OAH 60-1901-36894

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Roslyn Robertson, Commissioner,
Minnesota Department of Labor and
Industry,

Complainant,

vs.

S.M. Hentges & Sons, Inc.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before Administrative Law Judge James E. LaFave for an evidentiary hearing on August 26 and 27, and September 28, 2021. The parties submitted post-hearing briefs, on November 5, 2021, and the record closed on that date.

Alemayehu Ditamo and Scott A. Grosskreutz, Assistant Attorneys General, represent the Minnesota Department of Labor and Industry (Department). Aaron A. Dean and Elise R. Radja, Moss & Barnett, P.A., represent S.M. Hentges & Sons, Inc. (Respondent).

ISSUES

1. Did the Department meet its burden of proving that Respondent violated Minn. Stat. § 182.653, subd. 2 (2020)?

2. Did the Department meet its burden of proving that Respondent violated 29 C.F.R. § 1926.651(j)(2) (2021)?

3. Did the Department meet its burden of proving that Respondent violated 29 C.F.R. § 1926.651(k)(2) (2021)?

4. Did the Department meet its burden of proving that Respondent violated 29 C.F.R. § 1926.652(a)(1) (2021)?

5. Did Respondent meet its burden of proving the affirmative defense of employee misconduct as to any of the citation items?

6. If the Department met its burden, what penalty is appropriate?

SUMMARY OF DECISION

The Administrative Law Judge concludes that the Department established three of the four violations by a preponderance of the evidence: Minn. Stat. § 182.653, subd. 2; 29 C.F.R. § 1926.651(k)(2); and 29 C.F.R. § 1926.652(a)(1). The Department also established the severity levels and penalties for the proven violations are appropriate.

The Administrative Law Judge further concludes that the Department has failed to meet its burden of proving that Respondent violated 29 C.F.R. § 1926.651(j)(2). This citation is therefore reversed.

Finally, Respondent failed to establish the affirmative defense of employee misconduct as to any of the violations.

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

FINDINGS OF FACT

I. Basic Background

1. Respondent is a site development, utilities, and trucking company based in Jordan, Minnesota.[1]

2. The City of Belle Plaine hired Respondent to replace a portion of a water main pipe and, on May 20, 2019, a crew employed by Respondent was at 105 Hillcrest Drive, Belle Plaine, Minnesota - the project worksite (Worksite).[2]

3. That morning, one of Respondent's employees at the Worksite, John Sickler, was working in a trench that had been excavated to expose the old water main pipe.[3] Mr. Sickler used a Stihl cut-off saw to cut the pipe.[4] The saw kicked back and struck Mr. Sickler in the face, seriously injuring him, and prompted the investigation that resulted in this contested case proceeding.[5]

[1] Testimony (Test.) of Keith Belau; Exhibit (Ex.) 8 (supplement) at 1 (Responses to Requests for Admission No. 1).
[2] Belau Test.; Ex. 1 at DLI 003 (Inspection Report).
[3] Belau Test.; Test. of John Sickler; Ex. 1 at DLI 001-010; Ex. 8 (supplement) at 1, 7 (Responses to Requests for Admission Nos. 3, 27).
[4] Belau Test.; Sickler Test.; Ex. 1 at DLI 001-010; Ex. 8 (supplement) at 1, 7 (Responses to Requests for Admission Nos. 3, 27).
[5] Belau Test.; Sickler Test.; Ex. 1 at DLI 001-010; Ex. 8 (supplement) at 1, 7 (Responses to Requests for Admission Nos. 3, 27).

II. The Worksite on the Day of the Injury

4. On May 20, 2019, a six-person crew was working at the Worksite.[6] Respondent's crew, who had considerable experience working together, was composed of Leon Rothbauer (foreman), John Sickler (pipe layer), John Mans (backfiller), Jonathan Geyen (top man), Matthew Walker (bottom man), and Matthew Pomplun (excavator operator).[7]

5. Respondent's employees excavated a trench to expose the old water main, a cast-iron pipe - six-inches in diameter.[8] The trench was approximately 8.7 feet deep, and the water main was approximately 8.5 feet down from the ground level.[9]

6. The trench measured about 22 feet long and 18 feet wide, with a bottom width of 10.7 feet.[10] The angle of slope of the material on the sides of the trench was greater than 34 degrees.[11]

7. The trench was cut into ground composed of "type C"[12] soil, which is the least cohesive (in other words, most vulnerable to collapse) material classification under federal OSHA rules for soils, sands, and gravels.[13]

8. The trench was unprotected, meaning that there was no protective system in place to secure the sides of the trench.[14] During MnOSHA's inspection, Respondent's employees acknowledged placing a trench box in the trench after the injury but before the inspection.[15]

9. Placing the trench box after the injury required additional excavation. A photograph taken by a police officer, who was onsite before MnOSHA arrived, shows Mr. Pomplun operating the excavator after the injury.[16] Respondent's employees credibly testified that additional excavation took place during the placement of the trench box.[17]

10. The additional excavation was ordered to a halt by a police officer.[18] The testimony of Mr. Pomplun[19] — as well as photographs of the scene showing that, at the

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[6] Belau Test.; Ex. 1 at DLI 003, 009 (Inspection Report).
[7] Test. of Leon Rothbauer, Sickler, John Mans, and Jonathan Geyen; Declarations (Decls.) of Rothbauer, Sickler, Mans, Geyen, Matthew Walker, and Matthew Pomplun.
[8] Belau Test.; Sickler Test.; Decl. of Sickler at 8; Ex. 1 at DLI 006.
[9] Belau Test.; Ex. 1 at DLI 006, 022.
[10] Belau Test.; Ex. 1 at DLI 006, 022.
[11] Belau Test.; Ex. 1 at DLI 006, 022.
[12] Belau Test.; Ex. 1 at DLI 022.
[13] *See* 29 C.F.R. § 1926, subp. P, appx. A (defining type C soil) (2021).
[14] Belau Test.; Ex. 1 at DLI 006; Sickler Test.; Sickler Decl. at 9.
[15] Belau Test.; Ex. 1 at DLI 023; *see also* Sickler Test.; Sickler Decl. at 9.
[16] Ex. 102.
[17] Test. of Sickler, Rothbauer, Pomplun, Geyen, Mans.
[18] Ex. 7 at DLI 110-112 (Police Report).
[19] Pomplun Test.

time of the inspection, the trench lacked footprints and an earthen ramp/walkway[20] — establish that Mr. Pomplun's excavation took place after Mr. Sickler was in the trench, and that Mr. Pomplun was not able to finish the excavation work before the officer made him stop.

