

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Kenneth B. Peterson,
Commissioner of the Minnesota
Department of Labor & Industry,

**ORDER ON CROSS MOTIONS FOR
SUMMARY DISPOSITION**

vs.

Lametti & Sons, Inc.

This matter came before Administrative Law Judge James E. LaFave on cross motions for Summary Disposition. Respondent filed its motion for summary disposition on June 21, 2013. Complainant filed its motion for summary disposition on July 8, 2013. Respondent filed a memorandum in opposition to Complainant's motion the same day. A motion hearing was held on July 12, 2013, at the Saint Paul Offices of the Office of Administrative Hearings, 600 Robert Street North, Saint Paul, MN 55164.

Rory H. Foley, Assistant Attorney General, appeared on behalf of the Complainant, Kenneth B. Peterson, Commissioner of the Department of Labor and Industry, Occupational Safety and Health Division (MN-OSHA or Complainant). Aaron A. Dean, Best & Flanagan, LLP, appeared on behalf of the Respondent, Lametti & Sons, Inc. (Lametti or Respondent).

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED as follows:

1. That Respondent's motion for summary disposition is **GRANTED**;
2. That Complainant's motion for summary disposition is **DENIED**; and
3. The Complaint is **DISMISSED**.

Dated: February 3, 2014

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

Issue

Occupational Safety and Health Act (OSHA) standards require that individuals working in a trench be protected from cave-ins.¹ On September 19, 2012, Lametti dug an eight-foot deep trench in Rochester, Minnesota, to install a pipeline. MN-OSHA inspectors saw a Lametti employee in the trench without adequate protection. Lametti, however, had a work rule that implemented the OSHA standards, it communicated that rule to its employees and it enforced that rule. Is Lametti entitled to invoke the affirmative defense of employee misconduct?

Introduction

This is an enforcement proceeding regarding a citation issued by Complainant's Occupational Safety and Health Division to Respondent Lametti & Sons Inc., for a violation of the Minnesota Occupational Safety and Health Act. Lametti does not dispute the facts underlying the citation, however, it believes it should not be found in violation because of its affirmative defense of employee misconduct. There are no material facts in dispute. The Respondent and Complainant both brought motions for summary disposition. The only issue is whether Respondent Lametti is entitled to an employee misconduct defense.

Factual Background

Lametti installs sanitary, storm and water pipelines. The Company is located in Hugo, Minnesota, and employs approximately 70 people.²

In September 2012 Lametti performed work on a construction project in Rochester, Minnesota (the Rochester Project).³ Lametti was installing an eight-inch pipeline, which required creating a trench in the right-of-way along Second Street Northwest in Rochester.⁴ This was referred to as the "main trench" because Lametti was also working on a second trench about a half block away.⁵

¹ 29 C.F.R. § 1926.652(a)(1).

² Nickles Aff. Ex. B at 1 (June 18, 2013).

³ Robertson Aff. ¶ 4 (June 21, 2013).

⁴ *Id.*

⁵ Nistler Aff. ¶ 8 (June 21, 2013).

OSHA standards require that individuals working in a trench be protected from cave-ins.⁶ Lametti used a trench box that measured eight feet by twenty feet as a protective system on the Rochester Project.⁷ A trench box can be moved along the trench with a backhoe to protect workers and prevent cave-ins.⁸

Work on the main trench progressed in two stages.⁹ First, workers would be in the trench to remove old pipe and install new pipe.¹⁰ The trench box was moved as work progressed along the trench.¹¹ Second, workers would move outside the trench to place fill on top of the new pipe and use remote-controlled compactors to pack down the fill.¹²

a. MN-OSHA Inspection and Citation

On September 19, 2012, Brenda Nickles and Kyle Van Lent, Senior Safety Inspectors with MN-OSHA, visited Lametti's Rochester Project.¹³ Corey Nistler was the foreman at the site, but was at the other trench, about a half-block away, when the inspectors arrived.¹⁴ Nickles presented her credentials to Nistler and explained she was an inspector from MN-OSHA.¹⁵ During the inspection Nickles observed an individual, later identified as Lametti's employee P.R., standing in a portion of the trench which was not sloped, shored, or protected by the trench box.¹⁶ Nickles took several pictures of the individual in the trench.¹⁷

On the day of the inspection P.R.'s job was to use a remote-controlled compactor to compact soil at the bottom of the trench.¹⁸ The excavator would place bedding material and fill in the trench, and P.R. would then compact it.¹⁹ P.R. had no need to enter the trench because he could use the remote control compactor from outside of the trench.²⁰ There was an earthen ramp at the end of the trench where P.R. was working that allowed access to the trench.²¹ P.R. did not alert anyone he was entering the trench, and a fellow employee later said he was "surprised" P.R. had entered the trench.²²

⁶ 29 C.F.R. § 1926.652(a)(1).

