

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,  
Department of Labor and Industry,  
State of Minnesota,

Complainant,

v.

Danner, Inc.,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on October 14, 2011, at the Office of Administrative Hearings in St. Paul, Minnesota. The record closed at the conclusion of the hearing that day.

Julie A. Leppink, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry (Complainant). Marlon Danner, Vice President, Danner, Inc. (Respondent), 843 Hardman Ave., South St. Paul, MN 55075, appeared without counsel.

**STATEMENT OF ISSUES**

1. Did the Respondent violate Occupational Safety and Health (OSH) rules requiring that a competent person remove employees from a situation that could result in a possible cave-in; that employees are protected from cave-ins by sloping, shoring, or other adequate protective systems; and that excavated materials are placed at least two feet away from the edge of an excavation?

2. If so, what penalty is appropriate?

The Administrative Law Judge concludes the Respondent violated the rules in question and that the \$13,000 penalty sought by the Department should be reduced to \$10,200 to properly reflect the duration of the hazard.

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

## FINDINGS OF FACT

1. On August 27, 2010, the Respondent had a crew working at the intersection of St. Albans Street and Front Avenue in St. Paul. They were installing a six-inch water main. A City of St. Paul regional water crew and a utility locator were on site to assist, but the Respondent was performing the work.<sup>1</sup>

2. The crew had started work at about 7 a.m. that morning. The pipe segments being installed were about 18 feet long. For each segment of pipe, the crew used a backhoe to dig a trench about 25 feet long and approximately eight feet deep; the new pipe was being placed so the top of the pipe was at a depth of seven feet. The trench was approximately four feet wide at the bottom (the width of the bucket on the backhoe) and eight feet wide at the top. The walls of the trench were nearly vertical.<sup>2</sup>

3. When the hole for the first section was large enough, the backhoe operator placed a large trench box, approximately eight feet high, into the trench. A trench box is a steel structure, open at the top and bottom, used to shield employees from any cave-in of the trench walls. Employees worked inside the trench box to place and connect the pipe segments. When the pipe was connected, an employee operating a front-end loader would cover the pipe with about two feet of earth, which would be tamped down. The backhoe operator would track backwards and dig the next section, then pull the trench box forward so the back of the box was approximately even with the end of the last pipe laid. The employee operating the front-end loader would then finish filling the completed section of trench.<sup>3</sup>

4. The crew had placed three segments of pipe in this manner before encountering an area where fiber-optic and electrical lines were buried. At that point, the crew used shovels to hand-dig "pot holes" to locate the lines, which crossed the trench about three and one-half feet above the level of the water main.<sup>4</sup> The backhoe operator removed the large trench box at that point, because the box could not be pulled through the area where the lines crossed the trench.<sup>5</sup>

5. When the utility lines were exposed, the backhoe operator carefully excavated in front and in back of them to a level of seven feet or more. The far end of the trench, where it had been backfilled over the new pipe, was sloped steeply up over a relatively short distance from the level of the pipe to ground level.<sup>6</sup>

6. When the backhoe operator began digging underneath the utility lines close to where the new water pipe had been placed, the pipe layer went into the trench at the far end, to make sure the backhoe operator did not hit the pipe (marked with a

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<sup>1</sup> Testimony of Caleb Bussian; Testimony of Jeff Chirhart.

<sup>2</sup> Test. of C. Bussian; Ex. 23.

<sup>3</sup> Test. of C. Bussian; Ex. 26.

<sup>4</sup> Test. of C. Bussian; Exs. 20 & 22.

<sup>5</sup> Test. of J. Chirhart; Ex. 27.

<sup>6</sup> Test. of C. Bussian; Exs. 2-4 & 7.

piece of rebar in the photographs).<sup>7</sup> He was standing on a loose chunk of concrete on the sloped area at a depth of approximately five feet; however, he was just a step or two from where the backhoe was excavating at the deeper level of the water pipe.<sup>8</sup> Although a small trench box was on the site and was available to be placed in the area where he was standing, he did not use it to protect himself.<sup>9</sup>

7. The excavated soil was Type C, which means the soil was not compacted, was sandy, and contained chunks of debris.<sup>10</sup> Because of the lack of compaction, Type C soil poses a relatively higher risk of cave-in than other types of soil. When Type C soil is excavated from a trench, employers must use one of the following protective measures: the trench walls must be sloped at an angle of 34 degrees; the walls must be shored with appropriate equipment; or employees in the trench must be protected by use of a trench box.<sup>11</sup> For this project, sloping of the walls of the trench was not an option because a main sewer line was buried just a few feet away from where the water line was being installed.<sup>12</sup>

