

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

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

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

Complainant,

v.

Joe's Excavating, Inc.

Respondent.

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for a hearing on July 25-26, 2017 at the Stearns County Courthouse. On August 18, 2017, the parties filed written closing memoranda. On September 1, 2017, the parties filed responsive memoranda. The record closed on that date.

Scott A. Grosskreutz, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Christopher A. Jensen, Franz Hultgren Evenson, P.A., appeared on behalf of Joe's Excavating, Inc. (Joe's, Respondent, or Company).

This matter involves Respondent's challenge to the Citation and Notification of Penalty issued to Respondent on March 24, 2016, by the Department's Occupational Safety and Health Division (MnOSHA).¹ The Citation cites Respondent for a violation of Minn. R. 5207.1000, subps. 2B and 4A (2017).²

The Citation was issued after an inspection by MnOSHA following an accident resulting in the death of one of Respondent's employees at a work site in Royalton, Minnesota.³ Respondent was cited for failing to develop a training program and instruct its employees on safe work procedures for mobile earth-moving equipment, in violation of Minn. R. 5207.1000, subp. 2B.⁴ In addition, Respondent was cited for failing to

¹ Notice and Order for Hearing and Prehearing Conference (Oct. 31, 2016); Exhibit (Ex.) 7 (Citation and Notification of Penalty).

² Ex. 7 (Citation and Notification of Penalty).

³ *Id.*

⁴ *Id.* at 5.

require its employees to wear high visibility warning vests in violation of Minn. R. 5207.1000, subp. 4A.⁵ On March 31, 2016, Respondent filed a Notice of Contest, contesting both items.

STATEMENT OF THE ISSUES

1. Did Respondent violate Minn. R. 5207.1000, subp. 2B by failing to develop a training program and instruct its employees on safe work procedure for employees exposed to mobile earth-moving equipment?

2. Did Respondent violate Minn. R. 5207.1000, subp. 4A by failing to require its employees to wear high visibility warning vests or other high visibility garments while working on the ground and exposed to mobile earth-moving equipment?

3. Did the Department demonstrate by a preponderance of the evidence that Respondent knew or should have known of the existence of the hazards created by the violations?

4. Were the items in the Citation properly classified as “Serious”?

5. Were the penalties appropriately calculated pursuant to Minn. Stat. § 182.666 (2016)?

SUMMARY OF DECISION

Based on the evidence in the hearing record, the Administrative Law Judge concludes the Department has established Respondent violated Minn. R. 5207.1000, subps. 2B and 4A. The Administrative Law Judge concludes further that the violations were properly classified as “Serious” and the penalties correctly calculated pursuant to Minn. Stat. § 182.666.

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

FINDINGS OF FACT

Joe’s Excavating, Inc. and Its Owner

1. Joe’s is a small business located in Sartell, Minnesota. Joe’s provides excavating and earth-moving services for residential and commercial construction.⁶ Joe’s primary areas of work are grading and excavating.⁷ Joe’s performs work both as a general contractor and as a sub-contractor.⁸

⁵ *Id.* at 6.

⁶ Testimony (Test.) of Joseph Lahr.

⁷ *Id.*

⁸ *Id.*

2. Joseph “Joe” M. Lahr (Joe or Joe Lahr) is the founder and CEO of the company. Joe Lahr has been CEO of Joe’s since he founded the company in 1984.⁹

3. Joe Lahr’s father owned a masonry, cement, and excavating business named G.H. Lahr, Inc. near Sartell, Minnesota. Joe Lahr helped his father with the business beginning in sixth grade.¹⁰

4. After graduating from high school in 1976, Joe Lahr went to work for his father.¹¹ While working for his father’s business, Joe Lahr dug and backfilled basements and performed grading work.¹² Joe Lahr started as a laborer at his father’s company and moved up to be a foreman of a crew of approximately five workers. He worked for his father’s business until 1982.¹³

5. From 1982-1990, Joe Lahr worked at the paper mill in Sartell, Minnesota.¹⁴ During that time, he continued to perform excavating work on the side.¹⁵

6. Joe Lahr bought his first Bobcat, dump truck, and trailer from his father. With this equipment, he was able to start his own excavating business in 1984.¹⁶

7. In 1984 or 1985, Joe Lahr hired his brother Patrick “Pat” Lahr (Pat or Pat Lahr) to work for him. Pat worked full-time for Joe’s while Joe Lahr worked at the paper mill.¹⁷

8. When Joe Lahr started his company, he performed all facets of the business from the earth work to the invoicing and other office paperwork.¹⁸ Over time, his business grew.¹⁹ His business improved significantly when he started using GPS and laser technology.²⁰

9. In 1991, Joe Lahr hired Robert Steckling (Bob), and for several years Joe’s operated with just three employees: Joe Lahr, Pat Lahr, and Bob.²¹ By 2000, Joe’s had five or six employees, and by the end of 2015, Joe’s had nine full-time employees.²²

⁹ Test. of J. Lahr.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Test. of Robert Steckling.

²² *Id.*

10. Pat Lahr has continued to work for Joe's since it started. Pat is in charge of the other employees when Joe is not able to be at a work site.²³

11. Joe's owns a variety of earth-moving equipment including dump trucks, compactors, Bobcats, bulldozers, scrapers, and forklifts.²⁴ The earth-moving equipment is parked outside Joe's shop in Sartell, Minnesota when it is not in use at a work site.²⁵

12. Joe Lahr and all of his employees have many years of experience operating all of the earth-moving equipment owned by Joe's.²⁶

Training of Employees Regarding Earth-Moving Equipment

13. Joe Lahr provides some training to his employees on safe procedures for operating and working around earth-moving equipment.²⁷ When an employee is hired, Joe Lahr provides an orientation that includes training on how to operate each piece of equipment.²⁸ Additional training occurs through on-the-job training, discussions at morning meetings, training at breakfast meetings, and an annual training day that is typically held in March.²⁹

14. Joe Lahr typically starts each work day with a meeting at 7:30 a.m. with his employees at the Company's shop in Sartell. The purpose of the meeting is to discuss the work plan for that day and any safety-related concerns that arose during the previous day's work.³⁰ During the morning meetings, Joe Lahr frequently instructs his employees to stay aware of changing work site conditions and to watch out for each other.³¹

15. Since 2013, Joe Lahr has held breakfast meetings with his employees to discuss safety issues and hazards associated with their current job assignment.³² These breakfast meetings are held about once a month at Coborn's Marketplace in Sartell.³³ Occasionally at these meetings, Joe Lahr would discuss specific safety topics with his employees taken from his safety training manual.³⁴

16. At Joe's annual training day in March, Joe Lahr would typically read aloud portions of the safety training manual to his employees.³⁵

²³ Test. of J. Lahr; Test. of Patrick Lahr.

²⁴ Test. of J. Lahr; Test. of R. Steckling.

²⁵ Test. of J. Lahr.

²⁶ Test. of J. Lahr; Test. of Rodney Stanoch.

²⁷ Test. of J. Lahr.

²⁸ Ex. 1 at OSHA 012; Ex. 13.

²⁹ Test. of J. Lahr; Test. of P. Lahr.

³⁰ Test. of J. Lahr; Test. of P. Lahr; Ex. 13 at OSHA 131.

³¹ Test. of J. Lahr; Test. of R. Stanoch.

³² Test. of J. Lahr; Ex. 112.

³³ Test. of J. Lahr; Ex. 112.

³⁴ Test. of J. Lahr.

³⁵ Test. of J. Lahr; Test. of P. Lahr.

