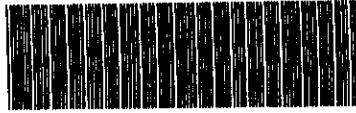


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**THE CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD**

HEARING LOCATION:
Environmental Control Board
66 John Street
10th Floor
New York, NY 10038
(212) 361-1400



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Method of Appearance
Live Hearing

DECISION AND ORDER
Violation #: 034826874N (1 NOV)
Hearing Date: April 21, 2011

To: Cohen Hochman & Allen
80 Maiden Lane, Suite 507
Attn: Bradley Green, Esq.
New York, NY 10038

City of New York v. BREEZE NATIONAL INC

Total Civil Penalty: \$0.00

I Notice(s) of Violation (NOV(s)) was/were issued to the Respondent. On the record before me, and upon the Further Findings of Fact/Conclusions of Law stated below, I find as follows and, where applicable, order payment and compliance.

NOV: 034826874N		
PLACE OF OCCURRENCE: 3229 BROADWAY MANHATTAN		
DATE OF OCCURRENCE: 02/05/2010		
ISSUING OFFICER/AGENCY: 2336 DOB		
ECB CODE: B109		
CHARGE: BC 3301.2 AC 27 1009A		
DISPOSITION: DISMISSED	CIVIL PENALTY IMPOSED:	\$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 034826874N BC 3301.2 AC 27 1009A

Respondent, Breeze National, Inc., was charged with an Aggravated II condition alleging failure to safeguard persons and property at its jobsite after an employee of Respondent's was killed when he fell into the elevator shaft at the premises.

Summary of the Testimony

The issuing officer, DOB Inspector Shahbazi, was first questioned by DOB attorney Lisa Minor. The inspector testified that he was called to the scene after the incident by the site safety manager. The remains of the decedent, Joseph Wilk, had been removed by the time the inspector arrived. On the date of the incident, Inspector Shahbazi observed that a large-scale construction operation was in place, and the building where the decedent fell was the only one for which Respondent had filed for permits. (The entire job was being overseen by Bovis Lend Lease, the general contractor in whose trailer the site safety plan was maintained.) On that date, the building was being prepared for demolition by Respondent, and asbestos abatement (a necessary precursor to demolition) was ongoing.

The inspector testified that the decedent had apparently fallen from a scaffold erected on the third floor into an opening in the elevator shaft covered with plastic sheeting. There were no guardrails in the opening, though the inspector indicated that at least one wooden guardrail was broken somewhere when the decedent fell. He took a series of photographs showing the premises, including the scaffold and elevator shaft. The decedent was wearing a safety harness, which was cut away by paramedics, and the scaffold from which he fell had a lifeline, but it appeared that he had not hooked the lifeline to his harness. On the date of the incident, the decedent had been preparing wire mesh guards for the window openings, to be installed after the asbestos abatement was concluded. The inspector testified that his account was based on what he was told by the site safety manager, and reconstruction based on the various agencies' investigation.

According to the inspector, he issued the notice of violation to Respondent as it was the permittee in charge of demolition for the building, and the lack of guardrails constituted an unsafe condition.

On cross-examination by Respondent's attorney Bradley Green, Inspector Shahbazi testified that a number of agencies were present and investigating. He recalled speaking with Toby Romano, the president of Respondent, but could not remember the substance of the conversation. When asked why he posted the NOV on the construction fence (i.e., attempted service under section 1049-a(d)(2) of the City Charter) rather than giving the original to Mr. Romano, the inspector testified he was the last person to leave the site. He recalled that Mr. Romano may have told him to post the NOV. The inspector testified that he was instructed to issue the NOV to Respondent by his supervisor. He acknowledged that the asbestos abatement required the complete removal of the windows.

When questioned by the ALJ, the inspector testified that the decedent had been missing for approximately 20 minutes before he was discovered. So far as the inspector is aware, no one at the site or involved in the investigation determined why the decedent had been

on the scaffold at the time he fell.

Mr. Romano then testified that ACT Environmental, a subcontractor hired by Respondent, was responsible for the asbestos abatement. On the date of the incident, ACT was approximately five weeks into what turned out to be an eight-week project.

He was called to the premises by one of his employees after the incident. There were 6-8 employees of ACT performing the abatement. Three employees of Respondent, including the decedent and a supervisor, were present, preparing the wire mesh window protections that were to be installed after asbestos work concluded and prior to the demolition.

According to Mr. Romano, the decedent had been measuring and cutting two by fours that were to be affixed to the window protections. These protections were being installed in stages, as ACT concluded its work in an area of the building. Respondent's employees were legally prohibited from performing any work in an area that ACT had not yet concluded asbestos abatement. When ACT finished an area, its workers, who were performing the abatement from the interior of the elevator shaft, would remove the plastic sheeting. Mr. Romano did not know why the decedent had been on the third-floor scaffold, and insisted that neither he nor the supervisor had directed or requested the Respondent go to the scaffold, given that asbestos work had not been completed in that area. Mr. Wilk had worked for the Respondent for a number of years, and Mr. Romano knew him to be an experienced and knowledgeable demolition worker.