8. The backhoe operator had placed the excavated soil into a spoil pile immediately adjacent to one side of the trench. There was no setback between the bottom edge of the spoil pile and the top of the trench. The spoil pile extended along the length of the trench, past the sloped area where the pipe layer was standing.<sup>13</sup>

9. At about 11:00 a.m., while the pipe layer was in the trench watching the backhoe operator, two OSH inspectors approached the work site. As they approached, the pipe layer saw them coming and backed up into the shallower area at the far end of the trench. He then exited the trench to speak with the inspectors.<sup>14</sup>

10. Inspectors Lisa Hollingsworth and Jeff Schultz identified themselves and conducted an opening conference. The pipe layer identified himself as the competent person on the site.<sup>15</sup>

11. The inspectors measured the trench and took photographs and a soil sample. They informed the pipe layer of the proposed citations in a closing conference: violation of 29 C.F.R. § 1926.651(k)(2) (competent person failed to remove exposed employees from an area that could result in cave-in until the necessary precautions have been taken to ensure safety); 29 C.F.R. § 1926.652(a)(1) (inadequate protective system in trench where employee was working); and 29 C.F.R. § 1926.651(j)(2) (spoil pile less than two ft. from edge of excavation).<sup>16</sup>

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<sup>7</sup> Test. of C. Bussian; Ex. 11.

<sup>8</sup> *Id.*; Ex. 22.

<sup>9</sup> Test. of C. Bussian.

<sup>10</sup> Testimony of Lisa Hollingsworth; Ex. 2.

<sup>11</sup> Test. of L. Hollingsworth; 29 C.F.R. § 1926.652(b), (c).

<sup>12</sup> Test. of L. Hollingsworth; Test. of C. Bussian.

<sup>13</sup> Ex. 2.

<sup>14</sup> *Id.*; Test. of L. Hollingsworth; Test. of C. Bussian.

<sup>15</sup> Test. of L. Hollingsworth.

<sup>16</sup> Ex. 1.

12. The violations were considered abated when the pipe layer agreed to stay out of the trench unless one of the trench boxes was used for protection.<sup>17</sup>

13. Hollingsworth prepared a penalty worksheet for the proposed citations.<sup>18</sup>

### **Penalty Calculations**

14. 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% or greater permanent partial disability). The MnOSHA Citation Rating Guide identifies the range of severity to be assigned to a particular violation, depending on the conditions at the work site.<sup>19</sup> In addition, a probability rating is assigned to each violation. The probability rating is a sum of factors pertaining to employee exposure, proximity to hazard, duration of hazard, work conditions, and additional instances found at the work site.<sup>20</sup>

#### ***Competent Person Violation; 29 C.F.R. § 1926.651(k)(2).***

15. With respect to the competent person violation, the Minnesota OSHA Field Compliance Manual provides that the investigator may use a severity rating of E or F, depending on whether the excavation is less than or equal to six feet deep with cave-in potential, or more than six feet deep with the potential to fully bury, crush, or asphyxiate an employee.<sup>21</sup> The majority of the trench was more than seven feet deep; it was even deeper in the area where the backhoe was excavating, and it was shallower at the sloped end where the pipe layer was standing.<sup>22</sup> Given the depth of the trench, the type of soil, the placement of the spoil pile, and the lack of any protective system, it is clear that in the event of a cave-in, a person working in the trench in the area where the pipe layer was standing could potentially have been buried, crushed, or asphyxiated.<sup>23</sup> The Department properly classified the violation in this case with a severity rating of "F."<sup>24</sup>

16. In assigning a probability rating, the Field Compliance Manual provides that the duration of the hazard should be rated "0" if the employee exposure to the hazard is less than 10% of the normal work day; "1" if the employee exposure is from 10% to 50% of the work day; and "2" if the employee exposure is from 51% to 100% of the work day.<sup>25</sup> The Department rated the duration of the hazard in this case as a "2," for a total probability rating of 5.<sup>26</sup>

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<sup>17</sup> Test. of L. Hollingsworth; Test. of C. Bussian; Ex. 25.

<sup>18</sup> Ex. 1.

<sup>19</sup> Ex. 13.

<sup>20</sup> Ex. 13 at 65-67.

<sup>21</sup> Ex. 13 at 127 (1926.651(k)(2)).

<sup>22</sup> Exs. 11 & 12.

<sup>23</sup> Ex. 2.

<sup>24</sup> Ex. 1 at 8.

<sup>25</sup> Ex. 13 at 67.

<sup>26</sup> Ex. 1 at 8.

17. The record reflects that the pipe layer was in the trench without protection for only a short time after the utility lines were exposed. The Respondent has photographs documenting that the large trench box was used until it had to be removed to excavate around the utility lines.<sup>27</sup> In addition, the Respondent has photographs showing use of the small trench box to complete the placement of the water main after the inspectors left the site.<sup>28</sup> The Department improperly rated the duration of the hazard in this case to be more than half the work day. The duration of the hazard should have been rated at “0” for exposure less than 10% of the day, resulting in a total probability rating of 3.