17. Joe Lahr has no documentation regarding what was covered at the annual trainings or who attended.³⁶

18. Joe Lahr is competent to provide training for his employees based on his knowledge, work experience, and training.³⁷ Joe has over 46 years of experience working with earth-moving equipment and has operated all the equipment that his Company owns.³⁸ Through his work and training, he has become knowledgeable about work site safety and the safe operation of earth-moving equipment.³⁹

19. Joe Lahr covers the following general topics in his training on earth-moving equipment: safe operating procedures for earth-moving equipment, blind spot awareness, communication through hand signals and visual commands, and how to be safe on the work site.⁴⁰

20. In July of 2015, Joe's was hired to build a new driveway and parking lot for the Lake Geneva Christian Center (Center) in Alexandria, Minnesota.⁴¹ On July 8, 2015, Joe Lahr held a safety meeting with his employees at the Center.⁴² The topics covered at that meeting included: awareness of underground utility lines; the proper way to climb on and off equipment; a reminder not to stand near dump trucks that are dumping loads; and awareness of moving equipment and persons at the work site.⁴³

21. Joe Lahr provided training to his employees on blind-spot awareness approximately one year before the accident on December 4, 2015.⁴⁴ Joe's employees were trained to make eye contact with the operator of the equipment to make sure the operator was aware of the location of the workers of the ground.⁴⁵

22. Joe Lahr estimates the blind spot on his dump trucks is approximately 50 feet in length.⁴⁶ He tells his employees that if they cannot see the dump truck's mirror, the driver of the dump truck cannot see them.⁴⁷

Toolbox Topics

23. Beginning in 2006 and continuing until January 2013, Joe Lahr subscribed to a series of training materials called Safety Sam Toolbox Topics (Toolbox Topic) from Safety Services Company (Safety Services).⁴⁸ Every month, Joe's received a new

³⁶ Test. of J. Lahr.

³⁷ Test. of J. Lahr. See Minn. R. 5207.1000, subp. 2B.

³⁸ Test. of J. Lahr.

³⁹ *Id.*

⁴⁰ Test. of J. Lahr; Test. of P. Lahr.

⁴¹ Test. of J. Lahr; Ex. 111.

⁴² Test. of J. Lahr.

⁴³ Test. of J. Lahr; Ex. 111.

⁴⁴ Test. of J. Lahr.

⁴⁵ Test. of P. Lahr.

⁴⁶ Test. of J. Lahr.

⁴⁷ *Id.*

⁴⁸ *Id.*

Toolbox Topic.⁴⁹ Each Toolbox Topic is a single sheet of paper that includes a general discussion of the topic, safety tips, and guidelines for employees to follow.⁵⁰ The Toolbox Topic sheet also includes a space at the bottom for employees to sign after the Topic is reviewed with the employees.⁵¹

24. Joe Lahr would occasionally read aloud Toolbox Topics to his employees at the monthly breakfast meetings and at morning meetings when it was raining and the employees were unable to work at the work site.⁵² He and his employees would then discuss how the Toolbox Topic applied to their work.⁵³

25. Joe Lahr estimates that he has reviewed approximately 100 different Toolbox Topics with his employees since 2006.⁵⁴ Joe Lahr did not retain the vast majority of signed Toolbox Topic sheets. He was only able to locate two signed copies of Toolbox Topic sheets in his files.⁵⁵ Both of these Toolbox Topic sheets were signed by employees and dated in April of 2012.⁵⁶ One covered guidelines for working around excavations.⁵⁷ The other covered defensive driving techniques.⁵⁸

Joe's Safety and Health Program

26. In January 2013, Joe Lahr purchased a safety training manual (Safety Training Manual or Manual) from Safety Services.⁵⁹ Safety Services refers to the materials as a "Safety and Health Program" and also as an "Injury and Illness Prevention Program."⁶⁰ Joe Lahr refers to the materials as his "training manual." The Safety Training Manual consists of a number of chapters that address safety and health issues.⁶¹

27. Prior to purchasing the Safety Training Manual, Joe Lahr was generally aware of the Minnesota rule applicable to earth-moving equipment.⁶² When deciding whether to buy the Safety Training Manual, Joe Lahr specifically asked a Safety Services representative if the materials covered all the safety rules applicable in Minnesota.⁶³ The Safety Services representative questioned Joe Lahr about his

⁴⁹ Test. of J. Lahr.

⁵⁰ See, e.g., Ex. 113 ("Topic 57: Watch out for Excavations and Open Tranches on the Job-Site!").

⁵¹ *Id.*

⁵² Test. of J. Lahr; Test. of P. Lahr.

⁵³ Test. of J. Lahr.

⁵⁴ *Id.*

⁵⁵ Test. of J. Lahr; Exs. 113 and 114.

⁵⁶ Exs. 113 and 114.

⁵⁷ Ex. 113.

⁵⁸ Ex. 114.

⁵⁹ Test. of J. Lahr; Ex. 107.

⁶⁰ Ex. 107.

⁶¹ Ex. 107; Test. of J. Lahr.

⁶² Test. of J. Lahr.

⁶³ *Id.*

business and the type of work Joe's performs, and tailored the materials to Joe's work and Minnesota regulations.⁶⁴

28. Once he purchased the Safety Training Manual from Safety Services in January 2013, Joe Lahr used it for his safety training meetings and discontinued receiving the monthly Toolbox Topics.⁶⁵

29. Chapter 19 of the Safety Training Manual is particularly relevant to excavation work and operation of earth-moving vehicles.⁶⁶

30. Chapter 19 of Joe's Safety Training Manual governs "Excavation Operations and Heavy Equipment."⁶⁷ Chapter 19's introductory paragraph states that Joe's Excavating will:

implement and enforce the following engineering controls, procedures, and work practices to ensure that no employee is exposed to hazards from excavations being performed or existing at the jobsite.

Joe Lahr will ensure that all employees are trained in and familiar with required work practices and excavation procedures to safeguard personnel involved in trenching operations or who work in the vicinity of excavation operations.⁶⁸

31. Topics addressed in Chapter 19 of the Safety and Training Manual include: locating underground utility installations; safe practices for trenching and excavation; exposure to vehicular traffic; and heavy equipment safety guidelines.⁶⁹

32. Chapter 19 of Joe's Safety and Training Manual provides that when mobile equipment is used adjacent to an excavation where the operator's vision is restricted, stop logs, barricades, or a signal person will be used.⁷⁰

33. Chapter 19 of Joe's Safety Training Manual also states that flaggers or spotters are required when an equipment operator's view of the intended path is obstructed or when a person could be endangered by the moving equipment or its load.⁷¹ The Safety and Training Manual also recommends the use of flaggers or spotters in heavily traveled or congested work areas to "direct equipment and prevent injuries and deaths caused by vehicles backing up."⁷²

⁶⁴ Test. of J. Lahr.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Ex. 107.

⁶⁸ Ex. 107 at 19-1.

⁶⁹ Ex. 107.

⁷⁰ Ex. 107 at 19-2.

⁷¹ Ex. 107 at 19-22.

⁷² Ex. 107 at 19-23.

