

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

<p>Steve Sviggum, Commissioner, Department of Labor and Industry, State of Minnesota,</p> <p style="text-align: center;">Complainant,</p> <p>vs.</p> <p>Lametti &amp; Sons, Inc.</p> <p style="text-align: center;">Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS AND ORDER</b></p>
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The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on October 16, 2007, at the Office of Administrative Hearings in St. Paul, Minnesota. The record closed on November 15, 2007.

Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry ("Complainant"). Arnold R. Kraft, 14636 Hampshire Place, Burnsville, MN 55306, appeared on behalf of Lametti & Sons, Inc. ("Respondent").

**STATEMENT OF ISSUE**

Whether the Respondent was in violation of OSHA standards at its work site in Minneapolis, MN on August 14, 2006, and if so, what penalties are appropriate?

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Mr. Gary Anderson is a principal safety investigator for the Minnesota Office of Safety and Health (MnOSHA).<sup>1</sup> He has worked for MnOSHA

<sup>1</sup> Mn OSHA is a division of the Minnesota Department of Labor and Industry. The acronym is derived from the federal Occupational Safety and Health Act (OSHA).

for over nineteen years. Mr. Anderson's training includes MnOSHA internal classes on trenching and excavation and a class with Professor Mickel at Iowa State University. Mr. Anderson has conducted over 60 trenching and excavation investigations.

2. On August, 14, 2006 as Mr. Anderson and a MnOSHA trainee<sup>2</sup> crossed the Washington Avenue bridge, they observed a backhoe on River Road East,<sup>3</sup> and suspected that excavation and trenching activity were taking place. Trenches and trench safety are emphasized by Federal OSHA because of the severity and nature of the injuries that occur due to trench collapse. After noticing the backhoe, the inspectors proceeded to observe the suspected work site.

3. The backhoe and trenching work site were located at 75 River Road East in Minneapolis (the "work site"). An excavation had been dug in the middle of East River Road, on the University of Minnesota Campus, approximately half way between Pillsbury Drive SE and Washington Avenue SE.<sup>4</sup> At the location of the excavation the street runs northwest to southeast,<sup>5</sup> parallel to the Mississippi River.<sup>6</sup> The excavation was dug in approximately the same direction.<sup>7</sup>

4. The work site required the inspectors to request entrance because it was fenced and locked off.<sup>8</sup> From outside the fence, the MnOSHA inspectors could not determine if the excavation complied with OSHA regulations.<sup>9</sup> As the inspectors approached the trench, Mr. Anderson observed an employee, Jason Zarbo, climbing out of the trench.<sup>10</sup> Jason Zarbo is a Lametti & Sons employee.<sup>11</sup>

5. Mr. Anderson presented his credentials to the site foreman, Mr. Mitch Mills, and conducted an opening conference.<sup>12</sup> Mr. Zarbo and the MnOSHA trainee were also present. Mr. Anderson informed Mr. Mills that the inspectors needed to conduct an investigation to ensure the trench was in compliance with OSHA regulations, because of the national emphasis on trenching. At the time of the inspection, there were four Lametti & Sons

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<sup>2</sup> Ex. 1, P.2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Ex. 1, P. 2; Ex. 2, P. 1 (This picture displays the fence surrounding the work site the inspectors observed.)

<sup>9</sup> Ex. 1, P.2.

<sup>10</sup> Ex. 1, P. 2; Ex. 2, P. 2 & P. 5 (Mr. Anderson observed the employee working in the trench between the shovel and the opening in the pipe shown in Ex. 2, P.2. The employee's presence is also indicated by the shovel and footprints in the dirt.)

<sup>11</sup> Exs. 1; P.1a.