⁷ Nistler Aff. ¶ 9 (June 21, 2013).

⁸ Blackstad Aff. ¶ 15 (July 8, 2013); Nistler Aff. ¶ 9 (June 21, 2013).

⁹ Nistler Aff. ¶ 11 (June 21, 2013).

¹⁰ *Id.*

¹¹ *Id.*

¹² Nistler Aff. ¶¶ 11 and 13 (June 21, 2013).

¹³ Nickles Aff. ¶ 2 (June 18, 2013).

¹⁴ Nistler Aff. ¶¶ 5 and 21 (June 21, 2013); Blackstad Aff. ¶ 29 (July 8, 2013).

¹⁵ Nickles Aff. ¶ 13 (June 18, 2013).

¹⁶ Nickles Aff. ¶ 4 (June 18, 2013).

¹⁷ Nickles Aff. ¶ 17 (June 18, 2013); *See*, Nickles Aff. Ex. C (June 18, 2013).

¹⁸ Robertson Aff. ¶ 9 (June 21, 2013); Nistler Aff. ¶ 16 (June 21, 2013).

¹⁹ Blackstad Aff. ¶ 22 (July 8, 2013).

²⁰ Robertson Aff. ¶ 9 (June 21, 2013).

²¹ Robertson Aff. ¶ 15 (June 21, 2013).

²² Blackstad Aff. ¶ 27 (July 8, 2013); Robertson Aff. Ex. 8 at 8-9 (June 21, 2013).

Nickles was apparently the first person who noticed P.R. in the trench. He only exited the trench upon being asked to do so by Nickles.²³ Nickles also observed there were tools, machinery and footprints in the portion of the trench that was not protected by the trench box.²⁴ However, David Blackstad, a journeyman laborer for Lametti, explained the footprints and tools were left behind when he and P.R. were working inside the trenchbox earlier in the day.²⁵ According to Blackstad, they leave the tools behind in the trench rather than removing them every time they begin work outside the trench.²⁶

During the inspection, Nickles and Van Lent measured the trench at eight feet deep, fourteen feet wide at the bottom, and twenty-four feet wide at the top.²⁷ They also determined the proper classification for the soil was class C.²⁸ Nickles made this determination because the soil was not cohesive, there were fissures in the trench walls, the equipment nearby was causing vibrations, and there was water in the trench.²⁹ The soil classification determines the proper protection for the excavation.³⁰ Type C soil must be properly sloped, shored, or protected by a support system like a trench box.³¹ Lametti does not dispute the dimensions of the trench, the type of soil, or the need for protections during work in a trench.

At the conclusion of the inspection, the inspectors held a “closing conference” with Nistler and Lametti’s Superintendent Jeff Glasow.³² Nickles informed them a citation would be issued for “failure to have trench protective equipment installed, or proper sloping/shoring in the excavation areas greater than five feet deep in type C soil where the employee was working.”³³ No one told Nickles that P.R. was committing employee misconduct.³⁴ Nickles completed the inspection report and proposed a serious citation. The citation states Lametti violated 29 C.F.R. 1926.652(a)(1) by allowing an employee in an unprotected excavation greater than five feet deep.³⁵ Nickles considered the violation a severity level F because there was a substantial likelihood of death or serious injury if there was collapse when an employee was present.³⁶ The “unadjusted” penalty for the violation was \$5,500.³⁷ After Lametti was

²³ Nickles Aff. ¶ 14 (June 18, 2013).

²⁴ Nickles Aff. ¶ 17 (June 18, 2013).

²⁵ Blackstad Aff. ¶¶ 33 and 34 (July 8, 2013).

²⁶ *Id.*

²⁷ Nickles Aff. ¶ 10 (June 18, 2013).

²⁸ Nickles Aff. ¶ 9 (June 18, 2013).

²⁹ *Id.*

³⁰ See, 29 C.F.R. 1926.652 App. B.

