BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
DAVID RAYMOND SULLIVAN and	) OAH Case No. 1303346
BARBARA KATHLEEN SULLIVAN	) Agency Case No. AQ/AB-WR-12-025

HISTORY OF THE CASE

On May 21, 2012, the Department of Environmental Quality for the State of Oregon (DEQ or the Department) issued a Notice of Civil Penalty Assessment and Order to David and Barbara Sullivan (Respondents), contending that Respondents had allowed an unlicensed individual to perform an asbestos abatement project, and had openly accumulated asbestos-containing waste material (ACWM). In a letter received by DEQ on May 23, 2012, Respondents requested a hearing.

On July 12, 2013, DEQ referred the hearing request to the Office of Administrative Hearings (OAH), and the OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. A prehearing conference was held on September 19, 2013, and the hearing was set for December 3, 2013.

Request for Jury Trial. Shortly before the September 19, 2013 prehearing conference, Respondents filed a written request for a jury trial, claiming they had a constitutional right to a trial by jury. ALJ Barber denied the motion. DEQ hearings did not exist at the time the Oregon Constitution was drafted in 1857, so there is no right under the state constitution for a jury trial in this enforcement matter.

Hearing was held as scheduled on December 3, 2013, in the DEQ offices in Salem, Oregon. Respondents appeared and testified, representing themselves. Case presenter Jenny Root represented DEQ and called Natural Resource Specialist Dottie Boyd as a witness. The record closed on December 3, 2013.

ISSUES

1. Whether Respondents violated ORS 468A.715(1) and OAR 340-248-0110(2) by allowing an unlicensed individual to perform an asbestos abatement.

2 Whether, if Respondents allowed an unlicensed individual to perform an asbestos abatement, Respondents should be assessed a civil penalty in the amount of $7,200.

3. Whether Respondents violated OAR 340-248-0205(1) by openly accumulating asbestos-containing waste material (ACWM).[1]

EVIDENTIARY RULING

Exhibits A1 through A10, offered by the DEQ, were admitted into evidence. Exhibits A through Y were offered by Respondents. All were admitted into evidence except Exhibits A, I, L, T and U, which were either excluded from evidence or withdrawn. Exhibits F, S, V and X were admitted over DEQ's objections.

FINDINGS OF FACT

1. Respondents own the duplex at 1466-1468 NW 20th Place in Corvallis. David Sullivan purchased the duplex in 2000. The duplex had "popcorn" ceilings which, unbeknownst to Respondents at the time of purchase, contained friable asbestos. When David Sullivan purchased the property, he coated all of the ceilings and walls with two coats of white paint. (Ex. A3 at 1). When portions of the popcorn on the ceiling would fall, Respondents would buy "Ceiling Acoustic," patch the spot, and paint it white to match the rest of the ceiling. (Test. of D. Sullivan).

2. Respondents had renters who lived in the front half of the duplex for several years and then moved to the back half. The renters noticed that some of the ceiling popcorn was falling in chunks to the floor, and asked David Sullivan about what to do. Sullivan told the renter what he had done in the past and supplied the renter with some Ceiling Acoustic to make the repairs. Instead, the renters had the popcorn tested and received reports that it contained asbestos. The renters informed Respondents of the findings and gave Respondents a 30-day notice that they were leaving the premises. (Ex. A3 at 2). At the time the renters left, the popcorn texture in the bedrooms was in bad shape, with patches falling off the ceiling and other patches being bare even before they rented the place. (Ex. A4 at 6). A ceiling in such bad shape cannot be repaired and the asbestos content must be abated. (Test. of Boyd).

3. In an effort to keep the renters, Respondents offered to have a certified asbestos abatement team remove the popcorn from the ceilings. The renters declined the offer and moved out. (*Id.*).

4. Respondents did not contact an abatement contractor or the DEQ, but instead researched asbestos removal on the Internet, learning that asbestos was dangerous and that a homeowner had the options of repairing the small spots needing repair or having an asbestos abatement firm remove the asbestos. David Sullivan decided to cover the popcorn with sheetrock in lieu of taking it out, believing the sheetrock would fully encapsulate the asbestos. Respondents did not consult with DEQ or a contractor before attempting to encapsulate the popcorn ceiling. (*Id.*; Test. of David Sullivan).

[1] There is no corresponding penalty issue because DEQ did not assess a penalty for the alleged ACWM violation.

