OAH 60-1901-36894

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Rosyln J. Robertson, Commissioner, Minnesota Department of Labor and Industry,

Complainant,

v.

ORDER DENYING THE DEPARTMENT'S MOTION FOR SUMMARY DISPOSITION

S.M. Hentges & Sons, Inc.,

Respondent.

This matter came before Administrative Law Judge James E. LaFave on the Minnesota Department of Labor and Industry's Motion for Summary Disposition (Motion).

Alemayehu Ditamo, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Aaron A. Dean and Elise R. Radja, Moss & Barnett, P.A., appeared on behalf of S.M. Hentges & Sons, Inc. (Respondent).

The Department filed its Motion on January 29, 2021, and S.M. Hentges responded on February 22, 2021. The Administrative Law Judge held a motion hearing on March 5, 2021. On May 16, 2021, Respondent emailed the Administrative Law Judge, attaching five cases supporting its assertion that the Department's Requests for Admissions should not be deemed admitted. On May 20, 2021, the Department responded. The motion record closed on June 3, 2021, after the Administrative Law Judge held a prehearing conference in this matter.

Based on the submissions of counsel and the prehearing record, the Administrative Law Judge issues the following:

ORDER:

1. The Department's Motion for Summary Disposition is **DENIED** in its entirety.

2. This matter will proceed to hearing as previously scheduled, beginning on August 26, 2021.

Dated: July 12, 2021

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

The Department argues that it is entitled to summary disposition on four safety-based citations issued to S.M. Hentges because there are no material facts in dispute.[1] S.M. Hentges denies that the safety violations occurred, and further argues, in the alternative, that it has an affirmative defense of employee misconduct.[2] S.M. Hentges argues that the Administrative Law Judge has the authority to *sua sponte* grant summary disposition in its favor.[3]

I. Undisputed Facts

S.M. Hentges is a Minnesota contractor.[4] In 2019, S.M. Hentges was hired to replace the existing water-main pipe in Belle Plaine, Minnesota (the Project).[5]

On May 20, 2019, the operator excavator, Michael Pomplun, excavated a trench in the right-of-way to expose the existing water-main pipe.[6] Mr. Pomplun placed the excavated materials from the trench in a "spoil pile."[7] Thereafter, John Sickler entered the newly-excavated trench to cut through the existing water-main pipe with a chop saw.[8] Part way through the cut, the saw kicked-back, hitting Mr. Sickler in the face, causing significant injuries.[9]

[1] Complainant's Mem. of Law in Support of Mot. for Summary Disposition (Complainant's Mem.) at 2 (Jan. 28, 2021).
[2] S.M. Hentges & Sons, Inc.'s Mem. in Opposition to MnOSHA's Mot. for Summary Disposition (Respondent's Mem.) (Feb. 19, 2021).
[3] *Id.* at 1.
[4] Declaration (Decl.) of Keith Belau at 1.
[5] *Id.*
[6] Decl. of Michael Pomplun at 5, 11-12.
[7] *Id.* at 11-12.
[8] Decl. of John Sickler at 9.
[9] *Id.* at 10; Decl. of K. Belau at Ex. 1 at DLI 007.

MnOSHA safety investigators arrived a few hours later to inspect the Project site.[10] Inspector Keith Belau interviewed members of the S.M. Hentges crew and photographed the trench excavation and surrounding area.[11]

II. Procedural History

On October 2, 2019, MnOSHA issued four serious-level citations to S.M. Hentges.[12] MnOSHA alleged that S.M. Hentges had violated applicable law by failing to maintain a safe workplace and allowing an employee to be injured,[13] allowing the spoil pile to be closer than two feet from the edge of the trench,[14] failing to remove an employee from an area where a cave-in was possible,[15] and failing to use adequate protective systems to prevent cave-in of a trench.[16] MnOSHA imposed a $16,450 penalty.[17] S.M. Hentges appealed these citations, and the Department initiated this contested case.