<sup>12</sup> *Id.*

employees present at the work site. Both Mr. Mills and Mr. Zarbo identified themselves as competent persons and employees of Lametti and Sons.<sup>13</sup>

6. Mr. Anderson conducted a walk around investigation during which the dimensions of the trench were determined.<sup>14</sup> Measurements of the trench were taken as Mr. Mills assisted Mr. Anderson in positioning the site-stick at a depth near where the employee had been working.<sup>15</sup> The site-stick was not placed exactly where the employee had been working because placing it at that depth would have exposed the employee to the hazard of trench collapse. Because the site-stick was tilted during the measurement,<sup>16</sup> Mr. Mills and Mr. Anderson agreed that ground level was at 10 feet on the site-stick. Additionally, the parties agreed that the employee was working one foot deeper in the trench, arriving at the stipulation that the trench was 11 feet deep. The other dimensions of the trench were measured and agreed to by Mr. Mills and Mr. Anderson to be 24 feet wide at the top, 29 feet long, with a bottom width of approximately 7 feet.<sup>17</sup>

7. To determine what type of soil was present at the work site, Mr. Anderson utilized visual and hand tests. Mr. Anderson conducted these tests on soil from an eight-foot tall spoil pile, which was present at the site.<sup>18</sup> The spoil pile is loose dirt from the excavation that is piled outside the trench. Mr. Anderson attempted to conduct a thumb penetration test and a string test on a soil sample taken from the spoil test but was unable to conduct either of these tests because the soil easily flowed through his fingers.<sup>19</sup> The thumb penetration test involves the individual rolling the soil into a ball and inserting his or her thumb into the soil.<sup>20</sup> The string test involves trying to roll the soil into a string in the palm of your hand.<sup>21</sup> Mr. Anderson's inability to conduct either of these tests is indicative that the soil was Type C soil (granular soil including gravel, sand, and loamy sand).

8. The trench had no adequate protective systems in place to protect the employee from the hazard of trench collapse. For excavations less than 20 feet deep, the maximum allowable slope from horizontal for Type B soil is 45 degrees with horizontal to vertical ratio of 1:1.<sup>22</sup> For excavations less than 20 feet deep, the maximum allowable slopes from horizontal for Type C soil is 34 degrees with a horizontal to vertical ratio of 1.5:1.<sup>23</sup> In order to have a 34-degree slope from horizontal the width of the top of the trench would have needed to be

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<sup>13</sup> Ex. 1, P. 5.

<sup>14</sup> Ex. 1, P. 2.

<sup>15</sup> *Id.*

<sup>16</sup> Ex. 2, P. 6 (demonstrating that the site-stick was tilted when the measurement was taken.)

<sup>17</sup> Ex. 1, P.2.

<sup>18</sup> Ex. 2, P. 7.

<sup>19</sup> Ex. 1, P.2.

<sup>20</sup> Ex. 5, P.2.

<sup>21</sup> *Id.*

<sup>22</sup> Ex. 8, P. 41.

<sup>23</sup> *Id.*

40 feet wide.<sup>24</sup> Additionally, the trench did not have a support or shield system in place or adequate benching to protect the employee.<sup>25</sup>

9. Mr. Anderson also took a sample of the soil. This sample was taken from the spoil pile<sup>26</sup> in a manner consistent with MnOSHA sampling procedures.<sup>27</sup> Mr. Anderson placed this sample in a plastic bag and took it back to his office, where he secured it. This sample was sent to the OSHA lab in Salt Lake City, Utah. This sample arrived at the OSHA lab with its seal intact. The analysis from the OSHA lab indicated that the soil from the spoil pile was Type C soil with a textural classification of sand and a structural classification of granular.<sup>28</sup> The OSHA lab determined that 82 percent of the sample was sand, 87 percent of the sample was sand and gravel, and 13 percent of the sample was clay and silt.<sup>29</sup> The lab did not determine the unconfined compressive strength of the soil.<sup>30</sup>

10. The Administrative Law Judge finds that the soil at the site was Type C soil.

11. Immediate abatement of the hazard was obtained due to the fact an employee was observed climbing out of the trench.<sup>31</sup> A closing conference was conducted with the company's safety manager on August 15, 2006.<sup>32</sup>

12. In calculating penalties, a severity rating is assigned to each violation. The severity rating is based upon a scale, ranging from A (violation unrelated to injury) to F (violation could result in death, permanent total disability, or 60 percent or greater permanent partial disability.)<sup>33</sup> Additionally, the probability that an injury or illness will occur due to a violation condition is considered independently of the severity of such an injury or illness.<sup>34</sup> There are four probability factors – employee exposure, proximity to the hazard, duration of the hazard, and work conditions – that are rated 0 – 2 and totaled to determine the total probability rating affecting the penalty determination.<sup>35</sup> Each instance of non-compliance is considered separately for purposes of determining a

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<sup>24</sup> Ex. 1, P. 1.