34. Joe Lahr rarely uses flaggers or spotters on a work site.⁷³

35. If a truck driver has been away from the truck for any length of time, Chapter 19 of Joe's Safety and Training Manual directs the truck driver to walk around the truck ("circle check") to ensure the area is clear before moving.⁷⁴

36. Chapter 19 of Joe's Safety Training Manual requires that, if an operator has been involved in an accident, that operator be given refresher training and an evaluation to ensure the operator has the knowledge and skills needed to operate the equipment.⁷⁵ Joe Lahr did not provide refresher training to Rod Stanoch (Rod) or evaluate him as required by the Manual after the December 4, 2015 accident at issue in this matter.⁷⁶

37. Chapter 19 of Joe's Safety Training Manual requires that the employer certify in writing that each employee who operates equipment has been trained and evaluated pursuant to the policies set forth in the Manual.⁷⁷ There is no evidence in the record that Joe Lahr certified that his employees were trained on the safety policies set forth in chapter 19 of the Manual.⁷⁸

38. Chapter 21 of the Safety Training Manual governs "Driver Safety Policy" and includes guidelines for safe driving practices, vehicle inspection, and avoidance of "backing accidents."⁷⁹ Because of the blind spot hazards associated with backing up vehicles, Chapter 21 of the Manual recommends that operators avoid backing up vehicles whenever possible and instead maneuver vehicles so as to come out front first.⁸⁰

39. Another chapter in Joe's Safety Training Manual, Chapter 20, is somewhat applicable to the safe operation of earth-moving equipment. Chapter 20 of the Manual governs "Highway and Roadwork Safety" and provides a general overview of common hazards associated with work on or near highways or roadways.⁸¹ This chapter includes material on the use of flaggers⁸² and safe equipment operation around workers on foot.⁸³ According to this chapter, dump trucks should be "channelized" and kept away from workers on foot by delineating pedestrian-free areas.⁸⁴ Chapter 20 of the Manual requires that workers on the ground and equipment operators be trained in

⁷³ Test. of J. Lahr.

⁷⁴ Ex. 107 at 19-22.

⁷⁵ Ex. 107 at 19-35.

⁷⁶ Test. of J. Lahr.

⁷⁷ Ex. 107 at 19-35.

⁷⁸ Test. of J. Lahr.

⁷⁹ Ex. 107 at 21-7.

⁸⁰ *Id.*

⁸¹ Ex. 107.

⁸² Ex. 107 at 20-6.

⁸³ Ex. 107 at 20-11.

⁸⁴ *Id.*

appropriate communication, such as hand signals and maintaining visual contact, when the job requires that workers on the ground work near heavy equipment.⁸⁵

40. Chapter 20 of Joe's Safety Training Manual recommends that each piece of equipment be assigned to an individual worker.⁸⁶

41. In addition to the Safety Training Manual, Joe's had a written company personnel policy that he provided to each employee to review when hired.⁸⁷ Joe's company policy included a section regarding Joe's Workplace Accident and Injury Reduction program (AWAIR).⁸⁸ According to the AWAIR program, Joe's provides safety training to its employees annually and maintains records of each safety meeting, including the date of the meeting, topics covered, and who was in attendance.⁸⁹ Joe Lahr is responsible for the safety program and for investigating any workplace accident.⁹⁰

42. Joe Lahr did not maintain records of each safety meeting, the topics covered, or who attended.⁹¹

Required Information Missing from Joe's Safety and Training Manual

43. Joe's Safety Training Manual lacked information and instructions for mobile earth-moving equipment operators on their responsibilities related to how to safely approach earth-moving equipment, including placing the transmission in neutral, setting the parking brake, and indicating to others that it is safe to approach the equipment.⁹²

44. Although Chapter 19 of Joe's Safety Training Manual contained "Ground Rules for Workers on Foot" that included the directives to "always remain visible to the operator" and "make eye contact to ensure you are seen," the Manual lacked information specific to visual, voice, or signal communication that must be made with the operator prior to approaching earth-moving equipment.⁹³

45. Joe's Safety Training Manual lacked information and instructions on safe loading procedures for transport, and lacked information on additional hazards that could be created by changing conditions.⁹⁴

⁸⁵ Ex. 107 at 20-11.

⁸⁶ Ex. 107 at 20-10.

⁸⁷ Test. of J. Lahr; Ex. 118.

⁸⁸ Ex. 118.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Test. of J. Lahr.

⁹² See Ex. 107 and Minn. R. 5207.1000, subp. 2C(1)(c) (2017).

⁹³ See Ex. 107 and Minn. R. 5207.1000, subp. 2C(1)(a) (2017).

⁹⁴ See Ex. 107 and Minn. R. 5207.1000, subp. 2C(4), (6) (2017).

High Visibility Apparel

46. Joe's provides high visibility vests in all sizes to his employees.⁹⁵ Employees are expected to wear the vests at all times when on the job.⁹⁶

47. Joe's has a laminated notice by the employee time clock that advises employees to always wear a hard hat and high visibility vest on the job.⁹⁷

48. On occasion, Joe Lahr and Pat Lahr have had to remind employees working at a work site to put on high visibility vests.⁹⁸ On such occasions when Joe Lahr or Pat Lahr has seen an employee working without a high visibility vest, they have verbally warned that employee not to work without a vest again.⁹⁹

49. Joe Lahr maintains personnel files on each of his employees.¹⁰⁰ If an employee is found violating a personnel policy, Joe Lahr may document the violation and put a copy in the employee's file.¹⁰¹

50. There is no documentary evidence in the record that Joe Lahr ever disciplined an employee for failing to wear a high visibility vest and documented the violation in the employee's personnel file.¹⁰²

Employee Vern Barthel

51. Joe Lahr hired Vern Barthel (Vern) in July 2013.¹⁰³ Vern had been a friend of Joe and Pat Lahr for over 30 years.¹⁰⁴ At the time he started with Joe's, Vern was approximately 58 years old.

52. Vern had a commercial driver's license and a Class A endorsement.¹⁰⁵ Prior to working for Joe's, Vern worked for Tru-Stone as a manager.¹⁰⁶

53. Vern's first day of work at Joe's was July 22, 2013.¹⁰⁷ On that day, Joe Lahr conducted an equipment orientation with Vern at the company shop.¹⁰⁸ Vern demonstrated skill in operating trucks and equipment under Joe Lahr's supervision.¹⁰⁹

⁹⁵ Test. of P. Lahr.

⁹⁶ Test. of J. Lahr; Test. of R. Stanoch; Test. of P. Lahr.

⁹⁷ Test. of P. Lahr; Test. of R. Stanoch.

⁹⁸ Test. of J. Lahr; Test. of P. Lahr.

⁹⁹ Test. of J. Lahr; Test. of P. Lahr.

¹⁰⁰ Test. of J. Lahr.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Test. of J. Lahr; Ex. 109.

¹⁰⁴ Test. of J. Lahr; Test. of P. Lahr.

¹⁰⁵ Test. of J. Lahr.

¹⁰⁶ Test. of J. Lahr; Test. of P. Lahr.

¹⁰⁷ Ex. 109.

¹⁰⁸ *Id.*; Test. of J. Lahr.

¹⁰⁹ Ex. 109; Test. of J. Lahr.

Joe Lahr gave Vern a copy of the Company's personnel policy and discussed it with him at the shop.¹¹⁰

54. Vern attended the safety meeting on July 8, 2015, that Joe Lahr held at the Lake Geneva Christian Center work site.¹¹¹

Royalton School Project

55. In 2015, Molitor Excavating was hired by the Royalton School District to do earth work at the Royalton Middle School/High School. Molitor Excavating subcontracted with Joe's to do "mass grading" and other earth work.¹¹²

56. Winkelman Building Corporation (Winkelman) was the project manager on site.¹¹³ Besides Joe's, there were a number of other contractors and subcontractors on the site.¹¹⁴ Winkelman supervised and directed the work on the site.¹¹⁵

57. Although Winkelman was the project manager and organized the workflow at the site, Joe Lahr supervised his own employees at the site.¹¹⁶

58. Joe's work on the Royalton school project began in the spring of 2015.¹¹⁷

59. Joe's scope of work for the Royalton school project included: building athletic fields and retaining ponds; digging and backfilling a U-shaped retaining wall for the school's athletic fields; preparing a pad for a building; and various grading and sodding work for a new addition to the schools.¹¹⁸ Another contractor built the forms and poured the concrete for the retaining wall.¹¹⁹

60. A Braun Intertec employee was also on-site testing the soil to ensure that the soil compaction being performed by Joe's employees as part of the construction of the retaining wall was correct.¹²⁰

61. The retaining wall ran east to west along a road that leads up to the school's bus garage on the east side of the project.¹²¹

62. The Royalton work site was a particularly dangerous site given the constant movement of numerous pieces of heavy equipment in what was a relatively

¹¹⁰ Ex. 109.