The First Prehearing Order stated: "The period for discovery, except for expert disclosures, shall close on **December 31, 2020**. All discovery shall be completed by that date."[18] On November 30, 2020, the Department served S.M. Hentges, by mail, with discovery requests, including Requests for Admissions, Requests for Production of Documents, and Interrogatories.[19] On December 31, 2020, S.M. Hentges informed MnOSHA that it would not respond to the Requests for Production or Interrogatories because, under the civil rules, it had until January 4, 2021 to respond, which was beyond the December 31, 2020, discovery deadline.[20] S.M. Hentges answered the Requests for Admissions on December 31, 2020, despite arguing that it had no obligation to do so.[21]

The Administrative Law Judge held a telephonic prehearing conference related to the discovery dispute on January 11, 2021. At that hearing, Aaron Dean, S.M. Hentges' attorney, argued that MnOSHA believes "there is a different set of rules that apply to them."[22] Mr. Dean also emphasized the fact that MnOSHA had not brought a motion to extend the scheduling order, stating that he did not understand "why the court should now intervene."[23] Mr. Dean continued: "MnOSHA makes a point of saying that discovery deadlines and court deadlines have to be obeyed in other cases. They can't have it both ways. We can't have two sets of rules; one that's lenient for the government, and one that is strict for private employers."[24] At the conclusion of the prehearing conference, the

[10] Decl. of K. Belau at Ex. 1 at DLI 006.
[11] *See id.*
[12] Notice and Order for Hearing and Prehearing Conference (Notice and Order) at Exhibit (Ex.) 1 (June 2, 2020).
[13] *See* Minn. Stat. § 182.653, subd. 3 (2020).
[14] *See* 29 C.F.R. § 1926.651(j)(2) (2021).
[15] *See* 29 C.F.R. § 1926.651(k)(2) (2021).
[16] *See* 29 C.F.R. § 1926.652(a)(1) (2021).
[17] Notice and Order at Ex. 1.
[18] First Prehearing Order (July 13, 2020).
[19] Decl. of Alemayehu Ditamo at 1.
[20] Prehearing Conference Digital Recording (Jan. 11, 2021) (on file with the Minn. Office Admin. Hearings).
[21] Decl. of Elise Radaj.
[22] Prehearing Conference Digital Recording (Jan. 11, 2021) (on file with the Minn. Office Admin. Hearings).
[23] *Id.*
[24] *Id.*

Administrative Law Judge stated that he would not "take any action to change the discovery timelines."[25]

The First Prehearing Order stated: "Any dispositive or non-dispositive motions shall be served and filed by **January 29, 2021**. The responding party shall serve and file a written response by **February 19, 2021**."[26] The Department moved the Administrative Law Judge for summary disposition on January 29, 2021. The Department served Respondent with its Motion on January 28, 2021, by placing a copy in the United States mail with postage prepaid.[27] S.M. Hentges argued that because it did not receive the Motion by January 29, 2021, service of the summary disposition motion was untimely. S.M. Hentges pointed to Minn. R. 1400.6600 (2019), which states that "all motions must be timely filed and served." Respondent also noted that Minn. R. 1400.6100 (2019) requires that three additional days be added to the prescribed time period when serving by mail. Respondent argued that, when these rules are read together, the Department's Motion was not timely served.

The Administrative Law Judge disagreed. In its Second Prehearing Order, the judge concluded:

> Respondent's argument is misplaced. The relevant rule governing service is Minn. R, 1400.5550 (2019), which provides that service by mail is effective when placed in the mail with postage prepaid.[28] The First Prehearing Order required that motions be served and filed by January 29, 2021. The Department complied with the Order by placing the Motion in the mail, with postage prepaid on January 28, 2021. The Respondent's request to strike the Department's motion is therefore **DENIED**.

On February 19, 2021, S.M. Hentges filed its Memorandum in Opposition to MnOSHA's Motion for Summary Disposition. The Administrative Law Judge held a hearing on the Department's Motion on March 5, 2021.

