirectly, performs asbestos-related work needs a license and a permit for the work.²¹⁰ Licenses and permits are only issued to individuals who have the required training and certificate for the type of asbestos-related work they intend to perform.²¹¹ The training and certification requirements differ depending on whether a person is applying to be, for example, an asbestos worker, a site supervisor, or a contractor.²¹² Entities approved by the Department provide the training and the certificates are issued, after a fee is paid, under rules promulgated by the Department.²¹³ The Department has provided further direction for asbestos abatement under its administrative rules 4620.3000-.3724, part of the Clean Indoor Air Act.

The Department enforces its asbestos regulations through procedures set forth in the Health Enforcement Consolidation Act of 1993 (Act), codified at Minn. Stat. §§ 144.989-.993. The Department has the authority to “issue an order requiring violations to be corrected and administratively assessing monetary penalties for violations of the statutes, rules and other actions.”²¹⁴ The Act directs that the Department must forgive a penalty if the person to whom the order was issued develops an acceptable corrective action plan²¹⁵ except in the case of repeated or serious violations. “For repeated or serious violations, the commissioner *may* issue an order with a penalty that will not be forgiven after corrective action is taken.”²¹⁶ The Act does not define “serious” or “repeated.” However, the Act does direct the Department to “prepare a plan for using the administrative penalty and cease and desist authority” found in the Act. That *Plan for the Use of Administrative Penalty Order, Cease and Desist Authority, and Other Enforcement Tools* (the Plan) provides guidance on the meaning of these terms. According to the Plan, a repeat violation “may be based on a variety of prior enforcement actions,” including a similar violation after a forgivable or nonforgivable administrative penalty order.²¹⁷ “[S]erious violations include conduct showing disregard for requirements or standards, or violations that present an actual or

²⁰⁸ Test. of M. Navara.

²⁰⁹ Minn. Stat. § 326.70-.81.

²¹⁰ Minn. Stat. § 326.72, subd. 1.

²¹¹ Minn. Stat. § 326.73.

²¹² *Id.*

²¹³ Minn. Stat. § 326.75.

²¹⁴ Minn. Stat. § 144.991, subd. 4.

²¹⁵ *Id.*

²¹⁶ Minn. Stat. § 144.991, subd. 4(b) (emphasis added).

²¹⁷ Ex. 17 at 8.

potential danger to public health....”²¹⁸ In the area of asbestos abatement, virtually every violation of the rules is deemed to be a serious violation.²¹⁹

The Act permits the Department to consider a number of factors in determining the penalty amount.²²⁰ However, under the Administrative Procedure Act, which also applies here, these factors *must* be taken into account in determining the amount of a fine.²²¹ These factors may be applied so as to mitigate or to increase a penalty. But the Department never applies these factors to reduce a penalty only to increase it,²²² and at least one factor, economic benefit, is never considered.²²³ During a process it calls the “penalty forum” Department staff use a form titled, “penalty calculation worksheet,” to determine the “base penalty” for each violation.²²⁴ The penalty calculation worksheet contains a “penalty matrix,” with a horizontal axis representing “Deviation from Compliance” and a vertical axis representing “Potential for Harm.” The higher along each axis the penalty forum staff decide the violation is, the higher the penalty amount up to a maximum of \$10,000.²²⁵ The worksheet notes that “[t]he amount chosen is discretionary because the matrix is intended to be only a guide.”²²⁶

The Act is also the source of the Department’s authority to refuse to renew, place conditions on, suspend, or revoke licenses for asbestos-abatement work.²²⁷ These sanctions may be imposed for “serious or repeated violations of the requirements in the statutes, rules, or other actions”²²⁸

Administrative Penalty Order for Case 140272

The Penalty Order under appeal in this case was based on the January 13, 2014 inspection of a residential property where Respondent had contracted to remove asbestos. The work site supervisor claimed that the inspector arrived before he had finished cleaning up the site,²²⁹ however, the inspector observed that the “regulated party was in the process of leaving the job site.”²³⁰ The inspection followed the Department’s inspection protocols for a “thorough and successful inspection,”²³¹ by using a checklist, taking photographs, taking and testing samples, and collecting additional information from Respondent. The inspector found that the workers had left asbestos containing material (duct paper) in various wall cavities, as well as pieces of

²¹⁸ *Id.* at 7.

²¹⁹ *Id.* at 21-22.

²²⁰ Minn. Stat. § 144.991, subd. 1.

²²¹ Minn. Stat. § 14.045 (2014).

²²² Ex. 17 at 47-50.

²²³ Test. of M. Bender.

²²⁴ Ex. 17 at 47-50.

²²⁵ *Id.* at 48.

²²⁶ *Id.* at 49. (Plan p. B-3).

²²⁷ Minn. Stat. § 144.991, subsds. 8, 9.

²²⁸ *Id.*

²²⁹ Ex. 12 at 22.

²³⁰ *Id.* at 44.

²³¹ Ex. 105 at 1.

the containment unit stapled to the walls, and had failed to conduct air monitoring to ensure that the air was free of asbestos fibers.²³²

Respondent had reason to rely on his site supervisor to perform the job without errors because the employee had been a site supervisor for many years without a violation.²³³ The employee accepted responsibility for the violations that occurred at the site, and Respondent terminated his employment.²³⁴ The employee sought unemployment benefits. According to Respondent, during the unemployment proceedings, it was revealed that the employee had a medical condition that impacted his judgment.²³⁵ However, the unemployment law judge granted the unemployment benefits because the employee's decisions on the job site were "not intentional, negligent or indifferent but inadvertent and a good faith error in judgment and exceptions to the definition of employment misconduct."²³⁶ The employee's medical condition is not mentioned.