¹¹¹ Ex. 111.

¹¹² Test. of J. Lahr.

¹¹³ *Id.*

¹¹⁴ Ex. 1 at OSHA 003.

¹¹⁵ *Id.*

¹¹⁶ Test. of J. Lahr.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Ex. 1 at OSHA 003.

tight construction space.¹²² The work site changed frequently with the movement of equipment and, as a result, Joe's employees needed to be on "high-alert."¹²³ In addition to the constant movement of equipment, students from the Royalton school would run across the work site at various times of the day to get to the adjacent parking lots, and school buses would pull into the site "non-stop" to park at the school garage.¹²⁴ There were no designated walk areas or barriers to prevent the students or other persons from accessing the site, and Joe's did not employ flaggers or spotters to direct the movement of equipment on the site.¹²⁵

63. Bob considered the Royalton work site to be the worst site he had ever worked on in terms of the amount of "distractions."¹²⁶ The lack of barriers to prevent students and parents from crossing the site, and the frequent arrival and departure of school buses, made the site particularly hazardous.¹²⁷

December 4, 2015 Incident

64. In December 2015, Joe's was about 80 percent done with its work at the Royalton school site. At that point, Joe's work focused on backfilling the retaining wall and picking up debris that needed to be removed to complete the grading of a ballfield.¹²⁸

65. On December 4, 2015, Joe Lahr and all of his employees, except for Vern, met at Joe's shop at 7:30 a.m. for the morning meeting.¹²⁹ They discussed the work plan and itinerary for the day.¹³⁰ Before going to the work site, Joe Lahr reminded his employees that there would be a lot of equipment in use at the site and he cautioned them to be alert and to watch out for each other.¹³¹

66. Joe's had nine employees on the Royalton work site the morning of December 4, 2015, including Joe Lahr.¹³²

67. On December 4, 2015, Joe's employees were moving and backfilling dirt around the retaining wall. The equipment in operation at the work site on December 4, 2015, included four or five dump trucks, a Caterpillar hydraulic excavator, a Caterpillar roller compactor, a Bobcat spreader, a Bobcat track loader, a side-dump truck, and a bulldozer.¹³³

¹²² Test. of R. Steckling.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Test. of J. Lahr.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Test. of J. Lahr; Test of R. Stanoch.

¹³² Test. of J. Lahr; Ex. 1 at OSHA 002.

¹³³ Test. of J. Lahr; Test. of P. Lahr; Ex. 1 at 003.

68. As on other days, Joe's did not have a spotter or flagger at the work site directing traffic.¹³⁴

69. Joe's employees are not assigned to a particular truck or other piece of equipment when on the job.¹³⁵ All of Joe's employees are licensed to drive any truck or operate any piece of equipment.¹³⁶ It is the nature of excavating and grading work that employees will operate different pieces of equipment throughout the day.¹³⁷

70. Vern was not at the morning meeting on December 4, 2015, because he had to have some blood drawn at a doctor's office that morning.¹³⁸ Vern told Joe Lahr about the appointment the day before, and Joe Lahr approved Vern's request to come to work late.¹³⁹ During their conversation, Vern mentioned that he had to fast for the blood work.¹⁴⁰

71. About 8:00 a.m. on December 4, 2015, Joe Lahr called Vern and asked him how he was doing.¹⁴¹ Vern said he was at the doctor's office and would be leaving there shortly.¹⁴² Joe Lahr instructed Vern to pick up the side-dump truck at the shop and bring it to the work site.¹⁴³

72. Joe Lahr and the other employees arrived at the school site between 8:15 a.m. and 8:30 a.m. that day.¹⁴⁴ When they arrived, they discussed the plan for the day and went to work on the retaining wall.¹⁴⁵

73. Joe Lahr called Vern again from the Royalton work site and asked him when he should expect him. Vern stated that he was just about to leave the shop.¹⁴⁶

74. Because the dirt in the area where the retaining wall was being constructed had excessive frost, Joe's employees loaded and hauled truckloads of that dirt up a hill to the east. After dumping that dirt into a pile, Joe's employees loaded fill dirt from the hill into the dump trucks to be transported back to the area by the retaining wall.¹⁴⁷ The dump truck drivers would line up and take turns backing up to the retaining wall and dumping the dirt next to the retaining wall. The fill dirt was then spread out about a foot thick by a Bobcat.¹⁴⁸ Once a layer of dirt had been spread by the Bobcat

¹³⁴ Test. of J. Lahr.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Test. of J. Lahr; Ex. 1 at OSHA 003, 006.

¹⁴⁸ Test. of J. Lahr.

operator, two employees would compact the dirt with hand-held compactors.¹⁴⁹ The soil needed to be fully compacted before another layer of soil could be added.¹⁵⁰

75. The dirt piles and retaining wall were located on the northwest corner of two roads that formed a T-intersection. The east/west road ran from the west side of the school building towards the east and up the hill to the bus garage. The north/south road ran parallel to the west side of the school building. The dump trucks were parked on the west side of the north/south road near the intersection.¹⁵¹

76. Vern arrived at the Royalton School work site with the side-dump truck at approximately 9:15 a.m. on December 4, 2015.¹⁵² Joe Lahr and the other employees were already working when Vern arrived.¹⁵³ Bob was operating a Bobcat, spreading layers of fill by the retaining wall. Two other employees were compacting the fill that Bob spread with hand-held compactors. Pat Lahr was operating a hydraulic excavator (backhoe on tracks) on the opposite side of the retaining wall.¹⁵⁴

77. When Vern arrived, Pat Lahr told him to leave the side-dump truck where he had parked it.¹⁵⁵ Pat Lahr explained that they would use the side-dump truck later for hauling concrete.¹⁵⁶

78. Vern began hauling dirt with the dump truck Rod had brought to the site as directed.¹⁵⁷ While Vern was hauling dirt, Rod was operating a bulldozer.¹⁵⁸

79. At that same time, Joe Lahr and another employee were loading a side-dump truck with concrete approximately 100-300 feet to the north of the retaining wall.¹⁵⁹

80. One of the employees compacting fill near the Bobcat and retaining wall was not wearing a high visibility vest.¹⁶⁰ Rod was also working on the site that morning without wearing a high visibility vest.¹⁶¹

81. Even though Joe Lahr was at the Royalton work site from approximately 8:30 a.m. until 11:00 a.m., he did not notice that two of his eight employees working at

¹⁴⁹ Test. of J. Lahr.

¹⁵⁰ *Id.*

¹⁵¹ Ex. 1 at OSHA 006; Ex. 4.

¹⁵² Test. of J. Lahr.

¹⁵³ *Id.*

¹⁵⁴ Test. of P. Lahr.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Test. of R. Stanoch.

¹⁵⁹ Test. of J. Lahr.

¹⁶⁰ Test. of J. Lahr; Ex. 4.