In its Motion, the Department argued that, because S.M. Hentges had failed to respond to the Department's Request for Admissions within 10 days, as required by Minn. R. 1400.6800 (2019), "the matters addressed in Complainant's admission requests are deemed admitted for the purpose of this motion."[29] In response, S.M. Hentges argued that its answer to the request was timely under Minn. R. Civ. P. 36.01, which has a 30-day response period.

On May 16, 2021, S.M. Hentges sent an email to the Administrative Law Judge, stating: "Since the motion hearing occurred, we researched the issue whether other Courts have addressed the issue if Requests for Admission will be deemed admitted if there is a short delay responding to Requests for Admissions, such as in this case." S.M.

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[25] *Id.*
[26] First Prehearing Order (July 13, 2020).
[27] Certificate of Service (Jan. 28, 2021).
[28] Minn. R. 1400.5550, subp. 2.
[29] Complainant's Mem. at 3 n.2.

Hentges attached five cases from districts other than Minnesota. The Administrative Law Judge provided the Department an opportunity to respond, and the Department sent a letter to the Administrative Law Judge on May 20, 2021.

On May 31, 2021, Mr. Dean requested that the hearing in this matter be continued due to a previously scheduled family vacation. On June 3, 2021, the Administrative Law Judge held a prehearing conference to discuss the request. At that hearing, the Administrative Law Judge rescheduled the hearing for August 26, 2021. In addition, the Administrative Law Judge reopened the discovery period to allow for additional discovery through July 30, 2021. The motion record closed at the conclusion of that prehearing conference.

III. Legal Standard

Summary disposition is the administrative law equivalent of summary judgment.[30] A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[31] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[32] The Administrative Law Judge does not weigh the evidence;[33] instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[34]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[35] A fact is material if its resolution will affect the outcome of the case.[36] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[37] A genuine issue is not a "sham or frivolous" one,[38] and it cannot rely on mere allegations or denials.[39] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[40]

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[30] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[31] *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[32] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[33] *Id.*
[34] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[35] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[36] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[37] *Thiele,* 425 N.W.2d at 583.
[38] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[39] *DLH*, 566 N.W.2d at 71.
[40] *See* Minn. R. Civ. P. 56.05.

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[41] Thus, summary disposition is only proper when no fact issues need to be resolved.[42]

IV. Legal Analysis

The Act grants the Federal Occupational Safety and Health Administration (federal OSHA) authority for setting and enforcing standards for workplaces.[43] Federal OSHA has promulgated the standards at issue in this proceeding.

Under the Act, states are permitted to develop their own standards if they are at least as effective as the federal standards and are approved by federal OSHA.[44] Minnesota has adopted a state workplace safety plan and the Department is responsible for promulgation and enforcement of the standards under the Act.[45] The Department has adopted numerous federal OSHA standards, including the standards at issue in this proceeding.[46]

In order to prove a violation of a safety standard under the Act, the Department must prove four factors: (1) the cited safety standard applies; (2) there was a failure to comply with the cited standard; (3) the employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.[47]

Requests for Admission

First, the Department argues that its Requests for Admissions are deemed admitted because S.M. Hentges' response was untimely. S.M. Hentges counters that, based on Minn. R. Civ. P. 36.01, its response was timely, and therefore argues that the requests should not be deemed admitted.

The First Prehearing Order stated that discovery would close on December 31, 2020. On November 30, 2020, the Department served S.M. Hentges, by mail, with Requests for Admissions, Request for Production of Documents, and Interrogatories. S.M. Hentges responded to the Requests for Admissions on December 31, 2020, but did not respond to the Request for Production of Documents or Interrogatories, arguing that it was not obligated to do so. At a prehearing conference, the Administrative Law Judge stated that he would not alter the discovery deadlines from the First Prehearing Order.