11. Mr. Rothbauer authorized Mr. Sickler to work in the trench without the trench box present.[21]

12. A spoil pile of excavated material was found within two feet of the edge of the excavated trench area at the time of MnOSHA's inspection.[22]

13. The evidence does not establish that the spoil pile was within two feet of the edge of the excavated area at the time Mr. Sickler was working in the trench. It is more likely than not that the spoil pile discovered during the inspection was created when Mr. Pomplun operated the excavator after the injury and before MnOSHA officials arrived at the Worksite.

III. The Injury

14. A few minutes after 8:00 a.m. on May 20, 2019, Mr. Sickler entered the trench to cut the existing water main so it could be connected to the new water line.[23] No trench box or other retaining device was in place when Mr. Sickler entered the trench.[24]

15. To cut the water main, Mr. Sickler had a Stihl cut-off saw, which is a motorized handsaw with a circular blade.[25] Because of the location of the pipe, Mr. Sickler was required to make an "up cut," which involved placing the saw toward the bottom of the pipe and cutting with an upward motion.[26] The up cut required Mr. Sickler to move the guard on the cut-off saw back.[27]

16. Mr. Sickler shoveled out a small area below the pipe at the cut location, while leaving the existing soil on both sides of the cut line.[28] He believed that the pipe was adequately secured by the soil on both ends, and he took no additional measures to support the pipe.[29]

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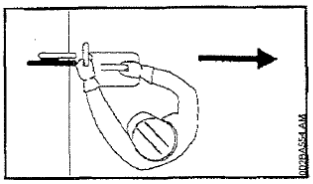
[20] Ex. 2 at DLI 113, 117, 120, 123-124, 127. Footprints demonstrate a worker was present in the trench after the additional excavation; the earthen ramp is an access point to the trench, and the fact that there is no earthen ramp is evidence that Mr. Pomplun did not complete his excavation before ordered to stop.
[21] *See* Ex. 1 at DLI 014, 022; Ex. 7 (Police Report) at DLI 110-112.
[22] Belau Test.; Ex. 1 at DLI 018, 034-35; Ex. 2 at DLI 113-14, 117, 120, 123-24, 127-28, 132-33, 135, 144-45, 147-48, 150, 154-55, 158-59 (site photographs).
[23] Sickler Test.; Sickler Decl. at 8-9; Ex. 1 at DLI 006.
[24] Sickler Test.; Sickler Decl. at 8-9.
[25] *Id.*; *see also* Ex. 5 at DLI 098-100 (Stihl operator manual).
[26] Sickler Test.; Sickler Decl. at 10. The parties agree that an up cut is not a prohibited use of the cut-off saw.
[27] Sickler Test.; Sickler Decl. at 10.
[28] Sickler Test.; Sickler Decl. at 10.
[29] Sickler Test.; Sickler Decl. at 9-10.

17. At approximately 8:20 a.m., as Mr. Sickler went to make the cut, the cut-off saw abruptly kicked back without warning and hit his face, causing him serious injuries.[30]

18. The Stihl operator manual instructs operators of the cut-off saw to "[p]osition the cut-off machine in such a way that your body is clear of the cutting attachment" and "[a]void standing in direct line with the wheel (See illustration.)"[31] The illustration is reproduced below:



3. Position the cut-off machine in such a way that your body is clear of the cutting attachment. Avoid standing in direct line with the wheel (See illustration.) Never bend over the cutting attachment, especially when the guard is pulled back towards the top and there is a risk of reactive force.

19. Mr. Sickler was positioned behind the cut-off saw as he made the cut.[32] This was Mr. Sickler's customary way of positioning himself to operate a cut-off saw, and he disagreed with several of the operator manual's instructions for proper use of the equipment.[33]

20. The starting saw position for a bottom-up cut, the fact that Mr. Sickler had only excavated a small area below the pipe, and the fact that the pipe was less than a foot above the bottom of the trench, all require the finding that Mr. Sickler must have lowered his body in some way to begin making the cut, and that his body must have been in some lowered position, bringing him closer to the cut-off saw in either a forward or downward direction, at the time he was injured.

21. Respondent had no specific rules regarding the use of a cut-off saw; instead, Respondent relied on other employees to provide on-the-job training until an employee attains journeyman status.[34]

22. Despite Mr. Sickler's customary use of the cut-off saw contravening the operator manual, Respondent did not correct Mr. Sickler's way of using the saw through its safety instruction and training.

[30] Sickler Test.; Sickler Decl. at 10; Ex. 1 at DLI 006.
[31] Ex. 5 at DLI 100.
[32] Sickler Test.; Sickler Decl. at 10.
[33] Sickler Test.
[34] Test. of Jonny Hentges.

IV. Inspection and Citations

23. On May 20, 2019, MnOSHA inspectors began inspecting the Worksite and investigating the injury.[35] The inspectors conducted a walkaround of the Worksite on May 20, 2019, and took several photographs.[36] MnOSHA's investigation included interviews with some of Respondent's employees and Mr. Sickler.[37] The closing conference took place on September 20, 2019.[38]

24. On October 2, 2019, MnOSHA issued a citation consisting of four citation items to Respondent.[39]

25. Citation 1, item 1 alleged a serious violation of Minn. Stat. 182.653, subd. 2, based on Mr. Sickler's operation of the cut-off saw in a manner that did not comply with the operator manual, resulting in serious injury.[40] The penalty amount for this item was $7,000.[41]

26. Citation 1, item 2 alleged a serious violation of 29 C.F.R. § 1926.651(j)(2) based on the spoil pile from the excavation being located within two feet of the edge of the excavated area.[42] The penalty amount for this item was $1,750.[43]

27. Citation 1, item 3 alleged a serious violation of 29 C.F.R. § 1926.651(k)(2) based on competent persons at the Worksite allowing Mr. Sickler to work in the trench despite the hazardous condition.[44] The penalty amount for this item was $3,850.[45]

28. Citation 1, item 4 alleged a serious violation of 29 C.F.R. § 1926.652(a)(1) based on Mr. Sickler being exposed to cave-in or crushing hazards from working in an unprotected excavation greater than six feet deep.[46] The penalty amount for this item was $3,850.[47]

29. Respondent timely appealed the citation, and this contested case followed.

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[35] Ex. 1 at DLI 003.
[36] Ex. 1 at DLI 003-04; Ex. 2 (photographs).
[37] Ex. 1 at DLI 003-010.
[38] *Id.* at DLI 006.
[39] Ex. 4 at DLI 086 (citations).
[40] *Id.* at DLI 090.
[41] *Id.*
[42] *Id.* at DLI 091.
[43] *Id.*
[44] *Id.* at DLI 092.
[45] *Id.*
[46] *Id.* at DLI 093.
[47] *Id.*

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry (Commissioner) and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 182.661, subd. 3; and 182.664 (2020).