¹⁶¹ Test. of Robert Darling; Test. of R. Steckling; Test. of P. Lahr; Ex. 1 at 017; Ex. 4.

the Royalton site on the morning of December 4, 2015, were not wearing high visibility vests.¹⁶²

82. By not noticing that two of his employees were working without high visibility vests on December 4, 2015, and by not disciplining employees who in the past failed to wear high visibility vests while on the job,¹⁶³ Joe Lahr did not require his employees to wear high visibility vests while working around mobile earth-moving equipment.

83. Vern completed several rounds of hauling dirt to Pat Lahr when he took a break at approximately 11:00 a.m. to use the portable toilet.¹⁶⁴ Vern left the dump truck parked in front of the overhead garage doors next to the school building and walked to the nearby portable toilet.¹⁶⁵

84. After he exited the portable toilet, Vern walked from the south to the north where Bob was operating the Bobcat spreader by the west end of the retaining wall.¹⁶⁶ Two other employees (Ron and Charlie) were nearby compacting soil with hand-held soil compactors.¹⁶⁷ Vern remained in this area for a few minutes observing the compacting work without talking to the other employees. At some point, Vern stepped between the Bobcat that Bob was operating and the pile of dirt he was leveling off.¹⁶⁸ Bob honked the horn of the Bobcat to get Vern to move out of his way.¹⁶⁹

85. It was contrary to safety practices for Vern to walk in front of a Bobcat that was in operation. Vern should have made eye contact with the Bobcat operator before approaching and should have walked behind the Bobcat.¹⁷⁰

86. While Vern was still standing by the retaining wall, Rod walked over to where Bob was working. Contrary to safety procedures, Rod crossed in front of the Bobcat, causing Bob to veer out of his way.¹⁷¹ Rod should have stopped and made eye contact with the Bobcat operator before approaching.¹⁷²

87. Rod asked Bob if he was ready for more dirt.¹⁷³ Bob indicated that he was.¹⁷⁴ Upon hearing this, Rod walked up the path to the dump truck that Vern had been driving.¹⁷⁵ The path Rod walked to the dump truck was essentially the path he

¹⁶² Test. of J. Lahr.

¹⁶³ See Finding of Fact 48.

¹⁶⁴ Test. of P. Lahr.

¹⁶⁵ Ex. 1 at OSHA 007; Ex. 4.

¹⁶⁶ Ex. 1 at OSHA 007; Ex. 4.

¹⁶⁷ Test. of J. Lahr.

¹⁶⁸ Test. of R. Steckling.

¹⁶⁹ *Id.*

¹⁷⁰ Test. of R. Steckling. See Minn. R. 5207.1000, subp. 2C(1)(a).

¹⁷¹ Ex. 1 at OSHA 007.

¹⁷² Test. of R. Darling. See Minn. R. 5207.1000, subp. 2C(1)(a).

¹⁷³ Test. of R. Stanoch; Test. of R. Steckling.

¹⁷⁴ Test. of R. Stanoch; Test. of R. Steckling.

¹⁷⁵ Test. of R. Stanoch.

took backing up.¹⁷⁶ Rod did not walk around the truck to check his blind spots before getting into the cab of the truck and backing up as required by Joe's Safety Training Manual.¹⁷⁷

88. Rod did not communicate to Vern or the two employees who were compacting the soil that he was going to move the dump truck.¹⁷⁸

89. The distance between where the dump truck was parked and the area Vern was standing by the Bobcat operator was approximately 100 feet.¹⁷⁹

90. As Rod got into the cab of the dump truck, Pat Smolley pulled up alongside him in another dump truck.¹⁸⁰ Using the radio in his truck, Rod told Pat that they could start dumping fill for Bob.¹⁸¹ After talking to Pat, Rod started to back up the dump truck, curving towards the south so he could dump the load of dirt near the west end of the retaining wall while avoiding Bob on the Bobcat.¹⁸²

91. After Rod got into the dump truck and started backing up, Vern walked into the path directly behind the dump truck.¹⁸³

92. Rod did not see Vern behind him as he backed up the dump truck because of the dump truck's blind spot, and Vern did not seem to be aware that the dump truck was approaching him until it was too late for him to move out of its way.¹⁸⁴ The dump truck struck Vern and ran over him. Rod did not realize he had hit Vern until he saw him lying on the ground in front of his truck.¹⁸⁵

93. The incident was recorded on a Royalton School video camera that was mounted on the outside of a building.¹⁸⁶

94. Approximately ten minutes before the accident, Joe Lahr left the work site with another employee to get lunch at a nearby Dairy Queen. Joe had just placed his order for lunch when he received a frantic telephone call from Rod. Rod was shouting that he had just run over Vern. Joe and the other employee raced back to the work site. When Joe got to the site, he saw Vern lying on the ground unresponsive. A first-responder from the school and Bob were attempting to resuscitate Vern.¹⁸⁷

¹⁷⁶ Test. of J. Lahr.

¹⁷⁷ Test. of J. Lahr; Test. of R. Stanoch; Test. of R. Darling; Ex. 19-22. *See also* Minn. R. 5207.1000, subp. 2C(3) (2017).

¹⁷⁸ Test. of R. Stanoch.

¹⁷⁹ Test. of J. Lahr; Test. of R. Steckling.

¹⁸⁰ Test. of R. Stanoch.

¹⁸¹ *Id.*

¹⁸² Test. of R. Stanoch; Ex. 1 at OSHA 007.

¹⁸³ Ex. 4.

¹⁸⁴ Test. of R. Stanoch; Ex. 4.

¹⁸⁵ Test. of R. Stanoch.

¹⁸⁶ Test. of R. Darling; Ex. 4.

¹⁸⁷ Test. of J. Lahr.

95. Vern was ultimately air-lifted to North Memorial Hospital, where he was pronounced dead.¹⁸⁸

96. Joe reported the accident to MnOSHA and the work site was shut down for the day.¹⁸⁹

97. Officers from the Minnesota State Patrol arrived at the site and inspected the dump truck involved in the accident.¹⁹⁰ Joe had an employee put the dump truck in reverse to test the backup alarms.¹⁹¹ The alarms on the dump truck were working and no other violations were found.¹⁹²

MnOSHA Investigation

98. On December 7, 2015, MnOSHA Safety Inspectors Robert Darling (Darling) and Luke Walker (Walker) went to the Royalton school work site to investigate the accident.¹⁹³ Mr. Darling was the lead inspector. As part of the investigation, Inspectors Darling and Walker held an opening conference with the CEO of Winkelman, the project site superintendent, and Joe Lahr. Together, they all watched the video of the accident and then walked around the work site while Inspector Walker took photographs to document the work site conditions.¹⁹⁴

99. After completing the walk-around of the work site, Inspector Darling interviewed three of Joe's employees, including Rodney Stanoch and Robert Steckling.¹⁹⁵ In separate interviews, Darling asked each employee whether they had received safety training from Joe's on safe working procedures and hazards related to earth-moving equipment.¹⁹⁶ All three stated that they had not received safety training pertaining to earth-moving equipment from Joe's.¹⁹⁷ One employee stated that he had received training from another employer, but not Joe's.¹⁹⁸ Another stated that he had not received training but that he had worked around earth-moving equipment his entire life.¹⁹⁹

100. During the December 7, 2015, inspection, Inspector Darling asked Joe Lahr to provide him with copies of Joe's training materials, including records of employee trainings he had conducted over the years.²⁰⁰ Joe Lahr showed Darling his Safety Manual. In addition, later that evening, Joe Lahr sent an email to Inspector

¹⁸⁸ Ex. 1 at OSHA 006.