5. On December 13, 2011, Respondents' former renters filed a complaint about the property with DEQ, contending that the popcorn ceilings on Respondents' property contained asbestos. On December 13, 2011, DEQ Natural Resource Specialist Dottie Boyd sent a letter to Respondents, stating in part:

> The Department received a pollution complaint regarding the possible improper handling of asbestos-containing popcorn texture from a residential rental property located at 1468 NW 20th Place in Corvallis, OR. According to the Benton County Assessor's Office you are the listed property owners. It has been reported that new sheet rock was recently installed over the asbestos-containing popcorn texture. This activity would crush and dislodge the asbestos-containing material. This activity is not allowed and is considered improper abatement of asbestos-containing material.
>
> Popcorn texture that contains asbestos is a friable asbestos-containing material (ACM). Only a DEQ licensed asbestos abatement contractor can abate friable asbestos-containing material. Abatement includes repair, enclosure, encapsulation, removal, salvage, handling or disposal of any ACM during demolition, renovation, repair, construction or maintenance activities on any public or private facility.

(Ex. A2).

6. After receiving the DEQ letter, David Sullivan wrote to Dottie Boyd on December 16, 2011. The letter stated in part:

> **The apartment's current condition:**
>
> All the popcorn was encapsulated before I read your letter. All popcorn is now hidden by a continuous ½-inch layer of sheetrock. All joints in the interior of rooms have been sealed with blue painter's tape. All light fixture openings have been sealed with drywall mud. Collectively, these steps have created a continuous and unbroken barrier between the popcorn and the living space in the apartment.
>
> The ceiling work is not finished. The new drywall needs a top coat on the joints, followed by a knock-down mud decorative finish, followed by priming and painting. Also, the ceilings need cove moldings, new light fixtures (I've thrown away all the old fixtures) and smoke alarms.
>
> After I installed the drywall, I cleaned the laminate floors with Swiffer wet mop pads, and I thoroughly vacuumed the carpets.
>
> **Request for advice:**

My good intentions have definitely led me astray so far, so I'd like your best advice about what steps I should take to make things right. I assume you will want some sort of professional testing...but I don't know what sort of testing should be done at this point.

* * * * *

Request for clarification about penalties/punishment:

I didn't sleep well last night: I'm not used to being accused of illegal activities. I know good intentions and ignorance of the law is not a defense against wrongdoing. When I began this project, I was unaware that crushing popcorn between two layers of drywall would be considered a disturbance – to my mind that seems more like permanent containment. But I've learned case law and administrative rulings don't always match what seems like a commonsense perspective – and often there are excellent (even scientific) reasons for the differences. So I would really appreciate any information you can give me about how much trouble I've blundered into.

(Ex. A3 at 3-4).

7. Ms. Boyd performed a site visit at the duplex on December 20, 2011. She took photos of the duplex and took samples of "overspray" from the open light fixture holes. Although David Sullivan gave Ms. Boyd permission to take the samples, he refused to answer her questions and told her he thought DEQ was being "vindictive" and was looking for a way to fine him. Ms. Boyd told Sullivan that a licensed asbestos abatement contractor would need to come in and remove the sheetrock and the asbestos, and thoroughly clean the area. Sullivan told her that her recommendation was too extreme, and that the sheetrock had totally encapsulated the asbestos. He said that the most that was needed was to come in and wipe down the area for asbestos. (Ex. A4 at 2). When tested, the overspray on the light fixture holes was found to contain asbestos. (Test. of Boyd).

8. After meeting with David Sullivan, Ms. Boyd contacted other DEQ asbestos experts. All agreed that encapsulation, as described by Sullivan, actually increased the friability of the asbestos and would need to be abated. (Ex. A4 at 3-4). Abatement would also include discarding carpet and soft furniture because of the possibility that asbestos was present on them. (Test. of Boyd).

9. On January 4, 2012, Respondents offered to pay a $1000 fine for putting up sheetrock without a permit, and to pay an asbestos abatement firm to come in and clean, but leave the sheetrock and popcorn in place. DEQ rejected the proposal, insisting on full abatement, and advised Respondents that any civil penalties would be determined and assessed under DEQ rules. Respondents disagreed with the requirement of full abatement and contacted the members of the "asbestos group" at DEQ to attempt to get encapsulation approved in this case. The group did not change its mind, and Respondents were required to hire an asbestos abatement firm to remove the asbestos, the sheetrock, and to clean the area. (*Id.*).

10. Respondents hired a licensed contractor to abate the asbestos. The project was completed on January 18, 2012, and Ms. Boyd received the completion report on January 23, 2012. There were 850 square feet of friable asbestos abated. (Test. of Boyd). Despite hiring the abatement contractor, David Sullivan believes that his encapsulation method is better, and that he was "saving lives" and doing "heroic stuff" by utilizing his method rather than hiring an abatement specialist. David Sullivan considers his encapsulation method to be the "gold standard" for asbestos abatement. (Test. of D. Sullivan).