Respondent argues that he is not responsible for the violations which occurred at this site because the violations were the employee's fault and because the unemployment law judge found that the employee's actions were not volitional.²³⁷ Respondent also argues that the penalty is too high when compared to the economic benefit derived from the job and because the air samples showed things were clear.²³⁸

Respondent's arguments are not persuasive. The asbestos statute and corresponding rules do not contain a provision excusing asbestos abatement contractors for employee misconduct or error whether caused by illness or carelessness. The unemployment law judge's decision is premised on entirely different standards and has a different purpose than the asbestos-abatement rules. It is Respondent's duty to assure compliance on his job sites.

Although the Administrative Penalty Forum found that the violations were not willful and were not repeat violations, the \$10,000 penalty is reasonable. It was reasonable for the Administrative Penalty Forum to find both the deviation from compliance and the potential for harm to be severe because both violations had the potential to expose others who entered the site to carcinogenic asbestos fibers. The photographs of the site show a residential home in the process of being renovated. Therefore it is likely that others entering the job site could have been exposed to the residual asbestos containing material had the inspector not found and ordered remediation of the violation.

²³² Ex. 12 at 54-55. The Department had two additional citations in its ten-day letter but it dropped those citations in the Administrative Penalty Order.

²³³ *Id.* at 47.

²³⁴ *Id.*

²³⁵ Test. of R. Pruitt.

²³⁶ Ex. 172.

²³⁷ Test. of R. Pruitt.

²³⁸ Ex. 12 at 57.

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In comparison to the case above, the investigation in this case did not follow the Department's protocols and the evidence and testimony was unclear. The investigator did not use the checklist, a required component of the Department's protocol.²³⁹ The inspector's photographs lacked labels or notes to explain them.²⁴⁰ The chain of custody for the samples taken is not documented and the Department did not produce the test results for the samples until the day of the hearing, though they were requested months earlier.²⁴¹ Similarly, while the investigator testified that the Department maintains permits on file going back many years, no permits were produced as evidence relative to this investigation. Respondent obtained two permits in this case: the initial work permit and a permit that modified the original permit to include additional material found on site.²⁴² Those permits would have clarified the scope of Respondent's work.

It is unclear whether the Department issued both citations for the material left on the pipes and pipe elbows, as shown in the photographs, or if the second citation for failing to clean the containment is based on some other evidence. If the Department is issuing two citations for one act, and simply using two statutes to do so, that is unfounded. If the Department is citing Respondent for not cleaning the actual walls and surfaces of the containment area, the Department did not present sufficient evidence to meet its burden. Therefore, although the Department proved by a preponderance of the evidence that some asbestos containing material was left in a work area for which Respondent was responsible, it did not prove the second violation and it is recommended that the fine be reduced.

A Conditional License is the Appropriate Enforcement Tool

Although the Department has met its burden to prove that Respondent committed serious and repeated violations such that it has the authority to revoke Respondent's license, the Administrative Law Judge respectfully recommends that a conditional license, rather than revocation, be the sanction in this case. This recommendation is based on the fact that Respondent has demonstrated his ability to operate in a compliant manner, which he did prior and subsequent to 2013 and 2014. In addition, Respondent took the remedial actions requested by the Department. Granted, Respondent could have taken additional measures once it became clear that he was unable to rely on certified employees to always act according to the regulations. For instance, he could have hired an additional supervisor to check job sites before allowing workers to proceed with or depart from a job, or, in the alternative, he could have taken on that role himself. But these, and other possibilities, can be included in a conditional permit, as can the directive that Respondent have no more violations during the term of the conditional license.

²³⁹ Ex. 105 at 12.

²⁴⁰ Ex. 15.

²⁴¹ Ex. 102.

²⁴² Test. of J. Martin Sr.; Ex. 15 at 31.

The recommendation for a conditional license is also based on concerns raised by facts in this case and thorough consideration of the record. In its legislatively required Plan for enforcement actions, the Department puts its enforcement staff on notice that “[a]n effective reporting and documentation system is essential to enforce the law and regulations. This system ensures the department takes proper enforcement action, and maintains a record of the outcome of enforcement actions. Proper enforcement administration promotes compliance.”²⁴³ But the Department did not document a critical enforcement action in this case.

In March of 2013, an inspector acted inappropriately towards Respondent’s employees. Respondent wrote a complaint to the Department regarding the inspector’s behavior. The Department addressed the behavior with the investigator. In May of 2013 the manager of Indoor Environments and Radiation Section, which included the asbestos unit, warned Respondent in a face-to-face meeting that the Department would move to revoke his license if he had one more violation in the next twelve months.²⁴⁴ There is no written record of this warning, and the manager’s memory of the event was cloudy. The current manager of the unit relied on this meeting’s occurrence in deciding to revoke Respondent’s license.²⁴⁵

The Department has the authority to place conditions on licenses.²⁴⁶ If the Department had issued a conditional license in May of 2013, it could have effectively communicated its expectations, the gravity of Respondent’s position, and the potential loss of his license and livelihood. If Respondent had received such notice, he would have had critical information to inform his responses to the Administrative Penalty Orders. A conditional license is an incremental step towards revocation that promotes compliance and creates a record. It is respectfully recommended that the Department issue a conditional license in this case.

B.J.C.

²⁴³ Ex. 17 at 6.

²⁴⁴ Test. D. Dorschner; Test. of M. Navara.

²⁴⁵ Test. of M. Navara.

²⁴⁶ Minn. Stat. § 144.991, subd. 9.