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[41] *Sauter*, 244 Minn. at 485, 70 N.W.2d at 353.
[42] *Id*.
[43] 29 U.S.C. § 655(a).
[44] 29 U.S.C. § 667(c).
[45] Minn. Stat. § 182.65 (2020).
[46] Minn. R. 5205.0010 (2019).
[47] *Omaha Paper Stock Co. v Secretary of Labor,* 304 F.3d 779, 784 (8th Cir. 2002).

The relevant administrative rule provides:

> A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document. The request must be served at least 15 days prior to the hearing, and it shall be answered in writing by the party to whom the request is directed within ten days of receipt of the request. The written answer shall either admit or deny the truth of the matters contained in the request or shall make a specific objection thereto. *Failure to make a written answer within ten days will result in the subject matter of the request being deemed admitted unless it can be shown that there was a justifiable excuse for failing to respond.*[48]

The Administrative Procedure Act Rules further provide that "[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed."[49] The civil rule regarding interrogatories and the production of documents both contain a 30-day deadline following service.[50] Similarly, the civil rule pertaining to requests for admissions provides:

> The matter is admitted unless within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney[.][51]

S.M. Hentges argues that it "complied with the standard 30-day response period for discovery set forth in Minnesota Rule of Civil Procedure 36.01, and discovery rules referenced within Minnesota Administrative Rule 1400.6700, subp. 2. Thus, there is a justifiable excuse for serving responses to the Requests for Admissions based on a 30-day response period."[52] Essentially, S.M. Hentges argues that it was justified in relying on which ever deadline it so chose. The Administrative Law Judge disagrees.

The Office of Administrative Hearings' administrative rules "govern all contested cases conducted by the office under Minnesota Statutes, chapter 14."[53] And these rules provide a 10-day response period specifically for requests for admissions unless there is

[48] Minn. R. 1400.6800.
[49] Minn. R. 1400.6700, subp. 2 (2019).
[50] Minn. R. Civ. P. 33.01(b), 34.02(c). Because the discovery request was served by mail, S.M. Hentges had an additional three days to respond, which made its response deadline January 4, 2021, outside the discovery window articulated in the First Prehearing Order. *See* Minn. R. 1400.6100, subp. 2.
[51] Minn. R. Civ. P. 36.01.
[52] Respondent's Mem. at 8.
[53] Minn. R. 1400.5010 (2019).

a justifiable excuse for an extension. The existence of a conflicting rule that applies in district court proceedings is not a justifiable excuse for failing to respond.[54]

Nonetheless, on June 3, 2021, the Administrative Law Judge reopened the discovery period to allow for additional discovery through July 30, 2021. This will permit the Department to re-serve its Interrogatories and Requests for Documents. Given this concession for the Department, the Administrative Law Judge will not deem the Requests for Admissions admitted, despite S.M. Hentges' untimely response and unjustified reliance on inapplicable rules.

Summary Disposition

According to the Department, "[t]here is no genuine issue of material fact as to whether S.M. Hentges violated [the] safety standards or whether [the Department] appropriately determined the severity of the citations and the monetary penalty."[55] S.M. Hentges contends that "[b]ecause disputed, material facts exist regarding the validity of the Citations and because S.M. Hentges can maintain the affirmative defense of unpreventable employee misconduct, MnOSHA's Motion for Summary Disposition must be denied."[56]

Citation 1, Item 1

The Department first cited S.M. Hentges for violating Minn. Stat. § 182.653, subd. 2 (2020), which is known as the "General Duty Clause." Section 182.653, subdivision 2 provides: "Each 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 Department contends:

> [T]he operator's manual of the Stihl cut-off saw warned against the possibility of kickbacks associated with operating the saw by clearly establishing that an operator must never bend over the cutting attachment and must have both sides of the pipe that is being cut to prevent sagging. S.M. Hentges foreman, and competent person, admitted that he observed the employee crouch over the cut-off saw and cut into an existing water main pipe without having both sides of the pipe supported in order to prevent sagging while operating the cut-off saw. Despite being aware of these hazards and the potential for kickbacks, S.M. Hentges allowed the employee to continue operating the saw in this hazardous manner until, unfortunately, he was severely injured and hospitalized. Finally, S.M. Hentges could have abated, and potentially avoided this unfortunate injury,

