

Deadly asbestos: Workers put in jeopardy, but state won't get tough

Jennifer Dixon and Kristi Tanner, **Detroit Free Press** Published 11:06 p.m. ET April 30, 2016 | Updated 2:16 p.m. ET May 2, 2016

At a time when blight removal is at historic highs and a record number of contractors are getting into the asbestos-abatement business in Michigan, the state's worker safety agency rarely gets tough with employers who expose their workers to the deadly toxin, a Free Press investigation has found.

The Michigan Occupational Safety and Health Administration — MIOSHA — says it does not have enough inspectors to police all abatement projects. It says its job is to encourage proper abatement and it often lowers penalties for companies that fix hazardous conditions quickly. The Free Press, however, found many instances in which contractors didn't remedy violations or pay their penalties — even when they were drastically reduced.

The investigation also found dozens of cases of unlicensed contractors and untrained workers removing asbestos improperly: In one, the crew included workers hired from a homeless shelter — people lured by the promise of easy cash and not likely to complain about working conditions. In others, workers weren't told they were removing asbestos or given proper clothing and respirators. In some, proper decontamination procedures weren't followed and debris was disposed of in ordinary garbage bags instead of airtight containers, potentially exposing many others to the contaminant.

Despite these glaring violations, the Free Press found that over a seven-year period, employers were issued zero penalties in two-thirds of violations in which safety issues were involved. For a serious violation, such as failing to provide a decontamination area, not one company got the maximum \$7,000 penalty. For a repeat or willful violation, such as failing to provide respirators and protective clothing, no company got the maximum \$70,000 penalty. Experts say the failure to levy tough fines only encourages rogue operators.

The stakes for workers are high. There is no known safe level of exposure to asbestos, which was declared a hazardous pollutant by the Environmental Protection Agency in 1971. It can cause lung disease and cancer, although symptoms may not become apparent for decades.

Asbestos fibers are much smaller than a human hair, and their aerodynamic shape helps transport them far beyond their point of original release if workers carry the dust home with them.

John Newquist, a former top official in OSHA's regional office in Chicago, which oversees Michigan, said states that choose to oversee worker safety rather than have the federal government do it tend to go easier on employers. Federal OSHA has gotten heftier penalties against companies that exposed their workers to asbestos, which must be removed before most buildings can be demolished or renovated.

The federal agency, for example, has gotten twice as much as MIOSHA for willful violations and two or three times more for repeat violations.

"Why are we making a deal when companies expose their employees to a known killer of thousands and thousands of workers? Why are we giving the worst of the worst a break?" asked Newquist, former assistant regional administrator for the Midwest. "If anyone should be hard on these people, it's these state plans because they know people die."

Newquist said OSHA and MIOSHA operate under the same standards but he has "serious questions" about why MIOSHA is not as aggressive.

The Free Press analysis of more than 4,000 violations MIOSHA closed between February 2009 and February 2016 also found:

- Ninety-six percent of safety violations resulted in penalties of \$1,000 or less.
- Only 14 companies racked up penalties of \$10,000 or more for multiple violations. Topping the list: Boydell Development and Boydell Building of Detroit, with combined penalties of \$132,300, and Redford-based Clean Air Insulation with \$63,750 in penalties.
- Unlicensed contractors or inexperienced workers were responsible for some of the worst asbestos releases. Out of 48 violations, only two employers got the maximum penalty of \$25,000 for operating without a license and only five got the maximum penalty of \$2,000 for using untrained workers.
- MIOSHA cited companies 80 times for removing asbestos without notifying the agency 10 days in advance. Not one got the maximum \$10,000 penalty, and some repeat offenders got off with fines in the hundreds of dollars.

The issue is particularly crucial now as abatement projects are way up across Michigan, doubling between fiscal 2010 and fiscal 2015, according to MIOSHA data. Detroit alone is undertaking what city officials call the largest blight removal operation ever attempted

nationwide. Since January 2014, the city has demolished approximately 8,400 homes and has roughly 32,000 left.

Incentives to fix violations

MIOSHA spokeswoman Tanya Baker said the agency's penalties are "designed primarily to provide an incentive toward correcting violations, not only to the employer cited, but also to other employers who may have the same violations."

She acknowledged the Free Press' findings, however, taking issue only with the analysis showing zero penalties in two-thirds of safety cases.