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law or rule.

3. Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7 (2020).

4. "Each employer shall furnish to each of its employees, conditions of employment and place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees."[48]

5. Each employer must comply with occupational safety and health standards and rules.[49]

6. The Commissioner has adopted by reference the federal OSHA standards found in 29 C.F.R. part 1926 (2021).[50]

I. Burden of Proof

7. To establish that an employer has violated an OSHA standard, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.[51]

8. The Department has the burden of establishing a violation of the OSHA standards by a preponderance of the evidence.[52]

9. A preponderance of the evidence means the party with the burden presents evidence making it more likely than not that the violation occurred.[53]

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[48] Minn. Stat. § 182.653, subd. 2.
[49] *Id.*, subd. 3 (2020).
[50] Minn. R. 5205.0010, subps. 1, 6 (2021).
[51] *Sec'y of Labor v. Dun-Par Engineered Form Co.*, 1986 WL 53522 at *4 (O.S.H.R.C. July 30, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988); Minn. R. 1400.7300, subp. 5 (2021); *see also Gary W. Bastian*, *Comm'r , State of Minn., Dep't of Labor & Indus. v. Indus. Containers & Dumpbox Mfg., Inc.*, No. 8-1901-112200-2, 1997 WL 706203 at *12 (Minn. Office Admin. Hearings Sept. 9, 1997).
[52] *See* Minn. R. 1400.7300, subp. 5.
[53] *See State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

II. Violations

A. Item 1: Minn. Stat. § 182.653, subd. 2

10. Minn. Stat. § 182.653, subd. 2, also known as the general duty clause, states that "[e]ach employer shall furnish to each of its employees, conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees."

11. The Department established by a preponderance of the evidence the elements of a general duty clause violation: that Respondent failed to render its workplace free from a recognized hazard, resulting in serious injury.[54]

12. Additionally, the Department established by a preponderance of the evidence that the general duty clause applies, that Mr. Sickler was exposed to the violative condition, and that Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition.

13. Thus, the Department established citation 1, item 1 (violation of Minn. Stat. § 182.653, subd. 2) by a preponderance of the evidence.

B. Item 2: 29 C.F.R. § 1926.651(j)(2)

14. 29 C.F.R. § 1926.651(j)(2), states:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

15. The Department established by a preponderance of the evidence that the standard applies, and that a spoil pile was located within two feet of the edge of the trench at the time of the inspection.

16. The Department, however, did not establish by a preponderance of the evidence that a violative spoil pile was present at the time Mr. Sickler was working in the trench. The weight of the evidence makes it more likely that the spoil pile was created by post-injury excavation by Mr. Pomplun in the process of placing the trench box.

17. Thus, the Department failed to establish by a preponderance of the evidence that there was a violation or employee exposure as to citation 1, item 2 (violation of 29 C.F.R. § 1926.651(j)(2)).

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[54] *See St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm'n*, 647 F.2d 840, 844 (8th Cir. 1981) (quotations omitted).

C. Item 3: 29 C.F.R. § 1926.651(k)(2)

18. 29 C.F.R. § 926.651(k)(2), states that, "[w]here the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety."

19. The Department established by a preponderance of the evidence that the standard applies, a violation occurred, the employee had access to the violation, and the employer knew or could have known of the violation.

20. Thus, the Department established citation 1, item 3 (violation of 29 C.F.R. § 926.651(k)(2) by a preponderance of the evidence.

D. Item 4: 29 C.F.R. § 1926.652(a)(1)

21. 29 C.F.R. § 1926.652(a)(1), requires that "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except [in situations not applicable to this matter]."

22. The Department established by a preponderance of the evidence that the standard applies, a violation occurred, the employee had access to the violation, and the employer knew or could have known of the violation.

23. Thus, the Department established citation 1, item 4 (violation of 29 C.F.R. § 1926.652(a)(1) by a preponderance of the evidence.

24. Because abating one does not necessarily abate the other, item 4 is not duplicative of item 3.

I. Affirmative Defense of Employee Misconduct

25. The affirmative defense of employee misconduct applies when an employer has an established work rule, adequately communicates that rule to employees, takes steps to discover incidents of noncompliance with the rule and safety training, and effectively enforced its rules when violations are discovered.[55]

26. Under Minn. R. 1400.7300, subp. 5, "[a] party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence."

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[55] *Ken B. Peterson, Comm'r, Minn. Dept. of Labor and Industry v. Dirt Merchant*, No. 68-1901-32482, 2016 WL 1399599, at *10 (Minn. Office Admin. Hearings Mar. 3, 2016).

27. Respondent failed to prove the existence of its affirmative defense of employee misconduct by a preponderance of the evidence.

II. Level of Violations and Penalties

28. Minn. Stat. § 182.651, subd. 12 (2020), defines a "serious violation" of state work safety standards as:

> [A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29. The Department established by a preponderance of the evidence that each established violation was properly classified as "serious."

30. The Commissioner has authority to assess fines, giving due consideration to the appropriateness of the penalty with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.[56]

31. The Department established by a preponderance of the evidence that its penalty calculations were correctly determined.

[56] Minn. Stat. § 182.666, subd. 6 (2020).