¹⁸⁹ Test. of J. Lahr.

¹⁹⁰ Test. of J. Lahr; See Ex. 103.

¹⁹¹ Test. of J. Lahr.

¹⁹² Test. of J. Lahr; Ex. 103.

¹⁹³ Test. of R. Darling; Ex. 1.

¹⁹⁴ Test. of R. Darling.

¹⁹⁵ Ex. 1 at OSHA 012.

¹⁹⁶ Test. of R. Darling; Ex. 1 at OSHA 012.

¹⁹⁷ Test. of R. Darling; Ex. 1 at OSHA 012.

¹⁹⁸ Test. of R. Darling.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

Darling with copies of the following documents in response to his request for Joe's safety training materials:

- a typewritten summary of Vern's "new employee orientation and training," which consisted of equipment orientation and demonstration under Joe Lahr's supervision and discussion of Joe's company policy;
- copies of three Toolbox Topics that were not signed. The Toolbox Topics covered: excavations and open trenches on the work site; defensive driving; and securing loads;
- a one-page summary of a May 2015 highway and roadway safety training meeting that was conducted at Joe's by two Minnesota State Patrol Sergeants on: "accident prevention," "load tie down requirements," and "safe driving practices;"
- a one-page handwritten summary of a July 2015 safety meeting held at the Lake Geneva Christian Center work site. The topics covered included safe practices around utility lines, awareness of moving equipment, and students on campus; "no standing next to dump trucks while dumping"; and "3 point climbing on and off equipment"; and
- handwritten notes from a safety breakfast meeting that listed equipment in need of repair.²⁰¹

101. In his December 7, 2015, email to Inspector Darling attaching the above documents, Joe Lahr also stated that Inspector Darling could contact Safety Services for information regarding Joe's safety program.²⁰²

102. Inspector Darling returned to the Royalton school work site on January 6, 2016, to take additional photographs of the site, re-watch the video, and verify that the backup alarms on the dump truck were in working order.²⁰³ Inspector Darling again requested Joe Lahr provide copies of any safety meetings and training materials pertaining to working with earth-moving equipment.²⁰⁴

103. Joe Lahr did not provide any other documentation of employee trainings to Inspector Darling.²⁰⁵

104. Inspector Darling considered Joe's Safety and Training Manual to be generic or "canned" material developed by a third party, and not specifically tailored to

²⁰¹ Ex. 13.

²⁰² *Id.* at OSHA 131.

²⁰³ Test. of R. Darling; Ex. 1 at OSHA 004; Ex. 2 at OSHA 044-056.

²⁰⁴ Ex. 1 at 004.

²⁰⁵ Test. of R. Darling.

the work Joe's provides or the specific training elements required by Minn. R. 5207.1000, subp. 2C (2017).²⁰⁶

Citation and Penalty Calculation

105. On March 24, 2016, MnOSHA issued the following two "Serious" citations²⁰⁷ to Joe's Excavating:

Citation 1, Item 1 – Serious – Minn. Rules 5207.1000, subp. 2B:

Training programs on safe work procedures pertaining to mobile earth-moving equipment were not developed or instructed by a competent individual who has the knowledge, training, experience, and the demonstrated ability to identify existing and predictable hazards related to the subject matter.

On December 4, 2015, the employer failed to conduct training on safe working procedures pertaining to mobile earth-moving equipment by a competent person to identify existing and predictable hazards while working around earth-moving equipment.

The proposed penalty for this violation was \$25,000.²⁰⁸

Citation 1, Item 2 – Serious – Minn. Rules 5207.1000, subp. 4A:

Employees working on the ground who were exposed to mobile earth-moving equipment were not provided with or required to wear a high visibility warning vest or other high visibility garments that meet the requirements of ANSI/ISEA Standard 107-2004 Class 2 and Minn. Rules 5207.0100.

On December 4, 2015, two employees working on the ground exposed to mobile earth-moving equipment were not wearing high visibility garments that meet Class 2 specifications.

The proposed penalty for this violation was \$1,750.²⁰⁹

106. Inspector Darling calculated the proposed penalty amounts using the instructions in the MnOSHA Field Compliance Manual.²¹⁰ Darling's proposed penalty amounts take into account the gravity of the violations and also include adjustments in accordance with the Manual and Minn. Stat. § 182.666, subd. 6.²¹¹

²⁰⁶ *Id.*

²⁰⁷ Ex. 7.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Test. of R. Darling; Ex. 3.

²¹¹ Test. of R. Darling; Ex. 1 at OSHA 015.

107. Inspector Darling determined the gravity of the violations based on a combined assessment of the severity and probability of injury that would most likely occur as a result of the violations.²¹² Based on the Field Compliance Manual, Mr. Darling concluded that both the violation of Minn. R. 5207.1000, subp. 2B and Minn. R. 5207.1000, subp. 4A had a severity level of “F” because employees were exposed to high hazard work conditions given the multiple pieces of earth-moving equipment on the work site.²¹³ Inspector Darling also assigned a probability factor of 5 to both violations, based on an evaluation of the number of employees exposed, proximity to the hazard, the duration of the exposure, and the work conditions present at the time of the work as specified in the Manual.²¹⁴

108. Darling calculated the penalty based on the severity rating of the violation, the number of employees exposed to the violation, and the proximity and duration of the danger. The unadjusted penalty for the violation of Minn. R. 5207.100, subp. 2B was \$7,000. However, for each serious violation that caused or contributed to the death of an employee, a “fatal factor” that equals the probability factor must be imposed on the penalty. Inspector Darling determined that Joe’s failure to develop and instruct a training program pertaining to the safe operation of mobile-earth-moving equipment caused or contributed to the death of Vern. As a result, a fatal factor multiplier of 5 was applied to the unadjusted penalty, resulting in an unadjusted penalty of \$35,000. Inspector Darling then applied a 75 percent credit based on Joe’s size, history of violations, and good faith, reducing the penalty amount to \$8,750.²¹⁵ However, Darling ultimately proposed an adjusted penalty of \$25,000 because state law mandates a minimum penalty of \$25,000 when a serious violation causes or contributes to the death of an employee.²¹⁶

109. Inspector Darling calculated the unadjusted penalty for the violation of Minn. R. 5207.100, subp. 4A to be \$7,000. After applying the 75 percent credit based on Joe’s size, history of violations, and good faith, the proposed adjusted penalty for this violation was \$1,750.²¹⁷

Procedural History

110. On March 31, 2016, Joe’s filed a Notice of Contest contesting both items in the Citation.

111. On June 23, 2016, MnOSHA served a Summons and Complaint on Joe’s.

112. On August 31, 2016, Joe’s answered the Complaint.

²¹² Test. of R. Darling; Ex. 3 at OSHA 289.

²¹³ Test. of R. Darling; Ex. 1 at OSHA 015; Ex. 3 at OSHA 289.

²¹⁴ Test. of R. Darling; Ex. 1 at OSHA 015, 019; Ex. 3 at OSHA 215-16, 289.

²¹⁵ Of the 75 percent credit, 10 percent represented a “good faith credit” for having a “canned” safety and health program in place. See Ex. 3 at OSHA 218.

²¹⁶ Test. of R. Darling; Ex. 1 at OSHA 015; See Minn. Stat. § 182.666, subd. 2a.

²¹⁷ Test. of R. Darling; Ex. 1 at OSHA 019; Ex. 3 at OSHA 215-216.

113. On October 31, 2016, the Department issued its Notice and Order for Hearing and Prehearing Conference in this matter.

114. Any Conclusion of Law more properly characterized as a Finding of Fact is hereby adopted as such and incorporated by reference.