The Free Press looked at each violation individually; Baker said in many of its inspections, MIOSHA groups related violations and assigns a penalty to just one of them.

Newquist said he "never grouped asbestos violations." Celeste Monforton, a former OSHA policy analyst, said if MIOSHA wants "to use penalties as a deterrent effect, you wouldn't be grouping them."

Both said each violation should be treated separately.

Monforton, who spent 12 years at OSHA and at the Mine Safety and Health Administration, said MIOSHA's penalties overall are so minimal they are not an effective deterrent. And weak enforcement "just encourages fly-by-night operations who risk people's health because they may get away with it."

Monforton, now a lecturer at the School of Public Health at George Washington University, also took issue with MIOSHA's assertion that it uses penalty reductions to encourage employers to remedy hazards quickly, noting that with asbestos, "exposure has already happened and there's no way to abate that. ... When you've already released asbestos fibers, you can't put that cat back in the bag."

MIOSHA doesn't monitor workers once they've been exposed.

David Rosner, a professor of public health and history at Columbia University and codirector of its Center for the History and Ethics of Public Health, called MIOSHA's fines "a penalty without meaning."

"This is certainly not an effective means to make companies abandon their work practices," said Rosner, who has studied diseases caused by lead and asbestos for 35 years. "It will not stop them at all from continuing to expose workers to dangerous substances."



Former Michigan Occupational Safety & Health Administration Director Martha Yoder speaks to the Free Press from her office in Diamondale on Wednesday May 13, 2015. (Photo: Mandi Wright/Detroit Free Press)

MIOSHA Director Martha Yoder, who recently retired, told the Free Press in an interview last year that her asbestos inspectors could not monitor all abatement projects in Michigan. The agency has four inspectors this year, down from five in fiscal 2015.

"Our job is to do spot-checking," Yoder said.

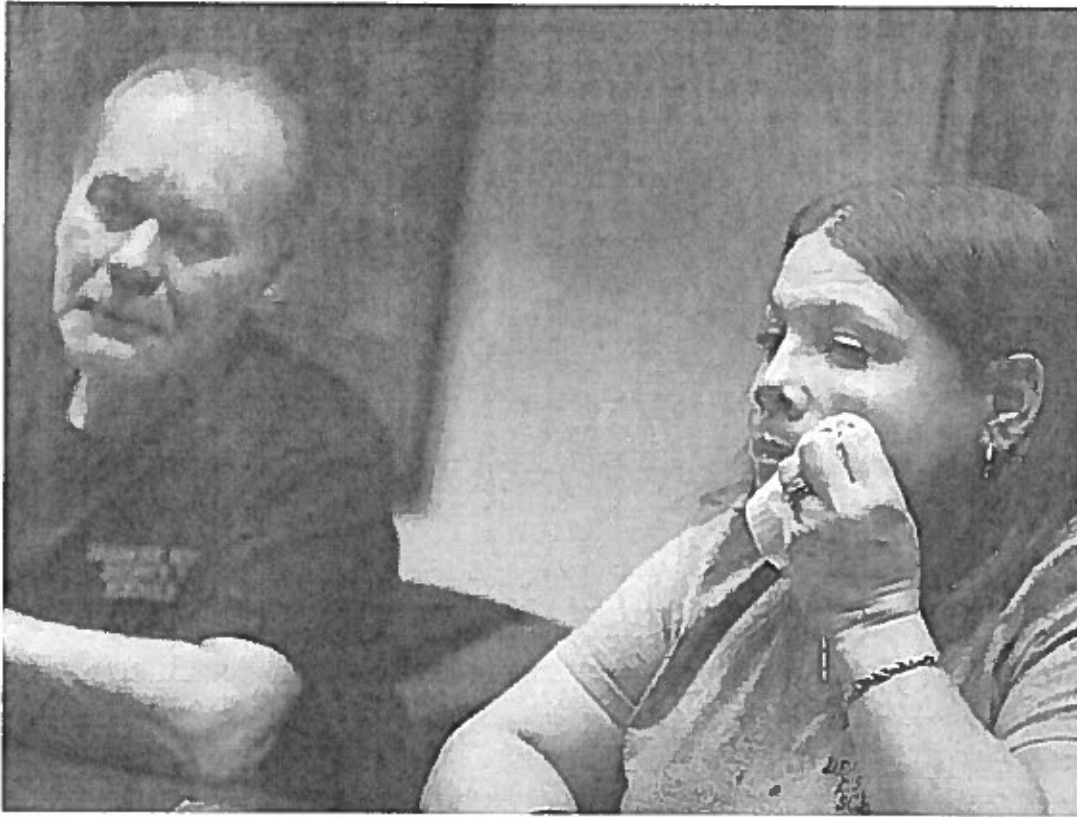
She also said MIOSHA holds symposiums for contractors to educate them about proper abatement.