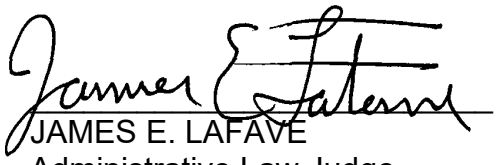
ORDER

Based upon these Findings of Fact and Conclusions of Law, the Administrative Law Judge hereby **ORDERS**:

1. Citation 1, items 1, 3, and 4 are **AFFIRMED** as **SERIOUS** violations.

2. Citation 1, item 2 is **DISMISSED**.

Dated: February 15, 2022



JAMES E. LAFAVE
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Order is the final decision in this case.[57] 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.[58]

MEMORANDUM

This contested case arose from the serious injuries sustained by Respondent's employee, John Sickler, at the Worksite. Mr. Sickler was cutting a water main pipe in an excavated trench when the saw he was using abruptly kicked back and struck him in the face. Mr. Sickler's injuries are the basis for the most serious of the four citations items (based on a Minnesota statute known as the general duty clause). After the ensuing investigation, MnOSHA issued three additional citation items based on alleged violations of OSHA regulations related to excavations.

Respondent raised substantive arguments as to each citation item and argued that two of the citation items were duplicative. Respondent also asserted the affirmative defense of employee misconduct. As addressed below, Respondent's arguments fail; the Department established three of the four citations items by a preponderance of the evidence, and Respondent has not established its affirmative defense by a preponderance of the evidence.

I. Violations

This proceeding centers on four citation items covering four alleged violations. To establish that Respondent has violated an OSHA standard, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.[59]

A. Item 1: Minn. Stat. § 182.653, subd. 2 (General Duty Clause)

The Department alleges that Respondent violated Minn. Stat. § 182.653, subd. 2, also known as the "general duty clause," which states that "[e]ach employer shall furnish to each of its employees, conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees."

The citation stated:

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[57] Minn. Stat. § 182.661, subd. 3.
[58] *Id.*; Minn. Stat. § 182.664, subd. 5.
[59] *Sec'y of Labor v. Dun-Par Engineered Form Co.*, 1986 WL 53522 at *4); Minn. R. 1400.7300, subp. 5; *see also Gary W. Bastian*, 1997 WL 706203 at *12.

> Minn. Stat. 182.653 subd. 2: The employer did not furnish to each employee, conditions of employment and a place of employment free from recognized hazards which caused or were likely to cause death or serious injury to employees:
>
> On 5/20/19, the employer did not comply with Operator's Manual for the cut-off saw. Both sides of the cast iron pipe were not supported, and an operator was bending over the cut-saw seriously injuring the employee when the saw kicked-back.[60]

Respondent does not dispute that the general duty clause applies or that Mr. Sickler was seriously injured when the saw kicked back; Respondent also does not dispute that Mr. Sickler was exposed to the hazard, although it contests that any violation occurred. Thus, the Administrative Law Judge will analyze two factors: whether the general duty clause was violated, and whether Respondent knew or could have known of the violative condition.

1. Was the General Duty Clause Violated?

To establish a violation of the general duty clause, the Department must prove (1) "that the employer failed to render its workplace free of a hazard," (2) that the hazard was "recognized," and (3) that the hazard caused or was likely to cause "death or serious physical harm."[61] The Department may also be required to "specify the particular steps the employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures."[62]

a. *Failure to Render Workplace Free of Hazard*

The Department argues that Respondent failed to render the Worksite free of hazard in two ways: (1) by allowing Mr. Sickler to operate the cut-off saw on a pipe only supported by the ground, and (2) by allowing Mr. Sickler to operate the cut-off saw standing in line with the cut and in a lowered position.

The operator manual for the Stihl cut-off saw states:

> Pinching occurs when the piece being cut closes on the wheel [. . .] If the wheel is severely pinched or bound in the upper quadrant, the wheel may be instantly thrown up and back towards the operator with great force in a rotational kickback motion. Such kickback situations can and should always be avoided. Pinching of the wheel can be prevented by proper support of the workpiece. (See below.) Severe binding of the wheel can be prevented by proper cutting techniques, e.g., not sideloading the wheel, and by the use of properly designed, manufactured and maintained wheels.[63]

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[60] Ex. 4 at DLI 090.
[61] *St. Joe Minerals*, 647 F.2d at 844 (quotations omitted).
[62] *Id.* (quotation omitted).
[63] Ex. 5 at DLI 098-099.

Regarding proper support of the pipe, the operator manual states:

> To reduce the risk of kickback injury, avoid cutting with the upper quadrant of the Wheel where possible. Be especially cautious for a pinching or binding of the wheel in this area, which can cause severe reactive forces in a rotational kickback motion.
>
> Avoid wedge action. The severed part must not bind the abrasive wheel. Be alert to potential movement of the workpiece or anything else that could cause the cut to close and pinch the wheel. In order to reduce the risk of pinching, support the workpiece in such a way that the cut remains open during the rutting process and when the cut is finished (see illustration [A]). Never make a cut that results in a binding of the wheel. If you cannot properly support the workpiece, do not use a cutting-off machine to make the cut; select another tool or cutting technique that is not subject to kickback.
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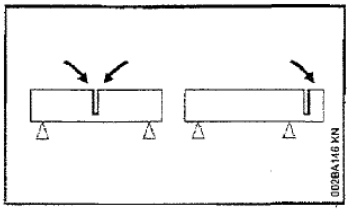
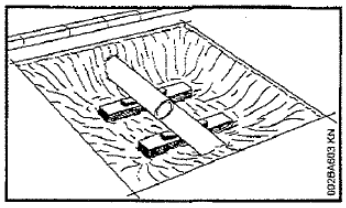
> ***



[**Illustration A]**



[Illustration B]

> Objects to be cut must therefore be properly supported and must be secured against pinching, rolling away, slipping or vibrations.
>
> Support an exposed pipe in a trench so that it is stable and capable of bearing weight. If the ends of the pipe are firmly in the ground, the ground may act as a support where the pipe emerges into the open. Additional support will be needed closer to the cut, however, to prevent sagging (see illustration [B]). Be alert for pipe that is under stress that may cause it to shift when cut; pipe in the ground may be under stress because of uneven pipe bed surfaces.

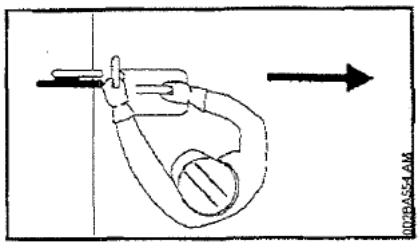
It is undisputed that the pipe was not supported by anything other than the ground at the time Mr. Sickler began his cut and was injured.[64] Mr. Sickler believed the ground was sufficient to support the pipe during the cut.[65]

The operator manual acknowledges that "the ground may act as a support where the pipe emerges into the open but adds that "[a]dditional support will be needed closer

[64] Sickler Test.; Sickler Decl. at 9-10.
[65] Sickler Test.; Sickler Decl. at 9-10.

to the cut, however, to prevent sagging" (and references Illustration B to demonstrate such additional support).[66] The undisputed fact that the saw did catch and kick back is very strong evidence for the conclusion that the pipe, in fact, needed additional support.