³¹ *Id.*

³² Nickles Aff. ¶ 18 (June 18, 2013).

³³ *Id.*

³⁴ Nickles Aff. ¶ 31 (June 18, 2013).

³⁵ Robertson Aff. Ex. 1 (June 21, 2013).

³⁶ Nickles Aff ¶ 29 (June 18, 2013); Robertson Aff. Ex. 1 (June 21, 2013).

³⁷ Nickles Aff. ¶ 20 (June 18, 2013).

credited for its good faith, safety programs, and prior history the penalty was adjusted to \$1,650.³⁸

On October 3, 2012, Lametti gave P.R. written discipline and probation for entering the trench on September 19, 2012.³⁹ P.R. signed the document, agreeing he was trained by Lametti not to enter unprotected trenches.⁴⁰ On October 12, 2012, MN-OSHA issued the citation.⁴¹ On October 25, 2012, Lametti filed notice it was contesting the citation.⁴² On January 11, 2013, the Department served the Summons and Notice to Respondent and Complaint.⁴³

b. Lametti's Safety Programs

To ensure employee safety and compliance with the Occupational Health and Safety Administration's regulations, Lametti has several programs in place.⁴⁴ All Lametti's employees must complete an hour to hour-and-a-half safety training before beginning work.⁴⁵ At the training employees receive: (1) a copy of Lametti's "Loss Control Program," (2) "A Work Accident and Injury Reduction" (AWAIR) handbook, and (3) a "Basic Safety Rules" handbook.⁴⁶ On June 11, 2012, P.R. signed an acknowledgement that he read the Basic Safety Rules handbook and received the AWAIR handbook.⁴⁷ Lametti does not have record of P.R. receiving a copy of its Loss Control Program, but asserts it provides one to all new employees.⁴⁸

Each of these handbooks includes information about trench safety. First, Lametti's Loss Control Program details Lametti's safety rules and policies.⁴⁹ The Loss Control Program contains rules regarding trench work.⁵⁰ These rules include:

Side slopes of ditch and trench shall be kept at an angle equal to OSHA standards (Rule of Thumb-flat enough to stop any creep or shifting movement of the banks for a period of two hours).⁵¹

The Loss Control Program also contains Lametti's enforcement policy of its safety rules and policies.⁵² The program states, "an employee may be suspended and/or terminated

³⁸ *Id.*

³⁹ Robertson Aff. Ex. 15 (June 21, 2013).

⁴⁰ *Id.*

⁴¹ Robertson Aff. Ex. 1 (June 21, 2013).

⁴² Robertson Aff. Ex. 2 (June 21, 2013).

⁴³ Summons and Notice to Respondent, *Peterson v. Lametti & Sons, Inc.*, Department of Labor and Industry Docket No. 1118.

⁴⁴ Robertson Aff. ¶ 16 (June 21, 2013).

⁴⁵ Robertson Aff. ¶ 26 June 21, 2013).

⁴⁶ *Id.*

⁴⁷ Robertson Aff. Ex. 6 (June 21, 2013).

⁴⁸ Robertson Aff. ¶ 16 (June 21, 2013).

⁴⁹ *Id.*

⁵⁰ Robertson Aff. Ex. 3 at 7-17 (June 21, 2013).

⁵¹ Robertson Aff. ¶ 19 (June 21, 2013); See, Robertson Aff. Ex. 3 at 7-17 (June 21, 2013).

⁵² Robertson Aff. Ex 3 at 12-1 (June 21, 2013).

at any time if the violation is flagrant or involves a serious offense.”⁵³ A flagrant violation is defined as, “Knowing the safety requirement and intentionally not complying.”⁵⁴

Second, the AWAIR “Employee Right-to-Know Safety and Health” program is required by Minn. Stat. § 182.653, subd. 8. Lametti’s AWAIR handbook states, “Slope all trenches or excavation bank at the designated angle to avoid cave-in.”⁵⁵

Finally, the “Basic Safety Rules for Construction” Handbook has a full-page devoted to trench safety.⁵⁶ It explains that any trench five feet or deeper must be sloped, benched, shored, or shielded.⁵⁷