In calculating penalties, MIOSHA is required to consider several factors: the seriousness of the violation, the size of the company, its history of violations and its efforts to have an effective health and safety program. Reductions of up to 95% are possible in a first round.

If an employer is willing to settle the case and promptly remedy the hazardous conditions, MIOSHA can allow another reduction — typically 50%.

Yoder said MIOSHA sees quicker abatement "as more advantageous than collecting a larger penalty."

'Gritty in your teeth'



Dearborn Heights School District custodians Theresa Ely and Rob Smith talk about district orders to use sanding equipment on asbestos tiles and being reprimanded for warning co-workers their health was endangered at Annapolis High School and Madison Elementary School on Friday, Feb. 26, 2016 (Photo: Romain Blanquart Detroit Free Press)

That's small comfort to workers who believe they've already been exposed to asbestos.

In the summer of 2012, custodian Theresa Ely said she was assigned to help rewax the floors at Annapolis High School in Dearborn Heights. She said the district was behind schedule and told custodians to dry sand the floor tiles to save time, rather than using water and scrubbers.

Rob Smith, who worked with Ely, said he used a leaf blower to corral the fine white dust that piled up in the second-story classrooms of the school after he'd used a high-powered electric sander to strip the wax from the tiles. Ely said she scooped the powder into 30 garbage bags, dragged them down the stairs and tossed them into an overflowing Dumpster.

Smith said it was so dusty he covered his mouth with wet rags. Ely said she spat out the dust with mouthfuls of Pepsi. She said a film coated cars in the parking lot and furniture in hallways on the first floor.

"We inhaled it. We swallowed it. It would get gritty in your teeth," Ely said. Smith said his eyes itched "just like I'd held a cat to my face."

Ely said she began to fear she'd inhaled asbestos when, a few months later, she learned a longtime school cook died of an aggressive cancer linked to asbestos exposure. Worried that they'd unleashed clouds of asbestos-laced dust on coworkers, teachers and students who had been in the building for summer school, Ely and Smith turned to MIOSHA.

"I actually danced that someone was coming," Ely said.

She would soon be disappointed.

MIOSHA, in its report, found that during sanding of the floor tiles "employees were exposed to asbestos-containing flooring materials" at two schools in Dearborn Heights School District No. 7. It also found that workers were not given protective equipment and cited Annapolis and Madison Elementary with three violations, among them failure to provide asbestos-awareness training for custodians who worked in areas with asbestos-containing materials and failure to prohibit sanding of asbestos-containing flooring. MIOSHA said such sanding is prohibited because of the potential for "significant exposure."

PRECAUTIONS FOR ASBESTOS REMOVAL

Suggested safety equipment for workers who are removing, handling and disposing of asbestos-containing materials.

COVERALL
A Tyvek coverall keeps dust off of clothing and should be disposed of after completing work

GLOVES

EYE PROTECTION
Non-fogging goggles or safety glasses

RESPIRATOR
Dual-cartridge respirator with 2 HEPA filters (high-efficiency particulate air)

BOOTS
Washable, lace-less rubber boots under coveralls

SOURCE: State of Oregon
Department of Environmental Quality

MARTHA THIERRY
/DETROIT FREE PRESS

Precautions for asbestos removal (Photo: Martha Thierry Detroit Free Press)

The agency proposed penalties of \$13,500 for each building. But after the district hired an environmental company to do asbestos awareness training for employees and developed procedures for proper maintenance of asbestos-containing floor tiles, among other measures, MIOSHA settled the case by dropping penalties to \$1,800 apiece.

"We are heartbroken over that. It enrages me. It makes me sick to my stomach. The punishment should fit the crime. The fines should reflect what was done. It's not enough money to bury one worker," said Ely, who has been vocal about potential asbestos in other district buildings.