The operator manual also contains directions regarding the stance of a cut-off saw's operator:



> Position the cut-off machine in such a way that your body is clear of the cutting attachment. Avoid standing in direct line with the wheel (See illustration [C].) Never bend over the cutting attachment, especially when the guard is pulled back towards the top and there is a risk of reactive [forces].[67]

Respondent adduced testimony from Mr. Sickler regarding the exact position in which he was operating the cut-off saw when the injury occurred.

It is undisputed that Mr. Sickler was, contrary to the operator manual's instructions, standing behind the saw, and in line with the cutting blade, at the time of the injury; Mr. Sickler's demonstration at the hearing involved him standing in such a manner.[68]

Mr. Sickler denied that he was bending or bent at the time of the injury and demonstrated during testimony an "athletic stance" that the forceful action of the saw requires.[69] Mr. Sickler's demonstration, however, involved holding a saw at a higher level than would have been plausible on the day of the injury, given the starting place (near the bottom of the pipe) for his up cut and the location of the workpiece less than a foot from the bottom of the trench; Mr. Sickler acknowledged that he had to excavate a portion of the ground below the pipe to have room to make his cut.[70]

With these spatial restrictions in mind, it is more likely than not that Mr. Sickler had to lower his body in some way to begin the cut that led to his injury. The spatial restrictions also strongly suggest that it would be implausible for Mr. Sickler to lower himself in a way that did not require some amount of forward bending. The MnOSHA report uniformly uses forms of the words "bend" and "crouch" to characterize Mr. Sickler's position at the time of the injury, including a quote from Mr. Rothbauer stating that "Contact #5 [Mr. Sickler]

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[66] Ex. 5 at DLI 099.
[67] *Id.* at DLI 100.
[68] Sickler Test.; Sickler Decl. at 10.
[69] Sickler Test.; Sickler Decl. at 9-10.
[70] Ex. 1 at DLI 006; Sickler Test.; Sickler Decl. at 10.

was crouching to cut the pipe and did not have both sides of the pipe supported."[71] Although both Mr. Rothbauer and Mr. Sickler later denied that the latter was crouching at the time of his injury, their testimony is less convincing than a contemporaneous report. This is especially true in light of the physical implausibility of Mr. Sickler aligning himself for the up cut on a pipe near his feet without lowering himself and making some kind of compensating motion forward or closer to the cutting wheel.

Regardless of whether Mr. Sickler's position was forward or downward enough to meet all definitions of the words "bend" or "crouch," it was still a hazardous cutting position. Because it is undisputed that Mr. Sickler was standing in line with the cut, *any* amount of forward or downward bending would bring him closer to the cutting wheel. The manual expressly cautions that such a position is dangerous, "especially when the guard is pulled back towards the top and there is a risk of reactive [forces]."[72] As previously discussed, Mr. Sickler had pulled the guard back to make the up cut, and the risk of reactive forces was heightened due to the lack of support under the pipe, as illustrated by the fact that a kickback unfortunately did occur.

The Department may also be required to "specify the particular steps the employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures."[73] In its briefing, the Department states that Respondent could have instructed employees not to crouch over a pipe while cutting, not to stand in line with the cut, and to support a pipe on both sides before cutting.[74] MnOSHA's report, in its section on citation 1, item 1, also includes those suggestions, in addition to Mr. Rothbauer's suggestion of using a "Pipe Snapper," a different device for cutting pipes.[75] Whether using a different cutting tool or deploying clear instructions, the record makes plain that there are feasible and effective ways of making the kind of cut that injured Mr. Sickler without creating a hazardous condition.

Because the evidence shows that Mr. Sickler was operating the cut-off saw in a hazardous manner, the Department established by a preponderance of the evidence that Respondent failed to render a worksite free from hazard. Respondent's actual or constructive knowledge of the violative condition is discussed below.

b. Whether the Hazard Was Recognized

"A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry."[76] MnOSHA's Field Compliance Manual states that a "manufacturer's warning on equipment relevant to the hazard" may establish industry recognition of that particular hazard.[77]

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[71] Ex. 1 at DLI 011-013, 016.
[72] Ex. 5 at DLI 100.
[73] *Id.* (quotation omitted).
[74] Dept.'s Post-Hearing Brief at 8.
[75] Ex. 1 at DLI 012.
[76] *St. Joe Minerals*, 647 F.2d at 845.
[77] Ex. 6 at 47 (Field Compliance Manual).

The evidence establishes that kickback from a cut-off saw is a well-recognized hazard. Testimony establishes that, as would be expected of experienced professionals, Respondent's employees were aware of kickback hazards. The saw's operator manual contains a lengthy section on avoiding kickbacks, including in the exact conditions (within a trench, cutting an underground pipe) under which Mr. Sickler was working.[78] The operator manual mentions both an unsupported pipe and an operator's stance in line with the cut as hazardous situations. There is no dispute that the general hazard of kickback — including kickback hazards arising from lack of pipe support or improper operator stance — was a recognized hazard within the industry and among Respondent's employees.

c. Whether the Hazard Caused Serious Injury

It is undisputed that Mr. Sickler suffered serious injuries when the cut-off saw kicked back and struck his face.

Thus, the Department established by a preponderance of the evidence the three elements of a general duty clause violation.