[54] *Cf. Baybridge v. City of Ortonville*, No. A07-0574, 2008 WL 2573268, at *5 (Minn. Ct. App. July 1, 2008) (concluding that "based on this record, the commissioner's conclusion that the holiday season provided a justifiable excuse for the minimally late response was not an abuse of discretion").
[55] Complainant's Mem. at 2.
[56] Respondent's Mem. at 1.

> by simply following the cut-off operator's manual. Specifically, S.M. Hentges could have instructed its employees to never crouch over the pipe that is being cut, not stand in direct line of the cut-off saw, and support the pipe on both sides. Its failure to do so, created an unsafe work environment that caused a serious injury to an employee in violation of Minn. Stat. § 182.653, subd. 2.

The Department relies on an assumption here that S.M. Hentges failed to instruct its employees on use of the saw, as well as pipe support. However, S.M. Hentges contends:

> S.M. Hentges trains its employees on cut-off saw safety. In fact, one of the Annual Goals and Objectives for 2019 related to safety while using chop saws. John Sickler was not bent over the pipe while cutting the pipe. Leon Rothbauer did not witness Mr. Sickler in the trench or while cutting the pipe. And John Sickler properly secured and stabilized both sides of the pipe before cutting the pipe, contrary to MnOSHA's allegations.[57]

S.M. Hentges supports these assertions with declarations from the relevant employees, which is enough to survive summary disposition.[58]

Moreover, the Department fails to address S.M. Hentges' reliance on the employee misconduct defense; it is possible that the employee was appropriately trained, but nonetheless chose to disregard that training. Therefore, because there are material facts in dispute, summary disposition is not appropriate on this count.

Citation 1, Item 2

The Department cited S.M. Hentges for violating 29 C.F.R. § 1926.651(j)(2). Section 1926.651(j) pertains to the "[p]rotection of employees from loose rock or soil" and provides:

> 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.

The Department alleges that its inspectors "observed the excavated material was placed in a spoil pile immediately adjacent to the edge of the trench."[59] The Department further contends that "the photographs taken by the OSHI clearly show that the excavated

[57] Respondent's Mem. at 13.
[58] *See* Decl. of Adam Schmitz; Decl. of J. Sickler; Decl. of Leon Rothbauer.
[59] Complainant's Mem. at 15.

material was not set back two feet from the edges [as] required by the standard and that there is no distinction between the end of the trench wall and the start of the spoil pile."[60]

Mr. Pomplun dug the trench and created the spoil pile on May 19, 2020.[61] In his declaration, Mr. Pomplun states:

> My training and on-the-job experience taught me to have at least two feet of clearance between the base of a spoil pile and the trench edge before anyone enters a trench and while anyone is inside the trench. I typically exceed this two foot minimum by dragging the excavator bucket across the ground to ensure that there is a walkway equal to the width of the bucket.[62]

Mr. Pomplun further articulates that he would often check spoil piles for any "sloughing off of materials" towards the trench such that the two-foot barrier would be maintained.[63] Mr. Pomplun contends:

> I do not know the exact time that MnOSHA took photos of the excavation, but any photos taken by MnOSHA showing what appears to be less than two feet of distance between the 'spoil pile' and the edge of the excavation were not taken at a time that S.M. Hentges employees were in the trench. I would have noticed this condition if it existed while employees were working in the excavation. I believe the 'spoil pile' was fully compliant at the time employees were working. I cannot speak to the 'spoil pile' condition at the time the MnOSHA photos were taken some time later.[64]