<sup>25</sup> Ex. 8, P. 45.

<sup>26</sup> Ex. 2, P. 7 (Mr. Anderson testified he took the sample to the left of the indentation in the lower center of this photograph).

<sup>27</sup> Ex. 5, P. 1.

<sup>28</sup> Ex. 3, P. 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Ex. 1, P. 3.

<sup>32</sup> *Id.*

<sup>33</sup> Ex. 4 Appendix VI-A; Ex. 9 Appendix VI-C.

<sup>34</sup> Ex. 4, P. VI-3.

<sup>35</sup> *Id.*

violation.<sup>36</sup> Finally, the penalty may be adjusted by giving the company credit for good faith, size, and history.<sup>37</sup>

13. Citation 1, Item 1 was for a violation of 29 C.F.R. § 1926.651(k)(2), which requires a competent person to evaluate the site's safety and remove people if they are exposed to unsafe conditions.<sup>38</sup> A competent person is someone who has the training and authority to affect the conditions at the site. Both Lametti & Sons' foremen, Mr. Mills and Mr. Zarbo, indicated to the inspectors that they were trained as competent persons.<sup>39</sup>

14. Mr. Anderson classified Citation 1, Item 1 as serious, utilizing the standards laid out in the MnOSHA Field Compliance Manual (FCM).<sup>40</sup> This citation was rated with a severity of rating of D because generally the trench was not in compliance and the competent person did not remove the exposed employee from this danger.<sup>41</sup> Additionally, this violation was given a probability rating of 4. This number was derived by looking at three factors. First, Mr. Anderson determined the employee exposure was I because one employee was in the excavation.<sup>42</sup> The proximity to the hazard was rated as a 2 because the employee was working in an 11-foot deep trench which could entail full body engulfment.<sup>43</sup> Finally, for duration to hazard, Mr. Anderson rated the probability as a I because exposure would be greater than 10 percent of the day but less than 50 percent of the workday.<sup>44</sup> No points were added to the probability rating for working conditions or additional instances.<sup>45</sup> The unadjusted penalty for a D4 citation was determined using a chart from the MnOSHA FCM<sup>46</sup> to be \$2000.00.<sup>47</sup> After taking into consideration credits for the company's size, good faith, and history the penalty was reduced to \$600.00.<sup>48</sup>

15. Citation 1, Item 2 was for a violation of 29 C.F.R. § 1926.652(a)(1), which requires that the employer provide the employee with protection while the employee is working in the excavation.<sup>49</sup> This citation was issued for type C soil.<sup>50</sup> Immediate abatement was obtained for this citation because an employee was observed coming out of the excavation.<sup>51</sup>

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<sup>36</sup> Ex. 4, VI-6.

<sup>37</sup> Ex. 4, VI-7-VI-9.

<sup>38</sup> Ex. 1, P.4.

<sup>39</sup> Ex. 1, P.2.

<sup>40</sup> Ex. 4, VI-3-VI-6.

<sup>41</sup> Ex. 4, Appendix VI-A-21.

<sup>42</sup> Ex.1 P.5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Ex. 4, P. VI-24.

<sup>47</sup> Ex. 1, P. 5.

<sup>48</sup> *Id.*

<sup>49</sup> Ex. 1, P.7.

<sup>50</sup> Ex. 1, P.8.

<sup>51</sup>

16. Mr. Anderson classified Citation 1, Item 2 as serious using the MnOSHA FCM. This citation received a severity rating of F because the excavation was greater than six feet deep.<sup>52</sup> The probability rating for Citation 1, Item 2 was also given a 4 and calculated in the same manner as the probability rating for Citation 1, Item 1.<sup>53</sup> The unadjusted penalty for a F4 citation was determined using a chart from the MnOSHA FCM<sup>54</sup> to be \$3000.00.<sup>55</sup> After taking into consideration credits for the company's size, good faith, and history the penalty was reduced to \$900.00.<sup>56</sup>

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 182.664.