115. Any Findings of Fact included in the Memorandum and not set forth above are hereby adopted as such and incorporated by reference.

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

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry (Commissioner) and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 14.50 (2016).

2. The Department gave proper notice of the citation, penalties, and hearing in this matter and has fulfilled all relevant procedural requirements under the Minnesota Occupational Safety and Health Act²¹⁸ and applicable rules.²¹⁹

3. Joe's Excavating, Inc. is an "employer" within the meaning of the Minnesota Occupational Safety and Health Act²²⁰ and applicable rules.²²¹

4. Covered employers are required to comply with Occupational Safety and Health standards and rules adopted pursuant to Minnesota Statutes, Chapter 182.²²²

5. The Commissioner has the burden of establishing a violation of an Occupational Safety and Health rule or regulation by a preponderance of the evidence.²²³

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 the employer, and the history of previous violations.²²⁴

7. The Minnesota Occupational Safety and Health Act defines a "serious violation" of state work safety standards to mean:

²¹⁸ Minn. Stat. §§ 182.65- .676 (2016).

²¹⁹ Minn. R. 5205.0010- .1400 (2017).

²²⁰ Minn. Stat. § 182.651, subd. 7 (defining "employer" to mean a person who employs one or more employees).

²²¹ Minn. R. 5205.0010-.1400.

²²² Minn. Stat. § 182.653, subd. 3.

²²³ Minn. R. 1400.7300, subp. 5 (2017).

²²⁴ Minn. Stat. § 182.666, subd. 6.

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.²²⁵

8. The penalty range for serious violations of Occupational Safety and Health standards is described in Minnesota law as follows:

Any employer who has received a citation for a serious violation of its duties under section 182.653, or any standard, rule, or order adopted under the authority of the commissioner as provided in this chapter, shall be assessed a fine not to exceed \$7,000 for each violation. If a serious violation under section 182.653, subdivision 2, causes or contributes to the death of an employee, the employer shall be assessed a fine of up to \$25,000.²²⁶

9. Minnesota law also includes the following provisions relating to citations involving the death of an employee who did not own a controlling interest in the business:

- (a) Notwithstanding any other provision of this section, if any (1) serious, willful, or repeated violation other than a violation of section 182.653, subdivision 2; or (2) failure to correct a violation pursuant to subdivision 4 causes or contributes to the death of an employee, the minimum total nonnegotiable fine which shall be assessed for all citations connected to the death of an employee is \$50,000 if there is a willful or repeated violation or \$25,000 if there is no willful or repeated violation, except as provided in paragraph (b).
- (b) If there is no willful or repeated violation and the employer has fewer than 50 employees, the employer shall be assessed an initial fine of \$5,000 and an additional fine of \$5,000 for each of the following four years. The commissioner may elect to waive the \$5,000 fine for any of the following four years if the employer received no citations in the preceding calendar year.²²⁷

²²⁵ Minn. Stat. § 182.651(12).

²²⁶ Minn. Stat. § 182.666, subd. 2.

²²⁷ Minn. Stat. § 182.666, subd. 2a(a) and (b).

Violation of Minn. R. 5207.1000, subp. 2B

10. Minnesota Rules Part 5207.1000, subp. 2, requires employees operating mobile earth-moving equipment or working on the ground exposed to mobile earth-moving equipment to be trained in safe work procedures.

11. Employees of Joe's Excavating operated mobile earth-moving equipment and worked on the ground exposed to mobile earth-moving equipment.

12. Training programs for employees exposed to or operating mobile earth-moving equipment must be developed and instructed by competent individuals and must include the following elements:

- (1) Safe work procedures on how to approach mobile earth-moving equipment, whether in use or idling, including:
 - (a) visual, voice, or signal communication that shall be made with the operator prior to approaching earth-moving equipment;
 - (b) maintaining one's visibility to the operator while approaching the equipment; and
 - (c) operator responsibilities, such as placing the transmission in neutral, setting the parking brake, and indicating that it is safe to approach the equipment;
- (2) Identification of the operator's blind spots on various earth-moving equipment used;
- (3) Instruction for mobile earth-moving equipment operators in conducting daily equipment inspections according to manufacturer's recommendations, and checking the area around the equipment for a clear path prior to beginning operation;
- (4) Safe operating procedures of equipment, including traveling, backing, parking, loading for transport, maintenance, and operation;
- (5) Safe work procedures when working around or adjacent to overhead or underground utilities as described in Code of Federal Regulations, title 29, parts 1929.600(a)(6) and 1926.651(b); and
- (6) Additional hazards that could be created by changing conditions.²²⁸

²²⁸ Minn. R. 52017.1000, subps. 2B and 2C.

13. Based on his approximately 40 years of experience in the excavation industry, Joe Lahr is a “competent individual” to instruct employees on safe work procedures pertaining to mobile earth-moving equipment.

14. Joe’s training program failed to include all of the training elements required by Minn. R. 5207.1000, subp. 2C.

15. Joe Lahr did not instruct his employees on all of the safety procedures required by Minn. R. 5207.1000, subp. 2C or all of the safety procedures contained in Joe’s Safety Training Manual.

16. The Commissioner has established by a preponderance of the evidence that Joe’s Excavating failed to develop a training program that included all of the required training elements and failed to instruct its employees on safe work procedures pertaining to mobile earth-moving equipment and associated unsafe or hazardous conditions as required by Minn. R. 5207.1000, subp. 2B.

Violation of Minn. Rule 5207.1000, subp. 4A.

17. Minnesota Rules Part 5207.1000, subp. 4A requires employees working on the ground who are exposed to mobile earth-moving equipment to be provided with and required to wear a high visibility warning vest or other high visibility garments.

18. The Commissioner has established by a preponderance of the evidence that Joe’s failed to require its employees to wear high visibility warning vests or other high visibility garments while working on the ground and exposed to mobile earth-moving equipment.

Classification of the Violations

19. Minnesota Statutes, section 182.651, subdivision 12, 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.

20. The Commissioner has established that Joe’s violations of Minn. R. 5207.1000, subps. 2B and 4A were properly classified as “serious violations” because there was a substantial probability that death or serious physical harm could result from the violations.

21. The Commissioner has also established by a preponderance of the evidence that Joe's knew or could have known of the presence of the violations with the exercise of reasonable diligence.

Appropriateness of the Penalty

22. The Department has established that the penalty amount of \$25,000 for Citation 1, Item 1 (the violation of Minn. R. 5207.1000, subp. 2B) is appropriate based on the factors set forth in Minn. Stat. § 182.666, subd. 6.

23. The Department established that Respondent's violation of Minn. R. 5207.1000, subp. 2B was serious and contributed to the death of an employee.²²⁹

24. The Department has also established that the penalty amount of \$1,750 for Citation 1, Item 2 (the violation of Minn. R. 5207.1000, subp. 4A) is appropriate based on the factors set forth in Minn. Stat. § 182.666, subd. 6.

25. The penalty calculations and application of various credits for these violations were in done in accordance with the Manual.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. MnOSHA Citation 1, Item 1, issued for the violation of Minn. R. 5207.1000, subp. 2B is **AFFIRMED**. In accordance with Minn. Stat. § 182.666, subd. 2a(b), the Respondent shall be assessed an initial fine of \$5,000 and an additional fine of \$5,000 for each of the following four years. The Commissioner may elect to waive the \$5,000 fine for any of the following four years if Respondent receives no citations in the preceding calendar year.