In addition, in his declaration, Mr. Rothbauer states: "Mr. Pomplun ensured that there was at least two feet of clearance between the base of the spoil pile and the edge of the trench while he was placing the excavated soils in the 'spoil pile.'"[65] He further states: "I also saw Mr. Pomplun use the bucket of the excavator to scrape along the ground to create a larger than two foot walkway between the 'spoil pile' and the edge/lip of the trench."[66]

In his declaration, Matthew Walker, a laborer for S.M. Hentges, states:

> On May 20, 2019, I [walked] between the 'spoil pile' and the trench after the trench was excavated. I had ample space to walk between the trench edge and the 'spoil pile.' There was more than two feet of room between the 'spoil pile' and the edge/lip of the trench on the morning of May 20, 2019. I would have remembered if there was less than two feet of room because I would

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[60] *Id.*
[61] Decl. of M. Pomplun.
[62] Decl. of M. Pomplun at 3.
[63] *Id.* at 4.
[64] *Id.* at 5.
[65] Decl. of L. Rothbauer at 9-10.
[66] *Id.* at 10.

> not have been able to easily walk through the walkway between the 'spoil pile' and the edge/lip of the trench. There was more than two feet.[67]

The Administrative Law Judge acknowledges that in the Department's photos the spoil pile is within two feet of the edge of the trench.[68] But S.M. Hentges argues that,

> there was a two-hour window between the incident in question and MnOSHA's arrival on site. No S.M. Hentges employee entered the trench or monitored the location of the spoil pile during this period. The soil at the Project site was Class C, sandy soil that is subject to sloughing. Given that the location of the spoil pile was known to be at least two feet from the edge of the trench prior to the incident, the location of the spoil pile viewed by MnOSHA investigators was a result of sloughing.[69]

In order for the Department to establish a safety violation, employees must have had access to the violative condition.[70] Therefore, the relevant time period for evaluating the location of the spoil pile was when employees were actually using the trench. Because there is a material fact dispute regarding the location of the spoil pile *at that time*, summary disposition is not appropriate.

Citation 1, Item 3

The Department next alleges that S.M. Hentges violated 29 C.F.R. § 1926.651(k)(2) by failing to remove employees working in an excavation after observing evidence of hazards that could result in a possible cave-in. The regulation explicitly provides: "Where 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 necessary precautions have been taken to ensure their safety."[71] To establish a violation, the Department must prove that S.M. Hentges either knew or could have known of the condition with the exercise of reasonable diligence.[72]

According to the Department, the regulation requirements were not met because:

> despite observing excavated soil piles being placed immediately adjacent to the open trench without utilizing any retaining device to prevent the spoil piles from falling into the trench, S.M. Hentges foreman, and competent person, failed to remove the employee from the excavation until necessary precautions could be taken to ensure the worker's safety.[73]

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[67] Decl. of Matthew Walker at 7-8.
[68] Decl. of K. Belau at Ex. 1 at DLI 034-DLI 035.
[69] Respondent's Mem. at 15 (citations omitted).
[70] *Omaha Paper Stock,* 304 F.3d at 784.
[71] 29 C.F.R. § 1926.651(k)(2).
[72] *Omaha Paper Stock,* 304 F.3d at 784.
[73] Complainant's Mem. at 16.

A MnOSHA inspector, Keith Belau, states:

> [T]he foreman identified himself as the competent person at the Worksite and informed me that he had the authority to stop the work if it were unsafe. He stated that he directed the worker to enter the trench and begin cutting a portion of the existing water main pipe and was supervising the worker as he performed the task. . . . At the time of the inspection, the foreman stated that he observed the worker crouching to cut the pipe the water main pipe and that the worker did not have both sides of the water main pipe he was cutting supported.[74]

However, in Mr. Rothbauer's declaration, he states:

> I did not see Mr. Sickler enter the trench. I did not see anyone enter the trench. . . . When I returned to the area of the trench, I saw Mr. Sickler in the trench, yet there was no trench box inside the trench. I did not stop and watch Mr. Sickler work, I was walking up to the trench when I saw Mr. Sickler in the trench and I saw no trench box in the trench . . . . I hurried my approach to the trench and I was preparing to direct Mr. Sickler to exit the trench because there was not a trench box in place. But my return to the trench area and Mr. Sickler's injury occurred simultaneously and I was not able to stop work or direct Mr. Sickler to exit the trench before his injury.[75]

According to Mr. Rothbauer, as soon as he discovered the hazardous condition, he attempted to rectify it. This stands in direct contradiction to the Department's arguments and Mr. Belau's statements. Because the Administrative Law Judge does not assess credibility at this stage of the proceedings, summary disposition is not appropriate on this count.