Mr. Romano could not recall the substance of his conversation with Inspector Shahbazi, though he conceded that he may have been told that Respondent would be issued a notice of violation. He did not see Inspector Shahbazi leave, as he was inside Bovis' trailer with Tim Lynch, the DOB's forensic inspector. Mr. Romano testified that he left prior to Mr. Lynch, but he believed that Mr. Lynch was the only other person onsite at the time he left.

Respondent's Motion to Dismiss

Mr. Green initially moved to dismiss the NOV for lack of proper service. The NOV was served using "affix and mail" as permitted by section 1049-a(d)(2). Before posting the original NOV at a conspicuous location at the place of occurrence, the issuing officer must first make a reasonable effort to personally serve the named respondent, or in the case of a corporate respondent like Breeze, an officer, member, or designated agent.

Because Mr. Romano was present and was a responsible officer of the company, Mr. Green argued, the inspector should have delivered the original NOV to Mr. Romano. Ms. Minor responded that by Mr. Romano's own admission, he had not seen Inspector Shahbazi for some time, as he was in the Bovis trailer with Inspector Lynch. Given that Mr. Romano acknowledged he was not the last person to actually leave the scene and the inspector was inside the building, Ms. Minor argued, Respondent could not show that posting the NOV was improper.

I find, based on the testimony of both parties' witnesses, that Petitioner properly served the NOV on Respondent pursuant to the City Charter. The inspector's testimony that he did briefly address the issue with Mr. Romano and that he in fact was the last person to leave the jobsite establishes a reasonable effort was made to serve a responsible person before the NOV was posted. Given Mr. Romano's inability to recall the substance of his conversation with Inspector Shahbazi and his acknowledgement that DOB personnel were still at the jobsite when he left, I find that Respondent has not rebutted this evidence. Mr. Green did not argue that the construction fence was not a conspicuous location, or that the required mailing was not performed.

Existence of a Violating Condition

Mr. Green further argued that Respondent had adequately protected persons and property at the jobsite, and was not responsible for the incident that resulted in its employee's death. He noted that the decedent should not have been on the scaffold he fell from, as the asbestos abatement had not been concluded, no one from Respondent had directed the decedent to go onto the scaffold, and that in any event the decedent was wearing a harness and a lifeline was present, but for some unknown reason he was not hooked up to the lifeline when he fell.

Ms. Minor argued that the apparent lack of guardrails in the window opening was an unsafe condition, and that Respondent was responsible as it was in control of that portion of the jobsite. Its subcontractor was performing work at the area where the decedent fell, and according to Ms. Minor, the reasons the decedent was on the scaffold at the time are irrelevant. Due to the nexus between Respondent and the decedent, Ms. Minor argued the NOV should be sustained, and the Aggravated II penalty imposed.

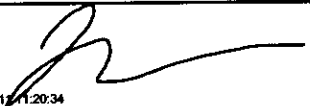
After considering the arguments, testimony and evidence of both parties, I find that Respondent has established a meritorious defense to the allegations in the notice of violation. Inspector Shahbazi referred to the lack of guardrails in the window openings, but both he and Mr. Romano testified that the removal of the windows and installation of plastic sheeting was necessary to ensure all asbestos were removed from the caulk in the openings. Petitioner has not shown that guardrails should have been installed during the abatement work, particularly in light of the fact that lifelines were present, rather than that their apparent absence is a post-hoc finding of a violating condition in light of what occurred.

The parties do not dispute that the opening through which the decedent fell was a part of the building where the abatement was ongoing at the time, or that the decedent should not have been on the scaffold until the abatement concluded in that area. The parties agree that a lifeline was available, and there has been no claim that the lifeline itself was unsecured or defective. Indeed, one of the central

questions that neither party has answered is why the decedent had not secured the lifeline to his harness.

I will not speculate as to what caused Mr. Wilk's death. However, I disagree with Ms. Minor that the reasons he was on the scaffold are irrelevant. The various events and unanswered questions go to the Petitioner's prima facie case. Whatever occurred on that day that led to this tragic event, Petitioner has not sufficiently demonstrated on the record before me that it was the result of an act or omission by the Respondent.

The notice of violation accordingly is dismissed.

TOTAL CIVIL PENALTY: \$0.00	
	= MAY 03 2011 05/04/2011
<small>Wed May 2011 05/04/11 11:20:34</small>	<small>Control 5</small>
James Moore, Administrative Law Judge	Date

**PAYMENT DUE WITHIN TEN (10) DAYS
READ BACK OF THIS ORDER – PROTECT YOUR RIGHTS**