Lametti’s efforts to ensure workplace safety also include various safety trainings or meetings.⁵⁸ Lametti holds monthly “Toolbox Talks” about safety issues, including excavation.⁵⁹ Lametti also conducts weekly safety trainings, some of which discuss trench safety.⁶⁰ Each workday Lametti conducts a Job Hazard Analysis meeting at the worksite.⁶¹ Nistler conducted the Job Hazard Analysis meeting each morning at the Rochester Project site.⁶² Nistler said he “constantly reminded...employees to use trench boxes and to honor the rule of not entering a trench five feet or deeper without using a trench box” at the Job Hazard Analysis meetings.⁶³

P.R. attended many of these trainings. On June 18, 2012, P.R. was present at a safety training meeting on excavations.⁶⁴ This training explained the types of protective support systems for excavation: sloping the sides of the trench, shoring the sides of the trench, or placing a shield between the worker and the sides of the trench.⁶⁵ The training handout stated one of these support systems must be used if the excavation is five feet deep or greater.⁶⁶ Between July 16, 2012, and September 10, 2012, P.R. also attended five weekly safety trainings that included trench safety.⁶⁷ In addition, P.R. attended a safety training session the week of September 10, 2012, which addressed trench safety.⁶⁸ The training explained that employees cannot enter the trench unless the trench is shored, sloped or the employee uses a trench box.⁶⁹

⁵³ Robertson Aff. Ex. 3 at 12-2 (June 21, 2013).

⁵⁴ *Id.*

⁵⁵ Robertson Aff. Ex. 4 at 13 (June 21, 2013).

⁵⁶ Robertson Aff. Ex. 5 at 21 (June 21, 2013).

⁵⁷ *Id.*

⁵⁸ Nistler Aff. ¶ 27 (June 21, 2013).

⁵⁹ Robertson Aff. ¶ 29 (June 21, 2013).

⁶⁰ Robertson Aff. ¶ 27 (June 21, 2013).

⁶¹ Robertson Aff. ¶ 35 (June 21, 2013).

⁶² Nistler Aff. ¶ 31 (June 21, 2013).

⁶³ *Id.*

⁶⁴ Robertson Aff. Ex. 9 (June 21, 2013).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Robertson Aff. Ex. 7 (June 21, 2013).

⁶⁸ Nistler Aff. ¶ 32 (June 21, 2013).

⁶⁹ *Id.*

Lametti periodically inspects its worksites to ensure compliance with its safety policies. Robertson performs surprise safety inspections of Lametti job sites to enforce the safety policies.⁷⁰ He conservatively performs over 100 surprise inspections every year.⁷¹ The safety inspection forms have a line for “Trench” and one for “Slope,” and boxes to indicate if it was good, fair, poor, or not applicable.⁷² On September 6, 2012, Robertson marked both the “Trench” and “Slope” fair. On September 19, 2012, before the OSHA inspectors arrived, Robertson again marked both “fair.”⁷³ Finally, in addition to its own inspections, Lametti requested a workplace safety consultation from the Department of Labor and Industry, which took place on July 2, 2012.⁷⁴

II. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.⁷⁵ The Office of Administrative Hearings follows the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.⁷⁶

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.⁷⁷ To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁷⁸ When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,⁷⁹ and all doubts and factual inferences must be resolved against the moving party.⁸⁰ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁸¹ Here, both parties agree there is no dispute regarding any material fact.

⁷⁰ *Id.*

⁷¹ Robertson Aff. ¶ 38 (June 21, 2013).

⁷² Robertson Aff. Ex. 12 (June 21, 2013).

⁷³ *Id.*

⁷⁴ Robertson Aff. Ex. 14 (June 21, 2013).

⁷⁵ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. 1400.5500(K); Minn. R. Civ. P. 56.03.

⁷⁶ See Minn. R. 1400.6600 (1998).

⁷⁷ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

⁷⁸ *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

⁷⁹ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).

⁸⁰ See, e.g., *Celotex*, 477 U.S. 317, 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele* at 583; *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

⁸¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

III. Discussion

a. Applicable Law

The Minnesota Occupational Safety and Health Act requires employers to comply with the federal occupational safety and health standards, and authorizes MN-OSHA to issue citations to employers who violate the standards.⁸² Lametti is an employer under the Act.⁸³

The Occupational Health and Safety standards include 29 C.F.R. § 1926.652 (a)(1), which states: “Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b)...” Paragraph (b) and the appendixes to 29 C.F.R. § 1926.652 set forth detailed requirements for adequate shoring and protection to prevent trench cave-ins.