18. Based on a severity/probability rating of F5, the Field Compliance Manual provides for an unadjusted penalty for this violation of \$7,000.<sup>29</sup> Based on the correct severity/probability rating of F3, the unadjusted penalty is \$5,500.<sup>30</sup>

19. The Respondent had been cited twice within the previous three years for violation of the competent person standard, in June 2008 and August 2008.<sup>31</sup> Both citations were resolved by agreement. In June 2008, the Respondent did not contest the violation but disputed the penalty, which was reduced to \$550; in August 2008, the Respondent contested the citation, which was rescinded, and no penalty was paid.<sup>32</sup>

20. The Department properly assessed a penalty multiplier of “2” for a first repeat of this violation.<sup>33</sup>

21. A 60% credit was applied to the penalty based on the employer’s size (50%) and good faith (10%).<sup>34</sup>

22. The Department proposed an adjusted penalty of \$5,600 for this violation. Using the correct duration rating, the correct adjusted penalty should be \$4,400.

***Unprotected Trench Violation; 29 C.F.R. § 1926.652(a)(1).***

23. With respect to the unprotected trench violation, the Minnesota OSHA Field Compliance Manual again provides that the investigator may use a severity rating of E or F, depending again on whether the excavation is less than or equal to six feet deep with cave-in potential, or more than six feet deep with the potential to fully bury, crush, or asphyxiate an employee.<sup>35</sup> For the reasons indicated above, the Department properly classified the violation in this case with a severity rating of “F.”<sup>36</sup>

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<sup>27</sup> Exs. 20, 21, 23 & 26.

<sup>28</sup> Ex. 25.

<sup>29</sup> Ex. 13 at 80.

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

<sup>31</sup> Ex. 14 at 6; Ex. 16 at 6.

<sup>32</sup> Ex. 17 at 2; Ex. 15 at 1.

<sup>33</sup> See Ex. 13 at 74.

<sup>34</sup> Ex. 1 at 8; Ex. 13 at 69-70.

<sup>35</sup> Ex. 13 at 127 (1926.652(a)(1)).

<sup>36</sup> Ex. 1 at 11.

24. In assigning a probability rating, the Department again rated the employee exposure as a “2” based on exposure from 51% to 100% of the work day.<sup>37</sup> The total probability rating was 5.<sup>38</sup>

25. The Department improperly rated the duration of the hazard in this case. For the reasons indicated above, the duration of the hazard should have been rated at “0” for exposure less than 10% of the day, resulting in a total probability rating of 3.

26. Based on a severity/probability rating of F5, the Field Compliance Manual provides for an unadjusted penalty for this violation of \$7,000.<sup>39</sup> Based on the correct severity/probability rating of F3, the unadjusted penalty is \$5,500.<sup>40</sup>

27. The Respondent had been cited twice in the previous three years for the unprotected trench violation, in June 2008 and August 2008.<sup>41</sup> Both citations were resolved by agreement. In June 2008, the Respondent did not contest the violation but disputed the penalty, which was reduced to \$550; in August 2008, the Respondent contested the citation and paid a reduced penalty of \$400.<sup>42</sup>

28. The Department assessed a penalty multiplier of “2” for this violation.<sup>43</sup>

29. A 60% credit was properly applied to the penalty based on the employer’s size (50%) and good faith (10%).<sup>44</sup>

30. The Department proposed an adjusted penalty of \$5,600 for this violation. Using the correct duration rating, the correct adjusted penalty should be \$4,400.

***Spoil Pile Violation; 29 C.F.R. § 1926.651(j)(2).***

31. With respect to the unprotected trench violation, the Minnesota OSHA Field Compliance Manual provides that the investigator may use a severity rating of D for general conditions, and E or F if large rocks are in the spoil pile.<sup>45</sup> The record reflects that there were bricks and large chunks of rock, concrete, and other debris in the spoil pile.<sup>46</sup> The Department properly classified the violation in this case with a severity rating of “E.”<sup>47</sup>

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<sup>37</sup> Ex. 13 at 67.

<sup>38</sup> Ex. 1 at 11.

<sup>39</sup> Ex. 13 at 80.

<sup>40</sup> *Id.*

<sup>41</sup> Ex. 14 at 9; Ex. 16 at 7.

<sup>42</sup> Ex. 17 at 2; Ex. 15 at 1.

<sup>43</sup> See Ex. 1 at 11.

<sup>44</sup> Ex. 1 at 11; Ex. 13 at 69-70.

<sup>45</sup> Ex. 13 at 127 (1926.651(j)(2)).

<sup>46</sup> Ex. 2.