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

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

4. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Minn. Stat. Ch. 182.

5. 29 C.F.R. § 1926.651(k)(2) requires that:

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 the necessary precautions have been taken to ensure their safety.

6. 29 C.F.R. § 1926.652(a)(1) requires that:

Each 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 when:

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<sup>52</sup> Ex. 1, P. 8; Ex. 4, Appendix VI-A-21.

<sup>53</sup> Ex. 1, P. 8.

<sup>54</sup> Ex. 4, P. VI-24.

<sup>55</sup> Ex. 1, P. 8.

<sup>56</sup> *Id.*

(i) excavations are made entirely in stable rock, or

(ii) excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of potential cave-ins.

7. The Complainant has the burden of establishing an OSHA violation by a preponderance of the evidence.

8. The Complainant has established by a preponderance of the evidence that the Respondent's employees were exposed to the cited hazards.

9. The Complainant has proved a violation of 29 C.F.R. § 1926.651(k)(2) and a violation of 29 C.F.R. § 1926.652(a)(1).

10. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines, giving due consideration 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.

11. The record supports the Department's penalty calculation regarding the severity and probability of harm of each violation. Adjusting the penalty calculation to the appropriate severity and probability of harm results in penalties of \$600.00 for the violation of 29 C.F.R. § 1926.651(k)(2) and \$900.00 for the violation of 29 C.F.R. § 1926.652(a)(1).

12. The Conclusions are based on the reasons set out in the Memorandum which follows. The Memorandum is incorporated into these Conclusions by reference.

Based on the Conclusions, the Administrative Law Judge makes the following:

## **ORDER**

### **IT IS ORDERED THAT:**

1. Citation 1, Item 1, issued for a violation of 29 C.F.R. § 1926.651(k)(2) and Citation 1, Item 2, issued for a violation of 29 C.F.R. § 1926.652(a)(1) on August 14, 2006, are AFFIRMED.

2. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of \$1,500.

3. If the penalty is not paid within 60 days after the fine becomes a final Order, it must be increased to 125 percent of the originally-assessed

amount. Furthermore, after 60 days, the unpaid fine shall accrue an additional penalty of 10 percent per month, compounded monthly until the fine is paid in full, as required by Minn. Stat. §182.666, subd. 7.

Dated: December 13, 2007.

s/Richard C. Luis  
RICHARD C. LUIS  
Administrative Law Judge

Reported: Digitally recorded. No transcript prepared.

### **NOTICE**

Notice is hereby given that under Minn. Stat. § 182.664, subd. 3, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for this appeal are set out at Minn. Rules 5215.5000 to 5215.5210.

## MEMORANDUM

Respondent asserts that the soil type at the work site was Type B soil. In support of the soil being type B, the Respondent argues several points. First, the Respondent relies upon the unconfined compression strength of the soil being 0.85 as determined by Mitch Mills, the site foreman at the work site, as indicating the soil was Type B.<sup>57</sup> Additionally, the Respondent relies on the characteristics of the spoil pile photograph as indicating that the soil was Type B.<sup>58</sup> Specifically, the Respondent asserts that in the photograph of the spoil pile clumps of soil, indicating cohesiveness, are apparent. Moreover, the respondent indicates that a vertical cavity apparent in the spoil pile is indicative that the soil was type B because the sides of this cavity are at a vertical slope. The Respondent also argues that the sample tested from the spoil pile was not taken in conformity with MnOSHA sampling standards and is not representative of the work site's soil type. Finally, the Respondent offered William C. Kwasny's testimony that, in his opinion, the soil at the work site was cohesive.

Gary Anderson, a MnOSHA principal safety inspector, identified the work site soil as Type C. Mr. Anderson attempted to perform two manual tests – a thread test and thumb penetration test. He could not perform these tests because the soil would not roll in a ball. In fact, Mr. Anderson testified that the soil drained right through his hands. Moreover, he indicated that in his experience it was not appropriate to re-wet these materials to perform these tests. He did not perform a pocket penetrometer test on the soil because it would not roll into a ball. In taking a soil sample for lab analyses Mr. Anderson only took one sample from the spoil pile because it appeared to be representative of the spoil pile's composition. The lab analyses conducted at the federal OSHA lab indicated that the soil sample taken from the spoil pile was Type C soil.