The district gave Ely a written reprimand shortly after MIOSHA inspected the schools and ordered her to stop telling coworkers that district buildings had unsafe asbestos levels. She was reprimanded a second time, in September 2014.

Federal OSHA is now investigating whether she was punished for being a whistle-blower, and she is suing the district in federal court, alleging it violated her First Amendment rights.

In an interview, Tim Mullins, an attorney for the district, cited three reports by outside consultants that found the high school was free of airborne asbestos fibers.

The Free Press examined the reports and found the first one is unsigned and undated. The cover page refers to asbestos testing at Annapolis, but inside the report refers repeatedly to the inspection of a home.

The report was done by D&D Consulting and says it was prepared by Don Clayton, an asbestos inspector.

In a brief interview with the Free Press at the front door of his home in Ferndale, Clayton said: "Someone forged it." Clayton said he signs his reports "Donald G. Clayton" and noted that his company is actually D&D Consulting Services.

"That's not my format," said Clayton, who has previously done inspections in Dearborn Heights schools. "The whole thing is wrong. There's no date, no signature. Who did the analysis? It's all missing. It's totally messed up."

Ely's lawyer, Bob Fetter, said federal OSHA has told him it has investigated the report, now part of Ely's lawsuit, and will address it in its findings on her whistle-blower claims.

Fetter argued in federal court documents that "the report was fraudulently prepared by representatives of the district. ... The Dearborn Heights School District No. 7 completely manufactured a fraudulent report in order to hide the asbestos exposure at the school."

Mullins said: "There is a preserved computer screen shot showing that company (D&D) authored the report and transferred it to the district. No one from the school district prepared or authored that report."

Nova Environmental of Ann Arbor did the other two reports in 2013, a year after the dry sanding. It analyzed samples from the school as well as the pads of the sander used in 2012. Nova's samples contained less than 1% friable asbestos. Asbestos-containing materials are regulated when the amount of asbestos exceeds 1%.

Fetter said he believes those reports confirm that there was an asbestos exposure.

But Superintendent John Fazer, who was not with the district at the time of the sanding, said it appears that based on testing, MIOSHA has no scientific evidence to support its finding that employees were exposed to asbestos-containing flooring materials.

"There's no indication in my mind that there was any asbestos exposure," Fazer said. He said the dust was from wax on the floors that were being buffed with an inappropriate, abrasive sanding pad.

"All the testing came back negative," said Fazer, who has been with the district since February 2015. Fazer said a 2013 study also found no asbestos at Madison Elementary.

Smith said he remembers dry sanding the floors for the district for years. But he said he didn't realize the tiles were made with asbestos. "Now, I think about it every day."

Smith and Ely continue to work as custodians for the district. She said it is stressful.

"It takes every bit of effort ... to continue to go into those schools every single day and do my job," Ely said.

Reducing the penalties

Between January 2009 and February 2016, the Free Press found, MIOSHA has reduced penalties for asbestos safety violations by 60% — from \$2.2 million to \$878,611.

Baker, MIOSHA's spokeswoman, said the reductions reflect an agency initiative that gave employers an additional reduction because of tough economic times.

Over the same time frame, the Free Press found that MIOSHA settled licensing and reporting violations by reducing penalties by 35% — from \$276,621 to \$179,570. These are violations against employers that remove asbestos without a license, use untrained workers or fail to give the agency 10 days' notice before beginning abatement.

Some of the worst violations involved unlicensed contractors or workers who were not accredited by MIOSHA. Workers must carry their MIOSHA-issued certificates of accreditation when conducting asbestos-related work.

B&B Enterprises & Environmental of Kalamazoo used unaccredited workers to scrap a former Consumers Energy plant near the city in 2012, causing what federal prosecutors say may have been the largest release of asbestos in Michigan in four decades — more than 600 cubic yards.

MIOSHA levied fines of \$18,000, including a \$500 fine for using unaccredited workers. It could have sought a maximum of \$70,000 for one willful violation and a maximum fine of \$7,000 each for eight serious violations.

Property Shield of Lansing didn't have a license when, in 2009, it removed steel piping from the John Bean Building in Lansing, causing a major release of asbestos fibers. The

agency cited Property Shield only \$1,600 for no license — the maximum is \$25,000 — and another \$1,300 for safety violations.

Other employers ignore the requirement that they notify MIOSHA 10 days before starting abatement.