<sup>47</sup> Ex. 1 at 13.

32. In assigning a probability rating, the Department again rated the employee exposure as a “2” based on exposure from 51% to 100% of the work day.<sup>48</sup> The total probability rating was 5.<sup>49</sup>

33. The record reflects that this violation was abated immediately when the pipe layer agreed to stay out of the trench unless he used a trench box.<sup>50</sup> The probability rating should have been “1” to reflect employee exposure from 10% to 50% of the work day, resulting in a total probability rating of 4.

34. Based on a severity/probability rating of E5, the Field Compliance Manual provides for an unadjusted penalty for this violation of \$4,500.<sup>51</sup> Based on the correct severity/probability rating of E4, the unadjusted penalty is \$3,500.<sup>52</sup>

35. A 60% credit was applied to the penalty based on the employer’s size (50%) and good faith (10%).<sup>53</sup>

36. The Department proposed an adjusted penalty of \$1,800 for this violation. Using the correct duration rating, the correct adjusted penalty should be \$1,400.

### **Procedural Findings**

37. On September 24, 2010, the Commissioner issued the Citation and Notification of Penalty Orders.

38. The Respondent contested the citations, type of violations, abatement dates, and penalty calculations.<sup>54</sup>

39. On June 14, 2011, the Commissioner served a Notice and Order for Pre-Hearing Conference and Hearing in this matter.

Based upon the foregoing 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, 182.664 and 14.50 (2010).<sup>55</sup>

2. The Department gave proper notice of the hearing in this matter and has

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<sup>48</sup> Ex. 13 at 67.

<sup>49</sup> Ex. 1 at 13.

<sup>50</sup> Ex. 1 at 12; Test. of L. Hollingsworth; Test. of C. Bussian.

<sup>51</sup> Ex. 13 at 80.

<sup>52</sup> *Id.*

<sup>53</sup> Ex. 1 at 13.

<sup>54</sup> Notice of Contest (Oct. 6, 2010).

<sup>55</sup> All citations to Minnesota Statutes are to the 2010 edition.

fulfilled all relevant procedural requirements of law or rule.

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

4. The Complainant has the burden of establishing an OSH violation by a preponderance of the evidence.<sup>56</sup>

5. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Chapter 182. In Minn. R. 5205.0010, subp. 6, the Department incorporated and adopted by reference the standards contained in 29 C.F.R. § 1926.

6. 29 C.F.R. § 1926.651(k)(2) provides 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.

7. 29 C.F.R. § 1926.652(a)(1) provides 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 (i) excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.<sup>57</sup>

8. 29 C.F.R. § 1926.651(j)(2) provides that:

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.

9. The Department has proved by a preponderance of the evidence that Respondent violated 29 C.F.R. §§ 1926.651(k)(2), 1926.652(a)(1), and 1926.651(j)(2) on August 27, 2010.

10. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of

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<sup>56</sup> Minn. R. 1400.7300, subp. 5 (2009).

<sup>57</sup> Paragraph (b) provides for protection in the form of sloping the walls of an excavation at an angle of 34 degrees for Type C soil; paragraph (c) provides for the use of support systems (shoring), shield systems (trench boxes), or other protective systems.

the employer and the history of previous violations.

11. The evidence in the record does not support the Department's penalty calculation regarding the duration of the hazard for each violation. Adjusting the penalty calculation to the appropriate probability of harm results in penalties of \$4,400, \$4,400, and \$1,400, respectively, for these violations.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

### **ORDER**

IT IS HEREBY ORDERED that:

1. The citations are AFFIRMED.
2. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of \$10,200.
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: November 4, 2011

s/Kathleen D. Sheehy  
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KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

### **NOTICE**

Notice is hereby given that under Minn. Stat. § 182.664, subds. 3 and 5 (2010), 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 appeal are set out at Minn. Rule Ch. 5215.

### **MEMORANDUM**

The Respondent asserted that the area where the pipe layer was standing should not be regulated as a trench, because it was less than five feet in depth. The Department argues that it does not matter where the employee was standing, because the trench itself was at least seven feet in depth and the employee in the trench had access to the hazard.

The regulation provides that excavations shall be protected from cave-ins by an adequate protective system except when they are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in. In this case, the trench itself was at least seven feet in depth, and the sloped area used to get in and out of it was relatively short and steep. The spoil pile continued along the very edge of this area and past it. Placement of the spoil pile increased the risk of a cave-in along the length of the trench,<sup>58</sup> including the sloped area at the far end, and a competent person should have recognized this danger. Given the overall depth of trench, the type of soil, and the placement of the spoil pile, the area where the pipe layer was standing is properly regulated as part of the trench, even if the exact spot was somewhat less than five feet deep.

**K.D.S.**

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<sup>58</sup> Ex. 1 at 12.