The testimony at the hearing and the photographs taken during the inspection clearly show that the trench did not contain any of the adequate protective systems required in accordance with 29 C.F.R. § 1926.652(a)(1). This regulation states:

- (1) Each 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 when:
  - (i) excavations are made entirely in stable rock, or
  - (ii) excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of potential cave-ins.

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<sup>57</sup> Ex. 7.

<sup>58</sup> Ex. 2, P. 7.

Because neither of the two exceptions listed apply to this fact scenario, the trench should have had adequate protective systems. The testimony at the hearing and the photographs taken during the inspection do not demonstrate any evidence of proper benching, proper sloping, support systems, shield systems, or other protective systems. Respondent argues that the Exhibit 2, P. 5 photograph demonstrates the presence of a bench to the right of the white cylinder marked 004 upon which a level lays horizontally. However the area in Exhibit 2, P. 5 relied upon by the Respondent does not conform to the Exhibit 8 diagrams of proper benching techniques to be used in Type B and Type C soils.<sup>59</sup> For Type B soil, Exhibit 8 indicates benches must be present on both sides of the trench, regardless of whether a single or multiple bench technique is used.<sup>60</sup> Additionally, Exhibit 8 indicates for Type C soil benching would not have been appropriate and that either a support/shield system or proper sloping should have been employed.<sup>61</sup> The evidence and the photographs taken during the inspection indicate the presence of only one possible bench and no support or shield system. Therefore, proper benching techniques were not used even if the soil was Type B.

The record demonstrates that at the time of the inspection, the trench was improperly sloped. The trench was measured at 29 feet long, 11 feet deep, 24 feet wide at the top, and 7 feet wide at the bottom of the trench.<sup>62</sup> These measurements were taken with the help of the foreman.<sup>63</sup> The foreman and Mr. Anderson agreed on these measurements because they were unable to obtain accurate measurements without exposing someone to the danger of entering the trench. For excavations less than 20 feet deep, the maximum allowable slope from horizontal for Type B soil is 45 degrees, with a horizontal to vertical ratio of 1:1.<sup>64</sup> For excavations less than 20 feet deep, the maximum allowable slopes from horizontal for Type C soil is 34 degrees, with a horizontal to vertical ratio of 1.5:1.<sup>65</sup> From the testimony at the hearing and the photographs<sup>66</sup> taken during the inspection it is apparent that the angle of the slope is closer to 60 degrees from vertical. Thus, the trench was improperly sloped for Type B or Type C soil and in violation of 29 C.F.R. § 1926.652(a)(1). The record also demonstrates that 29 C.F.R. § 1926.652(k)(2) was violated because a competent person (two Lametti & Sons employees at the work site indicated they were trained as competent persons) did not remove the employee from the excavation that had inadequate protective systems.

The record shows that the proposed adjusted penalty calculations for Citation 1, Items 1 and 2, were determined appropriately according to the

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<sup>59</sup> Ex. 8 P. 44-45.

<sup>60</sup> Ex. 8 P. 45.

<sup>61</sup> *Id.*

<sup>62</sup> Ex. 1, P.2.

<sup>63</sup> *Id.*

<sup>64</sup> Ex. 8, P. 41.

<sup>65</sup> *Id.*

<sup>66</sup> Ex. 2, P. 2; Ex. 2, P. 5.

MnOSHA FCM Citations Rating Guide.<sup>67</sup> Citation 1, Item 1's severity rating level of D was correct because the injuries likely to result from collapse of the trench include asphyxiation, loss of consciousness, contusions, crushing, dislocation, fractures, or strains.<sup>68</sup> Additionally, Citation 1, Item 2's severity rating of level of F was appropriate because the trench was greater than 6 feet deep. The probability rates and penalty adjustment credits also were calculated in accordance with the MnOSHA FCM.<sup>69</sup> Thus, the adjusted penalties were calculated correctly.

**R. C. L.**

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<sup>67</sup> Ex. 4, P. appendix VI-A-21.

<sup>68</sup> Ex. 9.

<sup>69</sup> Ex. 4, VI-4, VI-5, VI-7-9.