2. MnOSHA Citation 1, Item 2, issued for the violation of Minn. R. 5207.1000, subp. 4A is **AFFIRMED**.

Dated: September 29, 2017


JEANNE M. COCHRAN
Administrative Law Judge

Reported: Digitally Recorded
No Transcript Prepared

²²⁹ Minn. Stat. § 182.666, subd. 2a(a) and (b).

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, .664, subd. 5, 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.

MEMORANDUM

MnOSHA commenced this enforcement action against Joe's Excavating following the death of an employee who was run over by a dump truck at a work site in December of 2015. After investigating the work site fatality, MnOSHA issued two Serious citations against Joe's: Citation 1, Item 1, for failing to have developed and instructed a training program pertaining to safe procedures for working around mobile earth-moving equipment; and Citation 1, Item 2, for failing to require employees wear high visibility vests or other high visibility garments at the work site.

Respondent does not dispute that the cited standards apply. Joe's was conducting excavating, grading, and other earth work at the Royalton School site on the morning of December 4, 2015, and its employees operated and were exposed to mobile earth-moving equipment. Employees operating mobile earth-moving equipment or working on the ground exposed to earth-moving equipment must receive training on the elements specified in Minn. R. 5207.1000, subp. 2C. Consequently, Joe's was required to have a training program on safe work procedures for mobile earth-moving equipment in place and it was required to instruct its employees on those safety procedures.²³⁰ Joe's was also required to provide its employees with high visibility garments and require that they wear them.²³¹

Respondent argues that the Department has failed to show that Joe's violated the training program requirement and that a lack of safety training was a *substantial factor* in Vern's death. Respondent notes that Minnesota courts apply the substantial factor test for causation in the context of general tort liability²³² and argues that the Department must show that a lack of safety training was a substantial factor in causing or contributing to Vern's death in this matter in order to support the proposed penalty of \$25,000. Respondent asserts that the Department is unable to meet its burden because Respondent had a safety training program in place that covered all of the required elements and that this program was adequately communicated to its workers. Respondent maintains that Chapters 19, 20, and 21 of its Safety Training Manual cover all of the required safe work procedures. And Respondent contends that Joe Lahr provided instruction on these procedures to his employees at morning, monthly, and annual meetings. Respondent also maintains that little weight should be given to the fact that three of its employees told Inspector Darling that they had not received training

²³⁰ Minn. R. 5207.1000, subp. 2B.

²³¹ Minn. R. 5207.1000, subp. 4A.

²³² See *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006); 4 Minn. Prac., Jury Instr. Guides, Civil, CIVJIG 27.10 (6th ed. 2014).

on safe working procedures for mobile earth-moving equipment. Respondent asserts that the employees were likely nervous being interviewed by a MnOSHA inspector and simply did not fully understand what Darling was asking, given the technical wording of the question.

Respondent also maintains that Joe's provided high visibility vests to its employees and required the employees to wear them. Respondent argues that it cannot be held strictly liable any time a worker fails to wear a vest for any length of time while on the job.²³³ Respondent asserts that both citations should be rescinded.

The Department maintains that Joe's did not develop a training program as required by Rule 5207.1000, subp. 2B. Instead, the Department argues that Joe's purchased a "canned" Safety Training Manual from a third-party that was not specifically designed for Joe's or the earth work that it performs. The Department asserts that only Chapter 19 of the Manual pertains to mobile earth-moving equipment and that this Chapter only references some of the training elements required to be covered under Minn. R. 5207.100, subp. 2C.

The Department argues further that, even if Joe's Safety Training Manual is found to sufficiently cover all of the required earth-moving training elements, Joe Lahr failed to instruct his employees on those elements. The Department points out that three of Joe's employees interviewed by Inspector Darling three days after the accident, including the dump truck driver and the Bobcat operator, stated that they did not receive training from Joe's on safe procedures pertaining to working around earth-moving equipment. In addition, Joe Lahr was unable to produce any documentation of his monthly and annual safety training meetings beyond two signed Toolbox Topic sheets from April 2013, a one-page agenda from the Lake Geneva work site safety meeting, and a list of equipment in need of repair from a meeting at Coborn's Marketplace on October 23, 2015.²³⁴

The Department also points out that Joe's practices on the work site were not consistent with the procedures set forth in its Safety Training Manual, which suggests a lack of instruction pursuant to Joe's training program. For example, Joe Lahr testified that he does not use flaggers or spotters at work sites despite the fact that Chapter 19 of the Manual states that flaggers must be used when an equipment operator's view is obstructed. Joe Lahr also conceded that he did not certify that he had trained his employees on heavy equipment and highway procedures as required by Chapters 19 and 21 of the Manual.

The Administrative Law Judge finds that the Department has established by a preponderance of the evidence that Joe's violated Minn. R. 5207.1000, subp. 2B by failing to develop a training program that included all of the required elements and by failing to instruct its employees on safe procedures pertaining to earth-moving

²³³ To the extent that Respondent is suggesting employee misconduct, the Administrative Law Judge notes that this affirmative defense was not raised in Respondent's Answer to the Complaint and was therefore waived.

²³⁴ Exs. 110-114.

equipment. The Safety Training Manual purchased by Joe's lacked information and instruction on the following required training elements: operator's responsibilities related to how to safely approach earth-moving equipment, including placing the transmission in neutral, setting the parking brake, and indicating to others that it is safe to approach the equipment;²³⁵ visual, voice, or signal communication that must be made with the operator prior to approaching earth-moving equipment;²³⁶ safe loading procedures for transport; and additional hazards that could be created by changing conditions.²³⁷

Even if Joe's Safety Training Manual was an adequate training program, the evidence established that Joe's failed to implement the program as written and failed to instruct its employees on the required elements. The record lacks any documentation to support Joe Lahr's claim that he provided safety training monthly and annually. In addition, the Administrative Law Judge is persuaded that the actions of Vern and Rod on the morning of the accident that were contrary to the procedures set forth in the Manual reflect inadequate safety instruction. On the morning of December 4, 2015, both Vern and Rod stepped in front of the Bobcat without first making eye contact with the operator and waiting until it was safe to approach. And, Rod did not communicate with the employees on the ground or walk around the dump truck prior to getting into the truck and backing up. This conduct on the part of Vern and Rod as they operated and worked around earth-moving equipment reflects a lack of safety training.

The Administrative Law Judge finds further that Joe's failure to adequately instruct its employees exposed to earth-moving equipment on safe work practices was properly characterized as "serious" as it created a substantial risk of death or serious physical harm. In addition, the Administrative Law Judge concludes that the lack of safety training contributed to and was a substantial factor in Vern's death.

The Administrative Law Judge also finds that Joe's failed to require its employees wear high visibility vests while working at the site. The fact that two of Joe's eight employees were working at the site without vests the morning of the accident while in the presence of Joe and Pat Lahr supports finding that high visibility vests were not actually required. This finding is further supported by the fact that Joe Lahr did not discipline other employees who failed to wear high visibility vests in the past.

The lack of high visibility vests exposed the employees to an increased risk of a serious injury as they worked in proximity to various pieces of earth-moving equipment. Both Joe Lahr and Pat Lahr were working on the site with the two employees for approximately two hours before the accident. With the exercise of reasonable diligence, either should have known of the presence of the violations.

The Department properly classified the cited violations as "serious" and correctly assessed the penalties. The Citations are, therefore, **AFFIRMED**.

J.M.C.

²³⁵ See Ex. 107 and Minn. R. 5207.1000, subp. 2C(1)(a).

²³⁶ See Ex. 107 and Minn. R. 5207.1000, subp. 2C(1)(a).

²³⁷ See Ex. 107 and Minn. R. 5207.1000, subp. 2C(4) and (6).