2. Whether Respondent Knew or Could Have Known of the Violative Condition

Employer knowledge can be actual or constructive.[79] Actual knowledge of a violative condition occurs when a supervisor directly witnesses the violative conduct.[80] Constructive knowledge, by contrast, is established when one of the employer's supervisors was in close enough proximity that they should have seen the violative conduct, or when the employer failed to implement an adequate safety program.[81]

In a section on "[e]mployer knowledge of the hazard" regarding citation 1, item 1, MnOSHA's report states:

> Contact #2 [Mr. Rothbauer] said he was observing Contact #5 [Mr. Sickler] while he was using the cut-off saw in the trench. Contact #2 said he directed Contact #5 to cut the pipe. Contact #2 said he had the authority to stop the work if it were unsafe.[82]

Mr. Rothbauer said that he was at the Worksite at the start of the day and witnessed the start of excavation on the trench.[83] Mr. Rothbauer then left the trench area at the Worksite while the excavation was in progress to discuss a matter with Belle Plaine city officials.[84] Mr. Rothbauer said that he only saw Mr. Sickler using the cut-off saw as he was entering the Worksite area and "was preparing to direct Mr. Sickler to exit the trench because there was not a trench box in place," but his "return to the trench area

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[78] Ex. 5 at DLI 098-100.
[79] *Sec'y of Labor v. Quandel Constr. Group, Inc.*, 2015 WL 1597966 at *5 (O.S.H.R.C. Feb. 23, 2015).
[80] *Id.*
[81] *Id.*
[82] Ex. 1 at DLI 014.
[83] Rothbauer Test.; Rothbauer Decl. at 9-10.
[84] Rothbauer Test.; Rothbauer Decl. at 9-10.

and Mr. Sickler's injury occurred simultaneously and [he] was not able to stop work or direct Mr. Sickler to exit the trench before his injury."[85]

Mr. Rothbauer's account of the day of the injury does not correspond to the MnOSHA report. The report, which was produced contemporaneously with the accident, is better evidence than subsequent declarations because memories can fade and morph over time. Furthermore, the report is less likely to be subject to self-serving changes in narrative. Rather than rely on credibility determinations, however, the Administrative Law Judge will focus on the preponderance of the evidence showing that Respondent had constructive knowledge of the hazard.

Respondent's safety manager from 2012-2019, Jonny Hentges, testified that Respondent had no specific rules regarding the use of the cut-off saw; instead, Respondent relied on other employees to provide on-the-job training until an employee attains journeyman status.[86] Mr. Hentges acknowledged that this type of training can fail if the journeyman trainers are themselves not using the equipment in the proper way.[87]

The evidence establishes that Mr. Sickler persistently used the cut-off saw by placing himself behind the saw and in line with the cut, in contravention of the instructions in the operator manual.[88] This is how Mr. Sickler was positioned when he was injured, and at the hearing, he stated that he disagreed with the operator manual's instructions for using the saw.[89] The record clearly establishes Mr. Sickler as an experienced and skilled professional. But the record also clearly establishes that Mr. Sickler's customary way of using a cut-off saw was unsafe because of where he was positioned, and that this hazard was magnified on the day of the injury by the lack of support for the pipe and Mr. Sickler's position nearer to the cutting wheel.

The preponderance of the evidence also establishes that Mr. Sickler's customary way of using the saw was not corrected, as was required, by his employer's safety and training programs. Because the evidence shows that Mr. Sickler customarily used a cut-off saw standing behind the saw and in the cut line, Respondent had ample opportunity — not just on the day of the injury — to discover and correct Mr. Sickler's way of using the saw in contravention of the operator manual. Respondent failed to do so, and Mr. Sickler's customary alignment with the cut line combined with additional hazardous factors to result in his serious injuries. As a consequence, the preponderance of the evidence supports Respondent's constructive knowledge of the hazard.

3. Violation Established

The Department established by a preponderance of the evidence the three elements of a general duty clause violation. Furthermore, the Department established by a preponderance of the evidence that the general duty clause applies, that its requirements were not met, that Mr. Sickler was exposed to the violative condition, and

[85] Rothbauer Test.; Rothbauer Decl. at 9-10.
[86] Hentges Test.
[87] *Id.*
[88] Sickler Test.; Sickler Decl. at 9-10.
[89] Sickler Test.; Sickler Decl. at 9-10.

that Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition.

Therefore, the Department established by a preponderance of the evidence that Respondent violated the general duty clause, and that Citation 1, item 1 was proper.

B. Item 2: 29 C.F.R. § 1926.651(j)(2)

The Department alleges that Respondent violated 29 C.F.R. § 1926.651(j)(2), which states:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

MnOSHA inspectors extensively documented and photographed materials from the spoil pile of the excavation within two feet of the edge of the trench.[90] It is undisputed that the spoil pile was in a violative position at the time of the inspection. Respondent argues that, after Mr. Sickler's presence in the trench and his injury, but before MnOSHA's inspectors arrived, additional material from the trench was removed, which created the spoil pile within two feet of the edge that the inspectors documented.[91]

A police officer arrived on the jobsite before MnOSHA inspectors.[92] The police report states that the officer arrived on the scene at 8:59 a.m., about 40 minutes after the accident.[93] The first MnOSHA inspectors arrived at the Worksite at 10:25 a.m.[94]

The police officer told Mr. Rothbauer that the "site of the incident was to be shut down and nothing was to move until OSHA arrived on scene."[95] The officer observed the trench box being placed into the trench about 16 minutes after he arrived on the scene.[96] The officer told Mr. Rothbauer that the trench box placement "should not have happened"; Mr. Rothbauer later attempted to claim that the trench box was in the trench at the time of the injury, but the officer "advised him it was installed afterwards."[97]

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[90] Belau Test.; Ex. 1 at DLI 018, 034-35; Ex. 2 at DLI 113-14, 117, 120, 123-24, 127-28, 132-33, 135, 144-45, 147-48, 150, 154-55, 158-59 (site photographs).
[91] Test. of Rothbauer, Geyen, Mans, Sickler.
[92] Ex. 7 at DLI 111.
[93] *Id.*
[94] *Id.* at DLI 112.
[95] *Id.*
[96] *Id.* at DLI 111-12.
[97] *Id.*

The officer took a photograph of Mr. Pomplun operating an excavator before MnOSHA arrived on the scene.[98] Photographs taken by MnOSHA document that the trench area lacked footprints and an earthen access ramp.[99]

Mr. Sickler testified that he customarily checked to make sure that the spoil pile was in the proper position before beginning excavation work, and that he did so on the day of the injury.[100] Mr. Pomplun testified that the spoil pile was in a non-violative position at the time of Mr. Sickler's work, that he conducted additional excavation to place the trench box after the injury, and that the violative spoil pile was the result of this additional excavation.[101] Respondent's other employees testified that additional excavation work took place during the post-injury placement of the trench box.[102]

The Department argues that there is no evidence specifically mentioning additional excavation work other than the potentially self-serving testimony of Respondent's employees. Although it is true that the police report does not specifically mention excavation work, the officer took a photograph of Mr. Pomplun operating an excavator after he arrived on, and attempted to shut down, the Worksite. Furthermore, although the images are not so clear as to be conclusive on this point, the fact that no footprints appear in the trench in the MnOSHA Exhibit 2 photos is evidence weighing in favor of the finding that dirt had been moved after Mr. Sickler's injury. The strongest evidence is the lack of the earthen access ramp, which indicates that additional material had been excavated after the injury, but that the officer interrupted the excavation job before Mr. Pomplun could complete it, resulting in the state of the spoil pile at the time of the inspection. The lack of the earthen access ramp is strong evidence to support the employees' testimony that this is what happened.