In addition, the Department alleges that the foreman "affirmatively chos[e] not to place a retaining device into the trench."[76] Mr. Belau states: "Upon questioning of S.M. Hentges' foreman, he informed me that a trench box was not used to shore up the dug trench because he believed that the specific job would not take long, and the worker would not be in the trench for a long period of time."[77] But again, Mr. Rothbauer's declaration contradicts this statement. He states: "There was a trench box immediately available to be used to put inside the trench. Trench boxes had been onsite for week, as well. When I left the trench area to work with the City of Belle Plaine, I had no knowledge that Mr. Sickler would enter the trench without a trench box."[78] And Mr. Sickler states: "To the best of my knowledge, neither Mr. Rothbauer nor Mr. Pennington were aware that a trench box was not in the trench."[79] Because the Administrative Law Judge must view all

[74] Decl. of K. Belau.
[75] Decl. of L. Rothbauer at 10.
[76] Complainant's Mem. at 14.
[77] Decl. of K. Belau at 3.
[78] Decl. of L. Rothbauer at 10.
[79] Decl. of J. Sickler at 9.

evidence in a light most favorable to S.M. Hentges, these statements, under oath, create a material fact dispute that precludes summary disposition.

Citation 1, Item 4

Lastly, the Department cited S.M. Hentges for violating 29 C.F.R. § 1926.652(a)(1) "by failing to ensure employees were protected with an adequate protective system while working in an excavation greater than five feet deep."[80] The regulation offers employers two options for compliance: a sloping or benching system or a support system, including trench boxes. As noted above, to establish a violation, the Department must prove that S.M. Hentges either knew or could have known of the condition with the exercise of reasonable diligence.

It is undisputed that the trench was not sloped or benched; rather S.M. Hentges had trench boxes on site to meet the requirements of 29 C.F.R. § 1926.652(a)(1). However, according to the Department, "S.M. Hentges' foreman, and competent person, admitted to the violation by stating that he chose not to use a trench box."[81] S.M. Hentges disputes this assertion. In his declaration, John Sickler indicates that it was his decision not to use the trench box, stating: "Due to the location of the water main pipe on the edge of the trench, I thought it was safer to make the cut without the use of a trench box."[82] He further states: "To the best of my knowledge, neither Mr. Rothbauer nor Mr. Pennington were aware that a trench box was not in the trench."[83] Mr. Rothbauer states, under oath, that trench boxes were available onsite and that he had no idea anyone would enter the trench without a trench box.[84] According to Mr. Rothbauer, he did not see Mr. Sickler enter the trench, but as soon as he observed him in the trench without a trench box, he quickened his pace to tell him to get out of the trench; Mr. Sickler was injured before Mr. Rothbauer could speak to him.[85] Again, because the Administrative Law Judge does not assess credibility at this stage of the proceedings, these conflicts regarding the events of May 20, 2019, are sufficient to create a material fact issue.

V. Conclusion

The Department's Motion for Summary Disposition is denied because there are material facts in dispute. This matter will proceed to an evidentiary hearing on August 26, 2021.

J. E. L.

[80] Complainant's Mem. at 17.
[81] Complainant's Mem. at 18-19; *see also* Decl. of A. Ditamo.
[82] Decl. of J. Sickler at 9.
[83] *Id.*
[84] Decl. of L. Rothbauer at 10.
[85] *Id.*