State law allows for a maximum fine of \$10,000 per day, or per violation. But even repeat violators get off easy. MIOSHA caught two employers that had failed to give it advance notice on three separate occasions. The penalties: \$320 for Northern A-1 Services of Kalkaska, \$400 for A-Plus Asbestos Abatement of Metamora.

Monforton said notification is important because it alerts workers, contractors who make deliveries to the site, neighbors, and state and federal investigators.

"It's so people in the community know, so kids don't go on that property. There are all kinds of reasons that these notification rules are put in place," Monforton said. "And if you have rules, you have to enforce them."

Dangerous work practices

Investigators from agencies other than MIOSHA who investigate asbestos violations in Michigan have also found dangerous work practices across the state.

The U.S. Environmental Protection Agency investigated the asbestos release at the Consumers Energy plant near Kalamazoo because of its responsibility for enforcing the Clean Air Act. In a case subsequently prosecuted by the U.S. Justice Department, court records paint a picture of hazardous conditions inside the plant as it was being scrapped for valuable metals in 2011 and 2012. Some of the workers wore their street clothes and took the dust home with them. A man named Big Jim smoked a lot around the asbestos, which multiplies a person's risk for cancer if inhaled.

In court records, Robert (Mike) White, one of two men supervising the scrapping, described how he saw one of the salvage workers lying on the asbestos-covered floor. White said the worker carried the asbestos into his car and shortly afterward got into a car accident. White said he learned a police officer let the worker go because he didn't want to be exposed to asbestos on the man's clothing, records in the case show.

White and two others pleaded guilty in the case and were ordered to pay a combined \$1 million in restitution to the EPA.

During demolition work in 2014 at a former auto dealership in Warren, Shelby Township contractor Ralph Bush and at least one employee cut and peeled insulation from metal pipes, leaving asbestos in piles on the floor or tossed into a Dumpster. They didn't wet it or bag it properly, prosecutors said.

When another worker refused his orders to sweep up that "asbestos stuff," Bush told him: "OK, go home, good-bye," according to court records.

"Bush never told the other workers in the building that the pipe insulation contained asbestos," prosecutors said.

Bush pleaded guilty in federal court to failing to wet the asbestos in March and is awaiting sentencing.

What does the law do?

David Uhlmann, a law professor at the University of Michigan who has studied how worker safety laws compare with environmental laws, said he's found that worker safety laws often are inadequate, and enforcement often is weak. Environmental regulators are more aggressive with companies that expose the environment to asbestos than workplace safety regulators are with companies that expose their workers to the toxin.

"The disparity between environmental laws and penalties under worker safety laws is alarming," said Uhlmann, who spent 17 years at the U.S. Justice Department, seven as chief of the environmental crimes section, and has testified before Congress. "It says a lot about where we are in the United States, and the State of Michigan, in terms of worker protection but also the diminished influence of the labor movement."

"We are a long way from the time when labor issues were at the top of the agenda, and even when they were, it didn't result in worker safety laws being anywhere as comprehensive as the environmental laws. The disparity is real and it's troubling," Uhlmann said.

In congressional testimony, Uhlmann said relatively modest penalties in workplace safety cases make "it easy for companies to put profits before compliance and to view any penalties that may result as a 'cost of doing business.' "

Knowingly removing asbestos improperly is a violation of the federal Clean Air Act, and Barbara McQuade, U.S. attorney for the Eastern District of Michigan, has prosecuted several asbestos cases over the last few years, including one that resulted in a five-year

prison sentence for a contractor who hired homeless workers and did not equip them properly.

"Those who remove asbestos improperly are releasing harmful particles into the air that endanger workers and the public," McQuade said. "We hope that charging these cases criminally and obtaining prison sentences helps to educate the public about the seriousness of this offense and deter this behavior."

Rosner, the Columbia University professor, said there is no reason to go easy on someone who exposes workers to asbestos.

"This is a product that has been understood to cause deadly lung disease since the 1930s. There's no question we know how to prevent it, to guarantee that workers are not exposed," Rosner said. "It's inexcusable that anyone is still dying of mesothelioma or lung cancer or asbestosis in 2016."

He said fines in the hundreds of dollars are just "a rounding error for most companies, not something to stop them from profiting from the exposures they allow to occur, from profiting off people suffering."

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