On the weight of the evidence, it is more likely than not that the spoil pile within two feet of the edge of the trench was created by excavation that took place after Mr. Sickler was working in the trench.

The Department did not establish by a preponderance of the evidence that a violation occurred, the employee had access to the violation, or that the employer knew or could have known of the violation. Thus, the Department did not establish by a preponderance of the evidence that citation 1, item 2 was proper.

C. Item 3: 29 C.F.R. § 1926.651(k)(2)

The Department alleges that Respondent violated 29 C.F.R. § 926.651(k)(2), which states that, "[w]here the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from

[98] Ex. 102.
[99] Ex. 2 at DLI 113, 117, 120, 123-24, 127.
[100] Sickler Test.
[101] Pomplun Test.
[102] Test. of Rothbayer, Geyen, Mans.

the hazardous area until the necessary precautions have been taken to ensure their safety."

There is no dispute that Mr. Sickler was working in the trench without a trench box or other protective system present. These is also no dispute that the trench was excavated from "type C" material that is loosely cohesive and most vulnerable to collapse.

A "competent person" is a term of art in OSHA regulations defined as a person "who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."[103] There is no dispute that Mr. Rothbauer, as foreman, was a competent person at the Worksite. As an employee with delegated authority for, and special knowledge of, excavation matters,[104] as well as stop-work authority,[105] Mr. Pomplun also meets the definition of competent person at the Worksite as to excavation safety.

Based on the narrative set out in its employee declarations and adduced in testimony, Respondent argues that once Mr. Rothbauer (the foreman and competent person) learned that Mr. Sickler was working without a trench box, he made for the Worksite, intending to do everything in his power to remove Mr. Sickler from the trench, but he happened to arrive just as Mr. Sickler suffered an unrelated injury.

The MnOSHA report states: "Contact #2 [Rothbauer] said a trench box was not used because the specific job would not take long and they would not be there for a long period of time";[106] and "Contact #2 [Rothbauer] said he did not use a trench box because the trench was dug in the morning and the project was only going to take a couple hours to complete."[107] When 29 C.F.R. § 1926.651(k)(2) applies, the regulation does not permit work without a protective system, regardless of the amount of time a job is expected to take.

At the hearing, Mr. Rothbauer denied authorizing work without a trench box,[108] and Respondent's other employees corroborated Mr. Rothbauer's account. But the credibility of this testimony is severely undermined by the fact that, after the injury, employees moved many items at the Worksite, including placing the trench box.[109] Although he eventually acknowledged moving the trench box after the injury, Mr. Rothbauer's credibility is especially undermined by his attempt to tell the police officer that the trench box had been placed before the injury.[110] Particularly in these circumstances, the Administrative Law Judge finds that a contemporaneous account of MnOSHA

[103] *See* 29 C.F.R. § 1926.32(f).
[104] Test. of Sickler, Rothbauer.
[105] Pomplun Decl. at 10.
[106] Ex. 1 at 014.
[107] *Id.* at 022.
[108] Rothbauer Test.
[109] *See* Ex. 7 (police report).
[110] *See id.* at DLI 111.

investigators is likely to be more reliable, and less likely to be fit to a particular narrative, than Mr. Rothbauer's and other employees' subsequent accounts.

Consequently, the Administrative Law Judge gives significantly more weight to the MnOSHA report than to the testimony of Mr. Rothbauer and other employees. The Administrative Law Judge finds it is more likely than not that Mr. Rothbauer decided to authorize Mr. Sickler to work in the trench despite the lack of a trench box because the job would not take very long. This finding is sufficient to establish, by a preponderance of the evidence, that Respondent violated the regulation.

Furthermore, even under Respondent's account, Mr. Pomplun admitted that he and Mr. Sickler decided not to place the trench box before Mr. Sickler entered the trench.[111] Mr. Pomplun, as a competent person as to matters of excavation safety, first authorized, and then failed to remove Mr. Sickler from, a hazardous excavated area that did not have a protective system in place.

The Department established by a preponderance of the evidence that the standard applies, a violation occurred, the employee had access to the violation, and the employer knew or could have known of the violation. Thus, the Department established by a preponderance of the evidence that citation 1, item 3 was proper.

D. Item 4: 29 C.F.R. § 1926.652(a)(1)

The Department alleges that Respondent violated 29 C.F.R. § 1926.652(a)(1), which states that "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except [in situations not applicable to this matter]."

Under that regulation, excavations over five feet deep "shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below."[112]

There is no dispute that Mr. Sickler was working in the trench without a trench box or other protective system present. As discussed above, the Administrative Law Judge finds that Mr. Rothbauer and Mr. Pomplun knew that Mr. Sickler was working in the trench without a protective system in place.

Respondent argues that the Department cannot establish that the trench was more than five feet deep. Essentially, Respondent argues that MnOSHA inspectors used a laser distance finder held in their hand to find the depth, meaning that the depth was measured at an angle, rather than straight down. This argument is mathematically

[111] Pomplun Decl. at 12.
[112] 29 C.F.R §§ 1926.652(a)(1)(ii), 1926(b)(1)(i).

implausible[113] and contradicted by the credible testimony of the investigator.[114] Furthermore, the argument fails because Respondent answered "[a]dmit" to the request stating "[a]dmit that your employee(s) and/or the Injured Employee was working in an excavation greater than six feet in depth at the Worksite on May 20, 2019."[115]

The Department established by a preponderance of the evidence that the standard applies, a violation occurred, the employee had access to the violation, and the employer knew or could have known of the violation. Thus, the Department established by a preponderance of the evidence that citation 1, item 4 was proper.