11. On May 21, 2012, DEQ issued its Notice of Civil Penalty Assessment to Respondents, alleging entitlement to a civil penalty of $7,200 for allowing an unlicensed individual to perform an asbestos abatement project.

12. Neither Respondent is a licensed asbestos abatement contractor. (Test. of D. Sullivan).

CONCLUSIONS OF LAW

1. Respondents violated ORS 468A.715(1) and OAR 340-248-0110(2) by allowing an unlicensed individual to perform an asbestos abatement.

2 Respondents should be assessed a civil penalty in the amount of $7,200.

3. Respondents violated OAR 340-248-0205(1) by openly accumulating ACWM.[2]

OPINION

DEQ contends that Respondents allowed an unlicensed individual to perform an asbestos abatement and that Respondents openly accumulated ACWM. DEQ has the burden to establish that Respondents committed the violations, and must also establish the accuracy of the formula factors that determine the proposed civil penalties. ORS 183.450(2). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The unlicensed asbestos abatement project. Pursuant to ORS 468A.715, only a licensed contractor may perform asbestos abatement projects. To obtain a license for such projects, the contractor must meet the criteria in ORS 468A.720.[3]

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[2] There is no corresponding penalty issue because DEQ did not assess a penalty for the alleged ACWM violation.

[3] Those statutes state, in pertinent part:

In this case, the asbestos abatement project in question was Respondents attempt to encapsulate the asbestos by placing sheetrock over the deteriorating popcorn ceiling in the apartment. OAR 340-248-0010(6) defines an "asbestos abatement project" as follows:

> "Asbestos abatement project" means any demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, *encapsulation*, removal, salvage, handling, or disposal of any asbestos-containing material with the potential of releasing asbestos fibers from asbestos-containing material into the air.

(Emphasis added). Respondents' attempt to encapsulate the asbestos meets the definition of an asbestos abatement project.

Respondents base their defense in this case on their perceived quality of the encapsulation method. They concede that their attempted encapsulation of the asbestos was not one contemplated or approved by DEQ, but David Sullivan is convinced that he has come up with the "gold standard" for dealing with asbestos and contends he was "saving lives" and doing "heroic stuff" by encapsulating the asbestos with sheetrock.

However, despite David Sullivan's insistence that he was doing heroic stuff when he was attempting to encapsulate the asbestos, the pivotal piece of evidence in this case is that he was not licensed to abate asbestos using *any* method. Thus, even if his encapsulation method was to become, as he claims, the "gold standard" of asbestos abatement in the future, he was not licensed to do the work and he violated the statute and rule. DEQ has met its burden of proving the violation.

Accumulation of ACWM. DEQ further contends that Respondents committed a second violation by openly accumulating asbestos-containing waste material (ACWM). The gist of DEQ's argument is that Respondents' attempts to encapsulate the asbestos actually disturbed the asbestos, and Respondents failed to properly package and handle the material.

OAR 240-248-0010 defines ACWM as follows:

> (12) "Asbestos-containing waste material" means any waste that contains asbestos tailings or any commercial asbestos, and is generated by a source subject to OAR

468A.715 Licensed contractor required; exception. (1) Except as provided in subsection (2) of this section, an owner or operator of a facility containing asbestos shall require only licensed contractors to perform asbestos abatement projects.
(2) A facility owner or operator whose own employees maintain, repair, renovate or demolish the facility may allow the employees to work on asbestos abatement projects only if the employees comply with the training and certification requirements established under ORS 468A.730. [Formerly 468.881]

468A.720 Qualifications for license; application. (1) The Department of Environmental Quality shall issue an asbestos abatement license to a contractor who:
(a) Successfully completes an accredited training course for contractors.

340-248-0205 through 340-248-0290. This term includes, but is not limited to, filters from control devices, asbestos abatement project waste, and bags or containers that previously contained commercial asbestos.

The question in this case is whether asbestos that is still in the ceiling (and covered with sheetrock) may be considered asbestos waste material. I conclude that it can.

Recognizing that the attempted encapsulation process was an abatement project, as noted above, the ACWM is the waste from that attempted abatement. Although Respondents believed that attaching sheetrock to the underside of the popcorn ceiling would abate the asbestos, the evidence shows that it actually disturbed the asbestos, making it even more friable. That disturbed asbestos was ACWM, even though it was still on the ceiling.

