

STATE OF MINNESOTA

OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

Steve Sviggum, Commissioner,
Department of Labor and Industry,

Complainant,

v.

DECISION

Nova-Frost, Inc.,

OAH No. 16-1901-19993-2

Respondent.

FACTS AND PROCEDURAL HISTORY

Nova-Frost, Inc. ("Respondent"), is a Minnesota business engaged in excavation subcontracting work. In June 2008, at the site of a new Shopko under construction at 5630 St. Croix Trail, North Branch, Minnesota (the "worksite"), Respondent was an excavation subcontractor.

On June 25, 2008, the Minnesota Occupational Safety and Health Administration ("OSHA") Principal Safety Investigator Ryan Nosan ("Nosan") and Safety Investigator Todd Busch ("Busch") conducted an inspection of the worksite. Nosan determined that Respondent had excavated portions of a trench to more than five feet deep in Type C soil without an adequate slope, and without a trench box, benching, or shoring.

Nosan measured the depth of the southern corners of the trench to be six and a half to seven feet deep. Nosan observed that the trench walls were near vertical and determined that the opening at the top of the trench varied from 16 to 18 feet wide, representing an inadequate slope for the depth and structure of the trench. The parties do not dispute that the trench was dug in Type C soil.

On July 3, 2008, the Commissioner of Labor and Industry issued a Citation and Notification of Penalty identifying the open panel as a serious violation of 29 C.F.R. § 1926.652(a)(1) and proposed a penalty of \$1,750.00 for the violation. Respondent contested the Citation and Notification of Penalty, and a contested case hearing was held before Administrative Law Judge ("ALJ") Manuel J. Cervantes on January 13, 2009, at the Office of Administrative Hearings in St. Paul, Minnesota. Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2131, appeared on behalf of the Minnesota Department of Labor and Industry ("Commissioner"). Michael Frost, Vice-President, appeared on behalf of Respondent.

On February 10, 2009, the ALJ issued Findings of Fact, Conclusions, and Order ("ALJ's Report"), affirming Citation 01, Item 001, issued for a violation of 29 C.F.R. § 1926.652(a)(1) on June 25, 2008, and ordering Respondent to pay to the Commissioner the sum of \$1,750. The

ALJ's Report was served on the parties on February 10, 2009. Respondent appealed the ALJ's Report to the Minnesota Occupational Safety and Health Review Board ("Review Board") on March 10, 2009.

On February 26, 2010, the Review Board heard oral argument at 443 Lafayette Road North, Dakota Room, St. Paul, MN 55155. Julie A. Leppink appeared and presented oral argument on behalf of the Commissioner. Michael Frost appeared and presented oral argument on behalf of Respondent. Both parties submitted written argument. Daphne A. Lundstrom, Assistant Attorney General, was present as legal advisor to the Board.

DISCUSSION

The question presented for the Board is whether Respondent violated 29 C.F.R. § 1926.652(a)(1), which requires that the walls of a trench that is five feet or deeper, dug in Type C soil, be sloped to a ratio of 1-1/2:1, or 34 degrees from horizontal, or use of a trench box, shoring, or benching. The pertinent section involved provides as follows:

(a) Protection of employees in excavations.

(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 a potential cave-in.

....

(b) (1) Option (1)--Allowable configurations and slopes.

(i) Excavations 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.

....

(2) Option (2)--Determination of slopes and configurations using Appendices A and B.

....

(3) Option (3)--Designs using other tabulated data.

(i) Designs of sloping or benching systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

....

(4) Option (4)--Design by a registered professional engineer.

Respondent does not dispute that the trench was dug in Type C soil, or Nosan's finding that there was no sloping, or other adequate protection systems in place. Rather, Respondent disputes that standards set out in 29 C.F.R. § 1926.652(a)(1) apply in this case based on his contention that the trench was not more than five feet deep at any point.

Based on the record before the ALJ, Nosan took two measurements at the south end of the trench. These measurements indicated that the southeast and southwest corners of the trench were six and a half to seven feet deep.

Respondent argues that, based on the experience and observation of the backhoe operator, and additional measurements, the trench could not have been more than five feet deep. Although the OSHA inspectors could have taken pictures more directly demonstrating their actual measurements, the evidence in the record supports the Administrative Law Judge's finding that portions of the trench were more than five feet deep, and dug in Type C soil. Consequently, this record supports the ALJ's determination that the standards set out in 29 C.F.R. § 1926.652(a)(1) apply to portions of the trench at issue in this matter. Finally, the record supports the ALJ's finding that Respondent did not adequately slope the trench or use a trench box, benching, or shoring.

The Minnesota OSHA has determined that open trenches present an imminent danger to employee life and health. According to OSHA, open trenches create a danger of serious injury or death, including full body burial, crushing, or asphyxiation, due to bank cave-ins. Nosan testified that an excavation-related fatality occurs every year in Minnesota. Given the severity and probability of the cited violation, the OSHA-scheduled gross penalty is \$5,000, unadjusted for credits. Respondent received a 55 percent credit against the scheduled fine because of its size, employing 25 employees or fewer. Respondent was given a 10 percent credit against the scheduled fine based on good faith. A total deduction of 65 percent against a scheduled fine of \$5,000, leaves a remaining balance of \$1,750. This fine weighs the seriousness of the violation against the credits available to Respondent, and is reasonable in this case.

ORDER

IT IS HEREBY ORDERED that the citation in question is affirmed.

IT IS FURTHER ORDERED that the penalty of \$1,750 is affirmed as reasonable under the circumstances of this case.

IT IS FURTHER ORDERED that Respondent pay to the Department of Labor and Industry, the total amount of the proposed penalty within the time periods set forth in the citations.

Date: April 21, 2010



Patricia Solheid, Chair
& Management Representative
Occupational Safety & Health Review Board
443 Lafayette Road N.
St. Paul, MN 55155



Michelle Clark, Board Member
& Public Representative
Occupational Safety & Health Review Board
443 Lafayette Road N.
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April 21, 2010

Michael Frost, Vice President
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Re: Commissioner, et al. v. Nova-Frost, Inc.
OAH Docket No. 6-1901-19993-2; Inspection No. 312330251

Dear Mr. Frost and Ms. Leppink:

Please find enclosed and served upon you by mail the decision of the Occupational Safety and Health Review Board in the above-named matter.

Sincerely,

A handwritten signature in cursive script that reads "Carrie C. Rohling".

Carrie C. Rohling, Executive Secretary
Occupational Safety and Health Review Board
Phone: (651) 284-5217
Fax: (651) 284-5725
Carrie.Rohling@state.mn.us

/ccr

Enclosures

cc: MN OSHA Compliance
Daphne Lundstrom, Asst. Atty. General/OSHRB Counsel