In a challenge to an OSHA citation Complainant MN-OSHA has the burden of establishing that (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) an employee was exposed to, or had access to, the violative condition; and (4) the employer knew or, through the exercise of reasonable diligence, could have known of this condition.⁸⁴ The MN-OSHA has proved that P.R. was exposed to the cited hazard and thus violated 29 C.F.R. § 1926.652 (a)(1). Furthermore, Lametti does not dispute that P.R. was working in an unprotected area of the trench and needed to be protected with either a trench box or sloped trench walls.⁸⁵

b. Affirmative Defense

Lametti asserts it is entitled to the affirmative defense of employee misconduct. Respondent carries the burden of proof regarding this affirmative defense.⁸⁶ To succeed, Lametti must “prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.”⁸⁷

The evidence in the record establishes that Lametti: (a) established a policy to prevent unsafe trench conditions;⁸⁸ (b) adequately communicated the policy to its employees through a series of written materials and oral training;⁸⁹ (c) took steps to discover and rectify incidents of noncompliance with the policy through unannounced inspections;⁹⁰ and (d) enforced the rule through progressive discipline.⁹¹

⁸² Minn. Stat. § 182.653 subd. 3; Minn. Stat. § 182.66, subd. 1.

⁸³ Minn. Stat. § 182.651, subd. 7.

⁸⁴ *Ohama Paper Stock Co. v. Secretary of Labor*, 304 F.3d 779, 784 (8th Cir. 2002).

⁸⁵ Respondent’s Mem. of Law in Support of its Motion for Summary Disposition, at 1.

⁸⁶ Minn. R. 1400.7300, subp. 5.

⁸⁷ *Valdak Corp. v. Occupational Health and Safety Rev. Comm’n*, 73 F.3d 1466 (8th Cir. 1995).

⁸⁸ Robertson Aff. Exs. 3 at 7-17; 4 at 13; 5 at 21 (June 21, 2013).

⁸⁹ *Id.*; Robertson Aff. ¶ 25, June 21, 2013; Nistler Aff. ¶ 27, June 21, 2013.

⁹⁰ Nistler Aff. ¶ 33 (June 21, 2013); Robertson Aff. ¶ 38 (June 21, 2013).

⁹¹ Robertson Aff. Ex. 3 at 12-1 (June 21, 2013).

Despite that, MN-OSHA argues there are two reasons the employee misconduct affirmative defense fails. First, because the employee was in the trench, Lametti failed to take all feasible steps necessary to prevent the incident, and second, because a supervisor was present and failed to take action. Neither argument is supported by the facts or is persuasive.

MN-OSHA acknowledges that Lametti had implemented rules against entering an unprotected trench. However, it claims that because the inspectors saw an employee in an unprotected trench Lametti must have failed to properly implement the rule. Following that reasoning, no employer could ever assert an employee misconduct defense. Other than the fact an employee was in an unprotected trench, MN-OSHA can point to no other facts indicating that Lametti failed to follow or enforce its policy to prevent unsafe trench conditions.

MN-OSHA next argues that the employee misconduct defense is negated and not available to an employer when their supervisor is present, is involved in the violation or sees the violation and fails to take action. MN-OSHA's second argument assumes that the Lametti supervisor knew of the violation and failed to take action. There are no facts in the record to support that claim. The foreman on the job site that day was Mr. Nistler.⁹² The uncontroverted evidence is at the time P.R. was in the trench, Mr. Nistler was a half a block away at the second trench.⁹³ Mr. Nistler was unaware that P.R. was in the trench until notified by the inspectors.⁹⁴

As in *Horne Plumbing & Heating Co.* the record shows Lametti "took virtually every conceivable precaution to ensure that [its] employees were aware of and understood the requirement of the Act and that they conducted themselves in accordance therewith."⁹⁵

IV. Conclusion

Lametti is entitled to application of the employee misconduct affirmative defense because the employee misconduct at issue could not have been prevented through the exercise of reasonable diligence. Respondent's motion for summary disposition is granted and the citation dismissed.

J. E. L.

⁹² Nistler Aff. ¶ 5 (June 21, 2013).

⁹³ Nistler Aff. ¶ 6 (June 21, 2013).

⁹⁴ Nistler Aff. ¶ 36 (June 21, 2013).

⁹⁵ *Horne Plumbing & Heating Co. v Occupation Safety and Health Rev. Comm'n*, 528 F.2d 564, 569 (5th Cir. 1976).