In addition, by failing to remove carpeting and furniture from the room after the abatement process, Respondents allowed ACWM to accumulate there as well. DEQ has proved the second violation, although it seeks no civil penalty for that violation.

Sanction for the first violation. In "Exhibit 1" to DEQ's Notice, the Department sets out its findings and determination of the correct civil penalty under OAR 340-012-0045, which states:

Civil Penalty Determination Procedure

Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the department may assess a civil penalty for any violation. Except for civil penalties assessed under 340-012-0155(2), the department determines the amount of the civil penalty using the following procedures:

(1) The classification of each violation is determined by consulting OAR 340-012-0053 to 340-012-0097;

(2) The magnitude of the violation is determined as follows:

(a) The selected magnitude categories in OAR 340-012-0135 are used.

(b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, 340-012-0130 is used to determine the magnitude of the violation.

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant

actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.

(e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.(2) The results of the determinations made in section (1) are applied in the following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

(3) In addition to the factors listed in section (1) of this rule, the director may consider any other relevant rule of the commission in assessing a civil penalty and will state the effect that rule had on the penalty amount.

Each of the elements of setting the civil penalty is addressed below.

Classification of the Violation. DEQ contends that the violation in this case is a Class I violation according to OAR 340-012-0054(1)(p). DEQ is correct.

Magnitude. OAR 340-012-0135 describes a violation as "major" when the amount of asbestos-containing material (ACM) exceeds 160 square feet. Here, there was 850 square feet of ACM. DEQ has established that the magnitude was major.

Base Penalty (BP). The administrative rules set the base penalty for a Class I violation at $6,000.

Prior Significant Actions (P). Respondents have no prior significant actions, so DEQ appropriately set the P value at 0.

History (H). Likewise, because there were no previous actions or violations, the H value is also set at 0.

Ongoing Violation (O). OAR 340-012-0145(4)(a)(B) states in part:

(4) "O" is whether the violation was repeated or ongoing.

(a) The values for "O" and the finding that supports each are as follows:

(A) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding under paragraphs (4)(a)(B) through (4)(a)(D).

(B) 2 if the violation recurred on the same day, or existed for or occurred on more than one day up to and including six days, which need not be consecutive days.

DEQ contends, and the record reflects, that Respondents performed the attempted abatement over a weekend in December 2011. The project took more than one day and less than six days, so the value is appropriately 2.

Mental State (M). DEQ assigned a value of 2 to Respondents' mental state because Respondents were negligent in their attempts to abate the asbestos in the duplex. I agree. David Sullivan knew what was supposed to be done; the record shows that he offered to hire an asbestos abatement contractor to clean up the mess if his previous tenants would continue to rent from him. When they declined to stay, though, he decided to research methods on the Internet and failed to contact DEQ or any asbestos contractors. The assigned value of 2 is correct.

Efforts to Correct (C). Because Respondents took steps to correct the violation, DEQ assigned a -2 value to the C criterion. Although agreeing with ultimate conclusion, it bears noting that Respondents could have been given a more damaging score based upon the delays and attitude displayed in the communications with DEQ in the time between the complaint and the correction.

Economic Benefit (EB). The Department concluded that the EB value in this case was $0. I agree with DEQ.

Computing the Penalty. I agree with DEQ's computation of the penalty as set forth in the exhibit to the Notice and as repeated here:

Equation: BP + [(0.1 x BP) x (P+H+O+M+C)] + EB
$6,000 + [(0.1 x $6,000) x (0+0+2+2+-2)] + $0
$6,000 + [($600) x (2)] + $0
$6,000 + $1200 + $0
$7,200

Under the DEQ rules, the appropriate penalty for Respondents' violation is $7,200, as set forth above.

ORDER

I propose the DEQ issue the following order:

That DEQ's May 21, 2012 Notice of Civil Penalty Assessment and Order be AFFIRMED.

Rick Barber
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission
c/o Dick Pedersen, Director, DEQ
811 SW Sixth Avenue
Portland, OR 97204.

You may also fax your Petition for Review to (503) 229-6762 (the Director's Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.480 et. seq.

CERTIFICATE OF MAILING

On January 22, 2014 I mailed the foregoing PROPOSED AND FINAL ORDER issued on this date in OAH Case No. 1303346.

By: First Class and Certified Mail
Certified Mail Receipt #7012 2920 0000 1689 3101

David And Barbara Sullivan
208 6th Avenue SE
Albany OR 97321

By: First Class Mail

Jenny Root
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Ryan Clark
Administrative Specialist
Hearing Coordinator