E. Whether Items 3 and 4 Are Duplicative

Duplicative OSHA citation items may be vacated.[116] "Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well."[117]

Respondent argues that items 3 and 4 are duplicative because they have the same abatement measures, and abatement of one will necessarily result in abatement of the other.

Respondent's argument is unavailing. Item 3 concerns the actions of competent persons employed by Respondent while engaged in excavation work; item 4 concerns protective measures in place for Respondent's employees while engaged in excavation work. Although abatement measures for these items have a degree of overlap, abating item 3 requires Respondent to ensure that competent persons can identify hazards and will remove employees who are working in hazardous areas, while abating item 4 requires Respondent to ensure that adequate protective systems are in place during work in excavations.

Thus, abating either item will not necessarily result in the abatement of the other, and the citation items are not duplicative.

II. Employee Misconduct Defense

The affirmative defense of employee misconduct applies when an employer has an established work rule, adequately communicates that rule to employees, takes steps

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[113] Even crediting Respondent's theory that the inspector measured the hypotenuse of a right triangle instead of its vertical leg, simple Pythagorean math shows that, for a person measuring a "true" depth of five feet to get a "false" depth of 8.7 feet (the depth listed on MnOSHA's report), the person would have to be pointing the laser finder at a spot over seven lateral feet from where the person is standing, which is totally implausible. (For the equation "5 squared plus *x* squared = 8.7 squared," *x* equals approximately 7.1.)

[114] Belau Test.

[115] Ex. 8 (supplementary) at 7.

[116] *See Sec'y of Labor v. E. Smalis Painting Co., Inc.*, 2009 WL 1067815, at *8 (O.S.H.R.C. April 10, 2009).

[117] *Big Sky Well Serv.*, 22 O.S.H. Cas. (BNA) ¶ 1642 (O.S.H.R.C.A.L.J. Feb. 17, 2009).

to discover incidents of noncompliance with the rule and safety training, and effectively enforced its rules when violations are discovered.[118]

A party asserting an affirmative defense has the burden to establish the defense by a preponderance of the evidence.[119]

An employer must do "everything reasonably within its power to ensure that its personnel do not violate safety standards," and thus, an employee misconduct defense is only available when "an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures."[120]

Thus, "[t]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program."[121] An employer that attempts to "rely on the presence of an effective safety program" must "establish that it could not reasonably have foreseen the aberrant behavior of its employees must demonstrate that program's effectiveness in practice as well as in theory."[122]

Respondent produced no evidence of safety inspections conducted between October 2018 and the May 2019 injury to Mr. Sickler, and produced no evidence of documentation of verbal warnings under its progressive discipline policy.[123] Both facts weigh generally against Respondent's employee misconduct defense. Even absent other factors, discussed below, this evidence (or lack thereof) weighs strongly in favor of the finding that Respondent did not do "everything reasonably within its power to ensure that its personnel do not violate safety standards."[124] Thus, the Administrative Law Judge concludes that Respondent did not produce sufficient general evidence to establish its affirmative defense by a preponderance of the evidence.

As to item 1, the general duty clause, Mr. Sickler's customary use of the cut-off saw in a manner contrary to the operator manual is strong evidence that, whatever Respondent's rules regarding cut-off saw operation were, it did not take steps to find and correct Mr. Sickler's unsafe use of the saw. Even at the hearing, Mr. Sickler demonstrated what he evidently believed to be safe operation while standing behind the saw and disagreed with the operator manual's instructions for safe use.[125] This is additional evidence that strongly weighs against an employee misconduct defense specifically as to item 1.

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[118] *Dirt Merchant*, 2016 WL 1399599, , at *10.
[119] Minn. R. 1400.7300, subp. 5.
[120] *Mod. Cont'l Const. Co. v. Occupational Safety & Health Rev. Comm'n*, 305 F.3d 43, 51 (1st Cir. 2002) (quotation omitted).
[121] *Valdak Corp. v. Occupational Safety & Health Rev. Comm'n*, 73 F.3d 1466, 1469 (8th Cir. 1996) (quoting *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987)).
[122] *Brock*, 818 F.2d at 1277.
[123] Mr. Hengtes testified that the mere fact of giving a verbal warning served as its own documentation, regardless of whether a paper record existed, which is not a plausible interpretation of what constitutes documentation and provides no consistent way for different supervisors to learn about which employees have been verbally warned and may need closer attention or further training.
[124] *See Mod. Cont'l Const. Co.*, 305 F.3d at 51 (quotation omitted).
[125] Sickler Test.

As to items 3 and 4, the Administrative Law Judge's finding that, more likely than not, Mr. Rothbauer and Mr. Pomplun authorized Mr. Sickler to work without a trench box is further strong evidence that undermines Respondent's employee misconduct defense.

The Administrative Law Judge finds that Respondent did not establish employee misconduct by a preponderance of the evidence as to any of the citation items.

III. Severity and Penalty Amounts

Respondent did not contest the "serious" level of the penalties or the calculation of the penalty amounts.

When there is a substantial probability that death or serious physical harm could result from a violation, that violation is "serious."[126] Saw kickback and soil cave-ins both can lead to serious injury or death.[127] The Department introduced sufficient (and uncontested) evidence to meet its burden of showing that the "serious" designation was appropriate as to each citation item.

The Department introduced uncontested evidence that it calculated the citation item penalties in accordance with its Field Compliance Manual[128] and the statutory factors from Minn. Stat. § 182.666, subd. 6, as required.[129] The Department's uncontested evidence meets its burden of showing that the penalty amount was appropriate as to each citation item.[130]

IV. Conclusion

The Department established items 1, 3, and 4, as well as the proper severity levels and penalty amounts, by a preponderance of the evidence. The Department did not establish item 2 by a preponderance of the evidence. Respondent did not establish its employee misconduct defense as to any citation item. Therefore, citation items 1, 3, and 4 are affirmed, and item 2 is dismissed.

J. E. L.

[126] Minn. Stat. § 182.651, subd. 12.
[127] Belau Test.
[128] Ex. 6 at 65-84.
[129] Belau Test.
[130] As to item 2, the penalty amount would be appropriate if the violative spoil pile had been present when Mr. Sickler was working in the trench. Because the Department did not establish item 2 by a preponderance of the evidence, however, the penalty amount of item 2 is moot.